

Marcin Wielec, Bartłomiej Oręziak\*

## *Lex retro non agit* and extended confiscation of property in Poland: reflection on the Act of 23 March 2017 Amending the Criminal Code and Certain Other Acts

### 1. PRELIMINARY REMARKS

At the outset, the research problem should be presented and put to the test. On 27 April 2017, the Act of 23 March 2017 Amending the Act – the Criminal Code and Certain Other Acts<sup>1</sup> (hereinafter the ‘Amending Act’) entered into force in Poland, introducing into the Polish legal system the so-called extended confiscation of property. According to the bill’s justification, it aims to introduce ‘into the Polish substantive, procedural, and enforcement-related criminal law certain changes to improve the effectiveness of mechanisms to deprive criminals of the benefits derived from the commission of offences’<sup>2</sup>.

Moreover, its purpose is also to implement<sup>3</sup> Directive 2014/42/EU of the European Parliament and the Council of 3 April 2014 on the freezing and confiscation of instrumentalities and proceeds of crime in the European Union<sup>4</sup>, whose first recital directly states that: ‘[t]he main motive for cross-border organised crime, including mafia-type criminal organisation, is financial gain. As a consequence, competent authorities should be given the means to trace, freeze, manage and

\* M. Wielec, Doctor of Law, Chair of Criminal Procedure of the Faculty of Law and Administration of the Cardinal Wyszyński University in Warsaw, advocate, Institute of Justice, Poland, E-Mail: marcin.wielec@iws.gov.pl; B. Oręziak, Master of Law, doctoral student at the Chair of Human Rights and International Humanitarian Law of the Faculty of Law and Administration of the Cardinal Wyszyński University in Warsaw, holder of scholarship of the Minister of Science and Higher Education for outstanding achievements for academic year 2017/2018, Poland, E-Mail: boreziak@gmail.com

<sup>1</sup> Journal of Laws of the Republic of Poland Dziennik Ustaw 2017, Item 768.

<sup>2</sup> <http://www.sejm.gov.pl/Sejm8.nsf/druk.xsp?nr=1186>.

<sup>3</sup> See in general: J.P. Rui, *Non conviction based confiscation in the European Union-an assessment of art. 5 of the proposal for a directive of the European Parliament and of the Council on the freezing and confiscation of proceeds of crime in the European Union*, Treves 2012; [http://www.cde.unict.it/sites/default/files/Quaderno%20europeo\\_64\\_2014.pdf](http://www.cde.unict.it/sites/default/files/Quaderno%20europeo_64_2014.pdf); [http://www.ejtn.eu/Documents/THEMIS%202016/Semi%20A/Romania\\_TH\\_2016\\_01.pdf](http://www.ejtn.eu/Documents/THEMIS%202016/Semi%20A/Romania_TH_2016_01.pdf)

<sup>4</sup> OJ L 127, 29 April 2014, pp. 39–50, hereinafter ‘Directive 2014/42’.

confiscate the proceeds of crime. However, the effective prevention of and fight against organized crime should be achieved by neutralising the proceeds of crime and should be extended, in certain cases, to any property deriving from activities of a criminal nature<sup>7</sup>.

It should not come as a surprise therefore that the Polish legislator recognised that, due to the fact that organised criminal groups operate across borders and increasingly acquire assets in countries other than those in which they are based, one of the most effective means of combating organised crime is providing for severe legal consequences for committing such crime, as well as effective detection, freezing and confiscation of the instrumentalities and proceeds of crime<sup>5</sup>. Furthermore, the Stockholm Programme and the Justice and Home Affairs Council Conclusions on confiscation and asset recovery, adopted in June 2010, emphasise the importance of a more effective identification, confiscation and re-use of criminal assets<sup>6</sup>.

Directive 2014/42 refined the concept of the proceeds of crime. This was necessary in order to include the direct proceeds from criminal activity and all indirect benefits, including subsequent reinvestment or transformation of direct proceeds. Thus, proceeds can include any property including that which has been transformed or converted, fully or in part, into other property and that which has been intermingled with property acquired from legitimate sources, up to the assessed value of the intermingled proceeds. It can also include the income or other benefits derived from the proceeds of crime, or from property into or with which such proceeds have been transformed, converted or intermingled is<sup>7</sup>.

Extended confiscation should therefore be possible where a court is satisfied that the property in question is derived from criminal conduct. Moreover, Directive 2014/42 provides for a broad definition of property that can be subject to freezing and confiscation. That definition includes legal documents or instruments evidencing title or interest in such property. Such documents or instruments could include, for example, financial instruments, or documents that may give rise to creditor claims and are normally found in the possession of the person affected by the relevant procedures<sup>8</sup>. Importantly, the concepts of freezing and confiscation under EU law are autonomous<sup>9</sup>.

In contrast, the essence of the extended confiscation of property lies in the fact that criminal groups engage in a wide range of criminal activities. In order to effectively tackle organised criminal activities there may be situations where it is appropriate that a criminal conviction be followed by the confiscation not only of property associated with a specific crime, but also of additional property that the court determines constitutes the proceeds of other crimes<sup>10</sup>. According to recital 24 of Directive 2014/42, the practice by a suspected or accused person of transferring property to a knowing third party with a view to avoiding confiscation is common and increasingly widespread.

<sup>5</sup> Recital 2–3 of Directive 2014/42.

<sup>6</sup> Recital 6 of Directive 2014/42.

<sup>7</sup> Recital 11 of Directive 2014/42.

<sup>8</sup> Recital 12 of Directive 2014/42.

<sup>9</sup> Recital 13 of Directive 2014/42.

<sup>10</sup> Recital 19 of Directive 2014/42.

It is therefore becoming increasingly necessary to allow for the confiscation of property transferred to or acquired by third parties. Acquisition by a third party refers to situations where, for example, property has been acquired, directly or indirectly, for example through an intermediary, by the third party from a suspected or accused person, including when the criminal offence has been committed on their behalf or for their benefit and when an accused person does not have property that can be confiscated. Such confiscation should be possible at least in cases where third parties knew or ought to have known that the purpose of the transfer or acquisition was to avoid confiscation, on the basis of concrete facts and circumstances, including that the transfer was carried out free of charge or in exchange for an amount significantly lower than the market value.

