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An Unlawful Threat as a Statutory Feature of Criminal Offences Under Article 245 of the Polish Criminal Code. Considerations Connected with the Supreme Court and Appellate Courts Jurisprudence

Groźba bezprawna jako znamię przestępstwa z art. 245 k.k. Rozważania na tle orzecznictwa Sądu Najwyższego i sądów apelacyjnych

SUMMARY

This article aims to interpret the term "unlawful threat" under Article 245 of the Criminal Code. It can be observed that judicial decisions of the Supreme Court and legal doctrine do not provide a uniform interpretation of the term. The work discusses whether the result in the shape of a justified concern that the threat will be carried out is necessary. Such a criminal result is described in Article 190 of the Criminal Code which penalizes punishable threats. It corresponds with Article 115 § 12 of the Criminal Code which defines an unlawful threat. In the opinion of the authors, causing a justified fear that the threat will be carried out is one of the statutory features in all three cases, i.e. unlawful threats to commit a criminal offence, to institute criminal proceedings and to disseminate defamatory information.

Keywords: unlawful threat; punishable threat; creative interpretation

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INTRODUCTION

Article 245 of the Criminal Code of the Republic of Poland penalises using unlawful threats to influence a witness, expert witness, translator, prosecutor or defendant. One of the statutory features of the above-mentioned prohibited act, and a number of others defined in the Criminal Code (e.g. in Article 191a § 1 and Article 200a § 1) is using an unlawful threat. Legal definition of an unlawful threat can be found in Article 115 § 12 of the Criminal Code, which states that both a threat described in Article 190 of the Criminal Code and a threat to institute criminal proceedings or disseminate defamatory information concerning the person threatened or their next of kin constitute an unlawful threat. Article 190 § 1 of the Code defines statutory features of the so-called punishable threat, when a person threatens another person to commit an offence detrimental to that person or their next of kin if the threat causes in the threatened person a justified fear that it will be carried out. The distinction between a punishable threat and an unlawful threat is made in legal jargon and, hence, is not directly rooted in the Act.

Such legal background calls for analysing a significant problem of the interpretation of statutory features of an unlawful threat under Article 245 of the Criminal Code. In this scope, it should be considered whether the result in the shape of a justified fear of carrying out the threat to commit a crime belongs solely to the catalogue of statutory features of a punishable threat under Article 190 § 1 of the Criminal Code or whether it also completes the statutory features of a criminal offence under Article 245 of the Criminal Code pursuant to the reference made in the definition of an unlawful threat in Article 115 § 12 of the Code. This problem also has further implications. Answering the question posed in the title hereof may greatly impact analysing statutory features of other criminal offences, as the term "unlawful threat" is used in a number of definitions of prohibited acts under the Criminal Code. The interpretation of an unlawful threat in the light of its legal definition in Article 115 § 12 raises another vital question. Namely, it should be decided whether it is essential to establish if the threat caused a justified fear when two subsequent modalities outlined in Article 115 § 12, i.e. a threat to institute criminal proceedings or to disseminate defamatory information concerning the person threatened or their next of kin, occur.

We believe that there are substantial reasons supporting the assumption that causing a justified fear that the threat will be carried out is one of the elements of the statutory definition of an unlawful threat. Hence, in order to obtain satisfactory interpretational results, creative interpretation supported by corrective interpretation is essential.

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INTERPRETATION OF ARTICLE 245 OF THE CRIMINAL CODE IN JUDICIAL DECISIONS OF THE SUPREME COURT AND IN LEGAL DOCTRINE

Possible interpretations of the provisions raising similar questions were most comprehensibly presented in the Supreme Court Order of March 27, 2014, I KZP 2/14[1]. The Supreme Court stated that opinions found in literature on normative consequences of building the definition under Article 115 § 12 of the Criminal Code do not sufficiently discuss the topic and are not always relevant. They can be divided into a few groups. Firstly, the Supreme Court mentioned the standpoint stating that as a result of using referencing and indicating an unlawful threat under Article 190 of the Criminal Code, the term of unlawful threat encompasses not only an objective element, i.e. threatening to commit a criminal offence, but also a criminal result required under Article 190 of the Code, i.e. a justified fear that a threat will be carried out. Hence, according to this concept, there is a requirement to treat the subjective element on the part of the aggrieved party, i.e. causing a justified fear that the threat will be carried out, as an essential element, equivalent to other elements, in establishing facts, or even filing criminal charges, also in such unlawful threats where the statutory features point to a punishable threat (i.e. a threat to commit a criminal offence detrimental to the threatened party or their next of kin). The above-mentioned opinion distinguishes between "unlawful threat" and "punishable threat" and acknowledges that a justified fear that the threat will be carried out belongs solely to the statutory features of the criminal offence under Article 190 § 1 of the Criminal Code. However, it treats referencing this provision in the legal definition in Article 115 § 12 of the Criminal Code as a way in which the legislator incorporates in this definition the element of causing a justified fear in the threatened party that the threat will be carried out. Most often, although not always, such a standpoint refers solely to cases when an unlawful threat can be classified under Article 190 of the Criminal Code (concerns committing a criminal offence). It can, however, also concern other forms of unlawful threats under Article 115 § 12 of the Criminal Code[2].

