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SOME COMMENTS ON THE VIOLATION OF CRIMINAL LAW BY ACTS OTHER THAN THE FULL ACCOMPLISHMENT OF A CRIME

Abstract

Acts preceding the actual perpetration of the crime are traditionally referred to preparation and attempt. The Polish Criminal Code does not explicitly determine which crimes can be attempted. The statutory description of some types of crime is formulated like an attempt (e.g. Art. 128 CrC) or like a preparation for another specific crime (e.g. Art. 200a CrC). The problem considered in this study is whether criminal preparation can take the form of an attempt to realize this phase of the crime or whether it will be punishable to attempt to commit a crime whose statutory description is formulated like an attempt.

KEYWORDS

stages of committing a crime, preparation, commission of a crime

SŁOWA KLUCZOWE

formy stadialne popełnienia przestępstwa, przygotowanie, popełnienie przestępstwa

INTRODUCTION

Acts preceding the actual perpetration of a crime are traditionally referred to as stages of committing a crime. These include preparation and attempt. However, the preparation is punishable only when the law so provides (Article 16 CrC)[1], while attempt is punishable whenever it involves an intentional crime, also when it bears characteristics of an ineffective attempt, i.e. it could not actually lead to the commission of an offense.

In addition to the characteristic feature of an attempt set forth in the Criminal Code, the question about the types of crimes that can be attempted is also the subject of theoretical discussion[2]. The criminal law does not explicitly determine which crimes can be attempted (e.g., whether only those committed by action or also by omission), which means that whenever a specific act is considered an attempt, it is punishable within the limits of the sanctions provided for an attempted crime. Each of these forms has a statutory definition in the Criminal Code.

I.

The definition of preparation includes the following elements: the perpetrator of an act committed in the form of preparation takes steps to create the conditions for undertaking an act aimed directly at committing the actual criminal act. When a given act meets this definition, it constitutes criminal preparation. The definition further lists examples ("in particular…") of forms of criminal preparation: entering into an agreement with another person, obtaining or adopting means, gathering information, drawing up a plan of action. Any such activity is to be undertaken for the purpose of committing a criminal act.

In comparison with the definition of attempt, we come to the conclusion that inept preparation will not be punishable[3]. This is considered incompetent preparation, that is preparation that could not actually create the conditions for the performance of the actual (prepared) criminal act, e.g., the means obtained or adopted

[1] The Criminal Code of 1997, amended on 28 April 2022 (Dz.U. (Journal of Laws) of 2022, item 1138).

[2] Gardocki considers intention as an important element of attempt. He points out that attempt can concern both crimes committed by action and by omission. On the other hand, it can apply neither to unintentional crimes nor to those that can be committed through mixed guilt. He considers the time limit between preparation and attempt to be a difficult issue. See L. Gardocki, *Prawo karne*, 22nd edition, Warsaw 2021, pp. 112–113.

[3] See W. Wolter (*Nauka o przestępstwie*, Warsaw 1973, p. 289), who categorically states that: "inept preparation does not constitute a crime."

are not suitable for the commission of such an act, or the plan of action drawn up cannot be effective for the implementation of the intended act[4].

In addition to such standard preparation, the Polish Criminal Code (hereinafter also CrC) contains several types of crimes that constitute preparation for another specific crime (e.g. Article 200a CrC). What remains open, however, is whether criminal preparation can take the form of an attempt to realize this phase of the crime. Thus, there is a question of whether a perpetrator who attempts to conspire with another person, to obtain or prepare the tools, carries out criminal preparation or whether this stage is not relevant from the point of view of criminal law[5].

These issues relate to the more general question of the relationship between the various stages of a crime, that is whether it will be punishable to attempt to commit a crime whose statutory description is formulated as an attempt (e.g., Article 128 CrC), or which is in fact a preparation for the commission of another crime (Article 200a CrC), although its statutory description is a separate type of crime[6]. At the same time, only an act specified in Article 200a CrC (Article 197(3) (2) or Article 200 CrC) will constitute criminal preparation for crimes identified in this provision. Other forms of preparation, including those specified in Article 16 CrC. (e.g., entering into an agreement with another person or preparing a plan

[4] The boundary between preparation and attempt within the meaning CrC has been extensively written on by B.J. Stefańska, *Usiłowanie w polskim i hiszpańskim prawie karnym*, Warsaw 2021, p. 477 ff.

