



Research Article

# THE CRIMINAL LAW CONCEPT OF DRIVING IN A CONTEXT OF CHANGING MOBILITY

*English translation with AI assistance (DeepL)*

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## THE CRIMINAL LAW CONCEPT OF DRIVING IN A CONTEXT OF CHANGING MOBILITY

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**Abstract:** The constant evolution and transformation of mobility, driven largely by technological advances and the spread of artificial intelligence systems, highlight the inadequacy of the criminal law concept of driving, which appears to have been left behind by these changes. Its current definition, centred on mechanical propulsion and travel on public roads, is inadequate to cover certain scenarios which, although they do not fit within this traditional framework, pose significant risks to road safety. This analysis is based on regulatory developments, recent case law and the need to adapt criminal law to the technological and social changes that directly affect road traffic. This paper examines how the concept of driving has been defined under criminal law and why it is necessary to review its current scope from various perspectives: that of the protected legal interest; that of new mobility patterns – particularly personal mobility vehicles; that of progressive automation; and that of attempted offences against road safety. The paper concludes that it is advisable to reformulate the criminal concept of driving on the basis of functional and technological criteria more in line with contemporary reality, such as effective control over movement and the actual potential for harm inherent in the conduct.

**Resumen:** La constante evolución y transformación de la movilidad, impulsada en gran medida por los avances tecnológicos y la extensión de los sistemas de inteligencia artificial, ponen de manifiesto la insuficiencia del concepto penal de conducción, que parece haber quedado al margen de estos cambios. Su configuración actual, centrada en la tracción mecánica y en el desplazamiento en vía pública, es inadecuada para abarcar ciertos supuestos que, aunque no encajan en ese esquema clásico, generan riesgos significativos para la seguridad vial. Esta reflexión se apoya en la evolución normativa, en la jurisprudencia reciente y en la necesidad de adaptar el Derecho penal a los cambios tecnológicos y sociales que inciden directamente en la circulación viaria. Este trabajo examina cómo se ha configurado penalmente el concepto de conducción y por qué resulta necesario revisar su alcance actual desde distintas perspectivas: la del bien jurídico protegido, la de los nuevos patrones de movilidad -especialmente los vehículos de movilidad personal-, la de la progresiva automatización y la de la tentativa en los delitos contra la seguridad vial. El trabajo concluye que resulta conveniente reformular el concepto penal de conducción a partir de criterios funcionales y tecnológicos más acordes con la realidad contemporánea, como el control efectivo del desplazamiento y la potencialidad real lesiva de la conducta.

**Keywords:** Driving, road safety, automated vehicles, personal mobility vehicles (PMVs), strict liability, attempted offence.

**Palabras clave:** Conducción, seguridad vial, vehículos automatizados, vehículos de movilidad personal (VMP), imputación objetiva, tentativa.

## ABBREVIATIONS

Art.: Article.

BOE: Official State Gazette.

CP: Criminal Code.

DGT: Directorate-General for Traffic.

DPEJ: Pan-Hispanic Dictionary of Legal Spanish.

DOUE: Official Journal of the European Union.

FJ: Legal basis.

AI: Artificial Intelligence.

LSV: Royal Legislative Decree 6/2015 of 30 October, approving the consolidated text of the Law on Traffic, Vehicle Circulation and Road Safety.

RIA: Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024 laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144, and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828.

RGCir: Royal Decree 1428/2003 of 21 November, approving the General Traffic Regulations for the implementation and enforcement of the provisions of the Act on traffic, motor vehicle circulation and road safety, approved by Royal Legislative Decree 339/1990 of 2 March.

RGV: Royal Decree 2822/1998 of 23 December, approving the General Vehicle Regulations.

RJ: Case law index from the Aranzadi database.

ROJ: Registration number of judgements in the Judicial Documentation Centre.

SAE: Society of Automotive Engineers.

SAP: Judgment of the Provincial Court.

STC: Judgment of the Constitutional Court.

STS: Judgment of the Supreme Court.

TC: Constitutional Court.

TOL: Registration number of the judgements in the Tirant Prime database.

TS: Supreme Court.

EU: European Union.

PMV: Personal mobility vehicles.

## 1. INTRODUCTION

Traffic – understood in the broadest sense, referring to the movement of people and animals, not just vehicles – constitutes a historical social reality whose existence is linked to the very evolution of humanity, insofar as human beings have always had a need to travel. However, traffic has not always been as we conceive it today.

The advent of the engine and the subsequent widespread adoption of motorised vehicles<sup>1</sup>, particularly the car, together with the increased risks arising from their use, have transformed traffic into a significant social phenomenon, which has necessitated continuous regulatory adaptation to this changing reality, both technically and functionally. However, in contrast to this regulatory evolution, the criminal law concept of driving has remained virtually unchanged, untouched by the profound changes that both mobility and modes of transport have undergone.

This conceptual stagnation is particularly problematic in the current climate. Against a backdrop of constantly evolving mobility, characterised by the emergence of new forms of travel and technological advances, it is clear that the current criminal law concept of ‘driving’ is insufficient to address all situations arising from road traffic.

The aim of this paper is to analyse the shortcomings of the current formulation of the criminal law concept of ‘driving’ from various perspectives: the legal interest protected by offences against road safety, contemporary mobility, the rise of automated driving, and the issue of attempted offences in this category. On this basis, the paper proposes the development of an updated concept capable of adequately addressing the various situations that arise in road traffic.

