Crimes against the Security of the Traffic Circulation of Motor Vehicles: As Defined in §379 and §380 of the Spanish Criminal Code (SCC)[1]

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要　旨

スペインの国会議員・法の専門家は、スペインにおける交通事故及び交通犯罪の増加を深刻な問題として取り上げている。1950 年から現在に至るまで、刑事法の処理については何度も改正されている。交通犯罪者を抑止する為と交通事故の被害者を減少させる為スペイン法において立法者はどのようにスペイン社会を制御するのかを検討する。更に、交通のセキュリティを維持する為、深刻な行政上の交通違反と軽微な刑事上の交通犯罪はより重大な問題として捉えられている。交通違反を起こした加害者には、「行政上」、「民事上」、「刑事上」の責任が負わせられる。今回は「刑事上」を議論の対象とする。

Keywords: Traffic Crimes, Traffic Offenses, Traffic Law and Criminal Law Reforms

I. Introduction

The mobility provided by *road transport*, particularly the *passenger car*, allows many modern Europeans to enjoy a lifestyle characterized by flexibility and independence. However, if the lives lost and injuries caused by road traffic accidents are counted up, it is clear that this freedom comes at a price, with the most recent statistics revealing that more than 40,000 people die on European roads each year, while a further 1.7 million are injured. No less than a quarter of these deaths, some 10,000 per year, are estimated to be caused by *drink-driving*[3]. And although alcohol is by far the most prevalent and well-documented psychoactive substance affecting drivers, concerns have been mounting about increasing reports of road deaths linked to illicit or medicinal drugs. Public awareness of the role of psychoactive substances other than alcohol in road traffic accidents has increased due to the attention given to this issue by the media, and policymakers are increasingly called upon to respond to this problem. After examining the statistics showing the high number of victims and reviewing the causes of traffic accidents on Spanish roads, it is possible to say that one of the causes of mortality in general is the increasing rates of deaths on the roads. Although the countermeasures of prevention and control have been increased, the numbers of mortalities remain almost unchanged and the statistics show that there is an existing need to evaluate the causes of deaths caused by traffic accidents on the road[4].

The *criminalization of traffic offenses* is an important social phenomenon to be studied since it shows how the societal values have been manipulated by the policy makers aiming for specific outcomes such as to decrease the number of serious traffic offenses on the road[5]; to have less dangerous driving acts on the road[6]; to increase the security of the traffic system as a whole; to increase the levels of traffic safety for drivers themselves, and for other road users as well; to decrease the health costs caused by the victims of traffic accidents; and to increase the state revenue by increasing the traffic related fines for the traffic offences. On the other hand, *the criminalization of the traffic offenses* has collateral effects such as an increase in the number of persons with criminal records; an increase in the number of criminal cases in the already

overloaded criminal courts; an increase in court costs; an increase and complication of police officers duties who have been used to the already practiced procedures; the lack of traffic safety education; and the lack of places to complete the community service sentences[7].

The crimes against the security of the traffic are regulated in Chapter IV, Title XVII, Book II of the Spanish Criminal Code (SCC) of 1995 (from § 379 to § 385)[8]. By creating these regulations, the Spanish legislator aims to safeguard the correct and adequate functioning of the road traffic flow on the public roads. This regulation holds criminally liable all those acts which seriously compromise the safety of those implicated in its occurrence (drivers, those traveling together with the driver, and pedestrians). It could be inferred from it, that such codified offences are not to immediately protect the security of the traffic itself, but to safeguard the life and health of those who find themselves involved in road traffic. It is important to keep in mind that these criminal figures function as safeguards not of the security of the traffic itself, but the life and health of the persons immersed in the daily traffic[9].The justification of a criminal norm concerning the security of traffic is obvious at least in its essential aspects if the increasing importance of a motor vehicle as a mean of transportation is considered[10]. Such a phenomenon is concretely shown in Spain by the increase of motor vehicles and by the increase of the daily circulation on the roads[11]. The high circulation on the roads has generated a constant increase of the traffic accidents in recent years[12].Thus, it cannot be discussed that the necessity of a criminal intervention to prevent behavior which in a serious way flagrantly acts against the safety of the persons daily participating in traffic circulation. An activity that is dangerous in its nature.

II. Analysis of some aspects concerning the sets of elements required for the materialization of a crime under § 379 and § 380 of the Spanish Criminal Code (SCC)

1. The crime of driving under the effects of alcoholic beverages, toxic drugs, narcotic and psychotropic substances § 379 (SCC)

a) Nature of the offense

According to the unanimity of the Spanish legal doctrine this crime is a crime consisting of *abstract danger*. The perpetration of this crime does not require the presence of any lethal result (lost of lives) neither does it require the existence of circumstances evidencing the existence of a specific danger against the life or health of one or various persons. The definition in the (SCC) only requires the fact of driving a motor vehicle

or a motorcycle under the effects of the substances enumerated in § 379 (SCC). It seems that any additional requirement to commit the criminal behavior described by the norm is not necessary.

Additionally, it can be said that it is the classical distinction between two types of risk: concrete risk and abstract risk. The first type requires concrete endangerment of the legally protected good e.g. the security of the traffic, the danger is the typical result. In abstract danger, by contrast, it is the punishable action "typically hazardous or dangerous in the abstract". Thus, the key criterion is the *ex ante* perspective (the hazard) and *ex post* (the result of risk) that has been adopted to evaluate the traffic offenses falling in this category. The doctrine presents the Spanish Legal System as the first example of the crime of *reckless driving* at the rate required, along with driving with a "manifest recklessness" that may specifically threaten life or integrity of persons. A pattern of the crime of danger would be the abstract danger of driving under the influence of alcohol, toxic drugs, narcotics or psychotropic substances, which is very dangerous, but without requiring a specific endangerment. This type of goal difference (the requirement in early risk as a result of the dangerous action separately, against the danger of the conduct characterized as a component of the second) requires a separate treatment of both types of offenses in the analysis of the objective type, which explains the scheme of work set out. The theory predominant in modern doctrine is that the purpose of the common danger is the community, though this does not mean putting in danger, necessarily, a plurality of people, but that a party may be represented by a single person indeterminate *ex ante*, as part of that community. For example, the crime of reckless driving is a crime of common danger requiring particular danger to life or personal integrity, but does not mean that the driver has to make a specific threat to the plurality of persons to conduct the type, simply the danger of one, not considered in their individuality, but as representative of the group of participants in the road traffic, whose security is undermined by collective action by the drivers dangerous act[13].

b) Active subject

It can be said that this criminal act is a common crime because it does not require any special qualification to be committed. It only requires the presence of an intoxicated driver behind the wheel. The criminal code does not require to the person behind the wheel to be a driving-license holder. As a result, it takes effect in the first section of the annex of Royal Legislative Decree (RLD) 339 emitted in March 1990. This (RLD) it is an approved articulated text of the Spanish Road Traffic Law, Circulation of Vehicles and Traffic Safety (SRTL). Under such precepts of the (SRTL), a driver is defined as a person operating behind

the wheel of the vehicle or the person supervising and guiding an animal or animals in a public road. In the case of motor vehicles circulating for learning purposes the driver is understood to be the person in command of the additional operations. Thus, those traveling together with the driver are excluded from direct criminal liability. In any case, those traveling with the driver could be held responsible as participants (inducers, instigators, necessary partners in crime or accomplices). It is also necessary to keep in mind the second section of the annexes of the (RLD) in which are considered as pedestrians those pulling a baby-car or a car for the physically challenged or any vehicle with an engine of small dimensions; also considered as pedestrians are those conducting a cycle or a motorcycle with two wheels while walking; or a physically challenged person circulating at the pace of a wheelchair with or without engine[14].

c) Typified (criminal) act and proving requirements of it

According to § 379 (SCC) the typified criminal act consists of the fact of conducting a motor vehicle or a motorcycle under the effects of toxic drugs, narcotic substances, psychotropic or alcoholic beverages. In conformity with the content stated in the previous section, this criminal act is developed by those who generally are in command of the conduction of a motor vehicle, or of a motorcycle and circulate under the condition also described in the same previous section[15]. Concerning the object of the conduction of a motor vehicle the criminal definition includes motor vehicles as well as motorcycles, which is in concordance with the distinction made by the administrative laws[16]. The conduction of a vehicle shall take place in any public road as is defined in § 2 of the (RLD) 339/1990 "the conduction of a vehicle in any urban or inter-urban road or public land". Public land includes all those properties that are of common usage and those private properties, which are transited by a non-determined collectivity of users. However, the commitment of a criminal act does not necessarily have to take place in public roads, since such criminal acts are also committed in places in which the circulation of a vehicle or cycle-motor is prohibited e.g. sidewalks, gardens and public roads which are exclusively for pedestrians[17]. It is important to notice that such typified acts shall be excluded from the punishable range when committed in private roads, which are not of common or public usage. Also the places, which are, not open to the transit e.g. yards, garages, the banks of rivers, etc[18].

The central point of this crime as well as the typified act is without doubt, the fact of driving a vehicle under the effects of toxic drugs, narcotic and psychotropic substances, as well as alcoholic beverages. At this point, the discussion also acquires a transcendent practical importance because it is necessary to take under consideration what is stated in § 65.5.2 of the (RLD) 339/1990. The § 65.5.2 typifies as a very serious

administrative offence the fact of driving a vehicle under the effects of alcoholic beverages exceeding the standard levels established by the law. And in any case, the fact of driving a vehicle under the effects of toxic drugs, narcotic substances, and psychotropic or any other analogue substance is also included. In concordance with this, the § 20 of the (RLD) 13/1992, permits the approval of the Rules of General Circulation (RGC). It also establishes the application and development of the articulated text of the law of Traffic, Circulation of Motor Vehicles and Traffic Safety (SRTL) § 20 prescribes that the driver cannot circulate in the public roads with a level of alcohol over 0.5 grams per liter of blood or a level of alcohol over 0.25 milligrams per liter of exhaled air[19]. The issue in question consists of how to draw a line separating the administrative offense from the criminal offense. It is possible to pay close attention to the requirements that the criminal law imposes such as the principle of *minimal intervention* to limit the punitive power of the state. Above all, it should be indicated that in the *Spanish Legal System* the detection of the level of alcohol over to 0.5 grams per liter of blood or a level of alcohol over 0.25 milligrams per liter of exhaled air are not enough for this offense to be treated under criminal law. In this case the jurisprudence indicates that the levels of alcohol demonstrating a concrete objective risk to the traffic safety are those levels of alcohol starting from 0.75 milligrams per liter of exhaled air; or 1.5 grams of alcohol per thousand centiliters of blood. This leaves an intermediate zone, in which, in order to decide if the offense shall be treated under the criminal code or under the administrative code it is important to analyze other data allowing to conclude that there was not a mere alteration of the desired and required faculties to correctly drive a vehicle according to the Provisional Sentencing Audience (SAP) of Baleares (27-11-1998, the Archive Public Registration (ARP) 1998/5022). As a result, this leaves a margin of 0.5 milligrams of alcohol per liter of exhaled air or of 1 gram of alcohol per liter of blood to appreciate an administrative offense instead the criminal offense as prescribed in § 379 of the (SCC). However, as it occurs in the above stated resolution, sometimes a criminal offense is prescribed when the levels of alcohol are even lower than 0. 5 milligrams of alcohol per liter of exhaled air or of 1 gram of alcohol per liter of blood, if there are additional signs corroborating the fact of driving a vehicle while intoxicated[20].

