

An Exploration of the Legal Issue of the Source of the Duty to Act in Omission Crimes within Marital Relationships

Shuting Wang

School of Southwest Petroleum University, Chengdu, China

Abstract: This template explains and demonstrates how to prepare your camera-ready paper for Trans Tech Publications. The best is to read these instructions and follow the outline of this text. Please make the page settings of your word processor to A4 format (21 x 29,7 cm or 8 x 11 inches); with the margins: bottom 1.5 cm (0.59 in) and top 2.5 cm (0.98 in), right/left margins must be 2 cm (0.78 in). This template explains and demonstrates how to prepare your camera-ready paper for Trans Tech Publications. The best is to read these instructions and follow the outline of this text. Please make the page settings of your word processor to A4 format (21 x 29,7 cm or 8 x 11 inches); with the margins: bottom 1.5 cm (0.59 in) and top 2.5 cm (0.98 in), right/left margins must be 2 cm (0.78 in). With societal development, interpersonal relationships have trended towards indifference and alienation, a phenomenon also observable within the once most intimate marital relationship. In reality, cases are common where, due to disputes over trivial matters, one spouse commits suicide and the other fails to provide assistance, resulting in death. In such scenarios, scholarly opinions diverge on whether the non-assisting spouse commits a crime. In Chinese judicial practice, such conduct is mostly adjudicated as omission-based intentional homicide, with a minority of cases resulting in acquittal. The fundamental reason lies in the absence of explicit legal provisions in Chinese law regarding the duty of rescue between spouses. When adjudicating such cases, judges hold differing views on the duty to act in omission crimes, leading to inconsistent judgments for similar cases.

Keywords: Source of Duty to Act; Duty of Rescue between Spouses; Close Living Community.

1. Introduction

The Necessity of Exploring the Source of Duty to Act in Omission Crimes within Marital Relationships.

(1) The Concept of Omission Crime

Harmful acts have two basic forms: commission and omission. Commission refers to the perpetrator actively carrying out acts prohibited by criminal law. Omission is a special form of act, representing the inverse relationship to commission. Omission in criminal law refers to "a harmful act where the perpetrator bears a specific legal obligation to perform a certain act, has the ability to perform it, but fails to do so." There are two forms of omission constituting a crime in criminal law: pure omission crimes and impure omission crimes. Pure omission crimes are those explicitly stipulated by criminal law to be committed only by omission. Impure omission crimes are those stipulated by criminal law that can be committed either by commission or omission.

Intentional homicide committed through passive omission is a type of impure omission crime. It refers to conduct where a person, who is legally obligated to prevent the death of another and has the capacity to do so, intentionally remains passive and fails to fulfill this legal duty, thereby causing the death of the other person – essentially, "ought to act but fails to act." Currently, the view that omission is a fundamental form of act has become the prevailing theory in criminal law doctrine.

The establishment of an omission crime must satisfy the following elements: First, the perpetrator bears a certain positive duty to act; this is the prerequisite for constituting omission as a crime. Second, the perpetrator has the practical possibility to perform the specific duty but fails to do so; if the perpetrator has a specific duty but, due to some reason,

lacks the practical possibility to fulfill it, omission constituting a crime is not established. Third, the omission (failure to perform the specific duty) has serious social harm.

(2) Controversies Arising from the Source of Duty to Act in Omission Crimes

There has always been discussion and debate in Chinese criminal law circles regarding the source of the duty to act in omission crimes. The main theories include the "three-source theory," the "four-source theory," and the "five-source theory." In the three-source theory, the sources are: explicit provisions of law; requirements of duty or profession; and the prior conduct of the perpetrator. The four-source theory, commonly adopted in criminal law circles, posits that sources include: duties stipulated by legal provisions; duties required or profession; duties arising from legal acts; and duties arising from prior conduct. Some scholars endorse the five-source theory, adding, besides the aforementioned four, duties voluntarily undertaken by the perpetrator, and duties required by public order and social morality in special circumstances. However, the inclusion of duties required by public order and social morality in the five-source theory has sparked considerable controversy, as incorporating this could unduly expand the scope of omission crimes, increase the burden on individuals, and contravene the principle of legality (*nullum crimen, nulla poena sine lege*).