## 2. DOGMATIC DELIMITATION OF THE CRIMINAL CONCEPT OF DRIVING

An analysis of road safety legislation shows how it has adapted to the social reality of each historical period. Risk control has been the determining factor guiding this legislative evolution, from the perspective of both criminal law and administrative law, with the aim of preventing dangerous behaviour and protecting fundamental legal interests, such as life and physical integrity. An illustrative example of this evolution is the concept of speed: whilst in the 18th century risk was linked to the number of draught animals — as shown in the Royal Order of Charles III, dated 11 June 1787<sup>2</sup> —, today speeding is associated with a greater likelihood of losing control of the vehicle and an increased risk to other road users.

This process of regulatory adaptation contrasts, however, with the absence of a precise definition of the concept of ‘driving’ in criminal law<sup>3</sup>, a key verb common to most offences against road safety.

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<sup>1</sup> For the purposes of this paper, the expression ‘motor vehicle’ will be used as a general term, without prejudice to the use of ‘motor car’ where the applicable legislation expressly provides for this in its wording.

<sup>2</sup> Law XVI of Title XIV, ‘On the use of chairs, carriages, coaches and litters’, of Book VI of the *Novísima Recopilación*.

<sup>3</sup> This is confirmed by the Supreme Court Judgment ( , STS) (Criminal Chamber, Section 1) No. 436/2017, of 15 June (ROJ STS 2421/2017).

The definition of the criminal concept of ‘driving’ has been established primarily through legal doctrine and case law, drawing on the concepts set out in administrative regulations on traffic and vehicle circulation, in particular Royal Legislative Decree 6/2015 of 30 October, which approves the consolidated text of the Law on Traffic, Vehicle Circulation and Road Safety (hereinafter, LSV). Although this legislation does not expressly define ‘driving’ or ‘the act of driving’, it does provide a legal definition of ‘driver’<sup>4</sup>. In addition to these references, it is also advisable to consult the meaning given in Spanish language dictionaries.

However, as case law acknowledges, the common-sense meaning of the term ‘driving’ serves as a reference but is not sufficient to justify the imposition of a criminal penalty<sup>5</sup>, since, as will be seen below, for criminal purposes this requires the combination of a series of elements.

In this regard, the Act of 9 May 1950 on the use and circulation of motor vehicles, marks a turning point by limiting criminal liability exclusively to conduct arising from the driving of motor vehicles. As stated in its preamble, the frequency with which accidents occurred as a result of the – particularly reckless – use of these vehicles constituted a social danger that justified recourse to criminal law. Therefore, risk control has been – and continues to be – the *ratio legis* of offences against road safety.

In this context, offences against road safety are predominantly classified as offences of endangerment, chiefly in their abstract form, meaning that not all driving behaviour is criminally relevant. Only those acts that pose a significant risk to the protected legal interest — road safety, understood as an intermediate legal interest aimed at protecting the life and physical integrity of road users<sup>6</sup> — warrant criminal censure<sup>7</sup>. This criterion has been consistently adopted by case law, which requires consideration of the specific case and the relevant circumstances to determine the existence of criminally relevant danger.

This danger has been linked to the use of motor vehicles or mopeds, as it is considered that mechanical propulsion is what confers upon them an additional level of danger not present in other means of transport<sup>8</sup>. Consequently, moving a motor vehicle whilst the engine is not running is not included within the typical offence of ‘driving’, thereby excluding scenarios such as so-called ‘coasting’, as the potential for harm derived from mechanical force is absent.

On this basis, the current criminal definition of driving has been established as the concurrence of a series of elements: the operation of the steering and control mechanisms

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<sup>4</sup> The term ‘driver’ is defined as ‘the person who [...] operates the steering mechanism or is in control of a vehicle, or who is in charge of an animal or animals. In vehicles being driven for the purpose of learning to drive, the person in charge of the additional controls is considered to be the driver’.

<sup>5</sup> SAP GI (4th Chamber) No. 690/2014, of 5 December (ROJ SAP GI 1190/2014), First Legal Ground.

<sup>6</sup> STS (Criminal Chamber, Section 1) No. 893/2023, of 29 November (ROJ STS 5303/2023), Fourth Legal Ground.

<sup>7</sup> Provincial Court of Appeal (TF) (Second Section) No. 174/2015, of 20 April (ROJ SAP TF 2253/2015), First Legal Ground.

<sup>8</sup> By way of example, a vehicle’s kinetic energy is equal to half its mass multiplied by its speed squared, and this is, to a large extent, responsible for the damage (impact) that the vehicle may cause.

of a motor vehicle or moped; its movement by means of mechanical traction; travel on a public road; and the creation of at least an abstract danger to road safety.

This model, however, has significant limitations, insofar as it excludes from the scope of criminal law certain acts which, despite their potential danger, do not meet the technical requirement demanded by the criminal offences, in particular the potential for harm arising from the use of mechanical force<sup>9</sup>.

This technical exclusion also extends to the subjective definition of most offences against road safety, which require the perpetrator to be the driver of a motor vehicle or moped, thereby constituting specific offences in their own right<sup>10</sup>. The only relevant exception is the offence under Article 383 of the Criminal Code, which merely requires the status of a driver<sup>11</sup>, without linking it to a specific type of vehicle, thereby allowing it to be committed by anyone riding a bicycle.

This definition also highlights the need to review the acts that constitute the act of driving, particularly with regard to movement and the use of mechanical propulsion; for motor vehicles or mopeds, movement must be produced by mechanical force, without any requirement to travel a minimum distance, which has allowed mere acts of parking to be included within the concept of driving<sup>12</sup>.

The criminal concept of driving therefore raises a number of objections that call into question its suitability for today's reality. These can be analysed from four perspectives: that of the protected legal interest, the sociological perspective of mobility, the technological and automation perspective, and the concept of attempted offences against road safety.

