Improper Omission as an Amplifier Device of the Criminal Statue in Colombia

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Abstract

In the evolution of criminally relevant action in modern crime theory, social action has assumed a particular significance as a dogmatic element that enables the effective protection of legal assets in a society beset by risks. In the vast array of theories regarding the role of the guarantor and its legal and doctrinal development, as well as the jurisprudential extension of equivalence clauses of improper omissions that serve as amplifier devices of the criminal statue through an indirect adaptation, there is a need to identify the most effective means to shield legal assets, which allows for an imputation of passive conducts, despite having an active typical description. This introduces the controversial figure of the improper omission, which is used with the function of perfecting all of the structural elements of the criminal conduct. When an individual knows he is in a position of guarantor and is aware of the potential consequences, but fails to take action, having the means to prevent a foreseeable outcome, this device serves to enhance the criminal protection of legal assets, fostering social solidarity as the basis of the criminal justice system. This system, by satisfying the function of general prevention of the punishment, ideally dissuades the individual from committing crimes with the threat of penalty. These theories are fundamental to understanding criminal responsibility by improper omission in the context of the objective imputation theory. By guiding the evolution and delimitation of its application, they serve as a significant factor in criminal social control in Colombia.

Keywords: Criminal dogma, typicity, amplifier device of the criminal statue, improper omission and position of guarantor.

1. Introduction

One of the most contentious dogmatic institutions in the contemporary era is the phenomenon of improper omission. In Colombia, as in many other countries, the social function of the action is a crucial element in determining the criminal relevance of the conduct. When the objective

imputation to the criminal statue is considered, the structural elements of the criminal statue are configured within the framework of the ex ante criteria of objective imputation. This occurs when the creation of an impermissible risk or the raising of a permissible risk produces a harmful result, that is under the umbrella that the criminal statue is aiming to protect. In the absence of negative elements of the objective criminal statue (criteria for excluding objective imputation) and subjective (error on the criminal statue), and in the absence of grounds that exempt responsibility (Art. 32 of the Criminal Code), there is a need for the penalty, in two forms: (i) when committing a description of the criminal statue (active conduct/action), or (ii) for failing to avoid a typical result, despite holding the position of guarantor and having knowledge of it, while lhaving the means and opportunity to update their conduct (omission conduct/omission).

In this context, the social function of the action plays a fundamental role in overcoming the difficulties and obstacles presented by the physical action, especially in promoting an effective criminal protection of legal assets in crimes by improper omission. This is achieved by avoiding the abuse of authority, which, through sociological justification, satisfies the historical need to assign a normative value to the conduct through social action.

Max Weber, one of the founders of sociology, defined social action as that which has a subjective meaning for the author and is oriented towards the behavior of others. This perspective is crucial for understanding how such social action allows a sociological development of responsibilities in a modern socio-political environment. In criminal liability, the criminally relevant action is one that society considers to be outside of "normality," that is, deviant conduct.

Let us consider the proposition that the necessity for criminal law as a mechanism of formal social control to protect the legal assets of each person becomes valid in a life in society. If a person lived in solitude, without society, the behaviors that he carries out would be irrelevant to criminal law, since they would not affect the legal assets of others. In light of the preceding argument, it follows that the power to determine which conduct will be subject to the ultima ratio, and which will not, in accordance with the principles of the Social State of Law, should be vested in the People, through their representatives in Congress and the High Courts.

In this understanding, the action is the ontological element of the punishable conduct on which the causal link (conduct-result) is configured. This makes it one of the elements of causality, since the conduct is analyzed in the judgment of typicity, illegality, and culpability. That is, all the value judgments made in the different categories of the crime are carried out on behavior. The conduct must be subjected to three trials and then to the verification of the necessity of the penalty for criminal responsibility to be configured. However, for the purposes of causality, the causal or avoidance link is established in the typicity. It is thus necessary to determine whether the causal link (active conduct) or the absence of the avoidability nexus (passive conduct) is established in order to satisfy the requirement of objective imputation of a conduct that increases an impermissible risk as an element of causality.

In a clear delineation of the functional-social concept of action, the esteemed Professor Miguel Polaino Navarrete prioritizes the social value of the action above its ontological or normative value. Sociality is defined as the convention that individuals establish for the protection of their

rights against other individuals, which, in that sense, would be interpersonal. Those actions that violate that convention are deemed criminally relevant (Polaino, p. 331, 2007).

To illustrate, the Spanish author underscores the significance of society in defining the scope of criminal action. In the absence of a society, an individual would be unable to engage in criminal conduct, as there would be no passive subject of the conduct, given that no one would have suffered damage. This reinforces the philosophical premise that the boundaries of personal rights are delineated by the rights of other individuals who reside within a society.

Since the constitutionalization of the negative and positive duties of the State in the Colombian Political Charter of 1991, motivated by the same binding force of the constitutionality block derived from ratified international treaties and conventions, such as the American Convention on Human Rights of 1978, in accordance with Article 1 of the Constitution, the Constituent established the prevalence of the general interest and its founding elements, namely human dignity, work, and the humanizing principle of society, namely solidarity. This is due to the nature of the Social Rule of Law, as set forth in Article 1 of the Constitution.

In order to satisfy this fundamental principle, Article 6 ibid. exhaustively establishes the responsibility of individuals "for infringing the Constitution and the laws. Public servants are so for the same reason and for omission or overreach in the exercise of their functions" (National Constituent Assembly, 1991). In consequence of the aforementioned, in order to comply with the positive obligation to guarantee solidarity[1], the State develops the constitutional foundations of criminal liability for omission. This is done by virtue of the constitutional foundation of the duty to protect legal assets by avoiding the typical result from the perspective that the enjoyment of rights implies responsibilities that impose duties on all citizens in accordance with the principle of social solidarity set forth in Article 95.2 ibídem.

In accordance with the constitutional and international obligation of society and its State officials to protect legal assets with criminal protection, under penalty of the imposition of the threatened criminal sanction, it is important to bear in mind that criminal liability can be attributed not only for active conduct, but also for passive conduct (improper omission). This is when the structural elements of the criminal statue are configured, including the element of causality. This final aspect does not typically present difficulties in active behaviors, as in this case the active subject typically fulfills the typical description. Consequently, the judgment of typicity is carried out in order to determine whether the conduct of the active subject constitutes a breach of the negative duties (respect) imposed by the active criminal statues, which can be empirically evidenced through the modifications of the external world caused by the action of the subject.

