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PRAXIS OF THE OFFENCE OF FLEEING THE SCENE OF AN ACCIDENT IN ART. 382 BIS CRIMINAL CODE (ORGANIC LAW 2/2019 OF 1 MARCH 2019 AND ORGANIC LAW 11/2022 OF 13 SEPTEMBER).

PRAXIS OF THE OFFENCE OF FLEEING THE SCENE OF AN ACCIDENT IN ART. 382 BIS CRIMINAL CODE (ORGANIC LAW 2/2019 OF 1 MARCH 2019 AND ORGANIC LAW 11/2022 OF 13 SEPTEMBER).

Summary: 1. Introduction. 2. Analysis of the evolution of the reform that gave rise to organic law 2/2019 of 1 march. 3. Organic law 11/2022, of september 13, modifying the penal code regarding the reckless driving of motor vehicles or scooters, amending art. 382 bis of the Criminal Code. 4.- Analysis of Supreme Court Ruling 1/2023 of 18 Jan. 2023, appeal no. 10404/2022. a. Legal right protected by the offence under art. 382 bis of the Criminal Code. b. The person responsible is also the cause of the accident. c. This is a "fleeing" offence. d. The first instance ruling and ruling on appeal considered that the crime had attempted. Do imperfect forms of execution apply to the offence of fleeing the scene?

Resumen: (Análisis acerca de las características y circunstancias del delito de fuga del lugar del accidente que se incorporó en el texto penal en la LO 2/2019 de 1 de Marzo, modificado por LO 11/2022, de 13 de septiembre, con la finalidad de evitar situaciones de impunidad cuando un conductor golpeaba con su vehículo a otro y fallecía en el acto y se daba a la fuga no pudiendo, además del homicidio imprudente, o en su caso homicidio doloso eventual si se dieran las circunstancias, calificarlo antes de esta reforma como omisión del deber de socorro si había muerto la víctima. Sentencia del Tribunal Supremo 1/2023 de 18 de Enero analizando si cabe la tentativa en estos casos)

Abstract: (Analysis about the characteristics and circumstances of the crime of escape from the place of the accident that was incorporated into the criminal text in LO 2/2019 of March 1, modified by LO 11/2022, of September 13, with the purpose of avoid situations of impunity when a driver hit another with his vehicle and died on the spot and fled, not being able, in addition to reckless homicide, or eventual intentional homicide if the circumstances arose, to qualify it before this reform as an omission of the duty to help if the victim had died. Supreme Court Judgment 1/2023 of January 18, analyzing whether the attempt is possible in these cases)

Palabras clave: delito de fuga del lugar del accidente, caso fortuito, imprudencia

Keywords: Crime of escape from the place of the accident, act of God, recklessness

1. Introduction.

It is interesting, and strange to say the least, that some drivers who have a traffic accident and collide into somebody or run over a pedestrian react by fleeing from the scene of the accident, trying to avoid the consequences of the accident with a motor vehicle, instead of worrying about the person they have run over, or the occupants of the vehicle into which they have collided on account of their reckless behaviour or also due to unforeseen circumstances.

Ultimately, it may be more an act of cowardice and of not wanting to assume the responsibilities caused by their imprudence and wanting to run away from their own responsibilities, especially if they consider that they may have killed someone. Of course, such an event is extremely serious and the persons affected by somebody having been killed by a hit-and-run driver or who have been run over by a driver who then flees the scene will never be able to accept that they have lost a family member, but that, in addition, whoever killed him has left them on the road as if he were an object in agony, when, perhaps, if they had called an ambulance immediately, they would have saved their life.

The question we must ask ourselves is an important one: how many people would have remained alive if whoever hit them, or collided with them, had remained at the scene of the accident instead of fleeing and alerted the ambulance services. We would most definitely shake our heads, as first aid could have been crucial in saving the life of the victim instead of the perpetrator leaving them to die on the tarmac. It is therefore regrettable that such selfishness reigns in the heads of many people who, in order to avoid a possible conviction, are capable of leaving another person on the road half dead, or not knowing if they are dead, in order to avoid having their licence taken away and to avoid finding out who the perpetrator was.

The important thing is to know that in most cases the perpetrator will be discovered and will be held responsible for these reprehensible acts. The problem is that what led to Organic Law 2/2019 of 1 March was the volume of acquittals that existed before this reform for the crime of failing to give assistance under Art. 195 Criminal Code[1] when it was alleged that the victim was already dead when the collision occurred

[1] **Supreme Court, Second Criminal Chamber, Ruling 761/2022 of 15 Sep. 2022, Appeal No. 10768/2021:** Confirmation of acquittal. If there are several persons who are situationally obliged, the duty of assistance does not apply when the person in need is already being assisted by another obliged person and the hypothetical contribution of the one who omits the duty would not contribute anything to the elimination or reduction of the serious danger. The person to be assisted must be in a situation of manifest and serious danger, they must also be helpless, the person obliged to provide assistance must know that such a situation exists and that they are able, without risk to himself or herself or to others, to provide assistance personally or to request assistance from a third party. Criminally relevant helplessness encompasses both absolute helplessness, when the person in need receives no help at all, and relative helplessness, or insufficient protection, although in the latter case it must be assessed whether the residual danger, that which derives from incomplete help, is still serious. Otherwise, the omission would remain criminally irrelevant due to the lack of an essential precondition of the offence. In this case, helplessness is excluded from the moment it is declared proven that four people immediately and continuously provided assistance to the person who had been hit, carrying out manoeuvres to better position the body that had fallen onto the asphalt and synchronously alerting the emergency services, who, moreover, arrived very shortly afterwards.
Supreme Court, Second Chamber, Criminal Division, Ruling 167/2022 of 24 Feb. 2022, Appeal No. 3633/2021

and "there was nothing left to do", because the essence of the crime was the fleeing of the scene, specifically in relation to the failure to provide assistance rather than fleeing the scene in itself, because one could not "help" someone who was already dead. In any case, the question was by no means a trivial one, because how was it possible to know whether the person who had been hit was dead or the vehicle involved in the collision?