### **3. OBJECTIONS TO THE CRIMINAL CONCEPT OF DRIVING FROM VARIOUS PERSPECTIVES**

#### **3.1. THE LEGAL INTEREST PROTECTED: WHAT IS ROAD SAFETY?**

A legal interest constitutes the value or interest that the law seeks to protect at different historical stages (García Arroyo, 2022, p. 12; Muñoz Conde & García Arán, 2022, pp. 56,

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<sup>9</sup> SAP M (Second Chamber) No. 293/2014, of 8 May (ROJ SAP M 7026/2014), Legal Ground 2, and Supreme Court Judgment of 15 December 1961 (TOL 4337578).

<sup>10</sup> SAP GI (4th Chamber) No. 690/2014, of 5 December (ROJ SAP GI 1190/2014), First Legal Ground.

<sup>11</sup> Cámara Arroyo & Teijón Alcalá (2022) state that this is a specific offence that can only be committed by the driver of a vehicle. In support of this assertion, they cite two judgements: , SAP M (Section 1), No. 74/1999, of 5 February (ROJ SAP M 1475/1999) and , SAP TF (Section 2), No. 314/2001, of 23 March (ROJ SAP TF 761/2001). The first of these holds that the perpetrator of the offence of refusing to undergo tests to detect alcohol or drugs (Article 383 of the Criminal Code) is the driver of a motor vehicle, even though the provision refers only to a 'driver', without necessarily linking this to the driving of a motor vehicle or moped. However, given that the offence provides for the deprivation of the right to drive motor vehicles and mopeds as a legal consequence, it may be argued that, in effect, the perpetrator in this case is limited to those who drive such vehicles. Conversely, the second of the rulings cited refers only to the driver. In reality, given that the LSV establishes a generic concept of a 'driver', save for the reference to motor vehicles and mopeds in the legal consequences of the offence, the perpetrator of this offence is the driver of any means of transport that meets the LSV's definition of a vehicle.

<sup>12</sup> For example, Supreme Court Judgment (Criminal Chamber, 1st Section) No. 436/2017, of 15 June (ROJ STS 2421/2017), FJ Fifth, and SAP B (10th Section) No. 777/2016, of 15 November (ROJ SAP B 11782/2016), FJ Second.

57), which will vary depending on the social and cultural context of each era; hence, in reality, the legal interest is a social construct (Hormazábal Malarée, 1991, p. 151). The selection of the legal interests to be protected, as well as of the conduct that infringes upon them, is the exclusive prerogative of the legislature<sup>13</sup>. It is therefore a political decision that is not neutral (Hormazábal Malarée, 1991, p. 153), but one in which sociological, historical, economic and political factors play a part. In this sense, the legal interest not only serves to legitimise criminal intervention (García Arroyo, 2022, p. 1; Orts Berenguer & González Cussac, 2023, p. 247; Polaino Navarrete, 2019, p. 38), but also to limit it, insofar as it determines which conduct may be subject to punishment.

However, the exercise of this punitive power is not absolute and is subject to limits derived from the principles inherent to a social and democratic state governed by the rule of law. In particular, the legislator must respect the principles of minimal intervention, proportionality, fragmentary application and subsidiarity, so that recourse to criminal law is reserved for cases in which it is strictly necessary for the protection of socially relevant legal interests<sup>14</sup>. From this perspective, the legal interest serves a guaranteeing or politico-criminal function, acting as a limiting criterion for criminal intervention, particularly when it comes to essential legal interests such as life and physical integrity.

When determining which legal interests are eligible for and deserve criminal protection, legal scholarship typically refers to two main approaches: the constitutionalist and the functionalist, whose divergence lies in whether such a selection should be derived exclusively from constitutional values or from the criterion of social harm (García Arroyo, 2022, pp. 14–16; Miró Llinares, 2020, p. 601; Teijón Alcalá, 2024, pp. 308, 309). Neither of these models is entirely satisfactory; it therefore seems more appropriate to take constitutional values as a minimum standard without disregarding the requirements and functions inherent to a social and democratic state governed by the rule of law (Miró Llinares, 2020, p. 604).

In light of the above, it makes sense that, in addition to the legal interests that directly affect the individual, those that transcend the individual—known as supra-individual legal interests<sup>15</sup>—should also be protected, since their protection not only promotes personal self-fulfilment (García Arroyo, 2022, p. 32), but also reinforces, in an indirect manner, the safeguarding of individual legal interests. Among these are collective legal interests, which enable the functioning of certain social spheres, as is the case with road safety.

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<sup>13</sup> Constitutional Court (Plenary Session) No. 55/1996, of 28 March (BOE No. 102, of 27 April 1996), Legal Ground 6.

<sup>14</sup> Constitutional Court (Plenary Session) No. 105/1988, of 8 June (BOE No. 152, of 25 June 1988), Legal Ground 2, and Constitutional Court (Plenary Session) No. 24/2004, of 24 February (BOE No. 74, of 26 March 2004), Legal Ground 5.

<sup>15</sup> Generally speaking, one tends to refer to individual or personal legal interests, supra-individual legal interests, and collective or general legal interests. This is the classification used by Luzón Peña (2025, p. 163). Muñoz Conde & García Arán (2022, pp. 57, 58) also hold a similar view. According to García Arroyo (2022, p. 23), in legal scholarship these terms are often used interchangeably, even though, in reality, they correspond to categories with different scopes.

