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THE CRIME OF RECKLESS DRIVING WITH MANIFEST DISREGARD FOR LIFE (ART. 381 CP): FRONTIERS WITH THE EVENTUAL INTENTION OF HOMICIDE

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THE CRIME OF RECKLESS DRIVING WITH MANIFEST DISREGARD FOR LIFE (ART. 381 CP): FRONTIERS WITH THE EVENTUAL INTENTION TO MURDER.

Abstract: The proliferation of "homicidal drivers" or "kamikaze drivers" on Spanish roads concerned the legislator to the point of introducing a specific offense into the Penal Code through the reform implemented in 2007: the crime of driving with manifest disregard for the lives of others. This provided more stringent punishments for the perpetrators of this particular form of road rage.

Through a technical-legal analysis of the offense, this study aims to provide the keys to understanding the legal interests affected and to differentiate it from the basic offense of reckless driving. The main objective of this study will be the complex delimitation of this offense in relation to homicide committed with implied malice. The relative proximity between these two legal concepts has led to disparate judicial solutions that have required jurisprudential unification. An attempt will be made to establish indicators that allow for a more favorable classification towards one offense or the other.

Special attention will be paid to the application of the concurrent offense rule established in Article 382 of the Spanish Penal Code, given the significance of its application when, in addition to the risk, a harmful result occurs.

Finally, *de lege ferenda* proposals will be made to contribute to achieving the legal certainty to which the legal system should aspire.

Resumen: La proliferación de “conductores homicidas” o “conductores kamikazes” en las carreteras españolas preocupó al legislador hasta el punto de introducir un tipo específico en el Código Penal a través de la reforma efectuada en el año 2007: el delito de conducción con manifiesto desprecio por la vida de los demás. Con ello, se castigó con mayor rigor a los autores de esta especial forma de violencia vial.

A través de un análisis técnico-jurídico de la figura se pretenden ofrecer las claves para conocer los bienes jurídicos afectados y diferenciarla del tipo básico de la conducción temeraria. El objetivo principal del presente estudio lo conformará la compleja delimitación de la figura con el homicidio producido a título de dolo eventual. La relativa proximidad entre ambas instituciones ha desembocado en soluciones judiciales dispares que ha precisado de unificación jurisprudencial. Se tratarán de establecer indicadores que permitan inclinar la calificación hacia una u otra figura.

Se prestará especial atención a la aplicación de la regla concursal establecida en el art. 382 CP, dada la trascendencia de su aplicación cuando, además del riesgo, se produce un resultado lesivo.

Asimismo, el acercamiento al Derecho comparado nos permitirá confrontar la solución española con los modelos adoptados en Italia y Alemania, lo que nos permitirá tener más elementos de juicio para efectuar un análisis crítico del sistema español.

Para concluir, se efectuarán propuestas *de lege ferenda* para contribuir a la consecución de la seguridad jurídica a la que debe aspirar el ordenamiento jurídico.

Key words: Reckless driving, manifest disregard, risk, eventual intent, homicide.

Palabra clave: Conducción temeraria, manifiesto desprecio, riesgo, dolo eventual, homicidio.

ABBREVIATIONS

AP: Provincial Court

BOE: Official State Gazette

CP: Penal Code

FGE: General State Prosecutor's Office

LO: Organic Law

LSV: Road Safety Law

MF: Public Prosecutor's Office

P: Page

SC: Supreme Court

V.g.: E.g.

1. INTRODUCTION

The boom in motor vehicle traffic in recent decades has led to an increase in road accidents and the production of new forms of crime . [1]

Crimes related to driving at excessive speed, under the influence of intoxicating drugs, with manifest recklessness or with manifest disregard for the lives of others are crimes of mere activity whose limits have been progressively defined by doctrine and jurisprudence. The scenario becomes more complicated when, as a consequence of some of the above conducts, the result is death, serious injury or both. In this study we will deal with what is popularly known as "suicidal driving" or "kamikaze driving", and we will analyse the different legal possibilities to be applied when a harmful result is produced.

The figure is included in the criminal law, specifically in art. 381 of the current Criminal Code (hereinafter, CC), configuring it as an aggravated form of the generic reckless driving of art. 380 CC. The aforementioned precept is based on an abstract concept: "manifest disregard for the life of others", introducing a concept which is empty of content as it does not establish elements which make up the offence and which causes many problems of delimitation with related offences, such as attempted manslaughter by deliberate intent.

In the following lines, we will analyse the differences between the crime of reckless driving with manifest disregard for the lives of others and manslaughter with intent to kill, in which there is no intention to kill, but there is extremely dangerous conduct and a result of death. Likewise, we will assess the need for a specific precept such as art. 381 PC.

In order to reach the pertinent conclusions, we will examine the protected legal interest, the regulatory evolution and the elements of the offence. Likewise, we will delve into the subjective element of the offence ("manifest contempt") and we will learn about the different doctrinal perspectives as well as the evolution of case law on the conceptual conflict. Next, we will study the differences with the eventual intention in homicide, as well as the application of the concursal rule of art. 382 PC. We will learn about the responses that the problem has received in neighbouring countries. To conclude, we will make proposals *de lege ferenda*.

[1] The increase in road accidents led legislators to add or reinforce offences in order to respond to the social reality. Examples of this can be found in the criminalisation of leaving the scene of an accident (art. 382 bis PC), reckless driving with manifest disregard for the lives of others (art. 381 PC) or the qualification of reckless homicide committed by means of a motor vehicle or moped with multiple victims (art. 142 bis PC).

2. REGULATORY CONFIGURATION OF ART. 381 PC .

2.1. NORMATIVE LOCATION AND LEGISLATIVE EVOLUTION

The offence of driving with manifest disregard for the lives of others is regulated in Art. 381 PC, located in Chapter IV ("Crimes against road safety") of Title XVII ("Crimes against collective safety").

LO 3/89 updating the Penal Code penalised driving with conscious disregard for the life of others as an autonomous offence in Art. 340 bis d), in response to the social alarm caused by the proliferation of "suicidal drivers" on fast roads as a result of betting. In this sense, Quintero Olivares (1989) relates the appearance of the precept to the alarm caused by episodes of reckless driving. The Preamble of the aforementioned law justified its incorporation by alluding to the political-criminal need to increase the penalties for the case of "homicidal drivers", which is placed in an "intermediate position between the crime of risk and attempted homicide".

The 1995 Penal Code maintained the offence and kept the terminology "conscious disregard for the life of others", but placed it in Art. 384. Subsequently, the reform of the 1995 Penal Code by LO 15/2007, of 30 November, relocated the offence to Art. 381 PC and modified not only the terminology, but also an essential element of the offence, by replacing the expression "conscious disregard" with "manifest disregard". The lexical substitution obeyed the legislator's intention to externalise the intention of the perpetrator. The aim was to make the offence more objective, as the terminology "conscious contempt" alluded to an element that remained in the subject's inner self and whose proof was truly complicated, making it a sort of *probatio diabolica*. With this change, the focus was placed on the active subject's conduct manifested in a particularly dangerous way of driving.