In contrast, passive conducts present numerous challenges when the active subject fails to provide a typical description from a naturalistic perspective. Consequently, the judgment of typicity is employed to determine whether the conduct of the active subject contravenes the positive duties of safeguarding the integrity of the legal assets under their purview. This is

[1] Artículo 2 Superior.

achieved by relinquishing the role of guarantor in instances where the absence of an avoidability nexus is established.

It is therefore inappropriate to congratulate those who have not satisfied the avoidability link between their conduct and the result, thereby strengthening the typical adequacy in crimes of commission by omission when the subject does not cause the typical result by action but does not avoid the result when he is responsible for a legal asset.

In Colombia, this quality of authorship is the political-criminal response that the Legislator has given it, based on the Constituent Assembly, with the aim of ensuring the legitimate fulfillment of legal duties and preventing the configuration of typical descriptions that injure or endanger legal assets with criminal protection. The equalization clause (general and special) was created in the development of the new Penal Code of 2000 with the aim of obtaining effective criminal protection of legal assets. It foresees the ambiguities that may arise in the imputation of improper omission. The objective typicity of the clause of Article 25 ibid. is perfected by establishing guidelines in that clause and by jurisprudence outside of the grammatical content of the statues. This delimits the position of the guarantor and when the position of the guarantor is abandoned unjustifiably.

It is first necessary to clarify the doctrinal aspects of the commission by omission and then to specify the contingent aspects of the Colombian State that delimit the scope of the position of guarantor. This should be done by establishing clear examples. The objective typicity equivalences in which human conduct consistent with the postulates of the principle of relative legality in crimes of improper omission can be adapted will be discussed. These include the admission of guilt, malice, and attempt. Finally, the following will be answered sufficiently.

Problem question

What are the factual and legal basis that support the applicability of improper omission as a an amplifier device of the criminal statue in Colombia?

2. Methodology

The objective of this ongoing scientific project, which is both legal and qualitative-analytical in nature, is to examine the significance of criminal dogmatics institutions, focused on improper omission in the typical adequacy of the facts that possess criminal characteristics. Additionally, the project aims to identify any shortcomings in its legitimate application. In order to avoid the undue typical adaptations, which, with all certainty, would result in an erroneous punitive dosage, affecting the functions of the penalty of fair retribution or the protection of the convict, it is necessary to highlight the novel cases in which it is correctly applied.

In order to reach this teleological point, the historical method was employed to comprehend the dogmatic evolution of the institution of improper omission over time. This was done in order to then be able to compile the impact that the various doctrines and theories that have been raised by different authors in the field of criminal law have had. In order to determine the scope of

application of the concept of improper omission within the Colombian legal system, the hermeneutical method was employed. This entailed identifying all binding regulations, including constitutional precepts, penal codifications, and the jurisprudential rules established by the High Courts. The objective was to address the gaps that the legislator has left.

Finally, a deductive-inductive analysis was conducted to examine all the rules and principles with binding force. This analysis aimed to evaluate their application in specific cases. This allowed for the identification of deficiencies between current regulations and their contingent application. It also highlighted the potential risks to the wrong application of the institution. Furthermore, providing a systematization that facilitates the application of dogmatic institution of the improper omission as an amplifier device of the criminal statue in Colombia, projected as a theory that could be applied throughout the different criminal systems around the world.

The primary sources of information collection were secondary, as a significant amount of bibliographic information was utilized, immersed in iconic books and scientific articles found in indexed journals with high prestige. This served as a guide for the results to be merely theoretical, as this is a legal and theoretical research. To then be interpreted and transferred to the material aspect in practice when particular cases are presented, to warn of the negative impact that the non-application and/or erroneous application of said dogmatic institution would have on the Colombian State.

Historical dogmatic analysis

The evolution of theories of equivalence in crimes of commission by omission (causalist/ontological and normativist currents) around the nineteenth century has enabled the principle of relative legality to be upheld, in that the postulate of null poena sine lege has been fulfilled.

The first current, with naturalistic foundations, focuses on the effective causal link between a harmful result and an omission of conduct. It proposes that an omission of conduct that does not prevent a harmful result would be punished in the same way as the penalty of the contemplated action. This is because man is always doing something, and according to Gimbernat (2000, p. 31), would then be the cause of the criminal act. This is because the result would be imputed to him by his bodily movement, which is unrelated to preventing the result. This understanding of causality in omission conduct is similar to that of Lüden.

In the same compilation, in accordance with Binding's theory of interference, the moment of causality of the improper omission is the will to repress the impulses that avoid the danger in such a way that the harmful result does not occur. This causes a clear problem to encompass all improper omissions in all their various modalities (eventual malice, guilt), nor when an omission is worthy of equivalence. When it is not, in the context that the omission would be indiscriminately imputed to any omitter.

The causalist approach, which originated in the naturalist current, was developed by authors such as Krug, Glaser, and Merkel, who were its main proponents. They advocated for the theory of the preceding action, which is meticulously criticized, arguing that it was determined by the

naturalistic causality of the non-modifications of the external world to the result of the danger or injury to a legal asset with criminal protection. This approach presented significant challenges in objective imputation of the defendant, as the natural-scientific causal link between the passive action and the result was non-existent.

In alignment with the position of the Spanish jurist, Enrique Gimbernat Ordeig, when he mentions that, in a natural scientific sense, the omission does not cause anything, because it is characterized by the absence of (why it is not applied) energy, and causality, on the other hand, because through the example of energy the result is materially influenced. (Gimbernat, p. 58, 2003). It is evident that omission cannot be equated with action in the context of the imputation of conduct to the objective aspect of the structural elements fo the criminal statue in a functionalist-principialistic dogmatic scheme such as that currently in force in our Social State of Law. As a model of state constituted by Colombians, this model imposes a limit on the theory of crime accepted by the ius puniendi. This is evident in both constitutional axiology and teleology.

The second current is where the institution of the guarantor position arises. This arises from a teleological-functionalist approach that imposes duties to prevent the consummation of unlawful damage to legal goods with criminal protection due to the function that the subject has assumed in society by competence or by institution. This is based on the formal Theory of Legal Duty, as compiled by Dr. Fernando Perdomo Torres[2]. According to Feuerbach, the basis of the commission by omission is found in the violation of the duties that derive from the law or the contract and that have as their content an act.

