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Criminal Liability for Attempt. An Attempt at a New Perspective[2]

Odpowiedzialność karna za usiłowanie. Próba nowego spojrzenia

1. Introduction

The issue of criminal liability for attempt seems to be well researched now, not only in the Polish criminal law doctrine but also in other countries. The origins of this institution date back to antiquity: in ancient Greece and Rome certain behaviors that were not associated with a specific effect but were perceived as highly harmful were punished. For example, *lex Cornelia de sicariis et veneficis* (issued in 81 BCE on the initiative of the dictator Sulla Cornelius) provided for the penalization of not only traditional intentional homicide (*homicidium*), but also, inter alia, "circling" with weapons to kill, delivering, possessing or selling poison, and soliciting or intentionally giving false testimony to sentence an innocent person to death[3].

At the same time, the concept of attempt as a separate and general form of crime was developing. It was probably first expressed by Plato who pointed to the need to equate the responsibility of the murderer

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[3] See A. Dębiński, in: A. Dębiński, J. Misztal-Konecka, M. Wójcik, *Prawo…*, p. 14 and f.

with the responsibility of the one who, acting with the intention of killing, only injured his victim[4]. This idea was developed more fully by medieval Italian lawyers. They described an attempt as an act characterized by intention (*cogitare*), development of action (*ad actum procedere*), and failure of the effect (*non percifere*). At the same time, they distinguished between the "distant", "closer" or "closest" attempt (*conatus remotus*, *propinquus*, *proximus*), which essentially corresponds to today's constructions of preparation, incomplete and complete attempt[5].

The development of criminal liability for attempt was an expression of a general tendency to depart from objectification in favor of the subjectification of criminal liability. Criminal law ceased to be based on the element of revenge or retribution for a crime which required the occurrence of an effect. More and more attention was paid to its protective function rather than to administering justice: the goal of criminal law was not only to punish the evil that had already occurred but also to prevent dangerous behavior (such as attempted or a formal offense) from being undertaken at all[6]. However, it was not until the 18th and 19th centuries that the construction of attempt found its permanent place in criminal legislation, in particular in the codes that were in force in German, Austrian, Russian, French, and English territories. An expression of the subjectification of criminal liability and the institution of attempt was also the introduction of punishment for an impossible attempt[7].

At the same time, the impact of sudden political turns, revolutions, and the formation of totalitarian systems was very interesting. The French Revolution inhibited the development of subjective concepts of attempt within the French legislation: the institution of attempt provided for in Code Pénal of 1810 was narrowly defined, referring to the construction of the beginning of the execution of a prohibited act[8]. On the other hand, after 1917, in Soviet Russia (and then in the Soviet

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4 Platon, *Laws...* 876e–877c.

5 See, among others: E. Krzymuski, *Zasady...*, p. 25 and f.; K. Koranyi, *Powszechna...*, p. 92; A. Dziadzio, *Powszechna...*, p. 386; K. Sójka-Zielińska, *Historia...*, p. 155, 465; O. Sitarz, *Kryminalizacja...*, p. 59–60.

6 See J. Makarewicz, *Prawo...,* 1914, p. 89; R. Hemmer, *Warum...*, p. 9; L. Gardocki, *Uproszczone...*, p. 71.

7 See, for instance, G. Rejman, *Usiłowanie*..., p. 54–55; S.-J. Mintz, *Die Entwicklung*..., *passim*; A. Dziadzio, *Powszechna*..., p. 403; D. Gruszecka, *Rozwój*..., p. 31 and f.

8 J. Lelieuer, P. Pfützner, P. Volz, *Strafbares*..., p. 835–836.

Union) all actions aimed at committing a crime were made punishable, without differentiating between perpetration, attempt or preparation in the perspective of imposing a penalty[9]. Similarly, the objective approach to attempt, traditionally adopted in Germany, changed as a result of the adoption of the Nazi doctrine, which was more favorable to the subjective concept of attempt[10].

It seems, however, that one cannot simply equate the subjective concept of attempt with a concept corresponding to the needs of the authorities of a totalitarian state. The more subjective model of attempt may also work well in a democratic state ruled by law, especially if the legislature gives the judiciary an appropriate margin of discretion in the application of the norms concerning attempt. Moreover, a more subjective model of attempt may turn out to be fairer: the common law doctrine describes the problem of the so-called outcome luck: often it is a matter of circumstances beyond one's control, or even luck, whether the perpetrator's behavior is completed or remains in the phase of attempt[11]. The more subjective model of attempt seems also to be more in line with the goals of individual prevention: the perpetrator of an attempted act and the perpetrator of a completed act require rehabilitation to the same extent because both decided to violate a legal norm and have at least began to realize it[12].

2. The possible scope of the punishability of attempt – a comparative legal perspective

There are four basic perspectives as far as punishment for attempt is concerned: vertical, horizontal, constructive, and negative. The vertical plane refers to the boundary between preparation and attempt. The punishability of attempt in the horizontal sphere is determined by the catalog of crimes for which attempt is punishable. The constructive layer deals with the form of the intention of the attempter and whether attempt

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9 S. Pławski, *Prawo…*, p. 5–6; A. Wróbel, *Usiłowanie…*, p. 163.