Thus, the current wording of Article 381 PC punishes anyone who " with manifest disregard for the lives of others, carries out the conduct described in the previous article ", which punished the driving of a motor vehicle or moped with manifest recklessness and specifically endangering the life or integrity of persons. The second paragraph reduces the penal response to "when the life or integrity of persons has not been specifically endangered".

2.2. THE PROTECTED LEGAL INTEREST

Given the location of the offence in the Title relating to offences against collective safety, one sector of doctrine has considered that the legal right to be protected is road safety or traffic safety. This would imply the set of rules that guarantee safe driving, free from situations of risk for other individual legal interests.

A more modern line of doctrine classifies it as a multi-purpose offence, as it not only directly protects the collective good of road safety, but also immediately and directly protects the life and integrity of road users. Muñoz Conde (2019) and Quintero Olivares (2016), among others, are inclined to grant it this character. This theory seems to be more appropriate insofar as art. 381.1 PC, by reference to art. 380 PC, stops alluding to a collective good and focuses on a specific danger, by requiring a "specific danger to the

life or integrity of persons". The same conclusion can be drawn from the phrase "manifest disregard for the life of others".

2.3. THE ELEMENTS WHICH MAKE UP THE TYPE OF CRIME

2.3.1. The elements of the offence. Reference to art. 380 PC

Art. 381 PC is based on the manifest recklessness contained in Art. 380 PC, with the addition of manifest disregard. By referring to Art. 381 to Art. 380, imprudence is punished in its grossest form, which must be assessed in each case and taking into account the special rule of the second section ("driving in which the circumstances set out in section 1 and in clause 2 of section 2 of the previous article are present shall be considered to be manifestly reckless").

The reference inevitably leads us to study the content of the manifest recklessness of Article 380 in order to configure the qualified offence that Article 381 represents.

The legislator uses the term "recklessness" to refer to absolute disregard for the elementary rules of the road, to extraordinary imprudence. This gross behaviour would be exemplified, e.g. by driving faster than the statutory speed limit on urban roads, taking roundabouts in the opposite direction or driving in pedestrian areas. The expression "manifest" reveals that it is observable by the average person. And, by requiring that "the life or integrity of persons is specifically endangered", reference is made to the danger of causing damage to other personal legal assets. It is therefore a crime of mere activity and concrete danger, which is consummated with the concurrence of the aforementioned requirements.

For the analysis of the elements of the offence, priority has been given to the decisions of the Supreme Court (hereinafter, SC) as the natural interpreter of the offence in question, taking into account those decisions that have constituted interpretative milestones and have contributed to the definition of the offence. When the analysis required it, judgments handed down by Provincial Courts have also been taken into account for their illustrative value. On the other hand, on the doctrinal level, authors representing the main interpretative trends have been selected.

In the study of recklessness, STS 561/2002, of 1 April, which analyses the case of a novice driver driving at excessive speed and overtaking in prohibited places, causing vehicles on the road to swerve to avoid collision, is essential. On the basis that reckless driving of a motor vehicle constitutes a very serious administrative offence in art. 65.5.2 c) of the Law on Traffic, Circulation of Motor Vehicles and Road Safety (hereinafter, LSV), it considers that, if the recklessness is "patent, clear and with it the life or integrity of persons is specifically endangered", the offence becomes criminal and gives rise to the offence provided for in art. 381 CP.

In the same sense, STS 2251/2001, of 29 November, considers recklessness to be manifest when it can be clearly, notoriously or evidently noticed by the average citizen.

The High Court, in STS 363/2014, 5 May 2014, specifies the elements of the offence on which reckless driving is based: 1) the driving of a moped or motor vehicle with a notorious and abnormal disregard for the traffic regulations, and 2) that it poses a

specific danger to the life or integrity of other road users, so that the offence would not be executed if the risk created is abstract.

For a better understanding, the elements of Art. 381 PC and its differences with the eventual intention will be set out schematically:

Aspect	**Art. 381 PC (Driving with manifest recklessness and disregard for life)**	**Possible malice aforethought**
Nature	Aggravated offence of concrete danger.	Form of intent, not autonomous type.
Objective element	- Manifestly reckless driving. - Concrete danger to the life or integrity of others.	Risky conduct, does not require extreme recklessness or concrete danger.
Subjective element	Conscious disregard for life.	Mental representation and acceptance of the harmful result.
Internal attitude	Confidence in avoiding the outcome.	Accepts that the result may occur.

2.3.2 Aggravated subtype (art. 381.1 PC)

Art. 381.1 PC punishes "whoever, with manifest disregard for the lives of others, carries out the conduct described in the previous article", which punishes whoever drives a motor vehicle or moped with manifest recklessness and specifically endangers the life or integrity of persons.

Therefore, the elements of the offence are the same as those observed in Art. 380 PC: driving a motor vehicle or moped on a public road, with manifest recklessness and giving rise to a specific risk to the life or integrity of persons. The danger caused does not necessarily have to be to other drivers, but extends to any other road user (pedestrians) and even to the occupants of the perpetrator's vehicle. In any case, it must be direct, imminent and serious. To these requirements is added the "manifest disregard for the lives of others", which requires the driving to be extraordinarily dangerous. As Circular 10/2011, of 17 November, on criteria for the unity of specialised action by the Public Prosecutor's Office in matters of Road Safety (hereinafter, Circular 10/2011) recalls, one type or another will be applied depending on "the greater or lesser unlawfulness of the conduct and the flagrancy, from an objective point of view, of the characteristics of the conduct deployed".

For Suárez-Mira (2023, p.520), manifest contempt becomes an "element of qualification" which differentiates it from the manifest recklessness of Art. 380 PC. This assessment is shared by Muñoz Conde (2017), for whom the intention to endanger with respect to the action is not enough (as was the case in art. 380) but requires the concurrence of manifest disregard for the life or integrity of persons as a subjective element of the offence.

In terms of its nature, it is structured as an intentional crime of concrete danger, of mere activity (even when results are derived from the danger originated) and of permanent effects (Teijón, 2023). As a crime of mere activity, it is consummated even when there is

no result of death or injury due to the desistance of the subject, as long as the march has been produced with manifest disregard for the lives of others.

The Public Prosecutor's Office (hereinafter, FGE), in Consultation 1/2006, of 21 April, On the legal-penal qualification of driving motor vehicles at extremely high speed, means that, in this first section, not only is the situation of abstract danger inherent to road safety present, but also a danger against individualised legal assets is necessary, as the concrete endangering of the life or integrity of persons is required.

The main difference between this modality and reckless driving is the subjective element, as Circular 10/2011, of 17 November, points out: "It is the possible intention referring to the harmful result for life and physical integrity of Art. 381, as opposed to that referring to the typical danger to both legal assets that justifies the greater punishment".