The findings suggested that the scope of the accident and the final position of the deceased and the forensic report on the predicted time of death were the evidence that determined the time of death and the circumstances in which death had occurred. It was this data that was assessed at trial to determine whether the victim could have been dead when the hit-and-run driver fled the scene.

It was therefore necessary to reform the criminal text so as not to leave unpunished, at least from the perspective of fleeing the scene, this type of action that should be punished under the same terms as collisions or hit-and-runs and the degree of imprudence, if applicable, or the crime of intentional homicide with malice aforethought that could have been committed.

It should be remembered that when this reform was processed in the successive appearances made in Parliament, the media recalled that "Of the 174,679 drivers involved in a traffic accident in 2016, 1,028 (0.6% of the total) fled the scene, according to data from the Department of Traffic made public by the coordinating prosecutor for Road Safety, Bartolomé Vargas at the Justice Commission of Congress where the bill proposed by the Popular Party to toughen penalties for drivers for recklessness and leaving the scene is subject to study."[2]

The aim was to bring to light something that was occurring frequently and which was a real act of "evil" as set out in the law, whereby there are people who flee from a crime they have committed through recklessness, or which may have occurred by chance, and who, although they were not at fault, their first impulse was to flee from the scene of the accident, something that is unworthy of human nature, but which many people resort to, cruelly leaving a person on the road dying and being able to think more about themselves and the possible criminal response that their conduct may bring them than about the life of another human being.

In this type of case, the investigative action of the State Security Forces is essential, as the Spanish Civil Guard's traffic section has extensive knowledge in the preparation of reports on this subject and clarity is needed in the regulations to

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Acquittal. Absolute unfitness due to the instant death of the victim of the collision, in this case, a cyclist. 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. The doubt about instant death or within 20 minutes of the hit-and-run must be in the defendant's favour.

Supreme Court, Second Chamber, Criminal Division, Ruling 420/2023 of 31 May. 2023, Appeal No. 6373/2021

FAILURE TO GIVE ASSISTANCE. Acquittal. Death almost immediately after being hit by a car. The objective element of the existence of a helpless person in serious and manifest danger is absent; this can occur either because the perpetrator has ascertained that the victim is being assisted, or in the case of immediate death.

[2] https://compromiso.atresmedia.com/ponlefreno/noticia.

understand how to proceed in each case. In any case, the high level of professionalism of the Civil Guard guarantees perfect work in this and other matters related to road safety, and the proof of the commitment to training is the production of this journal, which allows all members of the Civil Guard to relay the appropriate knowledge in many areas, such as road safety, which is basic for a correct professional service in the preparation of the accident scene report.

2. Analysis of the evolution of the reform that gave rise to Organic Law 2/2019 of 1 March.

When the need to provide a solution to the acquittals for the crime of failing to give assistance under art. 195 of the Criminal Code was identified in these cases of fleeing the scene of the accident with a deceased person, the Spanish Congress of Deputies started hearings in relation to the proposed organic law amending Organic Law 10/1995, of 23 November, of the Criminal Code, in relation to imprudence in driving of motor vehicles or scooters and punishment for abandoning the scene of the accident.

This initiative gave rise to the reform of the Criminal Code under Organic Law 2/2019, of 1 March, which modified different aspects of the Criminal Code, specifically, Arts. 142, 142 bis, 152, 152 bis and 382 bis, the latter, which is the subject of these lines, is of transcendental importance for punishing the conduct of those drivers who "flee" from the scene of an accident, but more in relation to the "hit and run" aspect than "failing to give assistance" which was already punishable under Art. 195 of the Criminal Code, since "fleeing" as such was not punished, and the classification of the failure to give assistance left serious conduct without assistance, as when "there was no assistance that could be provided" in the event that the victim of the accident was dead as a result of the accident, it was impossible to be convicted under art. 195 Criminal Code.

As reflected in Opinion 1/2021, of 17 March 2021, on the reform of articles 142, 142 bis, 152, 152 bis, 382 and 382 bis of the Criminal Code, implemented by Law 2/2019, referring to the new concept of less serious negligence, serious negligence, aggravation of penalties in the multiple outcomes, criminal modification, criteria for the initiation of police and court proceedings, rights of accident victims and the new crime of fleeing the scene in relation to road traffic, "the so-called crime of fleeing the scene comes from Anglo-Saxon legislation, more colloquially *hit and run*, which is rigorously punished, having been extended to other European countries".

As already indicated at the time[3] "a new criminal offence is introduced in addition to the offence of failure to provide assistance under Art. 195, which punishes the offence of fleeing the scene of the crime having committed a criminal offence under art. 142 or recklessly or fortuitously causing injuries under Arts. 147.1, 149 and 150 of the Criminal Code. In this case, it is not necessary for the victim to be helpless and in manifest and serious danger, which is part of the offence of omission of the duty to provide assistance in Art. 195 of the Criminal Code. Therefore, if an accident is caused resulting in death and injury to the persons covered by Arts. 147.1, 149 and 150 of the Criminal Code, this offence is committed if the driver flees, under a new offence

[3] The new offence of fleeing in Art. 382 bis Criminal Code in road accidents. Vicente Magro Servet, Magistrate of the Criminal Division of the Supreme Court, Doctor of Law, Diario La Ley, No. 9346, Doctrine Section, 28 January 2019, Wolters Kluwer

referred to as "fleeing", or "leaving the scene of the accident". This would work as a new offence in addition to the specific offence committed by imprudence in the actual commission of the offence. However, it should be noted that it is not necessary for the initial conduct to be qualified as gross negligence or lesser negligence, as it only mentions that an accident was caused, so it could be qualified as minor negligence. The offence is committed when "fleeing".

