INSTYTUT WYMIARU SPRAWIEDLIWOŚCI

PRAWO W DZIAŁANIU

36

LAW IN ACTION

Scientific editors Elżbieta Holewińska-Łapińska, Łukasz Pohl

Wolters Kluwer

Warszawa 2018

Na okładce:
Stanisław Wyspiański, *Macierzyństwo*
Muzeum Narodowe w Krakowie

ISSN 2084-1906

Nakład 200 egz.

Wersja elektroniczna Prawa w Działaniu jest wersją pierwotną (referencyjną).

Wydawca:
Na zlecenie Instytutu Wymiaru Sprawiedliwości
Wolters Kluwer Polska Sp. z o.o.
01-208 Warszawa, ul. Przyokopowa 33

Wolters Kluwer

DYREKTOR DZIAŁU PUBLIKACJI PERIODYCZNYCH
Klaudia Szawłowska-Milczarek
e-mail: czasopisma@wolterskluwer.pl

Szczegółowe informacje o prenumeracie czasopisma można uzyskać:

Infolinia: 801 044 545, prenumerata@wolterskluwer.pl

Obsługa Klienta tel.: (22) 535 82 72

Księgarnia Profinfo: www.profinfo.pl

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Contents:

Spis treści:

PRAWO W DZIAŁANIU
LAW IN ACTION
36/2018

Report from the conference **Surrogate motherhood: fundamental and legal problems**

Warsaw, 27–28 September 2018

S. Wyspiański, Macierzyństwo [Motherhood], National Museum in Cracow

1. A multidisciplinary international conference titled *Surrogate motherhood: fundamental and legal problems* took place on 27–28 September 2018 at the Institute of Justice in Warsaw and gathered around 80 participants, mainly practicing lawyers and academics. The conference, with English as the working language, attended by some 30 experts from 12 countries, was organised as part of the project *Surrogate motherhood procedures worldwide and the universal prohibition of child trafficking: a multidisciplinary approach*, conducted in 2018 under the auspices of the Center for Family Research (*Centrum Badań nad Rodziną*) of the Nicolaus Copernicus University in Toruń, Poland, under the supervision of Prof. Piotr Mostowik from the Jagiellonian University in Cracow, Poland.

The aim of this study and the conference was to assess the current issue of surrogate motherhood (birth) using a multidisciplinary approach, including its

cross-border implications and protection of internal fundamental legal principles. Surrogacy contracts are allowed in a number of countries, including countries with substantial transfers of people into and from Poland (Ukraine, Russia, United Kingdom, some US states). Still, surrogate motherhood is prohibited in most countries. However, there is a need to address the issue of the recognition of the effects of foreign procedures. For example, applications aiming to recognise the foreign decisions and to register civil status were submitted also to the Polish authorities. Recently, the issue has been debated repeatedly before the European Court of Human Rights (e.g. the case *Paradiso and Campanelli v Italy*). The issue of the surrogate motherhood is currently vividly debated in the academic circles; one can point to the recent examples of the conference *Le «droit à l'enfant» et la filiation en France et dans le monde* organized on 18 May 2018 in Paris by *Le centre de recherches juridiques sur l'efficacité des systèmes continentaux* (CEJESCO) at the University of Reims Champagne-Ardenne in collaboration wit the High Council of Notaries (Conseil Supérieur du Notariat) and the conference *Law and Practice of Surrogacy* organized by the Academy of European Law (ERA) that took place in Cambridge (UK) on 25–26 June 2018. The September conference in Warsaw was part of a project with a broader agenda. The research consisted in comparative analysis of the issue of surrogacy and discussion of this issue in a multidisciplinary approach, i.e. from the perspective of the Polish constitutional, criminal, civil, and family law as well as civil registration. The philosophical, sociological and ethical aspects are also very important.

The conference and project involved both Polish and international academics from multiple countries (the Czech Republic, Estonia, France, Germany, Italy, Israel, Lithuania, Poland, Russia, Slovakia, Spain, Ukraine). They represented various disciplines: predominantly legal sciences, but also philosophy and sociology. Some were practicing lawyers. The results of the conducted research were presented by the experts during the September conference at the Institute of Justice. The two-day conference was organised around panels discussing selected issues.

The conference was officially opened by Marcin Romanowski, PhD, Director of the Institute of Justice, and Jarosław Przeperski, PhD, head of the Center for Family Research of the Nicolaus Copernicus University in Toruń. The introduction into the subject matter of the conference was delivered by Prof. Mostowik, the project coordinator. He noted that the conference venue was not accidental. Warsaw is the city where Janusz Korczak famously presented the idea of 'child's right to respect' and where the Council of Europe Convention on Action against Trafficking in Human Beings of 2005 was signed. Poland is the country of origin of Saint John Paul the Second, the patron of families, and the state that initiated work on the UN Convention on the Rights of the Child of 1989 that became a great international success with nearly 200 contracting parties. He added that the presence of participants of course did not mean that each of the experts accepted the idea of surrogate motherhood or all forms of this phenomenon, adding that all voices: enthusiastic, sceptical or critical were welcome, as in any serious academic debate.

2. In the substantive presentation *Fundamental legal issues concerning so-called surrogate motherhood* Prof. Mostowik underlined the polarisation of views on

surrogacy in selected countries: from total prohibition of such practices (including the instances where the prohibition is connected with the old legal principle of maternity of the woman who gave birth to the child, that is commented by the phrase *mater semper certa est*), to its acceptance subject to restrictive conditions and, finally, to a liberal approach. This in turn results in difficulties to work out the common approach (see recent attempts at international: United Nations, Council of Europe, Hague Conference of Private International Law, or federal level). Prof. Mostowik identified several principles of family law with which the practice of surrogacy must be confronted: the fundamental principles of legal parentage, adoption, parental responsibility, and right to access.

Referring to the previous discussion and literature, he questioned the accuracy of terminology in view of the evolution of surrogate motherhood in recent years. Currently the term 'surrogate motherhood' is used to describe various and non-comparable situations. The group of persons to whom the child can be handed over has been broadened: different legal regimes allow the child to be received not only by a couple comprised of man and woman, but, in some legal systems also to a constellation of persons in which the surrogacy *naturam non imitatur*, i.e. homosexual couples and single individuals. The he proposed the use of the following terminology, based on the genetic origin of the child contracted from the surrogate mother:

- strict surrogacy (a couple comprised of woman and man contractually acquire the legal status of mother and father of a child of their genetic origin, regardless the fact that another woman was pregnant and gave birth);
- surrogacy *sensu largo* (a couple comprised of woman and man contractually acquire the legal status of mother and father of a child of genetic origin of one of them, regardless the fact that another woman was pregnant and gave birth);
- pseudo-surrogacy (another constellation of persons contractually acquires the legal status of parents No. 1 and No. 2, although in the nature generally such constellation could not be genetic or biological parents of the child, e.g. a same-sex couple or a single person), and
- ancient surrogacy (the child is genetically related to surrogate who provided her own egg; sometimes called 'traditional' surrogacy).

At the end of his remarks, Prof. Mostowik formulated several questions for further discussion during the conference, including:

Are we all aware of the future general effects of current individual cases before domestic and international tribunals? Should the best interest be evaluated only in relation to the given child (*hic et nunc*) or rather in general in relation to children and women in the future?

Does it make sense to prohibit surrogacy internally (regionally) but accept the effects of transactions concluded abroad (results of so-called procreation tourism)?

Is possible and necessary to develop international global cooperation acceptable for all countries or rather a few cooperation schemes of different character (promoting or combating surrogacy) within groups of states?

3. The first panel *Overview of legal systems: domestic fundamental principles – grounds of (non)acceptance in substantive law and (non)recognition of foreign civil status registration* was chaired by Prof. Carlos Martínez de Aguirre from the University of Zaragoza in Spain and by Marta Soniewicka, PhD, from the Jagiellonian University in Cracow. It was devoted to the solutions implemented in selected countries: France, Ukraine, Italy, Russia, Slovakia, and the UK. Besides the current *status quo*, the experts presented the positions expressed in legal literature and case law, including cases of cross-border surrogacy, and the political attitude that indicates whether the changes are feasible or rather the existing state of affairs should be preserved.

Professor Nathalie Baillon-Wirtz (University of Reims Champagne-Ardenne, France) discussed in her lecture and accompanying presentation *Ethical and legal issues of surrogacy in the French law*. According to the French law, a surrogacy agreement is null and void. The French legal system, however, faces the issue of cross-border surrogacy. The case law of the Cour de Cassation has evolved significantly over the last years and as of today for the purpose of transcription of a civil status record France recognises the biological relationship between the father and the child born by a surrogate. The second spouse can adopt the received child.

Thereafter, Prof. Alla A. Herts (University of Lviv, Ukraine) presented *Ukrainian law and jurisprudence regarding surrogate motherhood*. The Ukrainian law allows for surrogacy, including the foreign commissioning couples.

The presentation of Prof. Andrea Nicolussi (Catholic University of Milan, Italy) was devoted to *Surrogate motherhood in Italy: legislation, jurisprudence and doctrine*. Italy is one of the countries in which the legal system explicitly [prohibits surrogacy]. The Italian courts are nonetheless faced with *fait accompli*, when it is necessary to decide on the descent of a child born by a surrogate abroad. The courts have to take into account the best interest of the child, which may be an argument in favour of recognition of foreign civil status registration.

Prof. Andriej Novikov (St. Petersburg University, Russia) in his lecture on *Surrogate motherhood in Russia and CIS countries: Legislation, jurisprudence and political discussion* focused on the Russian approach and indicated similarities in the solutions adopted in the CIS countries. The lecturer drew attention to the similar permissive approach to surrogate motherhood in those countries. He indicated further the liberal approach to verifying certain conditions prescribed by law, including the group of the commissioning persons or the verification of medical reasons for surrogacy.

Elena Judova, PhD, and Martin Píry, PhD (University of Banska Bystrica, Slovakia) presented *Surrogate motherhood from perspective of Slovakian legal principles*. Surrogacy is not regulated in Slovakia; on this basis, the Slovakian legal literature does not exclude such practice. Surrogacy is, however, not practiced openly. On the whole, the general public and political parties show negative approach to such practices.

The last presentation in this panel, by Natalia Karczewska-Kamińska, PhD, (Nicolaus Copernicus University in Toruń), was devoted to the evolution of legislation and case law concerning surrogate motherhood in United Kingdom. In that country this issue has been the subject of vivid public debate since the 1980s and

the publication of the Warnock Report. The UK belongs to the countries that allow surrogacy. It was regulated in the Surrogacy Arrangements Act and in the Human Fertilisation and Embryology Acts that determine its conditions. Additionally, the UK faces the problem of cross-border surrogacy when a person who has a British domicile requests recognition of the consequences of procedures performed abroad.

4. The next panel, entitled *Foundations of filiation (child's origin, maternity and paternity), parents-child relationship, and human dignity in constitutional and international law* was chaired by Prof. Baillon-Wirtz and Prof. Ondřej Frinta (Charles University in Prague, the Czech Republic).

Professor Martínez de Aguirre in his lecture on *International surrogacy arrangements: A global Handmaid's Tale?* indicated the growth in international surrogacy. The cases involving collisions of such cases with the legal orders of the countries that oppose surrogacy are regularly litigated before the European Court of Human Rights. The ECtHR itself is divided as regards the assessment of surrogacy, as can be interpreted from the case *Paradiso and Campanelli v Italy*. Steps aimed at unification of the approach are being taken under the auspices of international organisations, such as the Hague Conference of Private International Law, the Council of Europe or the European Union. However, a global agreement is difficult to reach, because of the differences of opinion. Prof. Martínez de Aguirre pointed out that there is a trend in the cross-border surrogacy cases to concentrate on the individual interests of the particular child. While striving to prevent trafficking in children, the interest of children in general should be taken into account. He referred to the suggestion of the UN Special Rapporteur Report that states should analyse carefully the cases of commercial surrogacies carried out abroad in order to avoid the sale of children.

Witold Borysiak, PhD (University of Warsaw) delivered a detailed lecture on *Motherhood under domestic constitutional principles on the example of Polish 1997 Constitution*. He presented those provisions of the Polish Constitution, in particular Art. 18, that concern marriage and the protection of motherhood and indicated that such protection was available to the woman who gave birth to the child.

Agnieszka Czubik, PhD (Jagiellonian University in Cracow), in her address called *Protection of women rights and health in international law versus 'surrogacy business*', pointed out that the protection of women's rights, including health and dignity, should be a factor determining the considerations regarding the admissibility and regulation of surrogate contracts. The existing legal provisions in the field of human rights at international level regulate issues related to the protection of women's rights in the context of their use in the surrogacy procedure only in a rudimentary and very general manner. However, because of divergent views on the admissibility of surrogacy, the broad adoption of detailed international regulations in this area is not realistic. At present, one should expect attempts at interpreting general norms, including Art. 8 ECHR.

Agata Niżnik-Mucha, PhD, and Aleksandra Dębowska from the Jagiellonian University in Cracow elaborated further on the constitutional framework in the lecture on *Maternity and paternity in cases before the Constitutional Tribunal: judgments and obiter dicta*. They took into account the perspective of reproductive rights.

5. In the next panel focused on *Surrogate motherhood as a subject matter of recent activities at international or federal level* chaired by Prof. Nicolussi and Agnieszka Czubik, PhD, Prof. Monika Wałachowska (Nicolaus Copernicus University in Toruń) continued the overview of the approach adopted in the legal systems of various countries in her presentation on *Surrogate motherhood under different laws on the example of the USA: comparison and evaluation*. The individual state laws represent diverging approaches, from prohibiting surrogacy to very liberal approaches, including the permissibility of commercial surrogacy. Prof. Wałachowska underlined that in the US surrogacy is presented as an altruistic act of a woman who sacrifices herself for other people.

The following presentations focused on the initiatives undertaken at international level. Łukasz Mirocha, PhD (legal practitioner), presented the issue of *Surrogate motherhood in activities within the Council of Europe system*. Beginning from 1980s, the Council of Europe adopted several reports addressing the issue of surrogacy, mainly critical in character. Łukasz Mirocha described various positions of the member states and underlined the change between the first report from 1989 and the last one from 2016, that resulted in abandoning the prohibition of surrogacy in favour of its restrictive regulation, which would allow such procedures.

A detailed address on *Activities of global international organisations (United Nations, Hague Conference of PIL) concerning surrogate motherhood)* was presented by Agnieszka Wedeł-Domaradzka, PhD (Kazimierz Wielki University in Bydgoszcz, Poland). She indicated a few areas where issues arise that are of particular concern in the work conducted on international fora: the rights and best interests of the child, the rights and interests of the surrogate, the rights of the intended parent/s, and the issues of cross-border surrogacy. The complexity of the problem and the diverging approaches, however, stall the progress on surrogacy regulation.

Finally, Marcin Sokołowski, PhD (Adam Mickiewicz University of Poznań, Poland) gave a presentation entitled *Surrogate motherhood in legal and political activities of European Union's institutions*. He pointed out that this subject appeared in political debates. Essentially, the European Union has no legislative powers that would allow it to adopt instruments applicable in all Member States (e.g. common surrogacy standards). The regulation on the scope of personal and family law and its consequences in the field of family law and civil status belongs to the Member States' exclusive competence.

6. The first day of the conference ended with a discussion concerning, in particular, the future general effect of the first rulings of domestic courts and the ECHR, as well as various 'legal degrees' of relations between parents and children established through contract with the surrogate. Prof. Michał Wojewoda (University of Lodz, Poland) presented his detailed opinion and indicated that the best interest of the child in a particular case, in particular if a family has been together for a longer period of time, may speak for recognising the parental bond. Prof. Mostowik argued that it is also worth pointing out that 'turning a blind eye' in individual cases on violations of the basic principles of domestic law (e.g. ban of child trafficking or the non-transferableness by contract of personal status of parent and child), as sometimes postulated, may in the long run cause an avalanche. Paradoxically, giving

priority to the principle of the interest of a particular child (e.g. as an argument for the exceptional recognition of the effects of foreign law, which is significantly contrary to domestic fundamental legal principles) may mean that in the future the interests of a whole group of children and women will be threatened and violated. On the other side, the well-being and best interest of the particular child should be taken into account, in particular when it was staying abroad for a long period under the actual care of certain persons. A separate issue was, in the opinion of Prof. Mostowik, what legal institutions of private and family law could serve this purpose (e.g. the possibility of adoption if the domestic conditions have been fulfilled, legal guardianship, right of access to child).

7. The second day of the conference (28 September 2018) began with a multimedia presentation *Reality. What's actually going on?* prepared by students of the Jagiellonian University and the University of Warsaw. In the introduction to the panel, its chairperson, Olga Bobrzyńska, underlined the purpose of the presentation, which was to describe the diverging views on surrogacy in the individual countries and by various actors involved in such practices (including surrogacy agencies and surrogates). Afterwards, students: Marta Śledź, Karolina Sęk, Piotr Wójcik, Adrianna Biernacka, and Katarzyna Różaniecka presented the outcome of a review of press and electronic media in the UK, the USA, France, Spain, Germany, Russia, Ukraine, and India. The presentation included videos, some of which portrayed surrogacy as an idyllic experience in which the surrogate and the commissioning couple await the birth of the baby, and thereafter the surrogate remains present in the life of family, and statements of the surrogates who during the pregnancy and after the delivery of the child experienced negative emotions. The surrogacy agencies create a 'problem-free' image of surrogacy and on their websites they offer 'packages', the purchase of which should guarantee fast delivery of a healthy child with the desired genetic features.

8. The next panel was devoted to two topics: *Fundamental questions: perspectives of philosophy, sociology, anthropology and theory of law* and penal considerations concerning *Illegal 'surrogacy business' and combating child trafficking* (e.g. ban on 'payment or compensation of any kind' under the 1993 Hague Adoption Convention) and was chaired by Prof. Novikov and Prof. Piotr Stec (University of Opole, Poland).

Marta Soniewicka, PhD, presented reflections about *Ethical and philosophical issues arising from surrogate motherhood*. She indicated different approaches to surrogacy in various philosophical doctrines and pointed out the moral and legal dilemmas concerning surrogacy. The new techniques of medically assisted procreation, including surrogacy, are supposed to resolve the problems of infertility faced by the aging western societies. This problem is however addressed at the expense of other important values related to procreation, such as stability and unambiguity of parental relations, responsibility for and care of a human being, and the perception of children as a gift. The new techniques of reproduction call for intensified debate.

The sociological approach to the issue of surrogacy was presented by Błażej Kmieciak, PhD (Medical University in Lodz, Poland) and Mirosław Boruta, PhD

(Pedagogical University in Cracow). Błażej Kmieciak, in his presentation on *The phenomena called surrogate motherhood in the sociological approach: current (casuistic) and future (general) perspectives*, pointed out serious doubts of psychopedagogical and legal nature related to the identity issues of a child born from the cells of the donors. He noted that some countries, such as Germany and the UK, revised their laws on the donation of cells in order to allow the child to know his /her biological parents. The practice of surrogacy makes the issue of motherhood more complex and turns a child into the object of a contract, which infringes the standards of respect for human life. Moreover, Błażej Kmieciak referred to the different positions of surrogates in the western countries and in Asia, e.g. in India, where their position vis-à-vis the other participants of the process is much weaker. Mirosław Boruta, in his lecture on *Surrogate motherhood from the perspective of sociology and anthropology of culture*, presented the beginnings of human life in the biological and cultural perspectives as well as the perception of surrogacy in literature and mass culture. He stressed that splitting parenting into genetic, biological, and sociological parenting gave rise to ethical and social controversies and dilemmas. He also pointed out that the definition of a family might change, because it would cease to be a social group built around a couple (a woman and a man) who had conceived a child.

9. The various criminal law aspects were presented by two criminal law scholars from the Jagiellonian University in Cracow: Wojciech Górowski, PhD, and Dominik Zając, PhD. The presentation of Wojciech Górowski concerned *Surrogate motherhood in Polish criminal law (de lege lata)*. Among other things, he pointed out the criminal liability for embryo formation outside a medically assisted procreation procedure and analysed the possibility of criminal liability for surrogacy in the light of Art. 211a of the Polish Criminal Code, which penalises the act of organising illegal adoption, to conclude that the acts of the commissioning persons did not amount to such acts.

Dominik Zając presented *International criminal law aspects of surrogate motherhood*. He indicated that international criminal law treated the issue of surrogacy in a fragmented way and – although to a limited extent – obliged states to penalise behaviours related to surrogacy. Such obligations refer to child trafficking, albeit specifically understood. The penalisation is left to the national law. Lack of uniformity of solutions may result in lack of liability due to the requirement of double criminality.

In her presentation on *International police cooperation against child trafficking and illegal adoption*, Agnieszka Laber, PhD (legal practitioner) presented the measures available to law enforcement agencies in various countries in cases of cross-border child trafficking and illegal abortion, commenting about the possibility of applying those mechanisms to specific acts related to surrogacy practices that could amount to the crime of trafficking in children. But the surrogate mother may be a victim of human trafficking, too, when she is forced to accept this role. Agnieszka Laber pointed out that efficient combating and prevention of these crimes required cooperation of a broad group of actors: the police and other authorities, as well as non-governmental organisations.

Konrad Burdziak, PhD (University in Szczecin, Poland) presented his *Remarks on the Polish criminal law and postulates de lege ferenda*, prepared in cooperation with Prof. Łukasz Pohl (University in Szczecin). He analysed the issue of completion of the prongs (elements) of the crime of human trafficking (Art. 189a of the Polish Criminal Code), in particular when the child is handed over to other persons in exchange for pecuniary consideration, and indicated that in order to impose criminal liability it would be necessary to establish an unlawful intent of the 'perpetrators' (surrogate mother/intended parents), such as abuse of the child or obtaining cells, tissues or organs.

10. The next panel, called *Principles of substantive private law (maternity and paternity, civil status registration, adoption, freedom of contract, unjustified enrichment) versus surrogacy motherhood* was chaired by Prof. Wojewoda and Piotr Rodziewicz, PhD (University of Wrocław, Poland).

Professor Stec presented some remarks about surrogacy in the context of changes taking place in the society and the development of technology.

Thereafter, two country reports were presented, providing the perspective of basic legal provisions and assumptions of family law. Paweł Sikora, PhD (University of Zielona Góra, Poland) gave an outline titled *Surrogate motherhood and the principles of German family law*. The German legal system is one where the practice of surrogacy is not accepted. It includes a clear rule that the child's mother is the woman who gave birth to him/her (§ 1591 of the German Civil Code). Furthermore, it is expressly prohibited to act as an intermediary (agent) in the conclusion of substitute motherhood (birth) contracts. However, some rulings of German courts recognised foreign judgments accepting the legal origin of a child from the commissioning persons, instead of the women who gave birth to the children.

Professor Frinta and Dita Frintová, PhD (Charles University in Prague, Czech Republic) familiarised the participants with *Surrogate motherhood from the perspective of Czech private law: legislation, jurisprudence and doctrine*. In the Czech Republic, despite lack of regulation and the principle that the mother is the woman who gave birth to the child, surrogacy is openly practiced (the biological father can acknowledge the child, and the woman who delivered the genetic material can adopt the child). As regards cross-border surrogacy, the Czech courts expressly stated that surrogacy is not *per se* manifestly inconsistent with the Czech public order, which could be seen as surprising.

Afterwards, Rafał Łukasiewicz, PhD (University of Rzeszów, Poland) presented an address prepared together with Prof. Janusz Gajda (The Jan Kochanowski University in Kielce, Poland), titled *Principles of the adoption system versus surrogate motherhood*. In their presentation the authors discussed the issue of applying the rules on adoption to establish the relationship bond between the commissioning persons and the child born by a surrogate.

The panel ended with a presentation by Prof. Radosław Flejszar (Jagiellonian University in Cracow) on *Selected issues of civil proceedings concerning personal and financial aspects of surrogate motherhood*. Professor Flejszar underlined the complexity of the issues arising in connection with surrogacy, which are aggravated by the problems posed by cross-border surrogacy and resulting from the different

national approaches. Besides the recognition of the civil status established abroad, the list of issues includes claims for undue performance or claims arising from a valid surrogacy arrangement (such as the claim to have the child handed over and to take the child).

11. Professor Flejszar together with Marcin Sokołowski, PhD, chaired the last panel of the conference devoted to *Surrogate motherhood as the subject matter of private international law*.

In the first address, Prof. Wojewoda presented detailed aspects of registration of the civil status in cases of cross-border surrogacy (*The birth records of children born in surrogacy proceedings and their value outside the country of issuance*). He indicated that under the laws applicable in Poland, the civil status of a child born by a surrogate mother, whose birth certificate indicates the paternity of the sociological parents, would in principle be assessed in accordance with the principle of public order. The conflict of surrogacy with the Polish legal order supports, *prima facie*, rejection of entering a 'surrogate birth certificate' into the Polish civil law records. However, the best interest of the child who for a longer period of time has lived in a given family and is genetically related with the intended parents may be an argument in favour of recognising foreign documents on a case by case basis.

Then Natalja Žitkevitš, PhD (legal practitioner) together with Katažyna Mikša, PhD (Mykolas Romeris University, Vilnius, Lithuania) described *Surrogate motherhood in the Baltic states*. In those countries, the law prescribes the *mater semper certa est* rule and surrogate birth is not allowed. In Lithuania, the prohibition of the surrogate birth has been expressed in the law regulating assisted procreation since 2016. In Estonia such a prohibition is derived from the provisions of criminal law. The law in Latvia does not contain any rules on surrogacy, however requests to allow it were rejected in the course of the legislative debate.

A complex presentation on *International surrogacy: choice-of-law and procedural issues of judicial cooperation in civil matters* was delivered by Piotr Rodziewicz. He indicated that from the perspective of private international law the act of surrogacy implies the position of the persons, for whom the applicable law should be determined separately, which may create problems at the intersection of various statutes. Piotr Rodziewicz pointed out that the principal rule of the Polish legal system is natural parenthood. This means that if applying foreign law resulted in a violation of this principle, it would be necessary to invoke the principle of public order in a given case.

12. The concluding working remarks, entitled *De lege ferenda: what kind of domestic or international legal and political measures should be taken?*, were delivered by Prof. Mostowik.

In his opinion, the question to ask is whether it is possible to cooperate internationally in order to regulate the so-called surrogate motherhood business? It seems impossible to create any global substantive law standards (e.g. for cases to be heard by an international tribunal). First of all, it is not feasible to adopt uniform common rules of substantive family law in the area in point or uniform rules for the recognition of foreign procedures, including the effects of registration of the civil

status abroad. National family law systems became so diverse in early 21st century that there is currently no common denominator that would be necessary to reach the kind of consensus that would enable adopting common supranational rules.

Another issue is the possibility of co-operation at international level among groups of countries. In such groups of countries with similar fundamental principles of family law it could be possible to declare ban on surrogacy and non-recognition of foreign law and registration, now and in future. Another group might agree on the opposite approach, i.e. recognition of legal parentage acquired under contracts with surrogates or partial recognition in cross-border situations, restricted to the so-called altruistic surrogacy *sensu stricto* (i.e. legal status of children who are genetically linked to a given couple comprised of man and woman).

Closing the conference, the organisers and students thanked all attendees for the high academic level of the conference, including the addresses and panel discussions. An opinion was also expressed that the knowledge gained thanks to participation in the conference and cooperation, also at international level, would certainly also yield fruits in the future. Next year, a book publication is planned. It will enable the readers to become familiar with detailed aspects of the thorough and multidisciplinary research – outlined above – on the contemporary phenomenon referred to as surrogate motherhood, which certainly creates a number of legal problems and may give rise to controversies.

Olga Bobrzyńska

PRAWO W DZIAŁANIU
LAW IN ACTION
36/2018

Helena Ciepła*

The Transformation of the right of perpetual usufruct into ownership

I. INTRODUCTION

As early as in the second half of the 19th century, urban sprawl and the need to satisfy the housing needs of the population generated the need to develop legal forms for the transfer of land for residential construction by the state and urban municipalities[1]. What occupied a particular position in the political and economic conditions at the time when law was created in Poland after the end of World War II was social property (in particular, state property)[2]. This had an impact on the shape of and changes to the legal institutions satisfying the need for long-term use of state land by citizens. Perpetual usufruct[3] was introduced into the system of Polish law by the

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1 J. Ignatowicz, *Prawo rzeczowe,* Warszawa 1979, pp. 170–171.