[5] According to Pohl, "neither preparation of preparation nor attempted preparation can be identified under criminal law. Only the carrying out of the preparation can be distinguished in such a case" – Ł. Pohl, *Prawo karne. Wykład części szczególnej*, Warsaw 2019, p. 224. With some specific examples as avidence, it is difficult to share this belief, especially in view of the justification of Pohl's position that the preparation of a criminal act is a stage prior to the attempt to perform this act (p. 224). Acts constituting an attempt should be referred to against the elements of preparation specified in Article 16 CrC, not against the act being prepared. It seems that attempted preparation is possible at least when the actions classically constituting preparation constitute elements of a separate crime. The view that it is necessary to exclude the application of the construction of attempt (Article 13 CrC) to a criminal act that involves preparation in the sense of the general construction of the Polish Criminal Code was also presented in A. Wąsek, *Kodeks karny. Komentarz,* vol. I., p. 224.

[6] A categorical view on the question of the relationship of the subsequent classic stages of crime described in the general part of the Polish Criminal Code was expressed in M. Małecki, *Przygotowanie do przestępstwa. Analiza dogmatycznoprawna,* Warsaw 2016, p. 307 in the following sentence: "Each type of preparatory criminal act is an act which cannot be attempted under the Article 13(1) of the Criminal Code. Thus, for example, the Criminal Code does not provide the criminal liability for an attempted offense under Article 127(2) CrC, Article 128(2) CrC, Article 130(3) CrC, Article 175 CrC, Article 200a(2) CrC, Article 270(3) CrC, Article 298(1) CrC, Article 310(4) CrC or Article 343(3) CrC (this list is obviously not exhaustive)." The author refers, inter alia, to such a view expressed earlier by W. Wróbel and A. Zoll *(Polskie prawo karne*, Kraków 2012, pp. 249–250), and to Pohl's view, see footnote 5. I do not find this argument convincing with regard to specific types of crimes that involve attempt or preparation (described in statute).

of action) will not constitute criminal preparation for the commission of those crimes indicated in Article 200a.

Without analyzing the issue of provocation to commit the act specified in Article 200a CrC here, it is worth mentioning that the criminalization of the act of a person provoked by so-called pedophile hunters is possible as an inept attempt specified in Article 13(2) of the Criminal Code due to the lack of an object suitable for committing a criminal act on it, in a situation where the person pretending to be a minor in contact with the perpetrator is actually an adult.

It is necessary in this context to consider the essence of punishability of preparation, including the question – why the criminal law provides for the punishability of preparation only in relation to strictly defined crimes, taking into account both their social harmfulness and the evidentiary possibilities of linking previous actions to the subsequently committed crime[7]. The first group of such crimes appears to be acts that are particularly harmful from the point of view of state security, its stability and the protection of state structures from undemocratic change. The second includes cases where the punishability of preparation is required by an international agreement ratified by Poland. The third accommodates crimes of such high social harmfulness that the non-punishability of preparation for them while maintaining the punishability of preparation in terms of the other two groups creates the impression of inconsistency in the criminal law.

As for the first group, it can be assumed that by criminalizing preparation the state wants to safeguard its interests by allowing repressive intervention at a very early stage of hostile action. It is worth noting in this regard, that some crimes against the state in the relevant statutory definition of their type specify a stage in the standard sense while at the same time introduce criminalization of preparation for this stage. An example of such regulation is Article 127 CrC and Article 128 CrC. Both of these types of crimes against the Republic of Poland are defined in the criminal law in a way that corresponds to the description of an attempt ("in order to... undertake an activity aimed directly at..."), and in both of them preparation is punishable, while at the same time the law explicitly allows attempts to commit them, i.e., an attempt leading to the realization of the goal specified in these provisions. Attempts to commit these crimes (Article 127(1) and Article 128(1)) are covered by Article 131 CrC, which provides for the possibility of active repentance, resulting in not being subject to punishment. This formulation of the provision on active repentance means that the legislator allows punishable attempts to commit crimes whose description corresponds to the description of an attempt to realize the intended effect and not to achieve it.