10 T. Vormbaum, M. Bohlander, *A Modern…*, p. 8, 79, 198.

11 See, for instance, A.P. Simester, J.R. Spencer, G.R. Sullivan, G.J. Virgo, *Simester…*, p. 355–357. In this context, the authors indicate a study conducted in Chicago, which showed that as many as 45% of victims survived being shot in the head with a firearm.

12 S. Trechsel, P. Noll, M. Pieth, *Schweizerisches*…, p. 174.

can also be made by omission. The issue of the punishability of impossible attempt should also be assigned to this layer. The final determination of the scope of the criminality of attempt in a given law system is possible only after three previously mentioned perspectives have been assessed. The fourth and last perspective consists of determining the grounds for excluding criminal liability for attempt (active repentance or abandonment).

Defining attempt by the legislator by defining the four planes described in the previous paragraph often results in the fact that the final normative shape of this institution is far from the colloquial meaning of the word used to describe it: "attempt", "Versuch", "tentative", "usiłowanie" etc. Therefore, the appropriate concept used by the legislator to introduce the structure of attempt into the penal system becomes a synecdoche[13]. This has the effect, in particular, that the interpretative methods relating to the linguistic (dictionary) meaning of the terms "attempt", "Versuch", "tentative", "usiłowanie" etc. are essentially irrelevant.

Of the four planes described above, the one defined as vertical seems to be particularly important: the demarcation of the boundary between preparation and attempt should be considered crucial because most often – due to the punishability of attempt of all or at least a significant number of the offenses and the exceptional punishability of preparation – this procedure simultaneously determines the initial moment of permissible state interference through criminal law. Therefore, determining the boundary between preparation and attempt is, in a sense, a determinant of the state-individual relationship as based on a more liberal model, related to the state's trust in the individual, or based on security, and thus prescribing sufficiently early interference where the individual's well-being is at risk[14]. Of course, there are more criteria for determining the borderline between preparation and attempt. One of

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[13] M.N. Berman, *Attempts...*, p. 19. See also: G.P. Fletcher, *Rethinking...*, p. 160; M. Spencer, *Attempt...*, p. 17.

[14] See G.P. Fletcher, *Rethinking...*, p. 170–173; M. Królikowski, *Kontekstowa...*, p. 206; A. Dutta, *The Law...*, p. 70; A. Zoll, *Konstytucyjne...*, p. 233. See also J. Keiler, D. Roef, *Inchoate...*, p. 255. These authors described the process of transition of modern society towards the so-called culture of control by using a very vivid metaphor: "as criminal law is more and more invoked in tackling conduct far removed from concrete harm or danger, it seems as if the dystopia of Steven Spielberg's Minority Report has become the utopia of modern society".

the most important is that the farther from the performance, the poorer the evidence will be and the more difficult it will be to determine that the perpetrator should be held criminally responsible[15].

The Polish Penal Code in Art. 13 § 1 uses the formula of "directly pursues its [prohibited act] commission", which is probably most frequently used to mark the boundary between preparation and attempt. Similar wording is also contained in, among others: § 22 para. 1 of the German Penal Code ("Unmittelbar ansetzt"), Art. 30 sec. 3 of the Russian Penal Code or Art. 15 sec. 1 of the Ukrainian Penal Code. On the other hand, it is possible to point to the French formula of the commencement of execution ("commencement d'exécution"), already introduced on the basis of Code pénal of 1810 and also binding on the basis of the present Art. 121-5 of the Code penal. The same formula is also used in Art. 23 sec. 1 of the Chinese Penal Code, Art. 42 of the Argentine Penal Code ("comienza su ejecución") as well as Chapter 23, sec. 1 of the Swedish Penal Code ("påbörjat utförandet"). The narrow formula of the beginning of execution, however, combined with an indication of the perpetrator's intention to commit a crime, is used by the Dutch Penal Code in Art. 45[16].

It is also possible to define attempt as an act by which the perpetrator intended to initiate the execution, or as an act intended to facilitate or bring about the commission of an act[17]. Likewise, Art. 1 clause 1 of the Criminal Attempts Act of 1981 used in England and Wales to define what an attempt is from the objective point of view (actus reus), only indicates that the perpetrator is to commit an act that goes beyond what would be qualified only as preparation ("an act which is more than merely preparatory to the commission of the offense"), which leaves a lot of room for judge's discretion[18]. Also the Italian Penal Code in Art. 56 para. 1 does not specify the beginning of attempt ("tentative") – this provision only mentions undertaking behavior in order to commit a prohibited act, if the perpetrator has not entered the commission phase or the criminal result has not occurred. Also, the Canadian legislature, in section 24 (1)

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15 G. Yaffe, *Attempts*..., p. 3.
16 See J. Keiler, D. Roef, *Inchoate*..., p. 266.
17 See J. Makarewicz, *Prawo*..., 1924, p. 97.
18 See A.P. Simester, J.R. Spencer, G.R. Sullivan, G.J. Virgo, *Simester*..., p. 341–342; A. Dutta, *The Law*..., p. 69–70.

of Criminal Code gives virtually no significant guidance on how to separate preparation from attempt.

