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CRIMES OF OMISSION, OMISSIVE OFFENCES AND PENAL RESPONSIBILITY BECAUSE OF OMISSION

I. Introductory remarks

During the last 100 years three penal codes were enacted in Hungary. During the time of the Austro-Hungarian Monarchy the Penal Code of 1878 was enacted (which, naturally, had been in force only in the territory of historical Hungary and it was not valid for the territory of the Austrian Empire); the second one was enacted in 1961 and the present one in 1978. In the following parts when Hungarian positive penal law is mentioned we refer to the Penal Code of 1978.

First of all we make a few remarks in connection with the appearance of the crimes of omission in Hungarian penal law. True crimes of omission (echte Unterlassungsdelikte) appeared already in the penal code of 1878 but it may be seen, the legislator displayed extreme carefulness concerning this category of offence. According to the classical principles of law, true crimes of omission – *as delicta propria* – were created in the group of crimes of office exclusively. These definitions of offence established essentially the responsibility of public officials who recognized in their official capacity that persons were arrested lawfully or unlawfully and ommitted to perform their official obligations in connection with that (e.g. informing higher authorities, relasing unlawfully arrested persons, etc – arts. 196 – 197 PC). It is a trait of both cases that the basis of penalization was characterized by the omission of the specific legal obligations prescribed for the particular public official. Among the true crimes of omission the Penal Code of 1878 mentioned only one case as *delicta communia*. According to that, a criminal offence is committed by the person who is aware of facts or evidence on which the acquittal of an innocent accused or the release of a convicted innocent person depends and would not disclose them to the competent authority (art. 230). However, it should be emphasized that the Penal Code of 1878 prescribed no general obligation of reporting the offence to the proper authorities in the case of any criminal offence.

It should be mentioned that one may find a number of definitions of criminal offence in the Penal Code of 1878 that could be regarded as

not true (mixed) crimes of omission (unechte Unterlassungsdelikte). Such were typically those offences of result (Erfolgsdelikte; the so called offences of result with an open definition of conduct) where the result could be produced also by omission, e.g. certain varieties of the offences against life and bodily integrity or crimes of office. We have mind, in primarily intentional offences in certain cases, however, under special rule of the Code, producing the result by negligence was also punishable. This group of the mixed crimes of omission appeared essentially in the same realm even in later penal codes, for this reason, this group is not to be discussed here.

In the first half of the twentieth century, particularly in the era between the two world wars a slow increase in the number of the true crime of omission could be observed as a result of the new ideas of penal law. It was in connection, on the one hand, with the legislative intention striving for a more intensive protection of public interests and, on the other hand, it was related to the regulation of the economy under criminal law. As the state control over the economy was growing, regulations of penal law were issued and they penalized the omission of keeping certain records or making certain reports. The number of definitions of true offences of omission was not significant and their appearance in the judicial practice was extremely rare. For example, the protection of public health was aimed at by those provisions of penal law that penalized the omission of obligations related to the registration of drugs enumerated in the international convention on opium of 1925. We also have te mention that Act II. of 1939 on the defence of the country, which was under the mark of war preparation, included provisions for the cases of the omission of obligation concerning military service manifested in the breaches of the obligations to register, to report and to appear. As far as the practical consequences were concerned, this group of criminal offence was the most significant. It should also be mentioned, it was in this Act that the criminal liability of legal persons appeared first in Hungary. According to the Act, if it was a legal person who had a legal obligation established by the Act or by a decree or a measure of an authority pursuant to the Act, the breach of which was declared by a legal provision to be a criminal offence, in the case of a criminal offence origination from the omission, that person was to be regarded as the perpetrator who should have had taken the measure aimed at the performance of the omitted obligation. On the basis of this principle the responsibility of the legal persons appeared exclusively as individual liability under criminal law.

After 1945 the development of Hungarian penal law was characterized by the fact that, in addition to the still valid PC of 1878, a number of provisions of penal law were enacted which were in connection with the reorganization of the property relations, the system of economy and the protection of the new conditions of economy. It was particularly in connection with the intensified state control over the economy that penal law made use of the means of the true crimes of omission. As early as in 1946 a statute was issued which, in connection with offences endangering

the interests of public supply, that qualified as a criminal offence the breaches of obligations based on legislation on the obligatory production of products and produces and also the omisison of registering the stores of such products and produces. Provisions of a similar character could be found in the penal statutes of the years of the fifties issued in order to protect planned economy and planned foreign currency policy. It was in this period that a general obligation of reporting offences against the state and social property, the breach of which qualified as a criminal offence, appeared in Hungarian law.

From the sixties the number of true crimes of omission has not been growing any more, the penalization of acts of this character has even been pushed in the background. In the Penal Code of 1961 and in the Code of 1978, one may find only a few true crimes of omission among the provisions protecting the relations of economy. A general obligation of reporting criminal offences has not been prescribed by these Codes and even the misprision of specific criminal offences has been penalized in an extremeley restricted area. Among the true crimes of omission in present practice we can find only certain definitions of offences which will be discussed in later parts.

From the outlined development concerning crimes of omission one may conclude that Hungarian penal law makes only a restricted use of the means of true crimes of omission. And from the point of view of legal policy the conclusion that can be drawn is that the true crimes of omission originate from certain social interests, primarily of the requirements of the protection of human life and bodily integrity or of the economy, and not from the requirements of the general control of society. The number of the offences belonging to this group is not likely to increase in the future.