The aforementioned approach was met with criticism, as it did not establish a mechanism for assessing the special-normative ingredients that should delimit the special position of the guarantor with causality. Consequently, it became a highly problematic figure, as the absence of such an assessment rendered the gabela susceptible to being misinterpreted as equating passive behaviors with active conduct. In contrast, when the aforementioned principle of relative legality is not observed, and without sufficient justification, the application of this other extreme occurs. This occurs when we are discussing a purely normative plane, without considering the ability to update the behavior, or even the knowledge of its position as a guarantor.

Consider the following scenario: a father assumes the role of guarantor for his daughter. The daughter, in pursuit of her balloon, which had slipped from her hands, falls into a lake. At the precise moment that the father observes his daughter's approach to the lake, he issues a verbal command to halt, indicating the presence of a lake ahead. However, she fails to heed this warning, resulting in her fall into the water and subsequent drowning before the father can intervene. The following example illustrates the potential dangers of assuming a purely normative position of guarantor. Regardless of the efforts made, the individual in this role would remain responsible for the mere fact of holding this position.

[2] 2005, P. 31.

Subsequently, the finalist theory emerged, which, by virtue of its teleological-evaluative approach, operates according to the material foundations of the position of guarantor. This position was supported by Armin Kauffman's theory of functions[3]. This theory posits that the dogmatic institution can be presented in two ways: (i) as a legal duty of vigilance over a legal good to prevent all attacks on it, whether contractual or non-contractual, and (ii) as a supervisory role over potential sources of danger without discrimination. (ii) By the supervision of the sources of danger without discrimination of the legal goods that are threatened by the source. Both can be applied through the systematic and teleological application of the regulations that enshrine that clause of equalization.

In contrast, Gimbernat developed the theory of the focus of danger[4], which shares numerous similarities with the clauses constituting the position of guarantor in Colombia (position of guarantor on source of danger and nexus of avoidability). The Spanish professor establishes a criterion of reasonableness to delimit the figure in the endangerment of legal goods. He considers that the commission by omission is when there is a harmful modification in the outside world, which would then give rise to a judgment of probability that includes two elements. On the one hand, there must be a source of danger that is both positive and material. On the other hand, it is a matter of speculation as to whether there are real measures that can prevent the unlawful harm and determine the probabilities that such a measure would have effectively avoided the unlawful result.

In this manner, this theory differentiates between the bases of the theory of social dominance, equating commission by omission to action in the assumption that the guarantor is a special subject and must have the capacity to actualize his conduct, given that it is within his domain to avoid or not the unlawful damage, and that without any intervention external to his will he can prevent the harmful result. The finalist and normativist theories can be synthesized by incorporating Schünemann's postulates, which posit that equivalence arises from the mastery over the basis of the result.

As the German scholar elucidates, the general principle of imputation can be pursued in two circumstances: when there is dominion over an essential cause of the result, and when the bodily movement of the guarantors is required. The former circumstance pertains to instances where the guarantors hold the power of dominion over things or engage in dangerous activities. The other circumstance is when one has dominion over another person. Professor Günther Jakobs offers a more comprehensive and coherent framework for understanding this concept.

Jakobs' functionalist scheme is based on the competence of institutions and organizations to fulfill positive and negative duties. He argues that society is not embodied in naturalistic concepts of action and omission, nor in logical-material structures that are alien to it. Instead, he posits that society is embodied in institutions that have a negative status or a positive status[5]. From this

[3] 2006, p. 289 -290.
[4] 2003, p. 269 -271.
[5] p. 69-70

perspective, negative status is the duty not to harm others, while positive status is the duty of solidarity with the social collective to live in community.

From the perspective of finalist functionalism, it can be argued that the quality of the author of the position of guarantor is the founding element of the circumstances in which a subject is in charge of the legal duty to prevent the typical results that may occur without the subsequent intervention of a third party. This is when possible, by the function of his position as guarantor that he assumes in society, either by institution or by organization.

In his seminal work, "The Theory of the Criminal Statue," Claus Roxin elucidates how omissions can constitute punishable behaviors when the author has a legal duty to act to avoid a typical result and omits to comply with that duty, thereby increasing the impermissible risk. This is particularly relevant in cases where the author has the means to avoid the typical result on the legal good by virtue of their position as a guarantor. It is evident that the omission does not act to prevent the outcome. In this case, the omission becomes a crucial element in attributing criminal responsibility, since the individual in question has a duty to act to prevent the damage that would otherwise result from their position of dominance over the situation.

The concept of "improper omission" is of paramount importance in comprehending the criminal liability of those who, without directly intervening, play a significant role in the commission of a crime. Roxin posits that crimes of omission should be treated as a distinct category and that there is a comprehensive concept of action and omission. He further asserts that both action and omission can be considered manifestations of personality. However, the omission must meet two specific conditions: (i) the expectation of the action. This can be socially or individually, and although the omission may exist in a naturalistic (proper) way, in some cases a legal-criminal expectation of the action (improper) is required. Furthermore, the individual must possess the capacity to act. The individual in question must possess the requisite physical capability to perform the expected action. The impossibility of acting may result from a lack of necessary resources, knowledge, or skills.

The capacity and duty to act do not disappear as a result of the absence of malice, the existence of a just cause, or the lack of culpability. An error in the foundation of the duty to act can be presented as an error of Statue. If it is overcome, it could be the basis for imprudence in a culpable crime. In contrast, an error of prohibition is attenuated when it is overcome. The renowned scholar elucidates the viability of errors on the criminal statue and prohibition in improper omission in a compelling manner. He posits that "the author errs about his existence," which does not preclude the typical adequacy, but does exclude the illegality and, consequently, the possibility of a conviction for the culpable act. An error of prohibition is defined as a failure to comply with a duty to avoid a particular result, which occurs when the author is aware of all the circumstances pertaining to their position as a guarantor but is unaware of their duty to avoid the result in question (Roxin, 1979).