This is the essence of the European model of extended confiscation of property, which model should be used by the Polish legislator when implementing this solution in Poland. However, we should remember that Directive 2014/42 does not provide for exhaustive harmonisation<sup>11</sup>. This means that EU Member States can provide for even tougher solutions, ones more stringent for offenders. This is due to the clear wording of recital 22 of the Directive 2014/42: 'this Directive lays down minimum rules. It does not prevent Member States from providing more extensive powers in their national law, including, for example, in relation to their rules on evidence'. Nevertheless, this does not mean allowing Member States to breach international legal norms or their constitutional standards on fundamental rights.

This article raises the basic research question of the relationship between laws providing for the extended confiscation of property in Poland and the *lex retro non agit* principle. In this context, the Polish amendment should be discussed first, then the *lex retro non agit* principle and, finally, a comparative view of the latter. In the concluding remarks to this brief study the authors make *de lege ferenda* recommendations for the Polish legislator.

## **2. THE CONTENT OF THE ACT OF 23 MARCH 2017 AMENDING THE CRIMINAL CODE AND CERTAIN OTHER ACTS: SUBSTANTIVE CONTEXT OF AMENDMENTS TO THE CRIMINAL CODE AND THE CRIMINAL FISCAL CODE**

As noted earlier, the Amending Act introduced into the Polish legal system the so-called extended confiscation of property, as part of implementation of Directive 2017/42. Nevertheless, this solution is not new in Polish legislation, as it is known from the Criminal Fiscal Code of 26 October 1971<sup>12</sup>, where similar provisions had already been in force. According to the wording of Art. 16 and 17 of this Code, the confiscation of property that was the subject of a fiscal offence included the seizure of objects being direct or indirect crime proceeds, as well as the forfeiture of tools and other objects that were used or were intended to be used to commit a crime. Interestingly, the objects were subject to confiscation even if they did not belong to the

<sup>11</sup> A. Zawidzka-Łojek, *Zagadnienia wprowadzające* [in:] *Prawo materialne Unii Europejskiej*, A. Zawidzka-Łojek, R. Grzeszczak (eds.), Warszawa 2015, pp. 4–5.

<sup>12</sup> Journal of Laws 1971, No. 28, Item 260.

perpetrator. The Code was repealed on 17 October 1999. The Amending Act amended many important laws<sup>13</sup>, in particular the Act of 6 June 1997 – Criminal Code<sup>14</sup> and the Act of 10 September 1999 – Criminal Fiscal Code<sup>15</sup>; introducing changes of substantive nature. Of course, the Amending Act also included procedural and executive changes, but considering the subject of this paper they will not be discussed.

Art. 1 of this Act amends the Criminal Code, including, without limitation, adding a new Art. 44a and reformulating Art. 45, according to which in case of a conviction for a crime from which the perpetrator gained, even indirectly, a financial advantage of considerable value, the court may order the confiscation of the enterprise constituting the perpetrator's property or its equivalent – if it was used to commit the crime or to conceal the advantage gained. In such a case, the court may also order the confiscation of an enterprise not constituting the perpetrator's property, but that of another natural person, or its equivalent, if it was used to commit the crime or to conceal the advantage gained and its owner intended the enterprise to be used to commit the crime or conceal the advantage or, anticipating such a possibility, they had agreed to do so. Furthermore, in case of co-ownership, the confiscation depends on the intent and knowledge of each of the co-owners and within their shares.

These rules also define situations in which confiscation of property cannot be adjudicated. This happens when:

1. this would be disproportionate to the gravity of the offence, the culpability of the accused or the motivation and behaviour of the enterprise owner;
2. the damage caused by the offence or the value of the concealed advantage is insignificant considering the size of the enterprise.

The court may decide not to confiscate also in other, particularly justified, cases, where the measure would be disproportionately harsh for the enterprise owner. Nonetheless, in these three cases, the same court may (but does not have to) decide to impose a financial penalty (fine for the perpetrator) of up to PLN 1.000,000<sup>16</sup> to be paid to the victim or to the fund which assists victims of crime and provides post-penitentiary assistance. According to Art. 45 § 2 CC, if a person is convicted for an offence from which a substantial financial benefit was obtained (albeit indirectly) or an offence from which a financial advantage has been or may have been obtained (albeit indirectly) and in both cases the offence is punished by imprisonment with the upper limit of no less than five years, it is deemed that the advantage from the offence includes property that the perpetrator has taken possession of or to which they have obtained any title in the period starting five years prior to commission of the offence and ending on the date of the judgment (even one which is not yet valid). *Ipsa facto*, the Polish legislator decided that this presumption of the criminal origin

<sup>13</sup> The full list is available at: <http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20170000768/O-D20170768.pdf>

<sup>14</sup> Journal of Laws 1997, No. 88, Item 553 as amended; consolidated text: Journal of Laws 2018, Item 1600 as amended, hereinafter as 'Criminal Code' or 'CC'.

<sup>15</sup> Journal of Laws 1999, No. 83, Item 930, hereinafter as 'Criminal Fiscal Code' or 'CFC'.

<sup>16</sup> Converted from PLN into USD: 273.500 (based on the exchange rate ruling on 5 November 2017: 3.6566 PLN).

of property is to affect not only the property acquired at the time of the crime<sup>17</sup> but also property acquired within five years before it was committed.

This is an example of the use of legal fiction in the Polish legal system, which also applies to crimes committed by an organised group or association formed for the purpose of committing an offence. Naturally, the above presumptions (legal fictions) are rebuttable, because the perpetrator or another person concerned may present the evidence to the contrary.

Very similar solutions are also provided for in Art. 10 of the Amending Act, in which it revises the Criminal Fiscal Code. According to which, the court may order the confiscation of items not owned by the perpetrator if their owner or other authorized person has provided that they may serve or be intended for the purposes of committing a fiscal offence or that could have been anticipated with the precaution required by the circumstances in question. As for legal presumptions, they have the same content as in the Criminal Code.