In spite of the development in the realm of law, the rules of the General Part of the Codes that are relevant to our topic remained essentially the same during the last hundred years. The exception is the rule concerning the result upgrading the offence, according to which (in both the Code of 1961 and of 1978) the graver consequences attached to the result as an upgrading circumstance may be applied only if the perpetrator was at least negligent as far as the result was concerned. Accordingly, if an offence by intention (e.g. intentional bodily injury) is upgraded by the result (e.g. death) for the upgrading result (for the death of the victim) the perpetrator is responsible on the condition that his negligence embraced this result (art. 15. of the P.C.). This provision is valid also for conduct of commission by omission and it is also valid for the upgrading result of offences by negligence.

We also have to note that for a long time the picture formed of *echte and unechte Unterlassungsdelikte* had been a simplified one: *echte Unterlassungsdelikte* could be perpetrated exlusively through omission and they could not be regarded as offences of result *(Begehungsdelike)*, whereas *unechte Unterlassungsdelikte* could be perpetrated equally by action and omission and they were necessarily offences of result *(Erfolgsdelikte)*. However, it has been realized that even offences that can be committed

exclusively through omission may have result, according to the definition of the offence) such as the omission of providing care, or such upgraded varieties as failing to provide assistance resulting in someones death or the omission of providing maintenance resulting in grave privation. (And reversely, among criminal offences which can be committed equally through action and omission, there are some which do not have a result defined as the element of the definition of crime (e.g. criminal trespassing). And since the exact distinction of Begehungsdelikte and Erfolgsdelikte within crimes of omission has significant consequences, the following classification is justified:

a) true crimes of omission as crimes by action *(echte Unterlassungsdelikte als Begehungsdelikte):*

b) true crimes of omission as offences of result *(echte Unterlassungsdelikte als Erfolgsdelikte):*

c) not true (mixed) crimes of omission as crimes by action *(unechte Unterlassungsdelikte also Begehungsdelikte):*

d) not true (mixed) crimes of omission as offences of result *(unechte Unterlassungsdelikte als Erfolgsdelikte).*

II. The ontological structure of omission

1. According to the prevailing conception in Hungarian penal theory omission is not nothing in absolute sense but is not doing something, an inaction breaching a duty. The most general definition namely that omission is inaction which breaches a duty, through the devolution of the ancient principle of *impossibilium nulla est obligatio*, comprises, of course, the possibility of action, too: nobody may be obliged to do the impossible. However, in the Hungarian theory of penal law there exists another conception which regards the obligation to act and the possibility of action (in concreto for the person in the given situation) as separate criteria and professes that the ontological basis of omission is the possibility of action, its normative criterion is the obligation to act, consequently, omission is the unity of the ontological and the normative.

Since our task now is the ontological characterization of omission it is not superfluous to point out that from a certain point of view the role of norms prescribing obligations is determined ontologically: the existent may be declared to be non-existent and vice versa and they are not fit to derive the ontological nature of a phenomenon which has come into existence. It is a consequence of this recognition that the view which derives the causality of omission from undutifulness has not been favourably evaluated by the Hungarian specialists of the theory of penal law as we shall discuss it later on, in the same way as Hungarian authors usually avoid the derivation of the distinction of action and omission from the prohibitive or imperative form of the norm. In reality the situation is the opposite, it is according to the active or passive ontological nature of the behaviour that we put the norm in the form of the grammatical prohibitive or imperative.

When we discuss the ontological structure of omission in the following parts, we study omission primarily as inaction not considering undutifulness. However, prior to that, we have to point out in connection with undutifulness that while the action as a fact and its unlawfulness are clearly separate from a dogmatical point of view, the relation between undutifulness necessary for the generation of omission and unlawfulness may be interpreted in different ways. Thus, in the literature of Hungarian civil law one can read the opinion, according to which omission as an undutiful inaction is unlawful by necessity. Among criminal lawyers it is the view that prevails according to which it is a different question that to the generation of omission mere undutifulness is necessary and it is again different whether there is also unlawfulness in the given situation or it is excluded.

2. Omission, the same way as action, is one of the forms of appearance of human behaviour. One of the consequences of keeping this fact in mind is that in the Hungarian theory of penal law there were not adherents of the conception that finds the relation of "A" and "non A" between action and omission – not being able to find a common criterion. Consequently, the argument of certain adherents of the theory of finality, according to which the connection between action and omission having the mentioned relationship may be created only by finality, could not have an impact.

That setting omission and action as the extreme opposite poles cannot reflect perfectly life either, can be seen from the fact that there occure more and more frequently criminal offences which are perpetrated through the fabric of moments of action and omission. It may be mere actual reality for example if someone causes an accident by not braking inspite of traffic regulations. But it also happens that some conduct is defined by the law in a way which presupposes the fabric of moments of action and omission. E.g. one of the varieties of perjury defined in the Code is that the perpetrator conceales elements of the truth when giving his testimony.