We must highlight that during the parliamentary session held in the Congress of Deputies on 21 February 2018, the Public Prosecutor of the Supreme Court responsible for coordinating road safety, Bartolome Vargas, now retired, and currently exercising this position in the Supreme Court Luis del Río, outlining the effort being made to detect those gaps in the criminal system, stressed that: "There is a network of seventy specialist deputy prosecutors who set a scientific and legal benchmark at a national level. We approach the phenomenon of road accidents from the perspective of the European Union's strategies: *education*, *engineering* and *enforcement*. The *enforcement* strategy in our country is made up of the administrative sanction of the Road Safety Law (Articles 74 to 81) and the criminal sanction (Articles 142 and 152), which we are dealing with here, and Articles 379 to 385 of the Criminal Code. Criminal law is governed by the principle of minimum intervention and its use cannot excuse the use of educational and preventive responses, which are always more effective.

With this in mind, one of the most important issues detected was that of drivers who were recklessly responsible for a traffic accident, or who accidentally collided with someone and killing them, abandoning the scene of the accident and leaving the person dead at the scene of the accident. It was not simply a matter of failing to assist, but that given the magnitude of the impact, the driver clearly anticipated that the victim had been killed and left the scene. This required the fact that they had left the scene be punished, rather than the fact of "failing to provide assistance", as there was nothing left to assist in the foreseeable death of the other driver or pedestrian.

This led to the inclusion, in the law ultimately approved, of the new criminal offence of "fleeing" in Art. 382 bis of the Criminal Code[4], which consisted of:

[4] **Supreme Court, Second Chamber, Criminal Division, Ruling 167/2022 of 24 Feb. 2022, Appeal No. 3633/2021**
This corresponds to 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.

In this sense, the preamble of Organic Law 2/2019, of 1 March, states that the aim is for this new offence to punish "the intrinsic evil involved by the abandonment of those who know they are leaving behind someone who could be injured or even dead, the lack of solidarity with the victims, which is criminally relevant on account of the direct involvement in the accident prior to abandonment, and the legitimate expectations of pedestrians, cyclists or drivers of any motor vehicle or scooter, to be cared for in the event of a traffic accident".

1. The driver of a motor vehicle or scooter 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, 152.2 and 150 are caused, shall be written-off as the perpetrator of the crime of leaving the scene of the accident.

2. The acts referred to in this Article which are the result of recklessness demonstrated by the driver shall be punishable by imprisonment for a term of six months to four years and a ban from driving motor vehicles and scooters for a term of one to four years.

3. If the circumstances giving rise to fleeting the scene were caused by an act of God, they shall be sentenced to three to six months' imprisonment and shall be banned from driving motor vehicles and scooters for a period of six months to two years.

Then, we will see the reform approved later to resolve the errors of this reform to this text, which left out actions caused by serious negligence.

Mr. LÓPEZ CERRÓN, president of the Royal Spanish Cycling Federation, said at the aforementioned session that “we are seeing accidents in which people leave the injured person without knowing whether they have died or not, whether they are serious or not, and they flee for many reasons. It is likely that most of them flee the scene because of irregular circumstances: they are uninsured, drunk or under the influence of drugs. What is clear is that right now, the person who flees the scene is not penalised and so it will be better for him to flee, even if they are then arrested, than to stay and help the injured person; there is no reason for them to do so”.

It then goes on to affirm the subsidiary nature of this type of offence in relation to Art. 195.3 criminal Code for cases of injury through the provision contained in the text, "referring to cases of people who suffer serious injuries but in which the requirements of manifest and serious danger are not met, which requires the omission of the duty to provide assistance".

As also reflected in the preamble, the aforementioned Organic Law responds to an important social demand, given the increase in accidents involving pedestrians and cyclists due to reckless conduct of motor vehicle or scooter drivers. This social demand was based precisely on the fact that the requirement established in the offence of the failure to provide assistance in Art. 195 Criminal Code that the victim must be helpless and in manifest and serious danger, had resulted in court rulings that did not involve a conviction for people who abandoned the victim after the accident.

Accordingly, the creation of the new rule was justified by the need to cover cases which, under existing legislation, were outside the scope of the criminal response, such as the case where the injured person was not left helpless and in serious and manifest danger.

Along these lines, a sector of doctrine justifies the criminalisation in the Criminal Code of the so-called crime of fleeing the scene precisely because, unlike the 1973 Criminal Code, the current Criminal Code does not contain a provision in which, in cases in which it is impossible to execute or produce the crime, the penalty is imposed one or two degrees lower than that established for the crime in question, in cases of non-existence of the object or lack of aptitude of means (such as the impossibility of resorting to the failure to provide assistance, in cases in which the victim died in the act).

In short, the aforementioned precept would cover cases that are difficult to fit into the crime of the failure to provide assistance due to the lack of the objective element of the existence of a helpless person in serious and manifest danger. This can occur either because the perpetrator has ascertained that the victim is being assisted or in the case of immediate death.

Whether we like it or not, every legal modification always has (and this is not negative) a raison d'être focussed on a specific case that shows that "there is still something wrong with the system for leaving aspects unregulated". And in this case Mr LÓPEZ CERRÓN stressed that: "Anna González, who, after the death of her husband, the victim of a hit-and-run driver, was faced with a sentence that had no logical explanation for anybody, even non-family members. The movement that Anna called "Por una ley justa" ("*For a fair law*") is one that has managed to ensure that we are debating this bill today and that in some way, I was also there when this was debated in Congress, all the parliamentary groups have supported the need to change these laws". He added with regard to the need to introduce the offence of hit-and-run in the Criminal Code that "this situation is aggravated when the perpetrator of the accident flees after the hit-and-run, as in the case of Anna's husband, which unfortunately happens quite often".