Some dogmatic sectors (Olmedo, 2010, p.102) focus the difference on the objective level, as the legislator replaces the word "conscious" contempt with "manifest" contempt in order to dispense with the subjective level and allow for an objective assessment of the greater danger of the conduct in order to place us in one or other precept.

The SAP of the Balearic Islands 486/2018, of 11 December, requires that the perpetrator mentally represents the very high probability that the action will produce an accident resulting in death. It states that "Case law configures it as a crime that punishes the attempt of intentional homicide and as such, if the result is produced, the resulting crime would be that of intentional homicide in article 138 of the CP and never that of reckless homicide".

STS 1209/2009, of 4 December, compiled with expository clarity the three objective requirements and the subjective one that had to be met in the previous art. 384, the predecessor of the current 381:

1st. Driving a motor vehicle or moped.

2º. Driving with manifest recklessness, insofar as accredited. Recklessness is understood to mean "extreme imprudence", as well as "daring, audacity, audacity, thoughtlessness, terms compatible with what is known as "possible malice".

3º. There must be a concrete danger to the life or integrity of certain persons, even if they were not identified.

4. The act must be carried out with conscious disregard for the lives of others.

Circular 10/2011 , in order to facilitate its application, identified a series of cases that could be included in the criminal offence under study:

- Wrong-way driving on motorways and dual carriageways.

- Piquing" between two or more drivers in urban areas with traffic of people who carry out high-speed races with manoeuvres typical of a racetrack.

- Driving at high speed in crowded pedestrian areas, sometimes combined with alcohol or drug use.

- Illegal races carried out in clandestine places or on public roads, at extreme speeds, with bets, etc.

2.3.3 Attenuated subtype (Art. 381.2 PC)

Art. 381.2 PC punishes with a significantly lower penalty than that provided for in Art. 381.1 "When the life or integrity of persons has not been specifically endangered"[2] .

It is considered an intentional crime, of abstract danger, of mere activity and of permanent effects. In the words of Teijón (2023, p.929) it is consummated "when driving with this manifest disregard for the life of others and which is prolonged as long as such driving continues".

In any case, it will not be easy to find cases in which there is a "manifest disregard" for the life of others, but there is no correlative risk to the life or integrity of persons. It is necessary to consider the hypothesis of the person who causes a situation that would have been objectively dangerous if there were third parties on the road, but without the presence of such third parties. Let us imagine driving at an extraordinarily high speed on a road closed to traffic due to road works and with access control. Even if the conduct were reckless, the absence of road users prevents us from speaking of a situation of specific risk for certain persons.

3. THE "MANIFEST DISREGARD FOR THE LIVES OF OTHERS".

The "manifest disregard for the life of others" forms the differentiating element with the reference type of Art. 380 PC. This is a subjective element of the offence, the occurrence of which must be assessed through manifestations in the outside world, through conduct which leaves no doubt as to this contempt.

The examples given in the aforementioned FGE Circular 10/2011 are examples of situations that can be included in this concept.

3.1 DOCTRINAL THEORIES

The subjective qualifying element of "manifest contempt" has been addressed by the doctrine from different approaches:

1.Subjectivist theory. The supporters of this theory, including Muñoz Conde (2022), place contempt for the life of others within the psyche. It would be a feeling of the active subject, who in his inner self would underestimate this legal good.

[2] Thus, Art. 381.1 PC punishes with "imprisonment of two to five years, a fine of twelve to twenty-four months and deprivation of the right to drive motor vehicles and mopeds for a period of six to ten years", while the privileged type in the second paragraph punishes with "imprisonment of one to two years, a fine of six to twelve months and deprivation of the right to drive motor vehicles and mopeds for the period of time foreseen in the previous paragraph".

The main criticism it faces is that it is difficult to prove, since the elements that remain in the internal sphere can hardly be accredited if they are not accompanied by external acts that prove it. Even if the accused admits that he acted with a total lack of respect for the legal right to life, this may not be sufficient to qualify the act as reckless driving if it is not accompanied by external acts.

Objectivist theory. This requires an analysis of the circumstances of the driving in order to be able to identify elements which, in the eyes of the average person, allow a situation of risk to be interpreted which exceeds the threshold of reckless driving because the risk created is much greater. It is the action itself (and not the recognition by the perpetrator) which is evidence of the extra danger in the driving of the vehicle. Among the main representatives of this theory is Ruiz Rodríguez (2010).

3. Intermediate theory. This looks at the motives that led the driver to drive in the way he did. Driving motivated by a situation in which it would be rationally understandable for the subject to act as he did (the criminal fleeing during a police chase) could not be assessed in the same way as when it is based solely on disregard for the life of others (illegal racing). The second example supports the existence of the precept. Authors such as Quintero Olivares (2016) stand out in this current.

3.2 JURISPRUDENTIAL ANALYSIS OF "MANIFEST DISREGARD FOR THE LIFE OF OTHERS".

Spanish case law adopts the reasoning of the objectivist and motivational thesis. Although there are not many judgments that analyse the issue due to the small number of cases that have reached the High Court, some of them have contributed effectively to delimit the figure.

In this way, both the Supreme Court and the erroneously called minor jurisprudence have been outlining the indications that contribute to specifying when a conduct reaches the threshold of manifest recklessness and is carried out with manifest disregard for life. The most relevant decisions can be summarised in the following table:

Date	Number of Ruling	Court	Relevant facts	Doctrine applied with respect to art. 381 PC
11 April 2001	**STS 615/2001**	Supreme Court	Prolonged dangerous driving, despite being warned by third parties.	Conscious acceptance of the risk. Contributes to integrating the type of art. 381 PC (manifest recklessness + disregard for life).
01 July 2005	**STS 872/2005**	Supreme Court	Extremely dangerous driving with disregard for the life of others.	Art. 381 CP is a crime of mere activity with contempt for life + a subjective state of contempt for the possible harm of others.
17 November 2005	**STS 1464/2005**	Supreme Court	Driving in the opposite direction on a busy motorway.	Conscious disregard for life, proper to Art. 381 PC.
16 April 2011	**STS 338/2011**	Supreme Court	High speed in a pedestrian area closed to traffic, ramming pedestrians.	Dolo eventual: driver accepts the lethal result.
06 May 2021	**AP Barcelona 259/2021**	Barcelona Provincial Court	Illegal racing of motorbikes on roads near nightclubs and bars open to traffic.	It can be included in articles 380 or 381 of the Criminal Code, as it is a deliberately risky action, which compromises life and integrity.

The table includes a series of court decisions - all of them from the SC - except the last one, which reflects the criteria of the Provincial Court of Barcelona - that analyse the conducts that could place driving within the scope of art. 381 of the Penal Code. From their reading, it can be inferred that driving at excessive speed in urban areas, driving in the wrong direction, continuing to drive dangerously despite warnings from third parties, or illegal racing can act as determining elements in the classification of the conduct as falling under the aforementioned precept.

In this way, in STS 615/2001, of 11 April 2001, the Supreme Court appreciated that continuing to drive dangerously despite warnings from third parties is evidence of a conscious acceptance of the risk, which contributes to integrating the criminal offence of manifest recklessness and disregard for life.

