

Study civil liability arising from omission in Iran's legal system

Ebrahim Nasirifar^{1&2}, Mozafar Bashokuh^{3*}

¹MA in private law, Science and Research Branch, Ardabil Branch, Ardabil, Iran

²MA in private law, Ardabil Branch, Islamic Azad University, Ardabil, Iran

³Faculty member, Ardabil Branch, Islamic Azad University, Ardabil, Iran

ARTICLE INFO

Article history:

Received 26 Dec 2016

Received in revised form 28 Jan 2017

Accepted 15 Feb 2017

Keywords:

Civil liability,

Omission,

Causation,

The criminal consequence.

ABSTRACT

Objective: Creation of civil liability arising from the omission has been the challenging issues of civil rights that is long discussed by lawyers, to be investigated next to crimes against physical integrity of persons that usually committed with positive and negative actions and in criminal law has a special position, especially after the adoption of the Penal Code in 2013, whether the liability from the civil aspect to be created in Iranian legal system? **Methodology:** In this regard, because of originality of Iran's rights in Islam, the legal situation is investigated with regard to the views of Islamic Jurisprudence and sometimes comparing it with other Islamic religions. **Results:** The main aim of this study is to investigate the liability of omission in terms of its civil liability. Since conflict and question is expressed by some experts in the field of non-liability of omission (of course considering the aspects of creating a causal relationship in order to avoid limiting aspects of individual freedom), the results are unacceptable. **Conclusion:** The findings of this study suggest that civil liability can be committed with positive action and with omission. And if positive committing harmful to the subject creates liability, refusal or omission is considered the instances of fault (Article 952) and this liability causes the liability of refusal person if there are elements and foundations of proof of omission (legal, contractual, certain customs and causal relationship).

1. Introduction

In today's world that specific legal definitions concerning the individual responsibility (natural or legal) have been highlighted than ethics and the procedure has caused that, humans violate the rights of others with negligence and carelessness and refrain from duty due to clear non-improvisation of the status of civil liability in the existing laws, or in other places, the victims pursue others as a cause of occurring crime as a result of personal negligence and abuse of the rules of civil liability and relevant guidelines that multitude of cases in the courts confirm this point. So, it is necessary to be investigated the establishment of civil liability arising from the omission with the aim of informing the audiences about the quality and quantity of their rights through the existing laws.

Investigating the history of civil liability arising from the omission represents the attention of Muslim jurists in this regard, including:

Dr. Emami (2012) in a study entitled "Civil Rights" has investigated the subject of "civil liability in action and compare it in Iranian law with French legal system" and concluded as the man may be guilty in committing act, he may be guilty in omission, it must be distinguish between refusal during the act and omission simply in legal terms. There is no doubt that refusing act in the activity causes liability but simple refusal and if refusing harmful act not to be in any activity, but the person without intervention in an action not prevents the harmful accident. French judicial procedure in recent case has not been agreed with liability of refusal person. However, this procedure changed and in some cases, refuse from act is considered liability and now in statute law of French, fault in two simple refusal cases is confirmed, 1. Refuse the simple act, when it is to harm others, it is considered fault; 2. Refuse simple act, when it is not to harm others, it is not considered faulty unless required to do act by law and by contract (Sucharitkul, 1995).

Dr. Rah Peyk (2010) in a study titled "law of civil liability and compensations" has investigated civil liability arising omission and concluded: Based on the theory of risk (or objective liability), in the case of loss, the agent (or owner of object or animal) is responsible for compensation. In other words, in

* Corresponding author: Mozafar.Bashokuh@sarc.ir

DOI: <https://doi.org/10.24200/jssshr.vol5iss01pp54-59>

this theory, the principle is on liability and compensation and due to the failure of the theory based on the fault; the proof of non-guilty or considering necessary precautions does not have any effect in the liability. The only way out of responsibility is to prove the existence of external cause, as in the case of obtaining external cause, the relationship between the agent (or owner), and the damage is cut and he will be exempt from compensation.

Dr. Ghasemzadeh (1999) in a study entitled 'civil liability arising from omission (fault from negative type with omission)' has investigated the issue and recognized types of omissions that cause civil liability as follows:

A) Omission during performing the act: this type of act is specific activity omission from the responsible person that is a kind of refusal to perform certain duty.

