

# "The Confined Woman of Poitiers" and the Guarantor's Position of the Brother

*Cristina Nicorici*<sup>1</sup>

## Abstract

*The concept of the state penalizing a person for his or her failure to act must be understood and analyzed as more than criminal responsibility for something that a person has failed to do. The idea that, unless a person complies with the obligations imposed by the state and acts accordingly, he or she will receive a court sentence, is related to the principle of legality in criminal law, individual liberty to act, and the rule of law.*

*This article will underline the concept of improper omission, and how the criminal liability for improper omission is affecting the principle of legality in the perspective of the French criminal law theorists. In contrast with other European countries that have a long-standing tradition in accepting and analyzing criminal omission (such as Germany or Spain, for instance), in France, the idea of criminal responsibility for an omission that is not expressly regulated by the law was rejected. This long-standing position is based on a famous case – law that was very popular and is still mentioned by the theorists of criminal law when talking about responsibility for omission (known as the "Poitiers Case").*

*This decision, however, besides being an important case-law for the French criminal law, raises a problem that has not been solved even in the systems where the commission by omission is accepted. The main question that must be answered is whether a brother has a guarantor's position, or, in other words, has a duty to act, if his sister is in danger, and in this article, I present the main ideas developed as an answer to this problem.*

**Keywords:** *commission by omission, improper omission, duty to act, "The Confined Woman of Poitiers", French criminal law, the brother's guarantor position.*

## I. Introduction

The concept of the state penalizing a person for his or her failure to act must be understood and analyzed as transcending a criminal responsibility for something that a person has failed to do, and in the perspective of non-compliance of a particular duty to act that a person had. Every time we commit an action, we omit infinity of other actions, therefore it can be said that we commit infinity of omissions. However, the goal of criminal law should be to punish only those particular omissions that are

---

<sup>1</sup> PhD, Assistant professor, Faculty of Law, West University of Timisoara, Romania. Contact: nicorici.cristina@gmail.com.

dangerous to others. The idea that, unless a person complies with the obligations imposed by the law and acts accordingly, he or she will be held liable, is related to the principle of legality in criminal law, individual liberty to act, and the rule of law.

In continental criminal law, the distinction between proper and improper omissions is a well-known distinction.

Proper omission is generally described as a type of crime expressly regulated by the criminal law, where the dangerous conduct is described in terms of inaction. Therefore, the norm that regulates the proper omissive crime imposes a certain conduct for the subject, that the subject, for various reasons, does not comply with.

Improper omission, also known as commission by omission, is different from the proper omission. Although the conduct of the subject is represented by an omission, this omission is not expressly punished by the law. On the contrary, a norm that regulates a positive act of the subject, therefore a crime that is committed by action, is the main framework for the commission by omission. In the case of commission by omission, the crime, that is defined by an action, is committed, in the concrete case, by an inaction of the subject, when the subject had a duty to act that he or she neglected. In some countries (such as Spain, Germany, Italy, Romania etc.), a general definition of the improper omission can be found in their criminal codes, definition that is generally considered to make this type of crime compatible with the principle of legality.

In France, however, the position of the theorists regarding the improper omission (or commission by omission) has a long-standing tradition in rejecting this type of crime. This position is usually justified based on the reasoning of a Court of Appeal in the case of a confined woman of Poitiers, a famous case-law regarding the criminal responsibility for omission, that will be analyzed in the following lines.

It was appreciated<sup>2</sup> that, in the case of France, we are at the antipode of the Spanish – German perspective, because the general clause of equivalence of the action with the omission does not exist. As a general line of argumentation, in France, because a general clause of equivalence of the omission with the action does not exist, the jurisprudence has refused to assimilate the lack of an action with the inaction and to admit that a commissive crime could be committed by a simple inaction<sup>3</sup>. As a consequence, in the French juridical literature, it is appreciated<sup>4</sup> that only where the law expressly regulates in this sense, the omission may have the juridical value of an action and may expose the author to be punished for a commissive crime. Some French theorists considered to be logic to punish as an author the person that has realized a crime, by a negative behavior, if the strict interpretation of the legal text does not exclude this possibility<sup>5</sup>.