3. In Hungary various schools concerning the doctrines of conduct are known in connection with the interpretation of human conduct (such as the natural, causal, social schools and the school of finality). There is, however, a partially special school, too, according to which human conduct is characterized objectively by the capability of having an impact and subjectively by the *per se* volition (Willkürlichkeit), and in this sense human conduct independent from unlawfulness and culpability is the unity of objective and subjective moments.

The manifestation of the objective sphere of human behaviour i.e. of the capability of having an impact may be specific in the case of various offences of action and omission, inspite of that both action and omission may be related to the capability of having an impact. If this were denied, i.e. without interpreting both action and omission as forms of conduct having equally the capability of inpact, the thesis according to which omission also violates or endangers the legal object (Rechtsgut) would not be convincing either. Besides, on the basis of the outlined doctrine of conduct which finds the capability of having an impact as an objective charac-

teristic of human conduct, the contrasting of the two forms of conduct in the absolute sense is even less possible.

It is self-evident that naming the capability of having an impact as the common trait of the two forms of conduct does not exclude at all that in the case of omission the capability of having an impact should appear in a specific form. This capability of omission exerts its influence indirectly and usually one can it discover in the fact that it allows the a socially harmful situation to remain, allows a socially unfavourable process to continue. In a different approach, in the case of crimes of omission, the potential capability of the omitted conduct to have an impact should be considered, consequently it is evident that inaction may become an omission even depending on the other conditions, only to the extent as far as the omitted conduct would have had the capability of impact, i.e. would have been suitable to eliminate the socially harmful situation or to create a socially desirable advantage.

4. It follows from the above that inaction may become capable of having an impact, consequently become omission only if the given person in the particular situation has the adequate possibility of action. While action (e.g. the planned administration of the poison with an intention of killing) after it is displayed frequently obtains an "independent life", the omission is more closely connected to the perpetrator and the capability of impact varies parallel with the possibility of action open for the concerned person (including the possibility of averting the result in the relevant cases into the possibility of action). The previously mentioned ontological criterion of the concept of omission, i.e. the possibility of action consequently, is definitive for the objective sphere of omission.

Although Hungarian literature never treated the possibility of action in full detail, recently the authors pay special attention to it. The common trait of their views is that they do not regard the lack of the possibility of action as a cause excluding the culpability of the omission but as a circumstance which excludes the omission itself.

The lack of the possibility of action may not benefit the person who eliminates this possibility through his own blamable action e.g. according to the consistent judicial practice, a person omitting providing maintenance may not be exculpated if he intentionally creates a situation where he is not able to perform his obligation. In such a situation similar to the actio libera in causa, the otherwise (i.e. withoug a blameworthy elimination) existing possibility of action is the ontological basis of omission.

5. One of the most interesting problems of the ontological study of omission is beyond doubt the issue of the causality of omission. We set out from the fact that the views of the theorists of Hungarian penal law are in agreement as far as they do not precondition their views by the existence or lack of undutifulness. The Hungarian legal development assisted the formation of such views. E.g. failing to provide assistance has been a criminal offence since 1948 and it is from that time of that providing assistance to injured persons or to persons whose life or bodily integrity is imperiled has been a legal obligation for everyone. However,

we hardly could say that the upgraded variety of the offence of failing to provide assistance and causing death that way was not a form of conduct where the omission and death where in causal relation and since 1948 it has changed. It is self-evident that the causality of omission may be proved only if the causality of inaction, independent of undutifulness, is also proved.

A prominent representative of the theory of Hungarian civil law developed a theory aimed at proving the causality of omission which is related the closest to the theory of interference. However, the theory was not accepted by the theorists of Hungarian penal law, the same way as other theories professing the causality of omission were not. On the grounds of the denial of the causality (at least with general validity) of omission essentially three conceptions can be enumerated:

a) In the case of omission the perpetrator is not responsible for causing the result but for not averting it.

b) Omission is not causal in the sense of natural sciences, the lack of this type of causality is replaced by a "legal causality".

c) Omission may initiate or influence a causal process, thus may be causal on its own part if another person's behaviour depends on the behaviour of the omitting party. The causality of omission, of course, is not proven by that with general validity. In any other cases deferring form the mentioned one, the relation is not a causal one but only one related to causality, in other words, it is not an actual but merely a hypothetical causality that exists between omission and result.

We may mention as an interesting point that in the literature of Hungarian criminal law the issue of hypothetical causality first appeared in connection with the objective inevitability of the result and not in connection with omission. However, while in the case of the inevitability of the result (e.g. the death of the victim of the traffic accident would have inevitably occured even in the case of observing the traffic regulations) hypothetical causality excludes responsibility for the result, in the case of offence of result by omission hypothetical causality lays the foundation of responsibility for the result.

While in principle one can form a judgement of certainty of actual causality, we have to be satisfied with a judgement of probability (even if it is a high probability) in connection with hypothetical causality. It is this fact that finds an expression in the provision of the Hungarian Penal Code, according to which death as a result may be consdidered as an upgrading circumstance in the case of failing to provide assistance if the assistance could have saved the life of the victim. To qualify the offence in this way it is not the certainty of avoiding the result of death that is necessary, but such a possibility.

6. In terms of time omission takes place at the moment of the generation of the obligation and possibility of action, i.e. together with those.