The substantive amendments to the Criminal Code and the Criminal Fiscal Code were intended to show the spectrum of changes in law, which consists in introducing into the Polish legal system the so-called extended confiscation of property. As a rule, this part of the Amending Act does not give rise to objections from the point of view of norms of international law or constitutional norms, in particular fundamental rights. It also complies with the Directive 2014/42. Nevertheless, what seems to be the most important from the point of view of the research question of this work is Art. 23 of the Amending Act: ‘The provisions of Art. 45(1a)–(2) and Art. 45a(2) of the Act amended in Art. 1 and Art. 33(1a)–(2) and Art. 43a of the Act amended in Art. 10, in the wording as amended by this Act, shall also apply to cases involving acts committed before the date of entry into force of this Act. Art. 4(1) of the Act amended in Art. 1 and Art. 2(2) of the Act amended in Art. 10 shall not apply’<sup>18</sup>.

According to the Amending Act, currently so-called extended confiscation of property is neither a punishment nor a normal punitive measure, but a different penal measure to which Art. 4 CC and Art. 2 CFC apply. This is the statement expressed in the judgment of the Court of Appeal in Kraków of 9 September 2015 (II AKa 129/15). Additionally, pursuant to Art. 4(1) CC and Art. 2(2) CFC, the application of which is disabled by virtue of the above-mentioned regulation, the following rule applies: ‘if a different statute is in force at the time of adjudication than that one that was in force at the time of commission of the (fiscal) offence, the new statute shall apply, but the previous statute shall apply if it is more lenient for the perpetrator’. Those provisions – the application of which is to be excluded under Art. 23 of the Amending Act – also enshrine two other procedural rules, in the event of a time conflict between regulations:

1. Permissibility of retroactive application of the statute more lenient to the perpetrator (*lex mitior retro agit*)<sup>19</sup>.
2. Prohibition of retroactive application of the statute more harsh to the perpetrator (*lex severior retro non agit*)<sup>20</sup>.

<sup>17</sup> As it is now.

<sup>18</sup> Authors’ own translation from Polish of Article 23 of the Act Amending the Criminal Code and Certain Other Acts of 23 March 2017.

<sup>19</sup> A. Zoll [in:] *Kodeks karny. Część ogólna. Komentarz LEX*, A. Zoll (ed.), Warszawa 2012, pp. 109–119.

<sup>20</sup> A. Zoll [in:] *Kodeks...*, pp. 109–119.

### 3. THE SUBSTANCE OF THE *LEX RETRO NON AGIT* PRINCIPLE

It must be said that the most democratic countries of contemporary world base their legal order on the principle of a democratic rule-of-law state<sup>21</sup>. Apart from Poland, examples of such states include many other countries, e.g. the United States of America. The democratic rule-of-law state has to adhere to a number of rules that, taken together, make up the so-called ‘principles of fair legislation’: ‘[t]hese principles gave the legislature the absolute limit of its intervention, emphasising one of the key components of the concept of the rule of law: the binding character of certain rules even on the body that creates the law and subjecting its actions to review by the constitutional court<sup>22</sup>. In order to correctly understand this principle, one has to point out that it has two aspects: the formal one and the substantive one. It was from the former that the Polish Constitutional Tribunal (hereinafter the ‘Tribunal’ or ‘Constitutional Tribunal’) interpreted the principle of non-retroactivity of law in its first judgment<sup>23</sup>. After this, the Tribunal stated that: ‘[t]he principle of non-retroactivity is one of the essential elements of the principle of the democratic rule-of-law state<sup>24</sup>. This means that the principle of non-retroactivity of law can be interpreted from the principle of democratic rule-of-law state<sup>25</sup>.

Moreover, this principle comes from Roman law<sup>26</sup>, as most of the legal constructions of our time<sup>27</sup>, and it is one of the most popular legal maxims used in Poland<sup>28</sup>. In one of its judgments, the Tribunal presented the origin of the principle of non-retroactivity; the following observations will recreate this reasoning<sup>29</sup>. The first trace of this rule can be found in Cicero, who in one of his works wrote the following: ‘[i]n lege Vaconia non est fecit, fecerit neque in ulla praeteritum tempus reprehenditur, nisi cius, quae sponte tam sclerata et nefaria est, ut etiam si illex non essent, magno opere vitanda fuerit<sup>30</sup>. Which translated into English means: ‘In the law Vaconia does not condemn anything that is in the past, unless something is so criminal and unholy that it should have been avoided also when there was no law<sup>31</sup>. This means that the principle of non-retroactivity of the law was considered absolute at that time.

While this prohibition applies to the whole system, it does not refer to crimes that are so serious that they should be punished regardless of whether they were

<sup>21</sup> B. Banaszak, *Prawo konstytucyjne*, Warszawa 2004, pp. 214–217; J. Żurek, *Zasada lex retro non agit i nul-lum crimen sine lege. Realizacja i ochrona konstytucyjnych wolności i praw jednostki w polskim porządku prawnym*, Wrocław 2014, p. 99.

<sup>22</sup> S. Wronkowska, *Klauzula państwa prawnego [in:] Podstawowe problemy stosowania Konstytucji RP. Raport wstępny*, K. Działocha (ed.), Warszawa 2005, p. 17; J. Żurek, *Zasada...*, p. 99.

<sup>23</sup> J. Jaskiernia, *Zasady demokratycznego państwa prawnego w sejmowym postępowaniu ustawodawczym*, Warszawa 1999, pp. 293–294; J. Żurek, *Zasada...*, p. 99; judgment of the Constitutional Tribunal of 28 May 1986, U 1/86, OTK 1986, para. 2.

<sup>24</sup> Judgment of the Constitutional Tribunal of 22 August 1990, K 7/90, OTK 1990, para. 5.

<sup>25</sup> W. Wróbel, *Zmiana normatywna i zasady intertemporalne w prawie karnym*, Kraków 2003, pp. 363–377.

<sup>26</sup> However, there are different opinions: M. Królikowski, *O dopuszczalności retroaktywnego stosowania wykładni w prawie karnym. Przypadek strzelców przy Murze Berlińskim [in:] Materiały Konferencyjne z Konferencji WPiA UW*, Warszawa 2004, p. 67; I. Wróblewska, *Zasada państwa prawnego w orzecznictwie Trybunału Konstytucyjnego RP*, Toruń 2010, pp. 104–105; J. Żurek, *Zasada...*, p. 100.