It must be mentioned that there are other states where the commission by omission is not expressly regulated, such as Sweden, where, although formally this concept does not exist, the literature and the jurisprudence have developed this

---

<sup>2</sup> J.A. Ramos Vázquez, *La secuestrada de Poitiers y la comisión por omisión en Francia* [The kidnapped woman from Poitiers and the commission by omission in France], in J.L. González Cussac, *Lenguaje y dogmática penal* [Criminal language and dogmatics], Tirant lo Blanch, Valencia, 2019, p. 207.

<sup>3</sup> G. Stefani, G. Levasseur, B. Boulloc, *Droit pénal général*, Dalloz, Paris, 2005, p. 207. Also see H.H. Jescheck, *Problemas del delito impropio de omisión desde la perspectiva del derecho penal comparado* [Problems of the improper crime of omission from the perspective of comparative criminal law], in *Nuevo Foro Penal* no. 59/1993, p. 10.

<sup>4</sup> G. Stefani, G. Levasseur, B. Boulloc, cited, p. 208.

<sup>5</sup> J. Pradel, A. Varinard, *Les grands arrêts du droit pénal général*, Dalloz, Paris, 2007, p. 369.

concept<sup>6</sup>. The introduction of a general clause of equivalence was rejected in this country because of the difficulty to identify an acceptable definition<sup>7</sup>.

In the following lines I will present the famous decision of Poitiers Court, and its implications in French criminal law, but also the other countries perspective of the guarantor's position of the brother (the problem that was analyzed in the mentioned decision).

## II. "The Confined Woman of Poitiers" – the decision of the Court of Appeal of Poitiers (20.11.1901)

The Monnier case remains a leading – case for the French jurisprudence in the matter of commission by omission<sup>8</sup>.

In fact, the catholic parents of Blanche Monnier kept their daughter locked in a room, without access to natural light, between garbage and excrements, for a period of 25 years, because, when she was younger, she had a relationship with a protestant lawyer, in France<sup>9</sup>. The investigation showed that, when their daughter was younger, their parents opposed to her marrying a protestant lawyer, and, as a consequence, she started acting strange, yelling at her parents and destroying goods from the house, and, in some days, isolating herself from the world.

Because of this behavior, their parents decided, together, that it is better that she will remain in her room permanently, and therefore locked her in her room, serving there all the food she needed. After her father's death, her mother continued to keep her locked for years, until the situation of her daughter was discovered, Blanche being found with serious damage regarding her health. Although her mother order food for her daughter from the most expensive restaurants, she refused to let her maid to clean her room, to open the windows for fresh air, or to change her daughter's clothes and her bedsheets. Let us remember that all this happened in the late XIX century, so the girl was let to make her needs in her room, near the food she ate and near her bed. Her mother completely forbidden her maid to ever clean the room of her daughter, so Blanche used the same clothes and bedsheets for decades.

In the words of Andre Gide, that describes<sup>10</sup> a photo of the girl when she was set free, "it is impossible to imagine something more impressive than the look of the poor girl, and that of her smile – because she smiles, an angelic smile, idyllic, but sly, almost mean".

The father of Blanche died long before the situation of his daughter was discovered, and her mother died two weeks after she was discovered and released by the authorities. At the time of the judgement, there was alive only one person that knew what has happened with Blanche, and this person was Marcel Moinner, her brother, that, at 11.10.1901 was convicted as an accomplice at 15 months of prison by the

<sup>6</sup> C.A. Domocoș, *Fapta omisivă și incriminarea ei în legea penală română* [The Omissive Crime and Its Regulation in Romanian Criminal Law], Ed. Universul Juridic, Bucharest, 2010, p. 313.

