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COMMISSION BY OMISSION

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Summary

The concept of state penalising a person for his or her failure to act must be understood and analysed as transcending a criminal responsibility for something that a person has failed to do. The idea that, unless a person complies with the obligations imposed by the state and acts accordingly, he or she will receive a court sentence, is related to the principle of legality in criminal law, individual liberty to act, and the rule of law.

This article will underline the concept of improper omission, and how the criminal liability for improper omission is affecting individual liberty. Should there be a general responsibility to help other persons? Which are the obligations, whose neglect should result in criminal responsibility? Should there be situations, expressly regulated by the law, in which a person, although he or she has omitted to do something, should not be held criminally responsible? These are some of the questions I intend to answer in this article, offering a theoretical presentation of the main theories of responsibility for omissions.

In conclusion, a theoretical study about criminal responsibility for omissions is, in essence, a study about the rule of law and individual liberty.

Introduction

The concept of state penalising a person for his or her failure to act must be understood and analysed as transcending a criminal responsibility for something that a person has failed to do. Every time we commit an action, we omit infinity of other actions, therefore, it can be said that we commit infinity of omissions. However, the goal of criminal law is or should be to punish only those particular omissions that are dangerous to others. The idea that, unless a person complies with the obligations imposed by the law and acts accordingly, he or she will be held liable, is related to the principle of legality in criminal law, individual liberty to act, and the rule of law.

1. Proper and improper omissions

A classic distinction regarding crimes committed by omission lies between proper and improper omissions¹. This distinction is important because it teaches us a degree of discipline regarding responsibility for omission: at every moment of his or her existence, a human omits to perform an infinity of actions. However, these omissions are criminally relevant only if we are talking about a proper omission (a crime defined by the law as an omissive act), or an improper omission (if the agent was in a guarantor's position, and omitted to fulfil the action).

2. Problematic cases

The classic case that regulates characterises commission by omission is the mother that does not feed her newborn baby, thus ultimately provoking its death. This omission of the mother is perceived as equally grave offence as if the mother would have killed the baby directly by using a gun or a knife.

However, not every example is as clear, and many situations stand at the borderline of the principle of legality.

Let us first analyse some controversial examples:

Case 1: *A father (A) and his friend of 20 years (B) talk at the edge of a pool, while the son of A is swimming. At one moment, the son of A starts to drown, and none of them, either A or B, do something to help. The son of A dies.*

In this case, the responsibility for the death of the child can be easily imposed upon the father. However, regarding the friend of the family, it seems morally unacceptable that his omission would not be relevant.

Case 2: *A babysitter makes a deal with the parents of a two-year-old girl to take care of her every Friday from 7 to 10 p.m., while the parents go out. One Friday, the parents return home at 9:30 and the girl has a heart attack. All the three, the parents and the baby-sitter, remain passive and do nothing, until the baby dies.*

One of the sources of the duty to act can be the contract. However, if the contract is understood from the civil point of view, we can wonder whether in the example above the baby-sitter still had a duty to act.

Case 3: *A man convinces his girlfriend to accompany him to a pension in the mountains with some of his friends. There, two of the friends of the man violate his girlfriend, without him reacting in any way.*

¹ Baumann J. Derecho penal. Conceptos fundamentales y sistema [Criminal law. About fundamental concepts and system]. Buenos Aires. Ediciones Depalma, 1973, p. 137, Cadoppi A., Veneziani P., Manuale di diritto penale [Criminal Law Handbook]. Milano: Casa Editrice Dott. Antonio Milani, 2005, p. 230, Sanchez Sodi H. Lineamentos elementales de derecho penal [Elementary Parts of Criminal Law]. Mexico, editorial Porrúa, 2003. p. 140, Orts Berenguer E., González Cussac J., Manual de derecho penal. Parte general [Criminal Law Handbook. General Part]. CAJ/FIU – USAID, 2004. p. 78, Castellanos F., Lineamientos elementales de derecho penal [Elementary Parts of Criminal Law]. Mexico: Editorial Porrúa, 2003, p. 158.

Another source of the duty to act is the previous conduct of the subject that has created that threatens a social value. However, if the previous conduct was licit, is it morally acceptable to base the criminal liability upon it?

Case 4: A driver hits a person that was walking near the road, and, scared, does not stop to verify the state of the victim's health, but runs away from the place of the accident. The victim dies as a result of the accident.