2 See: M. Bużowicz, *Ewolucja prawa własności w Polsce Ludowej w latach 1944–1956,* „Wrocławskie Studia Erazmiańskie" (Studia Erasmiana Wratislaviensia), Vol. X, *Wolność, równość i własność w prawie i w polityce*, M. Sadowski, A. Spychalska, K. Sadowa (eds.), Wrocław 2016, pp. 485–502; A. Machnikowska, *Nowe prawo własności – przekształcenia w stosunkach własności w Polsce w latach 1944–1950*, „Zeszyty Prawnicze UKSW" 2011, No. 11(2); Art. 8 of the Constitution of the Polish People's Republic of 22 July 1952, Journal of Laws of the Republic of Poland Dziennik Ustaw No. 33, Item 232, stipulated that 'National property […] is subject to particular care by the state as well as all citizens', and Art. 77(1) stipulated that 'Every citizen of the Polish People's Republic is obliged to protect social property and strengthen it as an unshakeable foundation for the development of the state […]'.

3 On the concept and function of perpetual usufruct, including information about legal forms of land transfer primarily for residential construction in force in the Polish territory earlier, in a synthetic form, see: J. Ignatowicz, *Prawo rzeczowe,* Warszawa 1979, pp. 170–172, in a monographic form – from earlier literature – J. Wichniarz, *Prawo użytkowania wieczystego,* Warszawa 1970, from more recent literature, for instance; Z. Truszkiewicz, *Użytkowanie wieczyste* [in:] *System Prawa Prywatnego,* Vol. 4, *Prawo rzeczowe*, E. Gniewek (ed.), Warszawa 2012. See also the literature indicated by: J. Górecki [in:] *Komentarze Prawa Prywatnego,* Vol. II, *Kodeks cywilny. Komentarz*, K. Osajda (ed.), Warszawa 2017, pp. 493–498. The legal character of perpetual usufruct was controversial (see, for instance: F. Dorożała, *Charakter prawny i istota wieczystego użytkowania terenów państwowych,* „Palestra" 1962, No. 12, pp. 59–66; S. Szer, *Użytkowanie wieczyste,* „Państwo i Prawo" 1964, No. 1, pp. 3–11; A. Kopff, *Charakter prawny wieczystego użytkowania,* „Studia Cywilistyczne" 1967, Vol. IX, pp. 3–39; S. Rudnicki, *Charakter prawny użytkowania wieczystego,* „Nowe Prawo" 1970, No. 12, pp. 1771–1777; T. Smyczyński, *Charakter prawny wieczystego użytkowania,* „Ruch Prawniczy, Ekonomiczny i Socjologiczny" 1971, No. 1, pp. 37–53; S. Wójcik, *Z problematyki użytkowania wieczystego,* „Nowe Prawo" 1977, No. 6, pp. 803–820. The view which prevailed prior to the entry into life of the Civil Code (Act of 23 April 1964 – Civil Code, in force from 1 January 1965, consolidated text: Journal of Laws of the Republic of Poland Dziennik Ustaw 2018, Item 1025 as amended), was that perpetual usufruct was a new type of a limited property right, in spite of the differences between this right and limited property rights, in particular between perpetual usufruct and usufruct (see, for instance: J. Wasilkowski, *Zarys prawa rzeczowego,* Warszawa 1963, p. 152). Following the entry into life of the civil code, which regulated perpetual usufruct in a separate title of Book Two 'Ownership and Other Property Rights', the Supreme Court declared that '[p]erpetual usufruct was shaped as an intermediate institution between the legal category

Act of 14 July 1961 on Land Management in Towns and Housing Developments[4]. This Act became effective on 31 October 1961 and remained in force until 1 August 1985[5]. It provided, among others, that the land development right, temporary ownership, long-term lease and other similar rights[6] became the right of perpetual usufruct in cases and on conditions specified in the implementing regulation[7].

According to the literature on the subject, systemic changes which took place in Poland at the end of the previous century are believed to 'have had their impact on the institution of perpetual usufruct'[8], which was expressed not only in limiting elements of administrative and legal nature that co-shaped the right but also in the choice of perpetual usufruct as an instrument of the economic restructuring of the state sector. 'The development of entities belonging to the state sector and the municipal sector, which evolved from the former, depended, in the new systemic realities, among others, on conferring on them their own right'[9].

Pursuant to Art. 1 of the Act of 20 July 2018 on Transformation of the Right of Perpetual Usufruct of Land Developed for Residential Purposes into Ownership of Land[10], as of 1 January 2019 the right of perpetual usufruct of such land will be transformed into ownership of such land.

The principal object of this study is to present the regulations of the aforementioned Act. It, however, seems advisable to precede it with concise information about the basic regulations concerning perpetual usufruct contained in the Civil Code as well as possibilities of transforming it into ownership according to the laws in force prior to 1 January 2019.

In accordance with Art. 232 of the Civil Code now in force, the right of perpetual usufruct can be established on land owned by the State Treasury, situated within

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of ownership and the category of the so called limited substantive rights. Thus, in cases not regulated in Articles 232–243 of the Civil Code as well as in the contract on letting state land for perpetual usufruct any interpretation difficulties should be solved by analogy to, first of all, the provisions contained in Section II Title I of Book Two of the Civil Code concerning the substance and exercise of ownership and thus, among others, also to Art. 145 of the Civil Code'. (And thus in the resolution of 9 December 1969, III CZP 95/69, OSNCP 1970, No. 10, Item 172 as well as in the decision of 17 January 1974, III CRN 316/73, OSNCP 1974, No. 11, Item 197). Thus also, for instance, J. Ignatowicz, *Prawo rzeczowe,* Warszawa 1979, pp. 172–173.

[4] Journal of Laws No. 32, Item 139.

[5] As of 1 August 1985 the Act on Land Management was replaced with the Act of 29 April 1985 on Land Management and Expropriation of Real Estate, Journal of Laws No. 22, Item 99. The new law did not have any essential impact on the shape of perpetual usufruct.

[6] The land development right (known in the Polish territory earlier) was the subject of the Decree of 26 October 1945 on the right to land development (Journal of Laws No. 50, Item 280). The Decree of 26 October 1945 on ownership and usufruct of land in the capital city of Warsaw (Journal of Laws No. 50, Item 279) introduced in Warsaw the right to emphyteusis. The Decree on the right to land development was repealed by the Decree of 11 October 1946 – Provisions introducing the Property Law and the Law on Land and Mortgage Registers (Journal of Laws 1946 No. 57, Item 321). The perpetual lease of land in the capital city of Warsaw was replaced by temporary ownership pursuant to Art. XXXIX of the Provisions introducing the Property Law and the Law on Land and Mortgage Registers, and perpetual lease and emphyteusis were abolished in Poland as a whole on the basis of Art. XXXVI of the same Provisions. Temporary ownership was introduced into Polish law in the Decree of 11 October 1946 – Property Law (Journal of Laws 1946, No. 57, Item 319); J. Szonert (*Własność czasowa,* „Palestra" 1959, No. 3/1 (13), p. 39) characterised temporary ownership as a combination of 'two institutions of property law, known already to Roman law, namely: emphyteusis and superficies. [...], with a certain innovation introduced which blur the picture of each of the original parts'. Z. Tuszkiewicz, *Użytkowanie…* [in:] *System…*, p. 2 et seq., held that 'the institution of perpetual usufruct has a number of elements in common with the emphyteutic (perpetual) rights'.

[7] That was the Decree of the Minister of Municipal Economy of 26 January 1962 *on transformation of certain rights to land into the right of perpetual usufruct or usufruct,* Journal of Laws No. 15, Item 67.

[8] And thus: Z. Truszkiewicz, *Użytkowanie…* [in:] *System…*, p. 3.

[9] Z. Truszkiewicz, *Użytkowanie…* [in:] *System…*, p. 3.

[10] Journal of Laws 2018, Item 1716.

the administrative boundaries of towns as well as on land situated outside of their boundaries, covered by the plan for the spatial planning of towns and transferred for the implementation of urban management purposes as well as land owned by units of territorial self-government or their unions. In cases foreseen in specific provisions the object of perpetual usufruct can also cover other land owned by the State Treasury, units of territorial self-government or their unions. The land is let under perpetual usufruct for a period of ninety-nine years. In exceptional cases, where the economic aim of perpetual usufruct does not require letting the land for such a long period, it is admissible to let the land for a shorter period of time, however, not less than forty years. In the last five years of the term provided for in the agreement, the perpetual usufructuary can request its extension for another period of forty to ninety-nine years. The perpetual usufructuary can submit such a request earlier if the period of depreciation of outlays on developments on the used land is considerably longer than the residual term of the agreement. Refusal to extend the agreement is admissible solely due to important public interest (Art. 236 of the Civil Code).

The letting of land owned by the State Treasury or units of territorial self-government or their unions under perpetual usufruct is governed by the provisions on the transfer of the real estate ownership (Art. 234 of the Civil Code). Buildings and other structures erected by the perpetual usufructuary constitute property of the latter. The same applies to buildings and other structures which the perpetual usufructuary acquired pursuant to the pertinent provisions upon conclusion of an agreement on letting the land under perpetual usufruct. The agreement stipulates that ownership of the buildings and structures is a right linked to perpetual usufruct (Art. 235 of the Civil Code). The perpetual usufructuary will then pay an annual fee for the duration of this right.

Like the earlier rights, which it replaced (in particular, the right to land development, perpetual lease, temporary ownership), the right of perpetual usufruct originated in different economic and systemic conditions. Starting from the 1990s, following political, economic and systemic changes, Poland has been a market economy. The role of the rights of state and private property has changed, affecting also the perception of the right of perpetual usufruct. In 2000, the Constitutional Tribunal held[11] that – following the amendments made – the concept of perpetual usufruct complied with the European standards. As one of the legal forms of land possession, it promotes trade in real estate. This enables people to choose a legal relationship which would best suit their plans and financial abilities. This, however, was not a position either commonly or fully shared in the years which followed, because the concept of abolishing this right and transforming it into ownership had numerous adherents[12].

[11] Judgment of the Constitutional Tribunal of 12 April 2000, K 8/98, Journal of Laws No. 28, Item 352.

[12] Legal literature witnessed an on-going discussion on the advisability of maintaining the right of perpetual usufruct in market economy conditions. On this subject see: M. Bednarek, *Przemiany własnościowe w Polsce. Podstawowe koncepcje i konstrukcje normatywne,* Warszawa 1994; E. Drozd, *Uwagi do projektu ustawy o gospodarce nieruchomościami,* „Kwartalnik Prawa Prywatnego" 1997, No. 6.2, pp. 273–288; E. Gniewek, *Katalog praw rzeczowych w przyszłej kodyfikacji prawa cywilnego – refleksje wstępne,* „Rejent" 1998, No. 4, pp. 25–43; E. Gniewek, *O przyszłości użytkowania wieczystego,* „Rejent" 1999, No. 2, pp. 11–30; J. Majorowicz, *Uwagi na temat aktualności instytucji użytkowania wieczystego,* „Przegląd Sądowy" 1999, No. 9, pp. 59–67; A. Brzozowski, *Z problematyki przekształcenia prawa użytkowania wieczystego w prawo własności,* „Zeszyty Prawnicze UKSW" 2003, No. 3/2, pp. 63–92. What should be noted is the exceptional unanimity of MPs of the 8th term during the vote on passing the Act on Transformation of the Right of

II. THE POSSIBILITY OF TRANSFORMING THE RIGHT OF PERPETUAL USUFRUCT INTO OWNERSHIP ACCORDING TO LAWS IN FORCE BEFORE 1 JANUARY 2019

1. Introduction

Following the systemic changes of the 1990s, the possibility of transforming the right of perpetual usufruct ownership was introduced in cases and according to principles provided for in statutory law.

For the first time, such a possibility was opened as of 1 January 1998 by virtue of the Act of 4 September 1997 on Transformation of the Right of Perpetual Usufruct Enjoyed by Natural Persons into Ownership[13].

The *ratio legis* of this law was to protect perpetual usufructuaries who acquired real estate in the so-called 'Recovered Territories' after World War II (in the north and west of Poland) against reprivatisation claims as well as to compensate for losses resulting from the nationalisation decrees issued after World War II.

The statute applies solely to natural persons. It assumed the transformation of perpetual usufruct into ownership through an administrative decision. In the original version, it provided for a very small fee for the transformation, which was challenged by the Constitutional Tribunal in its judgment of 12 April 2000, K 8/98. As a consequence of the position adopted by the Tribunal, Art. 4a, applicable from 28 July 2001, was added. It stipulated: '*1. The fee referred to in Art. 4 shall be determined pursuant to Art. 67(1), Art. 69 and Art. 70(2)-(4) of the Act of 21 August 1997 on Real Estate Management (Journal of Laws of 2000, No. 46, item 543), respectively. 2. Where the annual fee for perpetual usufruct was updated not earlier than in the period of the last two years prior to the date of the submission of the application for the right of perpetual usufruct to be transformed into ownership, the fee for the transformation shall be established on the basis of the value of the real estate determined for the purposes of such update. 3. Where the decision concerns real estate used or destined for residential purposes, the authority competent to issue the decision can grant a discount on the fee referred to in Art. 4 with respect to the real estate owned by: 1) the State Treasury – with the consent of the voivode; 2) territorial self-government units – with the consent of the competent council or local parliament'.*

This meant that the price to be paid for the transformation of the real estate was the price established by a qualified real estate appraiser, reduced by an amount equivalent to the value of the perpetual usufruct of the real estate on the date of the transformation.

The provisions of the Act of 4 September 1997 provided also for the possibility of gratuitous transformation, available to perpetual usufructuaries and their

Perpetual Usufruct of Land Developed for Residential Purposes into Ownership of Land (which will result in *ex lege* transformation as of 1 January 2019). None of the MPs was against adoption of the law, with 425 votes in favour the law and 2 abstentions. (The work of the Sejm of the 8th term on the bill, Print No. 2673, http://www.sejm.gov.pl/sejm8.nsf/PrzebiegProc.xsp?nr=2673).

[13] This Act, repeatedly amended (consolidated text: Journal of Laws 2001, No. 120, Item 1299), was the subject of two judgments of the Constitutional Tribunal of 12 April 2000, K 8/98, Journal of Laws No. 28, Item 352, and of 18 December 2000, K 10/2000, Journal of Laws No. 114, Item 1196.

legal successors: (1) to whom the real estate was let under perpetual usufruct in connection with the loss of property as a result of the 1939–1945 war or who left their property in the territory no longer in the present territory of the Polish State; (2) who were to receive an equivalent for the property left abroad where the value of said property was higher than the fee referred to in Art. 4 of the Act, in accordance with international agreements; (3) to whom real property was let under perpetual usufruct in connection with expropriation after 1494 and before 1 August 1985; (4) to whom real property was let under perpetual usufruct in exchange for real estate taken over by the State Treasury on the basis of any titles, prior to 5 December 1990; (5) who were granted the right to perpetual lease or the right to land development (right of perpetual usufruct) as owners or their successors, pursuant to Art. 7 of the Decree of 26 October 1945 on ownership and usufruct of land in the capital city of Warsaw[14], irrespective of the date of this right being granted or the date rent or fee payment.

The transformation into ownership was also free of charge also in the cases specified in Art. 1(4) of the aforementioned Act.

The right to a free-of-charge transformation of the right of perpetual usufruct of real estate owned by the State Treasury is established by the *starost* [head of *poviat*, in other words county] performing a task from the field of central administration and with respect to real estate owned by a territorial self-government unit by the head of village (mayor), *starost* or *voivodeship* marshal.

Another instrument concerning the subject in question was the Act of 26 July 2001 on the Acquisition by Perpetual Usufructuaries of Ownership of Real Estate[15]. What was at stake, however, was not a transformation but a claim (pursued in administrative proceedings) for free-of-charge acquisition of ownership to specific real estate.

Both of the aforementioned Acts (of 4 September 1997 and of 26 July 2001) were repealed by the Act of 29 July 2005 on Transformation of the Right of Perpetual Usufruct into Ownership of Real Estate[16], which took effect on 13 October 2005 and has regulated transformation of the right of perpetual usufruct into ownership of real estate until 31 December 2018. It should be emphasised that the Act does not limit the transformation to natural persons, it covers also legal persons.

Pursuant to Art. 1(1) of the Act, natural and legal persons being on 13 October 2005 perpetual usufructuaries of real estate can submit applications for the right of perpetual usufruct of real estate to be transformed into ownership. Pursuant to Art. 1a, a request for the right of perpetual usufruct to be transformed into ownership can also be made by natural persons being on 13 October 2005 perpetual usufructuaries of real estate, provided that they acquired the right of perpetual usufruct either in exchange for the expropriation or take-over of land in favour of the State Treasury on the basis of other titles, prior to 5 December 1990, or on the basis of Art. 7 of the Decree of 26 October 1945 on ownership and usufruct of land in the capital city of Warsaw[17].

[14] Journal of Laws No. 50, Item 279.
[15] Journal of Laws No. 1459 as amended; at present: consolidated text: Journal of Laws 2012, Item 83.
[16] Journal of Laws No. 175, Item 1459 as amended; at present: consolidated text: – Journal of Laws 2012, Item 83.
[17] Journal of Laws No. 50, Item 279.

Paragraph 1 does not apply to real estate let under perpetual usufruct to the Polish Association of Allotment Gardens, to real estate let under perpetual usufruct to state or self-government legal persons as well as to commercial companies, in relation to which the State Treasury or a territorial self-government unit is the parent entity within the meaning of the Act of 29 July 2005 on Public Offer and Conditions of Introduction of Financial Instruments into an Organised Trading System, and on Public Companies[18], to real estate with respect to which administrative proceedings are in progress, with the aim of acquisition of real estate or its part for a public-purpose investment.

The request for transformation of the right of perpetual usufruct referred to in paragraph 1 into ownership of real estate can also be made by natural and legal persons being owners of residential units the share of which in the joint real estate includes the right of perpetual usufruct and by housing cooperatives being owners of residential buildings or garages. The request for transformation of the right of perpetual usufruct can also be made by natural and legal persons being legal successors of the persons referred to in paragraphs 1 and 1a as well as natural and legal persons being legal successors of the persons referred to in paragraph 2.

Paragraph 1a(2) and paragraph 2(1) of the Act apply also to persons who were granted the right of perpetual usufruct or a share in this right after 13 October 2005.

Case law reveals major controversies as to whether the principle of public credibility of land and mortgage registers can protect the purchaser of the right of the perpetual usufruct on the basis of a legal act in the case of a faulty entry in the land and mortgage register of the State Treasury, a territorial self-government unit or a union of such units as the owner of the land. The divergent views were unified by the resolution of 7 Supreme Court Judges of 15 February 2011, III CZP 90/10[19], according to which in case of a faulty entry in the land and mortgage register of the State Treasury or a territorial self-government unit as the owner of the real estate, the '[p]rinciple of the public credibility of land and mortgage registers protects the acquirer of the right of perpetual usufruct also in case of a faulty entry in the land and mortgage register of the State Treasury or a territorial self-government unit as the owner of land'.

2. The group of entities eligible for transformation of perpetual usufruct into ownership

The possibility of the transformation concerns solely perpetual usufructuaries who had the right of perpetual usufruct on the day the Act took effect, i.e. on 13 October 2005. This means that the right of perpetual usufruct must have existed on the day the Act took effect. If the right was established after 13 October 2005, then no request for transformation can be submitted. This reservation concerns all categories of entities eligible to request transformation, with the exception of persons who obtained the right to a share in perpetual usufruct after the Act took effect.

Pursuant to Art. 27 of the Act of 21 August 1997 on Land Management[20], in order to let real estate under perpetual usufruct and to transfer this right through

[18] Journal of Laws 2009, No. 185, Item 1439 as well as Journal of Laws 2010, No. 167, Item 1129.
[19] OSN 2011, Nos. 7–8, Item 76 and LEX No. 693990.
[20] Journal of Laws 1997, No. 115, Item 741. Consolidated text of the Act on Land Management in Journal of Laws 2018, Item 121.

an agreement, it is necessary to make an entry in the land and mortgage register. The right of perpetual usufruct did not arise prior to the entry in the land and mortgage register even if the agreement for letting real estate under perpetual usufruct was concluded in the form of a notarial deed. The right of perpetual usufruct arises the moment an entry is made in the land and mortgage register. Pursuant to the principle of retroactive effect of the entry (resulting from Art. 29 of the Act on Land and Mortgage Registers[21]) the entry is effective from the date the application for the entry was filed. Consequently, neither a usufructuary whose right was established after 13 October 2005 nor a usufructuary who concluded an agreement in the form of a notarial deed prior to this date, but failed to file an application for the right to be entered in the land and mortgage register, were eligible for the transformation. Art. 92(4) of the Act of 14 February of 1991 – Law on Notaries[22] in the version in force until 30 June 2016 stipulated that: '[i]f the notarial deed concerned a transfer, change or forfeiture of the right disclosed in the land and mortgage register or establishment of a right which can be disclosed in the land and mortgage register or covers the act of transferring the ownership of real estate, even if no land and mortgage register is kept for the real estate, the notary preparing the notarial deed is obligated to place in the notarial deed an application for the relevant entries to be made in the land and mortgage register and to send a copy of the notarial deed to the land register court within 3 days.' That was the so-called deed application of the party in favour of which the entry was to be made and not an application of the notary, which is why in case some elements were missing it was the party that the court summoned to remedy the situation. The regulation was far from perfect and repeated transactions concerning the same real estate within those 3 days were not infrequent. Since 1 July 2016, pursuant to the new wording of Art. 92(4) and the new para 4^1 added to added to Art. 92 of the Law on Notaries[23], the notary preparing the notarial deed files an application for its entry to the land and mortgage register through the computerised system used for court proceedings not later than on the day of the deed.

3. The scope of transformation of the right of perpetual usufruct into ownership

The object of the transformation is the right of perpetual usufruct of the real estate as a whole. Though the right of perpetual usufruct can be shared by several persons in the form of shared usufruct, the transformation can involve solely the perpetual usufruct as a whole. In case of a transformation of a share where, for instance, two natural persons are perpetual co-usufructuaries, a situation would arise in which perpetual usufruct would be established on a real estate owned by an entity other than the State Treasury or a territorial self-government unit and would consequently be null and void.

[21] Journal of Laws 1981, No. 19, Item 147. Consolidated text of the Act on Land and Mortgage Registers.
[22] Journal of Laws 1991, No. 22, Item 91; consolidated text: Journal of Laws 2017, Item 2291 as amended.
[23] Consolidated text: Journal of Laws 2016, Item 1796.

4. The course of administrative proceedings concerning transformation of the right of perpetual usufruct into ownership

The request for transformation is granted in the administrative procedure. The authority competent to make a decision with respect to real estate owned by the State Treasury as well as real estate held in trust by the Agricultural Property Agency (since 17 September 2017[24] the National Centre for Agriculture Support), the Military Housing Agency and the Military Property Agency is the *starost* (or the mayor of a city with *poviat* rights). With respect to self-government real estate the decisions in question are made by the *voit (*mayor) and the board of *poviat* or *voivodeship*.

Pursuant to Art. 3(3) of the Act, the decision on the transformation 'shall not infringe the right of third parties'. A doubt arises as to whether it means that the transformation cannot take place if it infringes the rights of third parties or constitutes an obstacle to the third parties asserting their rights. In my opinion, what should then be assumed is that transformation is not possible[25].

Ownership is acquired on the day when the decision on transformation becomes final. This decision constitutes the grounds for disclosing the ownership in the land and mortgage register and does not infringe the rights of third parties, which means that encumbrances on perpetual usufruct, such as mortgage or usufruct, remain in effect. It should be pointed out that in accordance with the Supreme Court judgment of 16 May 2002, V CKN 1284/00[26], where the perpetual usufructuary submitted an application for transformation of the right of perpetual usufruct into ownership after the owners had instituted an action for termination of the perpetual usufruct agreement, then the administrative proceedings concerning the transformation should be suspended pursuant to Art. 97(1)(4) of the Code of Administrative Procedure[27] until the end of the court case.

The Act of 29 July 2005 on Transformation of the Right of Perpetual Usufruct into Ownership of Real Estate[28] does not define the notion of 'transformation'. Colloquially, transformation means a change of the appearance, form or organisation of something that already exists in a particular shape.

III. THE GENESIS AND LEGAL CHARACTER OF TRANSFORMATION OF THE RIGHT OF PERPETUAL USUFRUCT INTO OWNERSHIP ACCORDING TO THE LAWS IN FORCE SINCE 1 JANUARY 2019

1. Introduction

Work on the bill went on for over two years. The first bill on the transformation of the right of perpetual usufruct into ownership was prepared on 8 August 2016 by the Ministry of Infrastructure and Construction and presented by the government in December 2016. It met with criticism from various circles, in particular, territorial

[24] Journal of Laws 2017, Items 623 and 624.
[25] This position was also adopted by the Voivodeship Administrative Court in Cracow in their judgment of 6 March 2018, II SA/Kr 209/18, LEX No. 2464196.
[26] LexPolonica No. 379759.
[27] The Act of 14 June 1960 – Code of Administrative Proceedings (Journal of Laws 1960, No. 30, Item 168). Consolidated text: Journal of Laws 2017, Item 1257, amendments Journal of Laws 2018, Items: 149, 650, 1514, 1629.
[28] Consolidated text: Journal of Laws 2012, Item 83.

self-government units. The date of the introduction of *ex lege* transformation was postponed repeatedly at the requests of self-governments and the Government Legislation Centre. For many months, the bill was discussed with self-governments, also with respect to fees, so the municipalities had time to update them. In spite of that self-governments fear loss of revenue from fees for letting land under perpetual usufruct. They accuse the government of unlawfully depriving them of one of the main sources of income, assuming that the introduced transformation is illegal. They even warn of their intention to lodge a complaint with the Constitutional Tribunal as the Constitution allows to dispossess self-governments of land for public purposes and the Act's provisions dispossess them of land for private purposes[29]. The point is, however, that even if the Constitutional Tribunal declares the Act non-compliant with the Constitution, it will not be possible to rescind the transformation anyway.

Yet, the law was expected by the general public, as indicated by numerous petitions addressed to central administration authorities as well as to the Parliament by perpetual co-usufructuaries of land on which multi-apartment (multi-family) buildings were erected and where separate ownership of individual apartments was distinguished. Wanting to pursue the claim granted to them by the Act of 29 July 2005 for transformation of the right of perpetual usufruct into ownership, this group of perpetual usufructuaries are forced to institute court proceedings due to the absence of consent from owners of other apartments and perpetual co-usufructuaries of the land. Court proceedings tend to be lengthy and there is no guarantee that the transformation will be effective. Thus, the law will strengthen stabilisation of the right to the land also of these owners of apartments and perpetual co-usufructuaries of the land. Besides, owners of apartments will have a homogenous right to the joint real estate. The hitherto existing problems with updating annual fees for perpetual usufruct of real estate developed for residential purposes will thus be eliminated. The aforementioned problems arose where only part of perpetual usufructuaries (apartment owners) appealed against the updated fee. Where the appeal was allowed, as a result owners of apartments in the same building paid different annual fees for the land under the building. This generated a feeling of injustice, social discontent and even neighbourly conflicts (which was pointed to in the reasons for the governmental bill).

The law definitely puts an end to the practice of periodically passing subsequent acts concerning transformation of the right of the perpetual usufruct of land developed for residential purposes into ownership. Enfranchisement of a specific group of entities due to the residential function of the real estate, the perpetual usufructuaries of which they are, does not constitute an unjustified or unfair privilege and, consequently, infringement of the principle of equality. It suffices to refer to the Constitutional Tribunal judgment of 10 March 2015, K 29/13[30], which declares this solution to be compliant with Art. 75 of the Polish Constitution[31].