<sup>7</sup> *Ibidem*.

<sup>8</sup> Decision of Poitiers Court of Appeal, from 20.11.1901, *apud* J. Pradel, A. Varinard, cited, pp. 360-361.

<sup>9</sup> The case is presented from the newspapers and documents of the investigation by Andre Gide in A. Gide, *Amintiri de la Curtea cu Juri. Sechestrata din Poitiers* [Memories from the Jury Court. The Confined Woman of Poitiers], Ed. RAO, Bucharest, 2016, p. 114 and following.

<sup>10</sup> *Idem*, p. 116.

Tribunal of Poitiers. It was proven during that investigation that Marcel lived in the house near the one where Blanche was kept locked, and he used to visit his sister during all this period of time, being perfectly aware of her condition. Although it was testified by the house's personnel that he tried to persuade her mother to set Blanche free in a few occasions, he did nothing more to help his sister over all this period of time.

Against this decision, Monnier formulated an appeal, arguing that, although he knew the fact that her sister was held against her will in that room, and despite the fact that he did not do something for saving her, he personally committed no act to affect her liberty, all the acts being committed by their parents, and, therefore, he should not be held liable.

This case and the sentence that followed remain an important point in the French criminal law, but they also raise the problem of the duty to act of the brother of the victim. Therefore, before analyzing the sentence of Poitiers Court, I will present the main positions regarding this problem.

### III. The duty to act of the brother of the victim

The problem of the brother that has a duty to act to protect his sister is not an easy problem for the systems that accept commission by omission, and the case from Poitiers is even more complicated. Firstly, let us make some considerations regarding the responsibility of the brother regarding the protection of his sister.

If we regard the sources of the duty to act from a formal perspective, then we may face a difficult problem, since we cannot find a legal norm, a contract or a former dangerous conduct to fundaments this duty to act. For instance, Romanian Civil code does not foresee a duty of the brother to protect his sister, but only a duty of maintenance (article 516<sup>11</sup> Romanian Civil code). However, this duty supposes only that, in case of need, the brother must give to the sister the means to live<sup>12</sup> (to buy food, to pay for the basic necessities), but this article does not foresee a duty to help his sister when she is in danger. Therefore, unless there was a contract where the brother promised to help his sister, or unless the brother did something that increased the previous state of danger of the victim, in case of omission, his criminal responsibility is excluded.

If we regard the duty to act from a material perspective, therefore from the perspective of the theory of the duty to act of Armin Kaufmann<sup>13</sup>, then the things get complicated. Normally, one of the functions identified by Armin Kaufmann as being the source of the duty to act is the family relationship between the victim and the subject<sup>14</sup>. The doctrine is not unanimous when establishing a duty to act of the brother, given his relation of family with his sister. There are authors that consider that he has a duty to act<sup>15</sup>, others that recognize this duty to act only if the victim lived with his

<sup>11</sup> Article 516 of the Romanian Civil Code: *"The duty of maintenance exists between husband and wife, between family in direct connection, between brothers and sisters, and between all the other persons foreseen by the law"*.

<sup>12</sup> According to article 529 alin. (1) of the Romanian Civil Code: *"The maintenance is to be paid in accordance with the need of the debtor and the means of the creditor"*.

<sup>13</sup> A. Kaufmann, *Dogmática de los delitos de omisión* [Dogmatics of crimes of omission], Marcial Pons, Madrid, 2006, p. 289 and following.

<sup>14</sup> *Ibidem*.

<sup>15</sup> *Idem*, p. 322.

brother (therefore we must identify what is named "a community of life"<sup>16</sup>), and other that completely deny this criterion, considering it is too imprecise<sup>17</sup>. It was appreciated that, if the family connection is not close, there should be taken more precautions regarding the commission by omission<sup>18</sup>.