We respectfully disagree with this interpretation, as the existence of an invincible error on the objective assumptions of the open criminal statue would be classified as an error of criminal statue in Colombia and by the majority of legal scholars, considering that the position of

guarantor is a structural element of the criminal statue. This is distinct from an error of prohibition, which is sanctioned for the absence of malice because the objective elements of the conduct are not known to be criminally relevant to society. Consequently, in the absence of malice, the conduct may be punished, provided that the culpable offense exists in the criminal law. This is because, in the absence of malice, if there is no culpable offense, the subjective typicity could not be perfected.

Roxin's theory is particularly relevant in delineating the circumstances under which an omission can be deemed improper and criminal liability must be imposed. Some critics argue that the theory may extend criminal liability inappropriately, particularly in situations where there is no clear legal duty to act. Nevertheless, Roxin's contribution has been substantial in the evolution of modern criminal law, providing a theoretical framework for the analysis of how omissions can be as relevant as positive actions in the commission of crimes, particularly in contexts where there is a relationship of control or dominance over the criminal situation, as perceived through the lens of objective imputation.

Table 1. Dogmatic evolution of the assumptions of improper omission worldwide.

Dogmatic current	Approach	Authors	Year
First stream	Causalist	Lüden, Merkel, Binding	Omitting conduct that does not prevent the harmful result would be punished in the same way as the penalty for the action contemplated.
			The moment of causality of the improper omission is the will to stop the taking of measures that avoid the danger.
			Commission by omission when there is a harmful modification in the outside world.
Second stream	Ontologist/normativist Formal theories	Feuerbach's formal theory of legal duty	Constitution and the Law
	Materials	Gimbernat Ordeig	1970s Danger Focus Theory.
			The existence of: (i) positively and materially there is a source of danger (ii) of real measures that can avoid the unlawful harm to determine the probabilities that such a measure would have effectively avoided the unlawful result.
		Armin Kauffman's theory of functions	(i) By the legal duty of vigilance over a legal asset to avoid all attacks against it. (ii) Supervision of the sources of danger without discrimination of the legal assets that are threatened by the source.
Third stream	Mixed	Schünemann	It arises from mastery over the foundation of acting. Equating the commission by omission to the action in the budget that the guarantor is a special subject and must have the capacity to update his conduct.
		Jakobs	Competence by organization and competence by institution. The non-existence of the avoidability link beyond all reasonable doubt must be proven in the

Dogmatic current	Approach	Authors	Year
			same way that the existence of the causal link must be proven for the active conduct to be configured.
		Roxin	Duty to avoid typical results based on the theory of open criminal statues and the capacity for individual action. The author must be aware of his position as guarantor, he does not proceed in the mediate authorship and there may be both errors on the criminal statue and prohibition. The theory of increased risk allows imputation objectively when, to a degree bordering on probability, the perpetrator's ability to act could have avoided the typical result.

Source: Own elaboration.

Scope of application of commission by omission (improper omission) in Colombia

It is first necessary to make a conceptual differentiation between the terms “typicality” and “typical adaptation process.” Typicity, in the context of criminal law, refers to the dogmatic delimitation of the structural elements that derive from the respective criminal statue (objective, subjective, and their negatives). This serves as the basis for the process of typical adaptation, which is carried out by the Delegate Prosecutor upon receiving a noticia criminis of a punishable conduct. In this process, the prosecutor must advance the criminal action when there is a reasonable inference of authorship or participation in the structural elements delimited by the typicity of a punishable conduct. With regard to the conduct (active or omission) in question, from the procedural moment of the imputation onwards, there must already be a clear legal imputation that defines the legal classification. This may be direct or indirect typical adaptation (mediate authorship, co-authorship, acting for another, complicity, special intervenor, determiner, attempt and improper omission). Furthermore, the subjective criminal statue must be committed in what modality.

The structural elements of the criminal statue serve to delimit the judgment of typicity. Consequently, the responses to the issues of culpable crime, particularly in the context of error on the criminal statue through Welzel's rigorous theory of guilt, demonstrate that the invincible error on the criminal statue eliminates malice (knowledge and will) precisely because the individual in question had an erroneous understanding of reality, meaning that his will was not to make the typical description.

Nevertheless, with regard to human behavior, there were two distinct areas of the criminal statue. The objective and the subjective aspects of the criminal statue. The objective aspect must be analyzed first. This involves determining whether the actions or omissions in question satisfy all the requirements of the structural elements of the criminal statue. This is done through a causal link in which there is a reasonable inference of authorship or participation in the means of knowledge. This includes material elements of proof and physical evidence. These must meet the minimum criteria of objective imputation. This is done through an indirect adjustment of the reasonable inference of authorship or participation.

In the scientific work entitled "Sexual Crimes, Typicity and Objective Imputation," a precise classification of the functionality of the structural elements of the criminal statue in the framework of objective imputation can be rescued when it proposes that,

(…) typicity depends on the configuration of objective and subjective nature of the criminal statue and the NON-configuration of the negative elements of the criminal statue. We specify the composition in the following classification of the elements by their nature and their charge:

OBJECTIVES – POSITIVE

- That a causal relationship has been established between the conduct (by action or omission) that creates an impermissible risk and the typical result contained in the legal provision, which is within the purpose of protection of the norm.

- That all the objective elements required by the typical structure of the criminal statue, interpreted and delimited by binding jurisprudence are configured.

SUBJECTIVE – POSITIVE

- That the modality of the punishable conduct has been configured (Intent <of the first degree, of the second degree, or eventual>, guilt <with or without representation>, or preterintention).

- That the subjective ingredients required by the typical structure of the crime have been configured.

In addition, the NON-configuration of negative elements of the criminal statue must also be evidenced, since they would NOT allow the configuration conduct of the criminal statue. Namely, some of the negative elements are as follows:

OBJECTIVES – NEGATIVE

- That there is no cause that exempts the configuration of the structural elements of the criminal statue in accordance with Article 32 of the CPC.

- That there are no criteria for the objective imputation of exclusion accepted by binding jurisprudence, such as the confidence principle, being out of the purpose of protection of the norm.

SUBJECTIVE – NEGATIVE

- That there has not been an invincible error on the criminal statue, which, providing for the provisions of Article 32 of the CPC in its tenth numeral, expresses the punishability of the invincible error on the criminal statue when it is provided for in its culpable modality.

