

A HISTORICAL PERSPECTIVE ON THE CRIMINALIZATION OF OMISSION IN CRIMINAL LAW

PhD Senior Lecturer Carmen Adriana Domocoş
Faculty of Law, University of Oradea

Abstract:

Legal thinking with regard to omission has evolved over time, and, for a long time, inaction was not criminalized in the same way as action. The Romanian Criminal Code of 2009 regulates for the first time in our legislation the principles of liability for omissive acts and situations in which there is criminal liability for an act committed by omission, in a similar way to other European criminal codes.

Keywords: *omission, commission, non-denunciation, inaction, obligation to act*

1. The current concept of criminalization of omission has not always had the same meaning.

In ancient times, the person who did not prevent the commission of a crime that he could have prevented, or did not denounce a crime of which he was aware, or did not prevent a person from injuring himself or from committing suicide, or did not help a person in mortal danger when he could have done it without putting himself at risk, was culpable. According to the doctrine¹, this old principle was inspired by Christian morality, which claims love, and by the concern to involve all citizens in the fight against crime.

In Roman law, there were very few incriminations of omission, and very few misdemeanours *in omittendo*, the most famous of which were: the slave's omission to defend his master in case of an attack, the omission of a soldier to help his superior in cases where the superior has been captured by the enemy, a husband's omission to prevent his wife from becoming a prostitute, or the omission of a son to inform his father of a possible trap that his brother intended to prepare for the father².

The same absence of criminalization of the omission is mentioned by the first English authors in the field, in the 18th century; the first clear cases of omissions

¹ T. Pop, *Drept penal... (Criminal Law)*, p. 221.

² G. Hughes, *op.cit.*, p. 596.

concern betrayal, murder or the omission to surrender war capture. Later on, the refusal to provide private assistance to the king or the refusal to return to the territory of one's country of origin were also considered as omissions³.

The division of criminal offences into commissive crimes and omissive crimes was not known to the authors of old times, even though in the past crimes of inaction were of greater importance in the doctrine and the legislation⁴.

Diodorus Siculus (Diodorus of Sicily) tells us that, in the society of the ancient Egyptians, the person who could have protected another person from being killed or beaten and had not defended that other person, was punished by death; but if he was too weak to defend the other person, he had the obligation to denounce the guilty party to the legal authorities, for otherwise he was punished by beating and denial of food for three days.

A law mentioned by Plutarch ordered that: "He who, being present, has not turned an offender away from evil-doing, will be punishable by the same penalty as the offender himself". If individuals were compelled by penalties to prevent the commission of offenses, magistrates who did not prevent the commission of evil actions were all the more guilty. Cato⁵, as Plutarch also tells us, in order to determine more magistrates to punish criminals, said that anyone who can prevent a person from committing an evil act (that is, a crime) and does not hinder that person from doing so, becomes an accomplice. In fact, the same idea is found in Plato's laws.

Christian religion also condemned those who, having been able to prevent an evil act, had let it be committed. Grotius evokes in a work of his St. Jerome, who said that a stealer (thief) was not only the person who stole, but also the one who, knowing about the theft, did not want to denounce the thief.

Farinacius and Tiraqueau tell us that crimes *in omittendo* are punished more lightly than those *in comittendo*, but sometimes they are punished the same⁶.

Farinacius quotes the example of the governor who is aware of, but neglects to release an illegally arrested person; he will be punished the same as the person who ordered the illegal arrest. Farinacius remarks that this should be no surprise, because, by reason of negligence, a judge can be punished, in exceptional circumstances, even by death.

The ancient authors, always influenced by the authority of ancient laws and of the church, also accepted the same idea. Grotius finds that the punishment of the person who could have prevented a crime, but did not, is well-founded.

The most frequently criminalized omissions in old legislations were the crimes of non-denunciation of a plot against the sovereign or against the country, which

³ Idem.

⁴ I. Tanoviceanu, *op.cit.*, pp. 548-550.

⁵ I. Tanoviceanu, *op. cit.*, p. 548.

⁶ Farinacius and Tiraqueau, cited by I. Tanoviceanu, in *op. cit.*, p. 549.

were severely punished. Plato, in his laws, shows that the sovereign magistrate who does not defend the state against plotters or who, after uncovering them, appears to be unenterprising or sheepish, is as guilty as the perpetrator⁷.

In the European legislations of previous centuries, the criminalization of omissions went through various stages. In France, for example, until the beginning of the 19th century, there were provisions in the Criminal Code which punished the non-denunciation (non-disclosure) of crimes against state security, as well as the non-denunciation of the crime of currency counterfeiting, if a person was aware of their commission. The omission to help a person is also criminalized in the current French criminal code, which sanctions the act of any person of voluntarily abstaining, when there is no risk to himself or to another, from helping a person in danger, which help could be granted either by one's action or by otherwise causing the receipt of help by the person in danger. The text especially applies to vehicle drivers or to medical practitioners.

In the French doctrine, attention is drawn to the fact that⁸ the criminalization of omissions has constantly increased in recent times and that this reflects the preoccupation for educating citizens in the spirit of social solidarity. While in the 19th century it was considered in France that the obligation to give help was only of a moral nature, being left to the dictates of each individual's own conscience, in the 20th century this individualist conception of criminal law was progressively abandoned as a result of the transformation of the obligation of social solidarity into a legal obligation. While the first offences of proper omission sanctioned the selfishness of certain people, protecting the minors, subsequently the abandonment of an incapable person and the abandonment of family were criminalized⁹. Thus, in the middle of the last century, the obligation of solidarity and the criminalization of the non-denunciation of a crime¹⁰ and of the omission to testify in favour of an innocent person or to help a person in danger became generalized.