STS 872/2005, of 1 July, reinforces this idea, classifying art. 381 CP as a crime of mere activity, in which the contempt for life is manifested as a subjective state of the perpetrator in the face of possible harm.

For its part, STS 1464/2005, of 17 November, considers that driving in the opposite direction for more than 5 kilometres on a motorway with heavy traffic implies a serious present danger, which reveals a conscious disregard for the life of others, as "it constitutes, in terms of common experience, for anyone, a focus of serious present danger, given the foreseeable harmful consequences of a collision or even of an emergency evasive manoeuvre that is likely to be easily produced in such conditions".

In STS 338/2011, of 16 April, the Supreme Court understands that driving at high speed in an urban, pedestrian area close to schools and ramming pedestrians passing through it implies acting with malice aforethought, as the driver accepts the possibility of a lethal result.

SAP Barcelona 259/2021, of 6 May, examines participation in illegal motorbike races in areas close to discotheques and night-time bars open to traffic, pointing out that this deliberately risky conduct can be included in articles 380 or 381 of the Penal Code as it seriously compromises the life and integrity of third parties, as it "resulted from the beginning in a deliberate action of high risk to the health and integrity of people".

3.3. THE PARADIGMATIC CASE OF THE SUICIDAL DRIVER

The case of the driver who drives in the opposite direction to the direction of travel, generally on a fast road, and at extremely high speed, was the one that led to the introduction of the type under study. The Supreme Court, followed by the Provincial Courts for the most part, was inclined to appreciate the possibility of malice aforethought in the conduct of the subject .[3]

On the other hand, a minority of Provincial Courts dismissed the idea of malice aforethought in favour of fault. This was the view of the SAP of Girona (3rd Section), for whom, in the crime of reckless driving with conscious disregard for the lives of others, knowledge of the serious risk involved must be required, and it is sufficient that the harmful result is represented as possible. This places the offence in the sphere of conscious guilt, and not of malice aforethought, which would be present when the subject represents the result as certain and, even so, assumes it, which would place the conduct in the sphere of attempted homicide. He defends the impossibility of applying the eventual intent on the basis of the very purpose of the figure foreseen in the former 340 bis d) PC (precedent of Art. 384), which was introduced to punish suicidal drivers with a heavier penalty even when harmful results were produced, which made it difficult to assess the eventual intent inherent to attempted or completed homicide.

3.3.1. The eventual intention in the conduct of the "kamikaze driver".

The aforementioned STS 615/2001, of 11 April 2001, understood that there was no doubt that the accused, who drove in the opposite direction to the direction of travel, on a fast road, for more than 1.5 kilometres, and was warned of his improper behaviour by other vehicles he was passing, acted with the conscious disregard for the lives of others required

[3] Among others, SSTS 717/2014, of 29 January 2015 and 64/2018, of 6 February and the very recent STS 626/2025, of 3 July 2025.

by art. 384.1 PC (now 381.1 PC). He created a source of danger in which it was highly foreseeable that the result would be a collision with harmful consequences.

In the same sense, STS 561/2002, of 1 April, which stresses that malice does not exclusively cover "the infringement of the rule of care, but also the possible result". If a driver creates a situation that clearly endangers legal assets, it must be considered that the possibility of their injury is also represented, which obliges us to attribute to him, at least, a possible intention in his conduct. And, in the event of the harmful result occurring, this should also be imputed to him as malice aforethought.

This criterion was accepted by the majority of the Provincial Courts: SAP Asturias 134/2007, of 11 June; SAP Alicante, First Section, of 2 February 2010 (confirmed in cassation by STS of 8 October 2010; SAP Madrid (7th Section) 109/2003, of 10 March, among others.

The SC has addressed the issue of malice aforethought, understood as the knowledge on the part of the perpetrator both that his actions put the protected legal interest at risk and that there is a high probability that this interest will be harmed, in numerous rulings. Thus, STS 981/2017, of 11 January (citing SSTS 311/2014, of 16 April; and 759/2014, of 25 November; 155/2015, of 16 March; and 191/2016, of 8 March), which states that malice is present in those who know that their actions generate a situation of danger that causes a high risk to the victim and, despite this, initiate the action and maintain it without guarantees of controlling the risk "without it being necessary for them to directly pursue the cause of the homicidal result, as it is sufficient that they know that there is a high probability that their behaviour will produce it". The defence that he had the hope that the result would not be produced is not admitted as unreasonable and unfounded given the magnitude of the risk caused.

STS 71/2019, of 14 January, in the case of a conviction of the author for an offence against road safety under art. 381 CP in conjunction with an offence of manslaughter, although it did not assess (as it had not been raised) the application of one or the other precept, agreed with the court of first instance in the assessment of the possible intention in the conduct of the person who, after consuming large doses of alcohol, drove on a fast road in the wrong direction, despite having been repeatedly warned of this by other drivers. This circumstance made it reasonably likely that a head-on collision with another road user would result in death. The fact that he did not stop despite having been warned reveals the admission of both the action and the probable outcome.

The STS 717/2014, of 29 January, makes an interesting comparison between the crime of reckless driving with manifest disregard for the lives of others and the crime of intentional homicide, differentiating between the objective and subjective elements of the type.

As for the objective elements, he stresses the importance of an act of driving, understood as the movement of the vehicle to "link" two locations, which he excludes in the case analysed when the car plunged into the sea, in order to appreciate art. 381.

Secondly, it looks at the legal good attacked, considering that in offences against road safety, the aim is to compromise road safety. On the other hand, if the attack is

directed against specific and determined persons, we would be dealing with a crime against life in .

In relation to the subjective element of the offence (citing the ruling in STS 561/2002, of 1 April), he affirms that it is possible to appreciate, at least, the possibility of malice aforethought in those who drive recklessly, creating a specific danger to the life or physical integrity of people with conscious disregard for these legal assets. In this case, he points out, "the result represented and admitted makes him the perpetrator with malice aforethought".

In the case under analysis, the plaintiff accelerated and threw the vehicle into the sea, using the car as an instrument of the crime to kill specific persons. Therefore, both the element of driving and the endangering of indeterminate persons, which are proper to art. 381 PC, were excluded. In order to attribute the result to him as malicious intent, he assessed the fact that he mentally represented the lethal risk and accepted the consequences of his actions.

STS 64/2018, of 6 February, ratifies the interpretation offered by STS 717/2014, of 29 January 2015), and applies, at the very least, malice aforethought, when it creates a situation of specific danger with disregard for legal assets. When this risk translates into a result of injury that has been represented and admitted, this must be attributed to him as malice aforethought. In the case analysed in the decision, in which the perpetrator drove on a public road in conditions in which it was impossible to control the car, the result was foreseeable and, therefore, there is the malice aforethought inherent to intentional homicide.