Moreover, as it is stated in the (SAP) of Barcelona (23-6-1999, (ARP) 1999/2911): since long ago, the Spanish Supreme Tribunal (SST) has declared that the crime by which the accused is condemned is an autonomous type among the crimes against the traffic safety. Such a crime, independent of lethal results, sanctions among others, the fact of driving a vehicle under the influence of alcohol. It requires not only the presence of a specific level of alcohol, but also, that such circumstance influences the act of driving and as a consequence, a concrete danger to the legally protected interest (the security of the traffic and the traffic

safety on the roads). Thus, if there is not a concrete danger to the legally protected interest the fact of driving under the influence of alcohol shall be treated as an administrative offense. According to the doctrine of the Constitutional Tribunal (CT) in the sentences of the 28th and the 30th of October 1985 the Resolution of the Constitutional Tribunal (RTC) 1985/145, and (RTC) 1985/148, it requires not only the presence of a determined concentration of alcohol, but also, that in addition; such circumstance (the fact of driving under the influence of alcohol) influences the driving act. Such influence shall be evaluated by the judge taking in to account all means of evidence; which is also confirmed in the sentence of the (CT) emitted on the 25th of November 1991 (RTC) 1991/222. Such requirements are adequate if it is considered that "It has been scientifically shown that the level of alcohol resulting from the test varies not only with respect to the amount of alcohol drunk, but also according the major or minor reciprocity of the subject...above all, in order to evaluate the subjective reciprocity and it influence on the act of driving in a concrete case, it shall be imperative to analyze the symptoms presented by the accused, his or her way of driving as well as any other relevant circumstance" the (SAP) of Barcelona, (23-6-1999, (ARP) 1999/2911).

Concerning this issue, after analyzing the vast existing jurisprudence emitted in the lower courts it is possible to emphasize the importance given to certain circumstances of this criminal act in order to decide whether or not the driver is conducting a vehicle under the influence of toxic drugs, narcotic or psychotropic substances, or alcoholic beverages. In particular, such circumstances are the following: a) external somatic signals: alcoholic halitosis; bright, red and lachrymose eyes; pupil dilatation; stammering (hesitant), repetitive, and confusing speech; confused memory; a flushed, and sweaty face; slow or poor coordination of movements; lack of orientation, equilibrium problems, unsteady wandering about; and vomiting. Also, it is important to add the euphoric, rude, offensive, contemptuous, impertinent or arrogant behavior on the part of the driver against the agents practicing the appropriate diligence related to the case[21]. b) Characteristics of the driving act: in most of the cases a zigzag driving pattern is evidenced; inappropriate speed (excessive speed or too slow speed) invasion of the opposite lane, driving in the opposite lane, driving on the side-walks; ignorance of vertical traffic signs such as yield to other traffic or give way, stops, traffic lights, etc.; collision with moving objects (other motor vehicles, cyclometers, and pedestrians) or non-moving objects (walls, traffic signs, parked vehicles) involving the driver in a traffic accident. Moreover, failure to drive with the adequate illumination, sudden or abrupt turns and gearing; ignoring the lights and sirens of the traffic agents car as they request the driver to pull the vehicle over; attempt to turn around as soon as the driver sees the police patrol, among others[22]. c) The acknowledgement to the police from the part of the driver that he or she

has consumed alcoholic beverages or any other type of substance affecting the operation of the vehicle is considered as a vital important piece of evidence by judicial organs. Such declarations have a lot of significance though can be characterized as lacking concretion. For instance, in the (SAP) of Barcelona, (22-5-1998 (ARP) 1998/2708), it was declared, "that the accused himself has acknowledged in the oral proceeding he has drunk beer. In his declaration to the police he acknowledged that at about 23:00 hour he had consumed about three beers and that between that time and the time of the detention he had consumed another two or three beers." Although before the police officer he could not clearly remember (as in the oral proceedings) the exact number of beers consumed, it is undeniable that he admitted in a generic way the consumption of alcoholic beverages. Furthermore, such affirmations give information about the possible number of alcohol beverages consumed because if the driver had exclusively consumed only two or three beers as pretended (if that was the case the driver could enjoy of the plenitude of his mental faculties to remember the exact number of beers consumed), he would have a concrete memory not only of the amount consumed, but also, of the place where the beers were consumed. The driver's vague and blurred account of the events leads to the suspicion of an excessive alcohol consumption.

Until this point, the references given describe the operation of a vehicle under the influence of the consumption of alcoholic beverages. However, the § 379 of the (SCC) also prescribes as a criminal offense the fact of driving under the effect of toxic drugs, stupefacient substances or narcotics. These hypotheses, though with less frequency also occur in the traffic settings. Thus, are held criminally liable those driving a vehicle after consuming a pill of "Rohypnol" (a sleeping peel) or a line of cocaine the (SAP) of Girona, (15-6-1998, (ARP) 1998/2808); under the effect of injected heroin the (SAP) of Zaragoza, (26-5-1999, (ARP) 1999/1687); after consuming methadone and heroin the (SAP) of Asturias, (22-1-1998, (ARP) 1998/158), under the effects of cocaine and benzodiazepines the (SAP) of Zaragoza, (24-3-1999, (ARP) 1999/934) or a mixture of alcohol and "speed" (a stimulant drug: amphetamine or methamphetamine), the (SAP) of Vizcaya, (5-10-1998, (ARP) 1998/5707)[23]. In these cases, it is especially important to practice the corresponding analytical tests, as well as the concurrence of additional pieces of evidence demonstrating that in effect, the motor vehicle was operated under the consumption, and effects of such type of substances.

Finally, in order to have a more complete perspective concerning the typified (criminal) act of driving while intoxicated, and its accreditation; it is also important to make other proving considerations. Overall, it is important to remember that since the beginnings of the 1980's the Spanish Constitutional Tribunals (SCT) have held the following doctrine on the subject of evidence concerning the alcoholic breath tests :

"Procedural guarantees (due-process) shall be followed during the process (at the investigation phase) in order to allow the alcoholic breath tests to counteract the presumption of innocence; which is recognized as a fundamental right in the § 24.2 of the Spanish Constitution." Firstly, concerning the case of alcoholic breath tests in the Sentences of the Supreme Constitutional Tribunal (SSTC) of October 28th 145/1985, and October 30th, 148/1985, it is shown that the police statement has the simple value of accusation (denunciation) with regards to the criminal act prosecuted and that in order to consider such a test a legitimate charging evidence the imputed-perpetrator shall be the object of ratification in the oral proceedings. For instance, the simple reading or reproduction of the police statement (containing the breath tests results) in the oral proceeding cannot serve by itself as a solid fundament in the sentencing ruling (judgment).Thus, it is indispensable to apply in the course of the proceeding (at the investigation phase) a proving activity that shall allow counteracting its content concerning the reliability of the test; and the value of it as a determinantal element of the complemented criminal-type and according to the "x" or "y" criminal precept applied. In sum, in order to be able to consider the alcoholic breath test as charging evidence; its contradiction at the oral proceedings shall be possible. Such contradiction in the oral proceeding requires the presence of the police agents who applied the breath tests or at least its ratification or complementation during the course of the (investigation phase) judicial process. If that is not the case, due to the lack of the required procedural guaranties (lack of the required due-process) it cannot be attributed to the alcoholic breath tests the value of proving-charging evidence with enough authority to counteract the driver's fundamental right of the presumption of innocence (STC) (18-2-1988, (RTC) 1988/22)[24]. Secondly, it is important to point out that the verification of the rates of alcohol in the blood and breathed air through the alcohol-measuring machine (ethyl-meters) it is not an absolutely necessary requirement on which to base a sentencing ruling under the enforced § 379 of the (SCC). In this way, it has already pronounced the Constitutional Court, and the Supreme Court: "The constitutional tribunal has declared in the sentences (14-2-1992 (RTC) 1992/24) that the existence of the criminal offence prescribed in **§ 340 bis a** of the derogated (SCC) of 1967[25]. Firstly the already derogated (SCC) did not require a *sine qua non condition*; the previous application of an alcohol breathing test accrediting a specific level of alcohol in the blood previously ratified by the police agents who applied it." Thus, the alcoholic impregnation constitutes an appropriate means to estimate a determined concentration of alcohol in the blood of the driver, when combined with other tests, because it can lead to a sentencing ruling. However, the breath test is not the only test that can lead to a sentencing ruling neither it is an indispensable evidence test leading to the passing of a sentencing ruling (STS) (14-7-1993, Juridical Relation (RJ) 1993/6080). However, there

are court resolutions ruling completely the opposite[26]. Such jurisprudence has lead to the acceptation of the existence of charging evidence, if the application of the alcohol breath test is accredited by other pieces of evidence. Though the corresponding alcohol breath test is not applied e.g. for admission or because of the driver's reluctance to submit to the test, or the measuring machines lack of respective homologation or revision[27].

d)Concurrence of criminal offences and possible punishments

According to what is stated in §383 of the (SCC) if the driver, besides infringing the prevented risk, causes a lethal result independently of the degree of seriousness only the most serious offence committed shall be punished. In all the cases, it is important to hold the driver civilly liable for the damages caused. In such cases, to determinate the applicable punishment, the tribunals shall proceed according to their prudent judgment without considering the rules stated in §66 (SCC)[28]. Concerning the concourse of the crime for disobedience of §380 (SCC) it is important to refer to the next section. According to § 379 (SCC) the punishment applicable for this crime is imprisonment ranging fron eight to twelve weekends (only Saturday and Sundays the driver has to go to Jail. In the week-days the driver can dedicate to his normal working activities) or fine ranging from three to eight months (of salary) as alternative punishments. In either case, a cumulative punishment consisting of the deprivation of the driving license of a motor vehicle or a motorcicle respectively for a time ranging from over one year to four years. Concerning the criminal liability related to this crime it is important to point out that the deprivation of the driving license is not applied simultaneously to both motor vehicles and motorcycles; it is subject to the referred punishment on the type of license corresponding to the vehicle with which the crime was committed[29]. Additionally, the punishment aims to deprive the right to drive, but not the deprivation of the driving permit[30].