In this case, it is clear that the previous conduct of the subject created a threat. However, if the agent did not know the state of the victim, can his omission to act be criminally relevant?

Case 5: A drivers hits a person that was walking near the road. He stops, checks the victim's state of health and realizes the injuries are pretty serious, so he takes the victim, puts the victim into his garage on the floor, and leaves her there without food or medical attention. The victim dies 5 days later.

The difference between this case and the previous one is that after the impact, the driver undertakes another action that exacerbates the threat. In this case, it can be even questioned whether this can be considered an omission at all.

3. The structure of commission by omission

The improper omission crime has a particular structure that can be analysed when examining criminal responsibility for omission. Besides the result and the causality connection, of the elements that are also found in the commissive crime, for the improper omission crime we must have: the existence of the duty to act, the capacity to act, the omission to act of the agent. We will explore each of these elements in particular.

a) The duty to act

The existence of the duty act is the main element, that fundamentes the guarantors position. Traditionally, it is considered that the source of the duty to act can be found in a law, a contract or from the previous conduct of the agent.

Initially, this might seem simple, however, all these sources are extensively debated in the literature. Regarding the law as the source of the duty to act, many authors ask whether law should be understood as a normative act in general² or as an act emitted by the legislative authority only. Regarding the contract as the source

² Authors who agree with this interpretation: Luzón Peña D.-M. Omisión impropia o comisión por omisión [Improper omission or commission by omission]. *Revista de la Fundación Internacional de Ciencias Penales [Journal of International Foundation of Criminal Science]*, 2017, No. 6, p. 198, Ordeig E. G. La omisión en la dogmática penal alemana [The omission in German criminal literature]. *Anuario de Derecho Penal y Ciencias Penales [Annual Journal of Criminal Law and Criminal Science]*, 1997, p. 13, Aráuz Ulloa M. La omisión, comisión por omisión y la posición de garante [The omission, the commission by omission and the guarantor's position]. *Encuentro [Meeting]*, 2000, No. 54, p. 36.

of the duty to act, should we understand it as a contract in the civil form? Because, in this case, any cause of nullity or invalidation of the contract will affect the duty to act, thus being inexistent. The majority of authors maintain that the answer is negative, and that by “contract” we should understand a voluntary assumption of the duty to act, which should not be affected by the causes that, from a civil point of view, invalidate the contract³.

Thirdly, the previous conduct as the source of the duty to act generates numerous discussions. If the conduct is illicit, it can be argued that it could serve as the basis for a duty to act, yet, if the conduct is licit, or justified by a legitimate reason, then some argue, it is not normal to fundament criminal responsibility.

All the discussion above is valid mainly if we analyse the sources of the duty to act from a formal point of view, – a position criticized for its rigidity⁴. However, other authors, beginning with Armin Kaufmann, sustain that, instead of formalizing the duties to act, we should, instead, view them depending on the functions of the agent. Armin Kaufmann identifies three functions: the function to protect the social value, the function to supervise a source of danger, and the function to control the source of danger⁵.

This interpretation avoids the formality problems, but incurs other difficulty. The function of protection arises from a special relationship with the owner of the social value, but could we say that any form of special relationship reinforces a function of protection? Or, to put it in other words, what are the characteristics of a relationship that forms the foundation of this function? Parents to children (however, would it refer to the children of any age?), children to parents (in any case, or only under special conditions?), spouses between themselves, brothers and sisters, long-standing friends, neighbours? The list can be continued. Regarding the function to supervise or to control a source of danger, the things are not clear, either. Should there be an absolute function? What if the victim “provokes” the source of danger (especially when the source of danger is an animal), and thereby the victim himself/herself increases the risk of danger? What about the responsibility to control a person who cannot control his or her actions? Can

³ Zaffaroni E. R., Slokar A., Alagia A. *Derecho penal: parte general* [Criminal Law: General Part] Buenos Aires: Editar Sociedad Anónima Editora, Comercial, Industrial y Financiera, 2002, p. 578, Mir Puig S. *Derecho penal. Parte general* [Criminal Law: General Part]. Barcelona: Editorial, 2006, p. 323.