The Supreme Court Order No. I KZP 2/14 also discusses the opinion held by another group of commentators, who claim that for a threat to be unlawful, it must be serious and there must be a justified fear that it will be carried out. The Supreme Court, however, rightly argues that such view leads to blurring the distinction made

[1] The Supreme Court Order of March 27, 2014, I KZP 2/14, OSNKW 2014, No. 7, Item 53.

[2] See: M. Mozgawa, [in:] *Kodeks karny. Komentarz*, red. M. Mozgawa, Warszawa 2012, p. 268; *idem*, [in:] *System Prawa Karnego*, t. 10: *Przestępstwa przeciwko dobrom indywidualnym*, red. J. Warylewski, Warszawa 2013, p. 417; K. Nazar-Gutowska, *Groźba bezprawna w polskim prawie karnym*, Warszawa 2012, pp. 61–72.

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in the Code between the types of unlawful threats[3]. Some commentators point to systematic and functional arguments, which, in their opinion, support the need for a broader interpretation of the definition set forth in Article 115 § 12 of the Criminal Code which would incorporate the result in the shape of causing a justified fear that the threat will be carried out also if the threat does not fall under Article 190 § 1 of the Criminal Code[4]. Such direction would require corrective interpretation by the Supreme Court supporting functional interpretation. A different view on criminal coercion can be observed in the decision of the Supreme Court of 14 February 2013, II KK 120/12[5]. Pursuant to this decision, an unlawful threat under Article 191 § 1 of the Criminal Code must be real, that is it must evoke a conviction in an objective observer that using it can lead to a certain behaviour of the threatened person which is compliant with the perpetrator's will. Accepting the view that an unlawful threat must also have a real, psychological influence on the threatened party does not, however, mean that all charges of an unlawful threat must include an element of causing a justified fear on the part of the threatened person that it will be carried out, which is essential in criminal offences under Article 190 § 1 of the Criminal Code.

It should be noted that, in its judgement of 2 December 1948, K 1668/48, so pursuant to the Criminal Code of 1932, the Supreme Court clearly stated that:

> […] the difference between an unlawful threat (Article 91 § 4 of the Criminal Code) and a punishable threat (Article 250 of the Criminal Code) is not qualitative, i.e. it does not concern the threat *per se*, but quantitative, as it only extends – in the case of an unlawful threat – the scope of ways in which the perpetrator expresses the threat (not only a threat to commit a criminal offence, but also a threat to institute criminal proceedings or disseminate defamatory information). An unlawful threat under Article 251 of the Criminal Code must also meet the same qualitative criteria as punishable threats. It must, hence, be able to cause a justified fear in the threatened party. When a threat under Article 251 of the Criminal Code does not satisfy this condition, the act lacks the essential element under this Article[6].

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[3] Cf. e.g. B. Kunicka-Michalska, [in:] *Kodeks karny. Część szczególna*, red. A. Wąsek, R. Zawłocki, t. 2, Warszawa 2010, p. 377; W. Wróbel, A. Wojtaszczyk, W. Zontek, [in:] *System Prawa Karnego*, t. 8: *Przestępstwa przeciwko państwu i dobrom zbiorowym*, red. L. Gardocki, Warszawa 2013, p. 689; M. Jachimowicz, *Przestępstwo zmuszania świadka*, „Przegląd Sądowy" 2007, nr 11–12, p. 152.