All the above-mentioned terms are fuzzy. For this reason, however, one cannot speak of a weakening of the motivational function of criminal law or a depreciation of its guarantee function. A citizen looking for information about the law, wishing to find out what is forbidden and what is not in the case of criminal law, will focus his attention on what is written in the specific part of the Code, and not on how far the attempt goes: after all, the perpetrator of attempt has the same intention as the perpetrator of a committed act – he intends to implement all the features of a prohibited act, and not to stop at a certain stage of their implementation[19]. Ultimately, it is left to the courts to apply the provisions of criminal law to precisely determine the meaning of these imprecise expressions. In this context, contemporary doctrine in various countries recognizes that where a narrow formula of attempt (as the beginning of execution) has been adopted, it is interpreted appropriately broadly, and where the law adopts a more subjective concept of an attempt, the jurisprudence may narrow the field of criminal liability for it[20].

In searching for ways to solve the dilemmas related to the separation of preparation and attempt, doctrine and jurisprudence have developed a number of concepts. The most popular theories are (i) formal-objective, which can link the beginning of attempt with the beginning of the commission of a prohibited act (although it can also be used where the legislator uses the formula of "direct pursuing commission of a prohibited act"), which uses the criteria of temporal and local proximity of commission of a prohibited act and the framework of preparatory actions, and (ii) material-objective, linking the initial moment of attempt with creating a "direct", "specific" or "real" threat to the legal good[21]. In the German doctrine in the field of interpreting the term "directly pursuing" ("unmittelbar ansetzt"), the concept of impression ("Eindruckstheorie") was also developed, according to which the combination

19 See S. Rittermann, *Karalność…*, *passim*.

20 See, among others: J. Lelieuer, P. Pfützner, P. Volz, *Strafbares…*, p. 837; E. Krzymuski, *Wykład…*, p. 385–386; W. Makowski, *Prawo…*, p. 193; I. Kondratowicz, *Kilka…*, p. 708–709; S. Śliwiński, *Polskie…*, p. 300–301; A. Marek, *Istota…*, p. 95–96; A. Gubiński, *Zasady…*, p. 82.

21 See, for instance, R. Dębski, *Karalność…*, p. 103; A. Liszewska, *Formy…*, p. 775–776; S. Trechsel, P. Noll, M. Pieth, *Schweizerisches…*, p. 178 and f.

of negative factors – subjective and objective – determines the punishability of attempt. This theory links the punishability of attempt with the fact that the will of the perpetrator to commit a prohibited act, directed at violating a legal norm, harms the public's trust in the validity of the legal order[22]. The Italian doctrine, in the absence of an unambiguous determination by the legislator of the boundary between preparation and attempt, assumes the need to verify whether the perpetrator has reached the stage of direct pursue of the commission of a prohibited act, based on mixed objective criteria, related to the assessment of the usefulness of actions taken by the perpetrator from the perspective of the possibility of realizing the elements of a prohibited act ("idoneità") and subjective criteria related to the assessment of the unambiguity of the will of the perpetrator ("univocità")[23]. The Canadian judicature, located in a similar position, has developed a doctrine that is based on the relative proximity of behavior constituting an attempt to commit, which is verified by using criteria such as time, place, and remaining activities to be taken by the perpetrator[24].

On the basis of objective concepts in the American doctrine, the "last step" and "last proximate step" constructions have been developed, however, they are subject to criticism due to their relatively narrow scope. In light of these theories, it is also possible to distinguish stages of commission of a prohibited act and make the punishment for attempt conditional on the perpetrator reaching the appropriate stage of commission. The concept of examining whether the perpetrator's behavior has unambiguously revealed its criminal nature for objective reasons, especially by reference to the intention of the perpetrator (principle of manifest criminality), is also considered objective[25]. Apart from the criterion of examining the manifestation of the intention, the indicated concept has a largely subjective character and extends the scope of the punishment of attempt, which is revealed when it is compared with the doctrine of the so-called substantial test: using the case of the perpetrator intending to set the barn on fire, the substantial test may be fulfilled when the person arrives with matches directly to the barn,

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22 See, for instance, R. Schmidt, *Strafrecht*…, p. 266–267.
23 K. Jarvers, *Strafbares*…, p. 850–854.
24 A. Dutta, *The Law…*, p. 81–82.
25 G.P. Fletcher, *Rethinking…*, p. 139 and f.

and when using the principle of manifest criminality (also referred to as unequivocal test in comparison with the substantial test) – one can speak of attempt even earlier[26].

3. A proposal for a new method of delineating the boundary between preparation and attempt

In Polish judicial practice, when determining the boundary between preparation and attempt, courts most often rely on the material-objective method, examining whether a real threat to the legal good has already been created. However, my research of Polish court files[27] proves that this is an ineffective method, and referring to it in the justifications of court judgments seems to be purely ornamental. The material-objective method does not provide any specific and verifiable criteria for the judge who is faced with the dilemma of whether the perpetrator has already entered the phase of attempt or abandoned the criminal intention at the stage of preparation. In search of a set of such criteria, however, it is possible to take a step back and look more broadly at criminal law as an area where state protective obligations are in conflict.

In this context, it should be noted that a democratic state of law is obliged to provide an adequate level of protection of citizen's rights and freedoms as enshrined in the Constitution. This is expressed, on the one hand, in the prohibition of violating these rights and freedoms by state organs, and on the other hand – in the duty of state organs to ensure that the rights and freedoms of a specific individual are not violated or endangered by another entity. Criminal law is an area where those protective obligations collide. On the one hand, the court clearly interferes, and often very deeply, in the interests of the person accused of a crime, such as freedom or property. However, it does so in order to be able to protect the legal interests of the aggrieved party. In other words, an exception is created here in the prohibition of interference with the rights and freedoms of the accused person by adapting the scope of application of

[26] See A.P. Simester, J.R. Spencer, G.R. Sullivan, G.J. Virgo, *Simester…*, p. 340. The substantial step doctrine is referenced in the American Model Penal Code in section 5.01 (1) (c), which uses the formula: "a substantial step in a course of conduct planned to culminate in his commission of the crime".