This mentioned principle is also valid in connection with offences of result by omission concerning the omission forming the conduct constituting the crime and consequences are also attributed to the moment of

the omission (e.g. from the point of view of the validity of the law in terms of time this moment represents the time of perpetration). At the same time the offence of result committed by omission comes into existence in its completeness through a longer period of time and in all the cases when the completeness of all elements of the statutory definition of the offence has a significance, the time of the occurence of the result obtains a decisive role (e.g. in the case of offences of result the period of statutory limitation excluding punishability begins at that moment).

7. On the level of conduct independent of unlawfulness and guilt the subjective sphere of omission (the same way as of action) is to be found in the fact that the form of conduct is volitional (Willkürlichkeit). This willfulness usually is an actual one in the case of negligence accompained by inaction, however, it is only potential.

III. True crimes of omission

(Echte Unterlassungsdelikte)

In the following part offences that can be committed only through omission will be considered as true crimes of omission independent of their having a result forming an element of the statutory definition.

1. As far as *delicta propria* are concerned the condition of the perpetration of a true offence of omission is the special obligation of the perperator (the obligation to provide support or care) which is regulated by norms belonging to other branches of law and reflected *de lege lata* also by the Penal Code. Thus, the obligation of providing support is established by an enforcable judicial decision based on the provisions of law or, the obligation of providing child support without the establishment of fatherhood by a final judicial decision of the court.

In the sphere of *delicta communia*, according to law, the precondition. of the perpetration of misprision is the reliable knowledge of the crime. Although the other relevant statutory definitions do not include such criteria, at least so much is evident that the prior knowledge is a precondition also of concealing an exculpating circumstance.

2. As it has been mentioned, an omission is perpetrated at the moment when both the obligation of acting and the possibility of action are already present. The fact, these two are not always the same is expressed also by the provisions of the Penal Code. Thus, in the narrow scope as far as misprission is penalized by the Hungarian code, it is also emphasized, in addition to obtaining a reliable knowledge, that it is the person who does not make his report to the authorities *as soon as he can* that commits the offence.

As one may realize of the statutory definition of the failure of providing support the date when the payment of support is due and, accordingly, the perpetration of the true offence of omission may occur repeatedly from time to time. It is a different question that omissions committed before the judgement of the first instance court are not evaluated in Hungarian judicial practice as separate offences but as a single crime.

By its own nature the true offence of result by omission is complete only if the result occured.

3. Different from the theory of finality, the Hungarian theory of penal law, is uniform to the extent that intention is treated within the sphere of culpability and that intention is not considered as an element of unlawfulness (although the problem of intention in the case of attempt is not judged uniformly). At the same time, it is recognized that the objective dangerousness of the act to society (unlawfulness) may be influenced by certain elements of the subjective sphere of the statutory definition or, in other words, there are also subjective elements of unlawfulness. Such characteristics may be recognized in certain types of purpose, motives and, according to some authors, in the intention in the case of attempt. However, it is hardly relevant from the aspects of our topic since the statutory definitions of the true offences of omission in the Hungarian Penal Code do not include either purpose or motive and the significance of attempt is minor in this realm. The only thing which might require consideration is the following: since in the case of omission unlawfulness does not exist without a breach of obligation (but the reversed relation may occur), and the breach of obligation is sometimes actualized by obtaining the necessary knowledge, should it not be justified to consider this knowledge as a subjective element of unlawfulness?

4. According to Hungarian penal law, intention includes also the awareness of the socially dangerous nature (unlawfulness) of the act and if this awareness is lacking negligence may be established at most. Concerning this criterion of intention it is naturally not the perpetrator's own evaluation that is significant but the fact whether the perpetrator is aware at the time of the comission of the act of either the socially recognized dangerousness of the act or its unlawfulness. For this reason, further on, because the awareness of the facts constituting the elements of the statutory definition convey usually the awareness of the dangerousness to society (unlawfulness) too, it occurs only exceptionally that intention may not be established only for the sole reason that the perpetrator has been in error concerning the act's dangerousness to society (its unlawfulness).

The structure of true offence of omission regulated in Hungarian penal law is of a nature which makes almost inconcievable that a perpetrator acting aware of his action constituting all the elements of the statutory definition of the offence is not aware of the dangerousness to so cietyor unlawfulness. Consequently, it is only an artificial example that the person obligated to pay support is not aware of the fact that the obligee as the injured party withdraws his consent according to which the perpetrator does not have to pay for a certain period of time (this is a special variety of the presumed agreement of the victim to the crime). And even such cases can be considered as errors concerning the dangerousness to society instead of factual errors (which is separately regulated in the Hungarian Penal Code) only if undutifulness belonging to the concept of omission on the one hand and unlawfulness on the other hand are separated from each other in the sense of dogmatics.

5. According to Hungarian penal law, true offences of omission can be committed only by intention, consequently negligence has no practical significance in connection with them.

It is a different question that if some offence of omission is regulated in a way that the result constitutes an upgrading circumstance, it is enough that only the negligence of the perpetrator concerns the result. This type of culpability, however, is not different in terms of general principle, either as far as the structure of mixed culpability or the nature of negligence are concerned.