Returning to the paradigmatic case of the "kamikaze driver", a person who drives in circumstances in which it is highly probable that an injurious or fatal result will occur shows a disregard for the life of others that leads him to assume the result of death. However, the eventual and not direct malice is attributed to him as he assumes as almost certain the result of death of one or several indeterminate subjects, and does not pursue the death of a specific subject, which was pursued in the case of STS 717/2014, of 29 January.

Requejo (2024) agrees with these considerations, excluding from art. 381 PC those cases in which a direct intention to kill or injure using the vehicle as a weapon can be appreciated, which would constitute the crime of intentional homicide or murder with malice aforethought (in line with what was held in STS 29 January 2015).

Direct malice would be evidenced in conduct in which the intention to attack specific subjects is easily perceptible, such as driving over a pavement to run over a pedestrian (SAP Madrid of 18 April 2005).

4. THE TREATMENT IN BANKRUPTCY IN THE EVENT OF THE PRODUCTION OF HARMFUL RESULTS (ART.382 CP)

Art. 382 CC includes a concursal rule and another of civil liability of great importance in offences against road safety, in the following terms: "When the acts punished in Articles 379, 380 and 381 cause, in addition to the risk prevented, an injurious result constituting a crime, whatever its seriousness, the Judges or Courts will only assess the most seriously

punishable offence, applying the sentence in its upper half and sentencing, in any case, to compensation for the civil liability that would have arisen".

The precept offers a rigorous penal result for the guilty party, correcting the criticism made of the previous regulation that it was unjustifiably beneficial. The then article 383 of the Criminal Code established that: "When the acts punished in articles 379, 381 and 382 cause, in addition to the risk foreseen, an injurious result, whatever its seriousness, the judges and courts will only assess the most seriously punishable offence, sentencing in all cases to compensation for the civil liability that has arisen. In the application of the penalties established in the aforementioned articles, the judges and courts shall proceed according to their prudent discretion, without being subject to the rules prescribed in Art. 66". Among the critics of the previous regulation, we find Zulgaldía (2010), for whom the legislator had not considered drivers who, despite not having been killed or injured, had been put in danger due to the driver's drunkenness, because it solved the situation through the competition of rules, to be resolved according to the criterion of alternativity provided for in art. 8. 4 CP.

In contrast to the solution offered by art. 383 PC, the current regulation introduced by the reform of LO 15/2007 in art. 382 includes a concurrence between the crime of danger and the crime of result (homicide, injuries) which will act through the application of the more serious crime in its upper half. Escobar (2012, p.2) summarises the new features introduced by the bankruptcy reform in the area of road safety:

1. It includes conduct relating to reckless driving with reckless disregard for the lives of others (previously provided for in art. 384).
2. The harmful result produced must constitute an offence.
3. It resolves the competition by imposing the more serious penalty in its upper half.
4. The extent of the penalty will be determined in accordance with the rules of Art. 66 PC.

The regulatory provision gave rise to controversy both in doctrine and in minor case law on how to assess the competition due to the different interpretation of the expression "the most seriously punishable offence", which led the Supreme Court to unify its doctrine initiated after STS 1135/2010 in order to ensure legal certainty in the regulatory interpretation. The discussion involved opting between the interpretation that art. 382 PC established a concurrence of rules to be resolved in accordance with the principle of conjunction or absorption established in art. 8 PC or, on the contrary, an ideal concurrence of offences which, in turn, could be real or ideal.

The choice between the application of one or the other type of concurrence in the clause of Art. 382 PC entails important punitive consequences. If it were considered that we were dealing with a concurrence of rules (art. 8 PC), the harmful result would be subsumed (in accordance with the principle of absorption) in art. 381 PC, punishable only by the penalty of that provision. This solution would be more beneficial for the offender than the actual concurrence of offences (art. 73 PC), in which both the penalties for the crime of result and the crime of danger would be applied, being the most burdensome solution.

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If, on the other hand, it is understood that we are dealing with an ideal concurrence (Art. 77 PC), the penalty foreseen for the most serious offence, aggravated, would be applied, but it would give the option of punishing the offences separately. The solution proposed in Art. 382 PC is a special penological rule, as it allows punishment for the most serious, aggravated offence, without offering the possibility of punishing the offences separately. The interpretation of the clause, therefore, is not merely academic; it requires the unification of criteria by the Supreme Court in order to guarantee adequate punitive proportionality and a coherent interpretation of the regulatory set of offences against road safety.

The Provincial Courts approached the issue with an initial disparity of criteria, some considering it a concurrence of rules, others an ideal concurrence, and still others an actual concurrence. STS 1135/2010 marked a turning point by classifying it as a specific competition. For a better analysis of the interpretative evolution, the following comparative table should be developed:

Resolution	Case / Relevant facts	Thesis on insolvency proceedings	Doctrinal contribution
STS 130/2000 and STS 1241/2001	Reckless driving + harmful result	Concurrence of norms (absorption)	The disvalue of danger is absorbed by the crime of result.
SAP Madrid 30 June 2010	Reckless driving + injury	Competition of norms (principle of alternativity)	Only the most serious offence applies (art. 8 PC).
SAP Valladolid 485/2001,5 July 2001	Reckless driving + manslaughter and injuries	Ideal competition + medial competition	Driving is a precondition for several offences of injury; multiplies concurrence. Burdensome option.
SAP Madrid 109/2003,10 March	Reckless driving + death	Ideal concurrence of Art. 77 PC	Each offence is punished separately.
SJP Oviedo nº 2, 12 April 2007	Hit and run with double intention: to injure and create danger.	Real competition	Two autonomous purposes: to injure and to create danger. Maximum seriousness.
STS 1135/2010,29 December	Driving + several harmful results	Concurrent offences with the special rule of art. 382 of the Criminal Code.	First clear pronouncement: art. 382 is a specific ideal concurrence, different from art. 77 PC, which does not allow separate offences to be punished. Turning point in case law.
STS 64/2018, 6 February	Reckless driving + harmful result constituting an offence.	Combination of offences (specific ideal) according to art. 382.	Establishes doctrine: art. 382 combines the criterion of the most serious offence + aggravation to the higher half. It is neither a concurrence of norms nor a common ideal concurrence. Double legal good is attacked, but the penalty is imposed by means of a special rule.
STS 744/2018 (2019), 7 February	Accident with a crime of danger + crime of result.	Competition of offences with a specific penal rule	Reiterates 2018 doctrine: penalty for the more serious offence in its upper half. Recognises plurality of offences, but does not allow separate punishment.
STS 350/2020, 25 June	Dangerous driving + result of death or injury	Competition of offences unless there is direct intent, in which case there is	Rule of concurrence only applies if the result is caused by recklessness or eventual intent; if there is direct intent to kill/injure ⇒ actual concurrence.

Resolution	Case / Relevant facts	Thesis on insolvency proceedings	Doctrinal contribution
		actual competition.	