[4] Cf. J. Majewski, [in:] *Kodeks karny. Część ogólna. Komentarz*, red. A. Zoll, t. 1, Warszawa 2012, pp. 1396–1397; S. Hypś, [in:] *Kodeks karny. Komentarz*, red. A. Grześkowiak, Warszawa 2012, p. 662; J. Giezek, [in:] *Kodeks karny. Część ogólna. Komentarz*, red. J. Giezek, Warszawa 2012, p. 708.

[5] The Supreme Court Order of February 14, 2013, II KK 120/12, Biul. PK 2013, No. 3, pp. 10–14, LEX No. 1405555.

[6] The Supreme Court Judgement of December 2, 1948, K 1668/48, „Państwo i Prawo" 1948, No. 4, p. 145.

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The above-mentioned Order of the Supreme Court No. I KZP 2/14 refusing to answer the same legal question, does, however, include *obiter dicta* of certain interpretation of Article 245 in relation to Article 115 § 12 of the Criminal Code. This interpretation is based on the division of unlawful threats into those against individual legal interests (causing a justified fear that the threat will be carried out) and those against collective legal interests (according to the Supreme Court, lacking such element, e.g. influencing the official acts of constitutional bodies – Article 128 § 3 of the Criminal Code, influencing the official acts of state authorities, administrative bodies or local authorities – Article 224 § 1 of the Criminal Code, coercing a public official to perform or abstain from a lawful official activity – Article 224 § 2 of the Criminal Code, affecting the official functions of a court of justice – Article 232 of the Criminal Code, influencing the participants of court proceedings – Article 245 of the Criminal Code, obstructing elections Article 249 of the Criminal Code, preventing or dispersing a lawful gathering – Article 260 of the Criminal Code, obstructing the performance of military duties or coercing a military supervisor to perform or abstain from performing their duties – Article 346 § 1 of the Criminal Code). The Supreme Court observed that in offences against individual legal interest, defining the aggrieved party is not problematic. Subsequently, the existence of the subjective element of causing a justified fear is analysed with reference to the threatened individual.

According to the Supreme Court, in the case of criminal offences against "collective legal interests", criminalising unlawful threats is related to such values as unobstructed functioning of the state, courts of justice, government and local government administration, protecting basic civil rights, such as participating in elections and gatherings. The Supreme Court also noted that in such cases the individual legal interest in the shape of freedom from feeling threatened is secondary. As stated by the Supreme Court, it should be considered whether, on account of the character of the attacked public interest, criminal liability in such cases is not, in fact, independent of a subjective element in the shape of causing a justified fear that the threat will be carried out. The Supreme Court further argues that when using functional interpretation of Article 245 of the Criminal Code – from the point of view of proper functioning of courts of justice – the primary significance is given to the fact that the perpetrator uses an unlawful threat to influence a witness or other person mentioned in the Article. According to the Supreme Court, whether the threat caused or did not cause a justified fear that it will be carried out is of secondary importance for the infringed interest.

The analogical view was expressed in the judgement of the Supreme Court of June 6, 2011, V KK 128/11, in which the Court stated that:

> Apparently, the counsel does not see that Article 224 § 2 of the Criminal Code, unlike Article 190 § 1, does not treat causing a justified fear on the part of the threatened party as a statutory feature of

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the criminal offence; therefore, contrary to what the prosecution claims, the courts did not comment on this issue, in particular they did not assume that the police officers feared that the threats made by the defendant will be carried out[7].

Most recently, the Supreme Court presented a similar standpoint in its order of September 14, 2017, I KZP 7/17 saying that the term "a threat defined in Article 190" used in Article 115 § 12 of the Criminal Code concerns only the subjective behaviour of the perpetrator, and, hence, does not encompass the result in the shape of causing a justified fear on the part of the threatened party that the threat will be carried out[8]. In the justification, the Supreme Court pointed to the aforementioned decision No. I KZP 2/14 and outlined three kinds of arguments supporting this opinion. Firstly, according to the Supreme Court, incorporating the subjective element of causing a justified fear that the threat will be carried out as an element of unlawful threats to institute criminal proceedings and disseminating derogatory information constitutes law-making. However, it does not contradict the fact that, when creating the types of prohibited acts with criminal consequences, where the criminal result is a consequence of using a threat, the legislator indirectly included the element of influencing the actions undertaken by the aggrieved party. Nevertheless, causing a justified fear does not constitute a statutory feature of such criminal offences and does not have to be included in the description of the act. Secondly, the Supreme Court discussed the catalogue of legally protected interests and different types of prohibited acts with statutory features of a threat and stated that in the case of criminal offences against public interest excluding the requirement of causing a justified fear is acceptable in the light of other offences disrupting official acts of state bodies. Thirdly, the Supreme Court indicated a systematic incoherence which would occur if causing a justified fear on the part of the aggrieved party were required for threats to commit criminal offence and not for the two remaining threats.