(Montes & Soto, 2024)

In order to substantiate the position of guarantor, it is necessary to evaluate the negative elements of the criminal statue and the negative elements of illegality at a later stage. This evaluation must determine whether the impermissible risk has any justification or inculpability. This includes

errors according to the strict and limited theories of guilt. In the first instance, as proposed by Welzel, the invincible error is not considered culpable because there is no intent or fault. Instead, it is punished for the error on the criminal statute that can be overcome according to Article 32.10 of the Criminal Code, which states that the conduct must admit the culpable modality.

In the second case, the error of prohibition under numeral 11[6] absolves by invincibility when there is no knowledge of the illicit and punishes the error that can be overcome with an attenuated malice in accordance with the strict theory of guilt. This is because, in this instance, the typicity was perfected; the only thing that would not be present is the awareness of the unlawfulness, when the defendant is unaware of the prohibition.

The position of guarantor requires that, in the seat of guilt, in addition to the presuppositions of imputability and the non-enforceability of other conduct, awareness of the unlawfulness is not required. Rather, it is sufficient that the accused was aware of the actualization of the unlawfulness. This means that the question must be analyzed whether the accused was materially aware of the disvalue of the result that causes the unlawfulness. If the accused was aware of this, he may be held responsible for not preventing the result that he knew it was legally disapproved.

The prevailing opinion of the Criminal Cassation Chamber of the Supreme Court of Justice of Colombia is that participation is not an appropriate charge in crimes of improper omission. This can be evidenced by the ratio decidendi of the conviction against General Uscategui[7], in which he clarified that his conviction was in the title of author. In contrast, there is the subjective aspect of the criminal statue, which is the title by which the cognitive-volitional aspect of the behavior is evaluated (malice, guilt, or preterintention, and errors on the criminal statue). It is also noteworthy that eminent theorists such as Roxin subscribe to the principle of equivalence, which is applicable to both co-authorship and participation.

From this perspective, the deficiency in the objective aspect of the criminal statue can be more clearly appreciated when we consider the typical adaptation. In such cases, there is a tension when there is no causal link between the omission and the result. Instead, there is a lack of a legal duty to truly avoid unlawful damage in the circumstances mentioned in accordance with Article 25[8]. This is in contrast to the general duty clause of Article 2, which establishes the legal duty to avoid such damage. The lack of a clear causal link between the omission and the result is further complicated by the fact that the jurisprudence in force does not clearly define the circumstances under which this duty is applicable. In other words, the subject commits the conduct not because his actions caused the typical description, but because he does not avoid it. This condition is not contemplated by the criminal statue, since there is no express mention in the criminal statue of homicide that the perpetrator must prevent the death of another who has the duty to protect.

[6] Art. 32.11 del Código Penal
[7] Radicado 35113 de 2014.
[8] Código Penal colombiano.

A clear relationship has been identified throughout our dogmatic argumentation. This relationship can be described as follows: in the same way that the attempt is used as a response to the imperfect objective aspect of the criminal statue as an amplifier device to adapt a behavior that does not fit within the typical description itself, but, by virtue of Article 27,[9] a sentence can be imposed from the moment that, with will, the execution of criminal behaviors begins. This is regardless of whether the external cause that deviates the criminal behavior is present or not.

From our perspective, the role of guarantor represents a distinctive component of objective, normative nature, which serves to amplify the aforementioned circumstances. This is because when adapting the quality of the commission by omission (improper omission), it is necessary to refer to the normative circumstances that define the position of guarantor beyond the scope of Art. 29. Authors and co-authors. Furthermore, the governing verb is satisfied through the clauses of equivalence (general and special) outside the criminal statue, as the omitter does NOT "PERFORM[10]" THE TYPICAL DESCRIPTION. Consequently, the clause of equivalence of the improper omission is used in the same way as the clause of attenuated equivalence of the attempt, which serves as a amplifier device in the typical indirect adequacy of the criminal statue. This is why there is identity between the functions, enabling imputation through the perfection of the objective aspect of the criminal statue. This absolves the framework of an imperfect objective aspect of the criminal statue, with effects of objective atypicality of the conduct. This is in the same function as the other amplifier device of the criminal statue (mediate authorship, co-authorship, acting for another in their functions, complicity, intervening and the determiner, in Colombia).

In light of the fact that the 1980 Colombian Criminal Code did not include any evaluative circumstances that would delimit in which circumstances the control of the result was due to omission conduct, the legislator enshrined the surveillance of a certain source of risk by the competence of the institution in the governing rules on typicity.

In particular, Jakobs' theory, which posits the position of guarantor derived from the competencies of institutions and organizations, is analogous to the position outlined in the second paragraph of Article 10 of the new Penal Code, Law 599 of 2000. This article states, "In the case of omission criminal statues also the duty must be enshrined and clearly delimited by the Political Constitution or in the Law." Similarly, Article 25, in its second paragraph, which delineates the commission by omission, stipulates that "it is required that the agent (...) has been entrusted as a guarantor with the surveillance of a certain source of risk, in accordance with the Constitution or the Law." [11]

In the same legal disposition, the concept of competence by organization was integrated when the legislator included the expression "it is required that the agent be in charge of the protection of the protected legal asset (...)," thereby abandoning the position of guarantor when he does not prevent the result of a typical description from doing so. This is analogous to the finalist theory

[9] Código Penal colombiano.

[10] El mismo realiza del Art. 29 de la Ley 599 de 2000.

[11] Jakobs *Supra.*

proposed by Kauffman. In terms of general equalization clauses based on the supervision assigned by the competence of the institution, that is, by the supervision in its charge, there is a potential for legal goods to be endangered in accordance with the competence of the organization and the capacity for action that reflects a willingness to engage in fault or willful misconduct.

Furthermore, numerals 1, 2, 3, and 4 are constitutive positions of the guarantor with respect to typical conducts against legal assets, including life and personal integrity, individual freedom, and sexual freedom and formation. These are provided for in the paragraph of the same article, which lists the doctrinal institutions in the same order as the sphere of domination, the close community, risky plural activity, and interference.

Examples

Own domain – A nurse who neglects her duty to maintain the patient's life may be held legally responsible for the patient's death. In such a case, the nurse had the authority to determine the patient's fate within the context of her professional role. Consequently, when the nurse fails to comply with her legal duty by causing harm to the patient's legal assets, she must be held accountable for culpable homicide as the perpetrator. This is because the objective and subjective requirements of the crime have been met without any justification or extenuating circumstances..