[27] See M. Wantoła, *Teoretyczne…*, p. 460–476.

this prohibition. This process requires taking into account the relationship of conflicting goods that takes place on several levels and requires outlining different perspectives of the norms established on the basis of the provisions of criminal law: primary and secondary norms. Primary norms are addressed to a citizen and express obligation or prohibition of taking given behavior, while secondary norms are addressed to an appropriate state authority (court) and express obligation to impose a sanction in the event of a citizen's failure to comply with the primary norms[28].

Firstly, when a secondary norm is applied, there will be direct and often serious interference with the interests of the accused, such as personal freedom or property. At the level of a primary norm, the only good of the accused subject to limitation or violation will be freedom understood as the freedom to undertake a specific behavior. The described interference with the rights of the accused will be justified by the need to protect the rights and freedoms of the aggrieved party, such as life, health, property, or physical integrity. The prohibition resulting from a primary norm is to protect against direct violation or exposure to them, and the application of a secondary norm may be perceived as the introduction of indirect protection aimed at confirming the legal nature of the protection of these rights.

Secondly, in the light of a primary norm, the accused (the perpetrator of a crime) is an entity that has a stronger position in relation to the aggrieved party, i.e. the other party to the relationship of a horizontal nature. At the level of a secondary norm, the most important thing is the vertical relationship of the accused with the court applying the legal norm and imposing the penalty.

Thirdly, the differences regarding the entities applying the appropriate primary and secondary norms should be also considered relevant. In the case of a primary norm, it is established primarily in realtime in order to determine whether the attacker has violated it and to determine the possibility of resisting the attack as part of the necessary defence or assistance. Thus, the entity determining these circumstances will usually

[28] See M. Atienza, J.R. Manero, *A Theory…*, p. 5–6. In the German literature, the primary norms are referred to as Verhaltensnorms and the secondary norms as Sanktionsnorms and in Polish literature the primary norms are referred to as “normy sankcjonowane” (sanctioned norms) and the secondary norms as “normy sankcjonujące” (sanctioning norms).

have precise knowledge of the circumstances of the attack, but often will not have knowledge of the perpetrator's volitional attitude, and may also operate in a special motivational situation related to the current threat. Application of a secondary norm, in turn, is made by the court after the event itself. Due to the passage of time, the court often has distorted information about the course of the event but more knowledge as to the intention of the perpetrator at that time. Finally, the motivational situation of the court is normal.

The above remarks lead to the fact that, first of all, the same phrase, used in the provision used to establish both primary and secondary norm, may be understood differently depending on whether it constitutes an element of the former or the latter. The principle is that on the level of a primary norm a given phrase is understood broader than on the level of a secondary norm. Secondly, if the same vague phrase is applied to other phrases because it is an element of a regulation modifying many central provisions or it is an element of a central regulation modified by many other provisions, then – both on the level of a primary and secondary norm – its final shape will be dependent on the value expressed by the provision containing the phrase to which it relates. The recognition of high importance of a given individual good should lead to choosing an interpretative solution that provides for wider protection of that good, and to recognize that under a given provision an individual good is only indirectly protected, and the basic subject of protection is the so-called general, universal or supra-individual good that may justify adopting a narrower interpretation of a given phrase. Thirdly, the understanding of a given phrase within the framework of the same criminal law norm (primary or secondary) will differ depending on how significant a breach or threat is, and to what extent a legal good protected under this norm is harmed. What is important here is both the qualitative aspect (whether there was a breach of a legal good or only the creation of a concrete or abstract threat) and quantitative (how much damage to a legal good occurred or how high was the probability that this threat would damage a legal good).

The above conclusions of a general nature should be properly translated into the perspective of criminal liability for attempt and in particular into the interpretation of the element of attempt that is direct pursuance of the commission of a prohibited act. As a rule, it should be

interpreted more broadly at the level of unlawfulness and more narrowly at the level of punishability. Such an interpretative proposal may be a solution to the traditional dilemma emerging in the context of attempt, which is related to the tension between the need to protect legal goods and criminal law interference with the sphere of individual freedom. Adopting a different solution – that the initial moment of unlawfulness, most often simultaneously defining the initial moment of possible interference with the interests of the attacker, is at the same time the initial moment of criminalization of behavior qualified as an attempt – may result in a delay in defense of the attacked legal good for fear of intervening too early. Introducing a distinction between the limits of preparation and attempt at the levels of unlawfulness and criminalization allows, on the one hand, to remove such dilemmas and increase the real protection of legal goods, and, on the other hand, does not result in a constitutionally questionable increase in interference with the legal interests of the accused by moving criminalization more to the forefront of the commission of a prohibited act.

The significance of the previously presented concept of the interpretation of fuzzy phrases in the context of the interpretation of the element of attempt that is direct pursuance also means that this element should be understood more broadly in the case of an attack on a legal good of greater value, especially where the probability of violation is relatively high. As a consequence, it will be necessary to state that the starting point of an attempted murder should be determined earlier than the initial moment of attempt to cause a slight injury to health. Similarly, attempt to destroy a legal interest when the perpetrator's plan has a very good chance of success should be outlined on the timeline more broadly than attempt to destroy a legal interest when the probability of the effect occurring is low. A possible attempt will also occur earlier than an impossible attempt.