However, the authors that accept that there is a duty to act, consider that it is necessary to really exist a direct connection with the social value that must be protected, meaning a social proximity with the value protected. Some authors<sup>19</sup> talk in this case about a natural solidarity as a juridical cause from which we can imply a duty to act. We talk therefore in the case of the community of life not only of an aspect of privacy, but of close solidarity<sup>20</sup>.

In other states, formal solutions have been found to this problem. As an example, the Criminal Code of Chile, in article 352, sanctions the act of a person to abandon his spouse, concubine, ascendant of descendant, legitimate or illegitimate, sick or who is in an impossibility to take care of himself, if the person abandoned has lesions or dies because of the inaction<sup>21</sup>, this representing a possible solution regarding our problem.

#### IV. The decision of the Court of Appel of Poitiers

The decision of the Court of Appel from Poitiers remains famous in France and for the France criminal law, one century later. Through this decision, at 20.11.1901, the Court of Appeal set Monnier right, appreciating that the facts he was accused of cannot be qualified as a criminal act, not being an act of killing or of hitting a person. "Taking into consideration that the appellant has not participated, as an coauthor or as an accomplice, at the facts considered crimes by the law, acts of which only the mother appears to be responsible (...); that, without a doubt, it cannot be trusted Monnier that said that he has ignored the lamentable state in which his sister was, and that the pure passive role that Monnier thought he must resign to should be punished with the most severe reproach, however, his conduct, without any doubt, does not enter the sphere of criminal law, sphere that the judges cannot supply, and, therefore, his acquittal is mandatory"<sup>22</sup>.

<sup>16</sup> C. Roxin, *Derecho penal. Parte general. Tomo II. Especiales formas de aparición del delito* [Criminal law. General part. Volume II. Special forms of appearance of the crime], Civitas Thomson Reuters, Madrid, 2014, p. 862.

<sup>17</sup> R. Gullock Vargas, *Fundamentos teóricos básicos del delito de omisión su aplicación en el derecho penal costarricense* [Basic theoretical foundations of the crime of omission and its application in Costa Rican criminal law], Heredia, San Joaquín de Flores: Escuela Judicial, 2008, p. 121; T. López Angel, *Límites político criminales del delito de comisión por omisión* [Political-criminal limits of the crime of commission by omission], in *Anuario de derecho penal y ciencias penales* [Yearbook of Criminal Law and Criminal Sciences], 1984, p. 703.

<sup>18</sup> S. Mir Puig, *Derecho penal. Parte general* [Criminal law. General part], Editorial Reppertor, Barcelona, 2006, p. 309.

<sup>19</sup> P. Gómez Toledo, *El delito de omisión impropia* [The crime of improper omission], p. 166, <https://docplayer.es/43776481-El-delito-de-omision-impropia.html> (accessed on 25.02.2022).

<sup>20</sup> R. Plascencia Villanueva, *Teoría del delito* [The theory of crime], Universidad Nacional Autónoma de México, México, 2000, p. 167.

<sup>21</sup> C. Izquierdo Sánchez, *Comisión por omisión. Algunas consideraciones sobre la injerencia como fuente de la posición de garante* [Commission by omission. Some considerations on interference as a source of the position of guarantor], in *Revista Chilena de Derecho*, no. 2/2006, p. 341.

<sup>22</sup> J.A. Ramos Vázquez, cited, p. 202.

The French doctrine considers also today as being determinant this sentence for the commission for omission, and it appreciates that it is not possible to convict a person for an omission, if the crime is regulated in terms of action<sup>23</sup>. If the lawmaker wants to introduce certain omissions in the sphere of the criminal law, he must do so expressly. It was underlined that to conclude otherwise would supposed to use an analogy, that is a forbidden method of interpretation<sup>24</sup> if used against the accused person.