Here, it should be emphasised that the judicial decisions of the Supreme Court are made in certain normative and procedural circumstances and avoiding applying corrective interpretation is undoubtedly good practice. The authors, are undertaking polemics from the perspective of a different, academic reality without procedural and judicial constraints. Most critical comments in this text are, hence, addressed to the legislator and do not constitute the criticism of judicial decisions.

On the other hand, it seems that the Supreme Court judgement of October 7, 2008, III KK 153/08[9] conclusively and without justification states that causing a justified fear that the threat will be carried out belongs to the statutory features of criminal offences under Article 245.

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[7] The Supreme Court Judgement of June 6, 2011, V KK 128/11, LEX No. 897778.

[8] The Supreme Court Order of September 14, 2017, I KZP 7/17, OSNKW 2017, No. 11, p. 63.

[9] The Supreme Court Judgement of October 7, 2008, III KK 153/08, Biul. PK 2009, No. 1, p. 15.

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The Supreme Court judgement of December 7, 1999, WA 38/99[10] is another important judicial decision. The Court stated that for the existence of a criminal offence under Article 346 of the Criminal Code, in which the perpetrator uses an unlawful threat in the shape of a punishable threat (Article 115 § 12 in connection with Article 190 § 1 of the Criminal Code), it is necessary to establish that the threat of the soldier caused a justified fear in their supervisor that it will be carried out. Although Article 346 of the Criminal Code concerns an individual, not individual freedom but military discipline is the protected interest. Hence, an axiological incoherence between the above-mentioned decision and order No. I KZP 02/14 can be noticed.

INTERPRETATION OF ARTICLE 245 OF THE CRIMINAL CODE IN JUDICIAL DECISIONS OF COMMON COURTS

Opinions, similar to that in order No. I KZP 02/14 have also been expressed by the common courts. In the judgement of 9 October 2014, Court of Appeal in Białystok[11], following the order No. I KZP 2/14, stated that judicial decisions emphasise that Article 245 of the Criminal Code uses statutory features of an unlawful threat defined in Article 115 § 12 of the Criminal Code, in which, unlike in Article 190, the requirement of causing a justified fear in the threatened person that the threat will be carried out is not directly expressed. According to this decision, if causing a justified fear in the threatened person were to be a constitutive element of an unlawful threat in all its types, such requirement would have to be enshrined in the statutory definition of the offence. By this statement, the Court supported the decision of March 24, 2014, of Court of Appeal in Katowice No. II AKa 20/14, according to which "an offence under Article 245 of the Criminal Code is a type of formal offence and the result in the shape of causing a justified fear that the threat will be carried out does not belong to its statutory features. It does not, however, mean that the Court can resign from establishing whether the threat was real"[12].

Court of Appeal in Lublin in the judgement of October 3, 2013, II AKa 152/13[13], also did not support the view that causing a justified fear is required for establishing criminal liability for a threat to commit a criminal offence under Article 245 of the Criminal Code. The Court thought that such a view is based on wrongly incorporating the result mentioned in Article 190 § 1 of the Criminal Code into

[10] The Supreme Court Judgement of December 7, 1999, WA 38/99, OSNKW 2000, No. 3–4, p. 32.

[11] Court of Appeal in Bialystok Judgement of October 9, 2014, II AKa 202/14, LEX No. 1532570.

[12] Court of Appeal in Katowice Judgement of March 24, 2014, II AKa 20/14, Biul. SAKa 2014, No. 2, Item 7.

[13] Court of Appeal in Lublin Judgement of October 3, 2013, II AKa 152/13, LEX No. 1388873.

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the definition of an unlawful threat under Article 115 § 12 of the same Code. This criminal consequence is the condition for penalising such threats, only if it serves as a means of tampering a witness within the meaning of Article 245 of the Criminal Code. According to the Court, as a criminal offence under Article 245 does not require any criminal consequence to occur, causing a justified fear that the threat will be carried out mentioned in Article 190 § 1 of the Criminal Code is not a condition for its penalisation.