[29] See: R. Krupa-Dąbrowska, *Prawo użytkowania wieczystego zniknie*, „Rzeczpospolita" („Prawo co dnia"), 4 July 2018.
[30] Journal of Laws 2015, Item 373.
[31] Journal of Laws Item 483 as amended. This provision stipulates that 'public authorities pursue a policy which favours satisfying the housing needs of citizens, in particular, counteracting homelessness, supports the development of council residential construction as well as supports citizens' actions aimed at obtaining their own flat and does not constitute a privilege but is a fair compensation, leveling of opportunities in gaining the right to a flat'.

According to the data of the Ministry of Justice relating to 2018, the number of beneficiaries of the Act will be no less than 2.400,000, because this is the number of land and mortgage registers opened for individual living quarters distinguished as separate with which a share in the perpetual usufruct of land is linked plus the number of land and mortgage registers established for land developed for residential construction.

It should be pointed out that the Act of 29 July 2005, in force until 1 January 2019, allowing owners of premises (buildings) used for residential purposes to lodge an application for the transformation, was not questioned by the Constitutional Tribunal in the scope concerning the claim allowed to natural persons occupying public land for housing purposes.

In the judgment of 10 March 2015, K 29/13[32], the Constitutional Tribunal gave the legislator freedom in shaping the institution of property law and did not question the possibility of cancelling perpetual usufruct, this particular the form of using real estate belonging to another party, from the Polish legal order. It was this position of the Constitutional Tribunal that underpinned the adopted changes concerning the transformation of the right of perpetual usufruct into ownership. In compliance with the recommendations of the Tribunal, the legislator introduced to the Act in question solutions which made the scope of Act include all perpetual usufructuaries of land developed for residential construction and the accompanying structures making proper use of real estate for residential purposes possible[33].

Prevailing in the case law of the Constitutional Tribunal is the view that the principle of the protection of self-government property does not mean a categorical exclusion of a possibility of the interference of the legislator in the ownership rights of *gminy* (communes), including cancelation of ownership. The principal argument given to justify this view is that ownership is not an absolute right and – due to the public nature and origin of the municipal property – communes must be prepared for the limitation of the property rights given to them following the dismantling of the uniform fund of state property[34]. This property constitutes financial coverage for the total of the necessary reforms and not only for the reform of public administration and thus communes have the obligation to bear a part of the costs of these reforms. It suffices to refer to the Constitutional Tribunal judgments: of 17 October 1995, K 10/95; of 9 January 1996, K 18/95; of 12 April 2000, K 8/98.

According to the reasons for the governmental bill, approximately 30.000 hectares of State Treasury land remain in perpetual usufruct (ca. 6% of all State Treasury land). Approximately 32.000 hectares of municipalities' land remain in

[32] Journal of Laws 2015, Item 373.

[33] See: A. Bieranowski, *Uwagi do projektu ustawy o przekształceniu współużytkowania wieczystego gruntów zabudowanych na cele mieszkaniowe we współwłasność gruntów,* „Rejent" 2016, No. 10, p. 102 et seq. and F. Pietrzyk, *Modyfikacja zasad przekształcenia prawa użytkowania wieczystego w prawo własności po wyroku TK z 10 marca 2015,* „Rejent" 2016, No. 6, p. 22 et seq.

[34] Art. 128 of the Civil Code (repealed as of 1 October 1990 by the Act of 28 July 1990, Journal of Laws No. 55, Item 321) stipulated that 'socialist national (public) property is the sole and undivided property of the State'. It was assumed that this provision verbalised the so-called principle of the unity of state property (a uniform fund of state property). Controversies arose whether what was involved was ownership within the meaning of civil law or ownership within the meaning given to this notion by the Constitution of the Republic of Poland. On this subject see, for instance: J. Majorowicz, *Commentary on Art. 128 of the Civil Code* [in:] *Kodeks Cywilny. Komentarz,* Vol. 1, Warszawa 1972, p. 334 et seq.; J. Gwiazdomorski, *Zasada jedności państwowej własności socjalistycznej a osobowość prawna przedsiębiorstw państwowych,* „Państwo i Prawo" 1967, No. 4–5; pp. 591–610, S. Grzybowski, *Sytuacja mienia ogólnonarodowego,* „Państwo i Prawo" 1965, No. 4, pp. 527–539; W. Opalski, *Mienie ogólnonarodowe w świetle prawa cywilnego,* Warszawa 1975.

perpetual usufruct by natural persons and housing cooperatives, which accounts for ca. 43% of all municipalities' land let under perpetual usufruct.

The act is intended to mandatorily transform perpetual usufruct of land developed for residential purposes into ownership of land in favour of owners of single-family houses and apartments in multi-apartment buildings. Yet, fears arise whether the act may not create conditions for circumventing the law to the detriment of public property. Suspicions are voiced that perpetual usufructuaries might be likely to abuse the new regulation by changing the way part of real estate is used solely to be able to benefit from the transformation. Practice seems to support them as cases can be found where a perpetual usufructuary of commercial premises changes their use to residential purposes for the sole purpose of meeting the formal conditions for transformation. In the light of the Construction Law it is simple to make such a change as long as it does not cause changes to the conditions of fire protection, flood protection, labour, health, hygiene and sanitation, environment safety or the value and distribution of construction loads (Art. 71 of the Construction Law[35]).

Practice will show how the provisions of the Act will be assessed by the real estate market. Even now not all perpetual usufructuaries who are investors and entrepreneurs are interested in acquiring ownership of land as they pursue their economic interests adequately using the right of perpetual usufruct.

2. The group of entities covered by the act

The first group of entities covered by the act are perpetual usufructuaries being owners of apartments in blocks of flats and single-family houses and owners of tenement houses unless they sublet flats, because then they would not be satisfying their housing needs. This group includes also perpetual usufructuaries of Warsaw land regained in reprivatisation proceedings even where the decision to return it was issued in violation of the law[36]. The decision of the Reprivatisation Commission repealing the decision to return the property is the basis for striking off the land and mortgage register any entry made on the basis of the repealed reprivatisation decision, decision concerning perpetual usufruct, decision concerning ttransformation of the right of perpetual usufruct into ownership of real estate or on the basis of a notarial deed prepared taking into account the repealed reprivatisation decision, and provides grounds for entry of the capital city of Warsaw or the State Treasury, respectively, as the owner (Art. 40(1) of the Act of 9 March 2017 on Special Rules of Removing the Legal Consequences of Reprivatisation Decisions Concerning Real Estate in Warsaw Issued in Violation of the Law)[37].

[35] Consolidated text: Journal of Laws 2018, Item 1202.

[36] On 9 March 2017 a law was passed on specific rules of removing the legal consequences of reprivatisation decisions concerning Warsaw real estate issued with infringement of law, Journal of Law 2017, Item 718. On this subject see: M. Pytlewska-Smółka, *Usuwanie skutków prawnych decyzji reprywatyzacyjnych – próba analizy,* „Nowy Przegląd Notarialny" 2017, No. 3 (73), pp. 25–32; W. Chróścielewski, *Niektóre zagadnienia związane z funkcjonowaniem Komisji do spraw usuwania skutków prawnych decyzji reprywatyzacyjnych dotyczących nieruchomości warszawskich,* „Zeszyty Naukowe Sądownictwa Administracyjnego" 2018, No. 1, pp. 9–26.

[37] The Act of 20 July 2018 in Art. 18 gave a new reading to Art. 40(1) of the Act of 9 March 2017. It ensures a real influence of the work of the Commission on the legal status of the real estate a legal title to which was obtained in contravention of the law. It should be noted that the change of the reading of Art. 40()1 violates the public credibility of land and mortgage registers (Art. 5 and 6 of the Law on Land and Mortgage Registers), thus thwarting the acquired rights protected by this principle.

The subsequent groups, from the second to the fourth, are made up of persons eligible for the so-called 'delayed transformation', which means that they will become owners (co-owners) of the land at a later date having met the additional conditions specified below.

The second group includes persons who concluded an agreement on the establishment of perpetual usufruct or an agreement transferring the right of perpetual usufruct prior to 1 January 2019, but their application for entry was not examined prior to this date or was not made at all (Art. 24(1) and Art. 24(3) of the Act). These people will become perpetual usufructuaries, though not, as provided for in Art. 24(1) of the Act, from the date the entry is made, but pursuant to the principle of retroactive effect of the entry, which results from Art. 29 of the Act on Land and Mortgage Registers, on the date of submitting an application for the entry. With respect to these persons, the competent authority will issue a certificate confirming the transformation within 4 months of the receipt of a confirmation that this right was entered in the land and mortgage register.

The third group comprises perpetual usufructuaries who live in single-family houses or multi-family buildings erected and put into service pursuant to Art. 59 of the Construction Law after 1 January 2019. This group of perpetual usufructuaries will become owners (co-owners of land) from the day the residential building was put into service (Art. 13(1) of the Act).

The fourth group are perpetual usufructuaries being foreigners. They must satisfy an additional condition required under Art. 1(1) of the Act of 24 March 1920 on the Purchase of Real Estate by Foreigners[38], that is, obtain a permission of the minister in charge of home affairs to purchase real estate. This does not concern, however, foreigners being co-usufructuaries of land connected with the ownership of a particular apartment. It is so because the transformed share is a right of accessory nature in relation to the ownership of an independent apartment for the purchase of which the foreigner had had to obtain a permission from the minister in charge of home affairs earlier. The apartment and the share in the perpetual co-usufruct cannot be the objects of separate transactions. This means that in such a situation the share in perpetual co-usufruct will be transformed, also in favour of a foreigner, by virtue of the Act as of 1 January 2019.

It should be pointed out that where it is to be decided whether a foreigner who is a perpetual usufructuary must obtain a permission to acquire the ownership required under Art. 1(1) of the Act on the Purchase of Real Estate by Foreigners in order to transform the right of perpetual usufruct into ownership, positions vary. The provision in question introduces limitations in the acquisition by a foreigner of ownership (perpetual usufruct) of real estate situated in Poland without a prior permission for the purchase (administrative decision). The permission has to be obtained both to purchase the real estate as a whole and a share in co-ownership (resolution of the Supreme Court of 30 December 1992, III CZP 153/92[39]). The permission is a 'legal condition', that is, a prerequisite of the validity of the purchase of real estate and thus an obligation agreement, for instance, concerning the sale of

[38] Consolidated text: Journal of Law 2017, Item 2278.
[39] OSNCP 1993, No. 6, Item 99.

real estate to a foreigner, becomes effective only upon obtaining the permission of the minister of home affairs. This means that a sale agreement will constitute legal grounds for transferring the ownership of real estate only after the legal condition referred to above (Art. 156 of the Civil Code) has been met. Yet, the sale agreement concluded 'on the condition of obtaining a permission' is not a conditional agreement referred to in Art. 157 of the Civil Code, but an obligation agreement of suspended effectiveness.

Pursuant to Art. 1(1) of the Act on the Purchase of Real Estate by Foreigners, the purchase of real estate by a foreigner requires a permission which is issued, by way of an administrative decision, by the minister in charge of home affairs unless an objection is lodged by the Minister of National Defence and in case of agricultural real estate unless an objection is lodged by the minister in charge of rural development.

Within the meaning of the Act, acquisition is neither transformation of the right of perpetual usufruct nor restoration of ownership by means of an administrative decision, for instance, return of expropriated real estate or obtaining the right of perpetual usufruct of real estate covered by the Decree of 26 October 1945 on ownership and usufruct of land in the capital city of Warsaw[40]. The scope of the Act on the Purchase of Real Estate by Foreigners covers the acquisition of ownership and perpetual usufruct by persons who have not had these rights before, and expanded interpretation is not admissible. This means that the act does not apply to acquisition of limited property rights or rights to real estate other than ownership and perpetual usufruct, such as preliminary agreements and agreements of purely obliging character, tenancy or lease agreements[41]. In Art. 2(2) of the Transformation Act, the legislator answered this question to the disadvantage of foreigners being perpetual usufructuaries of land. The regulation arouses doubts, particularly in the light of Art. 1(4) of the Act on the Purchase of Real Estate by Foreigners, pursuant to which the acquisition of real estate is the acquisition of ownership of real estate or the right of perpetual usufruct, on the basis of any legal act. The word 'any' means that the legislator used the notion of the 'legal act' in the broad sense. Thus, it concerns both the original acquisition and the derivative acquisition by way of acts in law, an acquisition by prescription as well as by inheritance, however with the exclusion of intestate succession or legacy *per vindicationem* for the benefit of persons who would be entitled to intestate succession. Thus, where a foreigner obtained a permission of the relevant minister to acquire perpetual usufruct of land and, in accordance with an agreement, built a single-family house, then in order to transform this right of perpetual usufruct he/she must institute administrative proceedings with the purpose of obtaining a permission from the relevant minister, and where he/she were only a perpetual co-usufructuary of the land and owner of a separate residential unit, he/she would get the transformation by operation of law. It is evident that the regulation causes an unnecessary differentiation of the situation of foreigners being perpetual usufructuaries and perpetual co-usufructuaries of land, and can jeopardise the fundamental ownership-related

[40] Journal of Laws No. 50, Item 279.
[41] And thus correctly S. Rudnicki, *Nieruchomości problematyka prawna,* Warszawa 2013, p. 202. Conversely, F. Hartwich, *Nabywanie nieruchomości w Polsce przez cudzoziemców,* Bydgoszcz 2012, p. 79.

rights of the perpetual usufructuary of land. This is the situation we are dealing with in the interpretation of Art. 2(1) and – in my opinion – what we should strive to do is a teleological interpretation of this provision, assuming that it applies only when a constitutive entry of perpetual usufruct in the land and mortgage register has not yet been made.

3. The scope of application of the Act

The scope of application of the Act is determined by paragraphs 1 and 2 of Art. 1. Paragraph 1 provides that the object of transformation is the right of perpetual usufruct of land developed for residential purposes, while paragraphs 2 defines the notion of land developed for residential purposes, stating that the land developed for residential purposes should be understood as real estate with single– or multi--family buildings erected solely for residential purposes in which at least a half of the space is occupied by residential units or the buildings referred to in subparagraphs 1 or 2, together with outhouses, garages, other structures or constructions allowing for proper and rational use of residential buildings.

The transformation covered also perpetual usufruct acquired pursuant to Art. 7 of the Decree on Warsaw land.

The Act concerns solely land with residential development including single– or multi-family residential buildings where at least half of the units are residential ones. A definition of a single-family residential building is given in Art. 3(2a) of the Construction Law, stipulating that it should be understood as a detached building or a semi-detached building or a terrace or cluster of buildings serving to satisfy residential needs, constituting an independent whole in terms of construction, in which no more than two apartments or one apartment and business premises not exceeding 30% of the total surface of the building can be distinguished.

Due to the fact that in order for the residential building to be properly utilised it is often necessary to make use of an outhouse, garages or other structures, for instance, a perpetual usufructuary built, pursuant to an agreement, a semi-detached house which is partly a residential building and partly business premises in which the perpetual usufructuary conducts his/her business activity. The legislator decided that the transformation should also cover land with outhouses, garages, other structures or constructions allowing for proper and rational use of the residential buildings (Art. 1(2)(3)).

The thus defined objective scope of the transformation gives rise to no doubts. On the other hand, what cannot be deemed correct is the fact that the transformation should cover land with multi-family residential buildings in which at least half of the units are apartments. Obviously, it is not easy to describe precisely the object of the transformation in multi-family residential buildings not used exclusively for residential purposes. Nevertheless, the adopted solution will extend the group of eligible persons to those who (in accordance with agreements) acquired ownership of business premises in these buildings and do not meet their residential needs there at all. Irrespective of this, due to using the phrase 'constitute' (which is obvious on the transformation date), the provision contained in Art. 1(1)(3) does not, however, refer to compliance with an agreement. Consequently, even in case

where the change of the way part of the building is used is be non-compliant with agreements on the purchase of the type of unit – it will anyway be covered by the transformation. As shown by practice, some perpetual usufructuaries of land who own business premises, knowing the bill, have applied for a change of the manner of use from business to residential so that on the transformation date they would satisfy the conditions of transformation[42].

The object of the transformation can also include land developed with other structures specified in Art. 1(2), however then the so-called 'subsequent enfranchisement' can take place. Namely, such real estate must first be divided, with the real estate developed with structures meeting the conditions specified in Art. 1(2) being sectioned off from the original land and mortgage register and a separate land and mortgage register being established for it or the land not meeting the conditions specified in Art. 2(1) of the Act being excluded from the original land and mortgage register.

The legislator was right to introduce this solution, thus preventing a differentiation of perpetual usufructuaries. Otherwise, a perpetual usufructuary who only built a residential building (buildings) on the land would benefit from the act, while one who built also other structures would not.

Pursuant to Art. 1(5), structures and facilities located on the land and referred to in paragraph 2, become, as of the date of the transformation, a component part of the land. The provision does not apply to equipment referred to in Art. 49(1) of the Civil Code[43].

Pursuant to Art. 1(6), the encumbrances on the perpetual usufruct existing on the date of the transformation become encumbrances on the real estate while the encumbrances on the shares in the perpetual co-usufruct of land become encumbrances on shares in the co-ownership of the real estate. The rights connected with the perpetual usufruct become the rights connected with the ownership of the real estate. This concerns, in the first place, persons who have limited property or obligation rights towards the perpetual usufructuaries. As it has already been said above, the right of perpetual usufruct does not expire following the transformation, and thus, consequently, the encumbrances established on it do not expire either (Art. 241 of the Civil Code). Thus, where the right of perpetual usufruct or a share in this right was, for instance, encumbered with a mortgage or a right of way, then after the transformation into ownership, the real estate constituting ownership or a share in the co-ownership of the real estate are encumbered. The necessity of establishing these limited property rights anew after the transformation is thus eliminated.

Property rights encumber each and every owner of the real estate at any time, while personal rights (obligations) are inure to (apply against) a specific person.

Following the transformation, the perpetual co-usufructuary will become the co-owner of the land in the same share in which he/she was the co-usufructuary (Art. 1(4) of the Act).

[42] See: F. Pietrzyk, *Kontrowersje wokół przekształcenia prawa użytkowania wieczystego gruntów zbudowanych na cele mieszkaniowe w prawo własności gruntów,* „Rejent" 2017, No. 12, p. 71.

[43] Art. 49(1) of the Civil Code: 'Equipment serving to bring in or drain off liquids, steam, gas, electric energy as well as other similar equipment does not belong to the component parts of real estate provided that they are part of the enterprise'.

4. Mandatory exclusion from transformation

Pursuant to paragraphs 1–3 of Art. 1 of the Act, excluded from the transformation is land (owned by the State Treasury or municipalities and remaining under perpetual usufruct) under tenement houses, developer blocks of flats in which not even one apartment was separated. The transformation will become possible only after the building has been consigned for use (Art. 59 of the Construction Law and Art. 13 of the Act). An exclusion of this type does not constitute an omission on the part of the legislator. It was deliberate, because, as demonstrated by the reasons for the bill, authoritative interference into ownership rights of self-governments is a justified by the implementation of the constitutional value of satisfying the citizens' residential needs. It is impossible to share the view expressed by some authors that the transformation concerning land under tenement houses in which owners lease out apartments will be excluded by law, and thus they will be excluded from the transformation because they do satisfy their own housing needs in the whole building and it would be them that would benefit from the law. The benefit that they would derive from the transformation would not be transferred onto tenants, buyers of apartments or houses. Conversely, having a stronger right, the owner of a multi-family building (a tenement house) could raise rent. Moreover, a failure to exclude this land from enfranchisement would often thwart the actions of the Reprivatisation Commission vis-à-vis people who regained whole multi-family buildings as a result of incorrect reprivatisation decisions[44].

Such an interpretation of the provisions of Articles 1 and 2 of the Act, specifying the eligible persons and the scope of application of the Act cannot be justified. The exclusion from the enfranchisement of land under tenement houses in which the owners lease out apartments would have to result from an explicit wording of the Act, expressing such an intention of the legislator and which cannot be only presumed. Meanwhile, irrespective of the fact that such an intention of the legislator not only does not follow from any provision of the Act, but would be contrary to the aim of the Act, which was to transform perpetual usufruct of land developed for housing purposes, irrespective of whose housing needs are satisfied in these buildings: the owner's or the tenant's.

Sharing the view I am criticizing would lead to consequences contrary to those assumed by the legislator. This is illustrated, for instance, by the following facts: a perpetual usufructuary bought two residential buildings on one site. He/she lives in one of them with his/her family. The second is temporarily leased out until the children (minor) grow up. Then he/she will make the currently leased building available to his/her children to secure their housing needs and the families they will establish. If only it were possible to transform the land under the building inhabited by the perpetual usufructuary, it would be necessary to divide the land, to separate the site with the leased building. Then, part of the land would be excluded from enfranchisement which would thwart the legislator's plan to abolish the existing right of usufruct and significantly limit the establishment of new rights of usufruct.

[44] See: E. Świętochowska, *Likwidacja użytkowania wieczystego przesądzona,* „Gazeta Prawna", 18 June 2018.

In Art. 1(7), land developed for housing purposes situated in the territory of sea ports and harbours within the meaning of Art. 2(2) of the Act of 20 December 1996 on Sea Ports and Harbours[45] were *ex lege* excluded from the transformation.

5. Certificate as a document confirming the transformation and constituting the basis for disclosure of ownership in the land and mortgage register

Pursuant to Art. 4 of the Act, it is a certificate[46] confirming transformation of the right of perpetual usufruct into ownership of the land, issued by the authorities that until now collected fees for its usufruct (the 'relevant authority' within the meaning of Art. 4(2)), that constitutes the basis for disclosing the ownership of land in the land and mortgage register as well as in the register of land and buildings.

In the case of land owned by territorial self-government units, these relevant authorities are the *voit,* mayor, board of the *poviat* or *voivodeship*, respectively (Art. 4(1)(3)), while in relation to real estate owned by the State Treasury – the *starost* performing tasks within the scope of government administration (Art. 4(1)(1)) or, alternatively, the director of the local branch of the National Centre for Agriculture Support or the director of the regional branch of the Military Property Agency or the director of the Board of Housing Resources of the Minister of Home Affairs and Administration in case of land in relation to which the owners' rights are exercised by these entities (Art. 4(1)(2) and Art. 4(1)(4) of the Act).

These authorities issue a certificate *ex oficio,* not later than within 12 months from the transformation date or at the request of the owner within 4 months from the day of the receipt of the request.

Where the usufructuary is a foreigner (Art. 2(2) of the Act), the certificate should be issued within 4 months after the foreigner presents the final permission.

Certificates issued *ex oficio* should be sent to the hitherto perpetual usufructuaries at the address indicated in the register of land and buildings or to any other address to which correspondence concerning perpetual usufruct was delivered prior to the transformation date. Service of the certificate to such an address is deemed effective (Art. 2(6)).

In fact the certificate confirms a change of the type of right to land, which occurred by operation of law, but does not establish this right. The legislator deliberately refrained from confirming the transformation with an administrative decision so that in case of co-usufruct the problems encountered before would not arise. Namely, an appeal by even only one of the co-holders of the right could thwart the aim of the transformation, blocking the acquisition of ownership by the remaining eligible persons.

Pursuant to Art. 4(3) of the Act, the certificate contains a designation of the real estate, whether land or apartment/house, according to the register of land and buildings as well as land and mortgage registers kept for these properties. In the case of a foreigner, the certificate contains also the designation and date of the permission from the minister in charge of home affairs, as referred to in the Act of 24 March 1920 on the Purchase of Real Estate by Foreigners.

[45] Journal of Laws 2017, Item 1933.

[46] A stamp duty of 50 PLN is collected for the certificate confirming the transformation issued at a request (Sect. 20a of the Schedule to the Stamp Duty Act, Journal of Laws 2018, Item 1044).

The certificate confirms the transformation, informs about the obligation to pay annual transformation fees, about their value and the period for which they should be paid, about the rules for paying an aggregate fee. In addition, the certificate should also include information about the possibility the new owner has of lodging a request for determination of the value and period of paying the fees by way of a decision if the new owner does not agree with the relevant information provided in the certificate (Art. 4, paragraphs 3 and 4). The certificate provides grounds for entry in Section III of the land and mortgage register of a claim concerning annual transformation fees with respect to each owner of the property at any time.

The relevant authority passes the certificate to the court keeping the relevant land and mortgage register, within 14 days from the day of its issuance. In case where the transformation of the right of perpetual usufruct is made in favour of a foreigner, the certificate is sent also to the minster in charge of home affairs within 7 days from the day of its issuance (Art. 4(7)).

The certificate is not an administrative decision. The court is obligated to check whether it complies with the real estate designation in Section 'I-O' of the land and mortgage register and with the legal status resulting from the land and mortgage register. Where it is found not to be in compliance, three solutions are possible: the party may be requested to eliminate the defects within a week under the sanction provided for in Art. 130 of the Code of Civil Procedure[47]; the application may be dismissed on the basis of Art. 626^9 CCP due to an obstacle in the substantive law meaning or the case may be ended, with the authority which sent the certificate being notified of failure to make an entry explaining the cause.

In my opinion, the first solution seems to conform best to the construction of the land and mortgage register proceedings and the official procedure of making entries adopted by the legislator. Yet, given the number of cases that will come to land and mortgage register courts with the certificates (2.400,000 for the whole country) and the possible cases of non-compliance between certificates and the status of the real estate resulting from the land and mortgage register, courts are more likely to apply the third solution, which is used with respect to certificates from the Register of Land and Buildings on a change of data concerning the real estate.

The court enters ownership of the land in land and mortgage registers as well as enters the claim concerning annual fees for transformation of the right *ex oficio*[48].

Where the transformation concerns a share in perpetual co-usufruct of land connected with a separate ownership of residential units, the entries referred to in paragraph 1 are made in the land and mortgage register kept for the residential unit. Pursuant to Art. 5(2), separating the ownership of residential units after 1 January 2019 in a building located on land covered by the transformation, the court *ex oficio* discloses the claim for the fee in the land and mortgage register kept for the residential unit. Having disclosing the claim for the fee with respect

[47] Act of 17 November 1964 – Code of Civil Proceedure (consolidated text: Journal of Laws 2018, Item 1360 as amended), hereinafter 'CCP'.

[48] The court sends the notification of the entry to the address indicated in the certificate. Service of the notification to this address is deemed effective. There is no court fee payable for making entries in the land and mortgage register (Art. 5(1) of the Act).

to all the shares in the co-ownership of land, the court acting *ex oficio* strikes off the claim for the fee from the land and mortgage register kept for the plot of land.

In accordance with Art. 6, when the person in whose favour the right of perpetual usufruct was transformed does not agree with the information about the value and period of paying annual transformation fees contained in the certificate, it can apply to the relevant authority, within 2 months from the date of service of the certificate, a request for determining the value and the period of paying the fees by way of an administrative decision. Until completion of the proceedings, the fee is paid in the amount indicated in the certificate. The value of the fee determined in the proceedings is effective from the day of the transformation. In case of an overpayment the relevant authority credits it for future fees and informs the applicant about it. In case of an underpayment, the authority notifies the applicant of the obligation to make an additional payment. If a decision confirming lack of the obligation to pay the fee is issued, the relevant authority passes the decision to the court keeping the land and mortgage register within 14 days of the day when the decision became final. The decision constitutes grounds for striking off the entry of the claim for the fee in Section III of the land and mortgage register (Art. 6(4) of the Act).

6. Fees for transformation of the right of perpetual usufruct into ownership

The transformation has been and is in fact done for a fee. Annual fees have been and are a derivative of the value of the real estate. The hitherto practice has shown that the value of the updated annual fee keeps growing, in particular in large urban agglomerations in which the value of land grows considerably. This has generated the discontent of the owners of apartments, reflected in complaints, and constituted one of the reasons for the change of the right of perpetual usufruct (as a temporary right) into ownership, which is not being subject to temporary limitations. The principles and procedure of paying such fees are regulated by Art. 7 of the Act.

Persons who became owners (co-owners) of land by operation of law, are obliged to pay the sums due for the acquisition of ownership in the form of fees payable regularly every year for a period of 20 years. As to the principle, the value of the fee will equal the annual fee for perpetual usufruct which would be effective on the day of transformation. This principle was proposed as soon as in the bill prepared on 8 August 2016. Thus, the legislator guaranteed to self-government units an adequate period of time for planning and updating the fees even in 2018. If self-government units failed to benefit from the right to cyclically update the fees by the time the bill became law, the provisions of the Act do not interfere with their decisions in this area in any way.