When determining this initial moment of attempt, i.e. determining the boundary between preparation and attempt, one should apply criteria based on the temporal and local proximity to the commission of the act intended by the perpetrator as the most measurable and objective, and consequently also possible to be verified in the course of court proceedings. At this point, one can cautiously express the hope that the possible application in the judicial practice of this argumentative method would allow for obtaining more predictable and better justified

interpretative results than in the case of using the methods developed so far, which are assumed to function as specific algorithms leading to choosing the best interpretative solution, but in practice are invoked only ornamentally to justify the rather intuitive decisions as to the separation of preparation and attempt.

4. Determining the intention of the perpetrator of attempt

The examinations of court files that I have carried out have made it possible to establish that the most characteristic cases in which the Polish procedural authorities use the institution of attempt are attempts to extort credits, loans, or subsidies. The modus operandi of the perpetrators of such crimes is exceptionally repetitive and consists in submitting forged, altered, untrue, or unreliable documents in order to obtain a specific form of financial support from a public or private institution providing such support. Relatively often in practice, the construction of attempt is also related to other crimes against property: theft, burglary, or robbery. Attempted crimes against life and health are also frequent. Especially in such cases there were particular difficulties in determining whether the perpetrator's intention was actually to take the victim's life or only to cause damage to his health. Making such findings is all the more difficult because – as the research has shown – the vast majority of these were emergency situations in which the accused, and often the aggrieved parties, were significantly influenced by alcohol, or emotions arising suddenly as a result of a violent quarrel. The above-described observations should lead to a postulate that in the case of the institution of attempt, the doctrine of criminal law should focus the great deal of attention not so much on determining the initial moment of attempt (which of course remains an important and particularly symbolic issue, but not the most important from the perspective of judicial practice), but on the criteria that allows the court to establish the intention of the attempter.

Problems with determining the intention of the attempter also result from the fact that attempt does not, by its very nature, result in a criminal effect and it may turn out that sometimes the effect which the attempter intended will be very difficult or even impossible to specify. In principle, this should not lead to the release of the attempter from criminal liability, but it may affect the legal classification of the act and, consequently,

the penalty, depending on the estimated value of the damage that the attempter was supposed to have caused. I am talking primarily about a situation in which the attempter has ceased to continue the criminal action – for reasons other than meeting the conditions of active regret (abandonment) – at such stage that it is impossible to determine what exactly he intended to do. For example the attempter was apprehended while attempting to break into a vault containing two items, each of such a size and weight that, under the circumstances, he had the factual ability to take only one of them. It may turn out that additional factual circumstances will indicate that the attempter was interested in seizing a specific item and that his intention was directed only at this one item. However, it may also be that in criminal proceedings the attempter will refuse to explain and there will be no evidence to determine which of these items he was actually interested in. It is also possible that his intention was not materialized because he was not sure what exactly was in the vault.

It seems that in such situations the procedural rule "in dubio pro reo" should apply. This rule would require the adoption of circumstances most favorable to the accused, i.e. for example recognizing, in the event of a different value of two items in the vault, that the defendant was directly aiming to collect things of lesser value[29]. It should be assumed that within the "irremovable doubts" referred to in this principle, apart from the doubts as to how the event subjected to criminal law evaluation proceeded, there are also doubts as to how it would have proceeded had it not been for the perpetrator's apprehension. On the other hand, assuming that a profit-driven perpetrator, aware of the value of two things of which he could steal only one, would take the less worthy one, would be far from common sense and therefore impossible to accept. Therefore, while the complete exclusion of the possibility of applying the "in dubio pro reo" principle in such situations would be unjustified due to the indicated specificity of attempt, this possibility should be significantly limited – to situations where the perpetrator, had he reached the interior of the vault, would not be able to judge which of the things is worth more, even though their values would be different. In such a case, due to the said principle, he should be credited with attempt to seize the thing that was worth less. A decision to (not) apply the "in dubio pro reo" rule

[29] See J. Makarewicz, *Kodeks...*, 1938, p. 121.

would be of particular importance in the case of types in which the determination of what object was included in the perpetrator's intention is decisive for assigning criminal liability for an offense or liability for a misdemeanor[30].

The presented case can be modified assuming that the vault contains two boxes that have the same appearance, one of which is filled with money, and the other – with documents that are of no value to the perpetrator and that definitely do not correspond to his intention. Let us also assume that, even if the perpetrator managed to take one of the boxes, he would not know what is inside till opening it, which he planned to do only after reaching a safe place. If he had been arrested earlier, when it was not yet possible to determine which of the boxes in the vault he would take – and he would not even make a decision on this matter– the construction of an impossible attempt would have to be applied consistently, due to the principle of "in dubio pro reo"[31].

Of course, the question will immediately arise whether the solution of the described case would change if there were a hundred boxes in the vault and all but one contained valuables corresponding to the intention of the perpetrator. Assuming in such a situation that the perpetrator would take just this one box containing no value for him would be nonsense. Therefore, it seems that the application of the "in dubio pro reo" principle should also take into account certain social assessments related to the probability of the perpetrator taking a path leading to the classification of his behavior as an impossible attempt. Of course, we are talking about a probability based on a random choice of the perpetrator, and not related to his will. For the latter, it is not possible to use the probability criterion.

