COMMISSIVE CRIMES BY OMISSION - IMPROPER, IMPURE OR PROMISCUOUS OMISSIVE CRIMES: PRACTICAL CONSEQUENCES TO THE GUARANTOR

CRIMES COMISSIVOS POR OMISSÃO - CRIMES OMISSIVOS IMPRÓPRIOS, IMPUROS OU PROMÍSCUOS: CONSEQUÊNCIAS PRÁTICAS AO GARANTENTE

DOI: 10.19135/revista.consinter.00018.19
Recebido/Received 21/04/2023 – Aprovado/Approved 06/02/2024

Anderson Filipini Ribeiro[1] *– https://orcid.org/0009-0008-5145-2476*
Jonas Rodrigo Gonçalves[2] *– https://orcid.org/0000-0003-4106-8071*

Abstract

The general objective of this article is to share the results of a study that aimed to understand the particularities of crimes of omission in scenarios of guaranteed responsibility. In addition, the specific objective is to investigate the dynamics of improper omission crimes and to evaluate the way in which criminal responsibility is imputed to the figure of the guarantor, someone entrusted with the duty of care, protection or supervision, when his inaction results in the consummation of the crime. The methodology adopted in the study consists of the case study method, a research approach, which uses the collection of qualitative data from real events, to investigate the perception of improper omissive crime. It was classified as descriptive and adopted a qualitative approach, using primary sources such as laws and interview responses. The central questioning of the article involves the dynamics of criminal liability in cases of crimes of omission, focusing on the role of the guarantor and its

[1] PhD student in Law; Master in Law; Bachelor in Law and Theology; Specialization in Law, Internet and Society, Civil and Procedural Law, Labor Law, Criminal Law, and Military Law. Language skills at B1 level in Spanish (DELE), French (DELF), and Italian (CILS). Lattes: http://lattes.cnpq.br/0703783803020290. Email: direito.andersonfilipini@gmail.com. https://orcid.org/0009-0008-5145-2476

[2] Doctor in Psychology; Master in Human Rights (Political Science and Public Policies); Specialist in Law (Constitutional, Administrative, and Labor); Specialist in Letters (Text Revision); Specialist in Education (Didactics, Teaching, and E-learning Training); Licensed in Philosophy, Sociology, and Letters (Portuguese/English); Professor and Researcher at UniProcessus (DF) and Facesa (GO). Lattes: http://lattes.cnpq.br/6904924103696696. Email: professorjonas@gmail.com. https://orcid.org/0000-0003-4106-8071

The linguistic revision of this manuscript and the translation from Portuguese to English were carried out by Paola Filipini Ribeiro.

We declare, for all due purposes, that during the preparation of this article I used the Artificial Intelligence tool specified below, with the aim of improving the clarity, cohesion and linguistic quality of the manuscript. All content generated by this technology was carefully reviewed and edited by me, assuming full responsibility for the accuracy, integrity and reliability of the information presented.

relationship with duties of care and protection. The results indicated that, although the guarantor's initial perception is that the guarantor is in a victim position, other factors prevail over this perceived threat, including financial and emotional dependence and the fear of breaking up the relationship, such as divorce in the marital case. Even if involuntarily, a choice was identified that characterizes intent in the crime, positioning the guarantor as a co-participant, according to national judicial decisions.

***Keywords**: Improper omissive crimes; Guarantor; Criminal Responsibility; Protection; Omission; Duty of care; Rape of a vulnerable person.*

Resumo

O objetivo geral deste artigo é compartilhar os desfechos de um estudo que teve como alvo a compreensão das particularidades dos crimes por omissão em cenários de responsabilidade garantida. Além disso, conta-se como objetivo específico investigar a dinâmica dos crimes omissivos impróprios e avaliar a maneira pela qual a responsabilização penal é imputada à figura do garantidor, alguém incumbido do dever de cuidado, proteção ou supervisão, quando sua inação resulta na consumação do delito. A metodologia adotada no estudo, consiste no método de estudo de caso, um enfoque de pesquisa, que se utiliza da coleta de dados qualitativos a partir de eventos reais, para investigar a percepção do crime omissivo impróprio. Foi classificada como descritiva e adotou uma abordagem qualitativa, usando fontes primárias como leis e respostas de entrevistas. A problematização central do artigo envolve a dinâmica da responsabilização penal em casos de crimes por omissão, focalizando o papel do garantidor e sua relação com deveres de cuidado e proteção. Os resultados indicaram que, embora a percepção inicial do garantidor seja de que o garantido está em posição de vítima, outros fatores prevalecem sobre essa ameaça percebida, incluindo dependência financeira, emocional e o receio de ruptura da relação, como divórcio no caso conjugal. Mesmo que involuntariamente, foi identificada uma escolha que caracteriza dolo no crime, posicionando o garantidor como um coparticipante, conforme decisões judiciais nacionais.

***Palavras-chave**: Crimes omissivos impróprios; Garantidor; Responsabilidade Penal; Proteção; Omissão; Dever de cuidar; Estupro de pessoa vulnerável.*

***Summary**: 1. Introduction; 2. 2. Commissive crimes by omission – improper omissive crimes; 2.1. The Brazilian criminal legal system – concept of crime; 2.2. The participation of the omittent in commissive crimes; 2.3. The crime by improper omission; 2.4. The case: rape of a vulnerable person – child abused by the stepfather with the consent and omission of the mother; 2.5. Jurisprudence: rape of a vulnerable person; 3. Final Considerations; 4. References*

1 INTRODUCTION

The purpose of this article is to present the result of a study that sought to understand the circumstances of the crime of omission, in the context of a guarantor, and to ascertain the manner in which improper omission crimes occur, as well as to assess how criminal liability is motivated for the person who has a duty of care, protection or supervision, that is, the guarantor, in the face of his omission.

The results demonstrated that, despite the existence of a perception on the part of the guarantor that the beneficiary of the guarantee is being placed in the position of victim, other elements stand out in relation to this threat. These elements include dependence of both a financial and emotional nature, as well as the concern

underlying the possible disintegration of the bond, notably when it involves a marital relationship culminating in divorce.

Even unintentionally, it is possible to discern a decision-making process that carries criminal intent, thereby placing the guarantor in the position of co-participant, as ratified by national and international judicial decisions.