The thus established principle of payment takes into account the recommendations resulting from case law of the Constitutional Tribunal on reconciling the interests of the hitherto owners of the land (the State Treasury and municipalities) with the interests of perpetual usufructuaries, while respecting the principle of financial independence of self-governments. The legislator's assumption was to ensure optimum revenues from transformation with a simultaneous benefit enjoyed by beneficiaries.

The fee for transformation of the right of perpetual usufruct into the right of ownership is to constitute compensation for the revenue from fees for the perpetual usufruct lost by the State Treasury and municipalities. The payment is to ensure revenues at a level comparable to the hitherto fee for transformation of the right of perpetual usufruct established on the principles, said fee determined according to the provisions of the Act of 29 July 2005. Its value will be, in principle, equivalent to that of the fee for perpetual usufruct which would be in force on the transformation date, with the exception of the situations: (1) in which on the transformation date the applicable annual fee is the fee set for the first or second year from the update, in accordance with Art. 77(2a) of the Act on Real Estate Management, equal to the annual fee for perpetual usufruct in the third year from the update (Art. 7(3) of the Act); (2) in which the right of perpetual usufruct was established or transferred in the period from 1 January 2018 to 31 December 2018, the value of the fee equals the annual fee for perpetual usufruct which would apply, in accordance with the provisions of the agreement, from 1 January 2019 (Art. 7(4) of the Act).

The legislator assumed that the total amount which paid for the transformation concerning a given real estate would not differ from the mean amount which public entities currently collect applying the principle resulting from Art. 69 of the Act on Real Estate Management. Pursuant to this provision, an amount equal to the value of the right of perpetual usufruct of the real estate, determined as at the date of sale (difference between the market value of the land and the value of the right of perpetual usufruct) is applied for the price of the land sold to the perpetual usufructuary. The thus established principle of payment does not constitute a novelty for perpetual usufructuaries as it follows existing practice. Until 1 January 2019 they paid annual fees for perpetual usufruct. Some of them will even benefit as the period of paying the fees will be shortened. In the majority of cases the 20-year period will be much shorter than the period left to the end of the perpetual usufruct period.

7. Discounts

The system of discounts which will be applied from 1 January 2019 is based on two sources of legitimacy: statutory, specified in paragraphs 1–6 of Art. 9 of the Act of 20 July 2018, concerning land owned by the State Treasury and resolution-based, concerning land owned by self-government units. To achieve the objective of the Act, the system came to cover in particular natural persons being owners of apartments and single-family houses, as well as housing cooperatives.

Pursuant to Art. 9(5) of the Act, the decree of the *voivode* (regarding land owned by the State Treasury) and the resolution of the board or the local parliament (regarding land owned by a territorial self-government unit) specify in particular the conditions of granting discounts and the percentage rates, taking into account, in particular: the use of the property solely for residential purposes, the period of paying the annual fees for perpetual usufruct of land, the household income, the family situation, the average unemployment rates in individual *poviats*.

A holder of a cooperative member's right to an apartment enjoys a discount in the form of a relief in the payments by virtue of a share in the costs of operation of the building. The value of the relief corresponds to the value of the discount on

the fee granted to the housing cooperative, pro rata the floor area of the apartment occupied by the persons entitled to the discount.

The act also provides for a possibility of granting discounts on the fee for a given year to natural persons who own residential single-family buildings or apartments or to housing cooperatives.

As for the land which, prior to 1 January 2019, was property of the State Treasury, this power rests with the *starost,* as part of discharging central administration tasks. With respect to real estate owned by territorial self-government units it rests with the *voit,* mayor, or boards of the *poviat* or *voivodeship*. A discount is given on the basis of a decree passed by the *voivod* or a resolution adopted by the municipal or *poviat* council or the *voivodeship* parliament.

A mandatory discount applies to natural persons who made a one-off payment of the fees, on the total amount of the fees with respect to the real estate which was, prior to 1 January 2019, property of the State Treasury (they are entitled to a 50% discount).

To solve the question of establishing separate ownership of apartments on land let under perpetual usufruct for development with multi-family buildings, where ownership of the apartment was separated after 1 January 2019, an obligation was established that the owner of the premises pay fees pro rata the share in the ownership of land (Art. 11(3)).

Incentives aim to encourage one-off payment of the fee. A system of mandatory discount was adopted for natural persons and housing cooperatives operating on land owned by the State Treasury prior to the transformation.

Pursuant to Art. 9(3) of the Act in point, in case where a one-off payment is made for the transformation of land owned by the State Treasury, natural persons who own residential single-family buildings or residential units, or housing cooperatives have the right to a discount of: 60% if the payment is made in the year in which the transformation took place; 50% if the one-off payment is made in the second year following the transformation; 40% if the one-off payment is made in the third year following the transformation; 30% if the one-off payment is made in the fourth year following the transformation; 20% if the one-off payment is made in the fifth year following the transformation; 10% if the one-off payment is made in the sixth year following the transformation.

An indirect incentive to make the one-off payment comes from the fact that the discount on the one-off payment is reduced in each subsequent year.

The person obliged to pay the fee has, at any time when the obligation to pay it exists, the right to apply to the relevant authority requesting a one-off payment of all fees in the amount remaining to be paid.

The buyer of the real estate can apply to the relevant authority for a certificate confirming the value and the remaining period when the fees are to be paid. The relevant authority can institute proceedings in this case *ex oficio*. This means that possible disposal of the real estate by the beneficiary before the lapse of the period for which the beneficiary would be obliged to pay the transformation fees, where the hitherto owner (the State Treasury, a territorial self-government unit) has a claim for the fee entered in Section III of the land and mortgage register kept for the real estate with respect to each subsequent owner, will not diminish the revenues of the hitherto owners.

If ownership of the apartments in a building located on land covered by the transformation was separated after 1 January 2019, the obligation to pay the fee encumbers the apartment owner pro rate his/her share in the co-ownership of the land connected with apartment ownership.

The fees are subject to indexation, since over 20 years the real value of money as well as the value of the real estate covered by the transformation can change. This is intended to help avoid a situation in which the fees cease to be adequate to the value of the acquired right and no longer ensure due remuneration to the hitherto owners of the real estate.

The Central Statistical Office of Poland is not able to announce an index of changes in land prices which would prove helpful in indexation. Consequently, indexation will be made in accordance with the principle specified in Art. 5(4) of the Act on Land Management, i.e. by applying the index of prices of consumer goods and services announced by the president of the Central Statistical Office.

Pursuant to Art. 10(3), the relevant authority can refuse indexation only where it concludes that the indices referred to in Art. 5 of the Act on Real Estate Management did not change from the day of transformation or the last indexation to the day when the application was made.

8. Gratuitous transformation

Pursuant to Art. 8 of the Act, transformation of the right of perpetual usufruct of land with residential development can be gratuitous in case of national parks, natural persons, their successors and housing cooperatives which/who have paid annual fees for the whole period of perpetual usufruct or obtained perpetual usufruct on the basis of the Decree of 26 October 1945 on ownership and usufruct of land in the capital city of Warsaw or other legal titles, in exchange for the expropriation or take-over of land in favour of the State Treasury before 5 December 1990.

There are legal reasons for the exemption of this group of entities, namely: national parks do not pay fees for perpetual usufruct and in case of the entities in the second group which paid the fees for the whole period of perpetual usufruct the obligation to pay the fees has already expired; as for the remaining entities, the former owners of land in Warsaw (prior to their municipalisation in 1945) or their legal successors were granted the right of perpetual usufruct; similarly, hitherto owners were granted perpetual usufruct of substitute real estate as compensation for the expropriation and the lost ownership of land if they were expropriated or their land was taken over in favour of the State Treasury prior to 5 December 1990. As a consequence, thanks to the transformation they regain the lost ownership. It should be pointed out that the quoted Art. 8 of the Act is nothing new, as similar regulations can be found in Art. 76(2) of the Act on Real Estate Management and Art. 5 of the Act of 29 July 2005.

9. 'Delayed' transformation of the right of perpetual usufruct into the right of ownership (short note)

Anticipating that in practice situations may occur in which land being in perpetual usufruct will be developed after 1 January 2019 with single– or multi-family

buildings, in accordance with local spatial development plans or a decision on the conditions of land development, the legislator rightly covered them with the regulation by introducing in Art. 13 of the Act the notion of the so-called delayed transformation. If the conditions described in this provision are satisfied, the right of perpetual usufruct is transformed into land ownership from the day the residential building is consigned for use[49].

10. The problem of giving the beneficiaries of the transformation the right to perpetual usufruct into the right of ownership 'assistance' in the context of EU law (short note)

The acquisition of ownership of real estate as a result of transformation of the right of perpetual usufruct according to the rules established in the act is undoubtedly an acquisition on concessionary conditions. Thus, all perpetual usufructuaries benefit from state aid, the scope of which must comply with EU law. In order to maintain this compliance and to avoid the risk of violating the principles of granting aid laid down in European law, the legislator introduced in Art. 14 of the Act the obligation to take into account provisions on state aid in the context of transformation of the right of usufruct. Granting aid of this kind is possible provided the *de minimis* aid conditions specified in Commission Regulation (EU) No. 1407/2013 of 18 December 2013 on the application of Articles 107 and 108 of the Treaty on the Functioning of the European Union to *de minimis* aid are satisfied. *De minimis* aid amounts to 200,000 euro. As long as it is not exceeded, there is no need to notify the European Commission.

What is important in the context of the principle of extending state aid is the fact that the perpetual usufructuary uses the apartment or house in which he /she lives for work or for doing business. As a rule, the beneficiaries of the *ex lege* transformation are natural persons. Even if they are entrepreneurs within the meaning of the provisions on state aid, the value of the aid granted to them will not exceed *de minimis*.

Only if in single-family buildings built on land of substantial value business activity is conducted by a natural person or developers for whom a substantial share in the right to land is transformed, can the aid limit be exceeded. However, the legislator foresaw such a situation and, in order to eliminate the extension of aid, introduced in Art. 14(2) a possibility for the authority to determine an additional payment to the market value of the land covered by transformation as at the transformation date. The additional payment will correspond to the difference between the value of the extended aid and the value of *de minimis* aid. The value of the additional payment is set *ex officio* in an administrative decision on the basis of an appraisal report the cost of which is borne by the person obliged to make the additional payment.

[49] Due to the reference to the appropriate application of Art. 2(2) of the Act contained in Art. 13, the scope of application of the transformation will also cover the perpetual usufruct of land developed by a foreigner who must satisfy an additional condition required by Art. 1(1) of the Act of 24 March 1920 on the Purchase of Real Estate by Foreigners (i.e. Journal of Laws 2017, Item 2278), that is, obtain a permission of the minister in charge of home affairs for the acquisition of the real estate.

11. The possibility of choosing the legal regime of the transformation

In Art. 26, the legislator introduced a possibility of choosing the legal regime applicable to transformation of the right of perpetual usufruct by perpetual usufructuaries who submitted applications for the transformation pursuant to the provisions of the Act of 29 July 2005, and the cases were not finished by 31 December 2018. The condition for being given the choice of regime is that the land covered by the applications should meet the conditions for *ex lege* transformation. Since according to the laws applicable before 31 December 2018 some self-government unis adopted resolutions granting a discount of over 50% on fees and it is not known whether any discounts will be granted on the *ex lege* transformation after 1 January 2019 and how high they will be, it is obvious that it is in the interest of the beneficiaries to be given the right to choose the conditions of the transformation. Pursuant to Art. 26(1), proceedings concerning transformation of the right of perpetual usufruct of land with residential development, within the meaning of Art. 1(2), instituted on the basis of the Act of 29 July 2005 and not ended with a final decision by 31 December 2018 are discontinued unless the perpetual usufructuary or co-usufructuaries, the total of the shares of whom amounts to at least half, submit by 31 March 2019 a declaration on continuing the proceedings on the basis of the Act of 29 July 2005. If the proceedings are not ended by 31 December 2021, the transformation takes place as of 31 January 2022.

Abstract

Helena Ciepła, *Transformation of the right of perpetual usufruct into ownership*

The article presents the most important provisions of the Act of 20 July 2018 on Transformation of the Right of Perpetual Usufruct of Land Developed for Housing Purposes into Ownership of Land. The transformation in question will take place ex lege as of 1 January 2019. This presentation is preceded by information about the possibility of transformation of the right of perpetual usufruct into ownership according to laws in force until 31 December 2018.

Keywords: *land, real estate, right of perpetual usufruct, ownership, transformation of a right, land registers, principle of public credibility of land and mortgage registers, reprivatisation, reprivatisation decision, appraisal report, fee, property right, civil law*

Streszczenie

Helena Ciepła, *Przekształcenie prawa użytkowania wieczystego w prawo własności*

W artykule zostały przedstawione najistotniejsze unormowania ustawy z 20.07.2018 r. o przekształceniu prawa użytkowania wieczystego gruntów zabudowanych na cele mieszkaniowe w prawo własności tych gruntów. Przekształcenie takie nastąpi ex lege z dniem 1.01.2019 r. Zostały one poprzedzenie informacją o możliwości przekształcenia prawa wieczystego użytkowania w prawo własności według stanu prawnego obowiązującego przed wymienioną datą.

Słowa kluczowe: *grunt, nieruchomość, prawo użytkowania wieczystego, prawo własności, przekształcenie prawa, księgi wieczyste, rękojmia wiary publicznej ksiąg wieczystych, reprywatyzacja, decyzja reprywatyzacyjna, operat szacunkowy, opłata, prawo rzeczowe, prawo cywilne*

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PRAWO W DZIAŁANIU
LAW IN ACTION
36/2018

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Adjudicating a ban on contacts with a child in the practice of Polish courts

The Family and Guardianship Code[1] provides in Art. 113(1) for the right of the parents and the child to maintain contact, making it simultaneously their obligation[2]. The right to maintain regular, personal relations and direct contact with both parents unless (in exceptional cases) contrary to the child's interests, is guaranteed in Art. 9 and 10 of the UN Convention on the Rights of the Child of 20 November 1989[3]. The right to contact between relatives is treated as an element of the right to family life referred to in Art. 8 of the Convention of 4 November 1950 for the Protection of Human Rights and Fundamental Freedoms[4]. These conventions were ratified and promulgated in the Polish Journal of Laws. Pursuant to Art. 91 in connection with Art. 87(1) of the Constitution, they are a source of law universally in force in the Republic of Poland, constituting part of the Polish legal order[5].

In case *Wielgosz vs. Poland*, the European Court of Human Rights (hereinafter 'ECtHR') stated, among others, that 'respect for family life under Article 8 of the Convention thus implies that this contact should not be denied unless there are strong reasons which justify such an interference'.

Art. 113[6] orders the court to forbid parents to maintain contact with a child in case maintaining them 'seriously threatens or infringes on the child's good', which is accordingly applicable to situations of other persons entitled to maintain contact with the child pursuant to Art. 113[6] FGC[7].

The Institute of Justice carried out a survey of case law of ordinary courts (Family and Minors Departments of District Courts[8]), covering the files of 181 cases in which

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1 Law of 25 February 1964 Family and Guardianship Code (consolidated text: Journal of Laws of the Republik of Poland Dziennik Ustaw 2017, Item 682 as amended), hereinafter 'FGC'.

2 J. Zajączkowska, *Legal aspects of parent-child contact problems in Poland*, "Prawo w Działaniu" (Law in Action) 2017, No. 32, p. 98.

3 Journal of Laws of the Republik od Poland Dziennik Ustaw 1991, No. 120, Item 526 with amendments.

4 Journal of Laws 1993, No. 61, Item 284 with amendments.

5 W. Skrzydło, *Konstytucja Rzeczpospolitej Polskiej. Komentarz,* Kraków 1999, pp. 83–88.

6 ECtHR decision of 11 May 1999, LEX No. 41089.

7 E. Holewińska-Łapińska, *Establishment of contacts between grandparents and minor grandchildren in the practice of Polish courts,* „Prawo w Działaniu" (Law in Action) 2018, No. 34, pp. 225–240.

8 A ban on contact can be adjudicated also in a judgment establishing parenthood, in a divorce judgment, in a separation judgment, in a judgment declaring a given child's parents' marriage null and void. Cases of this kind were not included in the file examination discussed in this paper.

a ban on contact with a child was adjudicated and the judgment became legally binding by the end of 2017[9]. This paper contains the most important findings of the survey[10].

I. GENERAL CHARACTERISTICS OF THE BAN ON CONTACT WITH A CHILD

1. Evolution of the regulation of the ban on contact in Polish law (1946–2009)

What had long prevailed in Poland was a conviction that where a minor child's parents live in separation, the good of the child requires coherent upbringing provided in a consistent and firm way by one of the parents, the one the child was 'entrusted to'[11]. This position affected the concept of the maintenance of contact with a child by the second parent.

The normative acts codifying family law after the end of World War II[12] treated maintenance of contact narrowly, as a possibility of visitation. For instance, speaking about extramarital children of established parenthood Art. 74(1) of the Decree *Prawo rodzinne* (Family Law) declared that 'the fact that parental authority is entrusted to one of the parents does not deprive the other parent of the right to visit the child'[13]. Where divorce was adjudicated, Art. 31(1) Point 3 of the Decree *Prawo małżeńskie* (Marriage Law) stipulated that the court would ensure to a parent to whom a child was not entrusted, but who was not deprived of parental authority, 'supervision' over the upbringing and education of the child as well as the possibility of maintaining personal contact with the child. Point 4 stipulated that the court could grant 'a visitation right' to see the child also to the parent deprived of parental authority. Art. 44(2) of the Decree *Prawo rodzinne* (Family Law) stipulated that the guardianship authority could grant to parents deprived of parental authority 'the visitation right' to see the child. Thus, deprivation of parental authority covered also loss of the right to visit the child.

The Family Code (Law of 27 June 1950[14]) in force since 1 October 1950, represented a different concept. Apart from the fact that instead of the 'visitation right' it

[9] 111 randomly chosen district courts were asked to provide records of the last 10 cases closed in a given court. In 50 courts there were no cases meeting the survey criteria. Records that satisfied the criteria came from 61 courts, the number of the cases in the majority of the courts being lower than 10, even when a several-year period of adjudication was taken into account.

[10] The report (in the Polish language "Orzeczenie zakazu kontaktów z dzieckiem") is available on https://www.iws.org.pl/pliki/files/IWS%20Holewi%C5%84ska%C5%81api%C5%84ska%20E.Orzeczenie%20zakazu%20kontakt%C3%B3w%20z%20dzieckiem%281%29.pdf

[11] On the legal situation of the child not entrusted to any parent by the court, see: A. Łapiński, *Ograniczenia władzy rodzicielskiej,* Warszawa 1975, pp. 147–174. The author refers (*Ograniczenia*…, p. 150) to the significant statement made by Bronisław Dobrzański that the parent to whom the continuation of parental authority was not entrusted 'maintains solely *nudum nomen* of this authority'.

[12] This refers in particular to the Decree of 25 September 1945 'Marriage Law', Journal of Laws 1945, No. 48, Item 270, as well as the Decree of 22 January 1946 'Family Law', Journal of Laws 1946, No. 6, Item 52 with the rectification in Journal of Laws 1946, No. 16, Item 113. On the subject of amendments to family legislation see: P. Fiedorczyk, *Unification and codification of family law in Poland* (*1945–1964*), Białystok 2014.

[13] The reasons for this empowering provision result from the fact that 'entrusting a child to one parent is a consequence of the existence of certain life-related necessities and thus cannot in any way restrict the right of the other parent to maintain personal contact with their child', as provided form in Art. 74(1) of the draft following Art. 326 of the Swiss Civil Code (of 1907). I quote after *Prawo Rodzinne. Dekret z 22 stycznia 1946. Tekst dekretu z objaśnieniami, motywami ustawodawczymi i tezami społeczno-politycznymi – Przepisy wprowadzające – Przepisy związkowe*, M. Kamiński (ed.), Kraków (no publication date), p. 65.

[14] Journal of Laws 1950, No. 34, Item 308, hereinafter 'FC'.

provided for 'personal contact', it did not stipulate automatic ban on personal contact as a consequence of loss of parental authority. This resulted from the reading of Art. 63 of FC: 'Where the good of the child so requires, guardianship authority will forbid personal contact with the child to parents deprived of parental authority'.

It was commented that what followed from this provision was that: 'in principle each of the parents, and thus even the parent deprived of parental authority, has the right to the visitation of the child unless the guardianship authority overtly deprives this parent of parental authority'[15]. This position was confirmed by the Supreme Court in its judgment of 28 August 1951, C 154/51[16], where the Court held that the good of the child will require adjudication of a ban on personal contact where there is a justified fear that it might be harmful to the child to see the parents (or one of them). The adjudicating panel of the Supreme Court treated 'visitation of the child' as a synonym of 'personal contact'. However, B. Dobrzański explained in the commentary on Art. 63 FC that the scope of 'personal contact' was broader and included, apart from 'child visitation', also correspondence[17].

What was then indicated as causes of harmful influence on the child that might justify a ban on personal contact were, for instance, 'negative influence on the child's upbringing', 'instilling asocial views in the child', 'making the child resistant to the authority of the other parent exercising parental or guardianship authority', as well as 'demoralizing the child (…) by behaviour or actions'[18].

The contents of Art. 63 FC were repeated in Art. 113 of the Family and Guardianship Code[19] (in its initial version), the only difference being that the notion of 'guardianship authority'[20] was replaced with the term 'guardianship court', which performed the function of the 'guardianship authority' also before this code took effect. Commentaries on this provision repeated the most important conclusions made on the interpretation of Art. 63 FC[21]. The majority of research studies point out that

[15] And thus B. Dobrzański in the comment to Art. 63 FC (*Komentarz do art. 63 k.r.*) [in:] *Kodeks rodzinny. Komentarz,* M. Grudziński, J. Ignatowicz (eds.), Warszawa 1959, p. 65.

[16] Reference in B. Dobrzański, *Kodeks*…, p. 564.

[17] B. Dobrzański, *Kodeks*…, p. 565. Later other authors accepted the above and expanded the scope of the notion (covering with it, for instance, telephone calls).

[18] B. Dobrzański, *Kodeks*…, p. 564.

[19] Journal of Laws 1950, No. 9, Item 59.

[20] The bill regulating relations resulting from kinship or guardianship, prepared by the Codification Committee, which worked in Poland in the 1930s, provided for state courts adjudicating in cases relating to deprivation or restoration of parental authority. The remaining cases which the draft concerned were to fall within the competence 'state guardianship authority', state office of a character close to a relevant court. The bill prepared by the Codification Committee did not become law. In the post-World War II period discussion ensued in Polish science on the concept of 'guardianship authority'. In the codified law, the term 'guardianship authority' was maintained and identified as the court. As maintained by Adam Zieliński (A. Zieliński, *Sądownictwo opiekuńcze w sprawach małoletnich,* Warszawa 1975, p. 41), this was aimed at avoiding the restructuring of the whole system of substantive law in case the structure of state authorities performing guardianship functions were to change. (A synthetic survey of organisational regulations of 'guardianship authority' in the legislations of other countries see: A. Łapiński, *Ograniczenia władzy rodzicielskiej,* Warszawa 1975, pp. 26–51 and A. Zieliński, *Kodeks*…, pp. 34–40). Such a change did not follow (a guardianship office was not established). However, yet in the late 1960s, Andrzej Stelmachowski postulated the establishment of an office for youth cases modeled on the solutions of German *Jugendamts,* 'with a reservation that their style of action would have to take into account the role of the civil, social factor to a much greater extent' (A. Stelmachowski, *O koncepcję opieki nad małoletnim,* „Studia Cywilistyczne" 1969, Vol. XIII–XIV, p. 339).

[21] For instance, B. Dobrzański in the commentary on Art. 113 FGC [in:] *Kodeks rodzinny i opiekuńczy. Komentarz,* M. Grudziński, J. Ignatowicz (eds.), Warszawa 1966, p. 626, the same author in the commentary on Art. 113 FGC [in:] *Kodeks rodzinny i opiekuńczy. Komentarz,* B. Dobrzański, J. Ignatowicz (eds.), Warszawa 1975, p. 692 (adding that 'personal contact with the child does not constitute an element of parental authority'), similarly, J. Ignatowicz [in:] *Kodeks rodzinny i opiekuńczy z komentarzem,* J. Pietrzykowski (ed.), Warszawa 1990, p. 470.

the right of the parent to personal contact with the child does not belong to parental authority while the ban 'is not *a priori* reduced as to its duration'[22].

The ban on 'personal contact' with the child, foreseen in Art. 113 FGC (since 1 March 1976, Art. 113(1) FGC[23]) has not been given particular attention in literature. The earlier remarks of the commentators (referred to above) were supplemented by the statement that contact with the parent can threaten the good of the child in case of 'a demoralizing influence of the mother or father deprived of parental authority might appear (…) exerted not only through directly teaching the child immoral principles or dislike towards the other parent but also through blameworthy conduct of the parent concerned which might provide a bad model for the minor'[24]. It was pointed out, in general terms, that the ban should constitute a reaction of the court to a threat to the mental or physical condition of the child, resulting, for instance, from excessive chastening, teaching of asocial behaviour models, demoralisation, instilling hatred towards the other parent, because in situations of this kind any form of contact may prove undesirable[25].

It was emphasised that application of Art. 113(1) FGC is likely to be very rare due to the fact that although it concerns parents, yet 'this adjudication works both ways' while the child has 'the right not to be separated from the parents' unless it is necessary for the best interest of the child' (Art. 9(1) of the Convention on the Rights of the Child). Consequently, a ban on direct contact 'should in practice be used only where any form of contact with the child might objectively be contrary to the good of the child'[26].

The exceptional character of the situation justifying a ban on a parent's personal contact with the child was confirmed by the position adopted by the Supreme Court in its decision of 7 November 2000, I CKN 1115/00[27]. The justification for banning the contact pointed out in the decision included a threat to life, health, security of the child or a demoralizing influence of the parent on the child.

The regulation of contact with the child changed dramatically[28] from 13 June 2009[29]. The fact that from that date the Code has contained examples of the forms of contact (Art. 113(2) FGC[30]) and ways of limiting contact (Art. 113^2 FGC[31]), creates a new perspective for the interpretation of the provision on the ban on contact.

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[22] J. Ignatowicz [in:] *System prawa rodzinnego i opiekuńczego,* J. St. Piątkowski (ed.), Wrocław–Warszawa –Kraków–Gdańsk–Łódź 1985, pp. 872, 873.

[23] Amendment to the Code was made by the law of 19 December 1975, Journal of Laws 1975, No. 45, Item 234, in force since 1 March 1976.

[24] J. Sauk, *Granice obowiązków i praw rodziców wobec dzieci i społeczeństwa. Studium prawno-porównawcze,* Toruń 1967, p. 112. Similarly, J. Winiarz, *Prawo rodzinne,* Warszawa 1993, p. 225, who also mentions 'coaxing into attitudes inconsistent with the principles of social coexistence, etc.'.

[25] M. Goettel, *Ingerencja sądu opiekuńczego w sprawowanie władzy rodzicielskiej a prawo rodziców do osobistej styczności z dzieckiem,* „Nowe Prawo" 1983, Nos. 9–10.

[26] Thus J. Strzebińczyk [in:] *System Prawa Prywatnego,* Vol. 12, *Prawo rodzinne i opiekuńcze,* T. Smyczyński (ed.), Warszawa 2003, p. 352.

[27] OSNC 2001, No. 3, Item 50.

[28] On the subject of draft amendments and the course of the legislative proces, see: W. Stojanowska [in:] *Nowelizacja prawa rodzinnego na podstawie ustaw z 6 listopada 2008 i 10 czerwca 2010. Analiza – Wykładnia – Komentarz,* W. Stojanowska, M. Kosek (eds.), Warszawa 2011, pp. 284–285.

[29] Journal of Laws No. 220, Item 1431.

