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Threat to Commit an Offence of a Terrorist Character According to Article 115 § 20 of the Polish Criminal Code – Selected Interpretation Problems

Groźba popełnienia przestępstwa o charakterze terrorystycznym w ujęciu art. 115 § 20 k.k. – wybrane problemy wykładni

SUMMARY

The paper discusses the concept of a terrorist threat in the light of Article 115 § 20 of the Polish Criminal Code. The author stresses the relationship between this term and the punishable threat described in the special part of the Criminal Code. The conducted analysis leads to the conclusion that the terrorist threat must be treated as a special type of the punishable threat and, as a result, many real terrorist threats may not meet the criteria of a forbidden act, e.g. because of the lack of an individualised victim. As a result, there appear serious doubts as to whether Polish criminal law meets the requirements of EU law referring to the criminalisation of terrorist threats and, therefore, the introduction of a new type of offence of a terrorist threat and some changes in Article 115 § 20 and Article 115 § 12 of the Criminal Code have been proposed.

Keywords: terrorism; terrorist threat; punishable threat; offence of a terrorist character

The aim of the paper is to analyse the threat to commit an offence of a terrorist character as regulated in Article 115 § 20 of the Polish Criminal Code (hereinafter: CC). Interpreting that provision, in particular as regards punishable threat defined in Article 190 § 1 CC, may pose some interpretation difficulties, which hinder the effective application of Article 115 § 20 CC to threats of a terrorist character.

The most important provision related to combating terrorism in Polish law is Article 115 § 20 CC containing the definition of offence of a terrorist character. This stems from the fact that the legislative technique used by the lawmaker allows all

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prohibited acts that meet the criteria set out in that provision to be considered as such an offence, and the attribution of such a character to a given act translates primarily into more severe rules for imposing the punishment, set out in Article 65 § 1 CC in conjunction with Article 64 § 2 CC. Thus, according to Article 115 § 20 CC, the offence of a terrorist character is an act punishable with imprisonment of at least 5 years, committed in order to: 1) gravely intimidate many people, 2) force a public authority of the Republic of Poland or of any other state or body of an international organization to perform or refrain from performing certain activities, 3) cause serious disturbances in the political system or economy of the Republic of Poland, another state or an international organisation, as well as a threat to commit such an act.

Before undertaking the analysis of terrorist threat referred to in Article 115 § 20 CC, it is worth noting that the need to introduce the category of offences of a terrorist character resulted from the Council Framework Decision 2002/475/JHA of 13 June 2002 on combating terrorism[1]. This act is no longer in force as it has been replaced by the Directive (EU) 2017/541 of the European Parliament and of the Council of 15 March 2017 on combating terrorism and replacing Council Framework Decision 2002/475/JHA and amending Council Decision 2005/671/JHA[2]. In both these legal acts, the EU lawmaker decided to use a legislative technique different from that adopted in the Polish Criminal Code. Both of the above-mentioned acts of EU law list specific types of behaviour which, where the perpetrator holds a terrorist motivation, should be regarded as "terrorist offences" (term used in the directive) in national law.

Thus, pursuant to Article 3 (1) of the Directive 2017/541, Member States shall take the necessary measures to ensure that the following intentional acts, as defined as offences under national law, which, given their nature or context, may seriously damage a country or an international organisation, are defined as terrorist offences where committed with one of the aims listed in paragraph 2:

a) attacks upon a person's life which may cause death,
b) attacks upon the physical integrity of a person,
c) kidnapping or hostage-taking,
d) causing extensive destruction to a government or public facility, a transport system, an infrastructure facility, including an information system, a fixed platform located on the continental shelf, a public place or private property likely to endanger human life or result in major economic loss,
e) seizure of aircraft, ships or other means of public or goods transport,

[1] OJ L 164, 22.06.2002, p. 3 as amended. This Framework Decision applied until quite recently in a form given to it by Council Framework Decision 2008/919/JHA of 28 November 2008 amending Framework Decision 2002/475/JHA on combating terrorism (OJ L 330/21, 9.12.2008).