6. It is a general opinion in the Hungarian theory of penal law that the attempt of true offences of omission, as Begehungsdelikte is conceptually impossible. For, as long as the obligation and the possibility of action are not existent there is no criminal offence at all, on the other hand if they are persent, immediately a completed criminal offence is perpetrated. As far as the offences of result are concerned, attempt is possible in principle (even if not in practice), namely the perpetrator's conduct constitutes the omission, but the result does not occur inspite of his intent.

Although attempt is possible in the case of offences of result by omission, differently from the crimes of action, their attempts may not be divided into phases (full and incomplete phases). In connection with that there is a further characteristic, namely that abandoning the attempt through mere passivity is not possible and the only possible way to desist voluntarily is to avert the result voluntarily.

7. In the sphere of true offences of omission, culpability is established according to the general principles. However, it should be underlined that although expectability (Zumutbarkeit) is not considered by all Hungarian authors to be part of the concept of the criminal offence, as far as the nature of the special causes excluding punishability in the case of true offences of omission is concerned, the opinion is uniform that the existence of these causes is justified by the lack of blameworthiness, more closely by the lack of expectability. Such causes excluding punishability are in the case of misprision family-relationship, in the case of keeping silent of an exculpating circumstance, if the witness would incriminate himself or a relation by telling the fact. And as far as the failure of providing assistance is concerned, expectability is an element of the definition of the offence.

IV. Crimes committed by omission

(mixed offences of omission)

a) Hungarian penal legislation has been characterized since 1878 by the principles of *nullu mcrimen sine lege, nulla poena sine lege and nullum crimen sine culpa*. From the point of view of the principle of legality (nullum crimen) the question arises: what should be incorporated in the disposition (corpus delicti)? Concerning material offences (Erfolgsdelikte) is it necessary to characterize both the act and the result or is it enough to incorporate the result?

Concerning crimes of omission it is generally the incorporation of the result and not that of the omission that is characteristic. However, it should be noted that in the case of material offences (including action or omission) the description of the act is rare (exceptionally occurs. e.g. with fraud and extortion); it is mostly the definition of the result that can be found in the disposition. But this type of regulation is not against the principle of legality.

By the definition of the result the legislator prohibits all the forms of behaviour that may be the causes of the result. As a rule, legal order is based on the foundations of ethics considering the result and not on one considering the intention, thus, in the final analysis, it is the result that puts the forms of conduct in a legally relavant unity (The exception in criminal law is related to the attempt and to the formal offences.) It follows from this that omission becomes relavant to law through the occurence of the result.

b) The techniques of codification are the following:

1. The disposition defines only the result and through that all forms of action or omission are sanctioned which are the causes of the result (e.g. in the case of homicide, bodily injury).

2. The disposition describes the result but points out that it is caused by the violation of a provision included in a separate norm. This separate norm may be a rule of a profession – e.g. in the cases of endangerment committed through nagligence in ones profession and in the case of the results upgrading the former (P.C. art. 171.). Such a rule of profession is medical *lege artis* the rule concerning construction work and rules for preventing accidents, the rules concerning the handling of pharmaceutical products, etc A separate norm is the traffic code, from the point of view causing a traffic accident negligently and the results upgrading the offence (P.C. art. 187.).

Finally, separate norms define certain rules of the economic activity in the realm of crimes of economy (crimes des affaires).

3. There is a special provision in the Hungarian Penal Code which concerns the causation of a result through omission. According to that, a person who intentionally does not provide the assistance expectable of him to an injured person or to a person whose life or bodily integrity is directly imperiled (basic variety), shall be punished for failing to provide assistance; if the victim dies although his life could have been saved by providing assistance (upgraded variety), the perpetrator shall be more gravely punished (P.C. art. 172.). As we have seen in II/5., this case may be interpreted as hypothetical causality.

c) Criminal law developed according to the models of crimes by intention, crimes perpetrated through action and crimes of result. Crimes of negligence, crimes of omission and formal offences represent something different in relation to these models.

It is not for nothing that the Congress of Hamburg discussed offences by negligence and the present one discusses offences of omission, as one of their topics.

Material offences (both by intention and by negligence) committed through action are characterized as it follows:

- In case of intention the deed starts and ties the causal chain, the consequences do not range. On the other hand, in case of negligence the causal chain follows a random pattern because the systematizing role of intention is missing.
- The obligation of avoiding the result gains significance in the sense that the causation of the result is prohibited by the law. This assertion expresses that it is the result that forms unlawfulness.
- The possibility of action is open for the perpetrator, due precisely to the actual action.

Accordingly, the deed and the causal consequences produced by it lay the foundation of a judgement of unlawfulness alone.

On the other hand, material offences (both by intention and by negligence) committed through omission are characterized as it follows:

- Causality is not initiated by the perpetrator and it is not regulated by him, but the causal relation and the occurence of the result fall under the culpability (intention or negligence) of the perpetrator.
- The breach of the obligation of avoiding the result is not simply a "judgement of unlawfulness" projected from the result to the deed, it is a breach of a special obligation to break the chain of causality – an obligation which has to be named, identified and proved. This special obligation is the *obligation to act*.
- The possibility of action has to be proved separately, in the lack of such possibility it is not the expectability of the norm-observing form of behaviour (an issue of culpability) but the criminal act itself that is missing.