[30] 'Art. 113 § 2. Contact with the child covers in particular staying with the child (visits, meetings, taking the child away from the place of the child's permanent residence) and direct communication, maintenance of correspondence, use of other means of long-distance communication, including means of electronic communication'.

[31] 'Art. 113^2 § 1. Where the good of the child so requires, the guardianship court shall limit the maintenance of the parents' contact with the child. § 2 The guardianship court can, in particular: 1) forbid child visitation; 2) forbid taking the child away from the place of the child's permanent residence; 3) allow for meetings with the child only in the presence of the other parent or a guardian, court curator or another person indicated by the court; 4) limit contact to specific forms of long-distance communication; 5) forbid long-distance communication'.

It should be pointed out that apart from the change of terminology (Art. 113(1) FGC regulates the ban on 'personal contact', Art. 113[3] FGC concerns the ban on 'maintaining contact') other legislative amendments were also made.

Pursuant to Art. 113 § 1 FGC in the old reading, the ban could be adjudicated for two reasons: first, where a given parent has been deprived of parental authority and secondly, where the child's good so requires. The legislator did not specify the second assumption leaving the court full discretion in this respect. The reprehensibility of the behaviour of the parent abusing his/her rights and/or exhibiting stark neglect of his/her duties, justifying depriving him/her of parental authority, could indirectly point to the scale of the threat to the child's good which required that in a given case personal contact be banned.

2. Reasons for adjudicating a ban on contact with a child

The chapter 'Contact with the Child' does not contain a statutory definition of the notion of 'contact'. Neither can a relevant definition be found in other regulations of the Polish law system. A definition of contact is given in Art. 2 of the European Convention on Contact concerning Children open for signature in Strasburg on 15 May 2003. The law allowing for the ratification of this Convention was passed on 23 April 2009 and promulgated in the Journal of Laws[32], but Poland has not yet deposited the ratification documents[33]. Thus, the Convention did not obtain the position of a source of law in force in the Republic of Poland[34]. The Convention gives a very broad definition of contact as all and any forms of communication as well as gaining information about 'the other party' to the contact[35].

Determining the meaning of the notion of 'contact' is further facilitated by examples of forms of contact listed in Art. 113(2) FGC[36]. The examples do not exhaust all possibilities, because since the law was passed numerous changes in both morality and technology have taken place. For instance, long-distance ways of communication have improved, communication equipment has become more easily accessible, etc.

What seems crucial from the point of view of the subject of these remarks is to emphasise that it is also possible to adjust the form of contact to the individual situation of the parties which are to contact each other and to shape the contact so as to make

[32] Journal of Laws 2009, No. 68, Item 576.

[33] On this subject, see: A. Bodnar, M. Kopczyński, *Konwencja w sprawie kontaktów z dziećmi z 2003 roku – ratyfikacyjne błędne koło,* „Helsińska Fundacja Praw Człowieka. Analizy i Rekomendacje" 2005, No. 9, and P. Mostowik, *Komentarz do art. 113 k.r.o., V. Kwestia potrzeby dostosowania prawa polskiego do konwencji Rady Europy z 2003 r. – wzmianka* [in:] *Komentarze Prawa Prywatnego*, tom V, *Kodeks rodzinny i opiekuńczy. Komentarz. Przepisy wprowadzające KRO,* K. Osajda (ed.), Warszawa 2017, p. 1332 (List of the countries which ratified the convention, https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/192).

[34] Arguments in favour of the desirability of the ratification of the Convention was presented by Robert Zegadło (R. Zegadło, *Czy Polska powinna przystąpić do Konwencji w sprawie kontaktów z dziećmi?*, „Rodzina i Prawo" 2008, Nos. 7–8, pp. 102–107).

[35] Art. 2(a) of the Convention provides that 'contact' means the child staying for a limited period of time with or meeting a person mentioned in Articles 4 or 5 with whom he or she is not usually living; any form of communication between the child and such person; as well as the provision of information to such a person about the child or to the child about such a person.

[36] The reasons for the bill (Print of the Sejm of the 6th term No. 888) which was passed on 6 November 2008 and is now the law in force emphasise that 'The catalogue is open in character but contains the most important components of contact with the child and should make it easier to formulate court adjudications in this subject matter'.

the likelihood of a threat to the good of the child as low as possible. Where the person entitled to contact and the 'primary carer' of the child are not able to negotiate the rules of keeping in touch with the child which would be safe for the latter (including the protection of the child's emotional sphere) or where the contact maintained threatens the child for whatever reason, the court can limit it. Examples of forms of contact limitation can be found in Art. 113^2 FGC. Contact can be seriously limited, it is even possible to eliminate contact and direct long-distance communication (via telephone calls or Internet communicators, such as Skype). In extreme cases, the only form of contact can be limited to mutual provision of information about the other person or to just informing the parent about the child.

The ban on contact adjudicated pursuant to Art. 113^3 FGC means that any forms of contact are eliminated, even in the form of remote provision to the parent of information about the current state of the child's health, development, education at specified intervals. The ban on contact is thus an extremely acute measure for the person concerned. The court can change such a decision only where the child's good so requires (Art. 113^3 FGC), which requires a detailed, multi-aspect analysis of the circumstances affecting this good, also from the point of view of how the child will function in the future after reaching majority, as an adult expected to perform a variety of social functions (including parenthood).

The ban on contact must be adjudicated where the court believes that maintaining contact, even in a very limited form (with the elimination of all direct forms), is contrary to the child's good or even creates a threat classified as 'serious'.

Poland is bound by the legal requirement contained in Art. 3 of the UN Convention on the Rights of the Child of 20 November 1989[37], which stipulates that 'the best interests of the child shall be a primary consideration' in 'all actions concerning children', including those taken by courts. The obligation to protect the 'rights of the child' is enshrined in Art. 71(1) of the Constitution of the Republic of Poland of 2 April 1997[38].

The good of the child has been and still is considered one of the leading principles of Family Law[39]. It should always be taken into account, even if not expressly mentioned in laws regulating questions directly or indirectly related to children's situation. If the child's good is referred to in a provision of law, it can be deemed to have been given much greater 'force' than in the case when it is taken into account as an 'ordinary' instrument of interpretation[40].

The Supreme Court declared, in resolution III CZP 48/92[41], passed by seven judges on 12 June 1992, that the notion of the child's good: '[…] corresponds in its general outline to the notion of the superior interest of the child reconstructed on the basis of the provisions of the Convention [on the Rights of the Child]. At the same time, the provisions of the Convention can be used to further specify the notion of the good of the child […], in particular, those provisions of the Convention which point out that

[37] The Convention has been applicable in the Republic of Poland since 7 July 1991. It was promulgated on 23 December 1991, Journal of Laws 1991, No. 120, Item 526, and subsequently amended.
[38] Journal of Laws, Item 483 as amended.
[39] Thus, J. Winiarz [in:] *System prawa*…, pp. 69–73.
[40] W. Stojanowska, *Dobro dziecka jako instrument wykładni norm konwencji o prawach dziecka oraz prawa polskiego i jako dyrektywa jego stosowania* [in:] *Konwencja o prawach dziecka. Analiza i wykładnia,* T. Smyczyński (ed.), Poznań 1999, p. 81 et seq.
[41] OSN 1992, No. 10, Item 179.

full and harmonious development of the child requires him/her to grow up in a family environment, in an "atmosphere of happiness, love, and understanding"' and that the child should be fully prepared for life in the society as an individual "brought up in the spirit of […] peace, dignity, tolerance, freedom, equality, solidarity" (…)'.

If these goals are to be achieved, it is necessary to protect the child, among others, against maltreatment[42], and thus all and any forms of physical and psychological violence, harm, neglect, abuse, including sexual abuse (Art. 19 of the Convention on the Rights of the Child) and all and any other forms of abuse (Art. 36 of the Convention).

It is difficult to develop a precise regulatory model of the child's good for the needs of applying Art. 113^3 FGC. The starting point is the assumption that its role, in a situation when the parents are separated, is for the child to maintain bonds with both of them, also through regular contact. There are certain child's welfare levels that can be indicated as potentially threatened by contact. These include, for instance, physical security (hence protection of life, health, freedoms covered by the notion of the child's good), feeling of security as well as self-esteem, dignity, uninterrupted education, development of body and mind fitness, spiritual development (including religious development where such a model of education results from the values and family traditions cultivated), etc.

It seems that particular importance should be attached to the child's sense of security and elimination of any influence of a parent's violence on the child's psyche[43], even if the child itself did not experience physical aggression[44] but only witnessed it. In this context, it is necessary to consider the delayed consequences of spending childhood in a family in which violence was used as a way of solving problems. Research into the phenomenon of violence carried out for decades in different countries revealed intergenerational transmission of violence, both in the form of reproducing in the adult life of the violence-imbued parental model of solving conflicts in the family and in the form of the learned role of being a victim of violence[45].

Polish research shows that children were witnesses of violence towards their mothers in family conflicts as often as in 60% of cases[46]. Violence on the part of the father of a common child tends to be a frequent cause of the parents' separation. Violence on the part of the former husband/partner often takes place after the separation[47], when it is the mother who has direct custody over their common minor children. The

[42] L. Kociucki, *Ochrona dziecka przed złym traktowaniem* [in:] *Konwencja…*; B. Banaszak, Ł. Żukowski, *Prawo dziecka do ochrony przed przemocą, okrucieństwem, wyzyskiem i demoralizacją – rozwiązania polskie na tle standardów Konwencji o Prawach Dziecka* [in:] *Konwencja o prawach dziecka. Wybór zagadnień (artykuły i komentarze),* S.L. Stadniczeńko (ed.), Warszawa 2015.

[43] Definitions of violence and a survey of Polish and foreign studies on the subject of violence in the family were presented in a synthetic form by Tomasz Szlendak (T. Szlendak, *Socjologia rodziny. Ewolucja, historia, zróżnicowanie,* Warszawa 2012, pp. 274–283).

[44] See: S. Wójcik, *Przemoc fizyczna wobec dzieci,* „Dziecko krzywdzone" 2012, No. 2(39) and the cited literature.

[45] B. Gruszczyńska, *Przemoc wobec kobiet w Polsce. Aspekty prawno-kryminologiczne,* Warszawa 2007, pp. 26–27. According to the studies referred to by the author, children witnesses of violence are three times as likely to use violence towards partners in adult life than children without such experience. Polish studies, the results of which were presented in the monograph referred to, showed, for instance, that women who experienced violence on the part of their father in childhood, experienced it twice more frequently from their partner, while those whose mothers resorted to violence, were beaten and injured by partners two and a half times more frequently than women who did not experience such violence (B. Gruszczyńska, *Przemoc…*, pp. 89, 90).

[46] B. Gruszczyńska, *Przemoc…*, p. 66.

[47] B. Gruszczyńska, *Przemoc…*, p. 63, Table 13.

influence of such events on the child's situation and the likelihood of their recurrence when the parent being the perpetrator of acts of violence maintains contact with the child should be taken into account when Art. 113^3 FGC is applied, also when the child is (was) 'only' a witness of an act of violence.

Studies confirm that when a child is sexually abused by a parent the consequences may be delayed and remote. Children victims of incest show symptoms of post-traumatic stress, sexualisation of behaviours, depression, feeling of guilt, low self-esteem, etc.[48] Sexual abuse of a child by a parent has much more serious consequences than a similar act by another person. It creates the risk of transferring incestuous behaviours outside of the system of one family and making it an element of a transgenerational transfer[49].

The degree of the potential threat to the child's good depends on the form, frequency, conditions in which contact takes place, and a host of other circumstances. A considerable part of the threats can be eliminated or significantly reduced by forbidding personal contact and certain ways of long-distance communication. A contact ban means that any form of contact would be disadvantageous for the child and the degree of the adverse influence of the contact on the child is significant.

The application of the ban to settle a particular case requires that the court take into account all the individual features of the child and all aspects of the state of affairs on the day when the contact ban is adjudicated.

As mentioned earlier, from the moment Art. 63 of the Family Code took effect, i.e. from 1 October 1950, until the amendment of Art. 113 of the Family and Guardianship Code, in force since 13 June 2009, it was possible to apply the ban on contact only towards the parent deprived of parental authority. There is then no doubt that the parent who has no parental authority (in particular an incapacitated person or a minor, a father established by the court who was not granted parental authority) can maintain contact with the child and that it was impossible to forbid contact to a parent who did not have parental authority over the child.

Since 13 June 2009, the changed statutory provision allows to presume and argue that the ban on maintaining contact with the child can be adjudicated without first depriving the parent of parental authority which seems not to arouse doubts among commentators[50].

What the provision in question signifies beyond any doubt, as I see it, is solely that deprivation of parental authority (preceding or adjudicated together with a contact ban) does not constitute a *sine qua non* condition for adjudicating a contact ban. In consequence, the parent who does not have parental authority (for instance a minor or an incapacitated person) cannot be prohibited from contacting the child.

I believe it is impossible to defend the thesis that parental authority and contact with the child can be treated as 'legal phenomena' not being part of any relation, developing automatically, and thus that it would be justified to forbid contact with the child

[48] In a synthetic form on this subject, see: M. Budyn-Kulik, *Psychologiczne i wiktymologiczne aspekty kazirodztwa* [in:] *Kazirodztwo,* M. Mozgawa (ed.), Warszawa 2016, p. 198 et seq., in particular p. 206. About the causes and effects of incest, where the perpetrator is a parent (usually father) see: M. Bisert, *Kazirodztwo. Rodzice w roli sprawców,* Warszawa 2008 and the literature referred to.

[49] See: M. Bisert, *Kazirodztwo*…, p. 194.

[50] Thus, for example: W. Stojanowska [in:] *Nowelizacja*…, p. 285, rightly drew attention to the fact that a ban on maintaining contact is: 'a higher degree of the child's separation from a parent (parents); G. Jędrejek, *Komentarz do art. 113³ FGC* [in:] *Kodeks rodzinny i opiekuńczy. Komentarz aktualizowany,* LEX/el. 2018.

to a parent who has full parental authority. (Yet, in some cases, extreme limitation of contact for a parent having parental authority with a ban on using any elements of personal contact might be rationally justified).

Given the fact that a contact ban means inadmissibility of any form of contact (information about the child included) what seems to be excluded is a possibility of implementing any attributes of parental authority over the child for the child's good. In consequence, I entirely share the thesis put forward by Wanda Stojanowska that substantiation of the presumptions from Art. 113^3 where the parent has the right to parental authority and there are no proceedings pending against the parent should cause such proceedings to be instituted *ex oficio*[51].

II. BASIC FINDINGS OF THE SURVEY OF COURT FILES

1. General information on survey findings

Children

The proceedings concerned contact with 264 children, 114 (43.2%) girls and 150 (56.8%) boys, aged from 4 months to 17 years. The average age of the children was 8.4 years, the median 8 years.

On the day when the case were brought to court, it was known that mothers had full parental authority over 150 children and direct care of four of them was to be provided, pursuant to a court ruling, by fathers. Fathers had full parental authority over 44 children, with the mother being indicated as performing direct care over 26 children.

In relation to 36 children, fathers' parental authority was limited to specified duties and rights in relation to the child and in relation to 25 children, the parents' parental authority was limited in accordance with Art. 109 FGC.

On the day when the case was brought to court, fathers were deprived of parental authority over 117 children while mothers over 53 children. The parental authority of fathers was suspended in 3 cases, and in one case the mother's parental authority was suspended.

Most frequently, in relation to 164 (62%) children, it was mothers who provided direct care. Thirteen children (4.9%) were under the care of their fathers, while nine (3.4%) were cared for by their relatives (in eight cases by grandparents). A considerable group of children (26.5%) remained in foster care: 33 children were in unrelated foster families, while 37 in care centers.

Persons who were prohibited contact

Contact was expected to be banned for 204 persons, including 54 women (26.5%) and 150 men (74.5%). The people in question were aged from two years (a younger step sister of the child, contact with whom was to be banned) to 79 years (grandfather).

Their right to maintain contact with children resulted in 199 (97.6%) of cases from kinship and in the remaining cases from prior care of the children.

[51] W. Stojanowska [in:] *Nowelizacja*..., s. 285.

The surveyed court files showed that 49 of the persons concerned were married, 68 divorced, 51 had never contracted marriage. There was one widow and one widower. There was no information about the marital status of the remaining persons.

Almost every third person had primary education, 38% vocational education. Only 12 of the 113 people of whose education information was available, had higher education (master's degree).

In some of the persons banned from contacting children, various manifestations of the so-called 'social pathologies' were observed (in many cases more than one).

The most frequent pathologies were alcohol abuse (26.7%), criminal activity or misdemeanours (25.8%), serving a prison sentence (11.8%). 31 persons (9.6%) were found to be suffering from drug addiction. Avoidance of employment, the so-called 'parasitic lifestyle', was manifest in 30 persons (9.3%).

Table 1
Manifestations of 'social pathology' in persons with contact bans

'Parasitic lifestyle'	30	9.3
Regular alcohol abuse	86	26.7
Alcohol addiction	17	5.3
Drug addiction	31	9.6
Gambling	3	0.9
Criminality, misdemeanours	83	25.8
Serving prison sentences	38	11.8
Threat of joblessness	19	5.9
Joblessness	4	1.3
Other	11	3.4
Total	**322**	**100.0**

Source: Author's own study.

Proceedings before court

In four-fifths of the cases, proceedings for the ban on contact resulted from the presentation of such a request by a person concerned about the child's welfare and in one-fifth (20.5%) the court instituted the proceedings *ex oficio* having received information indicating that the child's good might be threatened due to contact with a particular person entitled to such contact.

In 138 (80.2%) of the cases, the main substantive request was that specific persons be banned from contact with the child (children), in 27 (15.7%) of the cases the request concerned both a contact ban and a ruling on parental authority (in particular deprivation of parental authority and banning the parent deprived of this authority from contact with the child). In the remaining cases, the request of the ban on contact constituted a modification of an earlier request or appeared as a reaction of a participant in the proceedings to another request concerning contact.

Table 2
Applicants

Applicants	Frequency	Percentage
Mother	111	61.3
Father	12	6.6
The child's grandparents (also when they perform the function of a foster family)	4	2.2
Grandmother (also when she performs the function of a foster family)	3	1.7
Foster parent (other than the relatives specified above)	10	5.5
The child's guardian, other than a foster parent	4	2.2
Non applicable – the court initiated the proceedings *ex officio*	37	20.5
Total	**181**	**100.0**

Source: Author's own study.

In compliance with the study assumptions, in all examined cases studied a ban on contact with a child was adjudicated in respect of a person entitled to such contact (Art. 113(1) FGC, Art. 113^6 FGC). Instance control covered 25 adjudications. In 15 cases appeals were dismissed. In the cases in which a change of the adjudication took place it did not concern the ban on the maintenance of contact adjudicated by the court of the first instance.

The fastest and shortest of the proceedings lasted one month from the registration of the application to the date of the first instance court's judgment, while the longest lasted five years and two months.

The average duration of proceedings (from the date the case was brought to court to the date the judgment was issued) was ten months, with a median of seven months. In the case of appeals, the period from the issue of the judgment on the merits by the court of first instance to the date of the second instance court's judgment ranged from three to ten months. On average, the period in question amounted to 5.6 months (median – 5 months).

2. Verification of research hypotheses

Before the survey several hypotheses were formulated. The survey confirmed some of them.

Hypothesis 1. An assumption was made that the request that a ban on contact be ordered concerns most frequently fathers of children after the breakdown of marriage or non-formalised relationship with their mothers. The survey confirmed this hypothesis. In 144 of the analyzed proceedings, the father was indicated as the person which should be forbidden contact, though in 15 cases there was a concurrent request concerning the mother. In 69.6% of the cases, the proceedings focused on examining the advisability of preventing fathers from contacting children. Only in 13 cases the children's parents remained in marriage. In 42% of the cases they were divorced, while in 37.4% of the cases they used to be in a consensual union, which later broke down. In the remaining known cases, the parents had never been in any relationship for any, even short, time.

Hypothesis 2. The person whom the request of a ban on contact with the child concerns provides a bad role model for the child, due to the person's features (including personality disturbances) as well as way of life. In 75 of the cases studied (41.7%), the reasons given in the request for banning contact with the child to a specific person pointed out that the person concerned was a bad role model. Evidence-taking proceedings confirmed the correctness of the statement in 74 cases, that is, close to 100%. This assessment was substantiated by a number of confirmed circumstances, among them those listed below.

- Frequent violations of law (crimes and misdemeanours), confirmed in the majority of cases by legally binding convictions (also in conditions of repeat offending, in one case as many as 11 times), imprisonment as well as reliable information on preparatory proceedings in progress.
- Regular alcohol abuse, which led to alcohol disease in part of the cases. Consumption of excessive quantities of alcohol was accompanied by numerous negative consequences: breach of peace and principles of family and neighbourhood coexistence, improper behaviour in common spaces, aggression, violation of the physical dignity of other people (including the closest family living in the same household), damage to objects, threats.
- Inability to solve conflicts and personal problems, resorting to violence in conflict situations.

The proceedings revealed that some manifestations of social pathology occurred even more frequently than it was indicated in the substantiation of the applications for banning contact. To give an example, regular abuse of alcohol by the person concerned in the proceedings was confirmed in 86 cases, while the fact of having committed offences and misdemeanours law in 83. The files also revealed that eight fathers, eight mothers and one grandfather were diagnosed with mental illnesses, while six other fathers exhibited problems referred to in the files as 'mental disorders'. In one case, personality disturbances were mentioned, while in another depression and inability to control emotions. The above seems to substantiate the conclusion that the survey positively verified the hypothesis in question.

Hypothesis 3. The fact that a parent used violence towards the child or another person (especially towards the other parent in whose direct care the child remains at the given time) in the presence of the child creates a serious threat to the child's good if the child has contact with such a parent. The reasons substantiating 63 applications (35% of the cases studied) indicated that the person referred to in the application had used violence mainly towards the child's mother, also in the child's presence. The substantiations included also statements that the child was afraid of the person in question or bad memories connected with said person. Evidence-taking proceedings confirmed the use of violence in 55 cases, i.e. in every third case studied. The fact that in 40 cases the child's fear of the person whom the request for the ban on contact concerned was established provided further confirmation for the hypothesis. Most frequently, also in such cases, the children whose position was established, refused any contact with the perpetrator of violence.

Hypothesis 4. In the majority of cases, the request for the contact ban concerns the child's parent who was deprived of parental authority or against whom proceedings concerning deprivation of parental authority are pending.

This statement was only partially confirmed. On the date of the commencement of the proceedings in the case studied, fathers were deprived of parental authority in relation to 51.6% of the children, while mothers in relation to 24.5% of children with whom contact was to be banned. In 33 (18.2%) of the proceedings studied, some form of interference with parental authority was requested together with a ban on contact.

Hypothesis 5. Court proceedings are probing and searching in nature. People directly interested in the result of the proceedings present their positions. What is also common practice in cases relating to the ban on contact with the child is establishing the child's position, though the child is hardly ever heard directly by the court.

It was revealed that the extent of the court's probing in individual cases varied. Unfortunately, not all courts satisfied the above standards according to the aforementioned criterion, if one considers the complexity of the decision in its psychological aspect as well as the advisability of attempting to foresee the impact of a possible contact ban on the child's functioning in the future.

What also needs to be emphasised as positive was the practice of carrying out psychological and pedagogical examinations. In 38 cases evidence was obtained from opinions of members of consultative teams of court experts (family diagnostic and consultation centres)[52]. Twenty-five of them contained a conclusion that the ban on contact with the child was fully justified in the particular case. In 36 cases, opinions prepared by psychologists or pedagogues were requested and considered.

What is also worth mentioning is the fact that in 133 cases the files of the examined proceedings included files concerning some interference with parental authority (these files were not sent to be studied), which probably provided courts with essential knowledge necessary to assess the validity of the application. It can also be assumed that other guardianship-related proceedings with the participation of the persons concerned must have also been conducted prior to or concurrently with the proceedings studied and the court acting *ex oficio* must have been familiar with information on the persons concerned, which affected the outcome of the cases.

Community interviews conducted by court curators (in the place of the child's residence in 101 cases – 55.8%, in the place of residence of the person to be banned from contact in 61 cases – 34.1%) provided another valuable source of information in the case.

The expectation that the persons directly interested in the result of the proceedings would present their positions on a possible ban on the maintenance of contact by specific persons was not fully confirmed. 45 fathers who were forbidden

[52] J. Włodarczyk-Madejska, *Efficiency of consultative teams of court experts,* „Prawo w Działaniu" (Law in Action) 2017, No. 32, p. 113.

from contacting the children did not express any position in the case. In part of the cases, this resulted from the fact that they did not attend the hearings, in spite of having been duly summoned. Children were not treated as participants in the proceedings, though the effect of the proceedings always affected the child directly[53]. The establishment of the child's position was as a rule indirect (hence not always reliable) in 36% of the cases. Direct hearing of the children took place only in 17 cases (9.5%). Thus the hypothesis that direct hearing of children would not be frequent was fully confirmed

3. Conditions justifying ordering a contact ban

The actual circumstances of the cases in which the ban on maintaining contact with the child was issued to a specific person (usually the father) can be classified into three groups of cases.

The first group included factual conditions in which the person entitled to contact had harmed the child in the past by one (or several) behaviours harmful to the child, such as an offence against the child, in particular sexual abuse; used violence with at least indirect impact on the child; created a state of danger to the child while being the child's carer, because the person in question exhibited risky behaviours due to mental disturbances or while under the influence of psychoactive agents (mainly alcohol); exerted harmful influence on the child's upbringing, by stimulating the latter's disobedience or asocial behaviours.

The second group covered cases of long-term abandonment of contacts making the child's 'first-plan guardian' fear that resumption of contacts might disturb the already stabilized (in the guardian's opinion) situation of the child. In some cases, the factual state belonged also to the first of the groups listed (where the absence of contacts was due to a prison sentence served or psychiatric treatment, hospitalization included).

The third group of cases were those in which the child was placed in foster care due to neglect (usually culpable) of the person entitled to contact and contact with such a person interfered with the upbringing process or decreased the likelihood of the child's adoption.

As a rule, the ban seemed fully justified with respect to cases belonging to the first group. The assessment of the situation in other groups was definitely more diversified.

Among the facts of the examined cases that can be deemed indicative of a serious threat or even contrary to the child's good, with the highest intensity of this threat, we should mention sexual abuse of the child involved in the proceedings or sexual abuse of another child by the person who was forbidden contact; stark earlier neglect or an act posing a serious threat to the child's life where a possibility of a dangerous situation repeating itself cannot be excluded (the above concerns a case in which a drug addict, acting under the influence of drugs, attempted to kill the child and this person continued to take drugs).

[53] On the subject of the minor's position in guardianship proceedings, see: P. Rylski, *Uczestnik postępowania nieprocesowego – zagadnienie konstrukcyjne,* Warszawa 2017, pp. 248–252.

From the point of view of the frequency of occurrence, the following conditions seemed to have been of particular importance: negative features of the person who was forbidden contact and/or criminality and behaviour inconsistent with social standards, making them a bad role model for the child; the person concerned resorting to violence as a universal means of solving family conflicts; threat to the child's chances of being adopted or adaptation in the present upbringing environment, where there is a positive forecast for the provision of proper care to the child.

What was of essential importance were also the circumstances pertaining to the child, which included in the first place: bad memories of the behaviour of the person covered by the ban on contact (most frequently use of violence towards the child's mother); fear of the person covered by the ban; adverse physiological reactions in to unaccepted contact; conscious, determined position of the child that they do not wish to have contact with the person entitled to contact in any form. (As regards the latter circumstance, certain doubts may arise whether children have always been able to consciously understand that contact as understood by law is not limited to direct meetings, but includes also conversations via telephone, Internet communicators and correspondence. They must have rejected these forms of contact in a conscious and determined way. It is hard to be entirely sure that children excluded also the admissibility of informing the person entitled to contact about their health, progress in education, plans for further education, etc. and possible receipt of positive information about the person who was forbidden contact, for instance, that said person has completed anti-addition treatment, remains clean/sober, has undertaken employment, practises sports, helps others, has success in any field, etc.).

