# *LESSON 1*

# The Criminal Behaviour as an Action or Omission

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## 1.HUMAN BEHAVIOUR AS A STARTING POINT FOR AN OFFENCE

The **human behaviour** that a person materializes in the outside world constitutes the core of the offence, resulting in the violation of a criminal legal norm. It therefore follows that, although natural phenomena (storm, hurricane, fire, flood…), or animals themselves, can also produce harmful results (damage to things or injuries or death to people), only human beings can commit criminal acts.

> If an animal bites a person, the consequent injuries cannot serve as the basis for a crime of injury. Such an attack could only be considered «criminal» if the animal had been flogged by a person or if the attack was a resultant of a lack of care on the part of the owner. In both cases, the criminally relevant behaviour would be that of the owner rather than that of the animal.

Thus, human behaviour constitutes the starting point of the legal-criminal reaction, which is because the criminal law that governs our legal system is a criminal law based on the event and not on the agent's identity. This means that the criminal law will intervene only when the conduct manifests itself outside of the human body, for this reason thoughts, ideas and criminal resolutions that are not externalised may not constitute an offence. The above derives from the Latin principle «*Cogitationis poenam nemo patitur*», which means that thought is not punished. Likewise, an individual may not be criminalised only for having certain personal qualities, a certain character or manner of being, so long as this is not externalised in a behaviour that leaves their internal sphere.

> If an agent thinks about killing his/her neighbor, said intention will not be criminally relevant while remaining within the agent's internal scope. It would be different if the agent had already initiated acts aimed at producing the death of his/her neighbor, provided that they can be considered preparatory acts, which already suppose in some way the externalization of the criminal conduct, such as acts of conspiracy, proposition or provocation to commit a crime (Articles 17 and 18 of the Spanish Penal Code).

However, as we will see, only some human behaviour will be relevant to criminal law. For it to have criminal relevance, the behaviour must be typical, illicit (= illegal), culpable and punishable. In this book we will focus on the first of these stages of the legal theory of crime, the typicity. Therefore, given that the conduct is a «human behaviour», the next requirement is that is contained within the Special Part of the Spanish Penal Code (hereinafter referred to as the SPC). Thus, if it is found that the act in question is not a «human behaviour», then it cannot be criminally relevant.

Criminally relevant human behaviour can be divided into two groups: activity (positive acts or *actions*) or inactivity (*omissions*).

Actions and omissions constitute, therefore, the starting point to begin analysing the existence of an offence, as established by Article 10 of the SPC: «*felonies are intentional or negligent actions or omissions punishable by Law*».

This means that only typical acts or omissions will be criminally relevant.

Next, we will analyse the meaning of an «action» for the purposes of criminal law before later comparing this meaning, along with its legal treatment, to that of the typical omission.

## 2.NOTION OF AN «ACT(ION)»

The notion of a criminal act, despite its importance in understanding the offence, is not defined in the criminal codes, but it is the doctrine that has been responsible for defining what is understood as such. The search for a definition of the action (an act) has been considered a key aspect to establish the content and structure of the legal theory of crime. In general terms, **criminally relevant action** can be defined as an active and voluntary human behaviour that is externalised by an individual.

The notion of action has been configured over time, through contributions made by the different theories maintained in this regard. The discussion between penal Schools in the mid-twentieth century, mainly, has given rise to **theories of the action**.

### 2.1.EVOLUTION OF THE NOTION OF «ACT(ION)»

The main theories aimed at formulating the notion of an act for criminal purposes are: the causalist theory of action, the finalist theory of action, the social theory, and, more recently, the meaningful theory of action. However, here we will focus on explaining only the first two theories, as the most important.

#### 2.1.1.The causalist theory of act(ion)

According to this theory, which was at peak popularity in the late 19th and early 20th centuries, a criminal act is a voluntary bodily movement that causes a change in the outside world (result) perceivable by the senses. A human physical movement, produced by a manifestation of the agent's will, would be the cause of the result. Therefore, three elements are present in the causalist notion of action: act, result or outcome (as a separable effect in the outside world which is perceivable by the senses) and the causation link between them.

All the consequences are considered to be integrated into the action, whether or not they are wanted by the agent, that is, even if the result is attributable to chance. It is at this stage irrelevant whether or not the agent's will was direct to perform the crime, as this will be assessed later in the «culpability» stage of this theory. It is in this last stage where the causalists incorporated the intention and purpose pursued by the agent, that is, the intent.