Road safety is a collective legal interest, as is held, almost unanimously, by both legal doctrine<sup>16</sup> and case law<sup>17</sup>. However, even if this collective nature is accepted, it must be clarified what role this legal interest plays: whether criminal law directly protects road safety as such (an autonomous collective legal interest), or whether, on the contrary, it acts as a means of safeguarding other individual legal interests such as life or physical integrity (an intermediate legal interest).

To answer this question, it is essential first to define what is meant by the legal interest of road safety. This requires, first and foremost, reference to lexicographical definitions, as these reflect a socially established meaning of the terms and therefore constitute an objective basis for defining the content and function of this legal interest. The Pan-Hispanic Dictionary of Legal Spanish (DPEJ) defines road safety, in its first meaning, as the “state or situation characterised by the absence of any harm or danger to the lives and physical integrity of persons and their property in the context of road traffic or circulation”; and in its second definition, the “activity, primarily carried out by public authorities, aimed at protecting people and property involved in road safety”.

As can be seen, both definitions emphasise that the purpose of road safety is to protect individual legal interests. This supports the view that, in fact, road safety is a collective legal interest of an intermediate nature, aimed at indirectly safeguarding other individual legal interests—such as people’s lives and physical integrity—rather than an autonomous legal interest<sup>18</sup>. If the theory of an autonomous legal interest were adopted, the mere commission of conduct that directly affects road safety would suffice to infringe the protected legal interest; this would lead to offences against road safety being classified as offences of injury rather than offences of endangerment, as is generally understood today. Furthermore, this approach would result in an unjustified expansion of the scope of criminal law, by allowing the punishment of conduct of minimal seriousness merely because it affects road safety (Cerezo Mir, 2002, p. 58; Teijón Alcalá, 2024, p. 312).

On some occasions, the legislator refers directly to the legal interest being protected, whilst on others, it penalises certain conduct without a clear link to the protection of that interest. In the field of offences against road safety, not all the offences included under this heading effectively aim to protect road safety, and discrepancies can be observed between their classification within the legal system and the legal interest actually being protected. This is exemplified by the offence of leaving the scene of an accident (Article 382 bis of the Criminal Code), which demonstrates how, despite the initially restrictive nature of the legal interest protected, the offence can be applied expansively to justify criminal intervention (Miró Llinares, 2020, p. 605). Similarly, the offences of refusing to undergo breathalyser tests (Article 383 of the Criminal Code) and

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<sup>16</sup> Among others, see Cerezo Mir (2002, p. 57), García Arroyo (2022, p. 33) and Teijón Alcalá (2024, p. 309). Conversely, see Hefendehl (2001, p. 9).

<sup>17</sup> In this regard, Supreme Court Judgment (Criminal Chamber, Section 1) No. 419/2017, of 8 June (ROJ STS 2351/2017), Legal Ground 5.

<sup>18</sup> In Cerezo Mir’s view (2002, p. 58), collective legal interests cannot be considered in their own right; rather, they must be understood in relation to individual legal interests. If they were, offences of danger would become offences of harm. On this point, Rodríguez Mourullo (1966, pp. 147, 148) considers that it is not incompatible to characterise an offence as both a ‘crime of danger’ and a ‘crime of harm’. In his view, when a ‘crime of danger’ is committed, what is actually being protected is ‘the security of another legal interest’; thus, when that security is affected, the legal interest protected by the law is harmed, even though only a danger is created for that other legal interest.

driving without a licence (Article 384 of the Criminal Code) actually serve to protect the principle of authority<sup>19</sup>.

Having reached this point, and having clarified what is meant by the legal interest of road safety, we must address why the criminal concept of ‘driving’ is open to criticism from the perspective of this legal interest. The main reason is that it excludes conduct which, whilst objectively dangerous to road safety, does not fit within the technical-legal concept of driving. Such is the case with pushing a motor vehicle whilst it is stationary, but whilst operating the steering mechanisms<sup>20</sup> or moving a broken-down vehicle by taking advantage of the slope of the road<sup>21</sup>, essentially because driving without first starting the engine is not considered a criminal offence<sup>22</sup>. These exclusions not only create gaps in protection, but also a disconnect between the definition of the offence and the risk involved.

### 3.2. CONTEMPORARY MOBILITY VS. THE CRIMINAL CONCEPT OF DRIVING

Personal mobility vehicles (PMVs), particularly electric scooters, are now a common form of urban transport and lack specific, uniform administrative regulation at national level<sup>23</sup>, despite their regulatory classification as vehicles<sup>24</sup>, which means they are subject to the general provisions of traffic regulations that do not expressly exclude them.

From a criminal law perspective, VMPs are irrelevant<sup>25</sup>, insofar as offences against road safety are limited to motor vehicles and mopeds. However, this classification must take into account the actual characteristics of the vehicle at the time of the incident, regardless of those originally declared, so that those exceeding a maximum speed of 25 km/h may not be considered VMPs, but rather mopeds, and may therefore be treated as a typical offence.

In such cases, the driver of the vehicle could be the perpetrator of offences against road safety, including driving without a licence, which is required for mopeds (Article 59 of the Road Safety Act), unlike for VMPs (Article 22 bis of Royal Decree 2822/1998 of 23 December, approving the General Vehicle Regulations [RGV]). Where the use of these

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<sup>19</sup> As Miró Llinares (2009, p. 33) points out, invoking the principle of authority is also insufficient to justify the existence of this offence, since it is not comparable to the wrongful act involved in the offence of disobeying authority.

<sup>20</sup> Supreme Court Judgment of 4 January 1960 (TOL 4340754) and Supreme Court Judgment (Criminal Chamber, Section 1) No. 893/2023, of 29 November (ROJ STS 5303/2023).

<sup>21</sup> Supreme Court Judgment of 15 December 1961 (TOL 4337578).

