IMPOSSIBLE ATTEMPT VERSUS VOLUNTARY WITHDRAWAL OR PREVENTION OF PERPETRATION: COMMENTS ON THE SUPREME COURT RESOLUTION OF 19 JANUARY 2017 (I KZP 16/16)

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On 19 January 2017, in the resolution of seven judges, the Supreme Court once again[1] expressed its opinion on distinguishing between possibility and impossibility of an attempt and interpreted the features of "the object that can be subject to commission of a prohibited act" and the way of understanding a condition for voluntariness to abandon the commission. Unfortunately, one cannot fail to notice that the ruling did not eliminate doubts concerning the issue, accumulated in connection with the former resolution,[2] but even strengthened them, mainly due to ambiguity of the stand and its unsatisfactory justification. However, the main thesis of the resolution became an incentive to conduct the analysis presented below and it will certainly be the subject matter of many critical glosses, but the issue discussed by the Court to some extent in passing and which, as it seems, raises substantive

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1 The Supreme Court former resolution concerning the same issue was adopted on 20 November 2000, I KZP 36/00. In case of a complex nature of a crime, such as robbery, the construction of an impossible attempt refers to a perpetrator's conduct treated as a whole within the limits of features laid down in Article 280 CC.

2 See, glosses and comments on the above resolution by: K. Daszkiewicz, *Usiłowanie nieudolne (ze szczególnym uwzględnieniem uchwały Sądu Najwyższego z dnia 20 listopada 2000 r.)*, Prok. i Pr. No. 9, 2001, p. 19; J. Giezek, *Glosa do uchwały Sądu Najwyższego z dnia 20 listopada 2000 r., sygn. I KZP 36/2000 (dot. usiłowania nieudolnego)*, Prok. i Pr. No. 9, 2001, p. 105; E. Markowska, *Glosa do uchwały Sądu Najwyższego z dnia 20 listopada 2000 r., sygn. I KZP 36/2000*, Prok. i Pr. No. 9, 2005, p. 125; J. Biederman, *Glosa do uchwały Sądu Najwyższego z 20 listopada 2000 r. I KZP 36/2000*, Pal. No. 7–8, 2001, p. 212.

doubts, should be thoroughly analysed. Namely, it concerns admissibility of referring "active regret" to impossible attempt.

Differences in the scope of a perpetrator's legal liability are indicated as the basic argument emphasising the practical importance of the issue of classification of conduct as an effective (ordinary) or impossible attempt in all cases, which – like in the real state constituting the background to the above-mentioned judgement – ended in withdrawal from committing a prohibited act. A perpetrator who discontinues a criminal act, which has features of effectiveness, may – in case of the assumption of voluntariness of his withdrawal – refer to the advantage of the regulation under Article 15 §1 Criminal Code (hereinafter: CC), while a perpetrator who ineffectively attempts to commit a crime would be deprived of this opportunity in the same circumstances. Moreover, this was the justification presented by the First President of the Supreme Court, who requested adjudication on the differences in the interpretation and emphasised that assuming an impossible attempt in a situation in which a perpetrator fails to commit a prohibited act and there is no object of this intended act entitles one only to extraordinary mitigation of punishment or renouncement of its imposition. On the other hand, approval of an objective approach and assuming that the existence of any suitable objects that can be seized proves effectiveness of an attempt makes it possible to apply Article 15 §1 CC, stipulating that a perpetrator is not subject to punishment. At the same time, "application of active regret, even in case of objective examination of the provision laid down in Article 13 §2 CC, may result in some differences" in connection with the interpretation of the condition of voluntariness and influence of external circumstances on it.[3] Quoting the above opinion, the Supreme Court seems to fully share it as it states that: "the comparison of these legal consequences depending on the classification of an act as an effective or impossible attempt increases the significance of the issue".[4] This is the impression one can have based on these fragments of the resolution, in which the Court is for an effective attempt and only in this context discusses voluntariness of withdrawal from perpetration.[5] However, even those, by the way, general arguments provoke a question whether voluntary withdrawal from perpetration of a prohibited act may take place only in case of an effective attempt and what factors are decisive in exclusion of impossible attempts from the scope of application of the provision regulating active regret. At least three separate problems occur in connection with that issue and they can be provisionally presented as follows: firstly, whether active regret is possible in case of an impossible attempt and if so, what its form is; secondly, whether such a potential construction can be justified from the point of view of criminal policy, because this constitutes the essence of the privilege that we are ready to reward a perpetrator with for abandoning his criminal intent; and finally, whether even general approval of active regret in case of an impossible attempt would equal a possibility of adopting this construction in a case similar to the one referred to

[3] Justification for a motion of the First President of the Supreme Court of 2 November 2016, p. 8.

[4] Justification for the Supreme Court resolution of 19 January 2017, I KZP 16/16, p. 5.

[5] *Ibid*., p. 18.

in the above-mentioned judgements. Admissibility of active regret in case of an impossible attempt and adopting it to such a specific form of an impossible attempt undoubtedly constitute two totally different issues.

Although statute does not clearly resolve the problem,[6] for years authors of the literature on criminal issues have not seen fundamental obstacles to apply Article 15 §1 CC in cases of impossible attempts and have stated that "the fact that a perpetrator objectively could not perpetrate an act and cause a punishable result does not mean that he cannot abandon his intent".[7] Therefore, it is assumed that active regret in the form of voluntary withdrawal remains absolutely possible for an ineffectively attempting perpetrator as long as he remains unaware of a lack of possibility of committing a prohibited act. A different opinion, as e.g. the one expressed in the judgement of the Appellate Court in Kraków of 4 March 1999,[8] indicating that settlement of an objective possibility of achieving the aim is the essence of the dispute, does not deserve approval because it omits the subjective aspect, i.e. the fact that a perpetrator is unaware of the lack of possibility of achieving the aim in the course of its implementation. There are no arguments whatsoever that might be against potential voluntariness of withdrawal from an attempt, which was objectively, not in the conscience of a perpetrator, impossible in accordance with Article 13 §2 CC.[9] The emphasis placed on the requirement for a perpetrator's unawareness is connected with the interpretation of the statutory condition of voluntariness, which may exist only until a perpetrator realises that commission of an act is impossible.[10] On the other hand, adopting an objective perspective, like in the above-mentioned judgement, is usually thought to be equivalent to negating admissibility of active regret in case of an impossible attempt.[11]

However, can active regret in case of an impossible attempt take only the form of withdrawal from perpetration? Inadmissibility of another conclusion seems to result, necessarily and obviously, from the condition of objective inability to perpetrate, which is constitutive for an impossible attempt, because if perpetration (which, in case of property-related crimes, takes the form of a result occurred) from the very beginning is impossible, a perpetrator cannot prevent it.[12] Prevention

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[6] D. Gajdus has already drawn attention to the lack of a legal act in Polish legislation similar to the regulation of §24(1) II StGB, making direct reference to impossible attempt (precisely, completed impossible attempt); D. Gajdus, *Czynny żal w polskim prawie karnym,* Toruń 1984, p. 98.

[7] D. Gajdus, *Czynny żal…*, p. 99; thus, also R. Zawłocki, [in:] M. Królikowski, R. Zawłocki (ed.), *Kodeks karny. Część ogólna*, Vol. I: *Komentarz do art. 1–31*, Warsaw 2011, p. 665.