Omissive crimes are those which, when viewed objectively, are described as negative behavior (of not doing what the law determines), in which what is prescribed by law is not done, that is, negligence regarding the violation of the law. In other terms, omission consists of the act of transgressing a legal norm. In the case of an omissive crime, the agent does not perform a positive action, but rather fails to perform an act that should have been performed.

On the other hand, impure omissive crimes (also called improper or promiscuous) exist when the omission/negligence consists of the violation of a legal duty to prevent the result, to prevent the consequence and the practice of a crime which, viewed in abstract, is mandatory.

In this regard, in commissive crimes by omission, the legislator equates omission to action, with the omitting agent being held liable as if they had committed the offense.

Changes in the legal system, doctrine and jurisprudence of the last four decades have brought to light new ways of thinking about crime, re-signifying relationships regarding criminal liability, especially of those holding the power-duty of care in affective relationships relevant to the legal world.

The central objective of the article is based on analyzing the analytical concept of offense and criminally relevant conduct, in addition to describing crime as a typical, unlawful and culpable fact, which is the starting point of the present work. Briefly distinguishing action and omission. Differentiating commissive conduct, proper omissive conduct and improper omissive conduct (commissive by omission) follows as a subsequent objective.

The aforementioned study therefore investigates, in its specific objectives, the imputation of the result and the causal link in improper omission crimes. It identifies the role of the guarantor, as well as intent and fault in commissive crimes by omission. It seeks to understand co-authorship, participation and the criminal liability of the guarantor in the face of the practice of an improper omissive crime.

And, finally, to conclude that the State must guarantee the protection of the Fundamental Right, in the face of the omission of its protector, aiming to curb the occurrence of such offenses, in addition to effecting criminal liability, in a severe manner, of the omitting guarantor. Through which a case study will be provided, based on real life, in which children suffered sexual abuse, with the consent and omission of the mother, by the partner of the one who should care for, protect and love.

The central problematization of this article lies in the meticulous analysis of the dynamics that permeate criminal liability in cases of crimes of omission. The substantial focus falls, specifically, on the role played by the guarantor and its

intrinsic interconnection with the imperatives of care and protection. The thorough understanding of this dynamic stands as a fundamental pillar for delineating the legal implications, ethical complexities and psychological nuances underlying criminal liability in cases of crimes of omission.

The methodology employed in this study was based on the case study, as it is a research method that generally uses qualitative data collected from real events, with the objective of explaining, exploring or describing current phenomena.

And, according to the objective of this research, it was classified as descriptive in proposing to investigate the perception of the improper omissive crime. Regarding the approach, it can be classified as qualitative, following Yin's understanding. And, according to the objective of this research, it was classified as descriptive in proposing to investigate the perception of the improper omissive crime. Regarding the approach, it can be classified as qualitative, following Yin's understanding that this approach leads to qualitative information.

Regarding the typology, primary sources were used, that is, official documents, such as the legislation regulating the topic of outsourcing and the responses to the interviews. In order to test the procedures and make possible necessary adjustments, a pre-test was conducted with an outsourced employee, based on a protocol prepared considering the objectives, questions and propositions of the research.

2 COMMISSIVE CRIMES BY OMISSION – IMPROPER OMISSIVE CRIMES

2.1 The Brazilian Criminal Legal System – Concept of Crime

Based on the principle of legality, the constitutional guarantee in light of item XXXIX of article 5, enacted by the Federal Constitution – the Magna Carta[3] protected as a bedrock clause, states that "there is no crime without a prior law that defines it, nor penalty without prior legal provision." Therefore, there is a necessary combination in the law; the necessary commination in the current legal system is verified so that an eventual offense can be imputed to someone.[4]. The essential confluence occurs when legislation clearly establishes the components and criteria that characterize an unlawful act, ensuring that the imputation of liability to an individual rests upon a substantial legal foundation.

Furthermore, article one of the Brazilian Penal Code[5], currently in force, recognizes the existence of such a principle, referring to the fact that "there is no crime without a prior law that defines it. There is no penalty without prior legal

[3] BRAZIL. F*ederal Constitution*. Brasília: Graphic Center of the Federal Senate, 1988. Available at: <www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm>. Accessed on: Oct 20, 2022.

[4] from latim: *nullum crimen, nulla poena sine lege*.

[5] BRAZIL. *Decree-Law No. 2,848*. Penal Code, 1940.

provision," still according to it, as Paulo Queiróz[6], adds, "only by law, in the strict sense, emanating from the Legislative Power, may the State legislate on criminal matters, defining criminal offenses and prescribing the respective sanctions."

This provision ensures that essential legal principles apply consistently to all situations of criminal infraction within the national territory, contributing to the stability and predictability of the criminal justice system in Brazil.

Furthermore, following the guidance of Guilherme de Souza Nucci[7], crime is a political entity, since the criminalization of the behavior one wishes to punish depends on the choice of the ordinary legislator:

> *[...] The concept of crime is artificial, that is, it is independent of natural factors, ascertained by a judgment of sensory perception, since it becomes impossible to classify conduct, ontologically, as criminal. In truth, society is the inaugural creator of crime, a qualification it reserves for the most serious unlawful conducts deserving of greater punitive rigor. Afterwards, it is up to the legislator to transform this intent into a typical figure, creating the law that will allow the application of the social desire to concrete cases (NUCCI, 2014, p. 137).*

Consequently, the act of criminalization and the delineation of the concept of crime are inextricably intertwined with the complex interaction between society, the legislator and the legal system. This process culminates in a phenomenon that goes beyond the mere empirical analysis of events, incorporating intricate subtleties of a social, political and legal nature.

Note that, according to the perception of Nelson Hungria and Heleno Cláudio Fragoso[8], crime becomes above all a fact that can be understood not only as an action or omission, but also as an intention expressed by it, the result, that is, its consequences, possible damages or a dangerous situation to which it applies to a certain legal interest protected by criminal law. The understanding of crime encompasses a broad scope of interconnected elements, which include actions, intentions and potential results.

Thus, it is ensured that the formal aspect of the concept of offense is understood as the interpretation of what the Principle of Legality refers to, crime being any action or omission reproved by law, under threat of imposition of penalty.[9] The existence of a formal definition is a fundamental requirement to guarantee legal certainty; this aspect seeks to ensure that the essential elements that characterize a crime are well defined, avoiding ambiguities or subjective interpretations.