Similarly, according to the decision of Court of Appeal in Lublin of September 6, 2012, II AKa189/12[14], analysing Article 115 § 12 of the Criminal Code and Article 190 § 1 of the same Code leads to a conclusion that the relation between the two provisions can be described as an "incomplete symmetry", which merely defines the behaviour of the perpetrator and not the feelings of the aggrieved party. The Court drew our attention to different functions of these provisions. As the Court argues, Article 115 § 12 is a general provision which does not contain statutory features of any offence and merely defines an "unlawful threat". Article 190 § 1 of the Criminal Code, in turn, penalises a specific offence of a punishable threat. According to the Court, the issue of causing a justified fear that the threat will be carried out contained in Article 190 § 1 of the Criminal Code does not belong to the description of the threat itself, but to external circumstances – the consequence in a specific situation felt by the addressee of the threat; it constitutes, however, an additional requirement under this provision that must be met to criminalise a specific type of an unlawful threat used in a specific situation. According to the Court, the reference from Article 115 § 12 of the Criminal Code "a threat mentioned in Article 190" concerns merely a subjective aspect of the behaviour of the perpetrator; Article 115 § 12 does not contain the requirement of causing a justified fear and the wording of Article 245 (and other provisions containing statutory features of a threat) does not require the existence of a justified fear that the threat will be carried out in a witness or other persons mentioned in the Article. Such a view on Article 245 of the Criminal Code, according to the Court, is also supported by systematic and purposive interpretation of this provision, as Article 245 constitutes *lex specialis* in relation to Article 191 § 1 and can be found in the chapter on offences against judicial system. This provision protects not only bodily integrity and the right to freedom, but, above all, correct and unobstructed functioning of the judicial system, which greatly impacts its interpretation.

An alternative view on statutory features under Article 245 was expressed by Court of Appeal in Wrocław in its judgement of 14 July 2005, II AKa 155/05[15]. It stated, without providing extensive justification, that witness tampering defined in Article 245 of the Criminal Code requires using violence or an unlawful threat, which is a threat to commit a criminal offence against the addressee or their next of

[14] Court of Appeal in Lublin Judgement of September 6, 2012, II AKa 189/12, LEX No. 1217723.
[15] Court of Appeal in Wrocław Judgement of July 14, 2005, II AKa 155/05, LEX No. 1220370.

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kin causing a justified fear that it will be carried out or a threat to institute criminal proceedings or to disseminate defamatory information about the threatened or their next of kin (Article 115 § 12 of the Criminal Code).

INTERPRETATION OF ARTICLE 245 OF THE CRIMINAL CODE IN THE LIGHT OF LAW-MAKING TECHNIQUES

The correctness of Article 245 interpretation can be considered from the perspective of law-making techniques used by the legislator, systematic references in particular. References in legal acts are regulated in, among others, § 22 and § 156–158 of the Annex to the Regulation of the Prime Minister of 20 June 2002 on "Principles of Legislative Technique"[16]. According to § 156 thereof, "references in a normative act can be used for achieving brevity or ensuring legal coherence". According to § 156(2) "if the reference is used only to achieve brevity, the referenced provision or provisions shall be unambiguously indicated". It should be stated that the reference made in Article 115 § 12 of the Criminal Code is dynamic within the meaning of § 159 of "Principles of Legislative Technique", as the Act makes a reference to "legal provisions in force in the wording they have on each occasion within the time when the referencing provision is in force […]"[17].

In Article 115 § 12 of the Criminal Code, the legislator provides a legal definition of an "unlawful threat". According to this provision, an unlawful threat is:

> […] both a threat mentioned in Article 190, and a threat to institute criminal proceedings or disseminating defamatory information about the threatened party or their next of kin; an announcement of instituting criminal proceedings is not a threat, if it aims merely to protect the legal right infringed by the criminal offence.

The denotation of this term is complex – it is created by a legislative technique called internal reference – made within the same legal act (therefore, the legislator uses only the number of Article) and by the description of the remaining elements of *definiendum*. It is a projective – regulatory definition, which defines the term on the basis of the existing meaning (characteristic of the universal language). However, it is also projective – constructive as it points to separate extensions of the defined term[18]. Here, the subjective scope of the definition should be discussed and statutory features of an unlawful threat outlined.

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[16] Journal of Laws 2016, Item 283.