On the objective to be protected by the introduction of this new offence, Mr BATALLER I RUIZ stressed that "we have to consider what legal right we are protecting with it, and you have contributed some ideas in this respect. We could emphasise, for example, that when someone flees after causing an accident, what they are doing is disregarding the dignity of the victim, whom they leave behind without knowing whether they are dead, badly injured or whether they could have been helped by their intervention or not. Or we could also think that the emphasis should be on the protection of general interests, i.e. the right to safe, sustainable traffic and so on. Or we could also think that the work of public administrations must be protected and that with this new type of crime we would be punishing those who evade justice".

However, beyond the theoretical and conceptual issue of what is, in reality, the legal right protected by this new offence introduced by this reform, it was necessary to delve deeper into an issue that underlies Supreme Court ruling 284/2021, of 30 March, to which we will refer later, and that is the question of when we dealing with a hit-and-run offence, whether we should demand that it is only possible in cases of death when the driver was absolutely certain that the person they ran over was dead. This should be ruled out in favour of the *high likelihood* that this would be the case, given the impact caused.

This led Ms RIVERA ANDRÉS to point out in her parliamentary speech that it is "totally illogical for a person who causes an accident to flee and nothing happens to them if the person they have hit has died; it makes no sense at all. Why? Because nobody can know when they hit a person that said person, the cyclist, the pedestrian, the motorist or the person who was the subject of the accident, had died. In fact, at an accident scene, only the judge can authorise the removal of the body and certify the death. So it seems to me that this is a moral issue and it is clear that under no circumstances is it acceptance that today, it is more advantageous to leave the scene of an accident, to flee, than to stay. I think it is only fair and logical that this should be changed in the Criminal Code".

In the same vein, Ms ALBA MULLOR pointed out that: "It also means that, in addition to the failure to give assistance, the ***intrinsic evil of abandoning someone who may be injured or even dead is also punishable***. It is regrettable, but it is also a reality and recent accidents demonstrate that this is the case and that such behaviour cannot go unpunished, as you have reminded us throughout your speech.

In addition, it is required that when there are several parties involved, all of them remain at the scene of the accident, as ***the principle of solidarity*** applies to all those involved. As part of the proposed reform, feeling the scene will have the same criminal punishment whether the victim is injured or has died, thus correcting circumstances that could occur under the current regulation, by which, if death is immediate, there is nobody to provide assistance to and therefore no conduct that deserves any criminal punishment, which is something that must be changed and this is reflected in the reform".

The injustice in these cases is the grounds for the legal reform to avoid impunity when leaving the scene of the accident in serious cases where a person has been left dead on the road with the absolute absence of solidarity and "intrinsic evil" reflected in the preamble of the rule that involves an accident with a person and fleeing the scene without ascertaining the circumstances left behind. It was clear from the parliamentary debate that the aim of the reform was to avoid impunity for circumstances such as those referred to where "there was no possible assistance" when as a result of the accident, there was an absolute possibility that death had been caused.

With regard to the expression *intrinsic evil*, referred to in the explanatory memorandum of Organic Law 2/2019, CASTRO MORENO[5] points out that “this is clearly an excess, since criminal law should be limited, in any case, to punishing "extrinsic" evil, understood as conduct (not inner thought) that transcends the relevant injury or endangering of important legal assets in the outside world”.

And this action of "leaving the scene” or "fleeing" is performed with malice that may be potential, in other words, considering the high possibility that the victim is dead and this leads to the belief or conviction, as well as the high likelihood that the pedestrian has been killed, which leads to an instantaneous consideration of the cause of the accident, completed with the ex post confirmation of the victim's death, to conclude that the death occurred, and therefore the crime of fleeing the scene is applicable, but which is only applicable for cases occurring after 3 March 2019, not previous cases for which, as stated in the aforementioned judgement, the action would be atypical. This is also reflected in the Preamble of the Law, which states that "this is a ***different conduct and, this time, it is wilful and independent of the previous reckless or unforeseen conduct***". Therefore, the act of fleeing the scene is intentional, and this may entail malice aforethought in the admission of death, which makes the offence of fleeing the scene applicable, rather than the failure to provide assistance, the former being punished with a heavier penalty than the latter, as we have seen.

LANZAROTE MARTÍNEZ[6] points out in this respect that: "The new Article 382 bis would cover cases that are difficult to consider under the crime of failure to give assistance "(...) due to the lack of the objective element of the existence of a helpless person in serious and manifest danger, such as the failure to provide assistance when the

[5] CASTRO MORENO, A., "Comentario crítico a la LO 2/2019, de 1 de marzo, de reforma del Código penal, en materia de imprudencia en la conducción de vehículos a motor y ciclomotores: nuevo delito de abandono del lugar del accidente", La Ley Penal, No. 138, Ed. Wolters Kluwers, Madrid, 2019, electronic format.

[6] LANZAROTE MARTÍNEZ, P., "El nuevo delito de abandono del lugar del accidente y otras importantes novedades de la inminente reforma del Código Penal en materia de imprudencia", Diario La Ley, No. 9359, Sección Tribuna, Ed. Wolters Kluwers, Madrid, 2019, electronic format.

active subject has ascertained that the victim is being assisted or the aforementioned cases of death ipso facto".

MORELL ALDANA[7] adds that: "It is also an eminently intentional crime, as can be seen from the use of the expression "wilfully", and we are in favour of admitting direct, indirect or eventual wilful intent. To this, we add the argument that recklessness in the Criminal Code of 1995 follows the system of culpable crime, in such a way that, since recklessness is not expressly provided for in Article 12 of the Criminal Code for the offence of fleeing the scene, such conduct cannot be punished in the criminal sphere. It must also be classified as a subsidiary type, as the criminal lawmakers have expressly provided for its subsidiary application in relation to the crime of the failure to provide assistance in Article 195 of the Criminal Code".