B) Refuse from performing certain legal duty: the omission is a kind of independent omission. Refuse from performing in certain legal duty arises when law to be required a person to do a certain act. The origin of these duties is law, regulations, authentic guidelines and in some cases specific custom (derived from article 952). So, when there is a particular rule whether as law or custom, and it determines for someone a certain duty, that person must act to his legal obligation otherwise, the committed is guilty (omission) and will be responsible against affected (Deakin et al. 2005).

C) strict refusal without existence of a specific legal duty: the purpose of strict refusal that is a kind of independent omission is an omission that is not related to special action of responsible person in charge of his responsibility and there is not customary or legal obligation for him. In this case, the person refused because he has done an action without the necessary precautions is not criticized because he not done an act but because of the refusal or omission that is not obliged to do it and thus is not involved in losses, he will be blamed and probably questioned (Gauci, 1997).

Today by technological progress and industrial development, almost the damage and quality of its compensation has taken a new form. By complexity of relation and complications arising from it including work-related events, seeking welfare of the people and delegate responsibilities to other people based on contracts, produce fast cars and increase of traffic accidents, attention of persons responsible for the legal rules to avoid legal responsibilities, etc., the discussion of determining guilty of these events and how to compensate is raised. It is certain that no harm should remain uncompensated and it is accepted by all legal systems in the world. However, different views have been expressed in recognition of the charge and agent of loss and ultimately basis of responsibility. Including the principles of non-contractual or compulsory civil liability, guilty theory, the theory of risk, complex theory, theory of guarantee the right and ... is raised most countries have experienced it and in practice, the strengths and weaknesses of each one is represented. However, despite the above comments, most countries still follow the guilty theory and in the field of rights, guilty is considered the most important principles of civil liability.

There are a lot of difference between jurists and lawyers about the crime of act arising from omission whether refusal and omission can be material element of the crime or not? Some people with the assumption that refusal and omission is a negative entity and it cannot be the cause of the existence issue response negatively to this question, while others have considered this offense as lack of legal element. On the other hand, one of the best ways to create a spirit of cooperation and spread a culture of partnership among the public, which in case of danger and emergency rush to the aid of each other, is legally bound to assist, and in the case of refusal of duty, face with criminal sanctions (Peters, 2005).

The Holy Quran encourages his readers that in situations of risk and emergency especially life-threatening help to their fellow and refuse an action that causes the deprivation of life of other; to the extent that killing one innocent person is equal to killing all humanity, and saving one's life is considered equal to save all human beings: According to this verse, one who save other and save him from the risk of death, it's like that all human beings are revived and saved from death, and vice versa, a person who caused the killing of innocent people, whether committed this action with positive or negative act is as this that he has killed all humans. Although this verse has apparently considered criminal issue but considering that Iranian law is derived from this Sharia so it is used and relied in civic debate.

In this paper, though, omission causes civil liability, the criteria and regulations of responsibility with negative act and legal perspectives, jurisprudence and Islamic religions will be examined.

2. Materials and methods

2.1 Definitions of Words and Phrases

2.1.1 Civil liability:

Civil liability is to require person to compensate damages that is caused other. Civil liability arises, when someone without a license damages the right of other and losses to other due to it. (Emami, 2012), civil liability means the responsibility for paying damage. So, wherever a person against other is liable for compensating damage, there is civil liability. (Bahram Ahmadi, 2009) civil liability means when a person is responsive of his actions against another person and inevitably compensates damage that he is caused; so civil liability in its own meaning means "compensate damage to others". (Hossein Abadi, 2006)

2.1.2 Omission:

Omission is intentional refusing of a person from action to avoid harmful result to other despite the possibility of avoiding and without legal obligation to have a contract or common law to prevent it. A voluntary refusal of person to do positive certain action that legislator in specific conditions has required the obliged to do it.

2.1.3 Civil liability arising from omission:

Requiring the person to compensate damages that by voluntary refusal of doing positive certain action that legislator in specific conditions has required the obliged to do it (Emami, 2012).