It follows from the comparison of deed and omission that it is not simply the obligation to avoid the result (or its breach) but the obligation to act (its breach) that gains significance as an issue of unlawfulness; further on the possibility to act is not a criterion of culpability belonging to the realm of the "*können*" but a criterion of unlawfulness. In the lack of the possibility to act there is no deed and there is no criminal offence: *impdssiblium nulla est obligation.*

(The obligation and the breach of obligation are not the elements only of criminal offences of omission. Action that breaches an obligation is also possible.)

The essence of mixed omission is:

- The omission of interrupting the causal relation leading to a result prohibited by penal law on condition

- that the omission expresses the breach of the perpetrator's obligation to act,
- the perpetrator has the possibility to act;
- his culpability (intention or negligence) extends to the occurence of the result.

Considering that both action and omission may represent a breach of obligation, the same act in the ontological sense may be regarded as an action and an omission at the same time. One may say that the perpetrator arriving to the city failed to decrease his speed or one may say that he was driving faster than the speed limit. However, action is a deed even in ontological sense, while omission is a deed only in the sense of axiology. For this reason, if it is possible, it is preferable to use a qualification on the basis of action.

d) Certain results are considered by criminal law as undesirable. Criminal law is directed against persons whose activity becomes the cause of such results. However, similar results may occur "by themselves" (heart attack) or they may be caused by the activity of third parties not examined in this relation (the driver causing the accident). The question is, who *are obligated to act* (obligated to avoid the result) of those who recognize the generation of the process of causality?

Under our law the obligation of action is generated by:

1. Civil contract.

2. Labour-relation. In practice the obligation of action originating from a labour-relationship appears, as a rule, as the obligation to avert the damage threatening the property of the employer. The breach of the obligation of acting in this sphere may lead to the perpetration of a crime against property or a crime of economy if a result occurs.

3. The rules of a profession. According to art. 171. of the P.C. a person who negligently exposes the life, bodily integrity or health of others through infringing the rule of his profession to direct danger or causes bodily injury commits a misdemeanour (basic variety); upgraded variety: the occurence of permanent phisical disability, death or the death of more than two persons. It is under this disposition that the physician is responsible if he fails to send the patient to hospital (the result upgrading the offence is the death of the patient).

4. A general obligation to act (obligation to provide assistance) is created by art. 172. of the P.C. ,we have described that in item b/3. A driver is responsible for failing to provide assistance also in the case when he fails to provide the assistance expectable of him to the victim of a traffic accident caused by another person. As we have mentioned, if he victim dies but his life could have been saved by the assistance (upgraded variety), a mixed offence of omission is manifested. On the other hand, if a physician fails to provide assistance, it is not this offence but endagerment by negligence committed in someones profession (art. 171. of the P.C.) that is manifested.

5. It has been a well-known idea in the literature for a long time that family relation or the ties of blood create an obligation to act. The classical example is: a mother is obligated to feed her child. If she fails to do so, she is responsible for homicide, depending on the result.

In such cases our judicial practice establishes as a rule the failure of providing assistance (art. 162. of P.C.). The defendant was found guilty of this crime in a case when the defendant's daughter gave birth to a child and she left the newborn in the field although the defendant objected that (the child survived.). It was the same in another case when the husband left his wife who said she would commit suicide, alone in the apartment, although she had earlier attempted suicide repeatedly. (The woman committed suicide and died.)

The scope of the obligation to act cannot be clarified in a general way. Although it is considered to be an element of unlawfulness, its contents are individual. The contents vary according to the relation between the perpetrator and the victim, by the occupation of the perpetrator, by the performance expectable of him on the basis of his intelligence and age. This obligation may be considered as generalized only in the case of an obligation originating from one's profession or labourrelationship.

The obligation to act has the broadest scope in the realm of failing to provide assistance, for this obligation burdens everyone. The limit is the "expectability" (of the person concerned), which is adjusted to the subjective abilities. Further on, it is preconditioned by the fact that the person injured in an accident needs the assistance. If the victim does not need assistance or other persons have already provided, that, the obligation to act ceases. The obligation of acting required here is derived by the literature from morals and from the rules of social coexistence.

Fulfilling the obligation of acting may mean in a particular case providing first aid to the injured person or may mean simply calling an ambulance.

e) The causality in *criminal law always, is* consequently in the case of action too, a social and not a natural category. If the physician makes a mistaken diagnosis and prescribes the medicine according to that and the relative administers this medicine to the patient, if the patient dies, the pathologist making an autopsy and looking for the cause of death following the laws of natural causality, cannot trace back the causes to the wrong diagnosis of the physician whereas the causality is plausible for the judge.

Actual causality exists also with mixed crimes of omission but criminal law does not deal with that. Perhaps, from a different point of view, it is taken into consideration: the driver running over a person is punished on the basis of actual causality and the pedestrian who fails to provide assistance is punished on the basis of the causality of the omission.

Is the causality of omission a hypothetical one? It is an axiological causality at any way in the sense at least that it is the value system of criminal law that divides the homogeneous reality into action and omission.