In England, the non-denunciation of high treason crimes is considered as negative complicity and is punishable by law. The non-denunciation of crimes, in cases where the obligation to denounce is expressly provided for by the law, is also considered a special offence in the German Criminal Code. In the Swedish Criminal Code, the non-denunciation of certain offences is punished only when the life, health or property of others is thus endangered.

⁷ Farinacius and Tiraqueau, cited by **I. Tanoviceanu**, in *op. cit.*, p. 549.

⁸ R. Merle, A. Vitu, Fr. Désportés, Fr. Le Gunehec, cited by **Daniela I. Lămășanu**, in *Elementul material al conținutului generic...* (*The Material Element of the Generic Content...*), p. 119.

⁹ Family abandonment was criminalized by the laws of 7th February 1924 and of 23rd December 1942.

¹⁰ The non-denunciation of (failure to report) a crime was criminalized by the Ordinance of 25th June 1945.

Older Romanian legislation contains similar provisions. Thus, in the doctrine¹¹, the Criminal Code of Prince Ion Sturza is mentioned, which in paragraph 170 provides that the person who could have stopped the carrying out of offence, but did not, is punishable. In the subsequent criminal codes, although crimes of omission were criminalized, on our territory, as well as in France, the old principle was given up, and the failure to prevent or to report (non-denunciation of) offences was no longer punishable.

However, modern law has abandoned the old principles, and has adopted an opposite one: inaction or omission constitutes an offence only when the law expressly provides so. In our opinion, it could not be otherwise, considering the principle of the lawfulness of criminalization which governs current modern law systems. The current Romanian legislator also admitted Paul's Roman law rule stated in *The Digest (Digesta)*, a rule according to which the person who does not prevent an offence when he could have prevented it does not commit any crime.

In our criminal law literature of the beginning of the 20th century, it was shown that¹², although the past exaggerations related to crimes of omission are not worthy of approval, neither does the extremely selfish system created by our legislator. The omission to denounce certain offences and the obligation to prevent their perpetration must be regarded from the perspective of two categories: that of civil servants and that of private individuals.

Civoli's reasoning¹³ applies to the former category, according to which the following questions must be answered: what kind of civil servant is he who, being paid by the citizens to protect the orderly course of society, allows wrongdoers to hurt decent people, when he could contribute to punishing and restraining them? Such a civil servant is unworthy of his position, which he has probably obtained by deception, and therefore he protects those who resemble him in terms of honour and morality. He deserves, as Cato said, to be stoned. For these reasons, the Romanian pre-war legislator found it appropriate to punish senior officials who have the ability to prevent crimes, but tolerate them, by the very punishment for the crimes being tolerated; in our opinion, this is nothing but a sanctioning of negative complicity.

As regards the second category, that of private individuals, they could not be punished for not preventing certain crimes, nor for not denouncing them; in the case of private individuals, the legislator admitted the principle of Roman law. The legislator's choice in this case has been harshly criticized, for renouncing the beautiful Christian morals¹⁴.

¹¹ I. Tanoviceanu, *op. cit.*, p. 552.

¹² I. Tanoviceanu, *op. cit.*, p. 553.

¹³ Civoli, cited by I. Tanoviceanu, in *op. cit.*, p. 553.

¹⁴ I. Tanoviceanu, *op. cit.*, pp. 553-554.

The criminalization of omissive acts was not alien to the previous criminal codes on our territory, such omissions as the failure to display prices (Art. 268²² letter b, of the previous Criminal Code)¹⁵, the non-observance of the price scheme (Art. 268¹⁷, letter d, of the previous Criminal Code)¹⁶, the non-observance of the legal provisions related to labour protection and the safety technique that resulted in the death of a person (Art. 467 of the previous Criminal Code)¹⁷ or the failure to pay taxes (Art. 268³⁵ of the previous Criminal Code)¹⁸ having been considered as crimes, acts for which judgments of conviction to the payment of a fine or to correctional imprisonment were pronounced.

It was only at the end of the 19th century, in modern European legislations, and in the middle of the 20th century, in our own criminal law (with the issue of the Criminal Code of 1968), that the number of omissive crimes increased, with the criminalization of family abandonment, of the non-denunciation of serious crimes (the omission to denounce a murder, for example), and of the omission to notify the judicial bodies, the omission to provide assistance to persons in danger by the person having such an obligation, as well as, for instance, the intentional omission to testify in favour of an innocent person, while knowing that, this way, he/she would be unjustly convicted.

2. The draft New Romanian Criminal Code of 2007¹⁹, in a similar way to the old Criminal Code, proposed, in its special part, the criminalization of the omission to fulfill legal or conventional obligations in the form of purely omissive offences, improperly omissive offences or commissive offences committed through omission.

If the old Romanian Criminal Code was silent on omission, the new Romanian Criminal Code²⁰ expressly states that omission is assimilated with commission and

¹⁵ Criminal Decision no. 1866/1957 of the Criminal College of the Supreme Court, published in *Culegere de decizii ale Tribunalului Suprem al R.P.R. pe anul 1957* (Collection of Decisions of the Supreme Court of the Romanian People's Republic for year 1957), Scientific Publishing House, Bucharest, 1958, p. 416.