As stated above, the **content of the will** is **irrelevant to causalism**, since it is understood that the will is only important because it is a **simple impulse** or motor of the bodily movement that causes consequences. As far as the action (as the first stage in the legal theory of crime) is concerned, it doesn't matter what the agent wanted to produce when (s)he moved, but only that (s)he wanted to make that movement. The terms «will» and «voluntary» are to be interpreted in that sense.

Consequently, the causal theory of action focuses on the sole consideration of the **disvalue of the result** and constitutes a purely mechanical conception of criminally relevant behaviour.

Two phases could be distinguished in the causalist notion of an act: the first one based on a scientific-naturalistic approach, influenced by the progress of the natural sciences of the 19th century; and a second of a more valued and neo-Kantian character, which lasted until World War II.

Various criticism caused the causalist theory to be practically abandoned in Germany many years ago. Some of the most prominent doctrine of this theory, who intervened at various stages were Von Liszt and Beling, in the first phase, or Max Ernst Mayer, Von Hippel or Mezger, in the second. This theory continues to be supported by a minority of the Spanish academy.

#### 2.1.2.The finalist theory of act(ion)

The finalist notion of an action was developed by Welzel, who conceived it as an ontological concept. Welzel posited that the finalist nature of the human behaviour is unquestionable, inasmuch as it is an element of the very nature of being. As a consequence, the legislator is bound to accept it.

The finalist conception of an action suggests that actions are voluntary human behaviours which are materialised in the outside world, and whose possible consequences *are foreseen* or *could be foreseen*. That is to say, this theory would say that people do not act in response to simple impulses, or in a «blind» way, but rather their behaviour is directed towards the realization of various goals that they have set. In this way, this theory considered that the human being is able to configure the external reality with a meaningful content.

In other words, according to the finalist theory, the criminally relevant action is one that is aimed at achieving a previously planned goal. That is, it is the exercise of a *finalist activity*. Therefore, the content of the agent's will is the crux of the finalist theory. Contrary to the causalist theory of action, here, the intent would be valued in the stage of typicity rather than that of culpability. Metaphorically it has been said that, whereas causalist action is «blind», finalist action «can see».

In any case, these notions of action failed to capture the peculiarities of all behaviours with criminal relevance in a single formula. The main problem arose with omissions, since from the strictly ontological point of view (of the world of being) an omission does not cause modifications in the outside world nor is it capable of orienting a causal course towards a goal. These defects of the classical theories gave rise to new proposals more open to the incorporation of normative elements in their definitions. Such is the case of the social notion of action and of the meaningful notion of action, which definitively abandons the ontological point of view to move to the field of interpretation of behaviours and which in recent times has gained prominence.

### 2.2.NOTION OF ACTION ADOPTED

The concept of action for criminal law purposes that is supported in this work is the finalist notion. However, even though the contents of the legal theory of crime posited and discussed hereinafter stem from finalist bases, non-orthodoxly finalist positions are adopted. This approach is considered to be endorsed by strong arguments.

On the one hand, the purely finalist concept does not fit in the Criminal Code, which even claims the need to incorporate normative elements to it. It should be borne in mind that the Spanish Criminal Code expressly sets forth the dangerousness of the conduct as a requirement for it to be punished, which is an express claim for the presence of a legal causation link between the conduct and the outcome.

On the other hand, as Cerezo Mir —one of the most outstanding finalist scholars— wrote some decades ago, «strictly speaking, the finalist notion of an action is not ontological». In this regard, one can consider that some normative elements and assumptions are present in said notion.

The terms act or action are used in a broad sense in this lesson, therefore, they refer to both actions and omissions.

## 3.EXCLUSION FROM ACTION/OMISSION

After the adoption of a notion of finalist action, it is evident that the key element of the action is the will, manifested in the goal pursued by the agent with his/her conduct. Therefore, it is clear that where said will does not exist, there can be said to be no human action or omission for the purposes of criminal law.

Cases in which there is an *absence of will* and, therefore, an exclusion from action or omission, are cases in which the corporal movements are nothing more than an event or a mere happening, therefore irrelevant to Criminal law. These movements are involuntary acts or omissions and thus fail to satisfy the law's minimal condition for liability, which is the requirement of an *actus reus*. If the behaviour was involuntary in this so basic way, we say that even the action itself was not performed.