2. The crime consisting of the refusal to take the legally established tests to detect the offense of driving while intoxicated under the influence of alcohol, toxic drugs or psychotropic substances § 380 (SCC)

A) A brief reference to the problems related to the constitutionality of this crime

As it has been acknowledged by the Sentence of the Supreme Tribunal (STS) itself, (9-12-1999 (RJ) 1999/8576) it seems appropriate to acknowledge that the criminal type that the prosecuter imputates to the

accused is a crime consisting of serious disobedience of § 380 (SCC). This constitutes a polemic criminal figure introduced in the composition of the Spanish Judicial System caused by the current (SCC). This polemic criminal figure has been subject of solid critics since the parliamentary discussions concerning the approbation of the (SCC). During such parliamentary sessions several parliamentary groups formulated certain amentments. Among the amendments formulated by different parliamentary groups it is possible to mention the following: 1. Amendment 88 which has been formulated by the Basque parliamentary group. Such amentment was formulated acknowledging that the denial to submit one-self to the alcoholic blood test shall be considered an act of "self-emcubrimiento free from punishment". 2. Amendment 195 proposed by the parliamentary group Mixed (ERC), which considers that once the requirements for the crime of serious desobidience are met the remision of the alcoholic blood test is not necessary and in any case in such circumstances. It is sufficiently satisfactory in the administrative regulation. On the contrary, by criminally regulating the denial to undertake the alcoholic blood test, the law will be punishing more seriously the act of denial to undertake the alcoholic test rather than the more dangerous criminal act. 3. Amendment 414 formulated by the popular parliamentary group understands that it is not logical to consider as a serious criminal offence the driver's denial to undertake the alcoholic test. Additionally, such consideration could lead to a violation of the right to not self incriminate. And 4. Amendment 795 formulated by the united left group, which understands that the denial to undertake the alcoholic test from the part of the driver should not be considered under criminal law, because the administrative sanction is enough.

After the new (SCC) was put into effect the following sentence was emited by the Supreme Tribunal: "The cited presecpt serious criminal disobedience of § 380 (SCC) has led to the formulation of unconstitutional issues especially concerning the fundamental rights of the accused. 1. Every accused has the right not to declare and not to incriminate himself or herself; 2. A more in general issue: the violation of the driver's right to defend himself or herself; 3.The presumption of innocence; 4.The violation of the principle of proportionality of the punishment. Such arguments have been sanctioned and rejected by the Constitutional Tribunal please see the sentence of the Pleno, Oct. second, 1997, (RTC/161)". Although the resolution of the (TS) is omitted, the constutionality of serious criminal disobedience of § 380 (SCC)] was also confirmed by the Supreme Tribunal Court (STC), (18-12-1997 (RTC) 234). It is not the subject of this paper to analyze and possibly make a counter-argumentation of the reasons argued by the Constitutional Tribunal (CT)[31]. However, undoubtedly the shadows that loom over a provision as the one contained in § 380 (SCC) move us, certainly, to be more restrictive in the analysis of their potential application.

b) Subjects and typical (criminal) acts

According to what is stated in § 380 (SCC) "The driver who once required by an authority agent rejects to undertake the legally established tests aiming to prove the aspects "driving under the influence of alcohol or any other drugs" stated in § 380 (SCC) shall be punished as severe criminal disobedience as stated in § 556 of the (SCC). In relation to the active subject it is important to undertake what is stated in the epigraph concerning the driver and the persons accompanying him or her. Similarly in § 379 of the (SCC), it is stated that in order to be considered a perpetrator of a serious criminal disobedience it is necesary to effectively have driven a motor-vehicle or a cycle-motor[32]. On the contrary, in order to have the occurrence of a *typical criminal act* it should be verified in this, and in the following section the period from the enforcement of the 1995 (SCC) until the transcendental (STS) resolution, (STS) (9-12-1999 (RJ) 1999/8576.) The point of reflection of this resolution have set the basis for the interpretation and application of the criminal disobedience stated in § 380 (SCC)[33]. One of the main problems elicited since the preliminary discussions concerning the serious criminal disobedience precept consisted of the necessity to differentiate between the administrative infraction stated in § 65.5.2° del (RD)Legislation 339/02-11-1990 and the serious ciminal disobedience stated in § 380 (SCC). The § 65.5.2° of (RD) Legislation also considers as a serious administrative infraction "The failure of the driver of any motor vehicle or bicycle to abide by the obligation to undertake the established tests to determine possible alcoholic intoxication. Or the intoxication caused by the consumption of stuperfacients, psychotropic substances, stimulants or any other analogue drug. Also, the other users of the road have the same obligation when they become implicated in a traffic accident"[34].

Naturally, in the administrative infraction, the spectrum of the subjects obliged to comply is much wider than in the criminal offense because not only the drivers of a vehicle, but also the bicycle riders as well as those other road users; such as pedestrians, are obliged to comply with the required tests to determine alcoholic intoxication. However, besides those obvious differences it is important to distinguish the difference between the criminal offense and the administrative offense when the one who rejects to undertake the legally required tests is a driver of a motor-vehicle or a motor-cycle. Due to the fact that the behavior described in § 380 (SCC) is classified as a crime of serious disobedience, one possible criterion that can be used to avoid the mere application of the administrative sanction is the strong clear and persistent opposition from the part of the driver to undertake the required tests. Please see the (SAP) of Alicante, (18-12-1999, (ARP) 5174), the (SAP) of Barcelona, (22-4-1999, (ARP) 1676) & the (SAP) of Alicante, (3-7-1998, (ARP) 3081). The

appreciation of this criminal figure shall require the driver's disobedience as a crime against the public order as it was stated by the court "a serious concient attitude of rebelion against the legally required tests" (SAP) of Alicante, (13-10-1998, (ARP) 5267). The same criterion was applied by the (SAP) of Burgos, (12-02-1998 (ARP) 5755), in which, "the accused driver did not manifest certainly and explicitly her opposition...forcing the agents to make a deduction from such an uncertain situation". Definitely, as it was decided by the (SAP) of Madrid, (01-12-1999 (ARP) 2009), the offense against the § 380 (SCC) shall be regarded as a crime of disobedience and shall require the following two requirements: "1.The objective requirement: Such a requirement is constituted by openly rejecting to follow an order emitted by the authority or authority agent within the range of its competence and under the legally established formalities. Open resistance includes the persistent and categorical rejection to follow the required order. Such open resistance is exemplified by the presentation of difficulties or unjustified pretexts that in essence show a willful rebellion; which is different from the mere omisions that could be caused by errors of defective intelligence. And 2.Subjective requirement: It is deduced from the above stated requirement 1.which is the fact of voluntarily and intentionaly not following the order prescribed. This subjective requirement cannot be replaced by reiterated runaway because according to the content of the order there is no place for any confusion or defective intelligence. After outlying these possible citeria of distinction beween the administrative infraction and the criminal offense, it is important to analyze the elements of the typified behavior stated in § 380 (SCC). This precept points effectively to the denial of the driver being performed after the "requirement" from the part of the agent to undertake the legally established tests[35]. According to the unanimous jurisprudence for the procedure to be legal, it is necessary that the agents clearly, and explicitly understand the possible criminal consequences for the driver's disobedient behavior. Thus, the statements made by the (SAP) of Girona, (03-12-1998, 1999/3038), "For the occurrence of such a crime it is necessary that the requirement given to the person who should follow the order [to take the required tests] to be accompanied by perceptions of strictness; which consists of the expressed explanations of the consequences of not abiding by the given order. In this case, the perpetration of the crime described in § 380 (SCC)[36]. Moreover, the omission of this key information has led some tribunals to rule in several cases that such omission is enough to support prohibition error from the part of the driver who does not know the concrete range of the consequences of his or her disobeying behavior please see the (SAP) of Jaén (19-12-1997, (ARP) 1969) and the sentences cited in it[37]. Furthermore, in some cases, the provided information [from the part of the authority agent] could lack some important information leading the driver to an incorrect understanding that the resistance to take the required

tests could only lead to an adminitrative infrigement of the law. Such is the case for example, in the case judged by (SAP) of Girona, (07-01-1998, (ARP) 2506). In that case the driver was told by the agent that if he or she refused to undertake the required tests he or she was going to have "Multa" imposed, which means administrative fine. Such information provided by the authority agent led the driver to believe that he or she was going receive only an administrative sanction[38].

Obviously, if the required driver, due to the fact that he or she does not understand the language spoken by the agent, it will not be possible to consider the consequences of his or her non-abidance of the given orders as a criminal offence as stated in § 380 (SCC)[39]. After the appropriate request [from the traffic police or traffic agent] the resistance to comply from the part of the driver shall be produced. As mentioned before, the driver's resistance shall be strong, clear, and persistent leading to a rebellious attitude towards the authority agent and the law. However, in the judgement process of the concrete case there are dubious hypothesis that ought to be considered.

In the first place, although according to § 23 of the General Circulation Rules (GCR) in the (SAP) of Barcelona, (11-06-1998 (ARP) 5919) a driver was ordered to take two tests for alcohol (an initial test and a contrast test ten minutes after the first one. If in the first test, the results show a level of alcohol superior to the legally permitted levels, and if the driver shows evident symptoms of driving while intoxicated, a second test shall be applied). However, there are numerous court resolutions understanding that the requirement of the second test is to guarantee the security of the driver. Thus, the fact of resisting to take the second test from the part of the driver does not constitutes a crime of serious disobedience under the § 380[40]. In the second place, it shall be also emphasized that there is no a crime of serious disobedience when the driver although rejecting to undertake the breath test, he or she requests to the authority agents to administer a blood test because he or she considers the blood analysis a safer test, please see (SAP) of Madrid, (22-5-2000, (ARP) 2160), (SAP) of Barcelona (4-1-2000, (ARP) 929) & (SAP) of Burgos, (5-3-1998, (ARP) 1399).

Moreover, it has not been considered under the § 380 of the (SCC) the driver's elusive behavior when the driver tries to alter the results of the test because it does not constitutes opened resistance from the part of the driver (SAP) of Sevilla, (8-6-1998, (ARP) 2724)[41]. It should be acknowledged that the sentence corresponding to the one who deliberately blew unsuccessfully more than twenty times to the alcohol breathing test and then, requested the blood analysis, and finally, resisted to take the blood test because he was allergic to the metals, and or that he cannot take the blood test because of his religion (SAP), (16-6-1998, (ARP) 3033). In the same way an incriminating resolution has been given in the case when the driver failed to

undertake the breath alcohol test, and finally the driver stated that at that moment was not neither resisting or taking the required test (SAP) of Jaén, (2-6-1998, (ARP) 2877), the same sentencing resolution was emited when the driver blew several times improperly and in response to the agents advise stated that he or she was going to continue breathing improperly (SAP) of Salamanca, (7-10-1998, (ARP) 4164)[42]. Concerning the availability of the tests legally established to measure the criminal disobedience ruled in § 380 (SCC), it is important to acknowledge that some tribunals have understood contrary to what has happened when an alcohol detection test is requested by the authority agent. There is no legal precept establishing which tests shall be applied to measure the intoxication of toxic drugs, narcotics and psychotropic drugs.

In this sense, the § 12.3 of the RDLeg 339/1990 only points out that the tests to detect the intoxication effects of other drugs could be legally established. Thus, it is obligatory to request the submission to the legally established tests to measure the intoxication of toxic drugs, stupefacient substances and psychotropic drugs stated in § 380 (SCC)[43]. On the other hand, the (GCR), 01-17-1992, in its § 28.1-1 states that the test shall consists of a medical recognition of the persons requested to take the clinical analysis that the forensic-doctor or any other experienced entity such as authorized personnel of a sanitary or medical center. At the request of the interested party, or by an order of the juditial authority, the tests could be repeated aiming to contrast the result of the first. Such a contrasting test could be a blood, urine analysis or any other analogue test.