Close community of life between people – The husband, who meets his wife in the midst of a cardiac arrest and fails to provide the necessary medical assistance to prevent her death, is held culpable for her demise. Culpable homicide by improper omission in the authorship is constituted when the objective and subjective elements of the criminal statue are perfected without justification or inculpability of any kind.

It would not be an omission of help since, as spouses, they share a close community of interests and therefore the husband is not considered the guarantor when he fails to perform acts that would effectively avoid the result.

Risky activity by several people – In a similar fashion to the aforementioned case, a teacher who elected to embark on an excursion with her pupils ultimately resulted in the demise of two of them[12]. In this instance, the teacher was held liable for the deaths of the two students on the grounds of her role as the guarantor of the competition's safety. Consequently, this example can be extended to encompass the position of an organizational guarantor.

Interference – The legal duty to save a person who has been run over is incumbent upon the driver of the vehicle that caused the accident. However, if the driver fails to save the victim despite having the capacity to do so, the driver may be held culpable for homicide. This is known as culpable homicide by improper omission. The driver is culpable if the objective and subjective elements of the crime described above concur without justification or inculpability. The driver is the perpetrator of the crime. The crime is committed when the driver creates a legally disapproved proximate risk for the legal good corresponding to the victim.

[12] SP-54940-/22

Nevertheless, the aforementioned positions of guarantor do not preclude the possibility of exclusion based on competence or organizational affiliation from the overarching clause of equivalence that is rooted in the political-criminal structure, which is derived from the normative currents that have been previously referenced. Consequently, the position of guarantor can be derived from the general clause of the legal duty to prevent injuries or dangers to legal goods due to conduct, omission, or those circumstances that have been previously listed.

In this manner, the Criminal Cassation Chamber of the Supreme Court of Justice indicates in Judgment SP-1291 of 2018 that the position of guarantor encompasses two categories and is held by the individual who possesses the "competence derived from organization, institution, or interference." In conclusion, the interference is part of the competence by institution in that an unlawful situation of risk was created in proximity to the legal good, which the law has provided as typical. This duty is based on the understanding that human beings have the right to endanger legal goods in certain circumstances legally, which also generates a duty to protect legal goods that may affect those rights.

In the judicial precedent of General Uscategui (SP-7135/14), the Supreme Court delineated the typicity of the position of guarantor with respect to the public force. It did so by adding special normative ingredients through a jurisprudential rule, which verifies whether the harmful or dangerous result of the legal assets was knowable and avoidable. The aforementioned considerations are:

1. Situation of danger to the legal good.

2. Failure to perform the due conduct, for not acting having the duty to do so to avoid the result that increases the risk created.

3. Possibility of performing the life action, that is, that the subject is in a position to avoid the result or reduce the risk through the life action, for which he must have i) knowledge of the typical situation, that is, what result is going to occur, ii) have the necessary means to avoid the result, (iii) have the possibility of using them in order to avoid the result.

4. Production of the result.

The final update to the Criminal Cassation Chamber of the Supreme Court of Justice was in SP-801/22[13], which followed the jurisprudential line of SP-5333 of 2018. In this earlier ruling, the special normative ingredients of the criminal statue mentioned above were updated, beyond the systematic interpretation of the legislative technique. As the amendments were introduced via a jurisprudential rule, it is necessary for this to be reflected in practice for the typicity of the commission by omission to be perfected as a complement to Article 25 of the Criminal Code. This is particularly relevant in cases where it is probable that the capacity for action was sufficient to avoid the result, which is restricted by Article 2347 of the Civil Code.

Those normative presuppositions are:

[13] Radicado 54940 de 2022

i) Knowledge of the defendant's position of guarantee derived from a legal or constitutional mandate or his competence by organization or interference,

ii) the injury to a protected legal asset that is in their charge,

iii) the ability to take the measures required to prevent its affectation,

iv) the non-execution of such measures, and

v) The awareness, on the part of the agent, of the normative ingredients of the infringement, his condition as guarantor and his capacity for action.

Upon careful analysis of Numeral V, it can be reasonably concluded that in addition to the special objective-normative ingredients previously discussed, there is an update to the normative elements of guilt. It is sufficient to demonstrate the necessity of awareness of the normative elements of the "infraction," which is equivalent to awareness of illegality. This awareness is derived from the position of guarantor, but not from the assumption that the specific situation applies to the perpetrator.

In other words, awareness of the illegality is already complemented by awareness of the position of guarantor and its capacity for action to avoid the infringement. This is deduced from all the clauses of equivalence and their jurisprudential updating mentioned above. It can also be deduced when we contemplate awareness in the capacity to act. Consequently, the non-enforceability of other conduct as an element excluding guilt would result, which would not require the perpetrator to actualize his conduct when he realistically cannot avoid the harmful result of a good legally protected by criminal law. This is explained by the fact that there has been no updating of the conduct, and therefore the perpetrator does not deserve social reproach.

With respect to the avoidability nexus, the Criminal Cassation Chamber of the Supreme Court of Justice offers the following summary of the relevant paragraphs:

For this omission behavior, the avoidance nexus is verified. This is defined as the expected conduct that, if it had been carried out, the subject would have interrupted or avoided the result. In order to equate the causation of this and the relationship of the omitter with the protected good, the legal duty of the person called upon to avoid that consequence must be analyzed. This specifies who must guarantee its non-causation, either through the function of protection or surveillance (STC-SP-3705/18).

3. Discussion

In Colombia, can the position of guarantor be extended to the protection of legal assets that are not exhaustively enshrined in the First Paragraph of Article 25 of Law 599 of 2000?

In order to ascertain the viability of applying Article 25 of the Criminal Code outside the legal assets set forth in the first paragraph, we seek to answer the question posed in the aforementioned chapter. At first glance, it might appear that economic assets are not among the legal assets for which they serve as guarantors, given the exhaustive lists' limited scope and focus on protecting

life, personal integrity, individual freedom, and sexual freedom and formation. It is, however, essential to emphasise that the exhaustive lists do not preclude the general clause regarding the position of guarantor, whether in the context of competence by organisation or institution.