¹⁶ Decision for the Guidance of the Plenum of the Supreme Court of the Romanian People's Republic no. 12/1962, published in *Culegere de decizii ale Tribunalului Suprem al R.P.R. pe anul 1962* (Collection of Decisions of the Supreme Court of the Romanian People's Republic for year 1962), Scientific Publishing House, Bucharest, 1963, p. 66.

¹⁷ Criminal Decision no. 2462/1955 of the Criminal College of the Supreme Court, published in *Culegere de decizii ale Tribunalului Suprem al R.P.R. pe anul 1955* (Collection of Decisions of the Supreme Court of the Romanian People's Republic for year 1955), Scientific Publishing House, Bucharest, 1956, p. 103.

¹⁸ Criminal Decision no. 622/1960 of the Criminal College of the Supreme Court, published in *Culegere de decizii ale Tribunalului Suprem al R.P.R. pe anul 1960* (Collection of Decisions of the Supreme Court of the Romanian People's Republic for year 1960), Scientific Publishing House, Bucharest, 1961, p. 516.

¹⁹ www.just.ro

²⁰ Law no.286/2009, published in the Official Journal of Romania, Part I, no. 510 of 24th July 2009, in force as of 1st February 2014.

constitutes an offence if there is a legal or contractual obligation to act, and the obliged party remains passive (Art. 17 of the new Criminal Code), regulating the liability for omission under conditions similar to those regarding commission, in terms of the form of guilt, as in par. 5 and 6 of Art. 16 of the new Criminal Code:

(5) *There is an oblique intent when the deed consisting of an intentional action or inaction produces a more serious result, which is due to the perpetrator's fault.*

(6) *The act consisting of an action or inaction is a criminal offence when it is committed intentionally. The act committed by fault is a criminal offence only when the law expressly provides so.*

Article 17 of the new Criminal Code regulates as follows the commission by omission: *The commissive offence which implies the production of a result is also considered to be committed by omission when:*

a) there is a legal or contractual obligation to act;

b) the author of the omission created, through a previous action or inaction, a state of danger for the protected social value which facilitated the production of the result.

The new legal regulation of the omission was not sheltered from criticism, the reasons why it was necessary to legally enshrine liability for commission through omission being subject to investigation²¹.

Thus, in the recent criminal law doctrine, it was argued that the text of Art. 17 of the Criminal Code is an exception and only applies to the situation in which a commissive crime is committed by inaction, without the legislator also stipulating the other exception, that of omissive crimes committed through action, such a legal enshrinement being considered as unnecessary, the task of settling this matter falling upon the doctrine, not the legislator²². Moreover, the new legal rule is also criticized by the cited author because of its incomplete nature, given that the obligation to intervene may arise not only from the law or from a contract, but also from a factual situation or constitute a violation of a natural duty.

3. In the criminal doctrine, four main sources of the obligation for action were identified: the criminal law or other law, a job-related or professional duty, a contractual obligation, a promise or a previous action, to which the natural obligation to intervene was added. The specialized literature does not unanimously consider the regulation of liability for commission by omission as useful, but the jurisprudence (case law) has applied the principles laid down by law and has sanctioned the omissive or commissive-omissive acts of the person obliged to give up passivity, regardless of whether the source of such obligation was the law, the professional, moral or natural obligation, the contract, or a previous culpable action of the agent.

²¹ **George Antoniu, Tudorel Toader** (coordinators) and collaborators, *Explicațiile noului Cod penal (Explanations of the New Criminal Code)*, vol. I (Articles 1-52), Universul Juridic Publishing House, Bucharest, 2015, p. 187.

²² G. Antoniu, in *op.cit.*, p. 187

In an effort to identify the sources of the obligation to act, in the pre-war Romanian criminal law doctrine²³, it was noted that the omissive criminal offence is committed through the non-fulfillment of a mandatory order or of a mandatory action. The following were identified as sources of the obligation to take action²⁴:

a) The criminal law or another law, i.e. the express order of the law; in the former case, in the very text of the criminal law or, more precisely, in the act constituting the offence itself, omission is provided as a means of committing the offence, in addition to action; thus were criminalized, for instance, in the Criminal Code of 1864, the offence of exposing a child (paragraph 287), that of simple bankruptcy (paragraph 416), the crime of causing a danger (paragraph 436), the stranding of a ship (paragraphs 437, 439 and 444), the crime of bribery (paragraphs 445, 465 and 467); in the latter case, a civil, administrative or other law orders an action whose omission falls under prohibitive criminal rules. E.g., civil law requires certain persons to feed their dependents and to watch over them, by virtue of a relationship of kinship. The omission of this imperative duty is sanctioned by criminal law which prohibits the killing or endangering of the life or health of others; also, stealing food from persons who are unable to defend themselves, or the failure to watch over them, are omissions that can produce the results provided for by the criminal law and criminalized as offences; in other cases, an administrative or judicial organisation law, or even the fundamental law, imposes certain precepts on civil servants, obligations whose omission by those whom they address are found in the prohibitive rules of criminal law.