Regarding these issues the tribunals from (SAP) of Vizcaya,(10-6-1999 (ARP) 4073) have acknowledged that the driver's disobidience should be accompanied by the authority agent's order. Overall, it is important to determine if the authority agent has the competence or ability to perform the required test, and explain to the driver the possible consequences of not abiding by the orders given. However, according to § 28.1-3 of the (GRC), which states that the authority agent responsible for the vigilance of the traffic shall perceive evident or manifest symptoms of alcoholic consumption or any other drug intoxication in the driver or requested person referred in the previous section. In every case, the procedure shall be applied under the umbrella of the Criminal Procedural Code (CPC) or in any case according to the orders of the judicial authority and the dispositions stated in the (GCR) concerning the alcohol test. The tribunal sentence includes that "this regulation acknowledges in the first place an extraordinary normative laxitude with absolutely general remisions of the extension of the (CPC). And under an indetermined analogical pretension concerning the same General Circulation Laws with respect to the alcohol detection tests.

However, the tribunal resolution aknowledges that it is not stated in any part that the authority agent has

obtained from that precept § 28.1-3 of the (GCL) any competence to apply or to require its aplication. The authority agents shall act according to the precepts stated in the Spanish Criminal Procudural Code[44]. It is possible to deduct that the actions concerning the performance of the tests and an eventual detention is performed according to the orders given by the judicial authority. However, there is no case in which the the authority agent has been confered competence to submit the persons to any of the conditions stated in § 21 (GCR). As if it is in the case of the detection of the alcohol test of the § 21 itself of the (GCR). The agent is neither authorized to submit the person to any requirement[45]. It is possible to see a legislative technical deficiency, which produces a gap and an inexplicable different treatment in the case of the detection of stupefacient substances. In the first place, as it was mentioned above, there is no specific legally established test. And in the second place, the authority agents referred in § 380 lack a concrete legal or regulated coverage to enforce the requirement when a negative reaction is shown by the driver and as stated in the same § 380 the performance of a serious criminal disobedience. Another issue concerning the typical behavior of the crime of disobedience described in § 380 is to assess whether this offense, given the systematic placement of the precept - "crimes against the security of the traffic" – whether or not it is necessary that the subject has shown signs of driving under the influence of substances leading to a conviction for an offense under § 379. The issue is far from being illogical because the § 380 (SCC) refers to the refusal of the subject to the requirement on the asset subject to the tests "to verify the facts described in the preceding § 379 (SCC). "Another issue related to the criterion that typifies the criminal disobeying behavior of § 380 (SCC) which makes reference to the denial of the active subject when he or she is asked to take the required intoxication detection tests. On the other hand, it is also possible to say that there are resolutions denying as a necessary condition, for the perpetration of the crime of serious disobedience that the active subject shows evident symptoms that he or she is driving under the intoxication of alcoholic beverages or any other drugs.

Although some teleological similarities can be recognized between the two norms § 379 (SCC) & § 380(SCC), finally affirming the independence between both criminal figures differentiates both. As a result, for the application of § 380(SCC) it is unnecessary the concurrence of the precepts of § 379 (SCC) "The interpretation that the judge makes from § 380(SCC) cannot be subscribed because such precept function is to typify a special form of disobedience that does not require as a typical element the type consisting of the abidance of the requirements of the previous precept (§ 379 SCC). The drivers are required to submit to the tests when they are required to do so, though the driver has not consumed any alcoholic beverage or any other toxic drug"; (SAP) of Asturias, (2-7-1998, (ARP) 3383). In the same sense, although it can be recognized

that in the § 30(SCC) "The legislator has to address and define a specific criminal disobedience within those crimes protecting the security of the traffic. Thus, the judicial authority penalizes the driver who resists and opposes to undertake the test of alcoholic intoxication when such a test is requested by the authority agents, who are preventing the perpetration of a crime described in § 379 (SCC). In summary, the authority agents aim to reduce or eliminate the danger caused to the users of the road when someone is driving a motor vehicle or a motorcycle under the influence of alcoholic beverages and other drugs. A legitimate method aiming to control risk either by randomly or not randomly controlling the drivers who are circulating on the road at the moment at that specific time. Such a legitimate method could become inefficient if the driver persistently resists undertaking it, although such a test is speedy, not painful and innocuous." However, it is posible to maintain that "according to such evident relation between both precepts it is not necessary to infer that both are inextricably related. Thus, as is argued by the apealling person: there is no perpetration of criminal disobedience if the driver was not driving a vehicle under the influence of alcohol because such article expressedly makes reference to the "comprobation of acts that were described above. It shall be interpreted as a simple administrative procedure, and not as an indispensable constatation since the response of the implicated in the acts could be double and diverse. 1.To drive under the influence of alcoholic beverages, 2. And another completely distinct reaction which consist of the oposition to undertake an alcoholic impregnation test. Both are the object of criminal prosecution, but by different precepts and without total effect in the existence of the one condition for the other", (SAP) of Lleida, (5-2-1998, (ARP) 1090)[46]. On the other hand, there are tribunals dictating opposite and different resolutions. Thus, the (SAP) of Barcelona, (09-22-1998, (ARP) 5325). Such resolution ackowledges that " when the crime stated and punished in § 379 (SCC) cannot be proved, it shall be stipulated an absolutory sentence against the accused with respect to the crime provided and punished by § 380(SCC). Since the literality of § 380(SCC) determines the relationship between both precepts, and requires the previous perpetration of the crime against the traffic safety [to drive under the consumption of alcoholic beverages or any other toxic drugs]; as a necessary condition to determine if the required presumptions of § 380(SCC) [criminal disobedience] have been infringed or not[47]. The resolution (SAP) of Cantabria (10-2-1999 (ARP) 688)is more expressive[48]. According to this resolution the Constitutional Tribunal (STC) in its sentence number (161/1997 (RTC) 1997/161), starts to make considerations concerning the the judical good protected by § 380(SCC). This resolution states that "because it is under the rubric of the chapter in which the crimes against the traffic safety are sanctioned, the characterization of the active subject [the perpetrator] as a driver and the nature of the behavior that the tests

mentioned are trying to verify-driving a motor vehicle- There is no doubt that the finality of § 380 (SCC) is the protection of the security of the traffic."

Such protection of the security of the traffic becomes of vital importance for the effects discussed in this discourse because the posterior (STC) number 234/1997 (RTC 1999/234), in its judicial basis of its sentence states that " § 380(SCC), considers a specific criminal disobedience that is perpetrated just by the simple denial to undertake the requested tests. It does not matter if he or she has not consumed any alcoholic beverage or any other alcoholic drug". Thus, the denial to undertake such tests, seriously harms the judicial good protected by this § 380(SCC). However, it opens the door for considerations such as those precepts stated in this resolution : "It is a different question to determine if this type of crime shall be applied when there are signs of driving while intoxicated or as a measure of general prevention."

It can be considerecd as a "mere ordinary legality". *The thesis of this resolution, which is the one shared by the court, understands that* § 380(SCC) requires as an essential element that the active subject of the crime offers resistance to undertake the the alcohol intoxication tests. That he or she has conducted a motor vehicle or a motorcycle under the influence of the consumption of alcoholic beverages. It is not simple to deal with the question asking whether the driver has consumed any alcoholic beverage or not, which is an issue dealt with by the Tribunal Court. In order to consider someone a perpetrator of this crime, it is not enough that he or she offers resistance to undertake the requested tests, the simple denial: only the driver's denial accompanied by the extreme signs revealing that the consumption of alcoholic beverages influences negatively in the conduction of a motor vehicle leads to the application of § 380(SCC).Thus, it constitutes an unjust subjective element. The denial of the driver is based on the active subject (the driver) who precisely knows and is aware of the alcoholic influence.

This criterion has been finaly assumed by the Jurisprudence of the Supreme Tribunal (TS). For instance, the Sentence of the Supreme Tribunal (STS), (12-09-199 (RJ) 1999/8576) rules that: "...the dependency of § 380 (SCC) with respect to § 379 (SCC) permits to establish the order to determine the limits between the criminal punishment and the administrative sanction of the driver's disobedience. The following guiding criteria have been postulated: 1.The refusal to undertake the alcohol impregnation test, in either of the precepts stated in the section one and two of § 21 of the (GCR)[49]. It should be indicated that within § 380 (SCC) and 2. such denial in the sections 3 and 4 of the same precept of the circulation rules determine the following: If the agents intend to perform the tests notice on the driver symptoms of driving under the effects of alcoholic beverages, and let the driver know about it. In this case, the driver's denial to undertake the test

shall considered under the precepts of § 380 (SCC).When the authority agents do not acknowledge symptoms of alcoholic beverage intoxication in the driver, denial from the part of the driver to undertake the test shall be considered under the administrative sanction of § 65.5.2 b and § 67.1 of the traffic laws, circulation of the motor vehicles and traffic safety".

III. Conclusions

What is the relationship between § 379 and § 380 (SCC). Is it a concourse of the norms or concourse of the crimes?

There is, however, an additional issue to be resolved. It has become clear that the identity, at least partially of the contents of the unjust acts described in § 379 (SCC) and § 380 (SCC). A serious criminal disobedience can only be appreciated when the crime of disobedience previously demonstrated that the risk to the security of the traffic was caused by driving under the influence of alcohol or other drug abuse. However, if this actually happens, would it be possible to punish the crime stated on § 380? This question has not been resolved by any resolution emitted by the Spanish Supreme Tribunals. When the accused does not show to have developed symptoms of driving under the influence of alcohol is simply a free absolution leaving the way clear for a possible administrative sanction. Of course, as it can be seen, there have been court resolutions that affirm the autonomy, and independence of both traffic offences, and do not hesitate to implement a real contest between these two criminal figures. Such a court resolution-qualified as the major one[50] and appears to be based on the diversity of the legal right protected by § 380 (SCC) where the public order is what is, essentially in custody[51]. Or the principle of authority embodied in the duty of every citizen to comply with a lawful order issued by the authority or its agents[52]. More details can be seen in the court decision of the (SAP) Almeria, (1998-06-22 (ARP 2792), acknowledging that "there is no doubt that the essential purpose of the provision is to protect the security of road traffic." However, such a court decision argues the application of real concourse of the criminal figures expressed in both § 379 (SCC) and § 380 (SCC) to understand that this type of criminal offense, "on the one hand, it aims to protect the public order, as the title and section where the provision is located in the (SCC), the public order that must be understood as either the legal good the social peace or as climate of tranquility in the private or non-intimate sphere of citizens; or as social coexistence, peaceful and appropriate in the relationships among individuals. On the other hand, although the first aspect of the object of protection can be seen as a mere abstraction of the