[17] Cf. M. Dębska, *Komentarz do § 156 rozporządzenia w sprawie „Zasad techniki prawodawczej"*, LEX/el. 2013; G. Wierczyński, *Komentarz do § 156 rozporządzenia w sprawie „Zasad techniki prawodawczej"*, LEX/el. 2009.

[18] Cf. M. Błachut, W. Gromski, J. Kaczor, *Technika prawodawcza*, Warszawa 2008, pp. 32–33.

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According to Article 190 § 1 of the Criminal Code, "Whoever threatens another person to commit a criminal offence detrimental to them or their next of kin, if the threat causes a justified fear in the threatened party that it will be carried out, shall be subject to a fine, the penalty of restriction of liberty or the penalty of the deprivation of liberty for a term of up to 2 years". The wording "if the threat causes a justified fear in the threatened party that it will be carried out" is merely contained in the aforementioned provision of the Criminal Code. Hence, the condition for penalisation of the threat defined in Article 190 § 1 is causing a state in the threatened person, in which the fear is justified. In Article 245, in turn, the legislator states that "whoever uses violence or an unlawful threat to influence a witness, expert witness, translator, prosecutor or the defendant or consequently violates their bodily integrity, shall be subject to the penalty of deprivation of liberty for a term between 3 months to 5 years". Hence, a question can be raised whether, from the point of view of legislative rules, the element of a "justified fear" is a condition for criminalisation also in cases under Article 245 of the Criminal Code (analogically to other types of unlawful threats). Following the linguistic interpretation, the essential element of which is observing the rules of linguistic correctness and taking into account legislative techniques used[19], the answer to the above dilemma can be positive. Firstly, the legislator (having maintained a correct relation between the definitions and the articulated part) defines an unlawful threat, which results in the situation where each intentional use of this term updates its definition, a feature characteristic of rational law-making[20]. Furthermore, the definition primarily covers an unlawful threat mentioned in Article190 § 1 of the Criminal Code, the statutory feature of which is a justified fear. Hence, the legislator firstly defines the term *a rubrica*, which results in treating each instance of its usage as indistinctive (*lege non distinguente*). "Indistinctive" refers here to such interpretation that does not allow any freedom in choosing the terms which are significant for the result of the interpretation (a ban on *per non est* interpretation). In particular, the interpretation which intentionally excludes, even grammatically the smallest, parts of the legislative text is not permissible.

Thus, a systematic analysis of this problem could lead to a conclusion that the existence of a justified fear that the threat will be carried out should be treated as a statutory feature of each provision in the Criminal Code in which the legislator used the term "unlawful threat". For establishing such circumstances, the rules of legislative techniques (as a set of directives of a lower-order legal act) are less significant than rules of decoding legal norms from textual systematics established in legal doctrine.

[19] S. Wronkowska, M. Zieliński, *O korespondencji dyrektyw redagowania i interpretowania tekstu prawnego*, „Studia Prawnicze" 1985, nr 3–4, pp. 301 ff.

[20] S. Wronkowska, *Prawodawca racjonalny jako wzór dla prawodawcy faktycznego*, [in:] *Szkice z teorii prawa i szczegółowych nauk prawnych*, red. S. Wronkowska, M. Zieliński, Poznań 1990, pp. 118 ff.

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INTERPRETATION OF STATUTORY FEATURES OF AN UNLAWFUL THREAT UNDER ARTICLE 245 OF THE CRIMINAL CODE

Since the achieved interpretation is not satisfactory at an "ideal" (or *lex ferenda*) level, the legal problem can be solved in two ways: one can decide either that the subjective element does not belong to statutory features also in the case of offences under Article 190 of the Criminal Code (second option) or that it belongs to all types of unlawful threats (first option). A hypothesis may be put forward that a legal gap is present also in the case of threats to institute criminal proceedings or disseminate defamatory information. Its existence may be caused by two kinds of circumstances.

Prior to drawing any conclusions stemming from the aforementioned judicial decisions and the authors' careful considerations, the following options of legal interpretations and their consequences should be presented. The first option is stating that a justified fear is one of statutory features of punishable threats (but not other unlawful threats) independently of protected legal interest. Such interpretation resulting from a systematic approach to a normative legal act is, however, functionally (axiologically) not correct.