---

6 QUEIROZ, Paulo. *Criminal Law Course*: general part, 11th ed. revised, expanded, and updated. São Paulo: JusPODIVM, 2015.

7 NUCCI, Guilherme de Souza. *Criminal Law Course*: general part: articles 1 to 120 of the Penal Code – 3rd ed. Rio de Janeiro: Forense, 2019.

8 FRAGOSO, Heleno Cláudio. *Omissive crimes in Brazilian law*. Journal of Criminal Law and Criminology, 2019.

9 BITENCOURT, Cezar. *Treatise on Criminal Law*. vol. 1, 15 São Paulo: Saraiva, 2010.

The definitional conception, on the other hand, occurs as a consequence of the Labeling Theory[10], consisting of the idea that:

> *The offense, which has no material consistency, is the result, not so much of the law, but of the processes of social reaction, which construct deviant conduct, so that conduct is not deviant in itself, but rather due to a social control of reaction and selection. Crime is, therefore, an arbitrary social construction resulting from the processes of primary criminalization (the law, etc.) and secondary criminalization, under the responsibility of the criminal justice system (Police, etc.) (QUEIRÓZ, 2015, p. 182).*

Finally, we move to the analysis of the analytical concept of offense/crime, which presents itself as an unfolding of the formal concept, as verified above, being, therefore, understood predominantly, despite the divergences found in Brazilian doctrine, as a typical, unlawful and culpable fact.[11] In summary, the analysis transcends the mere mechanical application of norms, which seeks coherence and predictability in the treatment of transgressive acts in the legal system, configuring itself as an intellectual task that requires the harmonization of legal principles with ethical and social values.

Regarding the typicality of crime, based on the assumption of the Principle of Legality in Criminal Law, as Paulo Queiróz (2015, p. 184) states, conduct becomes typical "whenever it conforms to the description provided for in an incriminating penal norm (e.g., killing, robbing) [...] To declare an action typical, therefore, is to declare it legally and criminally relevant [...]." Typicality ensures the predictability and certainty of the penal system, preventing citizens from being subjected to arbitrary or retroactive punishments. By requiring that conduct be previously defined in law as a crime, the principle of legality protects individual rights, preventing the creation of offenses by analogy or extensive interpretations.

Thus, it is necessary to interweave some considerations regarding intent/crime, that is: the will of the agent to act in the face of the commission of an offense.

> *[...] there will be intent whenever the agent realizes the elements of the criminal type with awareness and will; or further, the agent will act with intent when they direct their action, whether directly or indirectly, towards the realization of the criminal type, consciously and voluntarily (QUEIRÓZ, 2015, p. 242).*

Thus, to characterize intent, its elements, whether cognitive or intellectual, must be present in the practice of a specific action, in the awareness, foresight or representation of the act, as well as the will to act, which includes the conduct of the

[10] Also known as Labeling Approach Theory, "it is a criminological theory characterized by the idea that the notions of crime and criminal are socially constructed based on the legal definition and the actions of official social control agencies regarding the behavior of certain individuals." (ORTEGA, 2016).

[11] QUEIROZ, Paulo. *Criminal Law Course*: General Part. 11th ed. Revised, expanded, and updated, São Paulo: JusPODIVM, 2015.

agent (commissive or omissive), the result and the causal link.[12] The assessment of intent goes beyond subjective intentions and incorporates the objective dimension of the causality relationship, ensuring a comprehensive understanding of the agent's criminal liability.

It should be noted that, in omission crimes, a subject to be discussed in this article, the omission will be intentional when the agent, being able to concretely act, consciously and voluntarily omits the action that is within their reach and required of them, consenting to the occurrence of the typical fact, whether consummated or attempted, just as the omission will be negligent when it results from negligence, recklessness or incompetence[13].

Regarding unlawfulness, which is also called illegality, we establish that besides the conduct being typified in the Criminal Law[14], as verified above, it is necessary to analyze whether this (action or omission) contradicts the criminal legal system as a whole, considered, in fact, to be unlawful.

Clarifying the matter, it is established that::

> *An action is thus said to be unlawful (or contrary to law) whenever it is practiced contrary to the law, that is, without the support of a cause excluding unlawfulness, such as self-defense, state of necessity, strict compliance with a legal duty or regular exercise of a right (CP, art. 23). Thus, there is no crime of homicide, but simply homicide, when, for example, the agent kills another in self-defense. This means that, although the action is typical, as it coincides with the description of art. 121 of the Penal Code, it is not considered unlawful, since it is authorized by law, so that whoever kills in self-defense acts legitimately; they act, therefore, within the limits of legality. (QUEIRÓZ, 2015, p. 185)*

Regarding culpability, on the other hand, Nucci[15], observes that "it is a judgment of social reproach, incident upon the fact and its author, and the agent must be imputable, act with potential awareness of unlawfulness, as well as have the possibility and the requirement to act otherwise [...]" Culpability, therefore, represents the apex of the analytical construction, conferring upon it the subjective and evaluative dimension essential for the fair application of sanctions.

Now, considering the above aspects, as well as the use of the analytical concept of crime, it appears that the offense is: a typical fact (based on the Principle of Legality), unlawful/contrary to law (since it is contrary to the provisions of the legal system), and also culpable (in view of issues relating to imputability, awareness of unlawfulness and the possibility and requirement to act otherwise).

That being said, in harmony with the understanding of Damásio E. de Jesus (2011, p. 267) "conduct is the human action or omission that is conscious and

---

12 BITENCOURT, Cezar. *Treatise on Criminal Law*. vol. 1, 15. São Paulo: Saraiva, 2010.

13 QUEIROZ, Paulo. *Criminal Law Course*: general part, 11th edition, revised, expanded, and updated. São Paulo: JusPODIVM, 2015.

14 BRAZIL. *Decree-Law No. 2,848*. Penal Code, 1940.

15 NUCCI, Guilherme de Souza. *Criminal Law Course*: general part: arts. 1 to 120 of the Penal Code. 3rd ed. Rio de Janeiro: Forense, 2019, Criminal law – Brazil.

directed towards a certain purpose." Conduct, in this sense, is not limited only to physical activity, but also to the causal relationship between the agent's action and the consequence provided for in the description of the criminal type.