defined traffic security, which would be the specific sector of the public that tries to secure, it should be noted that a second protective aim of the criminal type of the offense of disobedience, which is constituted by the dignity and the conditions of the exercise of the principle of authority". Some sentences have also added some palliative consequence to the determination of the concourse of the criminal offenses over the basic criterion establishing that once proved the commission of the offense in the § 379 (SCC), its results are obligatory to consider in connection with the crime of disobedience that must be considered the attenuating circumstance of drunkenness[53]. Other courts, by contrast, are opposed to the simultaneous condemnation for these crimes on the basis of other arguments. Interesting reasoning is provided, for example, by the (SAP) of Granada (1999-1-25 (ARP) 2) which, after recognizing that the mere refusal may lead to liability for the crime of § 380 (SCC). It also argues that if such a refusal is to prevent incriminating evidence that could be obtained for the crime stated § 379. If such existence is established, the rejection of the submission of the evidence would be constitutionally founded precisely to provide no evidence of self-incrimination for the traffic criminal offense committed[54]. In the same way the (SAP) of Barcelona, (1998-11-11 (ARP) 4744) when acquitting a driver charged for the offense of serious disobedience of § 634 (SCC), the absolved driver was conducting a motorcycle under the influence of alcohol and was sanctioned for that act, but the driver tried to evade the police. Finally, it is important to mention the court decision formulated by the (SAP) of Santa Cruz de Tenerife (1999-12-3 (ARP) 3618). This court argues the non-application of the § 380 (SCC). In the cases in which there is enough self evidencing signs showing that the driver is conducting a motor vehicle under the influence of alcoholic beverages, such self evidencing signs are enough to support a conviction under § 379 (SCC). In such a case the alcoholic breath test is absolutely unnecessary when it aims to collect evidence of a driving act that is self evident[55]. However, these views are difficult to reconcile with those recently developed by the (STS); which surely should address obstacles that arise in such cases in which drivers exercise the right not to cooperate with law enforcement officials in search of clues that can be involved in the commission of a criminal offense that actually has already been committed, as the High Court rightly considers the feasibility of applying § 380(SCC) when the act of driving under the influence of alcohol, drugs or toxic substances is established. The position discoursed in this paper on solving the real contest of the crimes in terms of its application toward any case must be clearly negative. If it is recognized that § 380 (SCC) has the "the essential aim of" protecting the safety of traffic, a partial differentiation of the object that both § 379 (379) and § 380(SCC) are protecting is made. The Spanish Criminal System shall not simultaneously condemn for a crime against § 379(SCC) and § 380(SCC) by using concourse of the crimes.

If a complete or partial coincidence is admitted concerning the content of the unjust in both criminal figures their accumulation results in a clear breach of the principle "*ne bis in idem*"[56]. Hence, it can be said that given the greater severity of the penalty for the crime of disobedience, the sentence for the crime sated in § 380(SCC) must absorb [the principle of absorption at the apparent criminal provisions contained in § 8.3 ° (SCC)] the loss of importance developed by the fact of driving under the influence of the substances in question. Precisely this approach has been successfully defended in several occasions as it is shown in the sentence emitted by the (SAP) of Madrid, (10-5-1999 (ARP) 5022)[57].

At it has been discussed throughout this paper the main object of legal protection in the crime stated in § 380 (SCC) is the security of the traffic due to:

1) The systematic location of the provision within the crimes against the security of the traffic and the legislator's decision of not including these behaviors inside the generic type of disobedience stated in § 556 (SCC).

2) The reference made in the drafting of the § 380 (SCC) to the previous article § 379 (SCC), which aims the prevention of dangerous behaviors perpetrated against the security of the traffic.

3) Even though it is understood that the legal protection through this criminal regulation is the security of traffic, through a democratic interpretation of the *principle of authority*[58] the same conclusion is reached. Thus, the provision stated in § 380 (SCC) would protect the conditions under which the authority and its agents execute the roles the society assigns to them. As a result, the authority and its agents in the current regulatory context are merely ensuring the utmost security of the traffic.

4) This conclusion resorts to the doctrine developed by the Constitution Tribunal (CT) in the following sentences: Sentence No. 161 and No. 243 of 1997, which recognizes that, the contested criminal norm intendeds to protect the *security of the traffic circulation on the roads*. Based on this argument the commented ruling without doubt concludes that: " § 379 (SCC) and § 380 (SCC) protect the legal interests of the security of the traffic circulation on the roads ,without affecting the fact that in a secondary way § 380 also protects the principle of authority ....There is no doubt that the sentence for both crimes is a clear violation of the principle "*non bis in idem*". When specifying the act under prosecution, and not just for violating the principle of " *non bis in idem*" it should apply the ["teoría del concurso de leyes"] theory of the competition of laws under § 8 of the (SCC)[59] which supposes that given the judgment that has been proven as the refusal to submit to the alcohol detection test, a conviction under § 380 (SCC), either because it describes a more complex form, absorbing the act described in § 379 (§ 8 (SCC) paragraph 3) or because it

predicts a more severe penalty (§ 8 (SCC), paragraph 4). However, while clearly defensible, the preference of the application of § 380 (SCC) does not leave the judges without problems. It does not stop being inappropriate that although the existence of a legally significant danger to the security of traffic is admitted, the applicable penalty is *imprisonment* instead of the *deprivation of the right to drive motor vehicles or motorcycles*[60]. This insufficiency could be remedied by imposing a deprivation of the right to drive motor vehicles or motorcycles as an accessory penalty by using § 56 (SCC)[61], which defines the accessory penalties. However, this path is not free from objections because in the first place, and for the sake of § 33.6 (SCC),[62]the duration of the punitive penalty imposed as accessory e.g. § 380 (SCC) would always be lower than corresponding imposed as a penalty e.g. § 379 (SCC). Secondly, it should not be forgotten that the vast majority of sentences imposed for the crime stated in § 380 (SCC) the suspension of the execution of the sentence of imprisonment was subsequently granted, which would also suspend the accessory sentence, which by definition follows the principal, not having any in the current (SCC) provision that counterparts to § 97 of the previous (SCC)[63]. It is possible to say the no one doubts that a sentence of § 379-fine and deprivation permit, neither of which is suspended is more serious in practice than that of § 380 (SCC)[64], even adding to it the bizarre formal denial of the right to drive as is shown by the (SAP) of Seville, (14-12-1999, (ARP) 5611)[65]. As a result, it is obvious to see the drawbacks of a criminal norm as the one contained in § 380 (SCC) that probably never had to leave the administrative field. That is because in many cases that is credited to the act of driving under the influence of alcohol, it is possible to believe that the combination of the sentence for a crime of the § 379 (SCC) and the corresponding administrative sanction for refusal to submit to an alcohol breath test § 65.5.2 ° of the (SRTL) of the (RD) 339/1990, adequately meet the need for prevention in the field of road safety at this point (2002)[66].

Until now, the material discussed in this paper was mainly relevant during the year 2003. It is important to include a brief review of the current year 2009, the Spanish Criminal Justice System and the problems in the area of traffic crimes to provide hints of the future discourse of my research concerning the area of criminal traffic offences against the (SCC). The challenge of the criminal system concerning its efficiency to apply the sentences given to the traffic offenders since there is a lack of the execution of sentences related with the community service that the driver shall perform for "X" or "Y" driving offense. In Spain even the places to perform community service are burdened by very long waiting lists of sentenced offenders. As it can be seen it is not enough just to create a punitive system without really preventing its costs and its consequences for the functioning of the justice system itself. In Spain, the current legal reforms are part of the

Strategic Plan of Traffic Safety that Spain has implemented from the year 2005 to 2008 in concordance the European Union Member States. One of the main objectives of such plan is "the promotion of the (criminalization) legal reforms in the area of traffic safety"; which is complemented by the establishment of a point system applied to the driver's licenses, and the implementation of a radar surveillance plan on the road that theoretically replaces the judges, the police officers and the traffic agents on the road. This modification of the (SCC) is summarized in chart 1, which shows an increase in the severity of the punishment aiming to reduce the number of victims affected by traffic accidents. At the same time, it attempts to persuade the drivers to avoid endangering the safety of other road users by avoiding acts leading to the abuse of their liberties, while using the public roads. The final objective of such criminal reforms is to prevent certain acts classified as offenses against the traffic safety are left unsanctioned and unpunished. Finally, by enacting more severe punishments against the criminal acts perpetrated by the Spanish drivers on the public roads, the Spanish criminalization of such violent acts is getting closer to the standards applied in other countries of the European Union.

In these new reforms the traffic offenses prosecute, and punish with more severity the following driving acts:

Those acts showing a manifested disregard for the life, and the traffic safety of other road users;

Those acts causing major levels of traffic accident rates;

Those acts of major danger on the public roads;

Although the major reforms make reference to typical traffic offenses such as speeding, high levels of alcoholic intoxication (driving while intoxicated), and driving without a driver's license, the (SCC) has made some advances by increasing the penalties concerning the '*Temerity of the Driving Act*' that can be called in other terms dangerous driving or reckless driving; and the circumstances of the road. Such changes are schematically explained in the following paragraphs.

Firstly, the modification of § 47 (Traffic Code). As a result, if the penalty imposed on the driver is greater than that of two years, the driver automatically loses the permission to drive or his or her driver's license. Secondly, the scope of the concept of *'security'* has been extended by changing the name of Chapter IV, Title XVII book II of the Spanish Criminal Code. It changes from "*Crimes against the Security of the Traffic*" to "*Crimes against the Traffic Safety.*"

Concerning the *excessive speed issue* the § 379 of the Spanish Criminal Code shows that it is considered a criminal offense to drive over 60 km/h on urban roads and on inter-urban roads over the speed of 80 km/h that

is different form the speed allowed in the traffic laws. This legal changes show a different perception with respect to the driver, road or vehicle. In both cases the over speed signifies '*grave risk*'. In the cities the pedestrian is the weakest road user and if a pedestrian is hit by a car at a speed of 110 km/h, the possibility of the pedestrian surviving is almost zero. That is the reason this legal modification searches for a reduction to the damages caused to the pedestrian and also the reduction of damages as a whole. In the case of the inter-urban roads the risks of the victim or pedestrian is less, but if a traffic accident happens at the speed of 180 or 200 km/h the possibility for the victim to survive or to remain unharmed is very low. Due to these facts, under the law, the severity of the consequences is imposed, and according to it, the punishments are established as well.

In relation to the *'Toxic Substances'* such as drugs, narcotics, psychotropic substances or alcoholic beverages the same § 379 (SCC), also establishes that in addition to the influence that lasts speeding is also a crime to drive under the influence of alcohol. It is a crime to drive under the influence of alcohol with a rate higher than 0.6 milligrams per liter in the breath or greater than 1.2 grams per liter in the blood. The § 380 (SCC) defines as a crime driving a motor vehicle or a motorcycle with *'manifest temerity'* putting in direct danger the life and integrity of other road users. The punishments applied for such driving offenses are imprisonment and the deprivation of the right to drive a motor vehicle or a moped. Both speeding and alcohol rate referred to in § 379 (SCC) shall be considered acts of reckless driving or in other words acts of *manifest temerity.*

The § 381(SCC) provides that, if in addition to undertaking the conduct described in the previous article, there is *a clear disregard for the lives of others*, the penalties will be higher and there will be a fine. The penalties will be reduced if although there was a clear disregard for the lives of others (to behave with contempt towards others) that behavior did not specifically threaten the lives and personal integrity of the other road users. In either case, the vehicle can be considered an instrument of crime and be confiscated.