The possibility of criminalizing an attempt in these cases means that a perpetrator who takes actions directly aimed at committing the listed acts, which

[7] See H-H. Jescheck, T. Weigend*, Lehrbuch des Strafrechts. Allgemeiner Teil,* Berlin 1996, p. 523.

are themselves defined as attempts in the Code, will be subject to punishment. In the case of Article 127, it is a matter of undertaking together with other persons an activity aimed directly at realizing the goal of depriving the Republic of independence, detaching part of an area or changing the constitutional system of the Republic of Poland by violence. The minimum of three perpetrators must be involved, while the attempt must consist of steps aimed directly at taking the actions described in Article 127 CrC, that is, exceeding the limits of preparation, which is also punishable (Article 127(2)). The offense thus has three stages: preparation (that fits the definition laid down in Article 16 of the Criminal Code and carries the sanction of "deprivation of liberty for a period of not less than 3 years"), attempt (that fits the definition of Article 13 CrC) and accomplishment, defined in Article 127 also as an attempt to achieve the intended goal. This means that a perpetrator who takes the actions described in Article 127(1) aimed at realizing the elements of an act in the form described in Article 127(1), e.g., will attempt to enter into an agreement with the authorities of another state in order to obtain support in an activity that would aim to detach a part of the territory of the Republic of Poland, will be committing an offense under Article 127 CrC in the form of an attempt and will be subject to punishment even if this attempt was inept. The incompetence (ineptness) in this case could be in the form of the lack of an object suitable for committing a criminal act on it (e.g., the perpetrator mistakenly believes that the area in question is on Poland's territory).

In the case of Article 128, an inept attempt of a crime could be the lack of an object suitable for committing a criminal act on it, e.g., the perpetrator will undertake an activity aimed directly at acting violently to eliminate the institution of the public prosecutor's mistakenly thinking that it is a constitutional body. In this case, preparation is also punishable.

Also, preparation for most crimes identified in Chapter XVI of the Criminal Code which prescribes different sanctions for them in Article 126c is down to the gravity of these crimes.

As for the second group of crimes for which preparation is punishable, the obligation to make this stage punishable sometimes stems from an international agreement ratified by Poland. An example here is the criminalization of preparation for counterfeiting currency (Article 310(4) of the Criminal Code). The International Convention for the Suppression of Counterfeiting of Currency[8] in Article 3(4) prescribes punishment for attempting to commit ordinary crimes and for intentional participation in them, and its Article 3(5) makes punishable the fraudulent making, receiving or obtaining of instruments or other articles peculiarly adapted for making counterfeit money.

[8] Signed at Geneva on 20 April 1929, with the protocol and the optional protocol, signed on the same day at Geneva, ratified by Poland by the Act of 5 March 1934 (Dz. U. (Journal of Laws) No. 30, item 261.

Finally, the third group must include the recently introduced criminalization of preparation for the crime of murder (Article 148(5) CrC)[9]. The motive behind this change was the desire to rid the criminal law of the inconsistency of not criminalizing preparation for the commission of the most serious crime against life and health[10].

So far, the lack of criminalization of preparation for murder has been associated with evidentiary difficulties as to proving that the action taken actually constituted preparation for the planned murder[11]. It should be borne in mind that the undertaking of attempted murder makes it unjustifiable to consider preparatory actions, which would often be actions taken in everyday life, such as buying a knife, poison, but can also include studying various ways of depriving a person of life. Such facts are, in many cases, the subject of proof that a person's death was the result of a deliberate (planned) killing (e.g., the killing was done in a way that the perpetrator became familiar with by studying the literature or finding their description on the Internet), especially when the trial is circumstantial. A significant portion of murder trials in the practice of Polish courts are circumstantial[12].

It seems that the doubts raised in this regard have been correct. Proposals have been made to criminalize only certain well-defined forms of preparation, in particular entering into an agreement to participate in a murder, as evidentially proving the objective of the participants in the agreement[13].