<sup>22</sup> Supreme Court Judgment of 15 October 1968 (TOL 4277375).

<sup>23</sup> Personal mobility vehicles (PMVs) are primarily regulated by Royal Decree 2822/1998 of 23 December, which approves the General Vehicle Regulations (RGV), specifically in Article 22 bis and Annexes XX and XXI, as well as in other provisions of the text itself. The recent Royal Decree 52/2026 of 28 January, which amends the General Vehicle Regulations and Royal Decree 2822/1998 of 23 December, which approves them, has updated the content of Article 22 bis of the General Vehicle Regulations, with the aim of maintaining consistency between this and the aforementioned annexes, within the framework of the regulation of the Register of Light Personal Vehicles. Following this latest reform, LCVs must hold a roadworthiness certificate attesting to compliance with technical requirements, be registered in the National Vehicle Register and bear an identification label.

<sup>24</sup> Supreme Court Judgment (Criminal Chamber, Section 991) No. 120/2022, of 10 February (ROJ STS 572/2022), Fourth Legal Ground.

<sup>25</sup> *Ibid.*

vehicles results in injury, the standard offences of causing bodily harm or reckless homicide shall apply, without the withdrawal of the driving licence being applicable. The main difficulty arises, in any case, in determining which duty of care has been breached, given the absence of a general regulatory framework applicable to PMVs (Andrés Domínguez, 2020, p. 19).

Ultimately, the emergence of new mobility patterns and modes of transport that are not fully integrated into the current regulatory system raises significant challenges in the field of road safety. Their use gives rise to risks<sup>26</sup>, which are not always adequately addressed by criminal law, due to the limitations of the criminal concept of driving; this highlights the need to establish, at least within the sphere of administrative law, a regulatory framework that is more consistent with the current reality of road traffic.

### 3.3. THE IMPACT OF AUTOMATION ON THE CRIMINAL CONCEPT OF DRIVING

The progressive automation of driving is a significant manifestation of the transformation of contemporary mobility and poses major challenges for defining the criminal concept of driving.

Regulation (EU) No 2144/2019 of the European Parliament and of the Council of 27 November 2019 defines an automated vehicle as a “motor vehicle designed and constructed to travel autonomously for certain periods of time without continuous supervision by the driver, but in respect of which the driver’s intervention is still expected or required” (Art. 3.21). Furthermore, a fully automated vehicle is defined as “a motor vehicle designed and constructed to travel autonomously without supervision by the driver” (Art. 3.22). The latter is what, in some contexts, is known as a “robotic vehicle” (Montoro González et al., 2017).

As can be seen, these are vehicles in which, once a certain level of automation is reached, the concepts of driver and vehicle merge completely. This, together with the rise of artificial intelligence (AI) systems<sup>27</sup>, raises important criminal law issues, particularly regarding culpability and the attribution of criminal liability should a harmful outcome occur during their use.

In accordance with the principle of criminal culpability— – the guiding principle of criminal law<sup>28</sup>— – the commission of a typical and unlawful act is not sufficient in

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<sup>26</sup> Road accident figures relating to VMPs remain lower than those for motor vehicles, although an increase in these figures is observed for the period 2020 to 2024. For further information on this matter, see ‘*Key Road Accident Figures. Year 2024*’, a document prepared by the Directorate-General for Traffic (DGT) and published on 28 October 2025.

<sup>27</sup> According to Regulation (EU) 2024/1689 of the European Parliament and of the Council of 13 June 2024, laying down harmonised rules on artificial intelligence and amending Regulations (EC) No 300/2008, (EU) No 167/2013, (EU) No 168/2013, (EU) 2018/858, (EU) 2018/1139 and (EU) 2019/2144, and Directives 2014/90/EU, (EU) 2016/797 and (EU) 2020/1828 (Artificial Intelligence Regulation – AIR), artificial intelligence systems are characterised by their ability to operate with varying levels of autonomy, as well as their capacity to generate results and responses through the inference of the information they receive.

<sup>28</sup> Constitutional Court (First Chamber) Judgment No. 44/1987, of 9 April (Official State Gazette No. 107, of 5 May 1987), Legal Ground 2, STC (First Chamber) No. 150/1989, of 25 September (BOE No. 250, of 18 October 1989), Legal Ground 3, Constitutional Court Ruling (Plenary Session) No. 150/1991, of 4 July

itself for the imposition of a penalty; rather, culpability must also be present (Binding, 2009, p. 5; Corcoy Bidasolo, 2024, p. 17; Mayer, 2007, p. 285)<sup>29</sup>. This is required by Articles 5 and 10 of the Criminal Code, which stipulate that only intentional or reckless acts or omissions are relevant under criminal law (Article 10) and, consequently, only those committed intentionally or recklessly are punishable (Article 5).

Under the theory of objective imputation, the attribution of harmful consequences requires the concurrence of human conduct—whether active or by omission—which breaches a duty of care and which has a causal and normative link with the resulting outcome. Therefore, when discussing driving, one must not rely solely on the criterion of operating the vehicle's steering and control mechanisms; rather, an additional criterion of effective control over the vehicle's movement must be included as a minimum requirement for criminal liability. The emergence of this type of vehicle poses a challenge both to that theory and to the typical verb 'to drive', as it not only makes it difficult to identify the specific individual performing the action, but also, in some cases, to determine whether one can even speak of human conduct.