In individual cases, the court took into account the specific circumstances generated by the facts. For instance, in one of the cases, the court must have shared the fear that contact could contribute to the transmission to the son by the father of another – non-Polish – nationality a social model based on discrimination of women and permitting the use of violence towards them.

Another essential circumstance was the attitude of the person whom the ban concerned (usually a parent) manifested by acceptance of the ban or absence of any activity constituting an expression of lack of consent for the ban – for instance, where a given person was duly informed about the date and time of a hearing but did not present at it, nor did it present its position as regards the request in any way thus creating a factual presumption that the person shows no interest in the child or contact with the child.

It can be presumed that as a rule courts took into account more than one circumstance justifying the ban on contact. They included the 'personality profile' of the person who was to be forbidden contact, the degree of the likelihood of a negative influence of contact on the child, the position of the child itself.

Where the child remained in foster care and the likelihood of ensuring the child's proper upbringing by the parents (return of the child to the family which would be fully and properly functional – at least until the child was able to maintain him /herself) was not high, good preparation for adoption or good functioning in family or institutional foster care were seen as more favourable for the child than maintaining bonds with the biological family. The circumstances of crucial importance for adjudicating a contact ban are provided in Table 3.

Table 3
Reasons for adjudicating a ban on contact with the child indicated in the judgment and resulting from evidence

Arguments in support of the thesis that contact ban is needed	Frequency	Percentage
The person entitled to contact is a bad role model	74	40.9
The person whom the request concerns applied violence towards the child or another person (including the child's mother)	55	30.4
The child is determined to refuse contact	47	26.0
The child fears the person, has bad memories associated with them	40	22.1
Contact disturbs (would disturb) adaptation of the child in a new upbringing environment	35	19.3
The child does not know or does not remember the person to be affected by the ban on contact (including when the child believes the person to be dead)	33	18.2
Experts diagnosed an incorrect parental attitude	25	13.8
Conflict with the primary carer has a negative impact on the message conveyed to the child by the person to be banned from contact	23	12.7
The person who was forbidden contact is serving a custodial sentence	20	11.0
The person who was forbidden contact was grossly neglectful during earlier contact with child	16	8.8
The child was diagnosed with adverse physiological reactions in connection with unaccepted contact	12	6.6
The person to be covered by the ban is guilty of sexual harassment (of this or another child)	11	6.1
The person who was forbidden contact had used contact contrary to its purpose in the past, not taking care of the child, provoking tension and rows	8	4.4
No 'upbringing coalition' with the child's primary carer	7	3.9
Attempt at committing another offence against the child	5	2.8
The person to be covered by the ban kidnapped the child before	3	1.7
Contact disturbs the child's mental welfare for other reasons	23	12.7
Other (very individualised, related to facts of the case)	44	24.3
181=100% The percentages do not add up to 100, because the reasons contain several arguments		

Source: Author's own study.

4. Summary

The survey confirmed the position which can be found in literature that the ban on contact with the child should be imposed rarely. Many courts have not issued a single judgment of this kind in the past few years and in the majority of the courts asked to send files, decisions forbidding contact were very few.

It has not been observed that the ban was, in principle (always or in the majority of cases) another decision following a prior limitation of contact. Information about earlier adjudications concerning the child's contact with the person affected by the ban on contact was not found in the files of any cases studied. The files studied showed that only in 11.6% of the cases contact had been limited in a legally binding way earlier or their forms were specified in the decision (settlement) determining the forms and frequency of the contact so that they already included such limitation due to their very

nature (for instance, only indirect contact, contact supervised by a curator or contact in the presence of a psychologist in a clearly specified place). There might have been some earlier limitations of contact also in other cases, but this could not be verified in the present analysis.

In at least one-third of cases, the form and frequency of contact was never formally determined in the parents' agreement, in the court judgment or in the amicable settlement. The proceedings relating to the ban on contact were thus the first court proceedings concerning contact. Sometimes it was justified – for instance, where a given person had committed a crime against the child and it was impossible to exclude that the person might reoffend or where it was established that any contact (even the child's awareness of information concerning the child being passed to the person) could constitute a source of suffering for the child.

The majority of the judgments did not contain a statement of reasons and thus it can only be presumed what underpinned the decision, taking into account the evidence in the case files.

It seems that occasionally the ban on contact might have been understood as solely a ban on direct contact (in form of direct meetings and distance communication) – which would no doubt be justified – without it being considered a 'total' ban, covering even access to information about the child's life. In consequence it cannot be excluded that it would be enough to radically limit contact instead of banning it. In this context it is, however, necessary to draw attention to the fact that the degree of the legal awareness of the participants in the proceedings was in most cases rather low. On the other hand, the order imposing the ban gave the 'direct carer' and the child a considerably greater sense of security than the order limiting contact. It must have also sent a clear message to the person who was forbidden contact.

In almost every fifth case, a 'preventive' ban was observed in relation to contact which have long (relative to the child's age) been neglected by the entitled person. The aim of such a ban, which the applicants pointed to, was to protect the child against the 'shock' that could be generated by the appearance in his/her stable life (without the participation of the person concerned) of the person entitled to contact or a possible fear that once contact is resumed the entitled person will not be interested in maintaining regular contact. In most cases, these considerations related to contact between children and fathers. It is worth emphasizing that such a position was substantiated by lack of interest in the proceedings on the part of the person entitled to contact, who failed to appear at the court hearing in spite of having been duly summoned (in the court's opinion), failed to present his/her position in the form of a written statement of defence, and failed to take any action after a ruling was made by the court.

There seems to be no doubt that direct contact without prior preparation could prove unfavourable for both the child and the entitled person. Yet, it also seems that in individual cases it might also prove unfavourable to order the ban, in particular, when the child was small and the likelihood that the child's situation, assessed as stable, would change was either not verified or was not high in the light of life experience. The decision concerning contact can be changed (Art. 113^5 FGC), which applies also to a contact ban. Nevertheless, in the described group of cases, the likelihood that personal relations between the child and the person who was forbidden contact, would be established or resumed seemed definitely lower than the likelihood that the ban

would constitute an additional, powerful barrier to a change of the actual condition. In the long run this may prove unfavourable for the child.

The group of cases studied included cases concerning contact between relatives (mainly parents) and children being in foster care. There was no doubt that in the majority of the cases failure to stick to the meeting schedule and the parents' incorrect behaviour during meetings with children gave rise to serious concerns. The way in which the obligation (and not only the right) of the parents to maintain contact with children was performed tended to disorganise the upbringing efforts of entities responsible for foster care as well as actions intended to prepare the children for possible adoption.

The way in which contact with children remaining in foster care is effected by people other than the parents (in particular by the children's grandparents) did not arouse concerns. The decisive factor why measures which ultimately led to the ban on contact were undertaken was the conviction that adoption would provide the best development opportunities for the children, while being the most favourable option for sustaining bonds with the extended family. This attitude was probably a consequence of what other children remaining in foster care experienced, where their parents did not achieve long-term ability to take over direct care over children and to perform their parental obligations appropriately.

Where the potential possibility of adoption is treated as a justification of the thesis that the contact of a child remaining in foster care with the biological family always constitutes a serious threat to the child's good, this should be approached with utmost caution. What seems to support this approach is the trend of not keeping adoption secret from the child, recognition of the adopted child's right to retain his/her identity as well as the conviction, having ever more adherents, that the mutual right of parents and children to maintain contact has its source in the 'law of nature'[54] and in consequence that it also continues after a legally binding adoption judgment. Although the latter position can arouse doubts viewed against the background of Polish law[55], it is hard to say how it will be perceived when the children adopted today will reach maturity[56].

The general assessment of case law is positive. Yet, there are things that should be recommended to make it better and namely:

- change of the practice; the child should be treated as a participant in the proceedings;
- more frequent use of indirect hearing of the child;
- tadmission of a psychological-pedagogical opinion as a rule;
- adoption of effective actions to determine the position in the case of the person who is to be banned from contacting the child;
- considering of the child's good in a longer time perspective and distinguishing between the protection of the child's interest and the protection of the interest (and sometimes only convenience) of the 'primary carer';

[54] T. Justyński, *Prawo do kontaktów z dzieckiem w prawie polskim i obcym,* Warszawa 2011, pp. 27–28; T. Sokołowski, commentary on Art.113 FGC [in:] *Kodeks rodzinny i opiekuńczy. Komentarz LEX,* H. Dolecki, T. Sokołowski (eds.), Warszawa 2013, p. 796; J. Zajączkowska, *Aspekty prawne kontaktów z dzieckiem,* „Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2018, No. 1, pp. 275–277.

[55] On this subject in particular J. Gajda, *Tajemnica przysposobienia i jej ochrona w polskim prawie cywilnym,* Przemyśl–Rzeszów 2012.

[56] In his commentary on Art. 119^1(1), second sentence FGC Tomasz Sokołowski (T. Sokołowski, *Kodeks*…, p. 801) argues that this regulation 'constitutes an expression of the already fairly outdated approach, being the dogma in the 1970s […] Today […] such bonds are treated as the child's personal good and are subject to strong protection, also on the basis of fundamental instruments of international law […]'.

- considering whether in a given case it might not be more favourable to seriously reduce contact rather than ban it, in particular by prohibiting staying with the child and direct communication with the child as well as adopting a rule that the ban on contact must be preceded by limitation of contact;
- considering the advisability of instituting parental authority-related proceedings *ex oficio* where the circumstances revealed in the proceedings concerning the ban on contact with the child demonstrate a threat to its good and the parent has unlimited parental authority.

Abstract

Elżbieta Holewińska-Łapińska, *Adjudicating a ban on contact with a child in the practice of Polish courts*

The article presents the main findings of the survey of files of 181 cases in which a ban on contact with children was adjudicated and became legally binding by the end of 2017. The survey was carried out by the Institute of Justice. The survey showed that ban on contact with a child is adjudicated relatively rarely. The general assessment of the case law is positive, nevertheless the author presents a number of suggestions of how it can be improved. She suggests, among others, a change in the practice of treating the child as a participant in the proceedings; more frequent use of direct hearing of the child; treating the admission of psychological and pedagogical opinions as a rule; effective actions in order to establish the position in respect of the person who is to be banned from contacting the child. The author points to the validity of the long-term assessment of the child's good and distinction between the protection of the child's interest and the interest of the 'primary carer'.

Keywords: *contact, ban on contact (contact ban), child's good, threat to the child's good, thing contrary to the child's good, family life, family law*

Streszczenie

Elżbieta Holewińska-Łapińska, *Orzeczenie zakazu kontaktów z dzieckiem w świetle polskiej praktyki sądowej*

W artykule zostały przedstawione główne ustalenia badania 181 akt spraw, w których zapadły orzeczenia o zakazie kontaktów z dziećmi i uprawomocniły się do końca 2017 r., przeprowadzonego w Instytucie Wymiaru Sprawiedliwości. Badanie wykazało, że zakaz kontaktów z dzieckiem jest orzekany stosunkowo rzadko. Generalna ocena orzecznictwa jest pozytywna, niemniej autorka przedstawiła szereg postulatów w celu jego udoskonalenia. Między innymi sugeruje zmianę praktyki przez traktowanie dziecka jako uczestnika postępowania, częstsze stosowanie bezpośredniego wysłuchania dziecka, traktowanie dopuszczenia opinii psychologiczno-pedagogicznej, jako reguły, podejmowanie efektywnych działań w celu ustalenia stanowiska w sprawie osoby, której kontakty maja być zakazane. Wskazała na celowość oceny dobra dziecka w dłuższej perspektywie czasowej i rozgraniczanie ochrony jego interesu od ochrony interesu (a niekiedy tylko wygody) „pierwszoplanowego opiekuna".

Słowa kluczowe: *kontakty, zakaz kontaktów, dobro dziecka, zagrożenie dobra dziecka, naruszenie dobra dziecka, życie rodzinne, prawo rodzinne*

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PRAWO W DZIAŁANIU
LAW IN ACTION
36/2018

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Technical and Legal Aspects of Critical Infrastructure Protection

1. INTRODUCTION

The safety and security of critical infrastructure plays important role in running of the country. One of the most sensitive, and crucial parts of critical infrastructure are nuclear power plants (hereinafter ‚NPPs'). Nuclear power plants have been the subject of many studies[1]. The particular features of types of NPPs are considered with the aim to assure regular operation[2]. However, NPPs consist of critical infrastructure which could be affected by lightning. These not demand occurrences are mainly a result of their locations and spatial configuration. The consequences of lightning very depending on many factors, e.g. the point of lightning strike, the type of discharge or features of NPPs. It is important to stress that this natural endanger has a random character and cannot be prevented. In principle, all components of NPPs can be affected by lightning[3]. The external components, like

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[1] *International Atomic Energy Agency: Modern Instrumentation and Control for Nuclear Power Plants: A Guidebook*, Technical Reports Series No. 387 Vienna 1999; *International atomic Energy Agency, Safety Assessment of Proposed Improvements to RBMK Nuclear Power Plants*, IAEA-TECDOC-694, Vienna 1993; *International Atomic Energy Agency, Advanced nuclear plant design options to cope with external events*, IAEA-TECDOC-1487, Vienna 2006; *International Atomic Energy Agency, Safety of Nuclear Power Plants: Design*, Safety Standards Series, No. NS-R-1, IAEA, Vienna 2000; *International Atomic Energy Agency, External Events Excluding Earthquakes in the Design of Nuclear Power Plants*, Safety Guide, IAEA Safety Standards Series, No. NS-G-1.5, IAEA, Vienna 2003; *International Atomic Energy Agency, Safety Assessment and Verification for Nuclear Power Plants*, IAEA Safety Standards Series, No. NS-G-1.2, IAEA, Vienna 2001; *International Atomic Energy Agency, Engineering Safety Aspects of the Protection of Nuclear Power Plants against Sabotage*, IAEA Nuclear Security Series No. 4, Vienna 2007.

[2] T. Anegawa et al., *Development of ABWR-II and its safety design* [in:] *Advanced Nuclear Reactor Safety Issues and Research Needs. Workshop Proceedings*, NEA/OECD, Paris 2002, p. 153; P.D.W. Bottomley, C.T. Walker, D. Papaioannou, S. Bremier, P. Pöml, J.-P. Glatz, S. van Winckel, P. van Uffelen, D. Manara, V.V. Rondinella, *Severe accident research at the Transuranium Institute Karlsruhe: A review of past experience and its application to future challenges*, "Annals of Nuclear Energy" March 2014, Vol. 65.

[3] R.A. Kisner, J.B. Wilgen, P.D. Ewing, K. Korsah, M.R. Moore, *A technical basis for guidance on lightning protection for nuclear power plants*, Fourth American Nuclear Society International Topical Meeting on Nuclear Plant Instrumentation, Controls and Human-Machine Interface Technologies (NPIC&HMIT

structures, are fully exposed to the lightning threat, however internal components are endangered, too. In particular the internal apparatus can be affected by direct or indirect effects of lightning current. The modern digital apparatus provides many benefits in NPPs operation e.g. much more appropriate system control. However, due to their typically low voltage withstand, these apparatus are much greater risk failure caused by lightning overvoltage that can appear in the power feeder and /or in the signal network.

The natural endanger of lightning could be the cause of critical events, especially in the NPP's safety-related instrumentation and control system, not only in case of direct lightning strike, but also in case of nearby strikes, which can couple with instrumentation and control systems by lightning electromagnetic pulse field ('LEMP').

During the past twenty years, many surveys have been done and the data collected by U.S. Nuclear Regulatory Commission ('NRC') in a dedicated database suggests that lightning damages can be severe[4].

Of course protection is key to avoid component failures which can lead to reactor trips or other dangerous outcomes. Therefore protection measures to avoid damage induced by lightning or resistive overvoltages contribute to NPP safety. In fact the most severe damage is that affecting instrumentation and control systems, resulting in inoperability of safety systems or causing false alarms, thus triggering automatic actions which may destroy critical equipment or delay safety-related functions.

The criteria for design, installation and maintenance of lightning protection measures can be divided into two different groups: the first one concerns protection measures to reduce physical damage and life hazard in a NPP; while the second group concerns protection measures to reduce failures of electrical and electronic systems within NPP ancillary facilities. For both cases a risk management concept can be helpful to achieve an adequate protection level. Although the IEC 62305 series standards on lightning protection have not been developed specifically for nuclear power plants, the suggested method and requirements can be usefully applied. After a summary of the NRC damage report, an overview follows of some aspects of lightning protection on which IEC standards focus.

2. PROBLEMS OF SERVICE CONTINUITY PROVISION

In early 1990s the U.S. Nuclear Regulatory Commission engaged Oak Ridge National Laboratory ('ORNL') to develop a technical basis in order to design a lightning protection system for NPPs.

2004), Columbus, Ohio, September 2004; T. Kisielewicz, C. Mazzetti, Z. Flisowski, B. Kuca, F. Fiamingo, *Natural danger of nuclear power plants due to lightning strokes*, International Nuclear Energy Congress 2012, Warsaw, Poland; IEC 62305–3: Protection against lightning – Part 3: Physical damage to structures and life hazard, Ed. 2.0, December 2010; IEC 62305–4: Protection against lightning – Part 4: Electrical and electronic systems within the structures, Ed.2.0, December 2010.

[4] P.D.W. Bottomley, C.T. Walker, D. Papaioannou, S. Bremier, P. Pöml, J.-P. Glatz, S. van Winckel, P. van Uffelen, D. Manara, V.V. Rondinella, *Severe accident research at the Transuranium Institute Karlsruhe: A review of past experience and its application to future challenges*, 'Annals of Nuclear Energy', March 2014, Vol. 65; NUREG/CR-6866 ORNL/TM-2001/140: Technical Basis for Regulatory Guidance on Lightning Protection in Nuclear Power Plants, Oak Ridge National Laboratory Managed by UT-Battelle, LLC Oak Ridge, TN 37831–6472, January 2006.

The report, written by ORNL, describes many events of failure, damage or false alarm related to lightning[5]. It is important to mention reactor trip/SCRAM, ventilation isolation damage, containment isolation damage or other kinds of damage[6]. The results show that among many recorded events (about 87) only 30 were responsible for the relevant damage or failure: 11 events involved reactor trips, 9 concerned a loss of power or other outcomes that caused the backup and diesel generator to start, 2 involved ventilation or containment isolation, and 6 were miscellaneous events[7]. According to the analysis[8] the probability of fire protection system damage and simultaneous fire due to lightning strike can be estimated at about $3–10^4$, while the core damage probability is estimated to be two orders of magnitude lower. Although this probability does not seem high enough to cause concerns about safety, the losses brought about by the event can be very high, therefore the resulting risk cannot be neglected. Furthermore, most of the data considered in the report were collected in surveys at operating plants with older, analog electronic and electromechanical systems, which are less susceptible to lighting damage[9].

Lightning can generate a cascade of critical events that result in false instrumentation and control signals, while simultaneously damaging plant components. For example, an overvoltage due to direct lightning impact can damage a subsystem by inductive coupling and, at the same time, initiate a fire. In is reported a remarkable event occurred in a nuclear power station in June 1991[10]. A direct flash struck the NPP. During the event the 'plant operating power was 89 percent of full power […]. The event was initiated by a lightning strike (possibly multiple strikes) that disabled both off-site power sources, started a transformer fire, and disabled communication systems. The turbine and reactor automatically tripped at the event onset. The cascade of failures delayed restoration of off-site power for about 12 hours'.

3. TECHNICAL STANDARDS OF RISK ASSESSMENT

Risk assessment can be performed on the basis of technical standards and recommendations[11]. From the practical point of view, in order to select the optimum protection against lightning overvoltages and electromagnetic field, a risk analysis based on probabilistic approach should be performed. The lightning hazard to which a NPP is exposed is a random process involving a set of effects which

[5] R.A. Kisner, J.B. Wilgen, P.D. Ewing, K. Korsah, M.R. Moore, *A technical basis…*; NUREG/CR-6866 ORNL /TM-2001/140: Technical Basis…
[6] R.A. Kisner, J.B. Wilgen, P.D. Ewing, K. Korsah, M.R. Moore, *A technical basis…*
[7] R.A. Kisner, J.B. Wilgen, P.D. Ewing, K. Korsah, M.R. Moore, *A technical basis…*
[8] R.A. Kisner, J.B. Wilgen, P.D. Ewing, K. Korsah, M.R. Moore, *A technical basis…*
[9] R.A. Kisner, J.B. Wilgen, P.D. Ewing, K. Korsah, M.R. Moore, *A technical basis…*; NUREG/CR-6866 ORNL /TM-2001/140: Technical Basis…
[10] R.A. Kisner, J.B. Wilgen, P.D. Ewing, K. Korsah, M.R. Moore, *A technical basis…*
[11] IEC 62305–2: Protection against lightning – Part 2: Risk management, Ed. 2.0, December 2010; C. Mazzetti, T. Kisielewicz, F. Fiamingo, B. Kuca, Z. Flisowski, *Rational Approach to Assessment of Risk Due to Lightning for Nuclear Power Plants*, „Przegląd Elektrotechniczny", R. 88, No. 6, 2012, pp. 72; A. Tofani, D. De Carli, G. Mosti, V. Montarese, C. Mazzetti, *Lightning protection in nuclear and radiological environments according to IEC/EN 62305–2:2012*, International Conference on Lightning Protection (ICLP), Shanghai, China, October 2014.

are correlated with the parameters of the lightning discharge, the characteristics of the NPP, its content, the installations inside the facility, the transmission lines and other services entering the facility[12]. An example of lightning risk assessment is presented by P. Duqueroy et al.[13]

If the time of observation is fixed (usually $t = 1$ year), it is possible to demonstrate that the risk, defined as the probability of annual loss in a NPP due to lightning, may be expressed using N, P, L variables in the formula $R = 1 - e^{(-N \times P \times L)}$ in accordance with[14]. N is the average annual number of flashes influencing the NPP and its content. P is the probability of damage to the NPP due to single flash. L is the average amount of loss, with consequential effects, due to single flash. The value of NPL is the level of risk or the number (or frequency) of annual loss in a NPP caused by lightning. It is evident that if NPL$<<1$ (in practice NPL < 0.1), the risk (as probability) and the level of risk are coincident.

The International Standard defines the risk as the probable annual loss in a structure due to lightning ($R = N \times P \times L$) in accordance with[15].

4. TECHNICAL STANDARDS OF PROTECTION MEASURES

The components of NPP may be influenced by whole or partial lightning current flowing to the earth in case of direct flashes. Internal electronic and electrical apparatus may be affected by the lightning current flowing to the earthing system causing overvoltages by resistive coupling. The inductive coupling of the lightning current can result in dangerous overvoltages in internal wiring or can have a direct influence on sensitive devices. Flashes to the ground near buildings can introduce overvoltages due to inductive coupling of the lightning current with internal wiring or the impulsive electromagnetic field can have a direct influence on sensitive devices. When lightning flashes strike NPP incoming lines, the instrumentation and control can be affected by the lightning current, which may cause overvoltages, sparks, thermal and mechanic effects. Lightning flashes striking near incoming lines can affect the plant by inducing overvoltages in the line conductors, which may cause failure or malfunctioning of the connected electrical and electronic systems.

Designers should consider protection of an NPP's external and internal components as well as services entering the structure in order to reduce the risk due to lightning to a tolerable level. The possible protection measures are given in IEC 62305 series standards[16].

Protection measures to reduce physical damage are achieved by the lightning protection system ('LPS'), which includes the following features: air termination system; down conductor system; earth termination system; lightning equipotential

[12] C. Mazzetti, T. Kisielewicz, F. Fiamingo, B. Kuca, Z. Flisowski, *Rational approach…*
[13] P. Duqueroy, C. Miry, P. Seltner, *Lightning risk assessment evaluation on French nuclear power plants*, International Conference on Lightning Protection (ICLP), Shangai, China, October 2014.
[14] IEC 62305–1: Protection against lightning – Part 1: General principles, Ed. 2, December 2010; IEC 62305–2: Protection against lightning – Part 2…
[15] IEC 62305–2: Protection against lightning – Part 2…
[16] IEC 62305–3: Protection against lightning – Part 3: Physical damage to structures and life hazard, Ed. 2.0, December 2010; IEC 62305–4: Protection against lightning – Part 4: Electrical and electronic systems within the structures, Ed. 2.0, December 2010.

bonding ('EB'); electrical insulation (and hence separation distance) against the external LPS. In principle, LPS is designed and installed with the aim to intercept, conduct and disperse the lightning current into the earth; bonding measures to minimise potential differences, and to limit surges using a meshed bonding network and bonding all-metal parts or conductive services directly or by suitable surge protective devices ('SPDs') which are included in internal LPS.

Protection measures to reduce failures of electrical and electronic systems include: earthing and bonding measures; magnetic shielding; line routing; isolation interface; coordinated surge protective device ('SPD') system. In principle, the core of protection measures to reduce failure of electrical and electronic apparatus consists of an SPD system, defined as a coordinated set of SPDs properly selected and erected to protect electrical and electronic systems against surges. An SPD at the point of entry of incoming services reduces essentially the risk related to overvoltages by resistive coupling due to direct flashes to the structure and/or the overvoltages transmitted through the lines[17]. An SPD at the point of entry of equipment reduces essentially the risk related to the overvoltages by inductive coupling due to direct and/or nearby flashes[18]. Spatial shielding serves to reduce the impulsive magnetic field due to lightning current from direct or nearby lightning flashes. Total or partial shielding of the structure and/or of the internal circuits by using shielded cables or cable ducts are effective measures to mitigate the penetration of magnetic field. Line routing and shielding serves to minimise voltages and currents induced into electrical and electronic system using minimised loop area by adjacent routing of power and signal lines[19].

Moreover, protection measures such as LPS, shielding wires, magnetic shields and SPDs determine lightning protection zones ('LPZ')[20].

LPZs downstream of the protection measure are characterised by significant reduction of LEMP than that upstream of the LPZ. With respect to the threat of lightning, the following LPZs are defined:

- LPZ 0A zone where the threat is due to the direct lightning flash and the full lightning electromagnetic field. The internal systems may be subjected to full or partial lightning surge current; crucial parts of LPZ OA of NPPs can be identified using the rolling sphere method, as suggested by the international standard[21];
- LPZ 0B zone protected against direct lightning flashes, but where the threat is the full lightning electromagnetic field. The internal systems may be subjected to partial lightning surge currents;
- LPZ 1 zone where the surge current is limited by current sharing and by SPDs at the boundary. Spatial shielding may attenuate the lightning electromagnetic field;

[17] M. Marzinotto, F. Fiamingo, C. Mazzetti, G.B.L. Piparo, *A tool to evaluate the need of protection against lightning surges*, "Electric Power Systems Research" April 2012, Vol. 85.
[18] T. Kisielewicz, G.B. Lo Piparo, F. Fiamingo, C. Mazzetti, B. Kuca, Z. Flisowski, *Factors affecting selection, installation and coordination of surge protective devices for low voltage systems*, "Electric Power Systems Research" August 2014, Vol. 113.
[19] IEC 62305–4: Protection against lightning – Part 4…; IEC 60364–5 Ed. 3.0, Electrical installations of buildings, August 2001.
[20] IEC 62305–1: Protection against lightning – Part 1…
[21] IEC 62305–3: Protection against lightning – Part 3…

- LPZ 2,..., n zone where the surge current may be further limited by current sharing and by additional SPDs at the boundary. Additional spatial shielding may be used to further attenuate the lightning electromagnetic field.

As a general rule, the object to be protected shall be in a LPZ whose electromagnetic characteristics are compatible with the capability of the object to withstand stress the damage to be reduced (physical damage, failure of electrical and electronic systems due to overvoltages).

Protection measures can be also combined with different complex solutions in relation to the peculiarity of the structure and its content, of the internal and external systems: e.g. if a very effective spatial shield is used, line routing and shielding may not be required, or vice versa.

To find the optimum combination of protection measures it is necessary to validate each separate protection measure as well as the resulting combination of several protection measures.