⁴ Roxin C. *Derecho penal. Parte general. Tomo II. Especiales formas de aparición del delito* [Criminal Law. General Part. Second Volume. Special forms of appearance of crime]. Madrid: Civitas Thomson Reuters, 2014, p. 848, Jescheck H.-H. *Problemas del delito impropio de omisión desde la perspectiva del derecho penal comparado* [Problems regarding improper omission from the perspective of comparative criminal]. *Nuevo Foro Penal* [New Criminal Forum], 1993, No. 59, p. 18, Crespo E. D. *Sobre la posición de garante del empresario por la no evitación de delitos cometidos por sus empleados* [About the guarantor's position of the business man for non evading crimes committed by his employees]. *Derecho Penal Contemporáneo: Revista Internacional* [Contemporary Criminal Law: International Journal], 2009, No. 28, p. 9.

⁵ Kaufmann A. *Dogmática de los delitos de omisión* [The dogmatic of omissive crimes]. Madrid: Marcial Pons, 2006, p. 289 et seq.

this responsibility be equalized with the function of control? What about owning certain goods, such as buildings or spaces used by others to commit crimes?

All these questions show that the problem of the sources of the duty to act still remains to be solved.

b) The existence of a typical situation

The duty to act activates only when there is a situation that threatens the social value⁶. Only in this case it might be said that the agent's duty to act was activated and that he or she must act in order to save the social value.

c) The capacity to act

The second element of great importance is the capacity to act, meaning that the agents must be able to perform an action that would prevent the adverse outcome⁷. For example, if the mother did nothing while her child is drowning, she would not be held criminally liable if she did not know how to swim and did not have any chance to call for help.

The literature identifies two facets of the capacity to act: the intellectual element⁸, meaning that the agent must have the representation of the action that can be performed. For instance, in the example above, the mother might have used a lifebuoy to save her son, but she did not notice it. In this case, it is obvious that she would not be held liable for a crime committed with intent, however, negligence might be identified. The second element is the physical possibility to act⁹, meaning that the guarantor must have the physical ability to perform the saving action. For example, if the father is paralyzed and, being in a room alone with his newborn child, notices that the child is suffocating, he would not be held liable for not acting, given that he was physically unable to act.

d) The omission to act

Thirdly, if the agent has a duty to act and has the capacity to perform the action, of course, in order to talk about a relevant omission, he or she must not have acted¹⁰. If there were an attempt to act and to save the social value, then

⁶ Zaffaroni E. R., Slokar A., Alagia A. 2002, p. 573, Kaufmann A. 2006, p. 114, Roxin C. 2014, p. 814.

⁷ Pozo Hurtado P. Manual de derecho penal [Criminal Law Handbook]. Lima: Eddili, 1987, p. 175, Gullock V. R. Fundamentos teóricos básicos del delito de omisión y su aplicación en el derecho penal costarricense [Basic theoretical fundaments of omissive crime and their appliance in Costaricás Criminal Law]. Heredia: San Joaquín de Flores: Escuela Judicial, 2008, p. 157.

⁸ Kaufmann A. 2006, p. 117.

⁹ Bacigalupo E. Delitos improprios de omisión [Improper omission crimes]. Madrid: Dykinson, 2006, p. 151, Zaffaroni E. R., Slokar A., Alagia A. 2002, p. 574.

¹⁰ Bacigalupo E. 2006, p. 128, Zaffaroni E. R., Slokar A., Alagia A. 2002, p. 573.

criminal liability might not be invoked. However, the reasons why the attempt did not succeed should be carefully analysed on the grounds of causality.

Conclusion

1. The first and general conclusion is that an omission is criminally relevant if it is expressly punished by the law, or the agent had a duty to act and neglected it.
2. When talking about improper omission or commission by omission, it must be kept in mind that it represents a special type of crime, with special elements: there must be a situation of danger that threatens a social value, the subject must have the capacity to act, and there must be a duty to act.
3. Criminal responsibility for omission is strongly connected with the duty to act imposed by the law. Consequently, it affects individual liberty. Numerous duties to act increase the limitations to the liberty of the citizen and represent a step towards a collectivist society in which a person is forced to act.
4. As the first proposal, I suggest that there should be a general clause that regulates improper omission, stipulating the main sources of the duty to act.
5. As the second proposal, when analysing criminal responsibility for an omission, the subject's capacity to act must be carefully assessed. However, it must always be kept in mind that not every duty to act generates a criminally punishable omission. It must be carefully analysed what duties can represent grounds for criminal responsibility for an omission.

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