3. Organic Law 11/2022, of September 13, modifying the Penal Code regarding the reckless driving of motor vehicles or scooters, amending Art. 382 bis of the Criminal Code

As highlighted, the criminalisation of the offence of fleeing the scene dates to Organic Law 2/2019, of 1 March, which sought to counter the impunity that existed in cases of the driver causing the accident fleeing the scene when the person hit or the victim of an accident had died, rendering Art. 195 Criminal Code on the failure to provide assistance inapplicable.

However, an error was detected in the text of the reform that created Art. 382 bis Criminal Code, based on the fact that it was not appreciated that, if the circumstances took place through serious negligence, fleeing the scene was not punishable, as the imprudence was reduced to less serious negligence by the wording of the text approved.

This led to the approval of Organic Law 11/2022, of September 13, modifying the Penal Code regarding the reckless driving of motor vehicles or scooters, amending Art. 382 bis of the Criminal Code in the following terms:

Article 382a(1) shall read as follows:

"1. 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 punished as the perpetrator of the crime of leaving the scene of the accident".*

Thus, it was no longer a reference to Art. 152.2 Criminal Code and the less serious type of imprudence, but all types of imprudence are now punishable.

The circumstances of the offence of fleeing the scene have been subject to repeated debate. A criminal offence with characteristics inherent to a ***system of lack of solidarity*** of some drivers who prefer to flee from the place where an accident occurred

[7] El delito de fuga: un «viejo» conocido de la dogmática penal. visión doctrinal tras su reintroducción por la LO 2/2019. Morell Aldana, Laura Cristina. Magistrate at the Court of First Instance and Preliminary Investigation No. 4 of Alcoy Doctor of Law Diario La Ley, No. 9687, Sección Tribuna, September 2020, Wolters Kluwer

involving them; hence the need for the criminal punishment defined in the precept approved in 2019, and with the rectification made in 2022, to avoid situations of impunity caused by the wording of the precept in 2019, which had left out situations of serious imprudence with the driver of the vehicle fleeing.

This is a criminal offence characterised, above all, by a ***lack of respect*** for others and by a personal attempt on the part of drivers to shift any kind of responsibility for the driving of motor vehicles to their own benefit and to cancel out any harm, as opposed to the other side of the scale where the victims are those affected by accidents in which the hit-and-run driver has been involved.

As a result, the decision taken by the driver at the time of the accident to flee the scene of the accident entails a ***self-exemption from liability***, leaving the victims at the scene of the accident caused by his irresponsibility, and denotes the need for the rule of law to intervene, not only with administrative infractions and sanctions, but also with a criminal sanction that should be allocated to conduct such as fleeing the scene of a traffic accident in which the hit-and-run driver has been involved and caused the accident.

The lawmaker has been required to intervene in this type of cases in view of the increase in these circumstances and the impunity arising due to the legal vacuum caused by the wording of the crime of failure to provide assistance in Article 195 of the Criminal Code, which was wholly insufficient when it came to covering situations of fleeing the scene of the accident.

The offence consists of the abandonment of the scene of the accident, an expression which is used at two points in the first section of Article 382 bis PC and in accidents caused thereby, with the second section distinguishing when any of the punishable imprudences have concurred or not, the third section concerning when the action was unforeseen, prorating the penalty based on these two circumstances.

However, the key is that the action that determining the typical and punishable conduct is the abandonment of the scene of an accident: after having caused the accident, the person flees in their motor vehicle, abandoning not only the scene, but also their own responsibilities for having caused the accident when the second paragraph applies to reckless conduct or when it has occurred due to an act of God pursuant to the third paragraph.

However, in any case, the action is characterised by the aforementioned absence of solidarity, whether this refers to the reckless conduct of the driver, or to an act of God, in both situations the criminal factor is evident, having left the scene of the accident instead of providing aid and assistance to the victims, abandoning them and placing a higher priority on their personal self-protection in avoiding criminal and civil liability than to worrying about the situation in which the victims, even when caused by an act of God, have been left, as should have been the case.

It is worth remembering that when establishing the scope of criminal liability in terms of the system of penalties under Article 382 bis of the Criminal Code, consideration should be given to the fact that the applicable penalty ranges from six months to four years in the second paragraph, when conduct is reckless, and this broad

range allows the penalty to be prorated and adapted to the circumstances by the judge, depending on the type of recklessness involved in this case.

The key when it comes to calculating the penalty can be traced to the fact that the reform approved under Organic Law 11/2022, of 13 September, now avoids the atypical nature of serious negligence and now includes it in the criminal category, allowing for cases of serious negligence concurrent with abandonment of the scene of the accident to adapt the penalty to the maximum pursuant to Article 66.1.6 of the Criminal Code, when there are no mitigating and aggravating circumstances. The judge may seek the imposition of the maximum sentence of four years in prison without the possibility of applying the suspension in the execution of the sentence, including as part of this decision the type of recklessness involved in the case, which may be serious, less serious or minor, since here we are not dealing with the atypical circumstances of minor imprudence, but that minor imprudence concurrent with the crime of fleeing the scene is typical under Article 382 bis. And it is not a matter, therefore, of the minor conduct being outside the criminal sanction, but rather that if the conduct of the perpetrator of the accident were minor, a lesser punishment could well be established than in the case of serious or less serious negligence.

In any case, the criminal sanction is the same in all three situations, since the seriousness is about fleeing the scene of the accident, rather than the type of negligence involved in the case.

4.- Analysis of Supreme Court Ruling 1/2023 of 18 Jan. 2023, Appeal No. 10404/2022

Having introduced the details of the criminal offence under Art. 382 bis of the Criminal Code, the important ruling of the Criminal Division of the Supreme Court 1/2023 of 18 Jan. 2023, Case 10404/2022, analysing this new criminal offence, is worth analysis.