[2] OJ L 88/6, 31.03.2017.

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f) manufacture, possession, acquisition, transport, supply or use of explosives or weapons, including chemical, biological, radiological or nuclear weapons, as well as research into, and development of, chemical, biological, radiological or nuclear weapons,
g) release of dangerous substances, or causing fires, floods or explosions, the effect of which is to endanger human life,
h) interfering with or disrupting the supply of water, power or any other fundamental natural resource, the effect of which is to endanger human life,
i) illegal system interference, as referred to in Article 4 of Directive 2013/40/EU of the European Parliament and of the Council[3] in cases where Article 9 (3) or point (b) or (c) of Article 9 (4) of that Directive applies, and illegal data interference, as referred to in Article 5 of that Directive in cases where point (c) of Article 9 (4) of that Directive applies,
j) threatening to commit any of the acts listed in points (a) to (i).

According to Article 3 (2), the aims referred to in paragraph 1 are:

a) seriously intimidating a population,
b) unduly compelling a government or an international organisation to perform or abstain from performing any act,
c) seriously destabilising or destroying the fundamental political, constitutional, economic or social structures of a country or an international organisation.

A thorough analysis of the above regulations in terms of punishability of the threat to commit one of the terrorist offences listed in Article 3 (1) points (a) to (i), as well as its comparison with the wording of the Polish implementation of these provisions may lead to certain doubts as to whether the current wording of the Polish regulations allows for a proper (or even any) reaction to the "terrorist threat", as understood in Article 3 (1) point (j) of the Directive.

First, it should be noted that in the very editorial terms, Article 115 § 20 CC may raise some doubts in the part in which it provides the definition of such a threat. The provision states that an offence of a terrorist character is constituted by any prohibited act if it is punishable by the sanction specified in Article 115 § 20 CC and provided that it is committed to pursue one of the three aims listed therein, "as well as a threat to commit such an offence". When read literally, this provision could be understood as meaning that "terrorist threat" is constituted by the threatening to commit a specific offence whose aim is the one mentioned in this provision – therefore, it is the announced offence, when committed, that would lead to the achievement of terrorist aims, such as intimidation of many people, or forcing a body of public authority to a specific behaviour, but the threat itself

[3] This regards the Directive 2013/40/EU of the European Parliament and of the Council of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA (OJ L 218/8, 14.08.2013).

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would not necessarily have such an aim. In other words, for this form of offence of a terrorist character to be committed in practice, the perpetrator should threaten that he will commit in the future an offence aimed at causing the effects referred to in Article 115 § 20 CC.

The above interpretation could seem fully justified in the light of the very wording of the provision – it would be easy to defend the view that "threatening to commit such an act" means a threat of committing a terrorist offence, i.e. a threat of committing a prohibited act punishable by imprisonment of at least 5 years, committed for the purposes listed in Article 115 § 20 CC[4].

However, such a method of interpretation may raise serious doubts, for example because that interpretation would be contrary to the above-mentioned requirements of the directive on combating terrorism, since the wording of Article 3 of that legal act clearly stipulates that the mere threatening to commit serious offences referred to in the directive already is intended to cause the effects listed in paragraph 2 of that provision (moreover, as a side note, it should be pointed out that the reading of the provision as proposed above would lead to considerable evidentiary difficulties, as it would be necessary to establish that only when intended the act would be committed with a particular aim, while the threatening itself should not have any particular motivation). Therefore, accepting the principle of interpreting the national law so as to make it compatible, where possible, with the EU law[5], it must be assumed that the threat itself is to be expressed to achieve one of the three aims referred to in Article 115 § 20 CC.