The significant proliferation of vehicles with a certain level of automation contrasts, however, with the limited legal framework governing this type of vehicle. Apart from certain European regulations, such as those cited above and those relating to intelligent transport systems<sup>30</sup>, there is as yet no specific national legislation fully adapted to autonomous driving. This is despite the fact that the DGT has reported that a draft bill is being prepared to amend Royal Decree 1428/2003 of 21 November, which approves the General Traffic Regulations for the implementation and development of the provisions of the Act on Traffic, Motor Vehicle Circulation and Road Safety, approved by Royal Legislative Decree 339/1990 of 2 March (RGCir), as well as the RGV, in order to adapt them to the emergence of autonomous vehicles<sup>31</sup>.

There are currently six levels of automation, defined by the Society of Automotive Engineers (SAE)<sup>32</sup>, which have significant implications from a criminal law perspective. Whilst at the initial levels (0 to 2) the driver retains effective control of the vehicle, from level 3 onwards automation is conditional, as the vehicle is capable of performing certain actions without constant supervision by the driver, although the driver must be available

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(Official State Gazette No. 180, of 29 July 1991), Legal Grounds 4, Constitutional Court Ruling (First Chamber) No. 246/1991, of 19 December (Official State Gazette No. 13, of 15 January 1992), Legal Grounds 2, and Constitutional Court Ruling (Plenary Session) No. 59/2008, of 14 May (Official State Gazette No. 135, of 4 June 2008), Legal Ground 11.

<sup>29</sup> The DPEJ defines 'culpability' as the 'final key element or requirement of the offence as a prerequisite for punishment, which allows the act to be attributed criminally to the perpetrator, principal or accomplice'.

<sup>30</sup> This refers to Directive 2010/40/EU of the European Parliament and of the Council of 7 July 2010, commonly known as the ITS Directive, which defines intelligent transport systems, including those applied to vehicles.

<sup>31</sup> Further information on this subject can be found at: <https://www.dgt.es/muevete-conseguridad/vehiculos-seguros/conduccion-automatizada/vehiculos-de-conduccion-automatizada/>

<sup>32</sup> See document J3016-202104 – *Taxonomy and Definitions for Terms Related to Driving Automation Systems for On-Road Motor Vehicles*.

to intervene<sup>33</sup>. This disengagement from human control is more pronounced at levels 4 and 5, where the vehicle operates autonomously with residual or no human control.

In most cases, harmful outcomes arising from the use of this category of vehicles will correspond to injuries or manslaughter. When the autonomous vehicle is used solely as a means of committing a crime, no additional issues of criminal interpretation arise, insofar as the crime is not a consequence of autonomous driving, but of a human decision to use the vehicle as an instrument (Amisano, 2025, p. 36). The truth is that it is unlikely that the vehicle would have been programmed by the manufacturer or the system developer with the aim of causing harm to third parties and, consequently, that the harmful consequences could be attributed to any of them on the grounds of intent, or at least on the grounds of direct intent (Teijón Alcalá & García Cuenca, 2024, p. 400). In any event, if the vehicle were knowingly used as an instrument to commit a crime, with control maintained at all times until the objective was achieved, the offence would be attributed as a direct perpetrator to the person in control of it (Quintero Olivares, 2017, p. 14).

With regard to driving, and following the reforms introduced by Organic Laws 2/2019 of 1 March<sup>34</sup> and 11/2022 of 13 September, the circumstances constituting gross and less serious negligence have been defined in Articles 142(2) and 152(2) of the Criminal Code, such that their assessment is now carried out automatically. However, this framework for negligence is difficult to apply in the context of autonomous driving, given that negligence is generally attributed to the harmful outcome. The underlying conduct consisting of a breach of the duty of care (for example, driving under the influence of alcohol) is voluntary, whilst the causing of harm is attributed on a negligent basis (Teijón Alcalá & García Cuenca, 2024, p. 401).

More problematic, however, is the generic dimension of recklessness. Unlike intentional offences, where one of the criteria for attribution is the actual foreseeability of the outcome, reckless offences are characterised by merely potential foreseeability. Furthermore, recklessness requires the breach of an objective duty of care. In this context of automation, just as with VMPs, one of the main difficulties lies in determining which standard of care has been breached, given that there are no general legal rules or criteria derived from common knowledge and experience (*lex artis*), as is the case in certain professional activities. In the absence of established criteria, one possible approach is to refer to the standard behaviour of a responsible person, which, in the context of automated driving, would correspond to that of a reasonable user. However, in such cases, the answer may vary depending both on the party involved (for example, the manufacturer or the system programmer) and on other factors, such as the use of AI (Blanco Cordero, 2025, p. 10).

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<sup>33</sup> In this regard, Regulation (EU) 2019/2144 defines the so-called '*driver availability monitoring system*', the purpose of which is to assess whether the driver is fit to take control of the vehicle in specific situations.

<sup>34</sup> Specifically, it introduced, amongst other aspects, an objective concept of gross negligence, such that, in any case, conduct falling under any of the circumstances set out in Article 379 of the Criminal Code will be classified as such. Furthermore, a concept of less serious negligence was established. In this regard, less serious negligence is defined as those situations in which the commission of any of the offences classified as serious under the Road Traffic Act (LSV) – that is, those set out in Article 76 of the LSV – was a determining factor in the occurrence of the incident. Nevertheless, provision was made for the judge to exercise discretion in this regard, an element which was removed in the subsequent reform introduced by Organic Law 11/2022 of 13 September.

That said, it is clear that issues of culpability and the attribution of outcomes will increase as the level of vehicle automation rises, particularly from level 3 onwards. At levels 0, 1 and 2, where the driver still retains primary control of the vehicle and the ability to intervene immediately if necessary, the attribution of liability will continue to be governed by the traditional system (Blanco Cordero, 2025, p. 7). However, the situation becomes considerably more complex at higher levels, where the driver gradually loses the ability to control and supervise driving tasks and AI assumes a significant role in decision-making. When this happens, a series of questions arise regarding who is acting, who is liable, and to what extent the system was programmed to anticipate potential harmful consequences.