When any of the acts described in these articles have a detrimental result constituting a crime, regardless of severity, only the most serious offense will be taken into account, but the upper half of the corresponding penalty will be applied. And [the perpetrator] will be condemned in any case, to pay the compensation of civil liability that would have originated. As to the refusal to submit to the drugs and alcohol detecting tests it passes from a crime of disobedience, and constitutes by itself a proper type of crime against road safety, which is also subject of imprisonment and deprivation of right to drive. It is also considered an offense to drive without a license, either by expiration of the license or driving permit total loss of points assigned

legally; for prudential or permanently deprivation of the permit or license by a judicial decision; or failure to ever obtain a driving license or permit. In these cases a prison sentences can be commuted to a fine and in any case community service may be carried out. Finally, those who cause a serious risk to the vehicle circulation by placing obstacles in the road, pouring slippery or flammable substances, or damaging parts of the road or subtracting and canceling the signaling or failing to reset the security when it must be done shall be punished. Such criminal acts will be punished with imprisonment or a fine and community service.

IV. Appendix

Chart No.1 Traffic Criminal Offenses and Its Punishment as Stated in the Spanish Criminal Code

Article		Criminal Offenses	Prison Time	Criminal Fine moths of salary		Community License
379	SPEEDING	1). Speeding 60km/h over in the implemented regulatory speed in *urban zones*. 2). Speeding over 80km/h over The implanted regulatory speed in the inter-urban zones.	From 3 to 6 months	Or from 6 to 12 months	From 1 to 3 years	Suspension From 31 to 90 days
		1). Rate of 0.6mg/l of alcohol detected by the 2). Rate of 1.2 g/l of alcohol in blood.				
383	ALCOHOL	Refusal to submit to test of alcohol or drugs	From 6 months to 1 year		From 1 to 4 years	
380		To drive with ***manifested temerity*** or in other words to Drive with gross***/reckless negligence.***	From 6 months to 2 years		From 1 To 6 years	
381	DISREGARD FOR LIFE	To perform the behavior described in§380, in which, the driving act is perpetrated with a manifested disregard for The life of other road users.	From 2 to 5 years	And From 12 to 24 months	From 6 to 10 years	
		When the manifest disregard for the life of other road Users, has not specifically put their lives in danger.	From 1 to 2 years	And from 6 to 12 months	From 6 to 10 years	
		The motor vehicle or motorcycle used in the driving acts matching those described in this article will be considered as instruments of crime.				
382		When the criminal offenses stated in §379,§380, §381resulted in an injury to other road users, independent Of the severity of such injury, the most severe punishment shall be applied in it superior half. In addition to it, The perpetrator shall be sentenced to repay the civil liability arising from the damages caused.				
384	DRIVING WITHOUT DRIVER'S LICENSE	1). To drive with an expired driving permit or license 2).To drive after loosing all the points legally Assigned to the driving licensed	From 3 to 6 months	Or from 12 to 24 months		From 31 To 90 days
		To drive when the driver is under prudential drive Sentence (temporarily suspension) or definitely deprived Of the driving permit or license by a court decision.				

Table No.1 Traffic Accidents victims (Deaths and Injured Altogether)

Years	Total	Variation*	Motorways	Variation*	Urban Zones	Variation*
1980	67,803	-3.582	35,708	-2.313	32.095	-1.269
1985	81,234	7.123	38,246	3.725	42.988	3.398
1986	87,703	6.469	41,937	3.691	45.766	2.778
1987	98,182	10.479	46,488	4.551	58.234	1.641
1988	106,356	8.174	49,763	3.275	58.234	1.641
1989	109,804	3.448	51,570	1.807	54.194	-4.04
1990	101,507	-8.297	47,313	-4.257	53.634	-560
1991	98,128	-3.379	44,494	-2.819	48.172	-5.462
1992	87,293	-10.835	39,121	-5.373	48.172	-5.462
1993	79,925	-7.368	35,814	-3.307	44.111	-4.061
1994	78,474	-1.451	34,354	-1.46	44.12	9
1995	83,586	5.112	37,217	2.863	46.369	2.249
1996	85,588	2.002	37,434	217	48.154	1.785
1997	86,067	479	36,551	-883	49.516	1.362
1998	97,570	11.503	44,388	7.837	53.182	3.666
1999	97,811	241	44,784	396	53.027	-155
2000	101,729	3.918	44,720	-64	57.009	3.982
2001	100,393	-1.336	45,483	763	54.91	-2.099
2002	98,433	-1.96	44,871	-612	53.562	-0.348
2003	99,987	1.554	47,567	2.696	52.42	-1.142
2004	94,009	-5.978	43,787	-3.78	50.222	-2.178
2005	91,187	-2.822	42,624	-1.163	48.563	-1.659
2006	99,797	8.61	49,221	6.597	50.576	2.013
2007	100,508	711	49,820	599	50.688	112

Variation* meaning variation with respect to the previous year, source: General Direction of Traffic (DGT) from Spain, http://www.dgt.es/portal/es/seguridad_vial/estadistica/ Accessed: April 22nd, 2009, 08:47, (JST).

Table No. 2 Total of Victims in Motorways and Urban Zones

Years	Total	Deaths	Severely Injured	Slightly Injured
1980	112,692	5,017	31,621	76,054
1985	131,703	4,903	38,695	88,105
1986	142,564	5,419	42,443	94,702
1987	158,246	5,858	48,298	105,090
1988	171,297	6,348	51,124	113,825
1989	176,599	7,188	52,418	116,993
1990	162,424	6,948	52,385	103,091
1991	155,247	6,797	50,978	97,472
1992	135,963	6,014	42,185	87,764
1993	123,571	6,378	36,828	80,365
1994	119,331	5,615	33,991	79,725
1995	127,183	5,751	35,599	85,833
1996	129,640	5,483	33,899	90,258
1997	130,851	5,604	33,915	91,332
1998	147,334	5,957	34,664	106,713
1999	148,632	5,738	31,883	111,011
2000	155,557	5,776	27,764	122,017
2001	155,116	5,517	26,566	123,033
2002	152,264	5,347	26,156	120,761
2003	156,034	5,399	26,305	124,330
2004	143,124	4,761	21,805	116,578
2005	137,251	4,442	21,859	110,950
2006	147,554	4,104	21,382	122,068
2007	146,344	3,823	19,295	123,226

Source: General Direction of Traffic (DGT) from Spain,

http://www.dgt.es/portal/es/seguridad_vial/estadistica/ Accessed: April 22nd, 2009, 08:47, (JST).

V. End Notes

1 Most of the issues discussed in this paper are a direct translation from the original paper in Spanish. However, this paper aims to be not a mere translation, because it includes material that was not addressed by the original Spanish version presented in the Electronic Journal of Criminology and Criminal Science, (2002), PRACTICAL ASPECTS OF CRIMES AGAINST THE SECURITY OF TRAFFIC AS ESTABLISHED IN § 379 Y § 380 OF THE SPANISH CRIMINAL CODE, by Miguel Olmedo Cardenete, Professor of Criminal Law, University of Granada.

2 "Concurso de Leyes" means Conflict of laws, and "Concurso de Delitos" means Concurrence of Criminal Offenses, as defined in the Juridical Dictionary, Spanish-English and Vise versa, Editorial Gestion 2000.com, by Antonio Martinez

3 Drug use, impaired driving and traffic accidents, European Monitoring Centre for drugs and drug addiction
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4 Please see the Statistical Tables 1 and 2

5 Please see Chart 1

6 Road safety concerns all citizens, and all have a role to play in making roads safer. Although the action taken so far has been effective, the numbers of road fatalities remain unacceptably high in the European Union: 1.3 million road accidents a year cause 43 000 deaths and 1.7 million injuries. Road users' behavior is acknowledged as the primary cause of mortality: speeding, consumption of alcohol or drugs, tiredness, not wearing seat belts or protective helmets, etc. These issues are receiving growing attention throughout the EU. An ambitious target has been proposed: reducing the number of road fatalities by 50% by 2010 compared with 2001. To achieve this target a systematic approach is needed. The European Road Safety Action Program identifies some major areas of activity: encouraging road users to adopt more responsible behavior (better compliance with the existing rules, coupled with greater enforcement to curb dangerous behavior), making vehicles safer by supporting technical advances, improving road infrastructure using information and communication technology. Other major planned initiatives include the collection and analysis of data on physical injuries caused by road accidents and research, aiming to find the optimum solutions. To succeed, it is important that responsibilities be shared among the parties involved (Member States, regional and local authorities, industry, transport companies and private users). The Action Program proposes that all the parties concerned subscribe to a European Road Safety Charter. tp://ec.europa.eu/health-eu/my_environment/road_safety/index_es.htm

7 Skids of the traffic penal reforms: the majority of the sentences dictated since December (2007) are still without execution (May, 5th 2008) because of the case-overload and the lack of places to serve the community service sentences. Since December 2007 to May, 5th 2008 nearly 8000 cases are under the disposition of the courts from crimes against the safety of the traffic. Approximately 80% have to serve sentences mandating community service. However with the exception of Catalonia, which started these types of sentences in 2004, the rest of the Spanish Criminal System is under disorganized. Printed edition of El Pais.com, ttp://www.elpais.com

8 See chart 1 in the appendix

9 See CARMONA SALGADO, Course of Spanish Criminal Law, taught by COBO DEL ROSAL, M., Madrid, 1997, p. 176, ORTS BERENGUER, E., Criminal Law, PE, 2ª ed.
Revised and actualized in concordance with the Spanish Criminal Code of 1995, Valencia, 1996, p. 640.

10 In this sense it is very important to consider what has been stated by MUÑOZ CONDE, F., Criminal Law, PE, 11ª ed., Valencia, 1996, p. 586.

11 Please see CARMONA SALGADO, C., Criminal Law Course II, cit., p. 174.

12 See the official Statistic data presented in tables 1 and 2.

13 Offences of danger and peril abstract. Dr. Mario Eduardo Corigliario, Lawyer, mec[arroba]mariocorigliano.com.ar, Buenos Aires, Argentina, http://www.monografias.com/trabajos21/delitos-de-peligro/delitos-de-peligro.shtml#dispares

14 This study also integrates these legal definitions in the interpretation of the type of crime, MUÑOZ CONDE, F., (SCC).

15 The (SAP) of (17-3-2000 (ARP) 1577) sentences the accused for the crime stated in § 379 (SCC). The accused was inside his stationary motor vehicle. The motor vehicle was not properly parked, and it was invading the opposite-adjacent lane. The driver was sleeping, without properly engaging the hand break, and with the legs placed in the companion seats. This ruling of the mentioned sentence is based on the following logical deductions: "a) the accused drove the motor vehicle to the place it was found, with him inside, not properly parked and invading the opposite-adjacent lane, which put at risk the security of the traffic in the roads.; b) the driver had driven the motor vehicle right before falling sleep, because the if it were not that the case, the engine was not going to be hot and still on.