For the same reasons that justified the provision of criminal law and the punishment of certain inactions by previous criminal codes, the previous Romanian Criminal Code criminalized the agent's omission to fulfill the obligations imposed by the criminal law or by another law and, in some cases, by legislative acts (government decisions, regulations, orders, directives or other documents issued by military authorities or by central and local public administration bodies). Thus, there are numerous omissive crimes provided for in the criminal code, as well as commissive crimes that can be committed through omission, all of which punish the non-fulfillment of the obligation expressly provided by law or by other legislative acts. In fact, as we have mentioned before, the new Romanian Criminal Code assimilates the omissive act with commission when there is an obligation to act which arises from the law, being expressly provided or implicitly deduced from the text of the law (Art. 17 par. 1 letter a of the new Criminal Code).

The obligation to act which is sanctioned in the event of non-compliance with the criminal law derives, first of all, from its express provisions. It is the case of the

²³ T. Pop, *Drept penal...* (Criminal Law...), p. 224;

²⁴ Wachenfeld, Angyal, Vámbéry, cited by T. Pop, in *Drept penal...* (Criminal Law...), p. 225.

offence of appropriation of found property or of property which came by mistake into the offender's possession, provided for by Art. 243 of the new Criminal Code (Art. 216 of the old Criminal Code), which punishes the agent's omission to deliver within 10 days a found good to the authorities or to the person who lost it. In this case, the criminal law itself imposes an obligation to surrender the lost good to the charge of the finder, the failure to fulfill this obligation entailing the criminal liability of the agent. The legislator has the same approach in the case of the crime of not denouncing certain crimes listed exhaustively in Art. 266 of the new Criminal Code (Art. 262 of the old Criminal Code), as well as in the case of the offence of omission to notify the criminal prosecution bodies, provided for by Art. 267 of the new Criminal Code (Art. 263 of the old Criminal Code).

In other cases, the criminal law sanctioned the omission to provide the necessary assistance to a person in danger or to notify the authority about the situation, as well as leaving without help a child or a person in the custody or care of the offender, acts which are criminalized by Art. 314, 315 and 316 of the old Criminal Code.

Secondly, the Criminal Code sanctions the omission to comply with certain obligations provided by the former Family Code, as reiterated by the new Civil Code, such as the spouses' obligation to support each other or the parents' obligation to support their minor children (Art. 86 par. 1 of the former Family Code provides that the obligation of support exists between husband and wife, parents and children, the adopter and the adoptee, grandparents and grandchildren, great-grandparents and great-grandchildren, between siblings, as well as between other persons expressly provided for by law; thus, the obligation of support arises as a result of marriage, kinship and adoption, and Art. 107 par. 1 of the former Family Code provides that the minor child is to be supported by his/her parents). It has been shown in the doctrine²⁵ that the person who is in need and the one who is unable to work (minors, elderly, students pursuing their studies up to the age of 25 years, the sick, the disabled, etc.) are also entitled to support by others, the two conditions having to be met cumulatively. The non-fulfillment of the obligation of support stated above is criminalized by Art. 378 of the new Criminal Code (Art. 305 par. 1 letter b and letter c of the old Criminal Code) and constitutes abandonment of family.

The Civil Code also stipulates obligations incumbent on certain persons (manager, owner, etc.) whose non-observance entails the enforcement of criminal law provisions.

²⁵ P. Abraham, E. Derșidan, *Codul penal al României comentat și adnotat (Romanian Criminal Code Commented and Annotated)*, Editura pentru Științe Naționale (National Science Publishing House), Bucharest, 2002, p. 594.

Thus, the non-observance of the obligations of the manager compelled under Art. 1330-1340 of the new Civil Code²⁶ to handle the management with the care of a good owner, is sanctioned; the breach of such obligations is likely to entail the application of the provisions of Art. 242 of the new Criminal Code (Art. 214 par. 1 of the old Criminal Code), which criminalizes the fraudulent management offence. In the Romanian criminal law doctrine, it has been noted that the concept of fraudulent management is wider if we consider it as a violation of moral duty rather than a violation of legal duty. While the concept of fraudulent management is based on the idea of violation of legal obligations, the scope of this crime is narrower, given that the cases in which the administration or preservation of the assets of another is based on a state of facts, rather than the rule of law, remain unpunished, for example, in cases where all the formalities prescribed by civil law for the legal document on the basis of which the task of administering or preserving the assets was assigned, whereas a person's trust can be breached, regardless of whether the task was assigned in compliance with the legal forms or not²⁷.

In the Romanian Criminal Code, the concept of fraudulent management is based more on the idea of violation of the legal obligations of a patrimonial nature than on the moral considerations underlying the breach of trust. Fraudulent management (Art. 242 of the Criminal Code) is therefore a crime against patrimony, and the active subject of this crime can be only a person charged with the administration or preservation of the assets of another, whereas the breach of trust can be committed by any person. The manager's task may be derived from law, contract, or another legal relationship, as well as from a quasi-contract, as we have shown above. The task may be one of public law (the subject having been assigned the task or granted the authorization by a public authority) or of private law and may refer to the administration or preservation of the assets of an individual or of a legal entity, it may be assigned in writing or verbally, for an indefinite period or temporarily, but, just as in the case of a breach of trust (Art. 238 of the Criminal Code) it is required that the asset should be in the possession or custody of the active subject at the time of committing the criminalized action, so too fraudulent management requires that the act of administration or preservation which has caused material damage should have been committed during the assignment of the task, during the existence of the legal relationship constituting the premise situation, even if the damage occurred after the extinction of that relationship.²⁸

²⁶ Law no. 287/2009, published in the Official Journal of Romania, Part I, no. 505 of 15th July 2011, in force as of 1st October 2011.