There are three generally agreed upon groups of «involuntary acts»: (1) cases of irresistible physical force; (2) reflex movements; (3) and, finally, the behaviours engaged in while asleep or unconscious. When any of these assumptions concur, it is considered that there is an absence of will and, therefore, the action or omission is excluded for criminal purposes.

## 3.1.IRRESISTIBLE (PHYSICAL) FORCE

The irresistible force is based on an external impulse or influence, which acts materially on the agent, preventing him/her from controlling his/her action. In this way, the agent under an irresistible force acts automatically, that is, (s)he is compelled thereby. The agent movement is not voluntary at all. In fact, (s)he doesn't want to make it. It is a physical violence from the outside that makes the agent unable to perform any alternative behaviour.

The requirements that the irresistible force must meet so that it can lead to the exclusion of the action or omission are substantially three: it must be external, absolute and physical or material.

With respect to the first requirement, the force has to be *external*, that is to say, it must come from the outside, for example, from a third person, from an animal or from natural forces or events. If it were an irresistible force perpetrated by another person, (s)he could be responsible for the result that occurs.

> Agent «A» strongly pushes agent «B», who as a result impacts on agent «C», causing him/her injuries. Agent «A» would be the mediate principal of such injuries, having used agent «B» as an instrument. The latter would not have taken an action for criminal purposes, because (s)he could not direct his/her action towards another purpose, upon receiving said external impulse by having being pushed by «A» without the possibility of modifying the result produced.

From the external nature that the force is required to have, something commonly accepted by Spanish doctrine and jurisprudence is deduced, and that is that irresistible impulses of internal origin (heat of passion, outbursts, fits of rage, etc.) cannot give rise to the exclusion from action or omission, since it is understood that in these cases the will is not totally absent. However, in these cases, exemptions or mitigations which will be relevant in the stage of culpability could be seen.

> The agent who, in a fit of rage, attacks his/her neighbor with scissors, is carrying out the killing action, provided for in Article 138 SPC. However, his/her culpability will be diminished, which will mean a mitigation of the penalty, if it is proven that the internal impulse that led him/her to perform such action affected his/her capacity to be motivated by the norm.

Secondly, it must be an *absolute* force (*vis absoluta*) that completely annuls willfulness. This requires that the perpetrated force does not leave any option to the one who suffers it, since if (s)he could resist it, the action would not be excluded.

> If the push from agent «A» to agent «B», mentioned above, did not have too much force, so that it can be shown that agent «B» dropped on «C», having been able to avoid it, this requirement would not be fulfilled and, therefore, not the will of the agent would be annulled and the action would not be excluded for criminal purposes.

And, finally, the force must be *physical* or *material*, which totally prevents movement or causes uncontrollable movement.

> An example of the first case would be to tie a person's feet and hands, preventing him/her from acting by saving a life, this being not a criminally relevant omission since it was not possible for the agent to act otherwise; an example of the second assumption would be the case of the strong push of the aforementioned assumption when speaking of the requirement of the external character of the force.

The requirement that force be material or physical excludes cases of deception or threat (*vis moralis*) that, rather than completely annul the will of an agent, condition it, as it does not influence the individual's body, but his/her mind. In these cases, the agent does carry out an action for criminal purposes but the goal that directs it is marked by deception or threat and not by his/her own will. These cases, generally, will enter the field of culpability through the figure of insurmountable fear (Article 20.6° SPC).

> In the case of the push, mentioned above, there is an absence of action because the agent cannot direct his/her

movement to avoid the harmful result, consequence of the strong push. However, different is the case in which the injuries in agent «C» are caused by agent «B», because agent «A» threatens to kill him/her with a knife if (s)he does not. In this case, agent «B» would be carrying out an action for criminal purposes, his/her goal being to cause injuries. Even if his/her will would be vitiated by the threat of agent «A», such injuries would result voluntarily, rather his/her freedom being the one that would be affected by the preceding threat. These cases shall do not be analysed in the field of typicity, but they will give rise, where appropriate, to exemptions from illicitness (justifying state of necessity) or culpability (insurmountable fear).