<sup>27</sup> A. Spotowski, *Zasada lex retro non agit (geneza, uzasadnienie, zasięg)*, „Palestra” 1985, No. 5, pp. 7–10; J. Żurek, *Zasada...*, p. 100.

<sup>28</sup> W. Wołodkiewicz, J. Krzynówek [eds.], *Łacińskie paremie w europejskiej kulturze prawnej i orzecznictwie sądów polskich*, Warszawa 2001, pp. 151–193; J. Żurek, *Zasada...*, p. 100.

<sup>29</sup> Judgment of the Constitutional Tribunal of 6 July 1999, P 2/99, OTK ZU 1999, No. 5, para. 103.

<sup>30</sup> V. Krey, *Keine Strafe ohne Gesetz*, Berlin 1983, p. 49; A. Spotowski, *Zasada...*, p. 9.

<sup>31</sup> Authors’ own translation of the reasons for the judgment of the Tribunal, P 2/99.



banned under penalty. The next time it was repeated in times of Theodosius I in his constitution: “[o]mnia Constituta non praeteritis columniam faciunt, sed futuris regulam ponunt”<sup>32</sup>, which translated into English means: ‘Imperial Constitutions do not judge the past, but regulate the future’<sup>33</sup>.

The meaning of these words seems to be closer to our time, but we must not forget that in those days the rulers had unlimited power. Furthermore, thus expressed prohibition of non-retroactivity was limited by the emperor’s will, in other words, it applied so far as the ruler did not oppose it. In the 3rd century AD, prominent Roman lawyers: Ulpian, Papinian and Julian formulated the sentence: „[i]nterest rei publicae, ne maleficia remaneant impunita”<sup>34</sup>, that is ‘[i]t is in the interest of the state to ensure that unlawful acts do not remain unpunished’<sup>35</sup>.

The presented historical outline clearly shows that the principle of non-retroactivity of law is rooted in ancient times. It was one of the first principles of law-making and its importance is unquestionable, also in the Polish history of law. As for the latter, the first traces of this principle in Poland were found in the statutes of King Casimir the Great, which read: „Cum omnes constitutiones et statuta legem imponant rebus et negociis futuris et non preteritis, vclumus, ut omnes nostre constitutiones edite nunc in colloquio generali in Wislicza non respiciant preterita, sed tantummodo presencia et future”<sup>36</sup>, the sense being that when creating the law one must not look back and only move forward<sup>37</sup>; this was, at the latest, in 1362.

As we can see, the understanding of the *lex retro non agit* principle in this act was very close to contemporary thought, where it is seen as an absolute prohibition of retroactive application of law. Moreover, the validity of this principle was not questioned even in the times of the Polish People’s Republic – during the communist era, this was interpreted from the general principles of law that every modern society should desire<sup>38</sup>. As a consequence, this principle is also reflected in the current 1997 Constitution of the Republic of Poland<sup>39</sup>. An unquestionable role of this principle was brought to attention by the Tribunal in 2001: ‘The principle of non-retroactivity is the basis of the legal order. It establishes the principle of citizens’ trust in the state and the law that it enjoins. What lies at the core of that principle is the principle of a democratic rule-of-law state expressed in Art. 2 of the Constitution (...) The resulting *lex retro non agit* principle and the principle of the protection of lawfully acquired rights are the subject of substantive principles that define the limits of interference of public authorities in the sphere of legal rights’<sup>40</sup>.

<sup>32</sup> A. Spotowski, *Zasada...*, p. 9.

<sup>33</sup> Authors’ own translation of the reasons for the judgment of the Tribunal, P 2/99: „Konstytucje cesarskie nie oceniają przeszłości, lecz regulują przyszłość”.

<sup>34</sup> M. Kuryłowicz, *Słownik terminów, zwrotów i sentencji łacińskich oraz pochodzenia łacińskiego*, Warszawa 2012, p. 119.

<sup>35</sup> M. Kuryłowicz, *Słownik...*; authors’ own translation from Polish: „W interesie państwa leży, aby czyny bezprawne nie pozostały bezkarne”.

<sup>36</sup> H. Grajewski, *Granice czasowe mocy obowiązującej norm dawnego prawa polskiego*, Łódź 1970, p. 32; J. Żurek, *Zasada...*, p. 100; A. Spotowski, *Zasada...*, p. 10.

<sup>37</sup> H. Grajewski, *Granice...*, p. 32; J. Żurek, *Zasada...*, p. 100; A. Spotowski, *Zasada...*, p. 10.

<sup>38</sup> J. Jaskiernia, *Zasady...*, p. 294; J. Żurek, *Zasada...*, p. 100.

<sup>39</sup> The Constitution of the Republic of Poland of 2nd April, 1997 (Journal of Laws Item 483 as amended), hereinafter ‘the Polish Constitution’.

<sup>40</sup> Judgment of the Constitutional Tribunal of 3 October 2001, K 27/01, OTK ZU 2001, No. 7, Item 209; authors’ own translation based on the statement of reasons for the judgment of the Constitutional Tribunal, K 27/01: „zasada niedziałania prawa wstecz stanowi podstawę porządku prawnego. Kształtuje zasadę

The quoted sentence confirms the belief that the *lex retro non agit* principle is a necessary condition of a properly built legal system and attests that the principle of non-retroactivity of law can be interpreted from the principle of democratic rule-of-law state. All the historical remarks above clearly show that the principle of non-retroactivity has been known not only in Poland, but also in entire Europe<sup>41</sup>, for centuries.

Up to this day, as for universally binding law in Poland, according to Art. 2<sup>42</sup> of the Polish Constitution, Poland is a democratic state ruled by law and implementing the principles of social justice. Furthermore, in accordance with Art. 42 (2) of the Polish Constitution only a person who has committed an act prohibited by a statute in force at the moment of the commission thereof, and one which is penalised, may be held criminally responsible. This principle does not prevent punishment for any act which, at the moment of its commission, constituted an offence within the meaning of international law. This is the *nullum crimen, nulla poena sine lege* principle (i.e. no crime, no punishment without statute)<sup>43</sup>.