The second option favours the view, presented in the Supreme Court decisions No. I KZP 2/14 and No. I KZP 7/17, that a justified fear that the threat will be carried out is essential under Article 190 of the Criminal Code and possibly when statutory features mentioned in Article 190 are the components of other criminal offences, excluding the offences against public interest. At this point, the placement of Article 245 in the Criminal Code (and analogically, other unlawful threats against public interest) should be considered. The legislator places the provision in the chapter devoted to correct functioning of the judicial system. In this context, set by the criterion of the protected legal interest, more interpretational layers of the text come into light, next to linguistic and systematic approach, the latter of which has its limitations[21]. In particular, it seems reasonable to assume that criminalising a threat addressed to persons mentioned in Article 245 of the Criminal Code (as well as other offences against public interest) does not require causing a "justified fear". The distinction made by the Supreme Court in the decision No. I KZP 2/14 between offences against an individual and collective interest is functionally valuable, as it considers legal interest in the process of decoding statutory features of offences. However, it cannot be ignored that both code-based systematics and the perspective of a rational legislator can lead to at least an attempt to argue with such an approach. In the end, the functional interpretation suggested by the Supreme Court (considering the ambiguous results of linguistic and systematic interpreta-

[21] T. Spyra, *Granice wykładni prawa. Znaczenie językowe tekstu prawnego jako granica wykładni*, Kraków 2006, pp. 31 ff.

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tion) can be seen as a reasonable compromise. Nevertheless, it does not excuse the authors from more abstract, independent of practical aspects, legislative and doctrinal considerations.

To our minds, the third option where functional interpretation is supported by corrective interpretation deserves our approval. This approach stipulates that every unlawful threat mentioned in Article 115 § 12, and not only a punishable threat, must cause a justified fear that it will be carried out. Only such interpretation will establish order in terminology and serve to achieve coherence in enforcing law by the Supreme Court. It should be repeated that such interpretation is creative in nature and it refers only to the general part of the Criminal Code. Nevertheless, deep and fair functional interpretation should be in such cases supported by corrective interpretation. Unarguably, such interpretation would concern all unlawful threats, independently of the protected legal interest. The recent, dominant interpretation of the Supreme Court presented in the decision No. I KZP 2/14 and advocating the importance of the distinction between individual and public interest in the process of decoding the meaning of unlawful threat is a compromise. Such a solution has its essential practical value but is, nevertheless, imperfect. Its practical merit can be seen in the assumption that in the case of offences against individual interest, the result in the shape of a justified fear that the threat will be carried out is "naturally" present in all unlawful threats and not only in punishable threats. This reasoning is, however, inductive and above all "pragmatic", and unfortunately flawed. To exemplify, even a threat to disseminate defamatory information which does not cause a justified fear (together) with the objective criminal consequence defined in Article 197 § 1 of the Criminal Code would lead to (unjustified) imputation. It would be unlawful presumption of the existence of statutory features. Imperfection of such an assumption is clearly visible in the case of an attempted offence with criminal result. The reasoning "from result to causes" cannot be used and drastically reveals the injustice of the solution adopted by the legislator. It is even more apparent in coercion without a criminal result, where "from result to causes" reasoning is absolutely impermissible. This helplessness towards legislative inconsistency is especially apparent in the aforementioned judicial decision No. II KK 120/12. Nevertheless, it should be noted that since 1932, Polish legislators have been consistent in differentiating between the "types" of punishable threats, and it is always done at the level of statutory definitions.

At this point, it should be reminded that *per non est* interpretation of the fragment of Article 190 § 1 of the Criminal Code is impermissible. It means that, at least at the initial stage of the interpretation of Article 115 § 12 of the Criminal Code, the definition incorporates both the objective element, i.e. a threat to commit a criminal offence and the subjective element, which is a fear that a threat will be carried out. This initial stage of the interpretation was not, it seems, questioned by the Supreme Court in its judgement No. I KZP 2/14, as the subjective element was

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excluded from the legal definition of an unlawful threat on the basis of functional arguments referring to the concept of legal interest. Moreover, it should be noted that in the scope of the two remaining modalities of a threat, there is no literal indication of a subjective element.

Furthermore, assuming that the qualification of an unlawful threat under Article 190 of the Criminal Code requires causing a justified fear that the threat will be carried out and that it is not required in unlawful threats to institute criminal proceedings or disseminate defamatory information leads to conclusions, which are axiologically unacceptable. It turns out that in such a situation, a criminal consequence is required for an offence with grave social consequences to meet the statutory criteria (which can be deduced from separate types within prohibited act under Article 190 of the Criminal Code), whereas for less serious offences the behaviour of the perpetrator is sufficient. Such interpretation with a certain, obvious axiology of the Criminal Code should be excluded. In this scope, a relevant thesis presented in the judgement of the Supreme Court No. K 1668/48 can be helpful. It states that the difference between a punishable threat and an unlawful threat is quantitative, and not qualitative. The essence of both types of threat is, in fact, the same and the difference is that the two remaining cases of unlawful threats are not described separately in the specific part of the Criminal Code, but are included in the scope of prohibited acts involving unlawful threats.

