

Commission by omission

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Controversial examples that illustrate the limits of commission by omission:

Case 1: A father (A) and his friend for 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 drowning, and none of them, A or B, do something to help. The son of A dies.

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.

Case 3: A man convinces his girlfriend to go together at 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.

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

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

Main conclusions:

1. Not every failure to act represents an omission that engages criminal responsibility. In order to become criminal relevant, an omission must be connected with a duty to act of an individual.
2. Omission can be expressly punished by the law (proper omissions), or can represent a form of commission of a crime (improper omission) e.g. the mother does not feed her baby, resulting the death.
3. Improper omission or commission by omission represents a special type of crime, with special elements: there must be a situation of dangers that threatens a social value, the subject must have the capacity to act, there must be a duty to act.
4. Given the fact that improper omission is not expressly regulated, it can be argued that this type of criminal responsibility enters in conflict with the principle of legality. A general clause that regulates the main sources of the duty to act and that permit the equivalence between action and omission can diminish the conflict with the principle of legality.
5. The duty to act can be foreseen in a law (criminal or civil – lato sensu), it can be stipulated in a contract, or it can result from a previous conduct of the subject.
6. Criminal responsibility for omission is strongly connected with the duty to act imposed by the law, and therefore it affects individual liberty. Numerous duties to act increase the limitations of the liberty of the citizen and represent a step towards a collectivist society in which a person is forced to act.

Proposals

1. There should be a general clause that regulates improper omission, stipulating the main sources of the duty to act. Only based on interpretation of *verbum regens* from every crime, a person cannot be held criminally responsible for an omission. The principle of legality imposes a strict, clear and predictable regulation for all actions/inactions that can attract criminal responsibility.
2. When analyzing criminal responsibility for an omission, the capacity to act of the subject must be carefully analyzed. The subject that omits to do an action in order to save the social value, must be able to take that action to an end, from a physical point of view, but also form an intellectual point of view.
3. Not every duty to act generates a criminally relevant omission. It must be carefully analyzed what duties can represent a foundation for criminal responsibility for an omission. Special relationships (between parents and children, between spouses, between baby-sitter and the baby etc.) are for sure a source of the duty to act. However, these sources must be carefully analyzed in order to certify their actuality (e.g. spouses that have not been living together for 25 years should not be held liable).
4. In what regard criminal responsibility for improper omission, strict interpretation and good faith of the interpreter should be the main leading ideas, in order to avoid breaking the principle of legality and to guarantee the individual liberty.