From this starting point, it is possible to appreciate the position of guarantor in the protection of legal assets other than those mentioned in the paragraph, such as economic assets, the public administration. This is exemplified by the case of intentional and culpable embezzlement when there is a hierarchical functional dependence and the result is known and not avoided or monitoring and control is omitted.[14]

To illustrate, in the case of a commission scam due to the omission of institutional competence, the Law provides for duties for natural persons who carry out contractual negotiations to inform in the event of an error that changes the factual or legal circumstances of the business. Consequently, there is a reluctance to hide the inconsistency of the legal transaction in order to make the other person fall into error. In addition to presenting causes of defects of consent due to civil fraud, this conduct also fits within a typical pattern. The person in question had the institutional duty established by the law, in this case the Civil Code, which violates the principle of good faith when it does not prevent the perfection of the business. Furthermore, through its deceptive will, it did not prevent the causal course that configured the harmful result of the economic patrimony in the scam.

In this context, the Supreme Court of Justice has specified that in contractual relationships, the party in a superior position to the other will hold the position of guarantor. Fraud proceeds by improper omission, depending on the functional positions held by taxpayers and active subjects in society.[15]

Another clear example of the above is the responsibility of the commission by omission of competence by institutions in embezzlement by appropriation. This may occur when an institution fails to fulfill its legal duty of vigilance with malice, or when the culpable modality of embezzlement is typified, and the institution does not prevent the appropriation of resources by officials or individuals who obtain their right through fraudulent acts in administrative procedures or judicial.

Finally, a compelling argument demonstrating the inherent challenges of the concept of improper omission can be found in the Code itself. While it addresses the clauses of equivalence set forth

[14] Supreme Court of Justice of Colombia, Criminal Chamber. Judgment of December 6, 1982, M.P. Luis E. Aldana; Supreme Court of Justice, Criminal Chamber Judgment of September 23, 2003; Supreme Court of Justice, Criminal Chamber. Judgment of September 8, 1981, M.P. Dr. Fabio Calderón Botero.

[15] Judgment of June 12, 2003, with Radicado number 17196; Reporting Judge: Álvaro Orlando Pérez Pinzón, Judgment Rad. 17196. June 12, 2003. Supreme Court of Justice, Presiding Judge: Álvaro Orlando Pérez Pinzón, Judgment of October 27, 2004, under file number 20926; Presiding Judge: Mauro Solarte Portilla, Judgment of October 27, 2004, under file number 20926; Presiding Judge: Mauro Solarte Portilla, Judgment of June 10, 2008 with Radicado number 28693; Reporting Magistrate: Maria del Rosario González de Lemos.

in Article 25 of the Criminal Code and the prevailing jurisprudential rules, it also encompasses criminal statues omission that ARE in the Criminal Code, which are individually typified. These include the omission of control (Art. 325, Penal Code), the omission of support (Art. 424, Penal Code), the omission of a complaint by an individual (Art. 441, Penal Code), and so forth. The notion of an active nature is contemplated in the code, that is, in which there is no typical active conduct that typifies an action of the conduct. This is exemplified by the omission of assistance (Art. 131, Penal Code), which can extend beyond the sphere of the initial omission and could be consumed by commission by omission of other, more serious crimes. Prevarication by omission (Art. 414, Penal Code) represents another criminal statue, which presents exceptional circumstances that could cause legal uncertainty due to their typification by active commission.

The first occurs when the individual who is responsible for providing assistance within an institution fails to fulfill this duty and subsequently dies as a result of the failure to protect the legal assets of those outside of their care. In such a case, the most appropriate response would be to hold the individual responsible for the death of their spouse through the act of culpable homicide. This would be a result of their failure to fulfill their duty as a guarantor, which involved maintaining a close bond between individuals.

The other scenario is that of criminal prevarication by omission. In this instance, an omission, a delay, refusal, or denial of an act that is within one's functions when it does not prevent violent carnal access, having the means, obligation, and ability to do so, but deciding not to do so, would not be considered prevarication by omission, but rather carnal access, when all the presuppositions of improper omission are met.

In this context, the concept of violent carnal access can be adapted by improper omission when it is motivated by the existence of the position of guarantor of the specific legal duty. This duty has a substantial difference in the punitive dosage, with a range of 144 to 240 months, in favor of prevarication by omission, which carries a penalty of 32 to 90 months. This penalty is mitigated by an improper typical adjustment, which is contrary to the function of fair retribution of the penalty, as outlined in Article 4 of the Penal Code.

In particular, the typification of the aforementioned circumstances has been employed to avoid confusion. This is achieved by expressing the omission in the criminal statue, while simultaneously indicating that, in the event that it is appropriate to adapt the improper omission as a title of imputation, when there is an erroneous typical adaptation due to other omission conduct, Such an act would result in an imputation and eventual accusation, not only erroneous but also attenuated. It is important to note that if the individual in question holds the quality of guarantor with respect to the legal duty, then he must answer for the affectation of the legal assets in his charge. This is a more severe penalty than that of the crime of own omission.

Judgment C-1184/2008 of the Constitutional Court of Colombia

In its 2008 decision in C-1184, the Hon. Constitutional Court addressed the issue of improper omission and equivalence clauses in the context of criminal law. In this judgment, the Court makes a distinction between the general clause of equalization of improper omission, which

applies to all legal assets, and the special equality clause, which is restricted to the specific legal assets established in the first paragraph of Article 25 of the Criminal Code.

The general clause of equating improper omission implies that the omission to act in the face of a legal duty, when there is a duty to do so, can be equated to the positive action that produces the same harmful result. In other words, inaction can be considered equivalent to action, provided that the requisite conditions established by law are met.

Conversely, the special equalization clause, present in the paragraphs of Article 25 of the Criminal Code, is limited to certain specific legal interests. This implies that only in relation to these specific legal assets can the omission be equated with the action, as established in those paragraphs. The Constitutional Court thus recognizes the importance of this distinction in order to ensure proportionality and justice in the application of criminal law. The delineation of the limits of equalization clauses serves to prevent their arbitrary or disproportionate application, thereby ensuring respect for the fundamental rights of citizens.

In other words, the 2008 judgment C-1184 establishes that the general clause of equivalence of improper omission is applicable to all legal interests, while the special equivalence clause is restricted to the specific legal interests mentioned in Article 25 of the Criminal Code. This distinction is essential to guarantee legality and proportionality in its application in criminal law, while clarifying the application of improper omission outside the typical limits of the first paragraph of Article 25 of the Criminal Code.