2.1.4 Imprudence:

Not predict mistake and risk that might be occurred as a result of act. (Ibid)

2.1.5 La negligence:

Carelessness and negligence in performing act. (Ibid)

2.1.6 La culpabilite:

It is the credit status that can be found in person due to commit the act without legal license intentionally or as a result of carelessness. (Ibid)

2.2 Civil liability arising from causal act or omission

There is no doubt in relation to la culpabilite and personal responsibility that is deviant by doing an act from a normal human behavior, but various theories have been proposed about the fault of refusing action from certain act if it is harmful to others. Need to respect individuals' freedom in action and respect for their individual character requires that refrain from a certain action not to be fault, however, in many cases omission also like the act is the best examples of fault; as the Civil Code Article 952 and in defining wastage has acknowledged this issue (Ghasemzadeh, 1999).

In discussing the omission as a positive active, it should be investigated its constituent elements and if legal, moral and material elements to be established, but compare to criminal liability that needs to be recognized the type of offense intentionally, unintentionally or quasi-intentionally or mere error, in civil liability for determine damage and liability; there isn't required to identify the type of it, but wrongdoer should compensate the damage in any way but detecting the type of crime may be in the discussion of using liability insurance andthat this issue can be found in the discussion of authorities and responsibilities arising from act of employees, etc.

With an example we explain the constituent elements of civil liability arising from the omission:

An orchardist has given the liability of watering his garden to a certain person during a contract by mentioning conditions however, due to negligence and lack of irrigation of gardener, the garden is dried up and no product has been achieved, whether the omission of gardener have civil liability?

The garden owner by a contract that is assigned the task of irrigation to a third person actually he has created the legal element of liability, because the gardener by contract and for taking wage was obliged to irrigate the garden on time and according to the time circumstances, and therefore lack of timely watering the garden by the gardener has created a material element of omission but in the spiritual element, in the discussion of civil liability there is not any requiring for proof it, because the person to have criminal intent or not, he causes damage with owner and must be responsible for it. However, the civil liability arising from the omission with the above conditions exists and gardener must cope with its damage.

In other cases, perhaps legal element of this liability to be created based on statutory law or custom.

If we investigate the Article of the Penal Code enacted 2013 (2, 295, 145 and 495) about civil liability arising from the omission, although the issue has a special relationship with criminal liability arising from omission but we can use it in the field of civil liability as legal element. In terms of Islamic Penal Code, the crime is divided into two categories of crime of act and crime of omission. "Any behavior such as act or omission that penalty is determined for it in law is considered crime." Since the legislator has used so-called omission absolutely, it is including both types of the crime of omission. In addition, other Article has considered omission with the fulfillment of conditions as follow with punishable title and criminal:

1. One undertakes an act. 2- Law undertakes a duty on the person. 3-person has the ability to do it. 4-person leaves doing an act that he could. 5. Criminal outcome is achieved. 6. Causal relationship is between omission and criminal consequence.

As in the example above mentioned, in the discussion of civil liability arising from the omission, there isn't required to prove some of the causes recognized from the Islamic penal code.

In accordance with Article 492 of the Penal Code, the crime may be occurred in one of three ways stewardship, causality and social: "the crime results in death or blood money if the result is documented to behavior of committed whether to be done by stewardship or causality or social." Of various articles of the law can be deduced that the crime of act arising from omission is only occurred through the "causality" If the responsible person does "wastage" in doing saving act not through "stewardship". Islamic Penal Code has allocated Articles to commit a crime by causality as omission. Meditate in these Articles shows that due to lack of criminal responsibility of steward, the cause is from steward. Therefore, in all cases, the quitter that is the cause is responsible, not steward. For example, Article 522 IPC states about a pet owner that due to failing in protecting it has damaged the other: "" the owner of any animal that is aware of the possibility of its attack must maintain it and if as a result of his fault, the animal harms other, he is guaranteed. But if he not to be aware of the attack of animal and lack of knowledge is not due to his fault, he is not guaranteed. "Article 519 IPC on the liability of the owner of the building who is aware of the danger of wall collapse and at the same time for repair it, refuses appropriate measures, provides as follows: " "If a wall or a building that is constructed based on stability and is exposed to collapse or inclined to fall into other property or crossing if before the owner has the ability to repair or ruin it and causing injury, the liability is canceled provided that to be informed people exposing danger. If the owner neglects to prevent damage despite the ability to repair or eliminate or awareness, he is guaranteed."