From the controversies surrounding the sources of duty in omission crimes, it is evident that the core and foundation for establishing an omission crime is the duty to act. This duty plays a decisive role in determining whether an omission crime is constituted.

2. Current Status of Omission Crimes between Spouses in Judicial Practice Section Headings

(1) Introduction of Cases

Regarding whether a duty of rescue exists between spouses, controversy exists not only in theoretical circles but also significantly in judicial practice. A classic case that once aroused great controversy is the "Song Fuxiang Case." On June 30, 1994, Song Fuxiang returned home after drinking and quarreled with his wife, Li Xia, over trivial matters. Li Xia then attempted to hang herself. Song summoned a neighbor to dissuade her, but after the neighbor left, they quarreled again. Subsequently, his wife Li sought materials to hang herself. Song, aware of this, did not stop her. Upon hearing the sound of a stool falling, he still did not take rescue measures but instead left the scene to inform his parents. When family members arrived, Li Xia was already dead. The court of first instance held that Song Fuxiang was a person with a specific duty towards his wife, and having foreseen the consequence of Li Xia's death, he allowed that consequence to occur. His conduct constituted omission-based intentional homicide, sentencing him to four years imprisonment. Song Fuxiang appealed. The Nanyang Intermediate Peoples Court affirmed the conviction and sentence, dismissing the appeal.

Subsequently, other cases similar to the Song Fuxiang Case emerged. In most of these cases, like Song Fuxiangs, the courts rendered guilty verdicts for omission-based intentional homicide. However, a minority were acquitted. For example, in the Li Yinjian Case, Li Yinjian and his wife Xiao Min quarreled and scuffled on their way home. They were separated by a villager, He. After Li walked about 50 meters, Xiao threw herself into water to commit suicide. He shouted for Li to rescue her, but Li claimed Xiao jumped in herself and it was none of his business. Xiao ultimately drowned. In this case, the court acquitted Li.

(2) Analysis of Cases Involving Omission-based Intentional Homicide between Spouses

The divergence in judicial outcomes – guilty of intentional homicide versus acquittal – warrants consideration. Professor Zhou Guangquan argues that a spouse's suicide is an act of self-endangerment, and the other spouse does not have a normative duty to intervene and prevent such suicidal behavior. He states: "The purpose of the perpetrator's duty to act is to prevent the victim from suffering legal interest infringement, not to interfere with the victim's freedom of will when they are unwilling to accept protection, nor should the duty of protection become a constraint or control over the protected person."

Professor Qian Yedai argues that the object of intentional homicide is not limited to "others"; suicide satisfies the elements of intentional homicide. The reason suicide is not punished is its low punishability, not that it is an exercise of autonomous decision-making, and thus it does not affect the spouse's duty of rescue.

The crux of such cases lies in whether a specific legal duty exists between spouses. From the trial of the Song Fuxiang Case, both the court of first instance and the appellate court deemed the defendant Song Fuxiang a person bearing a specific legal duty towards his wife. Therefore, when his wife attempted suicide by hanging at home, the defendant had a duty to provide timely rescue; failure to do so constituted an omission crime. Chinese criminal law does not explicitly stipulate a duty of rescue between spouses. The fact that

courts often decide such cases as omission crimes raises a thought-provoking question: does this deviate from the principle of legality?

3. Analysis of the Jurisprudential Basis for the Source of the Duty of Rescue between Spouses

(1) Duty Explicitly Stipulated by Law

Chinese criminal law does not explicitly stipulate that when one spouse attempts suicide, the other has a duty to prevent or rescue them. Article 1043 of the Civil Code stipulates that family members should help each other. Article 1059 stipulates that spouses have a duty to support each other. Support implies the obligation of mutual assistance and support between spouses in daily economic and domestic life. Article 261 of the Criminal Code explicitly stipulates that refusing to support an aged person, minor, sick person, or any other person who has no independent living capacity, if the supporter has a duty to support and the circumstances are flagrant, constitutes the crime of abandonment. Legal scholars hold differing views on whether the duty of support stipulated in the Civil Code can serve as a source for the duty of rescue between spouses. Scholars represented by Professor Chen Xingliang tend to negate this, arguing that the duty of support in the Civil Code pertains more to the moral realm and does not explicitly establish a duty of rescue between spouses. Conversely, scholars holding an affirmative view argue that since spouses have a mutual duty of support, applying the principle of "interpreting a minor matter to infer a major one" (举轻以明重), the duty of support naturally includes the duty to rescue when one spouse falls into danger.