This is also the interpretation of the provision of Article 115 § 20 CC last sentence, which is accepted by the majority of criminal law scholars, who generally agree that the purpose of the threat (and not of the announced offence) is to raise fear, cause disruption, or enforce a certain behaviour[6]. This interpretation is, therefore, fully compatible with EU requirements in this regard and appears to be the most rational in the light of knowledge of the very phenomenon of terrorism and terrorist threats. This does not change the fact that these doubts about the manner

[4] Such an interpretation seems to be proposed by J. Giezek ([in:] *Kodeks karny. Część ogólna. Komentarz*, red. J. Giezek, Warszawa 2012, p. 738), who notes that "the offence of a terrorist character may occur in two forms: 1) as a prohibited act which cumulatively meets the following conditions: a) is punishable with a penalty of at least 5-years in the upper limit, b) has been committed to pursue one of the three alternatively specified aims; 2) as an act of threatening to commit an act meeting the above-mentioned conditions [underlined by A.M.W.]".

[5] For more on the obligation of using, where doubts arise, this kind of "pro-EU interpretation", see A. Kalisz, *Wykładnia i stosowanie prawa wspólnotowego*, Warszawa 2007, pp. 81–82.

[6] See, for example: J. Majewski, [in:] *Kodeks karny. Część ogólna*, t. 2: *Komentarz*, red. A. Zoll, Warszawa 2016, p. 1058; A. Michalska-Warias, [in:] *Kodeks karny. Komentarz*, red. T. Bojarski, Warszawa 2016, pp. 324–325, P. Daniluk, [in:] *Kodeks karny. Komentarz*, red. R.A. Stefański, Warszawa 2015, p. 716; K. Wiak, [in:] *Kodeks karny. Komentarz*, red. A. Grześkowiak, K. Wiak, Warszawa 2018, p. 760.

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of approach to the provision appear to be justified and can only be removed by a clear interference by the legislature (when applying this provision in practice, there may emerge the question whether its literal wording is more favourable to the offender, or a problem of error as to what threats constitute "terrorist threats"[7].

However, there are other interpretative difficulties with regard to terrorist threat, not addressed much in the literature, perhaps because the problem of a proper criminal-law response to the phenomenon of terrorism (fortunately) has not yet occurred in the practice of the Polish judiciary. Article 115 § 20 CC uses the term "threat", without specifying what kind of threat it is. The Polish law traditionally distinguishes punishable threat and unlawful threat. Article 115 § 20 CC refers only to "threat", but because it is undoubtedly the threat to commit an offence, it should be considered that it is a punishable threat or a special kind thereof. That type of threat is defined in Article 190 § 1 CC as a threat to commit an offence to the detriment of another person or his or her closest person. It should be kept in mind that in Article 115 § 20 CC the lawmaker does not create a new type of offence, but merely lists a set of additional features of the prohibited act, the occurrence of which causes the need to apply to the perpetrator (primarily when imposing the punishment and the probation measures), any solutions relating to the perpetrators of terrorist offences. Thus, the "terrorist threat" specified in that provision is not an independent entity, since for attributing it to the perpetrator it is necessary to establish that such a threat fulfilled the statutory criterion of a particular type of prohibited act. And this is where quite significant interpretative difficulties relating to their punishability in general in view of the current approach to punishable threats can arise in the case of many typical terrorist threats.

This is due to the fact that a typical "terrorist threat" within the meaning of the above-mentioned directive is, e.g., threatening to commit an offence against public security and such a threat is often addressed to a state body or mass media workers. Article 190 § 1 CC stipulates that the threat must be addressed towards a particular natural person and that the offence, the commission of which the perpetrator threatens, must be detrimental to either the addressee of the threat or a person closest to him or her. Already L. Peiper argued that a threat cannot be essentially addressed to a legal person because it cannot feel fear (unless it is apparent from the content of the threat that natural persons representing such a person are at risk)[8]. This author also stressed that the person against whom the threat is directed must

[7] The difficulties with the formulation of a synthetic definition of offence of a terrorist character have already emerged in the original wording of that provision, which required editorial intervention by the legislature, so that there is no doubt as to what the threat indicated at the end of the provision concerns. For more detail on this topic, see K. Wiak, *op. cit.*, pp. 759–760.