Legal procedure on the deduction of the advisory opinions of the legal department of the Judiciary has chosen a particular view about crime of omission; i.e. quitter based on law or personal commitment is required to perform life-saving action and omission caused criminal consequences. For example, if someone who is responsible for lifeguard according to regulations (governmental systems) refuses lifeguard against his responsibility and duty and the person to be chocked in the water, his omission is crime and including under Article 2 of the Penal Code of refusing to help injured and eliminate physical risks approved in 1975. In this case, the relation of causation in this way is considered that responsible will be guarantee for the payment of blood-money. If the responsible of lifeguard is committed omission and he intends to get result (chocking) and achieves the result, the mentioned responsible is considered killer and will have the punishment of murder. (Legal Department of the Judiciary, 1098/7, 1996).

Civil liability can be discussed the refusal person in two types: 1-elementary omission (sheer omission) 2. After doing positive act

So, whenever there is a particular rule as law or custom, and determines duty for someone, that person must do his custom or legal duty otherwise he is committed fault (omission) and will be responsible against the damaged person. Such as the duty of drivers to aid the victims and the injured with the duties of firemen in firefighting and rescue those who are trapped in the fire. Refusal of officer in this case is considered guilty. In addition to make civil liability even may be involved criminal liability. But in the second debate, if the person not involved from the beginning, there is no responsibility for leaving however, if he starts measures, he must act it to end and if loss or damage caused by omission occurs after a series of positive actions, the quitter is responsible for compensating loss or damage. For example, a driver while driving refuses to brake in time, or a contractor who has dug wells or pit on the general crossing leaves it without any warning sign as red light or proper shield.

2.3 Positions of different schools of Islamic law in relation to the omission from the standpoint of Islamic law

Many Shiite and Sunni scholars have referred to a person in prison and banned him from food and water, and have considered the prisoner as killer. In Tahrir Al-Vasile, Imam Khomeini has pointed out to issue of ban food and wine for a period of time that people typically do not survive and emphasized that the quitter is committed murder (Al-Mousawi Khomeini, 2006). He pointed out that the view of most of jurists is that such action is murder. But the question is whether the basis of verdicts of jurists in these fields is the individualistic basis of Western lawyers?

Western thinkers explain the issue of responsibility of leaving act based on contractarianism school. And trust that is common criteria of contract has become the origin of the responsibility of person leaving act, against the lack of action. Our jurists in these cases consider the person leaving act as guarantor. But it is a mistake to think that the same thing that in Western schools is the origin of responsibility is exactly the origin of guarantee of leaving act. Although jurists' verdicts in these cases, as well as Western jurists, may be the guarantor of leaving act, but there is a clear difference in their ruling that theory of Western lawyers is based on a pragmatic sense of duty and responsibility however, in Islam and the Islamic legal system, the view of our jurists is based on a divine sense of duty and responsibility that its basis is deep focus of Islam to man's position in the world. For example, Shahid Sani in describing Lame refers to the guarantor of building owner for loss resulting from collapse due to the lack of repair, as well as in the judicial books, swimming instructor responsibility for the drowning children who have been entrusted to him for instruction of swimming are discussed.

Based on the responsibility arising from the contract of Western schools, examples of the crime arising from omission must be specified: i.e. an omission that based on the contract, quitter has been its responsible is crime, but if quitter not has an obligation in this field, he has no responsibility. The problem of this solution is very clear. In such an approach, if person does not have any obligation to anyone, he nor has any human duty towards others. With these criteria may be a mother who refuses on giving milk to her infant that is required her for survival not to be the example of crime arising from omission.

Some Western thinkers to solve this problem have extended the contract issue and resorted to its custom meaning. Therefore, it can be said the most important characteristic of criteria of Western lawyers is relativism and subjectivism. But in Islamic jurisprudence, the criterion of crime of crime arising from omission is an objective issue and independent of circumstances.