[8] II AKa 22/99, KZS 1999, No. 3, item 14.

[9] J. Giezek, [in:] J. Giezek (ed.), *Kodeks karny. Część ogólna. Komentarz*, Warsaw 2012, pp. 135–136; thus also: A. Liszewska, *Komentarz online do art. 15 k.k.*, [in:] J. Stefański (ed.), *Kodeks karny. Komentarz*, ed. 17, Legalis.

[10] A. Liszewska, *Formy stadialne popełnienia czynu zabronionego*, [in:] R. Dębski (ed.), *System Prawa Karnego*, Vol. III: *Nauka o przestępstwie. Zasady odpowiedzialności*, Warsaw 2013, p. 793; by the same author, *Komentarz online do art. 15 k.k.…*; T. Sroka, [in:] M. Królikowski, R. Zawłocki (ed.), *Kodeks karny. Komentarz. Część ogólna*, Vol. I: *Komentarz do art. 1–31*, Warsaw 2015, p. 388; A. Zoll, [in:] A. Zoll (ed.), *Kodeks karny. Część ogólna*, Vol. I: *Komentarz do art. 1–52*, Warsaw 2016, pp. 308–309; W. Wróbel, A. Zoll, *Polskie prawo karne. Część ogólna*, Kraków 2013, p. 243.

[11] J. Giezek, [in:] J. Giezek (ed.), *Kodeks karny…*, p. 136.

[12] Similarly, like in case of an impossible attempt, he cannot directly strive to perpetration; compare, J. Majewski, *O różnicy i granicy między usiłowaniem udolnym a usiłowaniem nieudolnym*,

means reversal of a process, which without such a perpetrator's interference into its course would imply particular results that thanks to this undertaken reaction do not occur.[13] However, one cannot prevent something that objectively does not exist. When a perpetrator's conduct does not start any process that would cause changes in reality, he cannot reverse this reality to its former state. His conduct is not cable to causally influence this reality because, simply speaking, one cannot reverse a threat when there was no threat from the start.[14] Such a solution raises doubts concerning justice, though. Why should a perpetrator of an impossible completed attempt be in a situation drastically worse than a perpetrator of an impossible incomplete attempt? It is easy to illustrate this doubt with, e.g. a description of an actual state, in which a perpetrator with an intent to kill a leader of a political party he does not like, and at the same time not realising that the commission of this act is not possible because the politician went away on a month holiday to a spa a few days ago, places a bomb in the cellar under his study, sets a time-fuse, however, an hour before the scheduled explosion, he changes his mind and decides that dissatisfaction should be expressed in a different way in a democratic system, turns the device off and removes the mechanism completely preventing the explosion. Even intuitively, we would be ready to give this perpetrator a privilege of impunity in the same way

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[in:] J. Majewski (ed.), *Formy stadialne i postacie zjawiskowe popełnienia przestępstwa. Materiały III Bielańskiego Kolokwium Karnistycznego,* Toruń 2007, p. 28; thus, also D. Gajdus, *Czynny żal…*, p. 99.

[13] According to a Polish language dictionary, "prevent" means "not allow to happen, hamper", W. Doroszewski (ed.), *Słownik języka polskiego.* Vol. 10, Warsaw 1968, p. 700.

[14] In the doctrine, to explain the essence of active regret, a formula is used that "voluntary prevention of a result takes place when a perpetrator, realising a possibility of a result, abandons his intent to commit a prohibited act and undertakes action aimed at reversing it". Thus, the prevention of a result is interpreted as "striving to reverse a result", "counteracting a result", "reversing the danger to a legal interest" and also as "counteraction" (compare, K. Wiak, [in:] A. Grześkowiak, K. Wiak (ed.), *Kodeks karny. Komentarz*, Warsaw 2014, p. 131; V. Konarska-Wrzosek, [in:] V. Konarska-Wrzosek (ed.), *Kodeks karny. Komentarz*, Warsaw 2016, p. 119). All these terms introduced as synonyms are characterised by the expression of causality, and thus the requirement for a perpetrator to "cause" non-occurrence of a result. As J. Giezek indicates: "this means that it is necessary for a perpetrator to interfere into the causal chain, the already implemented link of which was an activity undertaken earlier within an attempt, while the potential result is a predicted link, the occurrence of which should be prevented", see J. Giezek, [in:] J. Giezek (ed.), *Kodeks karny…*, p. 134. L. Tyszkiewicz also directly writes about the necessity of a causal relation, L. Tyszkiewicz, [in:] M. Filar (ed.), *Kodeks karny. Komentarz,* Warsaw 2016, p. 87. Also see, the judgement of the Appellate Court in Kraków of 19 May 2016, II AKa 65/16, in which the court additionally refers to the criteria of decreasing the risk by a perpetrator. German jurisprudence expresses this element of causally relevant influence even in a clearer way and introduces not only a requirement that "preventing a result" should mean initiation of a new causal chain that might imply failure to commit. Thus, it is characterised by the preventive causality (*Verhinderungskausalität*), but, in addition, it should be objectively attributed to a perpetrator as his work, thus the rationale of normative attribution is taken into account (compare, K. Hoffmann-Holland, [in:] B. v. Heintschel-Heinegg (ed.), *Münchener Kommentar zum Strafgesetzbuch. Band 1, §§1–37,* München 2017, pp. 1194–1195, and the literature referred to therein, and abundant BGH case law; Ch. Jäger, *Der Rücktritt vom Versuch als zurechenbare Gefährdungsumkehr,* München 1996). Similar opinions, by the way under the influence of German doctrine, can be found in the Polish literature; see O. Sitarz, *Czynny żal związany z usiłowaniem w polskim prawie karnym. Analiza dogmatyczna i kryminalnopolityczna,* Katowice 2015.

as a perpetrator who abandoned his plans at earlier stages of his attempt, i.e. when it was incomplete, e.g. when he was carrying that bomb to the cellar, or when he was programming the fuse. However, how to conciliate a similar, probably right,[15] belief with indisputability of a statement that one cannot prevent a result where this result will never occur and with commonly repeated, especially in case law, dogma that it is not possible to voluntarily abandon the conduct that entered the stage of a completed attempt?[16]

In this light, it seems that the following possibility of solving the problem appears. Firstly, an assumption, which can be found in literature, although without broad justification, that the provision of Article 15 §1 CC must be applied to an impossible completed attempt, contrary to the incomplete one, *per analogiam*.[17] This, however, does not solve all the problems and does not explain this necessity alone. As it seems, it would be more appropriate to start from an assumption that strict division of the form of active regret into voluntary withdrawal, admissible always and exclusively in case of an incomplete attempt, and voluntary prevention of a result, always and exclusively in case of a completed attempt, fully refers to an effective attempt, and does not find equal transfer to the construction of an impossible attempt. The opinion may be justified when we take into consideration the issue, which is often ignored in case law and is not fully trusted by part of the doctrine, however, convincingly enough justified so that it raises no doubts, i.e. that the provision of Article 13 §2 CC is fully self-standing, independent of the provision of Article 13 §1 CC.[18] Thus, an impossible attempt is characterised by a separate set of changes, which is absolutely not a specification of the features of an effective attempt. It is composed of: an intent to commit a prohibited act, conduct that in a perpetrator's opinion is to lead to the implementation of this intent and, finally, an objective lack of a possibility of perpetrating an act because there is no adequate object or means, about which a perpetrator remains unaware and in error. Therefore, it is proposed to interpret Article 13 §2 CC as follows: "An attempt also takes place when a perpetrator with an intent to commit a prohibited act starts to conduct himself in the way that, in his opinion, will lead to perpetration of that act but he does not realise that this perpetration is not possible because of the lack of an

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[15] D. Gajdus calls this situation paradoxical, see D. Gajdus, *Czynny żal…*, p. 99. Thus, also A. Zoll, [in:] A. Zoll (ed.), *Kodeks karny...*, p. 310. Also see, the judgement of the Appellate Court in Wrocław of 10 June 2015, II AKa 136/15, Legalis: "The impunity clause under Article 15 §1 CC should be applied also in relation to such a perpetrator of attempted murder who, being convinced that a result in the form of death of the aggrieved is a real threat, in his desire to prevent this result, undertakes rational activities to do that referred to in Article 15 §1 CC, not being aware that, in fact, there was no threat to the life of the aggrieved."