While the affirmative view validates the interspousal duty to act as a source of duty in criminal law, I believe this might deviate from the principle of legality in criminal law, as criminal law does not explicitly stipulate a duty of rescue between spouses. Furthermore, the Civil Code and Criminal Law are fundamentally different in nature; one governs private law, the other public law. The duty of support between spouses stipulated in the Civil Code has a moral dimension. Elevating a moral duty to a source of duty for omission crimes might be overly harsh and unfair to the perpetrator. Therefore, the interspousal duty of rescue should not be considered a duty explicitly stipulated by law.

(2) Duty Arising from Prior Conduct

Duty arising from prior conduct refers to the obligation to prevent harmful consequences, stemming from the perpetrator's earlier actions that placed a legally protected interest in a state of danger. Examining the reasoning in the appellate court's judgment in the Song Fuxiang Case, which emphasized that the defendant's verbal provocation during the physical altercation with Li Xia spurred her determination to commit suicide, suggests that the appellate court grounded Song Fuxiang's specific duty in his prior conduct. This became another point of contention after the judgment. The question is whether Song Fuxiang's verbal provocation and the mutual scuffle placed his wife's legal interests in a dangerous state, and whether spousal quarrels, generally, can significantly lead one party into danger.

In the Song Fuxiang Case, the quarrel between Song and Li was ordinary daily conduct between spouses, common in many families. Not every quarrel between couples leads to one party's suicide. If the law were to recognize that spousal quarrels can cause one party to contemplate and attempt

suicide, thereby placing their life and health in danger, then whenever a quarrel arises from trivial matters, one spouse would have to constantly be vigilant about whether the other might actually attempt suicide. If they fail to notice, and the other does commit suicide, they would become a criminal guilty of omission-based intentional homicide, facing criminal punishment. This would be unfair and unreasonable. Suicide following a quarrel over daily trifles primarily stems from one party's poor psychological resilience and impulsiveness. Therefore, in the Song Fuxiang Case, although he quarreled and scuffled with his wife, this conduct does not necessarily lead to suicide in daily life. Consequently, his actions should not be considered prior conduct in the criminal law sense.

In summary, the traditional "four-source theory" cannot provide sufficient basis for the existence of a duty of rescue between spouses, nor offer the necessary jurisprudential support for imposing criminal liability for non-rescue between spouses. However, if non-rescue between spouses does not constitute omission-based intentional homicide, yet finding no crime seems inappropriate and unconvincing, it would inevitably spark academic and societal debates concerning ethics and morality. Therefore, there is an urgent need to redefine the interspousal duty of rescue to resolve the controversies in judicial practice.

When receiving the paper, we assume that the corresponding authors grant us the copyright to use the paper for the book or journal in question. When receiving the paper, we assume that the corresponding authors grant us the copyright to use the paper for the book or journal in question. When receiving the paper, we assume that the corresponding authors grant us the copyright to use.

4. Conceptions for Perfecting the Source of Duty to Act in Omission Crimes within Marital Relationships

(1) Explicitly Stipulating the Interspousal Duty of Rescue as an Independent Duty in Criminal Law

Both legally and logically, a duty of rescue exists between spouses. However, the source of this duty is not provided by the traditional four-source theory. Consequently, the basis for adjudicating such cases in judicial practice is always contentious, necessitating the search for a jurisprudential foundation for the interspousal duty of rescue. Some scholars propose that the interspousal duty of rescue is an independent duty to act in criminal law. Professor Lin Shantian from Taiwan regards the duty between spouses as falling under the duty to act arising from "closest kinship," proposing the "guarantor" theory. He categorizes relationships between parents and children, siblings, and spouses as mutual guarantors, where each is the guarantor of the others personal safety. When one party's personal safety legal interest is infringed upon, the other should provide rescue and guarantee the others safety.