3. Discussion and results

3.1 Omission from the perspective of Shiite jurists

Jurists also have not established any general rule in this area but in many examples consider omission (wastage) as an act causing liability, of studying various theories and examples can be achieved that: According to jurists votes, an omission creates responsibility that its act is possible to be created a responsibility legally and customarily for the person in other words, omissions create responsibility in terms of Shiite that: are as wastage (abandonment of protection) and leaving protection means refusing the caution and care that man considers in his affairs habitually and if leaves this caution and care, he leaves protection, and such a person is committed customarily. So sheer leaving not creates any responsibility unless the legislator is criminally prosecuted him that it also requires legal requirement so mere omission does not create criminal liability and not civil liability. According to some authors, the best Article that states abandonment of protection and is derived from the jurisprudents is Article 334 of the Civil Code, which its phrase can be changed and said: the owner of animal without abandonment of protection (fault) is not responsible for damage from animal. Therefore, as in the definition of wastage is said: in the omission, a previous commitment is essential, whether it is the source of contract or custom.

3.2 Omission from the perspective of Sunni jurists

Sunni jurists have strong disagreement about the crime by omission, so that the religion has accepted likely committed liability with omission in all cases. Abu Hanife and his followers not consider omission the cause responsibility because they believe it as a non-existence act and only consider positive act the result of criminal responsibility and believe that in all cases, omission is the main factor of the criminal result not omission (Fathi Behoseiny, 1980). But the heads of the three Sunni schools (Hanbali, Maleki and Shafi'i) said: If a person intentionally with his refusal leads to criminal incident, his intentional cause is considered event and to be sentenced to punishment, but if unintentionally he causes it he is considered unintentional cause, provided that in terms of common law, act of saving is obligatory on him (Odeh, 2000).

In this paper, the requirements of giving endowments were discussed and were analyzed. The results obtained are as follows:

Rent Endowment: some of the rules and principles that govern the lease, include being exchanged (not free), (Article 490 BC and Article 11 of the Executive Regulations of Religious Endowments), the term (Article 468 BC and paragraph (d) of Article 11 and paragraph 2 of Article 32 of the executive regulations endowment amended regulations), attracting the attention of experts (top Article 11 of the executive regulations endowment), auction (paragraph 3 of Article 32 of the bylaws dedicated law), receiving rent day fair rate (clause 'g' Article 11 of the executive regulations endowment) and set a formal lease (paragraph "g" of Article 11 of the executive regulations endowment).

Sell Endowment: The action of endowed, in fact, is establishing an exceptional facility that gives some form of legal entity to the endowment wealth. In other words, the endowment of a property, removes it from the asset of endowed, and prohibits being the asset of others, entry because. Because the

endowment basis is the owner will, on leave certain property, by confining it from any transfers (not transfer it to third parties who normally leave through property ownership) and determine the direction to spend its benefits or set of persons (other than itself), to be enclosed or non-enclosed to benefit directly or indirectly from the same. The same is the endowment property, which, according to the above description, since it is based on the imprisonment and not transferred, in principle, it is non-sales. However, the principle of non-sale of endowment property has exceptions like other legal establishment. Iranian Civil Code is recognized two cases as an exception to the principle: one case referred in Article 88 BC and the other is in Article 349 BC. Two articles permit the selling endowment with qualifications such as the possibility of failure and conflict among beneficiaries of the endowment. Article 88 BC: selling endowments, if it is damaged or there will be a fear to be damaged, so that benefit will not be possible, is permissible when its construction is impossible or no one presents for the construction. Article 349 BC: selling endowment is not true, except that, there will be different between the beneficiaries of the endowment, so that will be a fear of bloodshed or resulted in the destruction of endowment property and in cases, in the context of the endowment regulations.

Become the best: Assuming the same Endowment prepare sales, due to the conditions stipulated in the laws and regulations of the Endowment, in the consumption of an amount and incomes from the sale and the sale of endowment, there must be acted according to the law, that action in this manner is usually "become the best". Article 90 of the Civil Code expressed the general rule and saying, "The endowed becomes the purpose of endowed about selling licenses.

4. Conclusion

Omission in terms of criminal law is the criminal behavior negatively, as a refusal to perform a duty which the law specifies for people. And it is an absolute crime that does not require the conclusion and as omission is happened from the person responsible, crime is realized. In these crimes due to non-associating crime to result, causality relation does not arise. Therefore, one can assume that the constituent elements of this offense are two things: one, refuse from positive act and the other, the requirement to do it from legislator.