[16] Compare, e.g. the Supreme Court ruling of 8 September 2005, II KK 10/05, OSNwSK 2005, No. 1, item 1614; the Supreme Court judgement of 20 November 2007, III KK 254/07, Prok. i Pr. – supplement, 2008, No. 7–8, item 3; judgement of the Appellate Court in Kraków of 10 July 2013, II AKa 131/13, Legalis; judgement of the Appellate Court in Szczecin of 23 October 2014, II AKa 172/14.

[17] Thus, A. Zoll, [in:] A. Zoll (ed.), *Kodeks karny…*, p. 310; followed by T. Sroka, [in:] M. Królikowski, R. Zawłocki (ed.), *Kodeks karny...*, p. 384.

[18] J. Majewski, *O różnicy…*, p. 30, also approving, inter alia, A. Liszewska, [in:] R. Dębski (ed.), *System…*, pp. 766–767.

object suitable to perpetrate a prohibited act on it or because of the use of a means unsuitable to commit a prohibited act".[19] In particular, the features of this form of an attempt do not contain "direct striving to perpetration"; however, the feature of the lack of possibility of perpetration plays an important role.[20] The above causes that the distinction between a completed attempt and an incomplete one based on the contrast between all the features leading directly to perpetration, except the feature of an effect, and their non-implementation, i.e. remaining at the stage of a direct intent, stops matching the features of an impossible attempt. As a result, in case of an impossible attempt, it is hard to assume that we deal with a completed attempt in a situation when a perpetrator did everything that was necessary to commit a prohibited act, i.e. completed the last activity aimed at perpetration but, despite that, a perpetration did not take place, while an incomplete attempt takes place when a perpetrator did not finish the last activity aimed at the commission of a prohibited act so he is still "in the course".[21] Trying to match the features of an impossible attempt with the above-mentioned distinction leads to rather absurd solutions; and a statement that the feature "in one's opinion" may be a link between those two spheres as it makes it possible to move to the sphere of a perpetrator's own assessment and perception would have to lead to the approval of a thesis that the features of an impossible attempt contain "direct striving to perpetration", however, also "in a perpetrator's opinion".[22] In fact, the distinction between a completed attempt and an incomplete one in case of an impossible attempt does not make sense in the same way as the distinction between two forms of active regret does not make sense. It is not possible to describe the difference between the two forms of an impossible attempt in a satisfactory way. This lack of possibility of a result occurrence and the lack of possibility of direct striving to perpetration

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[19] A. Liszewska, [in:] R. Dębski (ed.), *System…*, p. 772.

[20] J. Majewski, *O różnicy…*, p. 28.

[21] A. Liszewska, [in:] R. Dębski (ed.), *System …*, p. 782. The division of attempts into completed and incomplete results from "their nature as a perpetrator's conduct consisting in direct striving to commit the main act"; after K. Tkaczyk, *Instytucja czynnego żalu w prawie karnym w aspekcie prawnoporównawczym*, Przemyśl 2008, p. 134.

[22] Thus, as a result, the features of an impossible attempt would constitute the repetition of the features of an effective attempt preceded by an additional feature: "in a perpetrator's opinion". The conception cannot be defended in our legal system, although it is close to the solution adopted in the German Criminal Code, in which §22 StGB, regulating an attempt stipulates that "he attempts to commit a prohibited act, **in accordance with his perception** of an act, who strives directly to implement the features of the type", which causes, each time thanks to the reference to the feature of "in a perpetrator's opinion", that the reference is made also to an impossible attempt (a perpetrator of an impossible attempt, in his opinion, also directly strives), with a reservation that inefficiency because of inadequacy of an object or a means always remains punishable within the limits of a standard attempt (with regard to impossibility of an attempt resulting from the features of an object, more and more often calls can be found against former unanimous belief that this type of impossible attempts should be subject to impunity, see e.g. K. Hoffmann-Holland, [in:] B. v. Heintschel-Heinegg, *Münchener Kommentar…*, pp. 1135–1137) and impossibility resulting from serious misunderstanding in accordance with the provision of §23 (III) gives a court a possibility of imposing extraordinary punishment. (In case of a successive one, the level of attempting, i.e. the unreal attempt, it is commonly indicated that there is a lack of reasons that may justify its penalisation); see, K. Kühl, *Strafrecht. Allgemeiner Teil,* München 2017, p. 530.

characterising this self-standing form cause that a perpetrator who – like in the already mentioned example, following his own plan and his basically erroneous perception – did everything to make the planned effect occur (in case of an efficient attempt, he might only reverse this initiated cause-result sequence at the most) still remains, in fact, at the stage in which nothing really happened to make it necessary to influence the reality in a special way. The necessity to prevent perpetration is this classified form of voluntary withdrawal[23] in which, because of an advanced stage of the causal course, it is necessary to do "something more" than just refrain from further criminal activity. Thus, from the point of view of the real causal value of his conduct, it is absolutely unimportant in what way he will demonstrate his definitive change of his intent to commit a prohibited act.[24] This connection of active regret with the conditions of causality introduces those two forms, however, in case of an impossible attempt, the issue of causality may be referred to only by analogy because a perpetrator does not have a causal influence on his surroundings and, that is why, his attempt is *ex ante* impossible.[25]

It must also be noticed that the former statement concerning inability to prevent a result in case of an objective lack of possibility of perpetration is to the same extent for the exclusion of admissibility of active regret in the form of voluntary withdrawal from perpetration. Indeed, an argumentative consequence, following an identical way, would make us assume that it is not possible to abandon something that does not exist in fact. This way of reasoning does not lead to limiting active regret in case of an impossible attempt only to a formula of voluntary withdrawal but totally eliminates active regret as a normative form in case of this type of an attempt. To be more precise, it eliminates a possibility of applying Article 15 CC directly not only in relation to preventing a result but also in relation to voluntary withdrawal. This does not mean, however, that active regret in case of an impossible attempt cannot or should not take place. Just the opposite, there is a lack of the only adequate statutory regulation directly determining such cases, and thus, with the significance of arguments that allow to reject a possibility of active regret also on the part of the person attempting ineffectively, the whole provision of Article 15 CC[26]

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[23] P. Kardas, M. Rodzynkiewicz, *Projekt kodeksu karnego w świetle opinii sądów i prokuratur*, WPP No. 2, 1995, p. 53; J. Raglewski, *Czynny żal w części ogólnej k.k.*, Jur. No. 1, 2000, p. 15; A. Liszewska, *Komentarz online do art. 15 k.k.…*

[24] Because it is an attempt *ex ante* impossible, there is no special need for a perpetrator's conduct to constitute the reflection of such a model of behaviour, which in case of an effective attempt we would perceive as "reversal of danger". Besides, the necessity of determining the attribution of this seeming, existing only in a perpetrator's imagination, "reversal of danger" as his work would be rather complicated because of its somewhat double hypothetical nature. One cannot exclude, however, that some elements close to similar findings will continue to be required in order to prove that a perpetrator really abandoned his intent.