²⁷ Gh. Voinea, *Abuz de încredere - Gestiu ne frauduloasă. Prezentare comparativă (Breach of Trust - Fraudulent Management. A Comparative Presentation)*, Revista de Drept Penal (Criminal Law Journal), no. 3/1995, p. 74.

²⁸ Gh. Voinea, *op. cit.*, p. 75.

The source of the obligation to act is the provision in the Civil Code also in the case of the refusal (omission) of the agent to return a movable asset belonging to another person to the one from whom he has received it (Art. 1227 of the Civil Code), sanctioned by the criminal law in Art. 238 par. 1 of the Criminal Code, since it constitutes the offence of breach of trust. In the judicial practice preceding the entry into force of the new Criminal Code, it was decided that the failure to return a good by the offender, more specifically, in the present case, the refusal to repay a sum of money borrowed, entails civil liability and does not constitute a crime of breach of trust²⁹. The recent judicial practice has decided in the same way, in application of the new legal provisions³⁰.

Art. 1378 of the Civil Code establishes to the charge of the owner of a building the obligation to maintain it in good condition in order to prevent its decay, and the breach of this obligation entails, in addition to the tort civil liability, the criminal liability of the owner for manslaughter (Art.178 par. 1 of the Criminal Code) or for bodily harm by fault (Art. 184 par. 1 of the Criminal Code), if another person is killed or injured as a result of the falling down of the building, as a consequence of the lack of maintenance.

Under the same conditions, Art. 1375 of the Civil Code compels the owner of a dangerous or aggressive dog to watch over it so as to prevent causing damage or injuries to another; the agent's omission to fulfill this obligation not only entails the tort civil liability of the owner of the animal, but also his criminal liability for the offence provided for by Art. 11 par. 1 of Government Emergency Ordinance no. 55/2002 on the rules governing the possession of dangerous or aggressive dogs³¹.

The obligation to act may also derive from the provisions of non-criminal special laws, but which contain criminal provisions and regulate the manner of carrying out certain activities. This is the case with Law no. 319/2006 on safety and health at work³², which provides for the occupational safety and health measures to be adopted by the persons obliged to adopt them and states the criminal liability of those who deliberately or faultily omit to fulfill such obligations (Art. 37 and 38 of Law no. 319/2006).

²⁹ The Supreme Court of Justice, Criminal Division, Criminal Decision no. 2216/08th October 1997, published in *Buletinul Jurisprudenței - Culegere de decizii pe anul 1997* (The Jurisprudence Bulletin - Collection of Decisions for year 1997), Argessis Publishing House, 1998, pp. 325-326, The Supreme Court of Justice, Criminal Division, Criminal Decision no. 301/09th February 1996, published in the *Buletinul Jurisprudenței - Culegere de decizii pe anul 1996* ((The Jurisprudence Bulletin - Collection of Decisions for year 1996), Proema Publishing House, Baia Mare, 1997, p. 170.

³⁰ Civil decision no. 418/17th March 2016 (Cluj Court of Appeal), www.rolii.ro, <https://legestart.ro/studiu-de-caz-suntem-sau-nu-prezenta-infractiunii-de-abuz-de-incredere/>

³¹ Published in the Official Journal of Romania, Part I, no. 311 of 10th May 2002.

³² Published in the Official Journal of Romania, Part I, no. 646 of 26th July 2006.

There are also provisions in the Labour Code ³³ which oblige the employer, namely the persons charged with tasks in the field of staffing and of distribution of the work tasks, to comply with special legal provisions related to the working conditions of minors and the age from which they can be employed in a workplace. Failure to comply with such provisions constitutes a criminal offence and is punishable under Art. 265 of the Labour Code. Other provisions of the Labour Code oblige the employer to comply with court rulings pronounced in labour disputes; the non-enforcement of judgments regarding the payment of salaries or the reintegration of an employee into employment (Art. 261 and Art. 262 of the Labour Code) are omissive crimes that are committed only through the omission of the persons obliged thereto to order the payment of salaries or the reintegration of the employees concerned³⁴.

In other cases, the obligation to act derives from legislative acts of a legal force inferior to the law, such as military regulations that establish the obligation of the army-embedded or reserve duty military to present themselves at the military unit within a given period of time or the obligation of the military to execute a legal order related to service duties. The Romanian criminal law sanctions, in Art. 413, Art. 414, Art. 417 of the new Criminal Code (Art. 331, 332, 334 of the old Criminal Code), the violation of such obligations, criminalizing in this case the offences of unjustified absence, desertion and insubordination.

b) A work or professional duty; thus, a public guard is obliged to prevent street fights or public scandal; a pointsman is obliged to prevent an attack on a train; an engineer who directs the rail or air traffic is obliged to take the necessary measures in order to avoid rail or air disasters³⁵.