Finally, attention should be paid to the problems arising from the impossibility of applying the commonly used in judicial practice institution of general intent (dolus generalis), which allows for the attribution of criminal liability for causing a certain degree of health impairment, depending on the type of the damage that was actually caused by the perpetrator, without the need to carefully examine whether the perpetrator actually intended to cause such damage to the health of the

30 See also: M. Budyn-Kulik, *Formy*..., p. 181; O. Sitarz, *Formy*..., p. 751–752; M. Błaszczyk, *Problematyka*..., p. 164–165.

31 See G. Rejman, *Usiłowanie*..., p. 46; M. Cieślak, *Polskie*..., p. 199.

aggrieved party[32]. In the case of attempt the said construction – regardless of its dogmatic correctness – is for obvious reasons excluded, which causes very serious practical difficulties with assigning responsibility for attempting intentional crimes against life and health, especially since, as empirical studies show, most of these crimes are committed in sudden, dynamic situations, under the influence of strong agitation, often by intoxicated perpetrators. It is impossible to solve this problem on the objective level (causation)[33]. It is also not sufficient to refer to the objective elements of the perpetrator's act, such as the type of tool used, strength, or the location of inflicted injuries. The authority determining the perpetrator's intention in such a situation should also take into account subjective criteria, such as the perpetrator's motives or his attitude towards the victim[34]. By the way, cases of this kind are among those in which the subjective nature of the structure of attempt is most strongly emphasized, and the number of cases in which the problem of determining the intention of the perpetrator of an act qualified as an attempt is revealed makes the problem of the subjective side of this structure the most significant in practice, at least in terms of quantity.

5. Assigning liability for attempt as a hypothetical anticipation

The special role of the perpetrator's intention in the structure of attempt may be regarded as a consequence of the presence of a specific feature in this structure. Leaving aside this form of attempt which is a completed attempt (a situation when the perpetrator has already done everything that, in his opinion, is necessary to cause a criminal result), let us analyze the acts qualified as an incomplete attempt and preparation. What the incomplete attempt and preparation have in common is that the perpetrator stopped before his actions were completed, i.e., before he had done everything he intended to cause a criminal result. Of course, if he voluntarily fails to fully implement his intention, then he will be rewarded – depending on the solution adopted in a given legislation – either with complete release from criminal liability, or at

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32 See, for instance, W. Grudziński, *Z problematyki*..., *passim*; W. Wróbel, A. Zoll, *Polskie*..., p. 83 and f.

33 See G. Rejman, *Usiłowanie...*, p. 74–76.

34 See Z. Jędrzejewski, *Z problematyki...*, p. 51–54; L. Bogunia, *Zmiana...*, p. 20.

least with significant mitigation of the penal repression imposed on him. However, if the intention was abandoned for external reasons, e.g. due to the intervention of the victim or a Police officer, it should be noted that it is not excluded that the perpetrator would not have completed his actions. Perhaps, before doing everything necessary to produce a criminal effect, he would have abandoned his intention, which, however, as a result of his prior restraint, will never be found out by the investigating authorities.

In such cases (incomplete attempts and preparation), the perpetrator does not initiate the causal course leading to the result. The latter situation happens when the perpetrator performed the last required action that could cause such an effect. However, it cannot be said that the acts constituting an incomplete attempt or preparation are not at all connected with creating a threat to the legal good (otherwise there could be no question of their being subject to criminal liability). However, this is a special danger: a subjective one, based on a certain assumption, a specific hypothetical anticipation that he will continue to implement his plan, taking subsequent steps, until the causal course leading to the creation of an effect actually begins. The perpetrator who takes a gun out of his pocket in order to shoot another person poses a threat to victim's life not because he triggers a causal course that may lead to the death of another person with a sufficiently high probability, but when reconstructing his will or action plan, it is possible to adopt a justified hypothesis that his next step will be to aim the weapon and fire a shot at the targeted victim.

The such subjective danger for legal goods should be distinguished from the danger characterizing the so-called offenses of a specific threat to the legal good, in the case of which the perpetrator has already created a state of affairs that may lead to a real detriment to the legal interest without taking further actions by him, the execution of which depends on his decision of the will. It can be said that the structure of attempt complements – or actually deepens – the area of criminalization in the foreground of the violation of the legal good, partially occupied by offenses of a specific threat to the legal good, related to the creation of an objective (and not only subjective) danger to the legal good[35]. The doctrine

[35] J. Giezek, *Formy*..., p. 55.

of criminal law in some countries treats attempt as a kind of offense of endangering the legal interest. This is how one can describe the construction of attempt in common law countries, where attempt is considered to be the so-called inchoate (incomplete) crime, in addition to, inter alia, incitement, aiding, and conspiracy[36]. A particularly lively discussion regarding the recognition of preparation and attempt as a stage of committing a crime or as separate crime also takes place in the Russian doctrine, whose representatives argue, inter alia, on the normative meaning of the title of chapter 6 of the Russian Penal Code (which includes Article 30 devoted to these forms): "unfinished crimes"[37]. However, it should be remembered that recognizing preparation and attempt as separate crimes may open the way to the introduction of further chain structures, which could create a real risk of a significant extension of punishability to the foreground of infringement of the legal interest[38].