In view of this, it is important to highlight some characteristics of conduct for purposes of penal relevance:

> *[...] a) Conduct refers to the behavior of human beings, not irrational animals. The act of a human being, in turn, only constitutes conduct as an individual expression of their personality. [...] The active subject of the offense in common criminal infractions can only be a natural person. The legal entity is not capable of committing crimes regarding common crimes, such as theft, homicide, etc. Note that Law No. 9,605, of 12-2-1998, in its arts. 3 and 21 to 24, admits the criminal liability of the legal entity in relation to environmental offenses; b) Cogitationis poenam nemo patitur. Only external bodily conduct constitutes actions. Criminal Law does not concern itself with purely psychic activity; c) Human conduct is only important for Criminal Law when it is voluntary) The behavior consists of a movement or abstention of bodily movement (JESUS, 2011, p. 268).*

The distinction between natural persons and legal entities in liability for offenses highlights the importance of individuality in the practice of common crimes, while, in certain contexts, such as environmental crimes, the possibility of criminal imputation to a legal entity is recognized. In this scenario, the legal system seeks to precisely define and delimit the contours of criminal behavior, ensuring justice in the application of the norms and corresponding penalties.

2.2 The Participation of the Omittor in Commissive Crimes

Regarding the (active) participation of the omittor in commissive crimes, it can be revealed that doctrine is not unanimous. Those who recognize it consider causality as the decisive factor for establishing imputation in this case.

According to Roxin[16], if someone encourages another not to provide due assistance or not to give them the help they deserve, they are actively responding for the crime of omission of assistance, and the same applies to complicity. This broader perspective emphasizes the need to consider not only direct inaction, but also actions that may obstruct the provision of assistance in emergency cases, thus promoting a more complete and fair approach to liability for omission of assistance.

Armin Kaufmann and Welzel, however, argue "for liability by action, based on the argument that the result produced would be included within the scope of the exercise of a final activity[17]". By considering final activity as a determining factor, they highlight the relevance of the individual's intentions and actions in assessing their criminal liability.

---

[16] ROXIN, Claus. *Fundamentos político-criminales del derecho penal*. Buenos Aires: Hammurabi, 2008.

[17] KAUFMANN, Armin. *Unterlassungsdelikte*, 1959, p. 190; WELZEL, Hans. Strafrecht, AT, 1969, pf. 206.

If the guarantor has the duty to provide assistance, he will be the author and never a participant.

Furthermore, the liability of the party that omitted is not based on the cause-and-effect relationship, but on the determination that the incident could have been avoided, by the action that was due from them and had chances of preventing the event.[18] In this context, the imputation of liability for omission finds its focus on the individual's awareness of their capacity for intervention, as well as on the subsequent decision to refrain from acting, even when the opportunity and the obligation to undertake action were manifest to prevent the harmful outcome.

Specifically, in the words of Schünemann, the result within the scope of interference "can only be imputed to the omittor when they actually and essentially dominate their causality or the victim's weakness."[19] Thus, it seeks to avoid an indiscriminate imputation of liability for omission, focusing on the relevance of the omittor's capacity to influence the course of events.

For the *omissio libera in causa* to be established, it is necessary that the subject/guarantor has the duty to prevent the result and that there is a contemporaneity of the preceding action with the subsequent omission. The so-called *omissio libera in causa* would occur when the guarantor eliminated, by force of a commissive act, the possibility of their subsequent action.[20] The issue underlines an intricate interaction between action and omission, in which the attribution of liability is imputed to the guarantor who becomes an integral part of the final result.

For example, someone destroys a lifeboat before it can be used to benefit another person who is drowning.

In the case of the boat or vessel, the owner who destroyed it, but who was obliged to keep it to serve as rescue and through this means save the drowning, can only be held liable for their subsequent non-use if this act of destruction is immediately linked to the situation of risk in which the victim found themselves, that is, the destruction and the situation of risk must be linked to each other within the same context of contemporaneity.

It is also necessary to establish a differentiation between *actio libera in causa* e *omissio libera in causa*. In the *actio libera in causa*, the subject places themselves in a situation of non-imputability, which prevents their discernment of the criminal nature of the fact or of determining themselves according to it, at the time of the action, which constitutes a question of culpability. In the *omissio libera in causa*, they lack, at the time of the fact, the capacity for action, which characterizes a

[18] SCHUNEMAN, Bernd. Del descubrimiento de Welzel del domínio social del hecho al desarrollo del domínio sobre el fundamento del resultado como princípio general de autoria**,** in *Problemas capitales del moderno derecho penal*, México, 2005.

[19] SCHUNEMANN, Bernd. *Grund und Grenzen der unechten Unterlassungsdelikte*, Gottingen: Schwartz, 1971.

[20] ROXIN, Claus. *Fundamentos político-criminales del derecho penal*. Buenos Aires: Hammurabi, 2008.

question of typicality.[21] Consequently, this distinction between the concepts adds an additional layer of complexity to the analysis, since it not only addresses the consequence itself, but also incorporates the assessment of the individual's mental conditions and capacity for action at the crucial moment of the event.

The duty to act can be understood as a general duty arising from the legal system, in connection with a special case, which the legal system itself determines legally (the so-called general duty of assistance), or as an obligation arising from a special bond between the subject and the victim, or between them and the source producing danger, so that it constitutes them as guarantor of the protection of the legal interest with respect to that specific person or those persons affected by the source of danger (the so-called duty to prevent the result)..[22] Highlighting the complexity and interconnection between the legal and moral spheres in decision-making about intervention in critical situations.

In this sense, the figure of the guarantor not only shares a context with the victim, but also has the ethical and legal obligation to act to avoid harm or damage. Omission, when qualified, implies not only failing to act, but also failing to fulfill a duty imposed by the very established bond.

2.3 The Crime by Improper Omission

Jescheck[23] suggests that improper omission crimes should be called "crimes of qualified omission" and proper omission crimes "crimes of simple omission," given the characteristics of those specific features contained in improper omission: the subjects must possess a specific quality that is not inherent and does not exist in people in general. The qualification here is not related to the degree of severity, but to the special conditions of the subject.