## 3.2.REFLEX MOVEMENTS

Reflex movements are those that are performed by *external stimuli* transmitted by the nervous system directly to the motor centers, without the intervention of consciousness or will. Therefore, since these movements are not controlled by the will of the agent, and occur purely mechanically, they do not constitute an action.

> Cases of reflex movements are, among others, reactions produced by muscle cramps or instinctive acts derived, for example, from closing the eyes while driving because suddenly an object is going to hit the vehicle or by the blindness caused by a blinding; of dropping a very hot plate by burning with it, hitting and injuring a child underneath; or of pushing an agent that burns with a burner by an abrupt movement triggered by an electric shock suffered by touching a refrigerator.

A variant of the movements or reflex acts are the *seizures and convulsions* (for example, epilepsy), and these also would not constitute an act or an omission for the purposes of criminal law.

> Case of the agent who, when suffering an epileptic seizure, drops the baby in his/her arms, causing him/her injury or the agent who suffers a seizure in a Murano glass shop, causing damages to several pieces.

Other than reflex movements, there are also *short-circuited acts*, which are impulsive or explosive reactions, in which the will, even if fleetingly, intervenes. Therefore, acts in short circuit do not exclude action or omission, even if these can mitigate the penalty in the stage of culpability.

> Case of the robber who, instinctively and nervously, shoots when (s)he hears noises behind him/her or when (s)he sees suspicious movements of a hostage that (s)he thinks will defend himself/herself by assaulting him/her. Or the case of the driver who makes a sudden movement on the steering wheel after seeing an animal that appeared on the road, resulting in an impact against a cyclist and causing his/her death. In these cases, we would be facing a criminally relevant action to the extent that body movement occurs more or less in an automatic way, not meditated, but at the service of a goal (dodge the animal).

## 3.3.BEHAVIOUR ENGAGED IN WHILE ASLEEP OR UNCONSCIOUS

A third group of cases in which there is no action or omission is that of the behaviours engaged in while asleep or unconscious. In these cases, the agent lacks control over his/her will or his/her body. The classic examples are the state of normal *sleep*, the assumptions of *sleepwalking* or loss of consciousness (fainting, fading, etc.).

> Firstly, some examples of normal sleep are the case of the driver who falls asleep at the wheel and runs over a person or the mother who, asleep next to her baby, crushes him/her, causing death. Likewise, cases of omission are frequent in cases of sleep, such as that of the caregiver who, because of falling asleep, does not hear the cries of help from the elderly lady (s)he is caring for, who dies due to lack of assistance. Secondly, an example of the cases of sleepwalking would be the case of the civil guard who, sleepwalking, took a gun, mounted it and fired on his roommate, causing injuries (Audiencia Provincial Zaragoza - Provincial High Court- Ruling of 07/07/1999 – Roj: SAP Z 1704/1999). Thirdly, as an example of the cases of loss of consciousness, it could be mentioned that of the mother who, because of fainting, cannot come to the aid of the child who has fallen from the cradle.

There also exist other behaviours which appear to manifest themselves whilst the individual is unconscious, but these create problematic assumptions as it is not clear whether there is an absolute absence of will or not. These assumptions can be summed up in two: the cases of hypnosis and those of narcosis.

In the first place, with respect to cases of *hypnosis* or hypnotic suggestion, the action or omission would be

excluded if the hypnotized person obeyed the hypnotist's orders. However, this has been a topic much discussed in the doctrine. Thus, on the one hand, the Paris School denied that in the hypnotic states the conscious will of the agent is annulled, not excluding action or omission. On the other hand, Nancy's School affirmed that every person was susceptible to hypnosis, to the point of being able to annul the agent's conscience and provoke the commission of crimes in this state. Finally, an intermediate position considers that the possibility of suggesting hypnosis crimes depends on the personality of the agent. In these latter cases, the majority of the doctrine considers that, although it is not possible to speak here of the absence of action because there is a certain degree of conscious will of the agent, an exemption or mitigation of the imputability could be appreciated. In any case, the solution does not depend on normative criteria of criminal law but on the conclusions of the behavioural sciences, from which it follows that, in case of a problem of this nature in judicial practice, it will be the experts who should provide the necessary knowledge so that the judge can decide on the voluntary or involuntary nature of the conduct.