To put it somewhat differently, in criminal proceedings, the object of which is a crime of a specific threat to the legal interest, the prosecutor or the court examines what actually happened, and in the proceedings that have as its object an incomplete attempt or preparation – what would have happened if the perpetrator could have finished the implementation of his criminal intention. The fact that the perpetrator intentionally pursued (directly in the case of attempt or indirectly in the case of preparation) to commit the prohibited act, is determined by the competent authority on the basis of circumstances that may indicate the perpetrator's intention, related, on the one hand, to his personal properties, and on the other, to what he managed to reveal with his behavior. However, the criminal procedure authority cannot know whether, if the perpetrator's behavior was not interrupted by circumstances beyond his control, he would not later abandon his plan to commit the crime, or, after taking all the activities covered by it, he would not undertake the appropriate countermeasures preventing the damage of the legal good[39].

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36 See A. Dutta, *The Law…*, p. 8–9; A.P. Simester, J.R. Spencer, G.R. Sullivan, G.J. Virgo, *Simester…*, p. 291.

37 See A. Wróbel, *Usiłowanie…*, p. 178 and f.

38 K. Jarvers, *Strafbares…*, p. 849–850.

39 See E. Krzymuski, *Zasady…*, p. 4–5; E. Krzymuski, *Wykład…*, p. 377–380. According to J. Makarewicz, it would not be logical to suppose that the perpetrator, who had already entered the phase of the attempt, would abandon his intention anyway: this is an exception that justifies the use of the construction of abandonment –

Thus, there is a kind of anticipation of the perpetrator's behavior, generally performed in real-time (when determining the content of a primary norm) or already ex-post (when applying a secondary norm). While granting such a specific anticipatory competence to the entity determining a primary norm, i.e. the victim most often endangered by the perpetrator, or to another person defending the victim, including a public official, does not raise any particular doubts and is clearly justified by the need to protect the threatened legal interest, making such reasoning by the judicial authority imposing criminal liability for preparation or incomplete attempt is a highly specific competence. Although it is often considered during the application of law what the reality would look like had it not been for the behavior of one of the participants in the proceedings (civil or criminal), nevertheless it is usually based on certain verifiable, objective natural or social rules. In the case of preparation and incomplete attempt, it is done within the framework of reasoning pertaining solely to the recreation of the perpetrator's hypothetical will, based on the assumption that he would not give up that will.

The described competence of state authorities to make hypothetical anticipation of the behavior of a perpetrator who has already entered the stage of punishable preparation or incomplete attempt is all the more specific the more he enters the foreground of the commission of the crime. This competence seems to be under a certain tension with the principle of human dignity and the assumption of free will. The tension is greater the wider the scope of application of attempt, i.e. the more time the perpetrator has to abandon his criminal intention.

This problem is perfectly illustrated (albeit in an exaggerated way) by Philip K. Dick's short story "Minority Report", screened in 2002 by

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J. Makarewicz, *Wstęp…*, p. 447. Stefan Trechsel, P. Noll and M. Pieth cite the following American example: „Imagine the evidence unfolding on a cinema screen. At a certain point, the film breaks. If there is no reasonable doubt that when the film is reconnected one will see the accused commit a particular crime, then he is already guilty of an attempt to commit that crime" – S. Trechsel, P. Noll, M. Pieth, *Schweizerisches…*, p. 180. Similarly, "Minority Report" mentiones the following considerations: one of the heroes, responding to the accusation that he arrests people who have not yet broken the law, presents an experiment in which he throws a ball on a table so that it fell down. When a ball is caught by his adversary before hitting the floor, he tells him that the fact that he has prevented it from hitting the floor does not change that this is what was going to happen.

Steven Spielberg[40]. In the future, the "Precrime" program is being implemented in Washington, D.C., which makes it possible to capture the would-be killers before they even proceed to their intention, thanks to the visions of three precogs (clairvoyants). It turns out, however, that in many cases one of the three precogs sees an alternative version of the events in which the perpetrator deviates from his intention. The so-called minority reports are hidden even from Precrime officers. Although thanks to this program, not a single murder has occurred in the entire city since its launch, it is not certain that some people deprived of their liberty "for a murder they were supposed to commit in the future" should not be left at large.

Analyzing this film precisely from the perspective of the construction of attempt, R. Batey put forward the thesis that Spielberg, an outstanding expert on the expectations and moods of viewers, expressed in his work the belief that is deeply rooted in people that they can fight the devil until the last moment, showing the victory of free will[41]. It turns out, however, that in the non-film reality, the previously described tension between the punishability of preparation and attempt on the one hand and the principle of human dignity on the other, as in the fictional Washington program Precrime, does not stand up to the need to protect the legal goods threatened by the perpetrator's behavior. The indicated tension should not, however, remain irrelevant at the level of law-making and application of legal norms. Its existence and degree of severity should be taken into account on three levels: determining the scope of punishability of preparation and attempt, determining the statutory threat of punishment for such acts, and finally – the judge's sentence.

The described tension between human dignity and the assumption of free will and the need to provide state organs with anticipatory competence in order to protect goods endangered by the perpetrator may also be perceived from the perspective of the constitutional principle of equality. We could compare the situations of two perpetrators trying

40 The importance of philosophical and legal problems, including those closely related to the construction of attempt, for which the background was the events presented in this story and film, caused that they were analysed in the legal literature. See: R. Batey, *Minority…*, p. 689 and f.; J. Krieger, *(Un-)Sicherheit…*, p. 175 and f.; K. Mamak, *Prawo…*, p. 149–152.