The supporters of the concurrence of norms considered that the disvalue of the conduct of reckless driving was subsumed in the disvalue of the harmful result. Therefore, only the most serious offence (that of the result) was punished. Examples of this are the SAP of Madrid of 30 June 2010 (citing SSTS 1241/2001, of 20 June, or 130/2000, of 10 April). This view is shared by a sector of doctrine, for whom, when in addition to the risk there is an injurious result derived from the same, the precept will be applied in the form of a concurrence of laws. Thus, according to Abadías (2021, p.537): "in a concurrence of laws, only the most seriously punishable offence will be assessed (principle of absorption), applying the penalty in its upper half *ex* art. 382 of the Penal Code".

The dogmatic path which considers the application of the concurrence of norms to be more appropriate argues that the crime of danger should give way to the crime of result (that of injury), as the latter was the one which was to be avoided. Accordingly, the offence of injury would be the principal offence, and the offence of endangerment would yield to it.

For other Provincial Courts, the conduct harms two independent legal assets: the collective legal asset "road safety" and the very personal asset "life or physical integrity". Therefore, the plurality of offences was related through the ideal concurrence envisaged in art. 77 PC, with a single act constituting two or more offences. This solution, however, is open to criticism, as it offers a penal result that may be far removed from the solution offered by art. 382 PC. By way of example, we can cite SAP Valladolid (2nd Section) 485/2001, of 5 July, which considered that the proven facts constituted an offence of reckless driving under art. 384 PC (now 381) in medial concurrence under art. 77.1.2 with an ideal concurrence under art. 77.1.1 PC between a crime of homicide under art. 138, a crime of injury under art. 149 and a crime of injury under art. 147, and a misdemeanour of injury under the extinct art. 617.1 PC. It justified this by pointing out that we are faced with a medial concurrence together with an ideal one: "the reckless driving involved the production of other results; it was constituted as an indispensable presupposition (medial concurrence) of the subsequent collision which, in ideal concurrence, produced a fatal result and other injury results".

The High Court addressed the problem of concurrence in STS 1135/2010, of 29 December 2010, in relation to facts that could be included in art. 383 of the Criminal Code (precedent of the current 382). It established that the special concursal rule was not affected when the situation of risk had led to several harmful results, as there would always be absorption in the most seriously punishable offence. He was in favour of considering the rule of Art. 383 PC (now 382) as a specific, individualised ideal concurrence of Art. 77 PC, as "Art. 382C.P. does not provide for separate punishment of the different offences, although this could be more favourable for the offender".

SAP Madrid (7th Section) 109/2003, 10th March, declared the accused responsible for the crime of reckless homicide provided for in art. 142.1 and 2 CP in relation to the ideal concurrence of art. 77.1 CP with arts. 379, 381 and 384.1 CP.

Authors such as Sánchez Melgar and Luzón Cuesta (2011) are in favour of the ideal concurrence of offences.

There were, however, defenders of the real concurrence of offences. Criminal Court No. 2 of Oviedo, in a ruling of 12 April 2007 in a case in which a driver deliberately ran over some people at a pedestrian crossing, ruled that there was actual concurrence between the offences of injury and reckless driving and the misdemeanours of injury, by noting the double intention of the subject: on the one hand, to run over the people and, on the other, to create a specific danger to those who were not hit.

The Supreme Court definitively resolved the issue, underpinning the thesis put forward in STS 1135/2010 in judgments such as STS 64/2018, of 6 February, STS 744/2018, of 7 February 2019 and STS 350/2020, of 25 June 2020, thus creating a consolidated doctrine. In them, he reasons that we are dealing with a concurrence of crime and not of rules, which has a special penological rule. In this sense, although it admits that there are several offences, it does not resort to the concursal rule of art. 77 PC, but rather follows the solution offered by art. 382 PC itself: "to assess only the most seriously punishable offence, applying the penalty in its upper half". This means that there is an attack on both legal interests, the collective and the individual, but the sanction is carried out through the specific formula.

The aforementioned STS 64/2018, of 6 February, unifies the interpretation of the rule of art. 382 as a concurrence of crimes for which the legislator provides a singular penal rule, similar to that of concurrence of rules: "that corresponding to the most serious crime, plus the provision of the ideal concurrence, in its upper half". It is therefore "an exception to the general criterion in the case of the concurrence of a crime of danger and another of result, by virtue of which the crime of result absorbs the crime of danger (STS 122/2002, of 1 February), a criterion which, in this case, is replaced by that of the more serious crime in its upper half, combining the rules of ideal concurrence and the principle of alternativity in the imposition of the sentence".

To explain that the nature of the concurrence is of crimes, the focus is on the fact that the precept states "when with the acts punished in arts. 379, 380 and 381", making it clear through the preposition "with" that the harmful result constituting the crime is produced with the action. In other words, the action not only produces a risk, but also a harmful result. Despite the fact that the action is only one, two different legal assets are attacked and two criminal precepts are infringed, which is punishable in the form of an ideal concurrence. The higher penalty is a consequence of a double disvalue: the danger caused to road safety and the harmful result that derives from it.

STS 744/18, of 7 February 2019, citing the previous STS, recalls that the provision of art. 382 CP is that of the concurrence of offences, but with a penological peculiarity, as it is close to the concurrence of rules by attending to the most serious offence, but it adopts the solution of the ideal concurrence of offences. In this way, the rule of Art. 382 "does not exclude the consideration of a plurality of offences to which an accumulated penalty can be applied".

STS 350/2020, of 25 June 2020, seeks to describe the contours of art. 382 in order to resolve "the contradictory doctrine of the Courts in this respect". It differentiates between whether the result was directly intended by the perpetrator, in which case the actual concurrence will be applied, or whether it was produced through negligence, in which case the concurrence clause will come into play for the harmful result. He points out that "For the application of the concursal rule, it is required that the perpetrator, in addition to the foreseen risk, causes an injurious result constituting a reckless offence, or possibly with malice aforethought. The direct intent to threaten life or cause injury to the victim pursued by the perpetrator, prevents the application of the concursal clause, because the intention is to bring about such a result. In this case, when road safety is affected, which includes third parties as a legal good, it may give rise to a real concurrence of offences, to be punished separately".

It may seem that the legislator had in mind the possibility of the concurrence of a crime of intentional endangerment (reckless driving) and a crime of homicide or injury due to recklessness derived from the consumption of alcohol or excessive speed, as these are the most frequent cases. However, the fact that the phrase "whatever the seriousness" is introduced raises doubts, because, when we are dealing with a case of Art. 381 PC, as we have seen, it can be argued that the result is produced as a result of malicious intent. In this case, the concurrence would take place with the intentional homicide of art. 138 PC, and the penalty would be applied in its upper half.

Escobar (2012), in cases in which death is the result, does not hesitate in the application of art. 138 PC in its upper half, and is therefore punished with a higher penalty when it is produced by means of a motor vehicle than in the case of an ordinary homicide. The explanation is to be found in the increase in the disvalue of the action and the result due to the use of the vehicle and because it is carried out in the context of an everyday activity such as road traffic, which "is accessed in an atmosphere of confidence in driving". He considers that, if he acted with intent to cause the death of a third party and the only result obtained was injury, attempted intentional homicide will have to be applied. A different solution is reached when the intention was only to cause injury, as the provision of reckless driving with manifest disregard is punishable with more punishment than the basic offence of injury in art. 147 PC and its aggravated form in art. 148 PC. If the result were that of injury under Art. 149 or 150, these would be the types applied in their upper half, as they have a higher penalty in the abstract.