[25] The author is of a different opinion than O. Sitarz, although she also indicates inadequacy of the classical division of the forms of active regret; see, O. Sitarz, *Usiłowanie ukończone i nieukończone (próba nowego spojrzenia),* PiP No. 6, 2011, p. 88 ff.

[26] The whole provision, because in case of a court's failure to find a possibility of extraordinary mitigation of punishment due to the features of an attempt, not every impossible attempt deserves automatically the abandonment of imposing punishment or its extraordinary mitigation; a court always can apply extraordinary mitigation of punishment based on this striving.

should be applied to this inchoate form by analogy. A perpetrator who does not realise that from the very beginning the perpetration was beyond his possibilities because of the lack of an object or because of the lack of a means suitable to commit a prohibited act and voluntarily abandons the intent to continue it, and adequately demonstrates this change of his attitude to his former proceeding, is fully entitled to expect that a court will treat his conduct in the same way as in case of active regret of a perpetrator of an effective attempt.

Does it mean that the only argument for this construction would be the need to ensure certain expected symmetry of legal consequences concerning an effective and impossible attempt? This is based on the assumption that if an impossible attempt remains in general punishable in the same way as an effective attempt, the legislator should also regulate exclusion of its penalisation at least in the same circumstances. Thus, it would be flagrantly unjust if a perpetrator of conduct of incomparably greater potential of a threat to legal interests, might benefit, under some conditions, from the privilege of impunity, while a perpetrator whose conduct, even before he abandoned the initiated activity, could never enter even an approximate phase of danger, meeting similar conditions, was deprived of this specific benefit. Contenting ourselves with this justification, although it may be in a way convincing, would not be sufficient, though. The assumption of impunity of an effective attempt in case of active regret depends on particular criminal policy factors which should also be updated to some extent in case of an impossible attempt. Paradoxically, the general lack of danger connected with this inchoate form may be an argument against awarding a perpetrator of an abandoned impossible attempt with the benefit of impunity. A perpetrator's conduct resulting from the abandonment of a criminal intent, in the same way as earlier it could not infringe legal interests, cannot protect them against infringement. In case of a perpetrator voluntarily withdrawing from the commission of an efficient attempt or a perpetrator of such an attempt who efficiently prevented a result, we can speak about measurable positive effects in terms of the protection of legal interests. Thus, his conduct leads to a certain real benefit, which balances the former loss in the form of a created threat.[27] The response to this benefit is a similar benefit at the level of punishment. However, where, especially in the context of what has been stated earlier, could a benefit be established from the perspective of the protection of interests connected with counteracting a perpetrator of an impossible attempt?

Firstly, and it is probably rather trivial at the subjective level, as long as a perpetrator is convinced that his attempt is effective, i.e. that there is every chance that he will commit a prohibited act, but despite that he decides to voluntarily abandon the chosen way, the termination of his criminal intent itself should be perceived as a positively assessed change. This argument is actually important for an impossible attempt. Contrary to criminalisation of an effective attempt, subjective elements will always remain the basic source of any negative assessment of this

[27] As A. Spotowski states, "withdrawal from an attempt constitutes a fact that is socially positive and, thanks to that, it balances the social negative assessment of an attempt perpetrated earlier"; see, A. Spotowski, *O odstąpieniu od usiłowania*, PiP No. 6, 1980, p. 90.

inchoate form, allowing application of a criminal ban on it.[28] Z. Jędrzejewski rightly notes that even if the same conduct is not definitely dangerous, from the perspective of lawlessness, the intent must be characterised by certain implementation ability or directional "dangerousness" that goes beyond purely motivational elements and can be subject to criminal-law assessment. What constitutes it includes a certain implementation potential of a perpetrator, his skills, abilities, aptitude for managing a causal process,[29] the termination of which as such is a guarantee of inviolability of legal interests. Therefore, abandonment of a will to continue an act or outright substitution of the intent for it in order not to commit an act deserves a positive assessment by analogy, and it should take place on the plane of legal, not moral, assessment of a perpetrator's "inner change".

Reference made to a form of "dangerousness" also allows extracting a certain minimum of blameworthiness of conduct for an impossible attempt. That is why, it is used by some authors who indicate a need and grounds for integration of objective and subjective elements when justifying the above inchoate form.[30] From this point of view, active regret of a perpetrator of an impossible attempt becomes a positive fact in the same way as voluntary withdrawal or prevention of a result in case of an effective attempt,[31] which ensures identical justification for abandonment of punishment. It is also worth expressing a reservation about an erroneous impression that the above would lead to contradiction with the former comments because it would require an assumption that a perpetrator's conduct is distinguished by a feature of causal influence on legal interests if one can say, at least in some cases, that it is generally and potentially dangerous. The problem is that there is a fundamental and unquestionable difference between general danger and creating danger. It is even not the difference between a possibility of a fact and its occurrence because there is no possibility of endangering interests from the very beginning. Thus, potentiality or generality of danger should be set somewhere not far away from possibility

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[28] Which does not mean that it is the only or sufficient source. However, attention is commonly drawn to the fact that in case of an impossible attempt, the subjective factor is of the greatest importance; compare, T. Bojarski, [in:] T. Bojarski (ed.), *Kodeks karny. Komentarz*, Warsaw 2010, p. 60; J. Giezek, [in:] J. Giezek (ed.), *Kodeks karny…*, pp. 127–128; A. Marek, *Kodeks karny*, Warsaw 2010, p. 66; K. Wiak, [in:] A. Grześkowiak, K. Wiak (ed.), *Kodeks karny…*, p. 129.

[29] Z. Jędrzejewski, *Bezprawie usiłowania nieudolnego*, Warsaw 2000, p. 194; Z. Jędrzejewski, *Granica karalności usiłowania nieudolnego*, WPP No. 2, 2007, p. 77.

[30] Compare, A. Zoll, *Odpowiedzialność karna za czyn niesprowadzający zagrożenia dla dobra prawnego w świetle Konstytucji*, [in:] J. Majewski (ed.), *Formy stadialne i postacie zjawiskowe popełnienia przestępstwa. Materiały III Bielańskiego Kolokwium Karnistycznego,* Toruń 2007, p. 18; R. Dębski, *Karalność usiłowania nieudolnego,* RPEiS issue 2, 1999, pp. 114–117; J. Giezek, *Formy stadialne popełnienia czynu zabronionego w polskim prawie karnym,* Annales UMCS Vol. LX, 2013, pp. 49–50; J. Majewski, *O (braku) karalności usiłowań „nierealnych", „absolutnie nieudolnych" i im podobnych*, [in:] Ł. Pohl, *Aktualne problemy prawa karnego. Księga pamiątkowa z okazji Jubileuszu 70. urodzin Profesora Andrzeja J. Szwarca,* Poznań 2009, p. 357; H.-H. Hirsch, *Problematyka regulacji nieudolnego usiłowania w polskim i niemieckim kodeksie karnym*, [in:] J. Giezek (ed.), *Przestępstwo – kara – polityka kryminalna. Problemy tworzenia i funkcjonowania prawa. Księga Jubileuszowa z okazji 70. urodzin Profesora Tomasza Kaczmarka,* Kraków 2006, p. 262; also see, D. Gruszecka, *Ochrona dobra prawnego na przedpolu jego naruszenia. Analiza karnistyczna,* Warsaw 2012, p. 272 ff.