Spouses form a living community, fostering a high degree of dependence and trust. Denying the duty to prevent or rescue when one spouse attempts suicide would inevitably lead to a breakdown of trust within the marital unit and the family, also creating negative social repercussions. Therefore, explicitly stipulating the interspousal duty of rescue as an independent duty in law aligns with the spirit and purpose of law. The interspousal duty of rescue deserves a place within criminal law norms, established in explicit textual form.

Furthermore, careful examination of factual illegality and social harm is necessary to strictly limit its application to the level of criminality, adhering to the principle of legality.

(2) Limitations on the Interspousal Duty of Rescue

First, the duty of rescue between spouses should be limited to parties constituting a close living community. The purpose of this duty is to prevent infringement upon the life and health rights of the spouse in danger. If the duty is unlimited, recognized in all circumstances regardless of context, it would impose an excessively high obligation on the spouse. Restricting the duty to a close living community means not all marital relationships automatically qualify. The key criterion for a close living community is whether the parties cohabit and, as a result, have a relationship of high trust. This approach helps narrow the scope of criminal punishment and alleviate the burden on the spouse. Based on this, even if a couple is legally married, if they do not cohabit and lack a relationship of high trust and mutual reliance, they cannot be deemed a close living community. In such a scenario, if one spouse falls into danger, the other would have no duty of rescue.

Applying this to the Song Fuxiang Case, he cohabited with his wife, and they shared a high degree of trust. Although the wife carried out the act of hanging herself, it occurred within their private residence, isolated from the outside world. In this context, Song Fuxiang had a duty to rescue his wife. Knowing that Li Xia's death would result under these circumstances, he adopted an attitude of indifference towards his duty to act, thereby constituting omission-based intentional homicide.

Second, the duty of rescue between spouses should be limited to situations where the perpetrator holds an exclusive controlling position. This means that, in the specific context, only the defendant has the possibility to provide rescue, with no realistic possibility for others to intervene. Establishing a close living community is insufficient to criminalize non-rescue between spouses; the condition that the perpetrator has exclusive control over the occurrence of the harmful consequence to the spouse must also be met.

In the Song Fuxiang Case, if Li Xia had chosen a public place rather than their home to hang herself, Song Fuxiang's failure to rescue might not have constituted omission-based intentional homicide. However, by choosing their home, their shared living space, Li Xia placed herself in a dangerous state over which Song, within this enclosed space, had exclusive control. Therefore, he bore the duty to rescue his wife. Yet, he allowed her to proceed with hanging herself, and others could not have known about this danger. Given his exclusive control in this situation, he had a duty to rescue, and his omission constituted intentional homicide. Conversely, the acquittal in the Li Yinjian Case can be explained by the fact that his wife chose to jump into a river by the roadside, a public place. Besides Li Yinjian, there were others present (the villager He) who could potentially render assistance. Li did not have an exclusive controlling position over this public space.

In summary, besides being explicitly stipulated in law, the interspousal duty of rescue must also be subject to limitations. This ensures neither an expansion of the perpetrators obligations nor a violation of the criminal law principle of legality.

References

- [1] Xu Chenglei, Theory of Crimes of Omission Not Specified in Law, People's Publishing House, 2009, p. 355.

- [2] Lin Shantian, *General Theory of Criminal Law*, Peking University Press, 2012, pp. 159–160.
- [3] Zhang Liqiong, "A Jurisprudential Analysis of Criminal Law Duty to Act Between Spouses", *Law Review*, 2008, Issue 2.
- [4] Zhou Guangquan, *General Theory of Criminal Law*, China Renmin University Press, 2016, p. 111.
- [5] Qian Yeliu, "On the Punishability of Participating in Suicide", *China Legal Science*, 2012, Issue 4.
- [6] Sui Yike, "Analysis of Several Issues in Crimes of Omission: Understanding Omission from the 'Song Fuxiang Intentional Homicide Case'", *Legal System and Society*, 2020, Issue 7.