Additionally, in accordance with Art. 87 and 90–92 of the Polish Constitution, Poland may be bound by international agreements. In this regard, there are at least three such sources of law which oblige States Parties to respect the principle of *nullum crimen, nulla poena sine lege*. The first one is the International Covenant on Civil and Political Rights<sup>44</sup> (hereinafter ‘ICCPR’), which, in Art. 15, provides: ‘[n]o one shall be held guilty of any criminal offence on account of any act or omission that did not constitute a criminal offence, under national or international law, at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time when the criminal offence was committed. If, subsequent to the commission of the offence, provision is made by law for the imposition of a lighter penalty, the offender shall benefit thereby’.

The second one is the Convention for the Protection of Human Rights and Fundamental Freedoms<sup>45</sup> (European Convention on Human Rights, hereinafter ‘ECHR’), whose Art. 7 states: ‘[n]o one shall be held guilty of any criminal offence on account of any act or omission that did not constitute a criminal offence under national or international law at the time when it was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed’.

The third source is the Charter of Fundamental Rights of the European Union<sup>46</sup> (hereinafter ‘CFREU’), which provides in Art. 49: ‘[n]o one shall be held guilty of any criminal offence on account of any act or omission that did not constitute a criminal offence under national law or international law at the time when it

*zaufania obywateli do państwa oraz stanowiącego przez niego prawa. U podstaw tejszy zasady leży wyrażona w art. 2 Konstytucji zasada demokratycznego państwa prawnego (...) Wynikająca z niej zasada lex retro non agit oraz zasada ochrony praw słusznie nabytych mają charakter zasad przedmiotowych, wyznaczających granice ingerencji władzy publicznej w sferę praw podmiotowych”.*

<sup>41</sup> In the countries influenced by the Roman civilization.

<sup>42</sup> J. Oniszczyk, *Konstytucja Rzeczypospolitej Polskiej w orzecznictwie Trybunału Konstytucyjnego*, Kraków 2000, pp. 65–75.

<sup>43</sup> M. Zubik, *Konstytucja III RP w tezach orzeczniczych Trybunału Konstytucyjnego i wybranych sądów*, Warszawa 2008, pp. 27–28.

<sup>44</sup> <http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx>

<sup>45</sup> Journal of Laws 1993, Item 284; [http://www.echr.coe.int/Documents/Convention\\_ENG.pdf](http://www.echr.coe.int/Documents/Convention_ENG.pdf)

<sup>46</sup> <http://eur-lex.europa.eu/legal-content/PL/TXT/?uri=CELEX%3A12012P%2FTXT>



was committed. Nor shall a heavier penalty be imposed than the one that was applicable at the time the criminal offence was committed. If, subsequent to the commission of a criminal offence, the law provides for a lighter penalty, that shall be applicable<sup>47</sup>.

Of course, the scopes of these articles vary: what is included in Art. 15 ICCPR is not included in Art. 7 ECHR. This also differs from what is covered by Art. 2 and 42 of the Polish Constitution. Nevertheless, it is obvious that all of these articles have to be applied in the Polish legal system. Additionally, at the level of statutory law, the *nullum crimen, nulla poena sine lege* principle is expressed by Art. 1(1) CC and Art. 1(1) CFC, according to which only a person who commits an act punishable under the law in force at that time can be held criminally liable.

It has been shown above that *lex retro non agit* can be interpreted from the principle of the democratic rule-of-law state. On the other hand, it remains to be determined whether the principle of *lex retro non agit* can be interpreted from the principle *nullum crimen, nulla poena sine lege*. According to the case law of the Tribunal, Art. 42(1) of the Constitution provides that criminal liability can be borne only by a person who has committed an act prohibited under penalty by the law in force at the time of its commission. This provision combines the *lex retro non agit* principle with the *nullum crimen sine lege* principle, which is based on international agreements binding on Poland.

This rule means that there is no crime *per se* without the law in force at the time of the offence, there is no punishment without the law, and that the law does not retroactive effect, therefore a person can only be judged on the basis of the law in force at the time of the offence. The principle of *lex retro non agit* provides reassurance that a given action does not constitute a criminal offence if it was not prohibited by the law at the time of its commission; at the same time assuring that if some action is prohibited and punishable, the punishment is precisely defined. Strictly speaking, this guarantees that a given action is not punishable *quod negotium poscebat* and if so, punishable by a clearly defined sanction<sup>48</sup>.

A number of postulates are derived from the *nullum crimen sine lege* principle. They are addressed both to the legislature – such acts prohibited by law be clearly specified and to those who apply the law, relating to the prohibition of using analogie and extended interpretation. However, the most important postulate related to this principle is the prohibition of retroactivity (deteriorating the situation of the perpetrator) of the criminal law provisions. This is the principle of *lex retro non agit*.

This principle is of paramount importance among the principles of criminal law<sup>49</sup>. Also, the legal scholars present a similar position<sup>50</sup>. The above arguments are sufficiently sound to prove that the *lex retro non agit* principle is basically in accord with the *nullum crimen, nulla poena sine lege* principle. This means that former principle can be interpreted from the latter.

<sup>47</sup> W. Gontarski, *Lex retro non agit. Uwagi konstytucyjne, cywilistyczne i wspólnotowe*, „Gazeta Sądowa” 2004, pp. 16–18; J. Żurek, *Zasada...*, p. 101.

<sup>48</sup> Judgment of the Constitutional Tribunal of 3 October 2001, K 27/01.

<sup>49</sup> Judgment of the Constitutional Tribunal of 3 October 2001, K 27/01.

<sup>50</sup> A. Zoll [in:] *Kodeks...*, pp. 81–87.