The French criminal law theorists do not contest only the causality of improper omission in relation with the dangerous result, but also the theory of the guarantor's position, thus creating a juridical environment completely opposed from the German and Spanish one<sup>25</sup> (and Romanian, we can add). Another aspect that is considered problematic by the theorists is that the improper omission is not compatible with the principle of legality, and with the principle of predictability of law<sup>26</sup>.

Another decision that follows the line marked in the Monnier sentence, is the sentence of the Court of Cassation from 29.01.1936<sup>27</sup> (named the "Coutant sentence") in which is acquitted an administrator of a commercial society that permitted the organization of an illegal lottery inside the society. The solution of acquittal was founded on the fact that the administrator committed no positive act that he could be held liable, in the case the conduct analyzed being only a simple abstention. For the same reason, he was held liable for no act of complicity.

The Monnier decision clearly underlines that it does not matter what obligation foreseen by the civil law or of moral character has a person, if a precise crime which could sanction the omission does not exist, and that a judge cannot decide to assimilate the omission with an action. It is considered that such a solution is still valid in the present time, in base of the principle of legality, as a consequence of the principle of strict interpretation of the criminal law<sup>28</sup>.

Let us not forget that the famous line "qui peut et n'empêche, pêche" ("the one that can do something, and does not do it, is a sinner") comes from the French culture, which supposes that the old theorists of criminal accepted the possibility of the commission by omission<sup>29</sup>.

In the period of XIX century, there were no regulations in France regarding omission, not even proper omission, and it was considered that the duty to act must remain in the personal conscience of each citizen<sup>30</sup>. Therefore, although the Poitiers sentence remains a leading case, in reality this sentence is an expression of it time, and Monnier could have never been convicted for letting a victim in danger (or for a crime similar to the one foreseen in article 203 Criminal Code), because those conducts were not criminalized.

In the present, not only the doctrine<sup>31</sup>, but, although in a shy manner, also the jurisprudence, begin to consider that where the lawmaker did not expressly foresee,

<sup>23</sup> *Idem*, p. 203.

<sup>24</sup> G. Stefani, G. Levasseur, B. Boulloc, cited, p. 207.

<sup>25</sup> J.A. Ramos Vázquez, cited, p. 204.

<sup>26</sup> P. Cannin, *Droit penal general*, edition Hachette Paris, 2005, p. 52, *apud* J.A. Ramos Vázquez, *op. cit.*, p. 204.

<sup>27</sup> J. Pradel, A. Varinard, cited, p. 361.

<sup>28</sup> *Idem*, p. 363.

<sup>29</sup> *Idem*, p. 363.

<sup>30</sup> J.A. Ramos Vázquez, cited, p. 207.

<sup>31</sup> A.C. Danna, *Essai sur la notion d'infraction pénale*, in *Librarie générale de droit et de jurisprudence*, Paris, 1982, p. 67, *apud* J.A. Ramos Vázquez, *op. cit.*, p. 209.

the judge can interpret<sup>32</sup>. Therefore, it could be argued that the French juridical space is going through a process of reform and change of juridical thinking regarding this theme (considering also the increasing intervention of the state that has as a consequence the multiplication of omissive crimes)<sup>33</sup>. If France will follow the example of Germany or of Spain, or will expressly equvalate the action with omission for certain crimes, this remains to be seen.

## V. Conclusion

As "The Confined Woman of Poitiers" remains a work of reference for the opera of Andre Gide, the Decision of the Court of Poitiers is still a reference case-law for the French perspective regarding criminal responsibility for omission, and, in particular, in what regards commission by omission.

As presented in this article, the duty to act of the brother to help his sister (or the other way around) is not a simple problem in criminal law. If we regard this duty through the theory of formal sources of the duty to act, we might conclude that there is no special duty to act of the brother to help his sister in danger, and, therefore, his omission has the same criminal value as the one of normal citizens, that does not share any special connection with the victim. This conclusion is, however, difficult to accept in our society, which sees the family connection between brothers and sisters as very important. It is difficult to accept that a brother must not help his sister when facing danger, and, I think, for many people, it is even outrageous to think like this.