[8] L. Peiper, *Komentarz do kodeksu karnego, prawa o wykroczeniach i przepisów wprowadzających obie te ustawy*, Kraków 1936, p. 506.

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be precisely defined, although the threat does not need to be pronounced in his or her presence[9]. Such interpretation is consistently being adopted from the time of the Criminal Code of 1932 and seems fully reasonable in the light of the wording of Article 190 § 1 CC[10].

However, this means that threatening a public authority, e.g. to poisoning a water intake in a large city, does not amount to a punishable threat because in such a situation it would be difficult to assume that it is a threat to the detriment of any of the natural persons representing that authority and, moreover, it would not be possible to individualise in any way the persons to whose detriment the future offence would be committed. The latter, i.e. the lack of a specific potential victim, means that even the construct of indirect threat does not solve the problem. As noted in the literature, an indirect threat occurs when "the perpetrator, when informing a third party of the threat, at least expected the threat to reach the victim and accepted this"[11]. For terrorist threats, e.g. aimed at forcing a state authority to a certain behaviour, it does not have to be the aim of the perpetrator that the threat reaches the potential persons at risk (it is the authority who is supposed to be forced to a certain behaviour by the threat of committing a terrorist attack), and in such cases it is quite likely that this authority would not make such threats public so as not to cause panic.

This aspect of the terrorist threat has already been pointed out by J. Majewski, who argued:

> […] an act consisting in presenting to a journalist living in Cracow the threat that an explosive will be detonated in the Warsaw metro, in the expectation that this information will become public, panic will outbreak in Warsaw and, thus, the aim of intimidation of many people will be achieved, is non-punishable. Although this act meets all the criteria of Article 115 § 20 for a terrorist offence, it is clear that the aforementioned provision itself cannot form a basis for criminal liability of the perpetrator[12].

This problem also appeared in the case-law with regard to an "ordinary" punishable threat, leading to the conclusion that the behaviour of a perpetrator who spoke threats in the presence of persons who were not intended to be harmed by

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[9] *Ibidem*.

[10] See K. Nazar-Gutowska, *Groźba bezprawna w polskim prawie karnym*, Warszawa 2012, p. 141; M. Mozgawa, *Przestępstwa przeciwko wolności*, [in:] *System Prawa Karnego*, t. 10: *Przestępstwa przeciwko dobrom indywidualnym*, red. J. Warylewski, Warszawa 2016, p. 433; A. Zoll, [in:] *Kodeks karny. Część szczególna*, t. 2: *Komentarz*, red. W. Wróbel, A. Zoll, Warszawa 2017, pp. 585–588; N. Kłączyńska, [in:] *Kodeks karny. Część szczególna. Komentarz*, red. J. Giezek, Warszawa 2014, p. 465; J. Kosonoga, [in:] *Kodeks karny. Komentarz*, red. R.A. Stefański, p. 1086; S. Hypś, [in:] *Kodeks karny. Komentarz*, red. A. Grześkowiak, K. Wiak, pp. 749–750.

[11] M. Mozgawa, *op. cit.*, p. 436. See also K. Daszkiewicz-Paluszyńska, *Groźba w polskim prawie karnym*, Warszawa 1958, pp. 137–13.

[12] J. Majewski, *op. cit.*, p. 1056.

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the announced offence does not constitute a criminal offence, while at the same time there was no ground to assume that the perpetrator at least accepted that his threats would reach their actual addressees. In the judgement of 13 February 2008, worth citing here, the Supreme Court, referring to the criteria of the offence under Article 190 § 1 CC, stated:

> […] a victim of this crime may, therefore, be only the person to whom this threat is addressed and who as a consequence could directly or indirectly (through the harm of the person closest to him) suffer damage as a result of this threat. All the police officers indicated as victims witnessed that the defendant threatened to blow up the building in which he lived, not immediately, but in the future, after leaving the correctional facility. Therefore, it cannot be said that he threatened to commit an offence to their detriment or to the detriment of their closest persons. None of the police officers performing activities with the defendant's participation lived in this building, nor did the closest persons of any of them. The threat was clearly addressed to people who "slander" the defendant, i.e. to those of his neighbours who informed the police about Mirosław C.'s behaviour. None of these people were present in the defendant's apartment when he was expressing his threats. Therefore, it cannot be assumed that the behaviour of the defendant met the criteria of prohibited act under Article 190 § 1 CC. Of course, the threats expressed by him were unlawful, but this is not tantamount to punishability of such a conduct[13].