As has been mentioned throughout this research, improper omission as an amplifier device of the criminal statue is of high utility, since it serves as a vital tool of the social rule of law to maximize the preventive and retributive purposes of the penalty. This is achieved by following the logical line of the deterrent effect of the threat of the penalty, which also intimidates the person who does not prevent the injury to the legal assets that are within the domain of his position as guarantor, to have to fairly compensate the victims of the omissions of his duties.

The ongoing development of constitutional and ordinary jurisprudence has facilitated the evolution of the concept of improper omission, which is still being shaped and delineated in its application. It is evident that the existence of such an institution enables society to maintain peace and stability through the implementation of effective social control mechanisms. In the absence of this institution, the consequence would be either the imposition of a lenient penalty for one's own omissions or, in the absence of such omissions, the perpetuation of impunity. Let us consider some illustrative examples of instances where these phenomena may manifest.

Cases in which the general equalization clause has been applied

In Judgment SP-36422/12, the Criminal Cassation Chamber of the Supreme Court of Justice of Colombia did not annul the conviction of the Telecommunications Manager of Bucaramanga SA ESP for embezzlement by culpable appropriation. Similarly, the conviction of the Deputy Manager of the same entity for embezzlement by appropriation in the modality of eventual fraud was not overturned. Instead, the court established a tacit agreement between the two managers

and the special interveners, whereby the managers would facilitate the appropriation of public resources through their apathy and carelessness.

In addition to the protection of the environment, which is currently under threat in Colombia, the protection of which has been reinforced by the threat of punishment for managers and senior managers who fail to take the necessary measures to safeguard it in solidarity with society. Similarly, the effective criminal protection that has been established has facilitated the peaceful jurisprudence of improper omission in the crime of embezzlement. This has clearly delineated the viability of both modalities (intentional and culpable) and as author or participant. As evidenced by the following quote, the Manager of [...] did not marry, confirming the conviction for culpable embezzlement,

"Moreover, it is perfectly possible that in crimes of the tenor of the one under investigation here, in which, given their complexity, several executive actions must be carried out and even the intervention of several authors or participants is necessary, by action or omission, in a malicious or culpable manner, a context in which different types of liability must be deduced, as in this case was done in the instances, among other reasons, because those who finally obtained the illicit economic gain are alien to the affected company and therefore should have had the consent or take advantage of the extreme apathy of those who, within it, they were obliged to monitor, guard and invest the money properly.

(…) counting, in that execution, on the absolute neglect or culpable omission of the employees of the defrauded company" (STC-SP-36422/12).

In the 2014 Judgment of the Reporting Magistrate Gustavo Enrique of the Criminal Cassation Chamber of the Honorable Supreme Court of Justice, an exemplary illustration of the application of the improper omission against the Manager of the Aqueduct, Sewerage and Sanitation Company Triple A S.A. is presented. As the author of the aforementioned judgment, it is observed that the Manager of the Aqueduct, Sewerage and Sanitation Company Triple A S.A. may have engaged in fraud by "(...) having omitted to take initial measures to counteract the environmental problem created by their company (...)". This is further specified by the position of real and material guarantor on the source of danger that they dominate in the following essence,

"It should also be added that the criminal conviction handed down against one of the directors of the company or its legal representative, or any employee who is said to have a duty of guarantor, cannot come from a fiction, but from the irrefutable demonstration that that particular individual not only intervened in the execution of the crime, but that he acted with full knowledge and will, if it is a matter of malicious behavior" (STC-SP-16794/14).

The impact of improper omission on the social control of criminal law is demonstrated by these real-world examples, which illustrate how individuals in positions of authority, such as those in powerful companies or public service, who are entrusted with the responsibility of safeguarding legal assets, often fail to prevent the typical result, resulting in significant damage to those assets and, consequently, to the public administration.

It is worthwhile to consider the potential benefits of the application of improper omission as an effective criminal protection for the assets of other legal assets outside the first paragraph of Article 25 of the Criminal Code. (i) Reduction of the commission of punishable conduct by satisfying the purpose of the general prevention penalty; (ii) sanctions consistent with the standards of the Social Rule of Law, which make reparations to the victims in full, enriching the purpose of fair retribution; (iii) both a unification in the treatment of viability of the protection of legal assets outside the first paragraph, through the indirect typical adequacy by improper omission of the crimes of result, in relation to the typical adequacy of the active conduct. In accordance with the established jurisprudence, which equates the action with the omission and delimits the latter within the former's general equivalence clause, the amplification of the active criminal statue to the omission conduct is permitted. This would strengthen peace in the community, as it would promote the material consolidation of values through the duties of solidarity between individuals.

4. Conclusion

Afterall, this article has explored the intricate dynamics of improper omission as an amplifier device of the criminal statue in the Colombian legal context. A detailed analysis has demonstrated how improper omission allows the imputation and punishment of individuals who, without fulfilling the typical description of a conduct, incur criminal liability when they abandon the position of guarantor in the absence of a nexus of avoidability. This occurs when the perpetrator fails to prevent the typical results that, in the case of legal assets in their charge, the perpetrator can update their conduct. However, they refuse to do so without sufficient justification.

It is crucial to differentiate between the general and special clauses of equivalence with regard to improper omission. While the former is applicable to all legal assets, the latter is limited to specific legal assets as outlined in Article 25 of the Criminal Code. This distinction is essential to ensure coherence and proportionality in the application of criminal law, thus avoiding possible arbitrariness and violations of fundamental rights, while allowing for the effective protection of positive duties to protect legal assets through criminal protection.

In particular, the question of extending the position of guarantor to the protection of legal interests beyond those contemplated in the first paragraph of Article 25 of the Criminal Code has been addressed. By means of practical examples and analyses of case law, it has been demonstrated how improper omission can be constituted in a variety of contexts, including situations in which typical behaviors may arise as a result of the negligence or eventual inaction of an individual, whereby the individual in question removes himself from the protection of the legal assets in his control, which he has assumed voluntarily, so that an omission is constituted without sufficient justification.

In conclusion, the clarification of the concepts outlined in this discussion will contribute to the ongoing academic and legal discourse on improper omission in Colombia. It will provide a comprehensive and nuanced understanding of its application and implications within the

country's legal framework. We encourage further reflection and debate on this complex issue, with the aim of strengthening and improving the administration of justice in Colombia.

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