Thus, under the Hungarian Penal Code the basic variety of causing a traffic accident by negligence (art. 187. P.C.) is the causation of grave bodily injury, one of the results upgrading the offence is the death of the victim. In the lack of another disposition causality could be conceivable only according to this one even if the victim dies immediately or if he dies several hours later. However, there exists another disposition too, namely the failure to provide assistance (art. 172. of. P.C.). One of the upgraded varieties of this is the case when *the person who caused the accident* fails to provide assistance. Another upgraded variety is when the victim dies but his life could have been saved by providing assistance. On the basis of the comparison of these two offences in Hungarian judicial practice it is examined, in case the victim does not die immediately and the defendant has failed to provide assistance (joint conditions), whether the assistance could have saved the life of the victim. If the answer is in the affirmative, causality is interpreted as it follows:

1. The traffic accident caused only grave bodily injury,
2. The perpetrator failed to provide the assistance expectable of him by which the life of the victim could have beend saved and owing to that omission the victim died.
3. Consequently, the perpetrator committed two offences and is responsible for two crimes.

Under item II/5. we have already described the pervailing Hungarian views concerning hypothetical causality. In this relation we underline that hypothetical causality is causality relavant to law; its scope might be extended or limited by positive law; it is an axiological category; its basis is the failure of preventing the occurence of the result and not the causation of it. Finally, we refer to the observation according to which the scope of hypothetical causality is not formed by the obligation of acting. Thus, the question concerning causality is, whether the assistance could have saved the victims life and it is only the second question who should have provided the assistance.

f) As far as intentional crimes committed by omission are concerned the consciousness has to extend to.

1. the possiblity of the occurence of the result, further on to
2. the circumstance that the occurence of the result can be prevented.

The awareness of the obligation to act is not an element of intention since it would mean the awareness of unlawfulness. The emotional sphere of intention (wish or acceptance) is connected to actual causality. A person who forsees the result and resigns himself to it but deems the occurence of the result to be unavoidable, is in an error in fact. If this arror has been caused by his negligence and the causation of the particular result is to be punished even in the case of he perpetrator's negligence, he is responsible for a criminal offence committed through negligence.

g) In the case of conscious negligence (culpa consciente) the perpetrator is confident without foundations that the danger recognized by him would not be manifest (and for this reason he fails to act). In the case of

unconscious negligence his awareness does not extend to the possiblity of the result or he is not aware of the fact that he could avert the result by an action, and this unawareness is balmeworthy.

Under Hungarian penal law the person who fails to provide the assistance expectable of him is responsible for an offence by intention even if he is only negligent as far as death (as an upgrading result) is concerned. This solution follows from the provision regulating the mixed form of culpability: art. 15. of P.C.

h) In principle *attempt* is not excluded (the mother does not feed her child but the child is still alive). Conceptually abandoning the attempt is excluded, instead the voluntary averting of the result may be considered. Under Hungarian penal law the person who voluntarily averts the occurence of the result is not punishable for his attempted offence but should be punished for the so called "remaining offence.

V. Conduct of omission and participation

1. The objective condition of being an actor is the obligation of acting and the possibility of acting. Hungarian judicial practice recognizes instigation to breach the obligation of action or in the intensification of the intention of omission (abetting), namely in connection with failing to provide assistance.

Thus, the court found guilty the wife in instigation who made her husband drive on and not take the victim of an accident caused by another person. However, the practice tries to limit liability. If the car does not stop the passanger who does not express an opinion (or tells the driver to stop) is not a participant in the offence. If the car is stopped every passanger has to provide assistance according to the obligation of acting expectable of him. The breach of this obligation is punishable under the rules of being an actor and not a participant.

2. Liability for the conduct of a third party or for not preventing a criminal offence is exceptional under Hungarian criminal law.

A person entrusted with the management of social property is responsible for the emerging damage (both for *damnum emergens and lucrum cessans*) if he failed to perform his obligation of supervision and made possible for another person the causation of the damage through that. It is an offence by negligence (art 320. P.C.) It is under this provision that the head of the financial department of an enterprise is responsible if he fails to supervise the cashier and the cashier had the chance through that to commit embezzlement.

The physician may be liable for negligent endagerment committed in his profession (art 171. P.C.) if he failed to perform random checking and the nurse caused the death of a patient through negligence by breaching instructions.

The court found a husband guilty in passive abettment because of his failure to prevent the criminal offence, since he let her sister in law living in his household kill his wife in his presence, although he verbally

opposed the perpetration. It is passive abettment that the courts establish in all the cases where it is precisely the prevention of theft and other similar offences that is the obligation of the perpetrator originating from his position and he tolerates the commission of the intentional offence breaching his obligation.

3. In Hungary legal persons are usually state institutions, state enterprises and cooperatives and associations (e.g. sport clubs) belonging also to the socialist sector. According to the general opinion, legal persons have no criminal responsibility. If a criminal offence is committed through the operation of the legal person it is not the head (manager, director, president) who is responsible but the perpetrator himself who e.g. failed in his duty of supervision.

At present in Hungary the operation of so called civil law companies in the sphere of economy is allowed. These companies, however, are not legal entities. The partners forming the civil law company are responsible for the operation of the business venture even with their personal property. The practice concerning the criminal liability of these companies is not formed yet by the courts.