This ruling confirms the generally accepted interpretation of this provision, which prevents deeming a number of typical "terrorist threats" as fulfilling the criteria of punishable threat, and without that condition, it is also impossible to consider them as unlawful threats. Even if trying to assume that, e.g. directing a threat to commit an offence against public security was an indirect threat, one cannot identify who specifically would be considered as a victim and whose feelings about the strength of the threat would be conclusive for the determination that this threat has raised a justified concern about its fulfilment. The fact that, for example, the state bodies responsible for security are convinced of the high likelihood of fulfilment of the threat is not sufficient in such a case, because it is not the members of such bodies who may be considered as directly threatened by the fulfilment of such threats. While, for example, in the case of a threat of blowing up a particular building, it could be assumed that all those staying there are the victims of such a threat, and their feeling of concern is sufficient to recognise that this element of threat occurred, in the case of many terrorist threats the perpetrators do not specify their target in such detail, and thus it is not possible to identify specific victims of their behaviour.

All this leads to the conclusion that considerable doubts arise as to whether the lawmaker has managed to criminalise "terrorist threat" to the extent probably intended and required by the above-mentioned EU Directive of 2017. Indeed, in

[13] Judgement of the Supreme Court of 13 February 2008, IV KK 407/07, „Biuletyn PK" 2008, No. 4, item 10.

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many hypothetical situations the perpetrator's act may prove to be *de lege lata* non-punishable, or, at most, prohibited under penalty as a petty offence, e.g. under Article 66 of the Code of Petty Offences (provided that the terrorist threat was addressed to a public service institution or security protection authority, public order authority or health authority)[14]. Nor does it seem permissible in this case to criminalise such threats through interpretation aimed at reconciling the existing scope of criminalisation with the requirements of EU law in that regard, since too much doubt arises, and interpreting the existing rules much more broadly, or even *contra legem* for achieving the effect of interpretation desirable from the point of view of the directive is incompatible with the guarantee function of criminal law.

These reservations may only be resolved through the intervention of the law-maker, with two options for adapting the current legislation to the EU requirements and to the need of ensuring a proper criminal-law response to terrorist threats. The first one would involve a change in the wording of Article 190 § 1 CC so that it would also cover quite serious threats but lacking the individualised addressee. However, this solution does not seem appropriate, as it would mean a significant modification of the provision and almost complete departure from the approach to it that is traditional in Polish criminal law. The second option is the introduction to the Criminal Code (perhaps to the chapter grouping the crimes against public security, or alternatively to the chapter covering crimes against public order) of a new type of crime of "terrorist threat", while modifying the definition of Article 115 § 20 CC and the definition of unlawful threat contained in Article 115 § 12 CC[15].

[14] This problem has already emerged in the practice. In the judgement of the Administrative Court in Katowice of 26 February 2009 (II AKa 3/09, LEX No. 504097), in the grounds of which the court stated: "Under the legislation currently in force, the behaviour consisting in misleading public institutions or security and public order protection authorities by falsely informing them about the threats of terrorist attacks, planting explosives or other similar threats, must be considered on three possible levels of responsibility – petty offences under Article 66 of the Code of Petty Offences, crimes against freedom (Article 190 CC and Article 191 CC) and finally crimes against security in transport or public security (crimes from Chapters XX and XXI of the Penal Code). The type of legal interest violated or threatened by the perpetrator's behaviour determines which of the possible legal qualifications is adequate in a given situation". In the case in question, a judgement was repealed in which the perpetrators of a false alarm about bombs planted at several railway stations was assigned liability for the act under Article 174 § 1 CC in conjunction with Article 165 § 1 (5) CC.