Civil liability arising from the omission has criminal outcome, the result is the key components of material element and it is carried out and the compensation to be applied if it leads to such result and causal relationship to be governed between the omission and its result and this occurs with positive act and omission; legal element of the crime arising from omission is the prohibiting legislator that is prohibited the realization of criminal consequence as injurious to others and determined punishment for it.

If the person with his refusal causes the criminal result, the crime of act arising from omission is realized. If these crimes occur with omission, the crime is called omission with result or a crime arising from omission, like the doctor refused to rescue patients who are dying. Although some lawyers disagree with title of act arising from omission and consider it a kind of act.

Article 295 IPC approved 2013 provides that: "If someone leaves an act that has undertaken its responsibility or a specific duty that assigned by law, as a result of it, a crime to be occurred, if he can do it, the crime will be documented and it is intentional or quasi-intentional, or sheer error, like the mother or the nurse who undertaken feeding the child, not milk the child or doctor or nurse leaves its statutory obligation.

Omission should be committed illegally and contrary to the obligations and has two conditions:

1- quitter of act in accordance with the law or social norms (contract or custom) is obliged to do an act that has left it.

2-quitter of act is known and aware that he leaves an act which is accompanied with harmful result."

Regulation 295 of the IPC is an attempt to consider legal responsible of leaving act and seems the important point in this regulation is emphasis on the "undertake".

Accordingly, "if a person was responsible for doing tasks in any way and committed to do tasks if he creates damages with his omission, he is liable to compensate it.

Civil liability of the refuser of aid to other in legal perspective, for that the refuser from rescue the other to be known guilty and responsible, three major factors are necessary: (1) refusing to rescue other in spite of other legal requirements 2-realize loss and damage 3-causality and causation relation among loss and omission abstained. As a result of the crime, the type of damage is determining responsibility of refuser.

Refuser is required to compensate damage and lack of criminal responsibility in financial losses, but in physical damage by establishing causality relation, his criminal responsibility (intentional, quasi-intentional, sheer error) is raised.

One of existential philosophy of claim of civil liability is the compensation of damage and restitution as much as possible before the occurrence of loss. For the acceptance of such a claim, the claimant must first prove the existence of loss as an essential pillar of responsibility and secondly prove the causal relationship between harmful act of defendant (medical professionals) and loss created and, in some cases, the defendant's fault is the condition of establishing responsibility, which it should be proved.

Finally, it is concluded from the principle of individual freedom in practice and legal principle of crimes and punishments in criminal law that civil responsibility of leaving act should also have a legal frame otherwise all people, in front of all the other people will have material and spiritual responsibility which is in conflict with their material and spiritual law.

REFERENCES

-
- Al-Mousawi Khomeini, R. 2006. Tahrir Al-Vasile, Dar Al-Elm, Qom.
Bahrami Ahmadi, H. 2009. civil rights 4, Mizan, Tehran

- Deakin, S. F., Morris, G. S., & Morris, G. S. 2005. *Labour law* (Vol. 6). Oxford: Hart publishing.
- Emami, M. 2012, *civil rights*, Eslamiye, Tehran.
- Fathi Behoseiny, A. 1980. *Al-jarayem fi al-Feghh al-Islami*, Dar al-shoruq, Beirut
- Gauci, G. 1997. *Oil pollution at sea: civil liability and compensation for damage* (pp. 210-212). Chichester: Wiley.
- Ghasemzadeh, SM. 1999. *the civil liability arising from omission (fault in type of negative action with omission)*, Faculty of Law and Political Science.
- Hossein Abadi, A. 2006. *investigates and analyzes Article 7 of the law of civil liability, theology and law*.
- Odeh, A.Q. 2000. *Al-Tashrih Al-Jenaiy*, Darolketab Al-Arabi, Beirut
- Peters, R. 2005. *Crime and punishment in Islamic law: Theory and practice from the sixteenth to the twenty-first century* (No. 2). Cambridge University Press.
- Rah Peyk, H. 2010. *law of civil liability and compensations*. Khorsandi, Tehran
- Sucharitkul, S. 1995. *State responsibility and international liability under international law*. *Loy. LA Int'l & Comp. LJ*, 18, 821.

How to Cite this Article:

Nasirifar E., Bashokuh M., Study civil liability arising from omission in Iran's legal system, *UCT Journal of Social Sciences and Humanities Research* 5(1) (2017) 54–59.