16 In accordance with the ninth paragraph of the annex to the (RDL) 339/1990, a motor vehicle is defined as follows: "the vehicle is provisioned with an engine for its propulsion". Moped and trams are excluded from this definition. In the seventh paragraph of the same Annex the motorcycles are defined as follows:
- Two-wheeled vehicle equipped with a cylinder capacity not exceeding 50 cm3, it has internal combustion, and with a maximum speed of not more than 45 km/h.
Three-wheeled vehicle, equipped with a cylinder capacity not exceeding 50 cm3, it has internal combustion, and with a maximum speed of not more than 45 km/h. Four-wheeled vehicles whose mass is less than 350 kg, excluding the mass of batteries in the case of electric vehicles, whose maximum speed is not more than 45 km/h with a cylinder capacity not exceeding 50cm3 for spark ignition engines, or whose maximum net power is less than or equal to 4 kW for other types of engines "(writing according to the

Law 43/1999 of November 25th).

17 In this sense please see ORTS BERENGUER, E., states the same in Criminal Law, PE, cit., p. 640, CARMONA SALGADO, C., Course II, cit., p. 176.

18 Please see MUÑOZ CONDE, F., Criminal Law, PE, cit., p. 590.

19 Under the provision cited, in addition, in the case of vehicles carrying goods with a permissible maximum weight exceeding 3,500 kilograms; motor vehicles carrying more than nine passenger seats, public service motor vehicles, the school bus or vehicles used for the transportation of minors; the transportation of hazardous goods; vehicles used for emergency services, or special transportation; the drivers cannot conduct such motor vehicles with a blood alcohol rate exceeding 0.3 grams per liter, or breath-alcohol test greater than 0.15 milligrams per liter. The driver of any motor vehicle shall not exceed the rate of blood alcohol level of 0.3 grams per liter, or a breath-alcohol test of 0.15 milligrams per liter, during the two consecutive years after obtaining the driving permit or driving license. This rule welcomes the drafting of the Royal Decree 2282/1998, of October 23rd, amending §20 and §23 of the General Regulation of Circulation. In addition, the Supreme Court has held in the Case of the 22nd of February, 1989 (RJ 1989/5885), for legal purposes making reference to the average man, it is considered that from 1.5 g per 1000 c. c. the influence of alcohol on driving performance is likely, and from 2.0 grams is definitely influential in the driving performance. Spanish: c.c. = centímetro cúbico => 1 c.c. = 1 ml. English: d.c. = Cubic centimeter => 1 d.c. = 1 ml.
(*Abbr.* cc) A unit of volume equal to one thousandth (10^{-3}) of a liter or to one milliliter.

20 The (SAP) of Barcelona, (27-11-1998, (ARP) 1998/5022) acknowledged that the "rates of blood-alcohol levels were recorded and undisputed, subject to what is said, of 0.44 and 0.45 mg of alcohol per liter of breath, are insufficient themselves to support the conviction."

21 It is curious indeed, to observe the behavior developed by the accused in the (SAP) of (Barcelona 22-5-1998, (ARP) 1998/1740), driving in the opposite lane, in underwear, barefoot and provoking the other vehicles when he stepped out of the car.
Similarly, it is valued the irregular behavior of the suspect whom being already in the hospital takes away the serum and runs away, see (SAP) of (Biscay 5-10-1998, (ARP) 1998/5707), the driver falls asleep while the police vehicle approaches his motor-vehicle, see (SAP) 28-1-1998, (ARP) 1998/52) or to fall asleep with his car stopped in the middle of the road (SAP) of (Barcelona 3-5-1996, (ARP 1996/376) and the (SAP) of (Tarragona -10-1994, (ARP) 1994/432).

22 Obviously, on the other hand, the reluctance to admit the incriminating evidence reproduced in the main text when the police action is part of a preventive control and the driver has diligently cooperated with the police authority. Please see the (SAP) of (Las Palmas 15-7-1999 (ARP) 3972). See also (SSAP) of (Madrid 11-10-1999 (ARP) 4551) and the (22-5-2000 (ARP) 2160), in which the Court also shows its reservations to the procedural efficacy of the external symptoms alleged by the police agents, despite the opposition of the driver to undergo the alcohol-breathing test.

23 To determine what has to be understood by such substances should be referred to the laws and conventions on the subject, in which Spain is a member, please see MORILLO CAVE, L., "Driving under the influence of alcoholic beverages, toxic drugs, narcotics or psychotropic substances and reckless driving," Comments on the Criminal Law, directed by COBO ROSAL, M., Volume XIV, V. 1, Madrid, 1992, p. 116; CARMONA SALGADO, C., Course II, cit., P. 185.

24 It should be noted that it does not constitute charging evidence the remission of the agents at the oral trial regarding the content of the affidavit alleging that they do not remember what happened in the day of the court order (writ), because this would deprive the defense of their legal right of contradiction, please see (SAP) of (Madrid 16-3-1999 (ARP9 1257).

25 The Circular number 2/ February 14th, 1986 discusses the issue concerning driving under the influence of alcoholic beverages, toxic drugs or narcotics. How to integrate the alcoholic breathing tests as defined in §340 paragraph a) of the Spanish Criminal Code of 1967. One of the typical behaviors expressed in Article 340 paragraph a) of the Criminal Code is to drive motor vehicles under the influence of alcoholic beverages. The successive reforms performed by the legislators since the introduction of this conduct in the field of criminal law have been characterized by a greater rigor. If the Law May 9th, 1950 demanded that drivers place themselves in a state of inability (to put themselves to rest before starting driving again) to perform the act of driving safely, the law of December 24th, 1962 required the existence of a manifest state of intoxication, while driving though the driving maneuvers were correct. Finally, from the Law of April 8th, 1967 which incorporated Article 340 paragraph a) the Criminal Code has even eliminated the manifest character of the alcoholic intoxication.

26 In this sense it can be seen that the (SAP) of (Barcelona 10-2-1998 (ARP)859), argues that a lack of objective data, which is marked by the index measuring device (the alcohol breathing tester), affects the pronouncement of the sentence that was based on witness statements from two police officers involved in the detention phase, telling that the defendant was unable to drive the motorcycle because he was desperate, with irritable behavior, with shining eyes; his face was congested with slurred speech, he expressed himself in an inconsistent an incoherent manner; and walked haltingly. The police officers testimony was definitely ratifying the symptoms and contents of all police reports concerning the alcohol-breathing tests that come to the Spanish Courts in a consistent mimetic way. Without denying that the police officers saw what they were affirming in the ratification of the act in the trial, the fact is that the accused in the day of the detention was driving normally. The only valuable data was the report of the police officers. Because of the absence of the of the auxiliary alcohol-breathing test data, it can not be understood as having sufficient basis to convict the driver under §379 of (SCC). Please see another sentence in the same direction, the (SAP) of (Barcelona, 21-2-1995 (ARP) 302). In other occasions, the acquittal of the driver has been given for the refusal of the police officers to provide the suspect the opportunity to take a contrast test analysis after the driver's three failed attempts to blow into the ethyl-meter, and the presence of external signs of intoxication were contradictory (SAP) of Caceres, 8-3-1999, (ARP) 2707).

27 Please see the SSAP 3-5-2000 (ARP 1534), 8-4-2000 (ARP 801), 20-3-2000 (ARP 885), 13-1-2000 (ARP 669), 11-1-2000 (ARP 1804) , 15-9-1999 (ARP 2554), 10-9-1999 (ARP 3856), 14-9-1998 (ARP 5195), 5-7-1999 (ARP 2719), 15-1-1998 (ARP 316) , 18-1-1995 (ARP 124), 8-2-1995 (PRA 74), 1-12-1994 (ARP 566), 17-10-1994 (ARP 432). About the requirements for the

homologation and periodical revision of the ethyl-meter please the order of the 27th of July, 1994 which establishes the metrological control of the state for the instruments used to measure the concentration of alcohol breathing test.

28 § 66. 1. In the application of the sentence, for malicious offences the judges or tribunals shall observe whether or not the mitigating or the aggravating circumstances can be applied according to the following rules:

1st When there is only one mitigating circumstance, the tribunals shall apply the penalty in the bottom half of the one set by the law for the criminal offense.

2nd. When there are two meetings or more mitigating circumstances, or one or more highly qualified, and there is no any aggravating circumstance, the judges shall apply a lesser sentence in one or two degrees lesser than the established by the Law, in light of the number and the entity of such mitigating circumstances.

3rd When there are only one or two aggravating circumstances, the tribunals shall apply the penalty in the upper half of the one set by the law for the criminal offense.

4th When there are more than two aggravating circumstances and there is no room for a mitigating circumstance, the tribunals cannot apply a penalty superior to the one established by the law in its lower half.

5th When there is an aggravating circumstance of re-incidence with the qualification that the offender had been convicted and his conviction had been enforced for at least three offenses under the same title of this Code, if the offenses are of the same nature the tribunals can apply the penalty in its superior degree stated by the Law for the offence concerned. The tribunals will take into account the previous convictions as well as the seriousness of the new offense.

For the purposes of this rule it shall not count any criminal antecedent that have been already cancelled

6th When there are not attenuating and no aggravating circumstances the tribunals shall apply the penalty established by the Law for the crime committed. In this case the penalty shall be applied considering the personal circumstances of the offender and the seriousness of the criminal act in its minor or grave degree.

7thWhen there are attenuating and aggravating circumstances, the tribunals will rationally value compensate them for the individualization of punishment. In the case of persistency of a qualified element of attenuation the tribunals will apply lower degree of the sentence. If it remains a qualified basis for an aggravating circumstance the tribunals will apply the sentence in its upper half.

8th When the judges or tribunals apply lower sentence in more than one degree they may do so in its entirety.

2. When cross-examining the reckless crimes, the judges or tribunals shall apply the penalties using their prudent discretion, without merely attaching their judgment to rules prescribed in the preceding paragraph.

29 In this sense, please see the (SSAP) of the (30-11-1999 (ARP) 3937), (SSAP) the one of (30-7-1998 (ARP) 4264), or the one of (16-6-1998 (ARP) 3019).

30 Please see the (SAP) of La Coruña, (11-1-1999) (ARP) 141).

31 In this respect, please see among many others, CARMONA SALGADO, C., MARTÍNEZ RUIZ, J., "Again on the 'unconstitutionality' of §380 (SCC), in line with the Constitutional Court ruling of October 2nd 161/1997", in the Law No. 4591, pg. 1., MORILLO CAVE, L., "The refusal to submit to the alcoholic breathing-test legally established as a specific crime of aggravated disobedience. A Critical Valuation", presented in the XIV National Conference of Law and Traffic, Granada, 1998, pg. 13.

32 The (SAP) of Madrid, (5-2-1999 (ARP) 415) absolves the accused of a crime of disobedience of the §380 (SCC) who is "inside the vehicle falling over the steering wheel, while the vehicle is stopped."

33 The resolution of the (TS) is described as "transcendental" by the (SAP) of (Madrid, 2-3-2000 (ARP) 1353).

34 The wording of this reproduced provision comes from the Law 43 of November 25th 1999.

35 Logically, the requirement should be ordered for the subject to undergo the alcoholic-breathing test "in situ". So the refusal to do so at the police station because the ethyl-meter was not properly functioning does not rise to the crime of aggravated disobedience. Please see an example of this case in the (SAP) of Cordova (12-5-2000 (ARP) 1509).

36 In the same vein, please see, among others, the (SSAP) (3-5-2000 (ARP) 1534), or (18-12-1999 (ARP) 5175), (12-2-1999) (ARP) 2009), (18-3-1999 (ARP) 1497), (6-5-1999 (ARP) 948), (26-2-1999 (ARP) 452), (18-1-1999 (ARP) 267).