In this case, the appellant complained about the infringement of Article 382 bis of the Criminal Code (CC), having assessed the offence as an attempted offence, when, according to the appellant, it should have been assessed as an actual offence.

Below is a systematic look at the analysis of the High Court's findings.

a. Legal right protected by the offence under art. 382 bis of the Criminal Code.

The Supreme Court recalled that "this criminal offence does not require, therefore, as an element of the offence, that a person be helpless and in manifest and serious danger, as is the case in Article 195 of the Criminal Code, nor, correlatively, that the act of assistance could be potentially useful. The provision expressly states that only cases not covered by Article 195 are punishable".

As such, the Supreme Court stresses that it is a criminal offence to cover the gaps left by the offence of the failure to give assistance, which did not fully "attend" to situations such as those described in the criminal offence of Art. 382 bis of the Criminal Code.

The Supreme Court then referred to a much discussed question as to why the criminal offence was introduced as a kind of "contempt" for victims when they were hit by or run over by the hit-and-run driver. It specified that "Although the doctrine, which has abundantly criticised the reference in the Statement of Reasons to "intrinsic evil" because of its relation to moral concepts, has not been unanimous in identifying the legal right protected, both case law and the majority of dogmatics, taking into account the content of the Preamble to the Organic Law cited above, speak of the ***infringement of a duty of human solidarity which is elevated to the rank of a legal duty"***.

Having said this, the Supreme Court considered that here, we are dealing with a kind of "crime of indifference", insofar as it points out that: "It has been said that the omitting party's indifference to the victim's situation of danger is to be punished (Supreme Court Ruling No. 167/2022, 24 February). In fact, more precisely, this indifference to the situation created is to be punished, having failed to comply with the duties imposed by Article 51 of Royal Legislative Decree 6/2015, of 30 October, approving the consolidated text of the Law on Traffic, Circulation of Motor Vehicles and Road Safety, amongst others, on those involved in a traffic accident, which includes the consideration of the danger to the victim, including other road users, as well as the duty to identify themselves as the person having caused the accident and to cooperate immediately in resolving it.

Article 51 of the aforementioned law stipulates that any road user involved in a traffic accident, witnesses it or has knowledge of it, is required to help or request help for any victims, to cooperate, to avoid further danger or damage, to restore, as far as possible, traffic safety and to clarify the events. This refers to solidarity with the victims through the provision of assistance; to the adoption of measures to maintain or restore road safety, i.e. solidarity with other road users, and specifically, to road safety itself, which may be affected by the accident; and to ensuring the effectiveness of the Administration's powers to investigate and clarify the circumstances surrounding traffic accidents, insofar as they directly affect road safety. It is true that with regard to the latter legal right, part of the doctrine has pointed out that it may affect the right not to testify against oneself. However, consideration should be given to the fact that the obligation to identify oneself as being involved in an accident does not imply an assumption of guilt or the provision of evidence.

This allows us to consider the concurrence of different legal interests as the object of protection, related in general with the requirements of solidarity, and specifically with the legitimate expectations of the victims to receive the care they need; of the other road users where the accident takes place and the necessary precautionary measures are adopted; and even with the requirement to identify the cause of the accident, from the perspective of the need to protect and guarantee road safety through the clarification of the circumstances by the competent authorities.

In other words, case law has also recalled that the Statement of Reasons invokes, as a reason for incrimination, the breach of the duties of citizenship based on the value of solidarity, thereby seeking to “cover cases that are difficult to fit into the crime of failure to give assistance because the objective element of the existence of a helpless person in serious and manifest danger is lacking”, see Supreme Court Ruling No. 167/2022, of 24 February (Supreme Court Ruling No. 761/2022, of 15 September)".

b. The person responsible is also the cause of the accident.

This is a characteristic that separates it from the crime of failing to give assistance under Art. 195 of the Criminal Code, and stipulates that the perpetrator is the one who causes or is involved in the accident, and not a third party unrelated to the events, hence the Supreme Court points out that:

"The definition of the offence **reduces the criminal significance of the conduct to the person who can be considered to have caused the accident, excluding other parties involved**.

It should be noted, on the one hand, that in many cases this condition can only be established after an investigation. And, on the other hand, that the precept contemplates the liability of the person causing the accident, even if the origin of the events giving rise to the abandonment was fortuitous".

c. This is a "fleeing" offence.

Punishment is handed down for fleeing the scene of the accident, not being present at the scene and the passivity of the perpetrator, which could give rise to other conduct, but not the conduct under Art. 382 bis of the Criminal Code. If the person causing the accident remains there, but does not help, it could constitute an offence under Art. 195.1 of the Criminal Code, but not under Art. 382 bis of the Criminal Code.

Thus, the Supreme Court indicated that:

"Finally, consideration should be given to the fact that **the offence is not committed if the subject remains on the site, even when they are engaged in passive conduct, except in cases where the elements of the conduct provided for in Article 195 of the Criminal Code are present, which will then be the applicable provision**.

On the contrary, **the offence will be deemed to have been committed if the subject leaves the scene of the accident, even if the possible victims could be attended to by other persons;** even if road safety could be restored by third parties; and even if the subject could be clearly and immediately identified by other means, such as the existence of cameras at the scene or the presence of witnesses who could do so.

From this, it can be concluded that **what is relevant is the physical abandonment of the site** in such a way that the subject is materially unable to personally fulfil the duties legally imposed for the case, in protection of the legal assets affected".

d. The first instance ruling and ruling on appeal considered that the crime had attempted. Do imperfect forms of execution apply to the offence of fleeing the scene?

The issue under debate subject to analysis by the Supreme Court and that makes this ruling so important is that the High Court states that:

"The question to be examined here, therefore, is the possibility of it being an attempt, without it being necessary to examine many other aspects of the offence that

may be complex to interpret, such as, for example, those relating to what should be understood by "causing an accident" or the occurrence of injuries caused by serious negligence in Article 152.1 of the Criminal Code.