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DIE UNTERLASSUNGSDELIKTE UND DIE VERANTWORTLICHKEIT FÜR DIE UNTERLASSUNG

(Zusammenfassung)

I. *Die Untersuchung der Unterlassung und ihrer strafrechtlichen Funktion*

1. Die Entwicklung der Bedeutung der Unterlassung im nationalen Strafrecht
   a) Echte Unterlassungsdelikte
   b) Unechte Unterlassungsdelikte
   c) Die Teilnahme bei der Unterlassung und die Verantwortlichkeit für die Handlung anderer

2. *Die Unterlassung und ihre Beziehung zur wirtschaftlichen und gesellschaftlichen Struktur und zum nationalen Recht*
   a) Das Strafrecht als Mittel der Kriminalpolitik
   b) Die Kriterien der Kriminalpolitik in Hinsicht auf die Zielsetzungen und Funktionen des Strafrechts
   c) Die Grenzen des strafrechtlichen Intervention durch den Staat

II. *Die Struktur der Unterlassung (ontologische Aspekte)*

a) Die Unterlassung aus dem naturalistischen Aspekt;
b) Die Unterlassung als Beziehung
c) Unterlassung und Kausalität
d) Unterlassung und die Zeit
e) Subjektive Gesichtspunkte der Unterlassung

III. *Die echten Unterlassungsdelikte*

Die Struktur der echten Unterlassungsdelikte
a) Die Bedingungen der Unterlassungshandlung
b) Die zeitlichen Bedingungen
c) Der Vorsatz, das bewusstsein und die Rechtswidrigkeit
d) Die Fahrlassigkeit, vor allem die unbewusste Fahrlässigkeit
e) Versuch und der Rückritt
f) Die Schuld

IV. *Unechte Unterlassungsdelikte*

Die Struktur der unechten Unterlassungsdelikte
a) Das prinzip der legalität und die Strafbarkeit
b) Normative Methoden
c) Die notwendigen Bedingungen zur gemeinsamen Regelung der Unterlassungs- und Handlungsdelikte (Allgemeiner und Besonderer Teil)
d) Die Pflicht zum Handeln
e) Die „Kausalität" der Unterlassung
f) Der Vorsatz
g) Die Fahrlässigkeit
h) Versuch und Rücktritt
i) Die Schuld

V. *Die Unterlassung und die Teilnahme*

1. Die Probleme der Teilnahme bei den Unterlassungsdelikten
2. Die allgemeinen Probleme der Teilnahme
   a) Verantwortlichkeit für die Fahrlässigkeit anderer
   b) Verantwortlichkeit für das Nichtverhindern von Straftaten
3. Die Verantwortlichkeit der juristischen Personen

INFRACTIONS D'OMISSION ET RESPONDABILITÉ PÉNALE POUR OMISSION

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(Resumé)

I. *La vérification du role actuellement joué par les conduites omissives et de la fonction du droit pénal*

1. Sythése (historique) de l'évolution du role joue par le phénomene de l'omission dans le droit pénal, national, notamment par rapport:
   a) aux infractions d'omission (progrement dites: echte Unterlassungsdelikte),
   b) aux infractions de comission par omission (unechte Unterlassungsdelikte),
   c) a la participation dans l'omission et responsabilité pénale du fait d'autrui
2. Les liens entre le role des conduites omissive et la structure socio-éconimique et juridique nationale:
   a) la détermination d'obligations d'agir punies par le droit pénal comme moyen de politique criminalle;
   b) les criteres de cette politique par rapport a la fonction et aux buts du droit pénal national;
   c) les limites de l'intervention de l'Etat en matiere pénale.

II. *La structure de la conduite omissive (les aspects ontologiques)*

a) L'omission d'un point de vue naturaliste;
b) l'omission en tant que concept de ralation;
c) omission et causalité;
d) omission et temps;
e) aspects subjectifs de la conduite omissive.

III. *Infractions d'omission (proprement dites: echte Unterlassungsdelikte)*

La structure des infractions d'omission (proprement dites) et ses problemes, notamment par rapport
a) aux conditions de la conduite omissive;
b) aux conditions temporelles (aussi en relation avec et) *f)*;
c) au dol, a la conscience et a l'antijuridicité;
d) a la faute, et particulierement la faute inconsciente;
e) a la tentative, le désistement;
f) a la culpabilité.

IV. *Infractions de commission par omission (unechte Unterlassungsdelikte)*

La structure des infractions de commission par omission et ses problemes, notamment par rapport:
a) au respect du principe de légalité dans le punissabilité des infractions de commission par omission;
b) aux techniques normatives;
c) aux conditions nécessaires a l'assimilation des infractions d'omission aux infractions de commission (partie générale et partie spéciale);
d) a l'obligation d'empecher le résultat de l'infraction et a l'obligation d'empecher l'infraction; le fondement de l'obligation d'agir;
e) a la pretendue "causalité" omissive;
f) au dol;
g) a la faute;
h) a la tentative et au désistement;
i) a la culpabilité et a l'equivalence entre action et omission.

V. *Conduite omissive et participation*

1. Les problemes de la participation dans l'infraction d'omission.
2. Les problemes généraux de la participation *per omissionem*
   a) (Co-) Responsabilité du fait d'autrui;
   b) Responsabilité pour ne pas avoir empeche une infraction; limites au consentement.
3. La responsabilité pour omission a l'interieur des societes, des groupements et des societes complexes. Relations avec le probleme de la responsabilité pénale des personnes morales.