Work or professional obligations constitute the source of an obligation to act in numerous situations, the former being most often laid down in the internal regulations of the institution within which the agent is operating or even in his job description. Thus, in cases where the special law does not provide for the work obligations or duties of the agent, but only for the sanctioning of the non-observance thereof, those duties are found in legislative acts of a legal force inferior to the law, such as the regulations mentioned above, service orders, decisions of the board of directors or other decisions of the governing bodies of the institution where the agent is performing his duties. E.g., the Regulation on the organization and operation of pre-university educational units of 08th September 2005³⁶

³³ Law no. 53/2003 on the Labour Code, republished in the Official Journal of Romania, Part I, no. 345/2011

³⁴ R. Popescu, *Infrațiunile reglementate de Codul muncii (Criminal Offences Regulated by the Labour Code)*, in Rev. Română de Dreptul muncii (The Romanian Labour Law Journal), no. 2/2004, p. 92-96; S. Corlățeanu, M. Ioan, *Infrațiunile prevăzute în Codul muncii (Criminal Offences Covered by the Labour Code)*, in Rev. Română de Dreptul muncii (The Romanian Labour Law Journal), no. 4/2003, p. 95.

³⁵ T. Pop, *Drept penal...* (Criminal Law...), pp. 225-226.

³⁶ Published in the Official Journal of Romania, Part I, no. 874/29th September 2005.

stipulated in Art. 17 that the head teacher of the educational unit is obliged to observe the provisions of the special law (i.e. Law no. 128/1997 on the Status of the teaching staff), of that Regulation, as well as those stipulated in the internal regulations; Art. 23 letter j of the aforementioned Regulation established the responsibility of the head of the educational institution with regard to the observance of the conditions and requirements regarding the standards of school hygiene, labour protection, civil protection and fire protection in the educational institutions he manages. If the head of the pre-university educational institution faultily omits to perform any of the work duties provided for in the aforementioned regulation or fulfills such duties defectively, he/she may be held criminally liable for the offence of professional negligence provided for in Art. 298 of the new Criminal Code or even for the offence provided by Art. 37 par. 3 of Law no. 319/2006 on health and safety at work, the duties of the agent, the agent's work duties stipulated in the said Regulation being relevant to the analysis of the material element of the two offences.

In a similar way, the Internal Regulations of "Carpați" Mountain Association³⁷ stipulate the obligations of the members of the association in relation to the carrying out of the activities it undertakes (not to endanger their own life or bodily integrity or that of other members through the activities they carry out – Art. 4 par. 2 letter i of the Regulation, to prevent the occurrence of any situation that could endanger the life of any person, the assets of the Association, the environment, etc. – Art. 4 par. 2 letter j of the Regulation); the omission to fulfill such obligations constitutes an offence of professional negligence (Art. 298 of the Criminal Code) or the offence provided by Art. 38 par. 4 of Law no. 319/2006, criminal offences which may concur with that of bodily harm by fault or manslaughter, as the case may be, entailing the criminal liability of the person guilty of non-observance of such obligations or duties.

c) A contractual obligation under which a person has undertaken an obligation to act (to do something); if the agent fails to fulfill his contractual obligation, he is committing an offence, on condition, of course, that the result of his inaction is provided by the criminal law. For example, a person who has undertaken to guide some tourists through the mountains or who has undertaken to teach others to swim has the obligation to intervene in order to help them if there is any danger threatening their health, bodily integrity or life; the omission to give such help, in cases where it was possible, constitutes the crime of intentional or faulty killing or bodily harm, depending on whether intention (deceit) or fault may be imputed, retained to the charge of the omitting person. Similarly, in cases where there is a valid service contract concluded between the parent of a minor and the swimming instructor, by which the latter undertakes to teach the minor to swim and

³⁷ http://img.carpati.org/site/asociatie/roi_asociatia_carpati.pdf.

supervise him/her during the swimming courses, intervening whenever his/her life or health would be jeopardized, civil contractual and criminal liability arises, as the case may be, if the instructor omits to fulfill the supervision obligation he has undertaken and the life or health of the minor is harmed, the provisions of Art. 194 or Art. 192 of the new Criminal Code becoming thus applicable.

The new Romanian Criminal Code assimilates the omissive act with commission when there is a contractual obligation to act undertaken previously (Art. 17, par. 1, letter a of the Criminal Code).

d) A previous promise or action, such as in the case of the swimmer who lures a person who cannot swim into deep water, deceiving the latter with false promises that he would provide help if needed; if the person who does not know how to swim ends up in danger of drowning, the swimmer is obliged to save that person because he promised to do so; otherwise, the swimmer is guilty of manslaughter (killing by fault) or even deliberate killing or premeditated killing (murder) if it is proved that he has intended or proposed to himself to get the other person killed. It has been said³⁸ that the rescue obligation derives from the swimmer's previous action by which the person who did not know how to swim was lured to enter into deep water.

The obligation to intervene in order to prevent a harmful result also belongs to the employees of an electricity company who, after having remedied a malfunction of an electrical installation, connect it to the national electricity grid without announcing that it is under electric voltage and thus cause serious harm to the bodily integrity of many people, as well as the destruction of high-voltage cables. The omission of the employees of the electricity company, whose professional duty is to intervene for the commissioning of the installation, is the result of their previous action and may constitute the offence of bodily harm (Art. 196 of the Criminal Code) and of destruction by fault (Art. 255 of the Criminal Code). Similarly, the person who, by making an illegal underground connection to the electricity grid, omits to signal the fact that there is danger of electric shock in that area and the death of a person occurs as a result, may be liable for manslaughter (the killing of a person by fault) (Art. 192 of the Criminal Code) caused by the omission to intervene; the agent's obligation derives in this case from a previous action.