Part of the doctrine understands the term “attempt” as possible. Leaving aside evidentiary problems regarding the purpose of the action taken, an attempt to leave the scene of the crime when prevented by the action of third parties, before the actual physical abandonment takes place, would give rise to an attempt, which is only relatively ineffective and therefore punishable. Not, however, when the subject moves away from the site or hides in the surrounding area in such a way that it is actually impossible for them to fulfil their legally established duties to protect the legal rights in question.

In general, the offence requires, as mentioned above, that the perpetrator of the accident leaves the scene of the accident. The term used in the precept is somewhat ambiguous.

From an objective perspective, it requires, at least, physical distance from the site. A specific distance cannot be established in general terms, although the concealment or suppression of the presence of the person that caused the accident on the site should be equivalent to not remaining on the site in a position to comply with the duties imposed by the aforementioned article 51 of the Road Safety Law; and from the subjective perspective, the will to abandon the site and, therefore, fail to fulfil those duties as a necessary consequence, is necessary.

The proven facts demonstrate that ***the accused, after the collision, got out of the vehicle he was driving in a hurry, started to run (in a different direction to the one in which the co-driver was heading), and was pursued by the officers who were already following the vehicle given his reckless driving, without losing sight of him, and proceeded to arrest him some 80 to 90 metres from the scene***.

Therefore, by **the time the pursuit began, he had effectively left the scene of the crime, with the clear intention of not remaining there, in breach of his legally imposed duties**.

Thus, in this case, **the accused, when arrested, had already physically left the scene of the accident, and had already harmed the legal rights protected, in that he did not remain at the scene of the accident and thus disregarded his duty of civic solidarity established in the law on road safety,** both in relation to the danger caused to the victims, and with respect to his duty to avoid possible dangers to other road users, as well as to cooperate in the proper resolution of the situation created by causing the accident".

We can see that the typical conduct of the offence in Art. 382 bis of the Criminal Code refers to the person who ***abandons the scene after causing an accident***.

The Supreme Court thus focuses the answer as to whether or not an attempt is possible in the offence under Article 382 bis of the Criminal Code in relation to the action described in the offence as regards the abandonment of the scene of the accident and not to subsequent circumstances.

The consummation of the criminal offence would occur when "leaving the scene of the accident", even if in a specific circumstance they were pursued, for example, and caught by law enforcement officers and arrested, since the act of leaving the site of the accident would have already occurred, and there would be no criminal effect in terms of the imperfect form of execution. Mostly because the offence would have been "perfected" and consummated by affecting the legal right protected. Thus, by fleeing, a duty of human solidarity would already have been attacked and violated, elevated to the rank of a legal duty, functioning as the protected legal right.

As regards the attempt to offend indirectly related to the subject in question, the failure to give assistance, the **Supreme Court** also handed down **Ruling 284/2021 of 30 March**. **2021, Appeal No. 2693/2019**, which dealt with a case in which the Provincial Court and the Criminal Court understood that the offence of failing to give assistance under examination in that case was committed in the form of an attempt.

The reasoning was as follows: *"...the crime was committed at the moment the perpetrator left the scene of the crime without checking the victim's condition, accepting the possibility of being in manifest and serious danger, as this is an attack on the legal right of human solidarity, which is within the scope of protection under the law, given that the inexorable result of death due to injuries incompatible with life, as in this case was confirmed by the forensic experts who testified in court, does not exclude the consummation of the crime if the death is not instantaneous because a few minutes had elapsed before death or because resuscitation measures had been performed by the medical services. However,* ***when death is instantaneous, this conduct must be punished as an attempted crime of failure to give assistance, as defined in Article 195 and 3 of the Criminal Code"***.

This assessment, that if the injured person dies on the spot and that the crime in the case of fleeing the scene is an attempted crime of failure to give assistance, is rejected by the High Court, recalling that, in any case, it would now be a crime of fleeing, as Article 382.bis(2) of the Criminal Code punishes the driver in question fleeing and leaving someone to die. In this case, for events that occurred before the entry into force of the reform and inclusion in the Criminal Code of Art. 382 bis of the Criminal Code, this type of event was not a crime of attempted omission of the failure to give assistance, but led to acquittal, a gap that has now been filled with the criminalisation of Art. 382 bis of the Criminal Code, the intention of which was to cover this type of absence of criminalisation for events such as the matter in hand.

Therefore, as in the case analysed in the High Court ruling under examination, the High Court indicated that:

"This Chamber, however, cannot agree with this line of argument. Art. 195 of the Criminal Code includes, in the objective offence, a situation of helplessness, a serious and manifest danger that imposes a duty to act that was omitted by the perpetrator. Therefore, the ability to receive such assistance is an element of the offence, the absence of which makes the classification ruling impossible.

And the impossibility of classifying the proven facts as constituting an offence under Art. 195 of the Criminal Code cannot be overcome, of course, with the confusing invocation of the doctrine of this Court on the subject of the unsuccessful attempt.

Article 16 of the Criminal Code has redefined attempt as opposed to its more classical interpretation, adding the term "objectively" ("by carrying out all or part of the actions which should objectively produce the result"). Objectively means that the perpetrator's plan or action, as well as the means used, "objectively" considered, are rationally capable of bringing about the result. The following are excluded from the punitive reaction: a) cases of unreal or imaginary attempts (when the action is, in any case and by essence, incapable of producing the end unsuccessfully sought by its perpetrator); b) the so-called "putative offences" (when the subject carries out an action that is not criminally defined, believing that it is), an inverse error of prohibition that under no circumstances can be criminally punished by imperative of the principle of lawfulness; c) and cases of impossible crimes stricto sensu by the absolute inexistence of purpose, which lack typical adequacy (lack of type); in other words, cases referred to by case law as absolute inappropriateness. In none of these circumstances should the actions objectively produce the typical result.