[31] Compare the stands indicating grounds for the division of attempts not into effective and impossible ones but into dangerous attempts and those which are not dangerous.

because it contains a certain chance or probability, while the subjective element of an impossible attempt may only be characterised by similarity to possibility consisting in the fact that, referring to A. Zoll's description, if the system of circumstances changed, a perpetrator on this road might lead to commission.[32] A perpetrator who perceives causal relations properly, although he is erroneous in the area of real circumstances, in which they can be updated, undoubtedly initiates some kind of causal chain with his attempt, so that we can say that his attempt is in general dangerous.[33] However, both danger and speaking about suitability to causal influence take place only in the sense that it would suffice to eliminate the initial error and the same conduct in the implementation sphere might really endanger interests. As long as an error exists, it excludes the initiation of this causal chain, a link of which will be formed by a threat to legal interests. However, even if conduct, which has all features of active regret for a perpetrator of an unconscious impossible attempt, is not able to causally influence reality implying a reversal of a threat to legal interests, like it was not able to create any real danger to those interests at the time before a perpetrator abandoned his intent, the already mentioned similarity of an impossible attempt to conduct creating a threat on the way to violate a rule of dealing with a legal interest justifies the application of Article 15 CC by analogy.

The above-presented comments, which are an attempt to unambiguously determine applicability of the construction of voluntary withdrawal or prevention of a result of impossible attempts as well as their usefulness and criminal policy rationalisation, do not have to mean the same as falsification of a statement that, in case a perpetrator abandoned criminal action because the aggrieved did not possess an object of his interest, it would not be possible to consider the application of Article 15 §1 CC. One can agree that reference to this instrument would be groundless in such cases, however, the problem is that this lack of justification is based on completely different grounds from those the Supreme Court quotes in its resolution. Just to recapitulate, it is worth adding that the whole argumentation of the Court oscillates around the interpretation of the term "voluntariness" of active regret. However, regardless of whether we agree with the interpretation presented in the resolution or not, it is necessary to firmly indicate that "voluntariness" understood in any way has nothing to do with similar cases. Moreover, because of the same reason, the objectivist perspective that is to determine particular specification of voluntariness is not what determines the lack of possibility of classifying a perpetrator's conduct under Article 15 CC in the discussed system of conditions, as well as in general in case of an impossible attempt of any other course. In other words, it is not the issue of objectivist determination or subjectivist perception of an attempt effectiveness.[34]

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[32] In this sense, S. Tarapata rightly writes that the construction of an impossible attempt is composed of an element being a typical surrogate of the feature covered by a collective name of the attack on the legal interest; S. Tarapata, *Dobro prawne w strukturze przestępstwa. Analiza teoretyczna i dogmatyczna,* Warsaw 2016, pp. 532 and 534.

[33] J. Giezek, *Formy stadialne…*, p. 49.

[34] Contrary to how it is usually presented, the indications of which are visible even in the content of the above-mentioned motion of the First President of the Supreme Court in case

The whole issue, in fact, amounts to careful differentiation of cases in which a perpetrator of an attempt abandons the commission of a prohibited act from cases in which he gives up further activities because he believes that the commission of crime is no longer possible, and thus to referring to a special construction distinguished in the doctrine, namely a failed attempt. In this context, in relation to the right comments A. Wąsek and A. Spotowski made some time ago, it should be said that in case of a failed attempt, analysing the issue whether a perpetrator who knows he cannot continue his proceeding abandons it voluntarily or involuntarily has no grounds whatsoever.[35] "In a situation in which a perpetrator believes that implementation of his criminal intent is not possible, one cannot speak about withdrawal from an act at all. One cannot abandon something that cannot be done. If a perpetrator draws a conclusion that, in spite of all his skills and efforts, he is not able to effectuate his intent, we deal with a failed attempt, which cannot be voluntarily or involuntarily abandoned. Therefore, it is necessary to distinguish attempt-related situations in which withdrawal is possible and those in which it is not."[36] The reason for which those two completely different cases are mixed up, it seems, results from the attachment to the formula explaining the essence of voluntariness: "if a perpetrator thinks that he can commit an act, his withdrawal is voluntary". Unfortunately, it is very easy to draw a conclusion *a contrario* that if a perpetrator draws a conclusion that he cannot continue the commission of an act, this means he abandons it involuntarily.[37] Logical correctness of this reasoning is only seemingly maintained. It is based on an assumption that all withdrawals from an attempt are either voluntary or involuntary. It is a mistake resulting in omission of a big group of withdrawals which are not included in this dichotomy. All withdrawals from an attempt are, first of all, suitable or unsuitable to refer active regret (voluntariness) to them. Only then, are those suitable ones diversified into those matching the features of voluntary withdrawal or not. As a result, on the logical plane, it is not possible to assume that all the other cases, i.e. those not included in

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I KZP 16/16, in which it is clearly stated that the adoption of an objectivist approach to the concept of a lack of an object, in accordance with Article 13 §2 CC, must lead to recognition that withdrawal in the above-mentioned case results from an external situation, and because of that eliminates voluntariness and active regret (compare, justification for the motion of the First President of the Supreme Court of 2 November 2016, p. 5.)

[35] See, A. Wąsek, *Glosa do wyroku z dnia 22 stycznia 1985 r., IV KR 336/84,* PiP No. 6, 1986, p. 146; by the same author, *Z problematyki usiłowania nieudolnego*, PiP No. 7–8, 1985, p. 80; A. Spotowski, *O odstąpieniu…*, p. 92.

[36] A. Spotowski, *O odstąpieniu…*, p. 92. It is also necessary to agree with the proposed sequence of examining an attempt with respect to application of the provisions concerning active regret proposed by A. Spotowski, who writes that "determination whether in a given situation withdrawal is possible or not should constitute the first stage of the assessment of the possibile application of Article 13 CC [*ex* CC]. If withdrawal is possible, it is not necessary to analyse the issue of voluntariness." The author's opinion is also approved of by A. Liszewska, who also draws attention to the fact in how many cases in case law, also of the Supreme Court, the indicated difference and its consequences are not noticed, with a praiseworthy exception of the judgement of the Appellate Court in Białystok of 20 December 2012, II AKa 213/12, Legalis.