In this context, the main difficulty from a criminal law perspective lies in the imbalance between the vehicle's technological complexity and the user's actual capabilities. In most cases, the driver lacks effective knowledge of how the automated systems operate and the decisions they make, a lack of knowledge that intensifies as the vehicle's level of automation increases. Under these circumstances, requiring the individual to take alternative action in the event of a potential system failure—or holding them criminally liable for failing to prevent a harmful outcome—may prove disproportionate, as it imposes a duty of anticipation and control that clearly exceeds their actual capacity for action and understanding of the risk.

In addition to the above, autonomous driving involves multiple scenarios involving different actors<sup>35</sup>, which makes it difficult to determine who carried out each task and, consequently, to attribute criminal liability, as this may become diluted amongst all those involved.

Whilst this matter requires further analysis, the above highlights that the automation of driving goes beyond the traditional assumptions underpinning the criminal concept of driving, in that control over the vehicle's movement, an understanding of risk and the actual capacity to intervene no longer necessarily rest with the driver, which calls for a re-evaluation of this concept.

#### 3.4. IS ATTEMPT A VALID CONCEPT IN OFFENCES AGAINST ROAD SAFETY?

Offences against road safety are characterised by being primarily defined as offences of mere activity, which in itself makes it difficult to recognise attempted offences<sup>36</sup>, particularly completed attempts, because, in general, the performance of all the constituent acts already entails the commission of the offence (Muñoz Conde & García Arán, 2022, pp. 387, 395). Nevertheless, in principle, there is no obstacle to recognising an uncompleted attempt at the offence (Acale Sánchez, 2002, pp. 37, 38).

To the above issue must be added the fact that, for the typical conduct to be established, most offences against road safety require the act of driving to have commenced. Thus, as long as that act has not actually commenced, the conduct generally

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<sup>35</sup> In this regard, the works of Quintero Olivares (2017) and Blanco Cordero (2025) are of particular interest.

<sup>36</sup> Case law is reluctant to recognise imperfect forms of commission in offences of mere activity. This is the case in Supreme Court Judgements (Criminal Chamber, 1st Section) No. 889/2003, of 13 June (TOL 4926579), Sixth Legal Ground, and Supreme Court Judgment (Criminal Chamber, Section 1) No. 13/2018, of 16 January (RJ 2018\238), Sixth Legal Ground.

remains within the scope of non-punishable preparatory acts, as – in the view of a certain strand of case law – there is no intermediate stage between driving and not driving<sup>37</sup>. However, in certain cases, attempted offences have been recognised where the perpetrator's intention to commence driving is unequivocal based on the circumstantial context<sup>38</sup>, or where the conduct displayed is, *ex ante*, already capable of producing the result<sup>39</sup>.

Furthermore, the fact that some offences against road safety are classified as offences of abstract danger introduces an additional difficulty in recognising attempted offences, as there is a particularly fine line between the legal basis of the two categories<sup>40</sup>. Indeed, both attempted offences (Muñoz Conde & García Arán, 2022, p. 382; Sola Reche, 2000, p. 310) and offences of abstract danger<sup>41</sup> involve moving the protective thresholds forward, by penalising conduct on the basis of its potential danger (Barbero Santos, 1973, p. 489).

Based on the above, it can be said that the viability of attempted offences in crimes against road safety depends on how the defining verb 'to drive' is defined in legal theory, particularly when the act of driving is considered to have commenced—that is, when the executive acts involved in driving begin. The key to determining when a preparatory act becomes an executive act lies in whether the action is directed towards the performance of the verb defining the typical conduct<sup>42</sup>, in this case, 'driving'.

To resolve this issue, the Supreme Court has drawn up a series of criteria aimed at defining the boundary between non-punishable preparatory acts and executive acts<sup>43</sup>, taking into account the manifestation of criminal intent and the existence of an immediate connection between the conduct carried out and the commission of the offence. From this perspective, it is only when the action taken is unequivocally directed towards the commission of the offence and forms part of a process of execution nearing completion that the commencement of the executive acts can be affirmed.

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<sup>37</sup> Provincial Court of Appeal GI (Fourth Section) No. 690/2014, of 5 December (ROJ SAP GI 1190/2014).

<sup>38</sup> This is the view taken in SAP CA (Fourth Section) No. 245/2018, of 19 July (ROJ SAP CA 1044/2018), which sets out a case in which the individual was already wearing the regulation helmet and was in a position to ride when he was stopped by the police.

<sup>39</sup> SAP TF (Second Section) No. 437/2010, of 25 November (ROJ SAP TF 2955/2010), First Legal Ground. This ruling recognises an attempt in a case where driving was impossible due to the vehicle's location, as the engine had been started, which demonstrates an unequivocal intention to begin driving, despite the fact that the vehicle did not ultimately move.

<sup>40</sup> Supreme Court Judgment (Criminal Chamber, First Section) No. 48/2020, of 11 February (ROJ STS 386/2020) states that the structure of offences involving danger is comparable to that of an unsuitable attempt. Therefore, accepting that an attempt is applicable to this type of offence is akin to punishing 'the attempt at an attempt' or 'the risk of the risk'.