On the other hand, **cases in which the means used, "objectively" assessed ex ante and in accordance with general experience, are abstractly and rationally capable of causing the typical result of injury or danger (pursuant to Supreme Court Rulings including but not limited to 771/2014, 19 November; 1114/2009, 12 November; 963/2009, 7 October; 822/2008, 4 December).**

In the case at hand, **the instantaneous death suffered by the victim and described as such in the proven facts, is absolutely inappropriate. 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.**

The will of lawmakers is different, who in the reform introduced by Organic Law 2/1919 (sic), 1 March, considered it appropriate to introduce a new precept (Art. 382 bis) which punishes drivers who "...outside the cases contemplated in Article 195, voluntarily and without risk to himself or others, **leave the scene of the accident after causing an accident in which one or more persons are killed** or in which injury is caused which constitutes an offence under Article 152.2".

This creates a subsidiary offence which aims to avoid the impunity of conducts which escape the limits of the offence defined under Article 195 of the Criminal Code. Inspiration has been sought by mistakenly mirroring the wording of the German provisions, which punishes the "crime of fleeing" or "crime of escaping" as a response to the offender's "legal duty to wait" and "assistance".

This reference to "injury constituting an offence under Art. 152 Criminal Code referred to above eventually gave rise to Organic Law 11/2022, of 13 September, as there had been cases of acquittal for crimes of fleeing, given that the accused party had acknowledged that the facts were serious negligence in order to be convicted only for this offence and acquitted for the crime of fleeing, given that only death or injuries caused by less serious negligence were punishable, but not serious negligence, a gap addressed by the aforementioned Organic Law 11/2022 of 13 September to close this loophole and convict for the crime of fleeing both in case of death caused and any of the

imprudence, as the new criminal offence refers only to ***causing any of the injuries referred to in Articles 147.1, 149 and 150***.

On the atypical nature of the facts of fleeing the scene of the accident when the victim had died before the introduction of Art. 382 bis of the Criminal Code in 2019, we have already ruled as part of the analysis of this ruling of the Supreme Court 284/2021, of 30 March[8] referred to above.

We pointed out that "the hit and run occurred before 3 March 2019, Art. 382 bis of the Criminal Code was not in force, and, therefore, if the above criteria in relation to the interpretation of situations in which the high likelihood that the injured party had died and the driver fled was applied, it would mean that "there was no assistance that could be given" and would lead to the non-application of Art. 195 or Art. 382 bis of the Criminal, as they were not in force when the circumstances occurred, i.e. before 3 March 2019.

As we have seen above, in the specific case subject to analysis in the aforementioned ruling, the Supreme Court overturned the conviction for attempted failure to given assistance in the face of proven facts, which included a case of a hit and run that occurred before 3 March 2019, and therefore, an attempt was not possible in these cases and neither is a conviction under Art. 195 Criminal Code, meaning that if Art. 382 bis Criminal Code was not in force, the act is atypical and, as a consequence, unpunishable.

Lest we forget, either, an issue that we have already highlighted and which may be of great interest, referring to the fact that with regard to the question of whether fleeing the scene of the accident can be justified by protection against self-incrimination, the aforementioned Opinion 1/2021 of the State Attorney General indicates that:

"In the case of intentional homicide, the abandonment of the site and fleeing in the presence of the agents is justified by the recognised protection against self-incrimination, among others, in Supreme Court Ruling 670/2007, of 17 July, and could also be justified in reckless crimes such as, by way of example, in the case of Art. 358 Criminal Code when the perpetrator is surprised and flees disobeying the orders of the agents. However, this is not the case for road traffic homicides and reckless injuries. The case of People v. Rosenheimer is well known in the USA, in which Rosenheimer rammed a car with three people in it, killing one, and fled the scene, before being identified and eventually charged. He appealed the Fifth Amendment, which required him to remain at the scene of the accident, arguing that it violated his right not to testify against himself. The ruling said "The use of these motor vehicles has created serious danger (...) to protect the victims and so that those causing such damage can be identified, it is the duty of the person causing the accident to remain and notify the police (...) certainly human decency would impose such an obligation and I cannot believe that a law imposing and enforcing this would be in breach of the US Constitution (...)".

[8] Inexistence of the to give assistance in the event of the death of the victim (Analysis of Supreme Court Ruling 284/2021, of 30 March) Vicente Magro Servet, Magistrate of the Supreme Court. Doctor of Traffic and Road Safety Law , No. 262, Doctrine Section, June 2021, Wolters Kluwer

With this in mind, it is hereby rejected that the actions in relation to which the criminal offence is based could obviously be covered by this conduct, although in the background, the perpetrator of the offence or the fortuitous collision may wish to avoid police and court proceedings by remaining at the scene of the accident and it being proven that the perpetrator was reckless, or to avoid, in the case of being unforeseeable, being linked to the circumstances, although he was not at fault, a circumstance that in many cases should be clarified in the corresponding trial and not taken for granted a priori, as there are traffic complaints involving negligence in which the accused party is acquitted because the event is understood to be unforeseeable or even the fault of the victim and not that of the driver. Fleeing the scene saves them from this dilemma; however, by doing so they commit a criminal act by transforming what might not be unlawful into fleeing the scene, which is ultimately unlawful.

Consequently, we have seen that imperfect forms of execution do not apply to the offences of Arts. 195 and 382 bis of the Criminal Code related to each other as conducts characterised by the human lack of solidarity of those who witness or participate in a traffic accident and their response is to flee, either by not helping when the accident is caused by a third party, or by leaving the scene when the cause is the very driver who is absent, evading their criminal, human and personal responsibilities, without in these cases imperfect forms of execution being possible.