[37] A. Spotowski notes that the way of distinguishing possibility from impossibility of withdrawal is identified with the way of distinguishing voluntariness from involuntariness of withdrawal; A. Spotowski, *O odstąpieniu…*, p. 92.

the formula quoted at the beginning of this paragraph, when a perpetrator stops his criminal action, should be treated as involuntary, especially as they would be automatically treated as involuntary withdrawals. Such a stand is also wrong from the normative and constructive point of view. Firstly, in accordance with the meaning of the provisions regulating active regret, and what needs emphasising only this kind of "withdrawal", not any other "withdrawal" used in the colloquial sense, may be the subject matter of significant criminal-law considerations in this context, one can abandon as long as one attempts. The moment this inchoate form ends, withdrawal is no longer possible. By the way, in order to eliminate whatever doubts, it should be added that the completed attempt remains an attempt. In this scope, active regret does not take place somewhere, to quote A. Wąsek's well-known expression, on "no man's land" between perpetration and an attempt because criminal law doctrine does not know such an area.[38] In accordance with the way of decoding the features of an impossible attempt presented earlier and approved of in the doctrine, it takes place when a perpetrator with the intent to commit a prohibited act conducts himself in the way that he believes will lead him to commit this act but does not realise that this commission is not possible. The lack of a perpetrator's awareness of no possibility of commission not only determines the conditions for the content, i.e. the features of this inchoate form, but also establishes its limits. Thus, the moment a perpetrator realises that the commission is not possible, his inefficient attempt ends; and because the lack of commission is also always a feature of an inefficient attempt, a prohibited act a perpetrator ineffectively wanted to commit ends at this moment, too. For a perpetrator acting ineffectively, *iter delicti* "breaks off" at an impossible attempt. In the discussed cases, it breaks off when a perpetrator realises objective impossibility and inefficiency of his action.[39] Therefore, whatever his conduct continues to be, it should be treated as conduct occurring after the commission of a crime rather than withdrawal from it.

The basic difference between the categories of an impossible attempt and a failed attempt, despite the fact that they have an element of a criminal activity failure in common, is especially evident, however, when we draw attention to the fact that those categories constitute derivatives of the two contradictory assessment perspectives. Inability to perpetrate characterising an inefficient attempt is undoubtedly subject to objective assessment from the *ex ante* perspective. On the other hand, inability to perpetrate that a perpetrator of a failed attempt realises exists only in his perception of the state of things; only a subjectivist perspective is important for its existence.

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[38] On the other hand, if it knew, the passage of a crime would have to resemble a surprising construction composed of consecutive occurrence of punishable and non-punishable conduct starting with usually non-punishable preparation, through a generally punishable attempt, again a non-punishable and not prohibited behaviour "in between", and again punishable perpetration.

[39] A perpetrator may, of course, draw a conclusion that he will continue his proceeding, although with the use of a little different methods or measures (e.g. a perpetrator, noticing that his gun has jammed, instead of shooting, decides to attack and strangle the victim), however, a question is raised here to what extent in relation to a perpetrator's change of the intent we would classify this conduct in terms of one or many acts. Still, the issue of assessment of various cases of an impossible attempt in case of a possibility of continuation goes far beyond the framework of this paper.

A perpetrator's opinion may match the reality and then he notices objective impossibility of his attempt but, equally well, it can result from his erroneous assumption of objective impossibility in a situation, which can absolutely lead to full implementation of the features of a given type of act. Then, a failed attempt may occur also in case of an impossible attempt. Thus, as a failed attempt does not depend on whether a perpetrator is right or wrong in his assessment of his chances, i.e. whether we are eager to classify his conduct as possible or not, while a perpetrator's personal opinion about impossibility of his intentions remains its feature, the dispute about subjectivist and objectivist perception of adequacy of an object, and so also effectiveness (or not) of an attempt, does not find translation into the discussed issue. In case of the discussed issue, i.e. whether a perpetrator may take advantage of the privilege of active regret in some situations, the dispute is pointless and its result irrelevant.

The attitude to the issue of a failed attempt that has been presented in German literature and case law for quite a long time, especially as a case in many points identical to the one analysed by the Supreme Court[40] also became the subject of an important judgement of the Federal Court of Justice, may be an interesting supplement to these considerations. Recognising that a perpetrator attempted robbery, the BGH stated in its judgement that – because of the intent of the perpetrator, and it was an intent to seize a cyclist's bag and appropriation of cash from it – from the very beginning a perpetrator did not take into account appropriation of any other objects, e.g. trainers of the aggrieved. "The perpetrator also did not want to appropriate the bag alone but its content, however, this contained things worthless for him, things that he was not focused on during the act. Thus, there was only an attempt of a robbery but, of course, the accused could not abandon it in a way that would make him exempt from a penalty (§24 StGB) because the attempt from his subjective point of view was failed."[41] It is commonly assumed that in case of a failed attempt, withdrawal does not take place at all because any features of active regret under §24 StGB such as: "refraining from implementation of an act", "prevention of commission" or "serious striving for preventing perpetration" impose a condition on a perpetrator to recognise an act as still possible to be committed.[42] "Therefore, in accordance with §24 StGB,

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[40] BGH ruling of 26 November 2003, 3 StR 406/03, NStZ 2000, 531. The factual state of the above-mentioned case concerned a perpetrator of attempted robbery, who attacked a cyclist, seized her linen bag but when he realised that there was nothing in it, especially money he expected, but only trainers, he threw the bag back to the bicycle basket.

[41] BGH ruling justification of 26 November 2003, 3 StR 406/03, NStZ 2000, 531, p. 2.

[42] Thus, K. Hoffmann-Holland, [in:] B. v. Heintschel-Heinegg (ed.), *Münchener Kommentar...*, p. 1162; also compare, V. Krey, R. Esser, *Deutsches Strafrecht. Allgemeiner Teil,* Stuttgart 2012, p. 528; T. Fischer, *Strafgesetzbuch mit Nebengesetzen. Beck'ische Kurzkommentare,* München 2017, pp. 230–231. A perpetrator who assumes a failure of his attempt does not need to give it up or prevent the result; see, K. Kühl, *Strafrecht...*, p. 546, it is also rightly indicated that there is no possibility of considering voluntariness of choice or not where, first of all, there is no choice at all, p. 212; H. Kudlich, J.C. Schur, [in:] H. Satzger, B. Schmitt, G. Widmaier (ed.), *StGB. Strafgezetzbuch Kommentar,* Köln 2009, p. 212; similarly, W. Mitsch, [in:] J. Baumann, U. Weber, W. Mitsch, *Strafrecht. Allgemeiner Teil,* Bielefeld 2003, p. 631; R. Zaczyk, [in:] U. Kindhäuser, U. Neumann, H.-U. Paeffgen (ed.), *Nomoskommentar. Strafgezetzbuch, Band 1,* Baden-Baden 2013,

withdrawal is possible as long as a perpetrator does not treat it as failed."[43] This, however, occurs when "for a perpetrator, who is aware of it, it is really impossible to achieve a result directly following the events",[44] "if a perpetrator recognises, or at least assumes, that in direct time and substantive connection with means he disposes of, he cannot lead to perpetration",[45] "if a perpetrator recognises, especially believes, that he cannot lead to perpetration"[46] or "if, in a perpetrator's perception, a particular project of an act cannot be led to commission because of the object of an act or means used to commit a prohibited act".[47] Regardless of some differences in the proposed definitions, they emphasise especially subjective element of the perpetrator's perception of effectiveness of an attempt. "A failed attempt is not an attempt that is objectively failed, the failure of which a perpetrator does not realise. A perpetrator may abandon such an attempt, in accordance with clear regulation of §24(1). It concerns a subjective, i.e. in a perpetrator's imagination, failed attempt."[48] Therefore, a perpetrator's exclusive perspective is the only reliable point of reference, regardless of its accuracy or justifiability.