5. LEGAL FRAMEWORK

Technical challenges relating to critical infrastructure, to which NPPs belong, should take into account the legal milieu and legal tools which can enhance and promote the best practices in the analysed area[22]. The legislator is usually interested in regulating the nuclear power sector in order to ensure protection against radiation[23]. In 2016, the IAEA published, as part of its Safety Standards Series, a revised version of the Governmental, Legal and Regulatory Framework for Safety[24]. It was updated after the 2011 accident at the Fukushima Daiichi NPP in Japan. As the document states in point 1.6, the framework is designed to protect safety of nuclear installations, radiation safety, the safety of radioactive waste management and safety in the transport of radioactive material. The issue of lightning protection for NPPs comes into the spotlight of the legal framework as far as damage caused by lighting can lead to radiation jeopardy. Legal regulations on lightning protection already appear in many legal instruments from the field of building regulations or regulations on occupational safety and health, since it deals with protecting life and property[25]. However, even there legislation is only one of the factors. Others include: specifications defined either by institutions responsible for safety in the workplace or in internal regulations of a given entity, and guidelines prepared by insurance companies to be followed by those insured[26]. In the case of NPPs, the role of lightning protection standards and best practices is even more crucial. Legal regulations can enhance lighting protection by promoting and endorsing technical

[22] G. Blicharz, T. Kisielewicz, *Prawne aspekty zarządzania commons wobec technicznych wyzwań rozwoju* smart city, „Forum Prawnicze" 2017, No. 1 (39), pp. 34–54.
[23] International Commission on Radiological Protection, 'The 2007 Recommendations of the International Commission on Radiological Protection', ICRP Publication No. 103, Annals of the ICRP, 2007, Vol. 37(2–4).
[24] *Governmental, Legal, and Regulatory Framework for Safety*, General Safety Requirements No. GSR, Part 1 (Rev. 1), International Atomic Energy Agency, Vienna, February 2016.
[25] IEC 62305–3: Protection against lightning – Part 3: Physical damage to structures and life hazard…
[26] *Lightning protection guide*, Building Connections-OBO, Bettemann Menden 2017, p. 22.

measures considered as state of the art in science and technology to prevent damage in NPPs. Since legislation usually uses broad legal terms directly indicating a technical standard, it goes out of the typical legislative toolbox, abandoning specific legal definitions and indicating specific names and numbers of technical standards created by professional bodies. Thus regulation becomes more flexible, and takes into account the ongoing development of technology. One of the key elements is the method of introducing best practices into the sphere of lightning protection of NPPs, and encouraging NPPs headquarters to update lightning protections systems. In order to take a broader perspective on the legislative framework, one should look at IAEA standards, and analyse what role the legislator should play, and how to formulate the legal regulations concerning NPPs in order to properly tailor the lightning protection solutions.

IAEA standards place the burden of creating legal regulations on two levels: firstly on each national legislator, and secondly on the global scale, involving international cooperation. The IAEA does not offer a draft of legal rules, but rather limits itself to showing what should be regulated in NPPs and what goals should be achieved. However, the Standards offer some substantial solutions on the structure of applying the law to the management of nuclear power. The IAEA standards contain 36 requirements for the national legislator. The main idea is to create an interplay between the legislator – or regulatory body – and the person or organisation responsible for a nuclear facility or a nuclear activity. According to requirements 3, 4 and 5, the legislator should create a regulatory body which is 'effectively independent' in its decision-making process. Its activity should focus on the safety of nuclear power facilities and activities. Independence of the regulatory body is crucial for maintaining safe conditions, and for having a controlling power over NPPs. IAEA standard 2.10 specifies that '[t]he staff of the regulatory body shall have no direct or indirect interest in facilities and activities or authorised parties'. Moreover, it shall have direct access to 'all necessary safety related information' even if it deems it to be 'proprietary' information, reserved by the operator of the NPP (2.13a). Interestingly enough, requirement 2.13 b states that the regulatory body has to have access to conduct inspections of the operator (authorised party) or any 'designer, supplier, manufacturer, constructor, contractor or operating organisation associated with the authorised party'. Broad insight of the regulatory body into the NPP operation sets up safeguards of the NPP's security and protection.

The other aspect which is highlighted by IAEA standards concerns assigning 'prime responsibility for safety'. According to requirement 5 responsibility should be assigned 'to the person or organisation responsible for a facility or an activity'. Within this responsibility, the authorised party should not only follow the rules imposed by regulatory body, but also should prove that it is following the established rules. Moreover, prime responsibility is not waived from the authorised party even if it has followed the established rules (2.14). Thus, IAEA standards are shifting risk burden on the person or organisation running the NPP. It requires such authorised party to be responsible throughout the lifetime of facility 'until their release from regulatory control' (2.15). The authorised party is expected to actively develop the protection of the NPP. It should follow the developments in science and technology, take advantage of the experiences of other parties and NPPs. The

same approach should be applied to lighting protection of NPPs analysed in this paper: it should be treated as one of the elements that – if covered properly – can help avoid unexpected danger.

This short insight into the guidelines concerning the legal framework shows the importance of cooperation between the government, regulatory body and private or public entities running the NPPs. Even though IAEA standards are merely guidelines, they today can be called soft law which governs not by power of the state, but by power of reason. Obviously, even in statutory law it is always good faith – *bona fides* – that is required to fulfill the legislative purpose[27]. It is so particularly in cases where lack of laws leads to disaster. The danger that can be created by irresponsible use of NPPs urges authorised parties, government, and regulatory bodies to follow best practices, and achieve outcomes desirable for the society as a whole. IAEA standards gain more authority due to international cooperation, and the 1994 Convention on Nuclear Safety. It is quite useful for the governments, regulatory bodies and parties running the NPPs to take into account not only the best practices set up for technological issues, but also for legal regulations on NPP safety. The outcome of IAEA legal standards and guidelines is a demand for cooperation within the nested structure of government, regulatory body, and parties running NPPs. Just like in the case of governing the commons, cooperation seems to be the only way to successful management[28]. Otherwise, any abuse of the resource can lead to a big disaster affecting the whole community. What is enacted is not always what is seen in practice. Having this in mind, regulatory bodies should not only put pressure on the technological development, but also on qualified staff in terms of both expertise and human virtues, which are essential for following legal precepts, and make NPPs beneficial for the communities[29].

6. CONCLUSIONS

The present paper contains basic considerations on selected aspects of service continuity provision in case of critical infrastructure. The legal and technological issues are presented on the background of NPP and lightning protection problems. A multidisciplinary approach to service continuity provision has been highlighted. The question of NPP protection is introduced by the results of NRC studies. The statistics obtained by the NRC shows that lightning phenomena can result in unexpected critical outcomes. Moreover, NRC database can be helpful in understanding lightning protection needs for NPPs. However these events clearly demonstrated that protection measures aimed to reduce damage and apparatus failure at NPPs, and to limit overvoltages caused by resistive and inductive coupling of the lightning current with such electronic and electrical apparatus are needed and have to be

[27] W. Dajczak, F. Longchamps de Bérier, *Prawo rzymskie w czasach dekodyfikacji*, „Forum Prawnicze" 2012, No. 2(10), pp. 8–22.

[28] G. Blicharz, *Commons – dobra wspólnie użytkowane. Prawnoporównawcze aspekty korzystania z zasobów wodnych*, Bielsko-Biała 2017.

[29] D. 1,1,10 (Ulpian, „Rules", book 2): *Iuris praecepta sunt haec: honeste vivere, alterum non laedere, suum cuique tribuere.* See: G. Blicharz, T. Kisielewicz, *Service continuity of critical energy systems in the light of present legal experience* [in:] *Decisions In Situations Of Endangerment. Research Development*, D. Kuchta, M. Popławski, D. Skorupka, S. Stanek (eds.), Wrocław 2016, pp. 221–236.

out in place. The recommendations provided by IEC 62305 standard are a good basis to achieve this aim and to deal with other lightning protection issues, even though this standard is not strictly dedicated to NPPs. In addition, the fundamental elements included in these documents can be helpful in performing a more accurate study on lightning protection dedicated to such critical systems. The lightning risk assessment and management should be carefully adopted for application to NPPs. However, some modifications aimed at creating a reliable procedure are needed. In particular, some studies on the probability of damage (*P*) and amount of loss (*L*) at the NPP due to flashes are strongly advised. This conclusion underlines that the critical power systems need to have an individual approach for the provision of safety and security, with the legislator engaged. The growing importance of soft law within almost any technological sector, from international transport to smart cities, should be taken into account by national legislators also in case of NPPs protection. Even though international technical standards provide a good basis for preparing an adequate safety level, the government agencies have a crucial impact on the final shape of regulations and, finally, on the safety and security of citizens.

Abstract

Tomasz Kisielewicz, Grzegorz Blicharz, Carlo Mazzetti, Giorgio Mosti, Alessandro Tofani, Davide De Carli, Valentina Montarese,
Technical and Legal Aspects of Critical Infrastructure Protection

The present paper discusses the mutual relations between technical aspects and legal solutions in the case of operation of nuclear power plants. To this aim principles of critical infrastructure safety and legal aspects are taken into account. The problem of service continuity provision in the face of natural dangers like lightning is reported. The article refers to nuclear power plants (NPP) with the aim of underlining the problem's importance. The discussion includes selected aspects of safety needs. The problem is discussed using a multidisciplinary approach. The role of international and national standardisation bodies is emphasised. Selected technical standards are quoted. The role of the legislator for service continuity provision is underlined. The present contribution gives a holistic overview on selected aspects of service continuity provision in case of critical infrastructure.

Keywords: *critical infrastructure, safety, natural endanger*

Streszczenie

Tomasz Kisielewicz, Grzegorz Blicharz, Carlo Mazzetti, Giorgio Mosti, Alessandro Tofani, Davide De Carli, Valentina Montarese,
Prawne i techniczne aspekty bezpieczeństwa infrastruktury krytycznej

W niniejszym artykule omówiono wzajemne powiązania aspektów technicznych i rozwiązań prawnych w przypadku prowadzenia elektrowni jądrowych. Praca uwzględnia zagadnienia ochrony i bezpieczeństwa infrastruktury krytycznej. Problematyka została podjęta w kontekście zapewnienia ciągłości usług w świetle naturalnych zagrożeń, jakimi są wyładowania atmosferyczne. Artykuł w szczególności odnosi się do elektrowni jądrowych (NPP) w celu podkreślenia ważności podejmowanej tematyki. Dyskusja dotyczy wybranych

aspektów bezpieczeństwa. Problem omawiany jest w podejściu multidyscyplinarnym. Artykuł przybliża rolę międzynarodowych i krajowych organów normalizacyjnych. Wybrane standardy techniczne zostają przywołane wraz z podaniem krótkiej charakterystyki. Podkreślono rolę ustawodawcy w kontekście zapewnienia ciągłości usług. Artykuł stanowi przegląd wybranych zagadnień związanych z ciągłością usług infrastruktury krytycznej.

Słowa kluczowe: *infrastruktura krytyczna, bezpieczeństwo, zagrożenie naturalne*

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3. G. Blicharz, T. Kisielewicz, *Service continuity of critical energy systems in the light of present legal experience* [in:] *Decisions In Situations Of Endangerment. Research Development*, D. Kuchta, M. Popławski, D. Skorupka, S. Stanek (eds.), Wrocław 2016;
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8. P. Duqueroy, C. Miry, P. Seltner, *Lightning risk assessment evaluation on French nuclear power plants, International Conference on Lightning Protection (ICLP)*, Shangai, China, October 2014;
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PRAWO W DZIAŁANIU
LAW IN ACTION
36/2018

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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[1] (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'[2].

Moreover, its purpose is also to implement[3] 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[4], 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

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1 Journal of Laws of the Republic of Poland Dziennik Ustaw 2017, Item 768.

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

3 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%2 0europeo_64 2014.pdf; http://www.ejtn.eu/Documents/THEMIS%202016/Semi%20A/Romania_TH_2016_01.pdf

4 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'.

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[5]. 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[6].

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[7].

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[8]. Importantly, the concepts of freezing and confiscation under EU law are autonomous[9].

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[10]. 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.

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[5] Recital 2–3 of Directive 2014/42.
[6] Recital 6 of Directive 2014/42.
[7] Recital 11 of Directive 2014/42.
[8] Recital 12 of Directive 2014/42.
[9] Recital 13 of Directive 2014/42.
[10] 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[11]. 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[12], 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 the

[11] A. Zawidzka-Łojek, *Zagadnienia wprowadzające* [in:] *Prawo materialne Unii Europejskiej*, A. Zawidzka-Łojek, R. Grzeszczak (eds.), Warszawa 2015, pp. 4–5.
[12] Journal of Laws 1971, No. 28, Item 260.

perpetrator. The Code was repealed on 17 October 1999. The Amending Act amended many important laws[13], in particular the Act of 6 June 1997 – Criminal Code[14] and the Act of 10 September 1999 – Criminal Fiscal Code[15]; 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[16] 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). *Ipso facto*, the Polish legislator decided that this presumption of the criminal origin

[13] The full list is available at: http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20170000768/O/D20170768.pdf

[14] 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'.

[15] Journal of Laws 1999, No. 83, Item 930, hereinafter as 'Criminal Fiscal Code' or 'CFC'.

[16] 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[17] 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'[18].

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*)[19].
2. Prohibition of retroactive application of the statute more harsh to the perpetrator (*lex severior retro non agit*)[20].

[17] As it is now.
[18] Authors' own translation from Polish of Article 23 of the Act Amending the Criminal Code and Certain Other Acts of 23 March 2017.
[19] A. Zoll [in:] *Kodeks karny. Część ogólna. Komentarz LEX*, A. Zoll (ed.), Warszawa 2012, pp. 109–119.
[20] 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[21]. 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'[22]. 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[23]. 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'[24]. This means that the principle of non-retroactivity of law can be interpreted from the principle of democratic rule-of-law state[25].

Moreover, this principle comes from Roman law[26], as most of the legal constructions of our time[27], and it is one of the most popular legal maxims used in Poland[28]. In one of its judgments, the Tribunal presented the origin of the principle of non-retroactivity; the following observations will recreate this reasoning[29]. 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 scelerata et nefaria est, ut etiam s ilex non essent, magno opere vitanda fuerit'[30]. 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"[31]. 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

[21] B. Banaszak, *Prawo konstytucyjne*, Warszawa 2004, pp. 214–217; 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, p. 99.

[22] 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.

[23] 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.

[24] Judgment of the Constitutional Tribunal of 22 August 1990, K 7/90, OTK 1990, para. 5.

[25] W. Wróbel, *Zmiana normatywna i zasady intertemporalne w prawie karnym,* Kraków 2003, pp. 363–377.

[26] 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.

[27] A. Spotowski, *Zasada lex retro non agit (geneza, uzasadnienie, zasięg)*, „Palestra" 1985, No. 5, pp. 7–10; J. Żurek, *Zasada*..., p. 100.

[28] 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.

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

[30] V. Krey, *Keine Strafe ohne Gesetz*, Berlin 1983, p. 49; A. Spotowski, *Zasada*..., p. 9.

[31] 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*"[32], which translated into English means: 'Imperial Constitutions do not judge the past, but regulate the future'[33].

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*"[34], that is '[i]t is in the interest of the state to ensure that unlawful acts do not remain unpunished'[35].

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 lawmaking 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*"[36], the sense being that when creating the law one must not look back and only move forward[37]; 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[38]. As a consequence, this principle is also reflected in the current 1997 Constitution of the Republic of Poland[39]. 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'[40].

[32] A. Spotowski, *Zasada*…, p. 9.
[33] Authors' own translation of the reasons for the judgment of the Tribunal, P 2/99: „*Konstytucje cesarskie nie oceniają przeszłości, lecz regulują przyszłość*".
[34] M. Kuryłowicz, *Słownik terminów, zwrotów i sentencji łacińskich oraz pochodzenia łacińskiego*, Warszawa 2012, p. 119.
[35] M. Kuryłowicz, *Słownik*…; authors' own translation from Polish: „*W interesie państwa leży, aby czyny bezprawne nie pozostały bezkarne*".
[36] H. Grajewski, *Granice czasowe mocy obowiązującej norm dawnego prawa polskiego*, Łódź 1970, p. 32; J. Żurek, *Zasada*…, p. 100; A. Spotowski, *Zasada*…, p. 10.
[37] H. Grajewski, *Granice*…, p. 32;J. Żurek, *Zasada*…, p. 100; A. Spotowski, *Zasada*…, p. 10.
[38] J. Jaskiernia, *Zasady*…, p. 294; J. Żurek, *Zasada*…, p. 100.
[39] The Constitution of the Republic of Poland of 2nd April, 1997 (Journal of Laws Item 483 as amended), hereinafter 'the Polish Constitution'.
[40] 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[41], for centuries.

Up to this day, as for universally binding law in Poland, according to Art. 2[42] 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)[43].

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[44] (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[45] (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[46] (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 stanowionego przez niego prawa. U podstaw tejże 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".

[41] In the countries influenced by the Roman civilization.

[42] J. Oniszczuk, *Konstytucja Rzeczypospolitej Polskiej w orzecznictwie Trybunału Konstytucyjnego*, Kraków 2000, pp. 65–75.

[43] M. Zubik, *Konstytucja III RP w tezach orzeczniczych Trybunału Konstytucyjnego i wybranych sądów*, Warszawa 2008, pp. 27–28.

[44] http://www.ohchr.org/EN/ProfessionalInterest/Pages/CCPR.aspx

[45] Journal of Laws 1993, Item 284; http://www.echr.coe.int/Documents/Convention_ENG.pdf

[46] 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'[47].

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[48].

A mumber 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 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[49]. Also, the legal scholars present a similar position[50]. 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.

[47] W. Gontarski, *Lex retro non agit. Uwagi konstytucyjne, cywilistyczne i wspólnotowe*, „Gazeta Sądowa" 2004, pp. 16–18; J. Żurek, *Zasada*..., p. 101.
[48] Judgment of the Constitutional Tribunal of 3 October 2001, K 27/01.
[49] Judgment of the Constitutional Tribunal of 3 October 2001, K 27/01.
[50] 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 crminem, nulla poeana 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'[51].
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'[52].
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'[53].
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'[54].
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'[55].

[51] https://constituteproject.org/constitution/Albania_2016?lang=en
[52] https://constituteproject.org/constitution/Brazil_2017?lang=en.
[53] http://laws-lois.justice.gc.ca/eng/Const/page-15.html#h-40
[54] http://www.presidency.gov.cy/presidency/presidency.nsf/all/1003AEDD83EED9C7C225756F0023C6AD/$fil e/CY_Constitution.pdf?openelement
[55] 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'[56].
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'[57].
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'[58].
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'[59].
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'[60].
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'[61].
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'[62].
13. **Morocco.** According to Art. 6 of the Constitution of the Kingdom of Morocco: '[…] The law may not have retroactive effect'[63].
14. **Norway**. According to Art. 97 of the Constitution of the Kingdom of Norway: 'No law must be given retroactive effect'[64].

[56] https://matsne.gov.ge/en/document/view/30346
[57] https://www.btg-bestellservice.de/pdf/80201000.pdf
[58] http://www.government.is/constitution/
[59] http://japan.kantei.go.jp/constitution_and_government_of_japan/constitution_e.html
[60] http://kenyalaw.org/kl/index.php?id=398
[61] http://www.sobranie.mk/the-constitution-of-the-republic-of-macedonia.nspx
[62] http://www.justiceservices.gov.mt/DownloadDocument.aspx?app=lom&itemid=8566&l=1
[63] https://constituteproject.org/constitution/Morocco_2011?lang=en
[64] https://www.stortinget.no/en/Grunnlovsjubileet/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'[65]. 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'[66].
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'[67].
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'[68].
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'[69].

[65] http://www.en.parlamento.pt/Legislation/CRP/Constitution7th.pdf
[66] http://www.en.parlamento.pt/Legislation/CRP/Constitution7th.pdf
[67] http://www.constitution.ru/en/10003000–03.htm
[68] http://www.justice.gov.za/legislation/constitution/chp02.html
[69] 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 […]'[70]. 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'[71].
20. **United States of America.** According to Art. I Section 9: 'No Bill of Attainder or ex post facto Law shall be passed'[72]; 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'[73]. 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'[74], 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'[75].

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

[70] https://global.tbmm.gov.tr/docs/constitution_en.pdf
[71] https://global.tbmm.gov.tr/docs/constitution_en.pdf
[72] https://www.senate.gov/civics/constitution_item/constitution.htm
[73] https://www.senate.gov/civics/constitution_item/constitution.htm
[74] https://www.senate.gov/civics/constitution_item/constitution.htm
[75] 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*

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PRAWO W DZIAŁANIU
LAW IN ACTION
36/2018

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The *mens rea* of the animal cruelty offence in the Polish criminal law

The *mens rea* of the offence of animal cruelty (ill-treatment of animals), the offence specified in Art. 35(1a) of the Law of 21 August 1997 on the Protection of Animals[1], has clearly been limited to deliberate actions. In the aforementioned law we cannot find any provision which would make unintentional cruelty to an animal criminally liable[2]. While the deliberateness of the prohibited act defined in Art. 35(1a) LPA is not contested, the question of its limits does arouse serious controversies. The question arises whether each of the codified forms of deliberate intent is involved[3]. Some claim that only direct intent is involved, according to others – also conditional intent. In this article, prepared on the basis of the 2017 report of the Institute of Justice (written by the authors of this article), we will attempt to answer which of the two approaches is right.

It is easy to find out that the differences of opinion reported in the discussed area are a consequence of divergent views as to whether the expression 'ill-treats'[4], which

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[1] Journal of Laws of the Republic of Poland Dziennik Ustaw 2017, Item 1840 as well as Journal of Laws, Items 650, 653. The law is referred to as 'LPA'.

[2] Although, as it will be pointed out further on in the study, unintentional cruelty to animals is not only possible, but it even seems that numerous arguments can be found to make it a prohibited and punishable act, either as an offence (which we support) or a misdemeanour.

[3] Let us recall that the Criminal Code of 6 June 1997 (consolidated text: Journal of Laws 2018, Item 1600 as amended), based on the law referred to, foresees two forms of deliberate intent: direct intent, consisting in the desire to commit such an act and a conditional intent (resultant, secondary), consisting in accepting the commitment of the act – see: Art. 9 of the code which points out that: 'A prohibited act is committed deliberately where the perpetrator has the intent to commit it, that is he wants to commit it or anticipating a possibility of its commitment he accepts it'. Let us also add the definition of the deliberate intent of committing a prohibited act (a definition which is from the logical point of view, a *partitio* definition, is a definition which at the stage of interpretation requires that the intent to commit a prohibited fact should be understood as the intent to satisfy the so called objective features of such an act. We should also indicate – once we are at it – that the literature on the subject draws attention to the fact that using a partial definition to define deliberate intent to commit a prohibited act can arouse doubts, that – therefore – a much better and more accurate method of defining a named object would be a *divisio* definition – see: Ł. Pohl, *Przyczynek do rozważań o strukturze nieumyślności i sposobie jej opisania w kodeksie karnym* [in:] *Obiektywne oraz subiektywne przypisanie odpowiedzialności karnej*, J. Giezek, P. Kardas (eds.), Warszawa 2016, pp. 418 et seq.

[4] For the record, Art. 45 (1a) LPA reads as follows: '[h]e who treats an animal with cruelty, is liable to the same punishment'. This provision – let us point it out for the clarity of the argument – refers back to the punishment specified in Art. 35(1) of the law in question. Under the law situation previously in force,

characterises the analysed type of offence and which the legislator used in the aforementioned law, assumes the deliberateness of the perpetrator's behaviours described in the provision. In the opinion of those who accept solely direct intent this is how the expression should be interpreted. Their opponents, who believe that conditional intent is also possible, claim that the expression does not mean it. In other words, according to the first view, it is impossible to ill-treat without the intention to do so, while according to the other view, ill-treatment without the intention to do so is fully possible and – in the present state of law – should result in a possibility of ill-treating with cruelty also through behaviours arising from giving effect to conditional intent.

In subject literature, relatively much room and attention was given to the subject by M. Gabriel-Węgłowski[5]. Noting that the aforementioned differences of opinion appear also in case law[6], the author expressed the following opinion: '[t]he view prevailing in case law is that the prohibited act characterised verbally as ill-treating (of a human being or an animal) – and thus an intentional offence – can be committed solely with direct intent'[7].

What should, however, be emphasised is the circumstance that among the judgments analysed by M. Gabriel-Węgłowski only one concerned the *mens rea* of the offence of animal cruelty. In the judgment of 16 November 2009 (V KK 187/09) the Supreme Court pointed out that: '[...] when determining whether a given behaviour constitutes ill-treatment of an animal within the meaning of the applicable Law on the Protection of Animals, views developed by legal scholars and in case law on the basis of Art. 184 of the 1969 Criminal Code and Art. 207 of the 1997 Criminal Code can still be applied in an accessory way, obviously provided that one takes into account the latest case law of the Supreme Court which explains how the notion of "ill-treatment" should be understood as well as the particularities of the object of the performed act […]. Using the same term "ill-treatment" in the Criminal Code with reference to people and also in the law in question with reference to animals, the rational legislator must have therefore admitted the application of an analogy to the extent to which a literal interpretation of the notion allows it. Thus, based on the abundant case law of the Supreme Court in this field, it should be indicated that in its essence ill-treatment signifies that the perpetrator wants to inflict physical

this punishment included a fine, restriction of liberty and imprisonment of up to two years. At present it is punishable by imprisonment from 3 months to 5 years; the qualifying feature is that the perpetrator acts with particular cruelty (see: Art. 35(2) LPA). Let us also add that the aforementioned changes of punishments for the commission of specified behaviours were introduced by the Law of 6 March 2018 on amendments to the Law on the Protection of Animals and the Criminal Code (Journal of Laws 2018, Item 663).

[5] See: M. Gabriel-Węgłowski, *Czyn zabroniony znęcania się nad człowiekiem lub zwierzęciem a umyślny zamiar sprawcy*, LEX/el. 2013. In spite of the fact that it is primarily the question of conventions, let us nevertheless note that the nomenclature used by the author to speak about deliberate intent forms a wrong terminological network as deliberateness and intent are synonymous notions.

[6] And thus, as regards judgments which pointed out that ill-treatment is only possible with direct intent, the author referred to the following sentences: Supreme Court judgment of 23 February 1995, II KRN 6/95, LEX No. 24461; Supreme Court judgment of 21 October 1999, V KKN 580/97, LEX No. 846111 and Supreme Court judgment of 16 November 2009, V KK 187/09, LEX No. 553896. What should be noted here is the fact that the views expressed in the last of these judgments were repeated in the Supreme Court judgment of 13 December 2016, II KK 281/16, LEX No. 2237277. In turn, as for judgments in which it was assumed that ill-treatment could also be committed with conditional intent, the author listed: the resolution of the Criminal Chamber of the Supreme Court of 9 June 1976, VI KZP 13/75, LEX No. 19141, Supreme Court judgment of 24 October 2000, WA 37/00, LEX No. 332949 as well as the Supreme Court judgment of 18 March 2015, III KK 432/14, LEX No. 1663408.

[7] M. Gabriel-Węgłowski, *Czyn zabroniony*…

or moral suffering on the victim, harass or humiliate the latter, and hence the acceptance by the perpetrator of such a character of the behaviour does not suffice to conclude that an offence defined in Art. 184(1) of the Criminal Code (of 1969 – authors' note) was committed and, consequently, the offence of ill-treatment defined in Art. 184(1) of the Criminal Code can be committed only with direct intent […]. It should also be emphasised that what determines the limitation of the *mens rea* to direct intent is also the verbal characteristic, the intentional "ill-treats", characterising the specific attitude of the perpetrator, which should refer to the ill--treatment of both people and animals. In such a situation, it should be concluded that also the offence of ill-treating animals, specified in Art. 35(1) of the Law, can be committed solely deliberately and, moreover, exclusively with direct intent'[8].

Thus, in the quoted judgment, the Supreme Court adopted, as we can see, a position that where the *mens rea* of the offence of ill-treatment of animals is established, reference should be made to the views about the *mens rea* of the offence of ill-treatment of human beings put forward in legal literature and case law and thus to the views formulated on the basis of interpretation of Art. 184 of the 1969 Criminal Code[9] and Art. 207 of the 1997 Criminal Code, which resulted in the Supreme Court's majority standpoint rejecting the possibility of ill-treatment as a behaviour with conditional intent.