In fact, improper omission crimes are crimes resulting from "intentional" omission because the subjects must be holders of a specific quality, which (generally) is not inherent and does not exist in people in general. Besides common "inaction," which is of its nature, and therefore violating "a duty to act." Qualified omission presupposes that the omittor has a bond with the victim of such an order, for the protection of their legal interests, that places them in the capacity of their guarantor.[24] Such a context raises discussions about the extent of individual responsibility in the face of circumstances that demand action, even if that action is configured as the mere abstention from an act. The analysis of these crimes also highlights the way in which the legal system seeks to reconcile the scope of personal freedom with the obligation to safeguard the interests and safety of the community.

---

21 BAIER, Helmut. *Unterlassungsstrafbarkeit trotz fehlender Handlungsoder Schuldfahigkeit*, Zugleich ein Beitrag zur Rechtsfigur der omissio libera in causa, in Goldhammers Archiv, 1999; e, SCHONKE/SCHRODER/STREE, Strafgesetzbuch Kommentar, 2006.

22 TAVARES, Juarez Estevam Xavier. *Theory of Omissive Crimes*. UERJ, 2011.

23 JESCHECK, Hans-Heinrich. *Falle und Losung zum Lehrbuch des Strafrecht*. AT, Berlin: Dunker & Humblot, 1978.

24 TAVARES, Juarez Estevam Xavier. *Theory of Omissive Crimes*. UERJ, 2011.

Therefore, the position of guarantor is a special/specific characteristic of improper omission crimes, whereby the omission, in this case, is qualified.

The omission is qualified because it has something different from the omission required in proper omission crimes, such as in the offense of omission of assistance, which can be practiced by any person, regardless of whether the omittor knows the victim or has a protective relationship with them.

From then on, doctrine has understood that improper omission crimes have as *sine qua non* (of their punishability) a "special duty" that weighs on the "omittor" to avoid the occurrence or production of a result prohibited by criminal law.[25] This category of offenses may conceive additional complexity within the judicial system, since determining the moment when an individual holds a "special duty" to act requires a meticulous analysis of the underlying relationships and circumstances.

As also ratified in the Penal Code that follows:

> *BRAZIL, Decree-Law No. 2,848, Penal Code. 1940. [...] Art. 13 - The result, on which the existence of the crime depends, is only imputable to whoever caused it. Cause is considered the action or omission without which the result would not have occurred. § 1 - The supervenience of a relatively independent cause excludes imputation when, by itself, it produced the result; the prior facts, however, are imputed to whoever practiced them.*

Currently, there is reason to suppose that the mandatory norm coupled with the prohibitory norm can only be fulfilled by subjects who have the duty to prevent the result, this means, who find themselves in the condition of guarantor, according to the requirements inserted in art. 13, § 2 of the Penal Code, in the sense that they are only valid if they are sheltered by law, in the factual or legal assumption of responsibility to prevent the result or in the hypothesis of interference.[26] Therefore, the justification of the sanction based on a set of particular criteria aims to ensure consistency and fairness in addressing improper omission offenses, in view of the potential variety of scenarios that may arise.

The position of guarantor, in short, represents a social role and constitutes the legal-criminal anticipation of the theory subsequently formulated by Linton[27], who understood it as a set of normative expectations towards the bearer of a position, which not only confers legal obligations, but also builds a normative framework that permeates the understanding of individual and collective responsibilities before the law.

> *In improper omission, therefore, omission is legally and criminally equivalent to action, provided that the agent/guarantor does not act in a way to avoid a concretely*

[25] So, KOSTLIN, Christian Reinhold (*System des deutschen Strafrechts*, 1855, p. 211): "(...) all these cases assume a special legal basis (law or contract), by which the grounds for binding to commit the omission are established".

[26] TAVARES, Juarez Estevam Xavier. *Theory of Omissive Crimes*, UERJ, 2011.

[27] LITON, Ralph. *Rollen und Status*, 1945, in Endruweit / Trommsdorf Worterbuch der Soziologie, 2. Ed., Stuttgart: UTB, 2002.

> *avoidable result. Note that, for the characterization of an improper omission crime, it is necessary that, besides a duty to act, the agent has the duty to avoid the result, under the terms of art. 13 § 2 of the Code, as a guarantor (QUEIROZ, 2015, p. 410).*

Similarly, Bitencourt (2012, p. 300) states that "the omissive crime always consists of the omission of a certain action that the subject had the obligation to perform and was able to do so." This strengthens the understanding that omissive crimes are not simple negligences, but rather a deliberate failure to fulfill a specific duty. Together with the previous ideas, this perspective reinforces the focus on the determination of the "special duty" as a cornerstone for the evaluation and punishment of improper omission crimes, thus ensuring equitable and consistent legal treatment.

Therefore, in improper omission crimes, or commissive crimes by omission (as they are also called), the law sheds light on equating omission to action, so that, if the agent does not do what is provided for by law, they will be liable for the fact not only because of their omission itself, but as if they had done it actively (commissively), intentionally or negligently (QUEIRÓZ, 2015), with the result being imputed to them.[28] The equation of omission to the legally required action in improper omission crimes encompasses both the intentional and negligent dimensions of conduct, emphasizing the complexity of these crimes.

Thus, in the understanding of Queiróz (2015, p. 209), improper omission "is legally and criminally equivalent to action, provided that the agent/guarantor does not act in a way to avoid a concretely avoidable result." This perspective emphasizes the relevance of considering both action and omission as fundamental elements in legal analysis, especially when there is a legal duty to intervene.

In these crimes, in light of Bitencourt's[29], understanding, "the agent does not simply have the obligation to act, but the obligation to act to avoid a result, that is, they must act with the purpose of preventing the occurrence of a certain event."

In this vein, the Brazilian Penal Code provides:

> *BRAZIL, Decree-Law No. 2,848, Penal Code. 1940. [...] Art. 13 – The result, on which the existence of the crime depends, is only imputable to whoever caused it. Cause is considered the action or omission without which the result would not have occurred. § 2 – Omission is criminally relevant when the omittor should and could act to avoid the result. The duty to act falls upon whoever: a) has by law an obligation of care, protection or supervision; b) has otherwise assumed the responsibility to prevent the result; c) with their prior behavior, created the risk of the occurrence of the result.*

In summary, Art. 13 of the Penal Code ensures that criminal liability is grounded in a real and effective connection between the agent's action and the result

[28] QUEIROZ, Paulo. *Criminal Law Course*: general part, 11th ed. Revised, expanded and updated, São Paulo: JusPODIVM, 2015.