The concept of a failed attempt covers cases of "a perpetrator's recognition of unavailability of a particular object of his influence" as well as the "senseless" attempts, in which a perpetrator in fact realises that he may achieve a result constituting a feature of a prohibited act, however, it is so different from what was the object of his initial intent that the whole formerly developed criminal plan is, in this perpetrator's opinion, deprived of any sense.[49] In the first group, inability to implement the features of a particular prohibited act, from a perpetrator's point of view, may be connected with an inadequate means, e.g. a skeleton key, which

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pp. 1006–1007; H. Lilie, D. Albrecht, [in:] H.W. Laufhütte, R. Rissing-van Saan, K. Tiedemann (ed.), *Strafgezetzbuch. Leipziger Kommentar, Erster Band,* Berlin 2007, p. 1684; M. Heger, [in:] H. Matt, J. Renzikowski (ed.), *Strafgesetzbuch. Kommentar,* München 2013, p. 300; J. Wessels, W. Beulke, H. Satzger, *Strafrecht. Allgemeiner Teil,* Heidelberg 2016, pp. 318–320; however, a partly different opinion is presented by H. Frister, who referring to the concept of "psychological-real possibility of matching the features of the type" assumes that in case of a failed attempt based on the lack of further sense in continuing the act, we should confine ourselves to determining voluntariness, as it was done in former case law; H. Frister, *Strafrecht. Allgemeiner Teil*, München 2013, p. 353; BGH NStZ 2010, 690.

[43] U. Kindhäuser, *Strafrecht. Allgemeiner Teil*, Baden-Baden 2013, p. 255.

[44] BGH judgement of 10 April 1986, 4 StR 89/86, BGHSt 34, 53.

[45] W. Mitsch, [in:] J. Baumann, U. Weber, W. Mitsch, *Strafrecht…*, p. 631.

[46] R. Zaczyk, [in:] U. Kindhäuser, U. Neumann, H.-U. Paeffgen (ed.), *Nomoskommentar…*, p. 1006.

[47] F. Zieschang, *Strafrecht. Allgemeiner Teil*, Stuttgart 2014, p. 145.

[48] K. Kühl, *Strafrecht…*, p. 547. Thus, K. Hoffmann-Holland, [in:] B. v. Heintschel-Heinegg (ed.), *Münschener Kommentar…*, p. 1163; U. Kindhäuser, *Strafrecht…*, p. 256; M. Heger, [in:] H. Matt, J. Renzikowski (ed.), *Strafgesetzbuch…*, p. 301; M. Heger, *Die neuere Rechtsprechung zum strafbefreienden Rücktritt vom Versuch (§24 StGB),* Strafverteidiger issue 6, 2010, p. 320.

[49] K. Kühl, *Strafrecht…*, p. 546. According to another definition: "It should be assumed that there is a failed attempt when an object really attacked by a perpetrator does not match particular expectations and, therefore, he has no interest in the commission of an act so the perpetration becomes senseless for him"; F. Zieschang, *Strafrecht…*, p. 145; also see, H. Lilie, D. Albrecht, [in:] H.W. Laufhütte, R. Rissing-van Saan, K. Tiedemann (ed.), *Strafgezetzbuch…*, pp. 1695–1702; A. Eser, [in:] A. Schönke, H. Schröder, P. Cramer (ed.), *Strafgezetzbuch. Kommentar,* München 2007, pp. 455–456.

is unsuitable to open the door, or inadequate object of an act, e.g. a jewellery or cash box, which turns out to be empty.[50] Recognition that it concerns classical cases of an impossible attempt is, however, negated by the fact that the assessment of unsuitability is left to a perpetrator. In other words, the above attempt would be impossible as long as a perpetrator did not realise that the commission was objectively impossible because the box was empty and vice versa. An attempt would remain failed also in case a perpetrator did not realise that, objectively, it was effective but only the totally counterfactual method assumed inadequacy of a means or an object (the box has a double bottom and is full in fact, which a perpetrator failed to notice). However, because of the indicated difference between the objective and subjective planes, one more subgroup of cases occurs, which are characterised by a perpetrator's recognition of inability to achieve a particular form of a result, which are the features of a given type of act with the simultaneous presence of chances, which a perpetrator also realises, to implement another form of it, e.g. seizure of thing A instead of thing B. These factual states, like in the BGH judgement of 26 November 2003, or in another mutation, a burglary into a safe where a perpetrator expected to find considerable amount of money and valuables but he finds only a few coins, which do not match his expectations at all,[51] also belong to the category of failed attempts, provided that from the very beginning a perpetrator's intent included this particular form of a result, the unavailability of which he realises. The difference between the result that is planned but recognised as unavailable and one that is available but initially unwanted may cause a complete termination of the sense of an act commission for a perpetrator,[52] which results in the classification of his conduct as a failed attempt that is not subject to the provisions concerning active regret.

However, with the full clarity of the above solution, a more sceptical reader might ask a question whether it does not constitute, by any chance, another way leading to the same final result, i.e. the recognition that impossibility of an attempt should be assessed from a perpetrator's subjective perspective, and thus, whether it does not deserve criticism equal to the concept presented by the Supreme Court in the former resolution of 20 November 2000.[53] The basic difference and unquestionable

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[50] Compare, BGH ruling of 1 February 2000, 4 StR 564/99, NStZ 2000, 531–532, in which perpetrators of attempted robbery returned a box when they saw there was no money in it, which they expected to obtain, and did not continue their proceeding. The BGH also recognised this form of a failed attempt when there was a lack of "a victim suitable to commit a prohibited act against her" in a situation, in which a perpetrator of attempted rape walked out of it because the aggrieved menstruated, BGH ruling of 5 October 1965, 1 StR 389/65, NJW 1965, 2410; K. Hoffmann-Holland, [in:] B. v. Heintschel-Heinegg (ed.), *Münchener Kommentar*…, p. 1169.

[51] U. Kindhäuser, *Strafrecht*…, p. 265; K. Kühl, *Strafrecht*…, p. 255, M. Heger, *Die neuere Rechtsprechung*…, p. 321; J. Wessels, W. Beulke, H. Satzger, *Strafrecht*…, p. 319; H. Lilie, D. Albrecht, [in:] H.W. Laufhütte, R. Rissing-van Saan, K. Tiedemann (ed.), *Strafgezetzbuch*…, p. 1700.

[52] Which is often described by reference to the German civil law concept of *Wegfall der Geschäftsgrudlage*, closest to the clause *rebus sic stantibus*; compare, M. Heger, *Die neuere Rechtsprechung*…, p. 321. It also worth emphasising that it concerns complete, absolute senselessness of continuing an act, not only the recognition whether it will be less profitable; T. Fischer, *Strafgesetzbuch*…, p. 232.