41 R. Batey, *Minority…*, p. 696–697.

to commit a prohibited act: one of them was stopped in the phase of criminal preparation or at an early stage of attempt, and the other one completed almost all the activities he had planned and only at the last moment abandoned or even managed to complete all the actions he had planned but successfully prevented the occurrence of a criminal effect. Only the first of them will be punished, although it is not certain that if he had reached the same stage as the second, he would not have acted in the same way, also avoiding criminal liability. From the perspective of the second perpetrator, it can be said that – paradoxically – it is better for him that he went so far in the implementation of his plan because if he had been stopped by another person at an earlier stage, he would not have avoided criminal liability. After all, it would have been assumed that he would not abandon his criminal intent. Of course, the legislator may establish that in situations such as the latter, the criminal liability is not excluded, but the criminal consequences of the act may only be mitigated. However, where – as in Polish penal law – the perpetrator's impunity clause is provided for, the comparison of the two described situations from the perspective of the principle of equality additionally justifies the necessity to adequately adjust the repression applied to the perpetrator whose behaviour was prevented from reaching the stage of the complete attempt – in all of the three previously indicated perspectives.

6. Summary

The presented analyses are an attempt at a new look at the problem of criminal liability for attempt. The indicated structure has evolved along with the development of criminal law, and the views on it changed along with the change of the general view on the functions associated with assigning criminal liability. And just as in the case of the criminal law system, the question arises whether to cover an increasing part of social behavior in its scope in order to increase the sense of security of members of society, or to leave them more freedom. In the case of attempt the legislator and the courts have to answer the question of whether it is more important to legislate and apply the provisions concerning attempt, which will result in more and more entering the foreground of the violation of the legal good in order to improve the security of entire societies and individuals, or it is more important to take into account the

appropriate sphere of individual freedom. This question is particularly important in the case of the construction of attempt, due to its special feature described above, which is that in order to assign criminal liability in this form it is necessary to make a hypothetical anticipation of what the perpetrator would have done if he had not been stopped at a certain stage of the implementation of his criminal intent.

In modern societies, there seems to be a tendency to extend criminal liability to the foreground of violating the legal good, in particular, to extend criminal liability for attempt or preparation. The question naturally arises as to what extent this process is needed and justified, and to what extent it raises concerns about its further development. Will it lead to an extension of the punishability of preparation? Can the ancient maxim "cogitationis poenam nemo patitur" lose its undisputed status in the name of the security of individuals, societies, and states? It must not be forgotten that the described tendencies may be strengthened in the face of the development of neurobiology, which can help in recognizing specific individuals as capable of committing a specific type of crime due to, for example, the occurrence of a specific gene or qualifying people as psychopaths or future recidivists[42].

These remarks allow me to outline one more – futuristic – perspective. Attempt, as an institution of the general part of penal law, has so far been analyzed from the perspective of criminality, as the basis for assigning criminal liability, and not on the level of unlawfulness, as opening the possibility of intervening against the person who committed the (unlawful) attempt. The use by the authorities of advanced technology: monitoring, face detection systems, or mobile applications referred to as "spyware", may allow detecting behaviors that may turn out to be attempts to commit a crime on an increasing scale. A question arises here whether situations where a perpetrator who has already entered the phase of attempt without realizing the features of any other crime and has been stopped at that moment, should remain within the scope of the

[42] See for instance H.T. Greely, N.A. Farahany, *Neuroscience...*, p. 461 and f. The mentioned authors admit that we are far from the science-fiction future in which we will be able to predict the commission of a specific crime by a specific person, but they explicitly indicate that it would be uncontroversial to make decisions regarding allocation to a specific type of prison or decisions regarding probation measures based on neuroscience, while arguing that the possible proving of the perpetrator's guilt or justifying the use of preventive detention in such a way would raise serious doubts.

classically understood penal law, or should they rather lead to the application of precautionary measures or measures similar to those provided for in the Mental Health Act (the use of which is based on examining whether the perpetrator may do something harmful in the future). Stopping the perpetrator at a sufficiently early stage in the implementation of his criminal intention makes it impossible to determine whether he would not depart from this intention, or – referring to the content of Philip K. Dick's story and its adaptation by Steven Spielberg – there was no "minority report" in this case, assuming a different version of events.

Summary

The presented analyses are an attempt at a new look at the problem of criminal liability for attempt. The indicated legal institution evolved along with the development of criminal law, and the views on it changed along with the change of the general view on the functions associated with assigning criminal liability. In modern societies, there seems to be a tendency to extend criminal liability to the foreground of violating the legal good, in particular, to extend criminal liability for attempt or preparation. The question naturally arises as to what extent this process is needed and justified, and to what extent it raises concerns about its further development. Will it lead to an extension of the punishability of preparation? Can the ancient maxim "cogitationis poenam nemo patitur" lose its undisputed status in the name of the security of individuals, societies, and states? It must not be forgotten that the described tendencies may be strengthened in the face of the development of neurobiology, which can help in recognizing specific individuals as capable of committing a specific type of crime due to, for example, the occurrence of a specific gene or qualifying people as psychopaths or future recidivists.

Keywords

attempt, criminal liability, endangerment of legal interest, intent

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