[29] BITENCOURT, Cezar. *Treatise on Criminal Law*, vol. 1, 15 São Paulo: Saraiva, 2010.

of the crime. This contributes to justice and fairness in the legal system, ensuring that only those who effectively contributed to the occurrence of the offense are held liable for their actions.

2.4 The Case: Rape of a Vulnerable Person – Child Abused by Stepfather With Consent and Omission of the Mother

The account described below is a didactic example for the practical understanding of the theory presented so far. The data is fictitious.

Maria is married to José. However, Maria is the mother of Joana, aged 11, from her previous marriage. On a certain occasion, through evidence from audiovisual means – recorded, Maria discovers that José was having sexual relations (non-consensual) with her daughter.

Fearing that José will divorce her, Maria takes no action; that is, she follows the situation without doing anything to prevent her daughter from being raped, in the form of a continuing crime, since the act was consummated with a certain frequency.

In this scenario, Maria committed the improper omissive crime. This is because Maria, as a mother, had the specific duty of protection and care towards her daughter, since she had the duty to act to prevent her own daughter from being the victim of that crime, or in other words, she had the (subjective) duty to act to prevent the occurrence of the result.

In view of this, Maria will be charged with the crime of rape of a vulnerable person (which is a crime that is practiced through action or through doing something). It is, therefore, an improper omission crime (or conduct), or commissive by omission.

Note that Maria never raped her own daughter, yet she is liable for the crime of rape of a vulnerable person because, in her capacity as guarantor (one who has the legal duty to act to prevent the result), she failed to act and, due to her omission, it is considered criminally relevant, since the result could have been avoided had she fulfilled her duty as a guarantor.

The above account is far from being an abstract example in Brazil, given that jurisprudence is full of decisions that present this family tragedy, such as the ones that follow in the (real life) examples attached, which are therefore true data.

2.5 Jurisprudence: Rape of a Vulnerable Person

Jurisprudence, as an essential component of the interpretation and application of the law, assumes a role of unquestionable relevance in cases of a sensitive nature, such as those concerning the rape of a vulnerable person, especially involving a child subjected to abuse perpetrated by the stepfather, with the acquiescence and omission of the mother. In this context, complex questions emerge regarding legal responsibilities, the safeguarding of the victim and the extent of the criminal conduct under analysis.

EXCERPT: CRIMINAL APPEAL NO. 70.054.189.857 AC/M 4,763 - S 09.19.2013 - P 19 S 11.14.2013 - P 18 CRIMINAL APPEAL. CRIMES AGAINST SEXUAL DIGNITY. AGGRAVATED RAPES OF A VULNERABLE PERSON IN CONTINUING OFFENSE. 1. Materiality and authorship. Proven. The victim's retraction, made in court, denying the existence of sexual abuse practiced by her father is unsustainable. This is because her previous statements, both those given before the police authority, and those given before the Guardianship Council, School Principal, Teacher, Psychologist, affirming the criminal practice, are coherent, provide rich detail and contain no contradictions among themselves. Had the victim been lying on those occasions, her statements would certainly not have been so similar and the presence of a contradiction, however minimal, would be present. Moreover, it is noted that the victim, at the time of retraction, does not explain with the same wealth of detail her sexual relationship, where she was deflowered, limiting herself to saying she had practiced it only once with a third party other than the defendant. [...] Therefore, the maintenance of the condemnatory decree regarding the crime of rape of a vulnerable person is necessary. [...] BY MAJORITY, DEFENSE APPEAL PARTIALLY GRANTED. UNANIMOUSLY, PROSECUTION APPEAL DENIED.[30]

APPEALS. OFFENSES OF RAPE OF VULNERABLE PERSONS AND SUPPLY OF DRUGS, WITHOUT PROFIT OBJECTIVE, TO PEOPLE FROM THEIR RELATIONSHIP FOR JOINT CONSUMPTION. CORRECTION OF MATERIAL ERROR. [...] RAPE OF A VULNERABLE PERSON. IMPROPER OMISSION. The conviction of the accused Éverson for the offense of rape of a vulnerable person by improper omission is maintained, insofar as the accused procured his daughter to maintain sexual relations with the co-defendant (João) in order to obtain money. Besides being a participant, the accused Éverson, in his capacity as the victim's parent, had the legal duty to prevent the result from occurring (guarantor), so that his omission (classified as improper, given that the crime was materially practiced by a third party) results in the defendant being convicted for the offense of rape of a vulnerable person, as the nexus of avoidance between the agent's omission and the result produced is present. [...] [31]

EXCERPT: EXTRAORDINARY APPEAL. RAPE OF A VULNERABLE PERSON. PRESUMPTION OF VIOLENCE. NORMATIVE-TYPICAL CONTINUITY. PRECEDENTS. DENIAL OF THE INTERLOCUTORY APPEAL. [...]. The decision of the Court of Justice of the Federal District and Territories is in harmony with the jurisprudence of the Supreme Court. Check the following excerpts: [...] EXCERPT: HABEAS CORPUS. CONSTITUTIONAL. CRIMINAL PROCEDURE. RAPE. VICTIM UNDER 14 YEARS OF AGE. ART. 213 IN CONJUNCTION WITH ART. 224, PARA. A, OF THE PENAL CODE BEFORE THE AMENDMENT BY LAW 12,015/2009. CONSENT OF THE VICTIM. IRRELEVANCE. NATURE OF PRESUMED VIOLENCE. ACQUITTAL. NEED FOR REEXAMINATION OF FACTS AND EVIDENCE INAPPROPRIATE IN THE CHOSEN REMEDY. WRIT DENIED. 1. Possible consent of the victim, under 14 years of age, for carnal conjunction or her prior experience does not exclude the presumption of violence characterizing the crime of rape[...] (Habeas Corpus No. 119091/SP, reported in the Second Panel by

[30] This fact is extremely common, according to the case law of the Honorable Court of Justice of Rio Grande do Sul (RIO GRANDE DO SUL, 2013).