On the other hand, if we analyze this duty to act from the perspective of the theory of material sources of the duty to act, things do not get necessarily clearer. Should we always accept that the family connection between the brother and sister fundaments the duty to act, even if, for instance, they were not in connection for a long period of time? Or should we recognize such a connection as a source of the duty to act only when they live under the same roof? Or only when the connection is strongly enforced by their day to day life?

In my opinion, the good faith of the interpreters is of maximum importance: I do not believe that the simple family connection between brother and sister can be considered a source of the duty to act. However, if they live together, therefore if they have developed a community of life, then I believe their relation is stronger and the dependence of the subject owner of the social values from her brother is a reason good enough for justifying such a source.

## References

1. Cannin, P., *Droit penal general*, edition Hachette Paris, 2005.
2. Danna, A.C., *Essai sur la notion d'infraction pénale*, in *Librarie générale de droit et de jurisprudence*, Paris, 1982.
3. Domocoş, C.A., *Fapta omisivă şi incriminarea ei în legea penală română* [The Omissive Crime and Its Regulation in Romanian Criminal Law], Ed. Universul Juridic, Bucharest, 2010.

<sup>32</sup> J.A. Ramos Vázquez, cited, p. 209.

<sup>33</sup> *Idem*, p. 210.

4. Gide, A., *Amintiri de la Curtea cu Juri. Sechestrata din Poitiers* [Memories from the Jury Court. The Confined Woman of Poitiers], Ed. RAO, Bucharest, 2016.
5. Gómez Toledo, P., *El delito de omisión impropia* [The crime of improper omission], <https://docplayer.es/43776481-El-delito-de-omision-impropia.html> (accessed on 25.02.2022).
6. Gonzáles Cussac, J.L., *Lenguaje y dogmática penal* [Criminal language and dogmatics], Tirant lo Blanch, Valencia, 2019.
7. Gullock Vargas, R., *Fundamentos teóricos básicos del delito de omisión su aplicación en el derecho penal costarricense* [Basic theoretical foundations of the crime of omission and its application in Costa Rican criminal law], Heredia, San Joaquín de Flores: Escuela Judicial, 2008.
8. Izquierdo Sánchez, C., *Comisión por omisión. Algunas consideraciones sobre la injerencia como fuente de la posición de garante* [Commission by omission. Some considerations on interference as a source of the position of guarantor], in *Revista Chilena de Derecho*, no. 2/2006.
9. Jescheck, H.H., *Problemas del delito impropio de omisión desde la perspectiva del derecho penal comparado* [Problems of the improper crime of omission from the perspective of comparative criminal law], in *Nuevo Foro Penal* no. 59/1993.
10. Kaufmann, A., *Dogmática de los delitos de omisión* [Dogmatics of crimes of omission], Marcial Pons, Madrid, 2006.
11. López Angel, T., *Límites político criminales del delito de comisión por omisión* [Political-criminal limits of the crime of commission by omission], in *Anuario de derecho penal y ciencias penales*, 1984.
12. Mir Puig, S., *Derecho penal. Parte general* [Criminal law. General part], Editorial Reppertor, Barcelona, 2006.
13. Plascencia Villanueva, R., *Teoría del delito* [The Theory of crime], Universidad Nacional Autónoma de México, México, 2000.
14. Pradel, J., Varinard, A., *Les grands arrêts du droit pénal général*, Dalloz, Paris, 2007.
15. Roxin, C., *Derecho penal. Parte general. Tomo II. Especiales formas de aparición del delito* [Criminal law. General part. Volume II. Special forms of appearance of the crime], Civitas Thomson Reuters, Madrid, 2014.
16. Stefani, G., Levasseur, G., Bouloc, B., *Droit pénal général*, Dalloz, Paris, 2005.