<sup>41</sup> Attempts have been made to justify the punishment of abstract danger offences on the basis of the precautionary principle, which is contrasted with the principle of prevention. Under the precautionary principle, what matters is the suspicion that a particular activity entails serious and irreversible risks, whereas, under the principle of prevention, it is the foreseeability of a risk occurring that is the determining factor (Cerezo Mir, 2002, p. 61). This same author considers, however, that the precautionary principle should not be invoked to justify broadening the scope of criminal liability, because mere suspicion should not serve as a basis for criminal liability (p. 62).

<sup>42</sup> Supreme Court Judgment (Criminal Chamber, Section 1) No. 428/2016, of 19 May (ROJ STS 2273/2016).

<sup>43</sup> *Ibid.*

Applying these criteria to offences against road safety, it is considered that the perpetrator commences the executive acts when they manifest an unequivocal intent to start driving and, furthermore, there is an immediate connection—both spatial and temporal—between that intention and the possible starting of the vehicle, such that, were the action to continue uninterrupted, the typical offence would be committed and the conduct would be sufficient, from a preliminary perspective, to give rise to the typical situation of danger. In such cases, the existence of a punishable attempt could be recognised.

#### **4. KEY POINTS FOR A POSSIBLE NEW CRIMINAL CONCEPT OF DRIVING**

From the analysis carried out, it can be concluded, firstly, that the current typical model of driving is insufficient to cover increasingly frequent scenarios which deviate from the classical framework — centred on mechanical propulsion and actual movement on public roads — but which nevertheless constitute situations of risk that must be addressed. For this reason, it would be advisable to redefine the typical act of driving from various perspectives.

The first of these relates to the typical verb ‘to drive’ itself. As has been explained, driving, for criminal law purposes, means operating the steering and control mechanisms of a vehicle propelled by its own mechanical engine on a public road. This definition excludes situations which may nevertheless pose a significant risk to road safety—the protection of which is the very *raison d’être* of offences against road safety—such as the act of pushing a motor vehicle whilst its engine is switched off. However, if the purpose of offences against road safety is precisely to mitigate the risk inherent in the movement of vehicles and, thereby, to protect legal interests such as the life and physical integrity of road users, it is worth reconsidering whether a strictly technical definition adequately fulfils this protective function.

With regard to personal mobility vehicles (PMVs), it is necessary to reconsider their exclusion as typical instruments. As noted above, the classification of this type of vehicle must be based on the characteristics they possess at the time of the offence; therefore, if these characteristics correspond to those of a moped, it must be classified as such and, consequently, may constitute a typical instrument. However, given the heterogeneity of the PMV category—which encompasses vehicles that are very diverse from one another—its prior review and conceptual definition must be considered. Only once this task has been completed can those VMPs that pose a significant risk to road safety be justifiably included as a typical category. This will not only provide legal certainty but also serve as a guarantee of the principle of legality. Thus, the inclusion of certain VMPs as typical instruments, based on previously defined objective criteria, would not constitute an analogical interpretation of the criminal offence incompatible with the principle of legality.

Furthermore, the emergence of automated vehicles or those equipped with autonomous driving systems raises specific issues regarding culpability and the attribution of criminal liability in the event of harmful outcomes arising from their use. In such cases, it is insufficient to restrict the term ‘driving’ solely to the physical operation of steering and control mechanisms, as effective control over the vehicle’s movement takes on particular significance. However, the application of this criterion is hampered by the technological opacity inherent in some AI systems and by the complexity introduced

by higher levels of automation; for these reasons, it is difficult to attribute criminal liability without resorting to broad interpretations, and to provide a definitive and generalisable answer.

Similarly, it is essential to address the issue of attempted offences in crimes against road safety, given that most of these are classified as offences of mere activity and of abstract danger. In the former, the traditional rejection of attempted offences has been justified by the absence of an intermediate phase between the commencement of the act and its completion, whilst in the latter, the difficulty lies in the fine line between the basis for punishing attempted offences and the very basis of offences of abstract danger. However, this position warrants review, given that case law has also highlighted the existence of cases in which the mere attempt to drive already poses an objective danger to road safety, particularly where driving under the influence of alcohol and other substances is concerned.

Hence the need to establish uniform legal criteria to define when a conduct, even if it is merely a preparatory act, acquires criminal significance as an attempt, thereby avoiding broad interpretations contrary to the principle of legality. The incorporation of objective elements — such as starting the engine, the vehicle's position on the road or the driver's readiness to set off — would contribute to greater legal certainty.

Finally, it is suggested that the typical act of driving be harmonised with the administrative concepts set out in road safety legislation, primarily those contained in the LSV, RGCir and RGV, with the aim of avoiding interpretative inconsistencies. This harmonisation would allow for a systematic interpretation of offences against road safety, particularly with regard to perpetrators, the typical instruments of the offence and traffic areas.

In short, the cases raised highlight the need to review and redefine the typical act of driving, taking into account the challenges posed by technological developments and the transformation of modes of transport. The almost automatic exclusion of certain scenarios—such as pushing vehicles with their engines switched off or the un d use of personal mobility vehicles (PMVs)—highlights a regulatory framework which, in many cases, does not correspond to the actual risk, the preventive purpose of criminal law, or even the traditional approach adopted by this branch of the legal system in matters of road safety. For this reason, it is proposed that this concept be rethought so as to incorporate functional and technological criteria based on the effective control of movement and the potential for harm inherent in the conduct, moving beyond the classic model of mechanical propulsion. This reconfiguration will enable offences against road safety to be adapted, in legal theory, to social reality, thereby achieving more effective protection of road safety and, consequently, of other legal interests, such as life and physical integrity.

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## **6. LEGISLATION AND CASE LAW**

### **6.1. LEGISLATION**

#### **6.1.1. European**

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## 6.2. CASE LAW

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