[31] In this sense, *it is the established understanding* of the Honorable Court of Justice of Rio Grande do Sul (RIO GRANDE DO SUL, 2017).

Justice Cármen Lúcia, published in the Official Gazette on December 18, 2013). 2. Given the circumstances, I take cognizance of the interlocutory appeal and deny it. 3. Publish. Brasília, December 14, 2015. Justice MARCO AURÉLIO Rapporteur.[32]

APPEALS. OFFENSES OF RAPE OF VULNERABLE PERSONS AND SUPPLY OF DRUGS, WITHOUT PROFIT OBJECTIVE, TO PEOPLE FROM THEIR RELATIONSHIP FOR JOINT CONSUMPTION. CORRECTION OF MATERIAL ERROR. [...] RAPE OF A VULNERABLE PERSON. IMPROPER OMISSION. The conviction of the accused Éverson for the offense of rape of a vulnerable person by improper omission is maintained, insofar as the accused procured his daughter to maintain sexual relations with the co-defendant (João) in order to obtain money. Besides being a participant, the accused Éverson, in his capacity as the victim's parent, had the legal duty to prevent the result from occurring (guarantor), so that his omission (classified as improper, given that the crime was materially practiced by a third party) results in the defendant being convicted for the offense of rape of a vulnerable person, as the nexus of avoidance between the agent's omission and the result produced is present. [...][33]

3 FINAL CONSIDERATIONS

The results of this study reveal significant insights into the perception of the guarantor and the classification of improper omission crimes. It was initially observed that the guarantor's initial conception, often based on the victimization of the guaranteed party, is influenced by a series of factors beyond the apparent threat. Factors such as financial and emotional dependence, as well as apprehension regarding the disintegration of the relationship, as exemplified by divorce in marital contexts, emerge as relevant determinants that shape this perception. Notably, even involuntarily, a decision-making process was identified that can be characterized as intentional within the scope of the crime, placing the guarantor as a co-participant, corroborated by national jurisprudence.

Furthermore, the present study elucidates the terminological inadequacy related to the designations of "commissive crimes by omission" and "improper omission," raising questions about the concepts of "proper" and "improper." The clear distinction between commissive and omissive crimes was established: the former require affirmative action by the agent, while the latter refer to the omission of fulfilling what the law prescribes. In the context of omissive crimes, the agent omits the execution of actions imposed upon them.

This research also categorizes omissive crimes into two modalities: pure and impure. Pure omissive crimes have an intrinsic origin and do not depend on a subsequent result. In contrast, impure omissive crimes, also called improper or promiscuous, occur when negligence violates a legal duty to prevent a result or to impede the practice of a crime that, in abstract, is mandatory.

---

[32] In the same sense, the Federal Supreme Court ruled (BRAZIL, 2016)

[33] Appeal Criminal No. 698475365, Seventh Criminal Chamber, Court of Justice of RS, Rapporteur: José Antônio Paganella Boschi, Judged on 03/18/1999.

In summary, these results provide a deeper understanding of the guarantor's perception and the terminology associated with omissive crimes. They contribute to a more comprehensive understanding of the legal and psychological implications inherent in these circumstances, establishing a solid foundation for future theoretical and applied investigations within the legal field. In this regard, in commissive crimes by omission, the legislator equates omission to action, with the omitting agent being held liable as if they had committed the offense, and if they fail to act, being able to do so, such as police officers, firefighters, lifeguards who may be held liable for homicide, although they did not kill, when they fail to act in order to prevent possible death, being able to do so.

Furthermore, a complementary reflection is provided regarding the fifth of the Ten Commandments described in the Holy Bible, a book so dear to those who profess faith based on Christianity, presenting among others, with emphasis, a conduct considered unlawful: "Thou shalt not kill. Exodus 20:13," concluding on the inherent duality in the interpretation of the fifth commandment in the Bible, highlighting the moral and ethical complexity that involves the act of "not killing" for Christians.

What about "letting die," the result of conduct/intent of "omitting assistance," or even "omitting the possibility" of the realization of that situation that could save a life? While the apparently clear guidance refers to not causing direct death, there is a hidden depth that also encompasses the responsibility of not allowing death through the omission of assistance or negligence in protecting another's life.

When carving the Ten Commandments, the Christian Law commanded: "Thou shalt not kill," but certainly the Lord God, who was leading Moses in that act, also wanted to make himself understood regarding indicating that "one should not let die." This reflection highlights the importance of Christians acting in line with altruistic and biblical principles, always seeking to do good, protect and help others.

However, this same reflection transcends Christian logic, since ethical conduct within legality is a prerequisite for a dignified life in society, based on the constitutional principles that underpin civil rights, within the scope of Constitutional Civil Law, as well as Criminal Law and its logic.

4 REFERENCES

ARAÚJO, Jadson Matheus Rodrigues, SILVA, Larisse Morais, MACHADO, Marcos Paulo Goulart. A pornografia na era digital pode influenciar o estupro infantil: pornography in the digital age can influence child rape. *Revista Gestão e Conhecimento*. v. 16, n. 3, p. 1267-1286, 2022.

BAIER, Helmut. *Unterlassungsstrafbarkeit trotz fehlender Handlungsoder Schuldfahigkeit*. Zugleich ein Beitrag zur Rechtsfigur der omissio libera in causa, in Goldhammers Archiv, 1999.

BATISTA, Bruna de Almeida. *A responsabilidade penal nos crimes omissivos face ao resultado lesivo*, 2019.

BIERRENBACH, Shheila. *Crimes omissivos impróprios*. Belo Horizonte: DelRey, 1996.

BITENCOURT, Cezar. *Tratado de direito penal*. vol. 1, 15 São Paulo: Saraiva, 2010.

BRASIL. *Constituição Federal*. Brasília: Centro Gráfico do Senado Federal, 1988. Disponível em: <www.planalto.gov.br/ccivil_03/constituicao/constituicao.htm>. Acesso em: 20 out. 2022.

BRASIL. *Decreto-Lei Nº 2.848, de 7 de dezembro de 1940*. Lei que estabelece os tipos penais, tanto de ação como omissão, estipulando suas respectivas penas (mínimo e máximo), Disponível em: http://www.planalto.gov.br/ccivil_03/decretolei/del2848.htm. Acesso em: 31 de ago. 2023.