[15] It should be noted that the proposal for a separate penalisation of terrorist threat, other than the one outlined above, was presented by the Codification Committee of the Criminal law in its opinion of 18 February 2014 (see the opinion of the KKPK on the implementation of the current recommendations of MONEYVAL on anti-money laundering and other measures, www.gov.pl/web/sprawiedliwosc/opinie-komisji-kodyfikacyjnej-prawa-karnego [access: 15.07.2019]). It was then postulated to introduce a new Article 259a penalising in § 1 the preparation for an offence of a terrorist character and penalising in § 2 the "use of a threat to commit a prohibited act of a terrorist character" punishable by imprisonment of up to 3 years.

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The new offence could, therefore, have the following shape: Article X. "Whoever, in order to seriously intimidate many people, force a body of public authority of the Republic of Poland or any other state or a body of an international organization to take or refrain from certain activities or to cause serious disturbances in the political system or economy of the Republic of Poland, another state or an international organization, threatens to commit a prohibited act punishable with a penalty of imprisonment of at least 5 years, shall be punished with […]". It seems that, as regards the determination of the sanction, it would be appropriate to raise it in relation to that attributable for the "ordinary" punishable threat. In Article 115 § 20, the words "as well as a threat to commit such an act" should be deleted and instead the following sentence should be inserted: "An offence of a terrorist character is also a threat referred to in Article X". The definition of unlawful threat from Article 115 § 12 CC should also be extended to include the new terrorist threat. It also seems that due to the specificity of terrorist threats, it is reasonable to give up specifying the addressee of the threat – the placing of the phrase "threatens another person" would mean the need to determine that the threat has been directed to a specific person, and this will not be always possible (e.g. the perpetrators spread leaflets announcing terrorist attacks). In this case, it is also groundless to require that the threat should cause justified fear about its fulfilment – the fact that it may be addressed to unspecified persons means that this element of the threat would also be difficult to prove (it would require, e.g. deciding whether the fear is to be felt by the person who received it, even though such a person is not among those who are to be harmed by the offence in the future, or rather the person potentially at risk – here, however, would be the problem of assessing who would be representative as such a victim). Therefore, an element to correct a too broad application of the provision would be, firstly, the general requirement for a higher than negligible degree of social harmfulness of the act, and secondly – the narrowly defined subjective side (mens rea) of the offence of terrorist threat. For this act to occur, it is necessary to prove the perpetrator's activity in pursuance of one of the three terrorist goals, and this makes it possible to eliminate, e.g. threats meant as a joke or pronounced under the influence of momentary emotions, without the accompanying intention to achieve one of such goals.

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STRESZCZENIE

W artykule omówiono pojęcie groźby terrorystycznej na tle art. 115 § 20 k.k. Autorka zwróciła uwagę na relację tego pojęcia do ujętej w części szczególnej Kodeksu karnego groźby karalnej. Z przeprowadzonej analizy wynika, że groźba terrorystyczna musi być traktowana jako szczególny rodzaj groźby karalnej, a to powoduje, że wiele rzeczywistych gróźb terrorystycznych może nie wypełniać kryteriów czynu zabronionego, np. z uwagi na brak zindywidualizowanego pokrzywdzonego. Powyższe sprawia, że można mieć poważne wątpliwości, czy polskie prawo karne spełnia wymogi unijne co do zakresu karalności gróźb terrorystycznych, dlatego zaproponowano wprowadzenie nowego typu przestępstwa groźby terrorystycznej oraz zmiany w brzmieniu art. 115 § 20 i art. 115 § 12 k.k.

Słowa kluczowe: terroryzm; groźba terrorystyczna; groźba karalna; przestępstwo o charakterze terrorystycznym