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[9] Act of 7 July 2022 on amending the act – Criminal Code and certain other acts (Dz. U. (Journal of Laws) of 2022, item 2600).

[10] See the Explanatory Memorandum to the amending law referred to above, which reads on p. 56: "Among all types of crimes stipulated in the Criminal Code, the legislator has provided for the criminalization of the preparation stage in only a dozen cases. In this context, it is unacceptable that currently the Criminal Law does not provide for the criminalization of preparation for murder under Article 148 CrC, a crime punishable with the most severe punishment among crimes against life and health. In practice, however, it is possible to undertake, and it happens often, a number of actions that meet the criteria of preparation under Article 16(1) CrC yet remain criminally irrelevant. Thes einclude for example entering into an agreement with a prospective accomplice or helper. These are highly socially harmful behaviors and, from the point of view of the axiology of the substantive criminal law system, require criminalization. (...) Thus, the draft eliminates axiological inconsistencies, as it is impossible to justify why the Criminal Code does not provide for the criminalization of preparation for the crime of murder, while it provides for such criminalization in the case of preparation for acts with a lower degree of abstract unlawfulness – only those threatening personal property."

[11] See O. Sitarz, (in:) *Prawo karne. Część ogólna, szczególna i wojskowa*, Warsaw 2016, p. 140 – "Nevertheless, the law does not provide for the criminalization of preparation for the crime of murder because, as indicated in the literature, this is a crime most often committed with the use of everyday objects (knife, axe), which would create evidentiary difficulties. However, there seems to be no impediment to criminalizing the preparation of murder in a multi-person form (i.e., entering into an agreement)".

[12] See T. Gardocka, D. Jagiełło, *Karny proces poszlakowy*, Warsaw 2020, p. 65 ff.

[13] In Anglo-Saxon law, entering into an agreement regarding various socially harmful acts, not only crimes, bears the general name of conspiracy and, when it concerns the commission

In this sense, the new type of murder provided for in the amendment to the Criminal Code, namely Article 148a, that is accepting an order to kill a human being in exchange for a given or promised financial or personal benefit, is also a special type of criminal preparation in the form of entering into an agreement. With the exception, however, that only this special preparation may be used by the acceptor as a possibility of exoneration by denunciation (Article 148a(2)). Others entering into an agreement to commit murder will not have such a possibility of exoneration, although it seems that an identical effect of being not liable for cooperation to commit a crime can be achieved by applying Article 17(2) in conjunction with Article 15(1) of the Criminal Code. The acceptance of a murder order, regardless of its connection with the acceptance of a benefit, is undoubtedly an entry into an agreement covered by the definition of preparation under Article 16 of the Criminal Code[14].

II.

The types of offenses whose substantive elements of the object side correspond to the statutory definition of attempt or preparation are also found in chapters of the Criminal Code other than Chapter XVII, which defines crimes against the Republic of Poland, mentioned in Section I. Such is the formulation of, for example, Article 200a of the Criminal Code[15] or Article 170 of the Criminal Code[16], which in fact define preparatory activities for other crimes[17], not listed in the definition of preparation, but covered by this definition (Article 16 CrC) due to the use of the word "in particular" in it. Does the introduction of a separate type of crime in Article 200a of the Criminal Code, instead of the introduction of punishability

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of crimes, is punishable in the United States separately from the crime itself, see S. Pomorski, *Amerykańskie common law a zasada nullum crimen sine lege*, Warsaw 1969, p. 167; in the criminal law of Australia, the crime called conspiracy is defined narrowly: "The crime of conspiracy should be limited to agreements to commit criminal offences: an agreement should not be criminal where that which it was agreed to be done would not amount to a criminal offence if committed by one person", J.C. Smith, B. Hogan, *Criminal Law,* London 2002, p. 296.

[14] Wąsek (in A. Wąsek, *Kodeks karny. Komentarz.* Vol. I, Gdańsk 1999) argues that "Entering into an agreement should be understood as agreeing and deciding on future cooperation (in the form of directing perpetration, joint perpetration, commanding perpetration, incitement or aiding and abetting) in the commission of a criminal act", p. 222.