4. Following the same reasoning, the new Romanian Criminal Code assimilates omission with commission in cases where the author of the omission, through a previous action or inaction, created a state of danger for the protected social value, which facilitated the production of the result (Art. 17 par.1 letter b of the Criminal Code).

³⁸ T. Pop, *Drept penal... (Criminal Law...)*, p. 225.

Essentially, criminal law distinguishes between an action that positively creates suffering, on the one hand, and the omission of the assisting witness, who sits about without taking any action to prevent suffering, on the other hand. It has been said, in the American doctrine³⁹, in an attempt to describe this principle, that the law should see that we do not want to cause suffering, but it should not see this in the absence of a legal obligation, because we do things to prevent suffering. In the view of this criminal doctrine, we are not the caretakers of our brothers or sisters⁴⁰.

The above-mentioned rule has been heavily criticized and considered to be morally unacceptable. One of the doctrine writers⁴¹ asserted, in relation to the *Beardsley* case that, in a civilized society, a man who is in the proximity of a powerless person that has no other hope for help, is under the legal duty to call for help, regardless of whether that person is his wife, his mistress, a prostitute, or the minister of justice. The necessary conclusion is that there is no essential moral difference between action and omission; there is no difference between sailing the Pacific Ocean and drowning or lying on the beach while someone is going under during low tide; there is no major difference between slamming the door at the entry of a bar in front of a child who is trying to escape a wild animal and failing to close the door behind the same child⁴².

The effect of the stated rule on omission is the exemption from criminal liability of the person guilty of moral indifference, as in the case of *Kitty Genovese's* neighbours in Queens borough. The rule above may even defend from punishment the person guilty of having had a culpable mental state (the will to act in a certain way or to refrain from acting). E.g., let's assume that the agent, who is an Olympic champion in swimming, sits and watches carelessly a child (not his own) drowning in a swimming pool. The agent is not criminally liable for the child's death, even if he could have rescued him from drowning without exposing himself to any risk. It does not matter why the agent did not act, he was probably distracted and did not realize that the child's life was worth saving; or, worse, the agent was a person who took sadistic pleasure in watching others suffer.

From a pragmatic perspective, the harshness of the rule on omission can be regarded as contempt for the criminal justice system. On the contrary, a rule that would require people to provide help to those at risk could promote real social cohesion; and maybe those who are ready to hurt others would give up their criminal plan if they knew the others would have to intervene⁴³. In keeping with

³⁹ Ibidem.

⁴⁰ J. Dressler, *op. cit.*, p. 86.

⁴¹ H. Graham, *op. cit.*, p. 596.

⁴² J. Dressler, *op. cit.*, p. 87.

⁴³ Idem.

the above rule, doctrine writers found theoretical, practical, moral and utilitarian arguments to support it.

First of all, practical arguments were raised. In any given criminal case, the prosecution must prove beyond any reasonable doubt that the defendant had a culpable mental state at the time of committing the offence, and it must also be proved that the accused has caused a social harm for which he is being tried. It is far more difficult to establish the two elements – will (mental state) and causality – in the case of omission than in a case where the accused acted positively. For example, if Beardsley had poisoned his mistress, a jury would have had no trouble deciding that he had intended to kill her. But omissions are more ambiguous, the author of the omission may want to harm the victim; but it's just as possible that the person making the omission is simply inert in the face of the strange novelty of the situation in which they find themselves. Similarly, with regard to Kitty Genovese's tragedy, it is possible that at least a few of the residents of the neighbouring flats assumed that someone else had called the police⁴⁴.

As regards the causal element of the omission, if a person poisons another, it should be easy to determine whether he/she caused the latter's death. But, of course, it is more difficult to state that *Beardsley's* omission to seek medical help for his lover caused her death; she could have died poisoned despite her lover's best efforts. Similarly, even if Kitty Genovese's neighbours had called the police, we cannot know whether they would have arrived in time to save her.

Beyond that, there are actual delimitation difficulties that arise as to the judgment of an omissive act. For example, in the Genovese case mentioned above, can all thirty-eight people who heard Kitty cry be held responsible, or just those who heard her in the first few moments and would have had enough time to help her? Furthermore, to what extent does responsibility depend on the extent to which the person who committed the omission had a certain amount of knowledge, should the responsibility be limited to those who have fully understood the extreme seriousness of the situation?⁴⁵

Nor can the moral arguments put forward in support of the above theory be ignored. The supporters of the action-omission distinction reject the argument according to which there is no moral difference between a voluntary positive act and an omission. They say that the distinction is intuitively obvious if the implications of the criminal treatment of action and omission are taken into account. The result in Kitty Genovese's case is the same even if her neighbours had been indicted, along with the killer, for her death. But, of course, there is a moral difference between stabbing the victim to death, and omitting to alert the police or someone else who could have helped the victim.

⁴⁴ Ibidem.

⁴⁵ J. Dressler, *op. cit.*, p. 89.

In the above-mentioned case, let's suppose that we learned that another person pushed the child into the pool. Even if we retain the agent's sadistic pleasure of looking at the child dying, can we claim that there is no moral difference between the other person's action and the agent's omission to act? The other person caused the child's death; the agent only allowed it. The other person changed the state of affairs by putting the child in danger; the agent only omitted doing the right thing. The other person killed the child; the agent gave up a gain. The supporters of the thesis of non-liability for omission are fighting for the obligation to intervene positively not to make the world worse, which is morally more stringent than the obligation to make it better.