In the second place, the assumptions of *narcosis* need only one clarification. In order to talk about the absence of will, the so-called lethargic drunkenness must be established, that is, the deepest point of drunkenness that gives rise to behaviours engaged in while unconscious. In these cases, the action or omission would be excluded, but not in the more frequent cases of semi-unconsciousness, because in these cases there is a conscious will of the agent.

## 4.THE *ACTIO LIBERA IN CAUSA*

There are occasions in which the cases of exclusion from action or omission that we have just seen may generate criminal responsibility. These cases occur when the absence of will, which results in the exclusion of the action or omission, comes from a previous active or omissive behaviour of that same agent, intentional or negligent, which makes him/her lose control of his/her body and of his/her will. These are the assumptions of the so-called *actio libera in causa*.

In these cases, the agent performs a preceding behaviour in which, intentionally or negligently, (s)he puts himself/herself in the situation of absence of will (behaviours engaged in while asleep or unconscious, irresistible force or reflex movement) and commits an offence. Hence, in these cases, the judgment on the existence or not of will must be rolled back to the moment in which the agent is put in said situation, foreseeing or being able to foresee the commission of the typical event.

The *actio libera in causa*, therefore, constitutes an action that was «free» in its origin or cause, and it is to that prior human behaviour to which the subsequent injury can be attributed. The *actio libera in causa* will be intentional if the principal intentionally sought the absence of consciousness to commit the offence. On the contrary, there will only be responsibility for negligence if, as is more usual, the individual came to that state due to lack of care in his/her previous actions.

> Case of the agent who gets drunk or who takes an antihistamine, aware that (s)he will drive later. In this case, if the agent hits a pedestrian, as a result of a state of lethargic drunkenness or sleepiness, (s)he would respond criminally for having put himself/herself in said situation before driving the vehicle. It is also the case of the agent «A» who is feeling very tired and sleepy because (s)he has not slept for 24 hours, and despite that (s)he decides to drive, falling asleep while driving and running over a pedestrian. The involuntary lack of movement carried out by «A», who has not been able to stop the car because (s)he is asleep, may be deemed an omission by criminal law, in as far as «A», given his/her personal circumstances, should have foreseen that (s)he might fall asleep while driving.

Therefore, in cases of absence of action, the existence of an *actio libera in causa* may be asserted provided that the involuntary acts were intentionally produced or foreseen by the agent or at least foreseeable to him/her.

## 5.SELF-ASSESSMENT MULTIPLE CHOICE QUIZ

Only one answer choice is correct.

1. **Criminal law punishes «thoughts» of a criminal event:**

a.From the moment the agent decides to commit it.

b.Only when the agent has externalized preparatory acts aimed at its perpetration.

c.From the moment in which the agent plans in his/her mind how (s)he will carry it out.

d.Only if the agent perpetrates it completely.

**2.Indicate the correct answer:**

a.The content of the will is the key element according to the causalist theory of action.

b.According to the causalist theory of action, the consequences of criminally relevant human behaviour are only those that the agent could foresee.

c.The criminal notion of an action, according to the finalist theory, understands it to be a voluntary human behaviour, whose possible consequences are foreseeable.

d.All of the above answers are correct.

**3.The irresistible force must be _____, _____ and _____ to exclude the action:**

a.Absolute, physical and external.

b.Absolute, moral and external.

c.Absolute, interior and material.

d.Absolute, physical and interior.

**4.Complete the following sentence with the correct answer: The agent that lethally runs over a pedestrian for falling asleep while driving…**

a.Is criminally liable for such criminal act in any case, for causing the death of a person.

b.Will not be criminally liable in any case, because there is an absence of action for criminal purposes, since in the behaviours during sleep the agent lacks control over his/her will.

c.Will be criminally liable for said criminal act only if, prior to starting driving, (s)he foresaw or could foresee that (s)he would fall asleep at the wheel.

d.Will not be criminally liable in this specific case, because it is a case of behaviours engaged in while asleep, in which the action is always excluded.

**5.Indicate the correct answer regarding the *actio libera in causa*:**

a.It excludes criminal responsibility.

b.It considers the will of the agent in the moment in which the action is performed.

c.It can be only intentional, but not negligent.

d.It constitutes an action that was «free» in its origin or cause, and it is to that prior human behaviour to which the subsequent injury can be attributed.