[15] Whoever, with the purpose of committing a crime provided for in Article 197(3) or Article 200, as well as producing or recording pornographic contents, establishes a contact with a minor under 15 years of age via a telecomputer system or a telecommunications network by misleading him, exploiting his error or incapability to duly understand the situation, or by using unlawful threat (…).

[16] Whoever arms or equips a sea vessel intended for committing sea robberies or undertakes service on such a vessel (…).

[17] See L. Gardocki, 2011, *op. cit*., pp. 282 and 260.

of preparation for the crime under Article 197(3) and 200 of the Criminal Code change something significant in terms of punishability? Does the introduction of Article 170, which actually defines preparation for the crime under Article 166 of the Criminal Code, do so? It seems that it does.

Firstly, only one type of preparation involving the act specified in Article 200a CrC is punishable. Secondly, attempting preparatory acts specified in this provision is punishable. In contrast, attempting acts that constitute standard preparation for the commission of a crime is not punishable in cases where the punishability of preparation is covered by the content of Article 16 of the Criminal Code contained in the statutory formula "whoever makes preparations..."

The criminalization of preparation to disobey an order (Article 343(3) CrC), limited only to entering into an agreement with other soldiers, was resolved differently, explicitly providing for the criminalization of only this type of preparation[18].

III.

A specific type of criminal aiding and incitement is provided for in Article 152(2) CrC and involves criminalization of aiding or abetting a pregnant woman to abort a pregnancy in violation of the law. This type of act is peculiar because of the fact that it is not an aiding and abetting crime, since a pregnant woman is not subject to criminal liability for terminating her own pregnancy (Article 152 CrC). Therefore, it is a peculiar crime unrelated to perpetration, punishable regardless of whether the termination of pregnancy has occurred or not.

There is no direct analogy to aiding or abetting suicide (Article 151). The Criminal Code uses the term "leads a person to make an attempt on his own life," which should be understood as influencing a person to decide to attempt suicide.

Assisting a person other than the pregnant woman, such as a doctor or midwife, to terminate a pregnancy, or inciting such a person to terminate a pregnancy in violation of the law, is punishable under ordinary rules and does not require separate regulation. It follows directly from Article 18 of the Criminal Code.

CONCLUSIONS

In Polish criminal law, in addition to the standard stages of crime (preparation described in Article 16 CrC and attempt described in Article 13 CrC), there are also separate, specific types of crime that constitute preparation for other specific

[18] Gardocki defines entering into an agreement as the second form of preparation, different from preparation in the strict sense, see L. Gradocki, 2011, *op. cit.*, p. 110

crimes (e.g., Article 170 CrC) and defined as an attempt to achieve an intended goal (e.g., Article 127 CrC or 128 CrC). Different rules must be applied to them than to classically defined stages, including that the attempt to commit these specific crimes or preparation for their commission constitutes a punishable attempt or preparation under the general provisions of the Criminal Code.

The separate regulation of preparatory activities for a specific crime excludes the possibility of applying general standard stages to this crime, e.g. only entering into an agreement with other soldiers constitutes preparation for disobeying an order (Article 343(3) CrC).

I do not share the view expressed by legal scholars and commentators (see footnotes 2 and 3) that there is no provision for criminalizing attempted criminal preparation, including when it comes to specific provisions that constitute a specific crime of preparation for another crime. In particular, such an exclusion cannot be based on the statutory regulations of stages. The mere fact that a criminal statute describes a specific type of crime as preparation for another crime (e.g., Article 200a) or that its elements are included in a form appropriate to an attempt (e.g., 127 or 128 CrC) does not rule out the application of any institution of the general part of the Criminal Code.

The introduction of special regulations for types of crimes involving some kind of aiding and abetting (which does not correspond to its standard definition) to a person who does not commit a crime (Article 152(2) CrC) is an unjustified expansion of penalization. Likewise, the introduction of criminalization of preparation in general alongside the criminalization of its particular forms that fall under the general definition of preparation (Article 148(5) and Article 148a of the Criminal Code after the amendment of 2022) does not seem to be justified.

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