#### 4. A COMPARATIVE VIEW OF THE *LEX RETRO NON AGIT* PRINCIPLE

As has already been noted above, the *lex retro non agit* principle can be deduced not only from the principle of democratic rule-of-law state, but also from the principle of *nullum crimen, nulla poena sine lege*. These principles are respected in numerous countries of the modern world. The following comparative analysis shows which countries have decided to prohibit retroactive application of law in their fundamental laws (criminal statutes of individual states have not been analysed, because these principles can be found in a hierarchically higher law, i.e. in the constitution). For instance:

1. **Albania.** According to Art. 29 of the Constitution of the Republic of Albania: ‘1. No one may be accused or declared guilty of a criminal offence that was not provided for by law at the time of its commission, with the exception of offences, which at the time of their commission constituted war crimes or crimes against humanity according to international law. 2. No punishment may be given that is more severe than that which was contemplated by law at the time of commission of the criminal offence. 3. A favourable criminal law has retroactive effect’<sup>51</sup>.
2. **Brazil.** According to Art. 5 point XXXIX–XL of the Constitution of the Federative Republic of Brazil: ‘XXXIX – there are no crimes unless defined in prior law, nor are there any penalties unless previously imposed by law; XL – the criminal law shall not be retroactive, except to benefit the defendant’<sup>52</sup>.
3. **Canada.** According to Art. 11 of the Constitution of Canada (Constitutional Act 1982 – Canadian Charter of Rights and Freedoms): ‘Any person charged with an offence has the right not to be found guilty on account of any act or omission unless, at the time of the act or omission, it constituted an offence under Canadian or international law or was criminal according to the general principles of law recognised by the community of nations’<sup>53</sup>.
4. **Cyprus.** According to Art. 12 of the Constitution of the Republic of Cyprus: ‘No person shall be held guilty of any offence on account of any act or omission which did not constitute an offence under the law at the time when it was committed; and no person shall have a heavier punishment imposed on him for an offence other than that expressly provided for it by law at the time when it was committed’<sup>54</sup>.
5. **France.** According to Art. VIII of the Declaration of Human and Civic Rights of 26 August 1789: ‘The Law must prescribe only the punishments that are strictly and evidently necessary; and no one may be punished except by virtue of a Law drawn up and promulgated before the offence is committed, and legally applied’<sup>55</sup>.

<sup>51</sup> [https://constituteproject.org/constitution/Albania\\_2016?lang=en](https://constituteproject.org/constitution/Albania_2016?lang=en)

<sup>52</sup> [https://constituteproject.org/constitution/Brazil\\_2017?lang=en](https://constituteproject.org/constitution/Brazil_2017?lang=en).

<sup>53</sup> <http://laws-lois.justice.gc.ca/eng/Const/page-15.html#h-40>

<sup>54</sup> [http://www.presidency.gov.cy/presidency/presidency.nsf/all/1003AEDD83EED9C7C225756F0023C6AD/\\$file/CY\\_Constitution.pdf?openelement](http://www.presidency.gov.cy/presidency/presidency.nsf/all/1003AEDD83EED9C7C225756F0023C6AD/$file/CY_Constitution.pdf?openelement)

<sup>55</sup> [http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank\\_mm/anglais/cst2.pdf](http://www.conseil-constitutionnel.fr/conseil-constitutionnel/root/bank_mm/anglais/cst2.pdf)

6. **Georgia.** According to Art. 42(5) of the Constitution of Georgia: ‘No one shall be held responsible for an action that did not constitute an offence at the time it was committed. No law shall have retroactive force unless it reduces or abrogates responsibility’<sup>56</sup>.
7. **Germany.** According to Article 103(2) of the Constitution of the Federal Republic of Germany: ‘An act may be punished only if it was defined by a law as a criminal offence before the act was committed’<sup>57</sup>.
8. **Iceland.** According to Art. 69 of the Constitution of the Republic of Iceland: ‘No one may be subjected to punishment unless found guilty of conduct that constituted a criminal offence according to the law at the time when it was committed, or is totally analogous to such conduct. The sanctions may not be more severe than the law permitted at the time of commission’<sup>58</sup>.
9. **Japan.** According to Art. 39 of the Constitution of Japan: ‘No person shall be held criminally liable for an act which was lawful at the time it was committed, or of which he has been acquitted, nor shall he be placed in double jeopardy’<sup>59</sup>.
10. **Kenya.** According to Art. 50(2) of the Constitution of the Republic of Kenya: ‘Every accused person has the right to a fair trial, which includes the right – [...] (n) not to be convicted for an act or omission that at the time it was committed or omitted was not – (i) an offence in Kenya; or (ii) a crime under international law’<sup>60</sup>.
11. **Macedonia.** According to Art. 14 of the Constitution of the Republic of Macedonia: ‘No person may be punished for an offence which had not been declared an offence punishable by law, or by other acts, prior to its being committed, and for which no punishment had been prescribed. No person may be tried in a court of law for an offence for which he/she has already been tried and for which a legally valid court verdict has already been brought’<sup>61</sup>.
12. **Malta.** According to Art. 39 of the Constitution of the Republic of Malta: ‘No person shall be held to be guilty of a criminal offence on account of any act or omission that did not, at the time it took place, constitute such an offence, and no penalty shall be imposed for any criminal offence which is severer in degree or description than the maximum penalty which might have been imposed for that offence at the time when it was committed’<sup>62</sup>.
13. **Morocco.** According to Art. 6 of the Constitution of the Kingdom of Morocco: ‘[...] The law may not have retroactive effect’<sup>63</sup>.
14. **Norway.** According to Art. 97 of the Constitution of the Kingdom of Norway: ‘No law must be given retroactive effect’<sup>64</sup>.

<sup>56</sup> <https://matsne.gov.ge/en/document/view/30346>

<sup>57</sup> <https://www.btg-bestellservice.de/pdf/80201000.pdf>

<sup>58</sup> <http://www.government.is/constitution/>

<sup>59</sup> [http://japan.kantei.go.jp/constitution\\_and\\_government\\_of\\_japan/constitution\\_e.html](http://japan.kantei.go.jp/constitution_and_government_of_japan/constitution_e.html)

<sup>60</sup> <http://kenyalaw.org/kl/index.php?id=398>

<sup>61</sup> <http://www.sobranie.mk/the-constitution-of-the-republic-of-macedonia.nspx>

<sup>62</sup> <http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8566&cl=1>

<sup>63</sup> [https://constitutionproject.org/constitution/Morocco\\_2011?lang=en](https://constitutionproject.org/constitution/Morocco_2011?lang=en)

<sup>64</sup> <https://www.stortinget.no/en/Grunnlovjubileet/In-English/The-Constitution---Complete-text/>