The rule only mentions the offences provided for in Articles 379, 380 and 381. It excludes the types of driving without a licence and causing a serious risk to traffic contemplated in Articles 384 and 385 PC, respectively, to which the general rule of concurrence of offences in Article 77 PC will be applied, as they do not result in a risk to traffic of the same nature as the previous ones. The clause uses the term "harmful" and not "damaging", in such a way that, if as a consequence of an action which fits in with Art. 379, 380 or 381, damage is caused, this will not be demanded in accordance with the special concurrence which it foresees, but can be demanded through civil liability. Hence the phrase: "condemning, in any case, to compensation for the civil liability that may have arisen".

From the study of the special insolvency rule, it is clear that the legislator offers a solution far removed from the competition of rules, despite the use of the expression "shall only assess", inherent in the former. An imperative solution is offered which does

not accept either the system of concurrence of norms of Art. 8 or the system of Art. 77, which allows the penalties for the offences to be established separately. According to Vargas (2007) "The Draft in the new Art. 382 formally considers the situation as a concurrence of norms, although it applies a more severe penal regime".

It will therefore be necessary to consider the most serious penalty in the abstract in accordance with the graduation of penalties established in Article 33 of the Criminal Code. The more serious penalty will be the one which carries a custodial sentence as opposed to the one which carries a disqualification sentence.

A divergent doctrinal sector advocates the elimination of the special concursal rule, arguing that the rules of ideal competition in Art. 77 PC are sufficient. In fact, they argue, it is the ideal concurrence which would have to be applied if, as a consequence of the act of driving, a crime of damage had been produced as foreseen in Art. 263 PC. It is worth noting, however, that the solution of Art. 382 is not exclusive to offences against road safety. The same technique can be observed, for example, in relation to offences relating to nuclear energy (Art. 343.2 PC).

What would be the solution in the case of several harmful results as a consequence of the risk (several deaths, several injured, or several deaths and injuries)? The precept only indicates that the rule will act "whatever the seriousness". FGE Circular 10/2011 is in favour of considering as many ideal concurrences as crimes of harmful results: "when applying the rule of art. 382, when there is a plurality of crimes of reckless results, the penalty of the most serious crime in its upper half will be applied and within it - and this is a crime of result - the rules of ideal concurrence of art. 77 PC will be applied". When a plurality of crimes of result concur through eventual malice, this would also be resolved through the ideal concurrence between qualified reckless driving and intentional homicide and, as Escobar (2012, p.8) points out: "this should be made up, on the one hand, of the precept resulting from the application of art. 382; and, on the other, of the rest of the intentional crimes".

As we explained *above*, Art. 382 PC includes a civil liability clause. As Suárez Mira (2023) considers, it is not an exception to the general regime of civil liability established in the Criminal Code, but it avoids interpretative problems.

5. A LOOK AT COMPARATIVE LAW

It has been decided to turn to German and Italian law as a comparative reference in the field of road safety, as opposed to bordering countries, given that the normative and methodological structure is closer to the Spanish system than that offered by the former. Therefore, the criteria of legal coherence, regulatory quality and dogmatic affinity have been taken into account rather than a merely geographical perspective.

5.1. THE GERMAN MODEL

The German Criminal Code (StGB) does not provide for an offence fully comparable to Art. 381.1 PC, although in § 315 c StGB[4] the offence of "endangering road traffic"

[4] StGB stands for Strafgesetzbuch (German Criminal Code) and § indicates the paragraph or section of the Code.

(*Gefährdung des StraBenverkhrs*) is provided for. The paragraph contains two alternative cases which are punishable under criminal law with a clear objective approach. Thus, the following are punishable:

-Driving under the influence of alcohol or other substances, or because of physical or mental defects.

-Committing one of the "seven deadly traffic sins", which are listed as a *numerus clausus*. These include failure to observe the right of way, improper overtaking, failure to respect pedestrian crossings, excessive speed in inconspicuous areas and driving in the wrong direction on motorways.

In both cases, it is required that the risky situation "endangers the physical integrity or life of another person or other people's property of significant value".

The German system has been criticised[5] for offering a closed list in an event such as driving, in which there can be a multitude of situations that put people's lives or integrity at risk. In its defence, by objectifying the offence and eliminating subjective expressions such as "contempt", the rule provides greater legal certainty, as it will be applied whenever one of the cases occurs, without the need for additional interpretation.

5.2. THE ITALIAN MODEL

The Italian Penal Code also advocates a different solution to the Spanish one, introducing a specific offence in Art.589 bis: road homicide (*omicidio stradale*). In this regard, it is worth adding a reference to the *ratio legis* of this provision, underlining that the 2016 reform was intended to provide a more rigorous regulatory response to the increase in particularly serious road accidents with fatal results, thus reinforcing the effectiveness of the Italian punitive system.

Road homicide acquires a culpable, not intentional, nature. It thus omits the need to ascertain the intention of the driver in order to assess the existence of direct malice or malice aforethought in the result. It compensates for the exclusively culpable nature of the offence, attributing a high penalty to the act, more typical of intentional offences than culpable ones. Together with the basic type (2-7 years' imprisonment), it contemplates qualified types depending on the concurrent circumstances:

- When the death is caused by a driver with a blood alcohol level of more than 1.5 g/l or under the influence of drugs (8-12 years).

- If the death is caused by a driver with an alcohol level of between 0.8-1.5 g/l, or as a consequence of extraordinary speeding, or acts such as running a red traffic light or driving in the wrong direction (5-10 years).

It is clear from the analysis of both models that both Germany and Italy opt for more objective models than Spain, avoiding the use of malice aforethought and subjective

[5] Mir Puig criticises the fact that liability focuses excessively on the creation of an objective risk, without assessing the subjective attitude of the perpetrator.

elements that are difficult to prove. Germany focuses on the objective creation of a danger, while Italy configures road homicide (*omicidio stradale*) as a culpable offence.

6. CRITICISM OF ART. 381 CP AS A PRIVILEGED TYPE

6.1. THE DIFFICULTY IN ITS APPLICATION

The Supreme Court, faced with the most serious cases of reckless driving in which the lethal result must be seen as an almost certain consequence, has opted to consider a crime of consummated or attempted homicide, leaving aside the crime against road safety of Art. 381 CC[6] . This is one of the most controversial issues in the study of the case of the "suicidal driver". If the most serious cases of reckless driving with reckless disregard for the lives of others are absorbed by attempted murder (in the event that the result does not materialise), what are the real possibilities of practical application of the offence, and in which cases would the facts be criminalised in accordance with Art. 381 PC?