Firstly, it should be noted that the fact that a person feels threatened is an immanent feature of a threat as a social phenomenon. This constatation alone does not lead to a statement that only such threats can be considered as unlawful and punishable in our legal system. It may, however, indicate a direction chosen by the legislator, who aims to sanction socially reprehensible behaviour.

To sum up, having considered the two options, the one more fully accounts for the characteristics of a threat and the legislative direction should be chosen. Since bridging the legal gap can be an example of using analogy, it should be considered whether such interpretation is not detrimental to the defendant, which would make it inadmissible in criminal law. The above analysis of the legal situation of the defendant (also when attempting a prohibited act) can lead to a conclusion that such interpretation does not aggravate the legal situation of the defendant. A different conclusion should be drawn about the interpretation in which causing a justified fear that a threat will be carried out is not required in threats to commit a criminal offence under Article 245 or Article 197 § 1 of the Criminal Code. Such functional interpretation means – as a consequence of assuming the formal character of an offence – that the act is qualified as committed at the stage of behaviour, which would be considered as merely an attempt if linguistic interpretation were used.

What is more, differentiating threats with respect to different types of protected legal interests (i.e. individual and public) raises more doubts. The interpretation emphasising the primary importance of public legal interests and consequently

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excluding causing a justified fear that the threat will be carried out leads *de facto* to excluding individual legal interest from protection under Article 245 of the Criminal Code. It should be noted that, in line with the judicial decision, the group of the aggrieved persons is limited by the set of statutory features of a prohibited act[22]. As in the second concept causing a justified fear does not belong to statutory features, but is considered additionally, such interpretation would lead to accepting the lack of direct protection of individual legal interests by the provision. Applying such interpretation has further consequences. Removing causing a justified fear that the threat will be carried out from statutory features of a criminal offence under Article 245 would have to be connected with a cumulative qualification of this behaviour jointly with Article 190 § 1 in connection with Article 11 § 2 of the Criminal Code. This would, in turn, lead to the necessity to reflect a full criminal capacity of the act in the punishment, which could cause harsher sentences for the presented behaviour. The view that causing a justified fear that a threat will be carried out most frequently accompanies criminal offences under Article 245, and such a criminal consequence does not have to be reflected in the statutory features is not convincing.

CONCLUSIONS

To sum up, the interpretation that causing a justified fear that the threat will be carried out can be a statutory feature under Article 245 of the Criminal Code cannot be excluded, in particular when corrective interpretation is taken into account. This standpoint is supported by the interpretation of the definition of an unlawful threat under Article 115 § 12 of the Criminal Code in the light of the interpretation intentionally excluding the fragment of the legislative text referenced in the provision. Therefore, using creative interpretation supported by corrective interpretation is necessary. Such an approach will lead to obtaining a full set of statutory features of a prohibited act under Article 245 of the Criminal Code.

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STRESZCZENIE

Celem niniejszego artykułu jest dokonanie wykładni znamienia groźby bezprawnej występującego na gruncie art. 245 k.k. We wskazanym zakresie brak jest jednolitości w orzecznictwie Sądu Najwyższego, sądów apelacyjnych oraz w doktrynie. Zasadniczy problem wiąże się z kwestią zawierania się w pojęciu groźby bezprawnej skutku w postaci wzbudzenia uzasadnionej obawy spełnienia groźby. Skutek ten został określony w art. 190 k.k. opisującym przestępstwo tzw. groźby karalnej, do którego odsyła definicja ustawowa groźby bezprawnej określona w art. 115 § 12 k.k. W ocenie autorów skutek polegający na powstaniu uzasadnionej obawy spełnienia groźby należy do elementów groźby bezprawnej we wszystkich trzech przypadkach, tj. w przypadku groźby popełnienia przestępstwa, spowodowania postępowania karnego lub rozgłoszenia infamującej wiadomości.

Słowa kluczowe: groźba bezprawna; groźba karalna; wykładnia prawotwórcza