15. **Portugal.** According to Art. 18(3) of the Constitution of the Republic of Portugal: ‘Laws that restrict rights, freedoms and guarantees must have a general and abstract nature and may not have a retroactive effect or reduce the extent or scope of the essential content of the constitutional precepts’<sup>65</sup>. Moreover, according to Art. 29 of this act: ‘1. No one may be sentenced under the criminal law unless the action or omission in question is punishable under a pre-existing law, nor may any person be the object of a security measure unless the prerequisites therefore are laid down by a pre-existing law. 2. The provisions of the previous paragraph do not preclude the punishment up to the limits laid down by internal Portuguese law of an action or omission which was deemed criminal under the general principles of international law that were commonly recognised at the moment of its commission. 3. No sentence or security measure may be applied unless it is expressly sanctioned by a pre-existing law. 4. No one may be the object of a sentence or security measure that is more severe than those provided for at the moment of the conduct in question, or at that at which the prerequisites for the application of such a measure were fulfilled, while criminal laws whose content is more favourable to the accused person shall be applied retroactively’<sup>66</sup>.
16. **Russia** – according to Art. 54 of the Constitution of the Russian Federation: ‘1. A law introducing or aggravating responsibility shall not have retrospective effect. 2. No one may bear responsibility for the action which was not regarded as a crime when it was committed. If after violating law the responsibility for that is eliminated or mitigated, a new law shall be applied’<sup>67</sup>.
17. **South Africa.** According to Art. 35(3) of the Constitution of the Republic of South Africa: ‘Every accused person has a right to a fair trial, which includes the right – [...] (l) not to be convicted for an act or omission that was not an offence under either national or international law at the time it was committed or omitted; (m) not to be tried for an offence in respect of an act or omission for which that person has previously been either acquitted or convicted; (n) to the benefit of the least severe of the prescribed punishments if the prescribed punishment for the offence has been changed between the time that the offence was committed and the time of sentencing’<sup>68</sup>.
18. **Spain.** According to Section 9(3) of the Constitution of the Kingdom of Spain: ‘The Constitution guarantees the principle of legality, the hierarchy of legal provisions, the publicity of legal statutes, the non-retroactivity of punitive provisions that are not favourable to or restrictive of individual rights, the certainty that the rule of law shall prevail, the accountability of public authorities, and the prohibition of arbitrary action of public authorities’<sup>69</sup>.

<sup>65</sup> <http://www.en.parlamento.pt/Legislation/CRP/Constitution7th.pdf>

<sup>66</sup> <http://www.en.parlamento.pt/Legislation/CRP/Constitution7th.pdf>

<sup>67</sup> <http://www.constitution.ru/en/10003000-03.htm>

<sup>68</sup> <http://www.justice.gov.za/legislation/constitution/chp02.html>

<sup>69</sup> <http://www.senado.es/web/conocersenado/normas/constitucion/index.html?lang=en>

19. **Turkey.** According to Art. 15 of the Constitution of the Republic of Turkey: '[...] offences and penalties shall not be made retroactive [...]'<sup>70</sup>. Moreover, according to Art. 38 of this act: 'No one shall be punished for any act which does not constitute a criminal offence under the law in force at the time committed; no one shall be given a heavier penalty for an offence other than the penalty applicable at the time when the offence was committed'<sup>71</sup>.
20. **United States of America.** According to Art. I Section 9: 'No Bill of Attainder or ex post facto Law shall be passed'<sup>72</sup>; and Section 10: 'No State shall enter into any Treaty, Alliance, or Confederation; grant Letters of Marque and Reprisal; coin Money; emit Bills of Credit; make any Thing but gold and silver Coin a Tender in Payment of Debts; pass any Bill of Attainder, ex post facto Law, or Law impairing the Obligation of Contracts, or grant any Title of Nobility'<sup>73</sup>. Furthermore, according to Amendment V (1791): 'No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation'<sup>74</sup>, and according to Amendment VI: 'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence'<sup>75</sup>.

The above comparative analysis shows that regardless of geographic location, values, religion and the adopted legal system, in all the countries indicated, the *lex retro non agit* principle applies. In addition, the above list is by no means exhaustive, because it is difficult to find a country that does not guarantee the principle of non-retroactivity.

## 5. FINAL REMARKS

In conclusion, the research question concerned the nature of the relationship between the provisions introducing the so-called extended confiscation of property in Poland and the *lex retro non agit* principle. The objectives of the Amending Act

<sup>70</sup> [https://global.tbmm.gov.tr/docs/constitution\\_en.pdf](https://global.tbmm.gov.tr/docs/constitution_en.pdf)

<sup>71</sup> [https://global.tbmm.gov.tr/docs/constitution\\_en.pdf](https://global.tbmm.gov.tr/docs/constitution_en.pdf)

<sup>72</sup> [https://www.senate.gov/civics/constitution\\_item/constitution.htm](https://www.senate.gov/civics/constitution_item/constitution.htm)

<sup>73</sup> [https://www.senate.gov/civics/constitution\\_item/constitution.htm](https://www.senate.gov/civics/constitution_item/constitution.htm)

<sup>74</sup> [https://www.senate.gov/civics/constitution\\_item/constitution.htm](https://www.senate.gov/civics/constitution_item/constitution.htm)

<sup>75</sup> [https://www.senate.gov/civics/constitution\\_item/constitution.htm](https://www.senate.gov/civics/constitution_item/constitution.htm)

were presented, including in particular the contents and importance of Directive 2014/42, which should have been a model for the Polish legislator. Subsequently, the amendments were described. In particular, Art. 23 of this Act was quoted and the meaning of Art. 4(1) CC and Art. 2(2) CFC was also clarified. Next, the substance of the *lex retro non agit* principle was presented, including a historical outline and an analysis of the existing laws that are universally applicable in Poland.

Thus, it has been proved that from the principle of democratic rule-of-law state and that of *nullum crimen, nulla poena sine lege*, we can derive the *lex retro non agit* principle. It was also noted that the latter principle applies not only to the introduction of new crimes, but also to penalties, penal measures, and other effects of conviction. Finally, a comparative view of the *lex retro non agit* principle was illustrated with examples to demonstrate that it applies in most countries of the modern world. All this provides a good background for authoritative and critical observations on the so-called extended confiscation of property introduced in Poland. Three such observations can be formulated.