[53] Compare, J. Giezek, *Glosa*…, p. 105 ff.

advantage of a failed attempt lies in the organisation of fundamental issues, i.e. determination that a division into an effective and a failed attempt is made following different criteria which cannot be identified with one another.[54] Because of that, the primary problem of overlapping various assessment perspectives is eliminated. This results in the dilemma to what extent the elements of an objective assessment and to what extent the elements of a subjective assessment should be reliable for the evaluation of suitability of an object or a means and the possibility of perpetration, which cannot be unambiguously solved.[55] Nor does the conception lead to "an absurd conclusion" that for the subjectivist perspective, a perpetrator's inability to implement a particular aim, must mean an impossible attempt.[56] Just the opposite, an attempt would be a failed one which would not result in any privileges connected with imposing punishment. The only weak point may be the requirement to reconstruct a particular stage of the original specification of a perpetrator's intent within it. The problem is not impossible to overcome, though. It should be even noted that it is much smaller than, e.g. the one connected with determination of subjective conditions for a continuous act, because in order to basically determine whether an attempt was failed or not, it is not enough to determine whether a perpetrator himself treated given objects as in general suitable to commit an intended act, i.e. in conformity with his criminal plan of a prohibited act. More thorough examination of details of his psychical processes is no longer necessary. A perpetrator's conviction that objects are completely unsuitable to commit a prohibited act to obtain them results in the occurrence of a failed attempt. On the other hand, in case of general conscience of suitability, it is not possible to exclude the elimination of the sense of acting and, thus, also a possibility of classifying conduct as a failed attempt. This way, only in case a perpetrator had a most general intention to commit a particular category of prohibited acts and with it he covered all actual changes in reality, which matched the feature of a result (e.g. seizure of whatever somebody else's moveable property characterised by these three minimum requirements: a thing, moveable and somebody else's), we might in advance exclude a failed attempt and would have to confine ourselves to determination of voluntariness of withdrawal. However, such a general intent would accompany a perpetrator rather rarely and its declaration at the stage of a trial would have to be carefully verified in the context of the whole evidence.[57]

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[54] This does not concern an answer to the question whether we deal with an object objectively suitable to commit a prohibited act against it and whether the decision should be based on the objective features of the object or a perpetrator's expectations concerning its features; compare, J. Giezek, *Glosa…*, p. 107, because this issue was discussed in the introduction.

[55] All the mixed conceptions are the most complete expression of the lack of satisfactory solution to the dilemma.

[56] J. Giezek, *Glosa…*, pp. 109–110.

[57] The unquestionable advantage of the concept of a failed attempt lies in its efficiency. Therefore, it was, first of all, approved of and developed in case law. Despite all the difficulties that are always connected with trial-related determination of subjective elements, it ensures a rather clear division of the attempt assessment perspective: for impossibility of an attempt – objective inability of perpetration; for the classification of an attempt as failed – always subjective from the point of view of a perpetrator, which eliminates the basic problem the Supreme Court faced and tried to solve in the successive resolution. It does not seem that it would be more

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sensible and, especially, simpler to bring the two-stage examination of conduct concerning the possibility of recognising active regret, which is composed of preliminary determination whether we deal with a failed attempt, and only then, as a result of negative answer to the above question, a transfer of assessment onto the plane of examining voluntariness of withdrawal, to the criterion of voluntariness. Only because of that, does this make an impression that it can be referred to all cases of a perpetrator's withdrawal from the commission, which remains very unclear. Thus, it is hard to agree with a similar proposal of L. Wörner, *Der fejlgeschlagene Versuch zwischen Tatplan und Rücktrittshorizont*, Baden-Baden 2009, pp. 117–120 or W. Gropp, *Strafrecht. Allgemeiner Teil*, Berlin, Heidelberg 2015, pp. 369–370; also critically, assuming uselessness of the concept of a failed attempt, F.Ch. Schroeder, *Rücktrittsunfähig und fehlerträchtig: der fehlgeschlagene Versuch*, NStZ issue 1, 2009, p. 9 ff (with right polemics by C. Roxin, *Der fehlgeschlagene Versuch – eine kapazitätsvergeudende, überflüssige Rechtsfigur?* NStZ issue 6, 2009, p. 319 ff); exclusively against the form of a failed completed attempt, see in: Ch. Brand, T. Wostry, *Kein Rücktritt vom beendeten "fehlgeschlagenen" Versuch*, Goltdammer's Archiv für Strafrecht No. 155, 2008, p. 611.

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IMPOSSIBLE ATTEMPT VERSUS VOLUNTARY WITHDRAWAL OR PREVENTION OF PERPETRATION: COMMENTS ON THE SUPREME COURT RESOLUTION OF 19 JANUARY 2017 (I KZP 16/16)

Summary

Impossible attempt, as a special form of inchoate offences, where the offender fails to realise that the attempt could under no circumstances lead to the completion of the offence due to the nature of its object or the means by which it was to be committed, is a source of many unsolved dogmatic dilemmas, with the justification of its criminalization in the first place. One of such issue is the admissibility of applying the institution of "active regret" to behavior which, even if the perpetrator did not prevent its completion would never cause any danger to the legal good. This issue has once again appeared in connection with the last Supreme Court's resolution of 19 January 2017, in which the Court analysed the criteria of the impossible attempt and the voluntariness of withdrawal. The author attempts to prove that, firstly, there are no reasons preventing one from treating an offender, who in his or her vision voluntarily gives up further execution of an offence or prevents its completion as the offender of effective (ordinary) attempt, although the application of Article 15 of the Criminal Code is

possible only by analogy. Secondly, the objective of the paper is to explain in more detail the institution of failed attempt, which allows the outlined problems to be solved more effectively and in a more theoretically correct way.

Keywords: inchoate offences, criminal attempt, impossible attempt, failed attempt, voluntary withdrawal, "active regret", criminal liability for attempt

NIEUDOLNOŚĆ USIŁOWANIA A DOBROWOLNE ODSTĄPIENIE LUB ZAPOBIEŻENIE DOKONANIU. UWAGI NA MARGINESIE UCHWAŁY SĄDU NAJWYŻSZEGO Z DNIA 19 STYCZNIA 2017 R. (I KZP 16/16)

Streszczenie

Usiłowanie nieudolne, jako szczególna forma stadialna popełnienia przestępstwa, przy której sprawca nie zdaje sobie sprawy, że dokonanie jest *ex ante* niemożliwe z uwagi na brak przedmiotu lub brak środka nadającego się do popełnienia przestępstwa, stanowi źródło wielu – jak dotąd nierozwiązanych – dogmatycznych dylematów, z uzasadnieniem jego karalności na czele. Jednym z takich właśnie zagadnień jest dopuszczalność stosowania instytucji czynnego żalu wobec zachowania, które nawet gdyby sprawca go nie zaniechał, i tak nigdy nie sprowadziłoby niebezpieczeństwa dla dobra prawnego. Kwestia ta po raz kolejny pojawiła się w związku z ostatnią uchwałą Sądu Najwyższego z dnia 19.01.2017 r., w której Sąd analizował kryteria udolności usiłowania oraz dobrowolności odstąpienia. Autorka stara się wykazać, że po pierwsze nie ma żadnych przeszkód, by sprawca, który w swoim wyobrażeniu dobrowolnie odstąpił od dokonania lub zapobiegł skutkowi stanowiącemu znamię czynu zabronionego, mógł korzystać z takich samych przywilejów w zakresie odpowiedzialności karnej, co sprawca usiłowania udolnego (zwykłego), choć stosowanie przepisu art. 15 k.k. możliwie jest jedynie na zasadzie analogii. Po drugie, celem artykułu jest przybliżenie konstrukcji usiłowania chybionego, która pozwala na efektywniejsze i teoretycznie poprawniejsze rozwiązanie zarysowanych problemów.

Słowa kluczowe: formy stadialne popełnienia przestępstwa, usiłowanie, usiłowanie nieudolne, usiłowanie chybione, dobrowolne odstąpienie od dokonania, czynny żal, odpowiedzialność karna za usiłowanie

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