The question is not a trivial one, as the choice of one or other possibility gives rise to not inconsiderable differences in terms of penalties. The crime of attempted homicide would range between 5-10 years imprisonment, while the penalty foreseen in art. 381.1 PC for reckless driving is 2-5 years imprisonment. How would it be justified that a subject who has driven with manifest disregard for the lives of others, producing an objective risk to life, could be punished by the more advantageous type of art. 381.1 PC? If the objective and subjective elements of the eventual malice concur in assuming and accepting as highly probable that death is the result of his action, there would be no explanation of criminal policy that would move him away from crimes against life and towards crimes against safety, with the aforementioned penal advantage.

The type of Art. 381 PC would remain residual, applicable to intermediate situations between the intention to endanger provided for in Art. 380 PC and the eventual intention, in the form of qualified intention to endanger or guilt with an added reproach. We would be faced with a situation that is difficult to configure and complex to apply in practice.

Circular 10/2011 indicated in which cases, other than the suicidal driver, art. 381 PC should be applied. To do so, it was necessary to consider "the concurrent circumstances, the greater or lesser danger to third parties and the representations of the perpetrator derived from his conduct". Despite this effort, it is still truly complex to determine the conducts which, being different from the suicidal driver, go beyond Art. 380 and should be punished in accordance with Art. 381 PC.

[6] See, among others, SSTS 717/2014, of 29 January 2015 and 64/2018, of 6 February and the very recent STS 626/2025, of 3 July 2025.

6.2. QUESTIONING THE NEED FOR THE EXISTENCE OF THE QUALIFIED TYPE OF OFFENCE

Among the main criticisms that can be made of Art. 381, the following can be identified:

1. It includes an indeterminate legal concept: "manifest disregard for the life of others" which lacks a universally accepted definition. Subjective, objective and motivational theories have been developed to try to give content to the provision.

2. In order to determine whether there is "reckless disregard", one looks at indications that coincide with those of malice aforethought. Thus, in the most serious manifestations of art. 381 PC, the borderline with the crime of attempted murder is blurred, and the courts have opted to apply the latter, and not the crime against road safety. Although this solution is logical from a criminal-policy point of view, as it protects the most valuable legal asset with a penalty proportionate to the seriousness of the risk, it significantly reduces the scope of practical application of the specific offence.

3. If the same case can be classified according to Art. 138 and 381, there would be no reason to apply the offence in Art. 381 PC, which gives a clear penal advantage to the perpetrator. The fact that the situation of risk had been provoked by means of a motor vehicle or moped is not sufficiently solid for us to opt for 381 PC, as the vehicle can be taken as an instrument of the crime for the purposes of attempted murder.

The majority of doctrine and jurisprudence reserve art. 381 for cases in which the conduct is considered extremely dangerous, so that for an average person, the death of a person is probable, without being so serious as to be considered as an attempt under art. 138. They consider it to be an intermediate type between attempted murder and reckless driving under art. 380 PC.

In Olmedo's opinion (2010), if the driving results in a direct and immediate danger to someone's life, attempted murder should be considered. This circumstance, however, does not necessarily have to occur in the type of art. 381. He understands that this idea is reinforced by art. 381.2, which allows reckless driving in which there is only a situation of abstract danger, without the need for a concrete danger to occur. This possibility would never fit in with attempted murder.

7. CONCLUSIONS

The legislator responded to the social demand to severely punish the conduct of the "homicidal driver" by means of a specific type of offence: the offence of driving with manifest disregard for the life of others.

It is defined as a fraudulent offence of intent, of concrete danger, of mere activity and of permanent effects, whose configuration is based on the offence of manifest recklessness and which differs from it in the subjective element of the offence: the reckless disregard for the life of others. It is precisely this qualifying element that gives rise to many interpretative problems, since, in cases where the risk voluntarily produced for the life of third parties does not lead to harmful results, the line separating the crime against road safety from the crime of attempted homicide is blurred.

The problem regarding the delimitation of the two offences has far-reaching consequences, as the difference in penalties between the two is significant. This gives rise to clear legal uncertainty, as there are no unequivocal criteria and the same case can lead to different solutions, without there being any criminal-policy reasons to defend the application of the most advantageous type. Therefore, the interpretative difficulty goes beyond the theoretical framework to have a direct impact on judicial practice and the predictability of sentences, generating possible significant differences in the application of the penalty between different courts.

In cases in which, as a consequence of the offence of art. 381, an injurious result is produced, the special concursal rule foreseen in art. 382 PC comes into play, a rule of special transcendence in offences against road safety, the application of which has given rise to doctrinal controversy in matters of road crime and disparities in judicial rulings. In contrast to those who argue that we are faced with a concurrence of rules, there are those who classify it as an ideal, medial or real concurrence. The decision to apply one or other type of concurrence goes beyond the mere doctrinal debate, and is of paramount importance in terms of the penal outcome.

The Supreme Court consolidated the interpretative criterion by affirming that Article 382 of the Criminal Code contemplates a concurrence of offences which, although it is close to the solution of the concurrence of norms by attending to the most serious offence, poses a special penological rule which adopts the solution of the ideal concurrence of offences.

Given the problems of application posed by this type of criminal offence, it is necessary to propose new scenarios that contribute to offering security to legal operators, by means *of lege ferenda* proposals. A conservative proposal would involve seeking an interpretative unity of the precept by means of a Circular of the FGE and an Agreement of the non-jurisdictional Plenary of the Second Chamber of the Supreme Court in which it would be indicated which external signs would concur in the offence of Art. 381 and not attempted murder. This would provide a kind of guide for legal operators, similar to the German model, but with an indicative and not closed character.

However, the most practical solution would be to delete the provision. The legal uncertainty that comes with not knowing with certainty whether one is dealing with an offence that has been transferred back to Art. 138 or 381 PC would disappear if the possibilities were reduced to Art. 380 and 138 PC. Article 380 would be limited to driving with manifest recklessness in which the eventual intention in the result is not clearly appreciated due to the limited possibilities of it occurring given the concurrent circumstances, whereas, if it were apparent, the crime of attempted murder would be applied (Article 138 in relation to Article 16 PC). A wider range of penalties in Art. 380 would make it possible to match the penalty with the seriousness of the act.

The current wording causes Art. 381 PC to include cases which imply an acceptance of the risk of killing, as is the case in the hypotheses of driving against the law at high speed or carrying out illegal races in the city without paying attention to the basic rules of the road. The existence of the offence becomes unnecessary as these cases could be covered by Art. 138 of the Penal Code. In addition, the legislator does not offer a definition of what should be understood by "manifest disregard", which leads to legal uncertainty and results in disparate rulings by the courts. The disappearance of the

definition, as we advocate, would entail the elimination of an indeterminate legal concept. In this way, we would align ourselves on this point with German and Italian law by not recognising an autonomous type of fraudulent endangerment.

In short, the study shows the need to balance the protection of such relevant legal assets as life and road safety with regulatory certainty and coherence in the application of criminal law.

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