Firstly, it has been pointed out that the *lex retro non agit* principle also applies to the penal measures. Such measures include, among others, the so-called extended confiscation of property and therefore these provisions should not have retroactive effect, unless such retroactivity would act in favour of the perpetrator of the offence (*lex mitior retro agit*).

Secondly, an analysis of the first sentence of Art. 23 of the Amending Act shows that the provisions introducing the so-called extended property confiscation in Poland may have a retroactive effect. From this sentence, one can interpret that these provisions have retroactive effect only when they are more favourable to the perpetrator of the offence (*lex mitior retro agit*), as expressly stated in Art. 4(1) CC and Art. 2(2) CFC.

Thirdly, the second sentence of Art. 23 of the Amending Act excludes the application of Art. 4(1) CC and Art. 2(2) CFC. This means that the intention of the Polish legislator is to retroactively apply the provisions on the so-called extended confiscation of property. This is certain to happen regardless of whether it will be more favourable or more severe for the perpetrator of the crime.

Finally, regardless of the legislative solutions adopted, it should be borne in mind that law is a domain where many values exist, such as: dignity, rule of law, justice, truth, trust, security, honesty, and morality. In certain circumstances, in order to realise one value at the expense of another. Without expressing any judgment on the solution adopted by the Polish parliament as to whether this be good or bad, one may venture the statement that perhaps it is justified.

### Summary

Marcin Wielec, Bartłomiej Oręziak, *Lex retro non agit and extended confiscation of property in Poland: reflection on the Act of 23 March 2017 Amending the Criminal Code and Certain Other Acts*

*This paper concerns the operation of the uncontested lex retro non agit principle in the new realities of criminal law on the example of so-called extended confiscation of property.*



*Until recently, perpetrators who derived financial benefits from offences, as a rule, were unpunished. The new institution introduced in 2017 restored the sense of the principle of social justice. Nevertheless, this institution has provoked doubts regarding the principle of non-retroactivity of criminal law.*

**Keywords:** *criminal proceedings, confiscation, extended confiscation, lex retro non agit, values*

### Streszczenie

**Marcin Wielec, Bartłomiej Oręziak, Zasada *lex retro non agit* i instytucja konfiskaty rozszerzonej w Polsce: uwagi do ustawy z 23.03.2017 r. o zmianie ustawy Kodeks karny i niektórych innych ustaw**

*Niniejsze opracowanie dotyczy funkcjonowania bezspornej zasady *lex retro non agit* w nowych realiach prawa karnego na przykładzie instytucji tzw. rozszerzonej konfiskaty mienia. Do niedawna przestępcy, którzy czerpali korzyści majątkowe z czynów zabronionych, co do zasady, byli bezkarni. Nowa instytucja wprowadzona w 2017 r. przywróciła zasadę poczucia sprawiedliwości społecznej. Niemniej jednak instytucja ta spotkała się z wątpliwościami odnoszącymi się do zasady nie retroaktywności prawa karnego.*

**Słowa kluczowe:** *postępowanie karne, konfiskata, rozszerzona konfiskata, lex retro non agit, wartości*

### Literatura

1. B. Banaszak, *Prawo konstytucyjne*, Warszawa 2004;
2. W. Gontarski, *Lex retro non agit. Uwagi konstytucyjne, cywilistyczne i wspólnotowe*, Gazeta Sądowa 2004;
3. H. Grajewski, *Granice czasowe mocy obowiązującej norm dawnego prawa polskiego*, Łódź 1970;
4. J. Jaskiernia, *Zasady demokratycznego państwa prawnego w sejmowym postępowaniu ustawodawczym*, Warszawa 1999;
5. V. Krey, *Keine Strafe ohne Gesetz*, Berlin 1983;
6. M. Królikowski, *O dopuszczalności retroaktywnego stosowania wykładni w prawie karnym. Przypadek strzelców przy Murze Berlińskim* [in:] *Materiały Konferencyjne z Konferencji WPiA UW*, Warszawa 2004;
7. M. Kuryłowicz, *Słownik terminów, zwrotów i sentencji łacińskich oraz pochodzenia łacińskiego*, Warszawa 2012;
8. J. Oniszczuk, *Konstytucja Rzeczypospolitej Polskiej w orzecznictwie Trybunału Konstytucyjnego*, Kraków 2000;
9. J.P. Rui, *Non conviction based confiscation in the European Union-an assessment of Art. 5 of the proposal for a directive of the European Parliament and of the Council on the freezing and confiscation of proceeds of crime in the European Union*, Trier 2012;
10. A. Spotowski, *Zasada *lex retro non agit* (geneza, uzasadnienie, zasięg)*, *Palestra* 1985, nr 5;
11. W. Wołodkiewicz, J. Krzynówek [eds.], *Łacińskie paremie w europejskiej kulturze prawnej i orzecznictwie sądów polskich*, Warszawa 2001;
12. W. Wróbel, *Zmiana normatywna i zasady intertemporalne w prawie karnym*, Kraków 2003;
13. I. Wróblewska, *Zasada państwa prawnego w orzecznictwie Trybunału Konstytucyjnego RP*, Toruń 2010;

14. S. Wronkowska, *Klauzula państwa prawnego* [in:] *Podstawowe problemy stosowania Konstytucji RP. Raport wstępny*, K. Działocha (ed.), Warszawa 2005;
15. A. Zawidzka-Łojek, *Zagadnienia wprowadzające* [in:] *Prawo materialne Unii Europejskiej*, A. Zawidzka-Łojek, R. Grzeszczak (eds.), Warszawa 2015;
16. A. Zoll [in:] *Kodeks karny. Część ogólna. Komentarz LEX*, A. Zoll (ed.), Warszawa 2012;
17. M. Zubik, *Konstytucja III RP w tezach orzeczniczych Trybunału Konstytucyjnego i wybranych sądów*, Warszawa 2008;
18. J. Żurek, *Zasada lex retro non agit i nullum crimen sine lege. Realizacja i ochrona konstytucyjnych wolności i praw jednostki w polskim porządku prawnym*, Wrocław 2014.