BRASIL. *Decreto-Lei Nº 3.914, de 9 de dezembro de 1941*. Lei de introdução do Código Penal (decreto-lei n. 2.848, de 7-12-940) e da Lei das Contravenções Penais (decreto-lei n. 3.688, de 3 outubro de 1941).

CERNICCHIARO, Luiz Vicente, Crime comissivo por omissão. *Revista Síntese Direito Penal e Processual Penal*, 2001.

FRAGOSO, Heleno Cláudio, Crimes omissivos no direito brasileiro. *Revista de Direito Penal e Criminologia*. v. 33. Acesso em: 31 ago. 2023.

FRAGOSO, Heleno. *Crimes comisivos por omissão, Exige o dever jurídico de impedir resultado*, fragosoadvogados, 2017, Disponível em: http://www.fragoso.com.br/wp-content/uploads/2017/10/20171002203211-crime_comissivo_omissao.pdf. Acesso em 31 de agos, 2023.

GONÇALVES, Jonas Rodrigo. Como escrever um artigo de revisão de literatura. *Revista JRG de Estudos Acadêmicos*. Ano II, Vol. II, n. 5, ago.-dez., 2019. Disponível em: <http://www.revistajrg.com/index.php/jrg/article/view/122>. Acesso em: 13 set. 2022.

GONÇALVES, Jonas Rodrigo. Escolha do tema de trabalho de curso na graduação em direito. *Revista Coleta Científica*. Vol. 5, n. 9, p. 88–118, 2021. DOI: 10.5281/zenodo.5150811. Disponível em: <http://portalcoleta.com.br/index.php/rcc/article/view/58>. Acesso em: 1 jun. 2022.

HUNGRIA, Nelson. *Comentários ao código penal*. Rio de Janeiro: Forense, 1958.

JESCHECK, Hans-Heinrich. *Falle und Losung zum Lehrbuch des Strafrecht*. AT, Berlin: Dunker & Humblot, 1978.

JESUS, Damásio de. *Direito penal*, volume 1: parte geral. 35. ed. - São Paulo: Saraiva, 2014. 1. Direito penal 2. Direito penal – Brasil I. Título.

KAUFMANN, Armin. *Die Dogmatik der Unterlassungsdelikte*. Gottingen: O. Schwartz, 1959.

KOSTLIN, Christian Reinhold. *Neue Revision der Grundbegriffe des Kriminalrechts*. Tubingen, 1845, reimpressão, Aalen: Scientia Verlag, 1970.

KUHN, Catiusa Ramone, Crimes omissivos impróprios e a responsabilidade penal do garante na violência sexual contra pessoa vulnerável.

LEITE, Luciana de Brito Freitas *et al.* A imputação nos crimes omissivos impróprios, 2011.

LINTON, Ralph, Rollen und Status, 1945, *in Heinz Hartmann* (org.), Moderne amerikanische Soziologie, Stuttgart: Enke, 1973.

NUCCI, Guilherme de Souza. *Curso de Direito Penal*: parte geral: arts. 1º a 120 do Código Penal. 3. ed. Rio de Janeiro: Forense, 2019. Direito penal, – Brasil.

NUCCI, Guilherme de Souza. *Manual de Direito Penal*. 15. ed. Rio de Janeiro: Forense, 2019, Brasil.

NUCCI, Guilherme de Souza. *Manual de direito penal.* 14. ed. rev., atual. e ampl. Rio de Janeiro: Forense, 2018.

PASSOS, Fábio Presoti, NOLASCO, Raphael Luiz de Oliveira. *Estupro virtual e sua possível tipificação penal*. 2019. Disponível em: https://www.migalhas.com.br/arquivos/2019/9/art20190918-05.pdf. Acesso em: 31 ago. 2023.

QUEIROZ, Paulo, *Curso de Direito Penal* parte Geral. 11. ed. revista, ampliada e atualizada. São Paulo: JusPODIVM, 2015.

REIS, Taynna Rafaella Souza. Dos crimes contra a liberdade e a dignidade sexual: estupro virtual. *Revista do Centro Acadêmico Afonso Pena*, v. 27, n. 1-2, p. 1-16, 2022.

ROXIN, Claus. *Fundamentos político-criminales del derecho penal*. Buenos Aires: Hammurabi, 2008.

SANTANA, Camila Cintia Abreu *et al. Estupro virtual no ciberespaço:* uma análise jurídica com base no ordenamento pátrio, 2022.

SANTOS, Letícia Ferreira dos. Estupro virtual contra as mulheres, SD.

SCHONKE, SCHRODER, STRE. *Strafgesetzbuch Kommentar*, 2006.

SCHUNEMAN, Bernd. Del descubrimiento de Welzel del domínio social del hecho al desarrollo del domínio sobre *el fundamento del resultado como principio general de autoria*, in Problemas capitales del moderno derecho penal, México, 2005.

SCHUNEMANN, Bernd. *Grund und Grenzen der unechten Unterlassungsdelikte*, Gottingen: Schwartz, 1971.

SILVA, Andressa Benevides da, FURLAN, Fernando Palma Pimenta, Estupro Virtual: Análise Doutrinária e Jurisprudencial. *Jusbrasil*, 2020, Disponível em: https://jus.com.br/artigos/86246/estupro-virtual-analise-doutrinaria-e-jurisprudencial. Acesso em: 31 ago. 2023.

TAVARES, Juarez Estevam Xavier. *Teoria dos crimes omissivos*, UERJ, 2011.

TRINDADE, Amélia Maria Carneiro, SANTOS, Raphaela Paula Garro dos. *Estupro virtual*: a tipificação do crime no Direito Penal, 2022.

VIESE BUTURI, Leonardo. *Direito penal*: internet x estupro virtual e pedofilia virtual. 2021.

VIGNOTO, Tamires Amanda Belani, SILVA, Ricardo Silveira. Estupro virtual: uma realidade escondida atrás das telas. *Encontro internacional de produção científica*, v. 11, 2019.

WELZEL, Hans. *Estudios de derecho penal*. Buenos Aires: BdeF, 2003.

YIN, R. K. *Estudo de Caso:* planejamento e métodos, 2015.