37 In the opposite direction the (SAP) of (Tarragona 12-5-1999 (ARP) 1492) states that "The obligation of drivers to submit to the alcohol-breathing test is commonly understood, and the attributions of the Agents of the Guardia Civil of the Traffic respectively. This commonly understood pattern does not allow the accused to present a socio-cultural gap that may suggest that she did not know about this driver's obligation. There is, therefore, awareness of the illegal act, which is accentuated by the persistent and marked attitude of the accused aiming not undergo the tests that she is legally obliged to". Also, the (SAP) of (Granada, 27-5-1999 (ARP) 1663) maintains that "the circumstances of the case the alleged error suffered by the appellant could not be neither invincible nor even vincible, therefore, as to the first method, it could have been enough for him to ask the agents about the consequences of his refusal to perform the test to get out of all doubts. And as for the second, it can not be ignored that the defendant subscribed two police attested diligences through which he was informed of the wrongfulness of the alleged criminal behavior. See Also another tribunal sentence which is "denying the viability of the error of prohibition, (SAP) of Navarra, (13-3-1998 (ARP) 1542).

38 See also the (SAP) of Granada (3-5-2000 (ARP) 1534), which makes a special emphasis on the formal requirements that requires the request of the police authority, "in particular the request concerning an act that would constitute a crime, which is crucial, since even the entry into force of new (SCC), the tests were not mandatory, the person concerned may refuse to undergo the test with the inevitable result of penalties in the administrative area. This means that if before refusal was the right of the accused, now is an obligation for drivers to take the test. As for the purposes of information, greater formality is required on the part of the traffic agents and police officers in the explanation of the extent to which the person concerned has expressed a negative behavior, so that the driver could understand the consequences of his/her refusal " .

39 Please see similar resolution in the (SAP) of Castellón (18-9-2000 (ARP) 2358).

40 Please see (SSAP) (17-3-2000 (ARP) 1577), (18-2-1999 (ARP) 899), (25-1-1999 (ARP) 288), (1-10-1998 (ARP) 5326), (1-7-1998 (ARP) 2968), (28-9-1998 (ARP) 5107). The second and last sentences cited here extract even the grammatical arguments concerning the crime of serious disobedience when they refer the plural form of "evidence" of § 380 (SCC) which is implying that the offense only constitutes a criminal act if the accused refuses each and every one of the quests of the officers, and by doing so, completely obstructing police work.

41 Conversely, (SAP) of Huesca (29-7-1998 (ARP) 3218) considered the crime of disobedience in cases where the subject, "seeming to accept the order, he breaches it by actually not performing the simple operation, which is blowing into the measuring device for a few seconds (without alleging the existence of illness or other cause preventing him from accomplishing that simple task), but on the contrary, instead of exhaling, inhaled air on it, so consciously, he did not comply with the order that he had received"

42 Also, please see the (SAP) of Madrid (11-10-1999 (ARP) 4551) in which the accused is sentenced whom "in numerous attempts, simulated his intention to blow into the measuring device, but voluntarily interrupted the air flow, blowing outside the tester or interposing his tongue in the nozzle of the testing device".

43 However, in relation to the alcoholic intoxication, the § 12.2, second paragraph stipulates that such evidence "normally consists in verifying the breathed air by using authorized ethyl-meters, and shall be applied by the agents in-charge of the vigilance of the security of the traffic. Under the request of the person interested or by order of the judicial authority (the courts) the tests could be repeated for contrasting effects that could consists of blood, urine or other similar tests".

44 In accordance with §773 of the Spanish Criminal Procedure Act (SCPA) referring to the Guardia Civil of the Traffic, the Local Police and Provincial Traffic Departments of the Autonomous Community of Galicia, given for the performance of their duties related Crimes against road safety as part of the reform effected by the Organic Law 15/2007 of the 30th of November, (BOE 01-12-07), amending the Organic Act 10/1995 of November 23, (SCC) in the area of road safety.

45 In §21 General Regulation of Circulation (GRC) literally provides the following statement "agents of the authority responsible for the vigilance of traffic can apply the tests to detect alcoholic intoxication...".

46 Please see the same ruling of the (SAP) of Almeria, (13-11-1998 (ARP) 4988).

47 The same resolution was already provided by the (SAP) of Zaragoza, (16-9-1997 (ARP) 2065) and the (SAP) of (Las Palmas, 26-11-1999 (ARP) 3340). This last sentence had provided an interesting argument to support the suggested solution discussed. Given that the greater the severity of the penalty prescribed by § 380 (SCC), the less it can constitute a more serious criminal act than driving a motor vehicle or motorcycle on the roads under the influence of alcohol or drugs classified in the § 379 (SCC), if it has not been established that the refusal by the driver was paired with the act of driving under such circumstances.

48 Also, please see the (SAP) of Barcelona, (10-2-1999 (ARP) 614), and the (SAP) of Santa Cruz de Tenerife (3-12-1999 (ARP) 3618).

49 According to§21 of the (GCR): "All drivers are required to undergo the established tests for the detection of possible alcohol intoxication. Also other road users are required to take such tests when they are involved in road traffic accident (§21, number 2, first paragraph, of the text article).
Officials of the authority responsible for the surveillance of the traffic safety can administer such tests to:
2. Those driving any vehicle with evident symptoms, denoting manifestations or events that reasonably permit the assumption that they are driving under the influence of alcoholic beverages.
3. Drivers who are accused of committing any traffic offense or infraction of the rules contained in this regulation.
4. While driving a vehicle drivers are required by the authority or its agents to take the tests as a part of the programs of preventive controls of alcoholic intoxication ordered by the authority by the aouthorities concerned with the safety of the traffic in the roads.

50 As it was decided by the (SAP) of Cordova, (12-5-2000 (ARP) 1509), expressly against the criterion of other courts that deny the feasibility of the combination of the traffic offenses.

51 Please see the (SAP) of Barcelona (14-10-1998 (ARP) 2792).

52 Please see the (SAP) of Almeria, (13-11-1998 (ARP) 4988).

53 In this resolution, the (SAP) of Badajoz, (20-11-1998 (ARP) 5451) suggests that "in pure logic if it is concluded as proved the perpetration of the crime against traffic safety, attested by driving under the influence of alcoholic beverages, it becomes regarded as evidence of the existence of drunkenness as a mitigating circumstance of §21.1 in relation to §21.2 and §20.2 of the (SCC), which determines that the tribunals should impose a sentence of imprisonment corresponding to the minimal legally established". Please also see the (SAP) (20-11-1998 (ARP) 4881) and (SAP) (11-1-2000 (ARP) 1804). The (SSAP) of Madrid, (20-3-2000 (ARP) 885) and (23-7-1999 (ARP) 3474) even applied the exoneration from the responsibility for the crime of disobedience when it was established that the driver committed the offense typified in §379 (SCC). On other occasions there has been only the incomplete exemption. Please see the (SAP) Huelva (9-3-2000 (ARP 456) and (SAP) Seville (14-12-1999 (ARP) 5611).

54 Clearly speaking out against the criterion maintained by the resolution of the Provisional Sentencing Audience (SAP) of Granada has said that it "ignores the true meaning and scope of the constitutional privilege against the self-incrimination .Given the historical origins and its primary role as a safeguard against the inquisitorial process, it only protects the accused from being compelled to provide self-incriminatory evidence of testimonial nature, and it shall not be allowed to become an object of discussion of the proper due process of other type of evidence or diligences of an investigation of a different nature, such as expert tests, visual and vocal identifications, making handwriting samples or determined bodily interventions. This delimitation of the scope of the right to non-self-incriminate is precisely what explains the constitutionality of testing for alcoholic beverages and other practices mentioned, to the extent of the illegality of using physical force to obtain the cooperation of the suspect. Such diligences are not based on the presumption of innocence nor in the right of non-self-incrimination, but on other fundamental

rights that may come into play in each case, such as privacy, physical and moral integrity; the interdiction of inhuman or degrading treatment , or ultimately, the principle of proportionality" (SAP) of (Seville 14-12-1999, (ARP) 5611).

55 Please see also the (SAP) of Santa Cruz de Tenerife (16-6-2000 (ARP) 1197) and (SAP) of Cordova (17-3-1999 (ARP) 369).

56 The principle "non bis in idem" translates literally from Latin as "not twice for the same", means that no legal action can be instituted twice for the same cause of action. It is a legal concept originating in Roman Civil Law, but essentially as the double jeopardy clauses found in common law jurisdictions. http://en.wikipedia.org/wiki/Ne_bis_in_idem. In other words, no one can be criminally prosecuted more than once for the same act. The principle bans the "new persecution" in a broad sense, since the same fact has received a final ruling, whatever the decision it contains. This principle clearly state that the prohibition applies "even though the legal denomination of (the act) is changed", "or the claim of new circumstances is made", as well as typifying it as "different" the persecution falls on the same act "doubling" " the persecution, (Sources: CREUS, Carlos, Spanish Criminal Procedure Act (SCPA), Ed. Astrea, 1996, p.11).

57 Please see also the (SAP) of Madrid (24-7-2000), published in "Actualidad Penal", (Current Criminal Law) No. 8 (2001).
Please see also the (SAP) of (Madrid 24-7-2000), published in "Actualidad Penal", (Current Criminal Law) No. 8 (2001).

58 The Principle of authority figures in the (SCC).

59 The principle of the concurrence or conflicts of Laws that figures in the (SCC).

60 This obstacle can be solved "by taking a look to the German doctrine and jurisprudence known as the principle of combination, under which the precept displaced in its course can continue to display some penology purposes. It is considered absurd to apply the most severe legal precept aiming to produce more benefits for the sentenced than it had been if applied the less severe one; originating in this way what is known as the closure effect, which affects, among others, the assumptions that the penalties or accessory consequences not established on the shifted precept. However, in Spain the principle of combination has been only applied by the Supreme Court in the isolated sentence of April 6th, 1998. The majority the doctrine has considered such a principle as contrary to the legality principle; and this conclusion is unquestionably imposed after the enactment of current (SCC), §8 contains for the first time a relatively detailed regulation of referring to the concurrence or conflicts of laws, based on the principle of exclusionary application of the shifting legal precept, without any minor reference to the eventual effect of closing the shifted precept" (SAP) of Seville (14-12-1999, (ARP) 5611).

61 Please see §56 of the (SCC).

62 Please see §33 of the (SCC).

63 Please see §97 of the (SCC)

64 The (SAP) of Granada (21-12-1999 (ARP) 5262) believes, however, that the crime of §380 (SCC) is punished more severely than the §379 (SCC).

65 The resolution states that "there is an imposition of the conclusion that none of the two legal provisions cover the totality of the legal devaluation of the behavior: §379 (SCC) because it omits the crime of disobedience and §380 (SCC) because of the lack of penalty associated with harm against the traffic safety", which ultimately leads to the implementation of a real concurrence of criminal offenses between the two legal precepts.

66 Between 2002 and 2009 there have been several modifications to the Spanish Criminal Code that will be addressed in future research, and that is shown in appendix, Chart 1.

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