5. Morality too can generate an obligation to act. In general, society expects individuals to do the right thing, which means fulfilling their moral duties. Moral obligations are those obligations which, on the basis of common sense, help us to distinguish between good and evil, duties which should guide every individual. However, the criminal law does not punish the omission to act according to a moral obligation, unless such an obligation derives from a civil law. While it is expected and it is hoped people those around us will be good Samaritans and prevent the suffering of others as often as they can, and whenever this does not involve a risk to them, the criminal law often does not impose such a positive obligation to act.

Numerous arguments have been put forward in support of this view, among which the preference for individual autonomy, the so-called *laissez-faire*. It was said⁴⁶ that the law should only prevent individuals from harming others deliberately, it should not require individuals to help others, especially when their possibilities are limited. Moreover, by imposing the obligation to provide assistance in certain cases, this might lead to excessive reactions that would overwhelm or even harm the victim. The boundary between the general obligation to intervene and the obligation to refrain from doing something is very fragile and one can easily slip from one side to the other. However, some states have adopted *the principle of the good Samaritan*, which means that it is a crime to refuse to help those who are in a serious danger, as long as the aid can be granted without endangering oneself. This generalized approach would emphasize the sense of duty, would make society better and would prevent unnecessary suffering with little or no effort on the part of the person bound to intervene; at the same time, the law would be closer to the individual and to morality, and the message that it would convey would be that of human solidarity, not selfishness⁴⁷.

Romanian criminal law has also taken over the model of other legislations and has criminalized omissions deriving from the moral obligation to intervene under

⁴⁶ R. G. Singer, J. Q La Fond, *op.cit.*, p. 38.

⁴⁷ R. G. Singer, J. Q La Fond, *op.cit.*, p. 39.

certain circumstances and to act in the manner required by law. Thus, in the Romanian Criminal Code, there are omissions considered as crimes and punished as such, criminalizations resulting from a moral obligation not respected by a person facing a situation in which the moral law or common sense would oblige anyone to give up passivity and to provide the necessary assistance. The agent's abstention from intervening in limit-situations, when his assistance is vital, a duty based on moral obligation, which is universally valid, to give first aid to the needy or to announce the competent bodies, is considered, under certain conditions, a criminal offence. It is the case of the offence of abandoning an individual in distress (Art. 203 of the new Criminal Code), that of leaving without help by omission of notification (Art. 316 of the old Criminal Code) or that of endangering a person unable to care for himself or herself (Art. 344 of the old Criminal Code), acts which had previously been criminalized only when committed intentionally and when the life or health of the person found were in danger. However, the new Romanian Criminal Code (Art. 17 par. 1 letter a of the Criminal Code) assimilates omission with commission only in cases where there is a legal or contractual obligation to act, not in the case of moral or natural obligations, which matter has been criticized in the doctrine, including in terms of the futility of the current regulation⁴⁸, an opinion that we do not agree with, considering that the regulatory gap cannot be supplemented by the jurisprudence.

If in most cases the legislator expressly states what constitutes the criminalized inaction or omission, in other fewer cases, this negative attitude is not concretized, being treated in general terms. This is the case of the provisions of Art. 203 of the Criminal Code on abandoning an individual in distress or Art. 426 of the Criminal Code on the failure to take appropriate steps during navy operations. Such acts can be committed through numerous inactions or omissions, but the legislator criminalizes them in the form of general regulations, so that law practitioners and theorists are not entitled to limit the applicability of the rule, that is, to distinguish only certain cases of culpable omissions.⁴⁹ It is also the case of the crime of failure to take labour (occupational) safety and health measures (Art. 349 of the Criminal Code) and that of non-compliance with labour (occupational) safety and health measures (Art. 350 of the Criminal Code).

6. One final argument that justifies the thesis of omission is that according to which the doctrine of omission is consistent with the principle of autonomy. In a society where individual values are gaining ground and state power is limited, the criminal justice system should distinguish between action and omission. Even if a person is morally obliged to give help to others, not all violations of a moral obligation require a criminal punishment. It is the role of religion and other

⁴⁸ G. Antoni, T. Toader and collaborators, in *Explicațiile...* (*Explanations...*), *op.cit.*, p.188.

⁴⁹ I. Pitulescu, T. Medeanu, *Drept penal. Partea generală* (*Criminal Law. The General Part*), Lumina Lex Publishing House, Bucharest, 2007.

institutions to perfect or model human character; the purpose of the criminal law is limited to preventing and punishing persons who cause harm. If it were otherwise, the criminal justice system would interfere unacceptably deeply with people's lives.⁵⁰

Finally, arguments have been found with regard to the usefulness of imposing such a thesis. If the law calls for the principle of the good Samaritan, people could become less, rather than more, involved in the problems of those around them in order to avoid the risk of criminal liability. Lastly, a legal system where omissions are generally punishable could be a costly one, requiring more police officers to investigate those who commit omissions, and courts would need more prosecutors.⁵¹

⁵⁰ J. Dressler, *op. cit.*, p. 88.

⁵¹ J. Dressler, *op. cit.*, p. 89.