The fact that reference was made to only one judgment concerning the *mens rea* of the offence of animal cruelty seems to fully support the opinion that the title issue has not been given any substantial consideration in the judicial practice[10] and thus a statement about the divergence of judgments in this respect must be seen as unjustified.

As for the legal scholars, it should be pointed out that while in light of the applicable Criminal Code and the legal regulations it contains (obviously these related to the ill-treatment of human beings) the dominant view is that that ill-treatment can be committed solely with direct intent, in light of the discussed Law on the Protection of Animals the definitely dominating view assumes that ill-treatment can also be accompanied by conditional intent. What we can notice in the studies which actually analysed the characteristic features of the offence of ill- treatment of an animal, is a fairly uniform approach to the *mens rea* of this prohibited act, expressed as follows:

1) 'In my assessment the second view admitting "ill-treatment" with conditional intent is more adequate' – M. Gabriel-Węgłowski[11];

[8] See: LEX No. 553896.
[9] Law of 19 April 1969 – Criminal Code (Journal of Laws No. 13, Item 94).
[10] Simultaneously, M. Gabriel-Węgłowski added – which we will have to refer to – that the Supreme Court '[…] was too automatic in transferring the interpretation of the ill-treatment of human beings to the ill-treatment of an animal, failing to discern the essential difference in the very provisions which is bound to affect their understanding and application' (M. Gabriel-Węgłowski, *Glosa do wyroku SN z dnia 16 listopada 2009, V KK 187/09*, LEX/el. 2010).
[13] As pointed out by M. Gabriel-Węgłowski: '[t]he issue referred to is controversial, though this controversy is definitely much more visible in the doctrine of criminal law, while much less so in case law as such' (M. Gabriel-Węgłowski, *Czyn zabroniony…*).
[11] M. Gabriel-Węgłowski, *Przestępstwo przeciwko humanitarnej ochronie zwierząt*, LEX/el. 2009. In another study, the author also adds that: '[…] the open catalogue of behaviours of *ex definition* ill-treatment of animals contains examples of very diversified acts. Their detailed analysis, including the wordings used by the legislator, leads to a conclusion that with reference to at least some of them it is erroneous to narrow down the potentially penalised deliberateness of the perpetrator solely to direct intent. This is further supported by both logical considerations and arguments of the law interpretation principles' (M. Gabriel-Węgłowski, *Glosa…*).

2) 'The linguistic interpretation of the terms describing undesirable behaviours towards animals used in it points out that almost all executive acts can be accompanied not only by the perpetrator's direct intent, but also by conditional intent' – D. Karaś[12];
3) 'Yet it seems that the minority position, supporting the possibility of the offence defined in Art. 35(1) of the Law on the Protection of Animals being committed with both forms of intent is right' – M. Mozgawa, M. Budyn-Kulik, K. Dudka, M. Kulik[13].

The only different position was expressed by W. Radecki, according to whom: '[t]he ill-treatment as such is, obviously, an act or omission committed with direct intent'[14].

In subject literature we can also read that: '[i]n 2009, the Supreme Court confirmed the admissibility of accessory application of these views to the examination of cases concerning the offence of animal cruelty indicating simultaneously that it can be committed only deliberately and solely with direct intent. The most important thesis of this judgment, based on the linguistic interpretation of Art. 6(2) of the Law on the Protection of Animals, was recognising that the perpetrator's intent should be established not in relation to the pain or suffering inflicted on animals, but in relation to the specific causative act specified in this provision'[15]. Simultaneously, D. Karaś, the author of the above remark, noted that in practice, in spite of frequent references to the judgment in question, the thesis is simply ignored because, in his opinion: '[t]he reasons for the refusal to institute investigation or for its discontinuation that were analysed during monitoring show that the bodies conducting preparatory proceedings tend to refer to the above Supreme Court judgment primarily with the purpose of justifying the need for there being direct intent in order to be able to attribute the offence of the ill-treatment of an animal to the perpetrator. As a rule, however, contrary to the interpretation given in the judgment, the perpetrator's intent is not referred to the actions specified in the law, but to the behaviour consisting in ill-treatment of animals. Thus, determining that the behaviour (action or omission) of a given perpetrator was not motivated by the desire to inflict pain or suffering to animals, torment them, be cruel to them, becomes sufficient grounds for refusing to institute investigations or discontinuing them'[16].

Doubts with respect to the aforementioned degree of deliberateness are also clearly visible in the literature when an aggravated form of the offence in point – that is, the type characterised by 'particular cruelty', specified in Art. 35(2) of the Law on the Protection of Animals, is analysed. And thus:

1) according to M. Gabriel-Węgłowski: '[c]ertain doubts arise, on the other hand, as to whether a person can act with particular cruelty with

[12] D. Karaś, *Niech zwierzęta mają prawa! Monitoring ścigania oraz karania sprawców przestępstw przeciwko zwierzętom*, „Przegląd Prawa i Administracji" 2017, No. 108, p. 23.
[13] M. Mozgawa, M. Budyn-Kulik, K. Dudka, M. Kulik, *Prawnokarna ochrona zwierząt – analiza dogmatyczna i praktyka ścigania przestępstw z art. 35 ustawy z 21.08. 1997 r. o ochronie zwierząt*, „Prawo w Działaniu" (Law in Action) 2011, No. 9, p. 49.
[14] This view is, however, at least partly, surprising due to the fact that the author admits the possibility of commission of the offence of ill- treatment (of an animal) with particular cruelty also withconditional intent.
[15] D. Karaś, *Niech zwierzęta*..., p. 22.
[16] D. Karaś, *Niech zwierzęta*..., p. 22.

conditional intent. […] Bearing in mind that particularly cruel behaviours of perpetrators towards victims (of rape, murder, abuse) tend to have their roots in a specific attitude of the perpetrator to inflicting suffering – an attitude resulting from a variety of reasons, primarily from personality disturbances or mental disturbances – then, unlike in the case of "ordinary" ill-treatment (which, as it has been indicated, can be an additional element of the perpetrator's behaviour), cases of particularly cruel behaviour with an intent other than direct intent will be extremely rare. Yet, once we adopt the assumption that an act of ill-treatment without an additional specification "with particular cruelty" can be committed withconditional intent, as we did earlier, it is likewise impossible to completely exclude such a possibility in the case of an aggravated offence'[17];

2) according to M. Mozgawa, M. Budyn-Kulik, K. Dudka and M. Kulik: [i]t is also here that a certain problem arises in terms of the forms of deliberateness in the case of ill-treatment with particular cruelty. Although in the literature views can be found that both direct intent and conditional intent can be present, this is however not so obvious. [...] It should [...] be noted that particular cruelty is a feature which embraces not only the objective element, but also the subjective one, which points to a specific attitude of the perpetrator. This in turn gives rise to serious reservations as to the possibility of accepting conditional intent where ill-treatment with particular cruelty is involved'[18];
3) according to W. Radecki: '[t]he qualifying feature specified in Art. 35(2) of the Law on the Protection of Animals is particular cruelty referred to both killing and ill-treating – the undertaking by the perpetrator of actions characterised by drastic forms and methods of inflicting death in a perverse and slow manner, intended to magnify the scale and duration of the suffering (Art. 4(12) LPA). The literature on criminal law assumes that particular cruelty is an objective category, not a subjective one. What decides about an act being deemed to be particularly cruel is not the perpetrator's intent, but the assessment of the intensity of the suffering inflicted on an animal, which presents as particularly cruel to the sensitivity of an ordinary man, for instance, blinding or other severe mutilation of an animal. As a consequence, it is possible to conceive the commission of the offence defined in Art. 35(2) LPA with conditional intent in case the perpetrator predicts and accepts that his behaviour would be assessed as particularly cruel by an ordinary man'[19];
4) finally, according to S. Rogala-Walczyńska: '[t]he problem concerns, however, the forms of deliberateness, primarily in the case of ill-treating

[17] M. Gabriel-Węgłowski, *Przestępstwa przeciwko…*
[18] M. Mozgawa, M. Budyn-Kulik, K. Dudka, M. Kulik, *Prawnokarna ochrona…*, p. 49. See also M. Mozgawa, *Prawnokarne aspekty ochrony zwierząt* [in:] *Prawnokarna ochrona zwierząt*, M. Mozgawa (ed.), Lublin 2002, p. 173; by the same author: *Prawnokarna ochrona zwierząt*, Lublin 2001, p. 21.
[19] W. Radecki, *Przestępstwo zabijania i znęcania się nad zwierzętami* [in:] *Szczególne dziedziny prawa karnego, Prawo karne wojskowe, skarbowe i pozakodeksowe. System Prawa Karnego*, M. Bojarski (ed.), Vol. 11, Warszawa 2014, p. 847. See also by the same author: *Ustawa o ochronie zwierząt. Komentarz*, Warszawa 2012, pp. 215–216, and discussion by the same author [in:] *Pozakodeksowe prawo karne z komentarzem*, M. Bojarski, W. Radecki (eds.), Wrocław 1998, p. 170.

> animals with particular cruelty. Although in literature one can find views that what is involved here is both direct and conditional intent, this is not so obvious. It should be pointed out here that particular cruelty is a feature covering not only the objective, but also the subjective element, indicative of a particular attitude of the perpetrator. This in turn arouses justified doubts as to the possibility of admitting the existence of conditional intent where ill-treatment with particular cruelty is involved'[20].

To conclude the survey of literature it is worth citing the following opinion: '[t]he features of the *mens rea* of the offence of inhumane treatment of animals in its basic type should be defined in such a way as to embrace both forms of deliberateness. This will allow for greater penalization of socially undesirable behaviours towards animals, ones which result in the suffering of animals, as well as release the law-applying bodies from the obligation to consider and discuss, for instance, what intent underpinned the behaviour of someone who kicked a dog. Changes of this kind will also translate into greater security and effectiveness of the law on protection of animals on humanitarian grounds. In the present state of law, it is not clear what undesirable behaviours towards animals are prosecutable, because the principal reason for holding the perpetrator liable for the offence is the objective conditions'[21]. In other words, according to the author of this quote, an attempt should be made for criminal law regulations on ill-treatment of animals to indicate clearly that the ill-treatment in question can be accompanied by both direct and conditional intent.

What draws attention – without analysing the views of the criminal law literature and case law – is the fact that they are not based on a thorough interpretation of the provisions of the Law on the Protection of Animals that we are interested in. Let us therefore present an attempt at solving the title issue that will be based on non-speculative arguments resulting from an interpretation of these provisions carried out properly, that is, in compliance with the tenets of the science of interpreting a legal text[22].

We will begin by repeating the wording of the provision where offence in point is defined. And thus, in accordance with it: '[f]e who ill-treats an animal is liable to the same punishment'[23].

As we know, unlike the Criminal Code, the Law on the Protection of Animals specifies when – in accordance with this Law[24] – we are dealing with ill- treatment of an animal, by indicating in Art. 6(2) that '[t]he ill-treatment of animals shall be understood as inflicting or consciously allowing that pain and suffering be inflicted

[20] S. Rogal-Wilczyńska, *Prawnokarna ochrona zwierząt*, „Prokurator" 2009, Nos. 3–4, pp. 100–101.

[21] D. Karaś, *Niech zwierzęta…*, p. 28. Comp. J. Helios, W. Jedlecka, *Znęcanie nad zwierzęciem w doktrynie prawa karnego i w orzecznictwie sądowym – kilka uwag tytułem wstępu do rozważań o prawnej ochronie zwierząt*, „Przegląd Prawa i Administracji" 2017, No. 108, p. 15.

[22] On the process of preparing an interpretation see, first of all, M. Zieliński, *Wykładnia prawa. Zasady, reguły, wskazówki*, Warszawa 2010, pp. 313 et seq.

[23] Let us recall once again that with respect to the punishment specified in it, the quoted provision refers to Art. 35(1) LPA, that is, the provision which states: '[h]e who kills, puts to death or slaughters an animal in contravention of Art. 6(1), Art. 33 or Art. 34 (1)–(14) is liable to a fine, limitation of liberty or imprisonment of up to 2 years'.

[24] It seems that in the science of the interpretation of a legal text, the legal definition placed in the provisions of a law, such as the Law on the Protection of Animals, is binding exclusively in the area of its application; for more on this issue see, for instance, M. Zieliński, *Wykładnia prawa…*, pp. 212–213.

and, in particular: 1) deliberate injury or mutilation of an animal, not constituting a treatment or a procedure allowed by the law within the meaning of Art. 2(1)(6) of the Law of 15 January 2015 on the Protection of Animals Used for Scientific or Educational Purposes, including the branding of warm-blooded animals, including hot branding and freeze branding, as well as all and any procedures aimed at changing the appearance of an animal and performed for the purpose other than saving their health or life, and, in particular, trimming dogs' ears or tails; 1a) hot branding or freeze branding of warm-blooded animals; 2) (repealed); 3) use for work, for sports or entertainment purposes of ill animals as well as animals which are too young or too old and forcing them to do things which can cause them pain; 4) beating animals with hard and sharp objects or objects equipped with a device intended to cause special pain, beating them on the head, on the lower part of the abdomen, lower parts of extremities; 5) overburdening of draught animals and animals of burden with cargos obviously inappropriate for their force and condition or the state of roads as well as forcing such animals to run too fast; 6) transport of animals, including livestock, slaughter animals and animals transported to markets, carrying or mustering animals in a way causing them unnecessary suffering and stress; 7) using harnesses, fetters, frames, bonds or other devices forcing the animal to stay in an unnatural position, causing unnecessary pain, injury or death; 8) performance on animals of surgical procedures and operations by people not having the required authorisations or in ways contrary the principles of veterinary medicine, without the necessary caution and respect as well as in any way causing pain which could have been avoided; 9) malicious frightening or teasing of animals; 10) keeping animals in inadequate living conditions, including keeping them in conditions of stark neglect and sloppiness or in spaces or cages making it impossible for them to maintain a natural position; 11) abandonment of an animal, in particular a dog or a cat, by the owner or by another carer; 12) application of cruel methods in breeding and keeping animals; 13) (repealed); 14) (repealed); 15) organising animal fights; 16) copulation with an animal (zoophilia); 17) exposing a domestic or farm animal to atmospheric conditions which threaten its health or life; 18) transporting or keeping live fish for selling purposes without adequate quantity of water to making breathing possible; 19) keeping an animal without adequate food and water for a period exceeding the minimal needs for the species'.

We will make no mistake if we assume that the clarification quoted above is nothing but a legal definition of 'ill-treatment of an animal'[25], and thus a crucial

[25] There is no reason which would make it impossible to apply the clarification indicated also to the case of the ill-treatment of one animal; in Art. 6(2) LPA, plural forms can be seen used as it speaks about the ill-treatment of animals. Moreover, what makes the solely descriptive reading of Art. 6(2) LPA incorrect is the fact that Art. 35(1a) LPA mentions an animal and not animals. In other words, the rejection of the plural is justified by the argument intended to ensure its efficiency on the basis of all the regulations of the said law, including in particular those provisions of the law which specify the scope of its criminalisation. Briefly speaking, the assumption of the rationality of the entity laying down the norms makes the interpreter depart from the literal reading of Art. 6(2) LPA and thus tells him to assume that the definition of ill-treatment of animals, that is, the definition which defines also ill-treatment of one animal not verbalised in it. We must also note, at this point, that the analysed definition is, from the theoretical and legal point of view, a definition placed in the general provisions – more on this subject of definitions of this kind in M. Zieliński, *Wykładnia prawa*…, p. 203. Obviously, it is also a classical, i.e. a normal definition – more on the subject of definitions of this type, for instance, in M. Zieliński, *Wykładnia prawa*…, p. 205.

component of the legal text, the importance of which in this process is manifested not so much in the obvious inability to ignore it (prohibition of *per non est* interpretation[26]), but first of all in the necessity of giving it key importance in the interpretation process[27].

M. Zieliński emphasises its importance by drawing attention to the fact that legal definitions: '[…] are extremely powerful interpretation directives. These are interpretation directives imposed normatively by the legislator itself. Their particular interpretational significance manifests itself in two aspects. First, the interpretation process would be largely irrational as it would consist in the first place in determining the meaning of a given phrase in the general language, i.e. after consulting dictionaries. But if the law contains a definition of the term, it will anyway prevail over the meaning derived from the general dictionary. Such a significance of the legal definition determines the necessity of reversing the order of interpretation steps, namely the need to first check whether the legal text contains a definition […]. The second aspect of the significance of the legal definition reveals itself not only in the fact that it can prevail over other meanings, but also in the fact that the meaning expressed by it cannot be changed even if the linguistic content of the definition undermined the assumption of a rational legislator'[28].

Given the above, we are obliged to understand ill-treatment of an animal, within the meaning of the Law on the Protection of Animals, as infliction of pain or suffering on them or (and in fact also[29]) knowingly allowing for pain or suffering to be inflicted on them (the definiens of the definition from Art. 6(2) LPA). Here, we must emphasize once again that the behaviours listed, with the help of an incomplete extentional definition, in the points of Art. 6(2) LPA, constitute but examples of the behaviours given in the aforementioned definiens[30].

Although, importantly, it is enriched further in Art. 6(2) LPA, i.e. in the specified points of the section, with an incomplete extensional definition, on definitions of scope and thus non-classic ones, see also M. Zieliński, *Wykładnia prawa*…, pp. 209–210, where the author clearly pointed out that: '[i]ncomplete extensional definitions tend to be used to strengthen the classical definition in a situation where it is not diagnostic enough' (M. Zieliński, *Wykładnia prawa*…, p. 210). As we can see, the quote finds its perfect reflection in the definition from Art. 6(2) LPA, which is commented on here.

[26] As explained by L. Morawski, the prohibition should be understood as an interpreter-addressed prohibition of interpreting in such a way that certain elements of the interpreted legal text would in the process of interpreting the text come to be treated as redundant. See: L. Morawski, *Zasady wykładni prawa*, Toruń 2014, pp. 122–123.

[27] See: M. Zieliński, *Wykładnia prawa*…, pp. 213 et seq., and also L. Morawski, *Zasady*…, pp. 104 et seq., where the compliance by the interpreter in the course of interpretation with the legal definition is defined as compliance with the obligatory directive of the legal language: '[i]f the legislator gave a specific meaning to a specific phrase, it should be understood in precisely this meaning; L. Morawski, *Zasady*…, p. 107.

[28] M. Zieliński, *Wykładnia prawa*…, pp. 214–215.

[29] The use of the word 'or' does not seem justified, as it suggests that what is at stake is an exclusive disjunction ('either…or'). Yet it was clear that what the drafter of the text wanted the definition to convey the message was that in the opinion of the legislator ill-treatment of an animal includes both the infliction of pain or suffering and allowing for this pain and suffering to be inflicted. In other words, the most adequate inter-sentence conjunction here would be 'and', which, if properly understood, would obviously not mean that the ill-treatment referred to would be involved only where the perpetrator, for instance, inflicts pain on an animal and consciously allows for the infliction of the pain. In spite of the word 'or', the conjunction used in Art. 6(2) LPA is not a synthesising, but an enumerative one, therefore both the infliction of pain and suffering on an animal and knowingly accepting the infliction of pain or suffering on an animal, are, when taken separately, cases of ill-treatment of animals within the meaning of the Law on the Protection of Animals. More on the meanings (conjunctional, enumerative or synthesising) of the conjunction 'and' in T. Kotarbiński, *Elementy teorii poznania, logiki formalnej i metodologii nauk*, Wrocław 1961, p. 474.

[30] See: M. Zieliński, *Wykładnia prawa*…, p. 209. In this study the author explains that: '[i]ncomplete extensional definitions, by design, do not list all elements of the scope, but limit themselves only to pointing to an example of these elements. As a rule, they then tend to use the expression *in particular*'.

Hence, in order to answer the question concerning the limits of deliberateness in case of the offence defined in Art. 35(1a) LPA, it is enough to determine whether the behaviours mentioned in the definiens of the definition in Art. 6(2) LPA can be committed with conditional intent.

We should adopt the stance that they can be committed with this form of intent. It is fully possible to inflict pain or suffering to an animal in the giving effect to an intent of this type. Pain and suffering can also be inflicted without the intent to generate situations of this kind. Yet, it is obvious that given the absence in the present state of law of a regulation which would criminalize the infliction of pain or suffering on an animal unintentionally, unintentional infliction of pain or suffering on an animal remains a behaviour that is not penalised. The same applies to knowingly allowing pain or suffering to be inflicted on an animal. However, in this case it is impossible to exclude cases where this knowing permission for pain or suffering to be inflicted on an animal would be a consequence of acting with conditional intent or with knowing non-deliberateness; obviously, in the absence in the present state of law of a regulation criminalising such a behaviour, in a situation when it was unintentional, means that unintentional behaviour is currently not penalised.

The above conclusions find adequate support also in an analysis of behaviours given as examples of behaviours specified in the definiens of the commented definition. Having a good look at them, we can clearly see that the conditional intent is perfectly possible in case of the behaviours specified in points 1, 1a, 3, 5, 6, 7, 8, 10, 11, 12, 17, 18 or 19 of Art. 6(2) LPA. It can be said that conditional intent is excluded solely with reference to the behaviours listed in those points of Art. 6(2) LPA whose characterisation contains the directional feature 'in order to'.

It is clear that the present considerations are in stark opposition to the position expressed by the Supreme Court in the judgment of 16 November 2009. This position is evidently erroneous, its primary drawback being the fact that it disregards the fact that the Law on the Protection of Animals contains a definition of 'ill-treatment of animals' and thus a definition the interpretation of which proves beyond any doubt that the features of the prohibited act defined in Art. 35(1a) LPA can also be displayed by a behaviour committed with conditional intent. Another consequence of the Supreme Court's inappropriate interpretation of the title issue is that it unambiguously suggests that while recreating the form of *mens rea* the offence defined in Art. 35(1a), interpreters, in particular courts, should benefit from the wealth of science and case law relating to the *mens rea* of the offence of ill-treatment of human beings. This suggestion that is unjustified in the light of what has been said. The legal definition of 'ill-treatment of animals' provided by the Law on the Protection of Animals specifies a fully autonomic area of behaviours falling under this caption. This means, among others, that reflection on the limits of deliberateness admissible in this case must be reduced to analysing whether in case of such behaviours conditional intent is also possible. As we have said – and we would like to emphasise it – this reflection seems to support the conclusion that conditional intent is also conceivable in case of such behaviours.

Naturally, the above remarks find are fully applicable to the aggravated type of the offence in point. Contrary to the occasionally presented view that direct

intent is favoured by the role 'particular cruelty' possibly plays in the subjective component (*mens rea*), this feature characterises solely and exclusively the objective aspect of the prohibited act[31].

The analysis presented in this article aimed to solve the problem of the existing legal regulations, therefore any possible proposals of legislative amendments remain beyond its scope.

Limiting ourselves here to expressing only the most basic of such proposals, we will point out that in our opinion the offence of animal cruelty should also have its unintentional form. Very frequently, we encounter cases where ill-treatment of an animal was accompanied by an essentially erroneous conviction resulting from lack of knowledge about proper treatment of animals and the respect due to them, furthered by the conviction that the resultant, all too common, degenerated way of treating animals, is socially acceptable. In other words, there seems to be no reason why erroneous opinions of this kind were to be placed outside of the scope of the criminal law regulation. We believe that criminalisation by means of creation of a pertinent type of offence would be a good optional solution. We would also welcome information about this criminalisation being given the form of a provision creating a pertinent misdemeanour[32].

In our view it is worthwhile to consider also a correction to the present state of law whereby the offence in question would be regulated in the Criminal Code. A change of this kind would constitute a clear signal about the seriousness of the offence, resulting from its social noxiousness, as well as amply demonstrate the legislator's departure from the axiologically unjustified – not to say rather embarrassing for the legislator – conception in accordance with which the Criminal Code treats an animal much worse than movable property[33]. In the report on which this study is based we pointed out that the procedure should be accompanied by a change of the punishment for the offence. We proposed that the basic type of the offence of ill-treatment of animals should be liable to the punishment of imprisonment of up to three years, while for the aggravated type, characterised by particular cruelty of the perpetrator's behaviour, should be liable to imprisonment from 3 months to 5 years. For the proposed unintentional type, we proposed a fine, limitation of freedom and imprisonment of up to two years. As we have already pointed out (see note 7), the Law of 6 March 2018 on Amendments to the Law on the Protection of Animals and the Criminal Code adopted the proposals referred with regard to the basic and aggravated form of animal cruelty. Also in this scope the report proved effective. Regrettably, we failed to persuade the legislator to introduce the unintentional type of ill-treatment of an animal[34].

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[31] See: Ł. Pohl, *Błąd co do okoliczności stanowiącej znamię czynu zabronionego w polskim prawie karnym (zagadnienia ogólne)*, Poznań 2013, pp. 94–95.

[32] The proposed solution would thus perform a crucial educational function, which is urgently needed in this area.

[33] Attention has already been drawn to it in literature see: Ł. Pohl, *O znaczeniu refleksji naukowej Profesora Tomasza Kaczmarka*, „Państwo i Prawo" 2017, No. 12, p. 93.

[34] What supports the idea that unintentional ill-treatment of an animal is fully possible is the meaning of the expression' ill-treat' in general language and thus in the language which constitutes legal basis for the legal language. In this language 'to ill-treat' means 'to inflict (physical, moral) suffering to somebody, torment somebody, bully somebody', see: S. Dubisz [ed.], *Uniwersalny słownik języka polskiego,* Warszawa 2003, p. 728. At the same time, there seems to be no doubt as to whether suffering can also be inflicted unintentionally.

Summary

Łukasz Buczek, Konrad Burdziak, Łukasz Pohl, *The mens rea of the animal cruelty offence in the Polish criminal law*

The article concerns the mens rea of the animal cruelty offence in the Polish criminal law, being an attempt at settling the dispute whether it comprises only direct intent or also conditional intent. The attempt was based on an interpretation of the Polish legal regulations and led to unequivocal support for the view that it is possible for the offence in point to be committed when the perpetrator's behaviour results from giving effect to conditional intent.

Keywords: *animal cruelty offence in the Polish criminal law, mens rea of an offence, conditional intent*

Streszczenie

Łukasz Buczek, Konrad Burdziak, Łukasz Pohl, *Strona podmiotowa przestępstwa znęcania się nad zwierzęciem w polskim prawie karnym*

Artykuł dotyczy strony podmiotowej przestępstwa znęcania się nad zwierzęciem w polskim prawie karnym. Podjęto w nim próbę rozstrzygnięcia sporu o to, czy strona ta obejmuje wyłącznie zamiar bezpośredni czy może jednak także zamiar ewentualny. Próbę tę oparto na wykładni stosownych przepisów prawnych. W wyniku jej zrealizowania opowiedziano się jednoznacznie za stanowiskiem dopuszczającym możliwość popełnienia wskazanego przestępstwa także zachowaniem powstałym w wykonaniu zamiaru ewentualnego.

Słowa kluczowe: *przestępstwo znęcania się nad zwierzętami w polskim prawie karnym, strona podmiotowa przestępstwa, zamiar ewentualny*

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PRAWO W DZIAŁANIU
LAW IN ACTION
36/2018

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Cybercrime *locus* as defined now and in amendments suggested

The question of *locus delicti* is regulated in the Criminal Code[1], Art. 6(2), under which an offence is believed to be committed in the place where the perpetrator acted or failed to act or where the result – being the distinguishing characteristic of an offence – occurred or was to occur according to the perpetrator's intent. The question is rather a complex one as it is related to the institutions of substantive criminal law, as for instance the principle of territoriality (Art. 5), or a number of offence types defined in the Special Section of the Criminal Code[2]. The determination of *locus delicti* is crucial for procedural criminal law as well, because it is a major criterion for establishing the jurisdiction of the Polish State in criminal matters and designating a competent authority to conduct criminal proceedings[3].

The question of *locus delicti,* although of paramount importance, enjoys moderate interest among the authoritative juristic literature[4] and is almost non-existent in judicial decisions[5]. It appears that criminal law practice will have to deal increasingly often with offences committed with the help of the Internet and in the Internet on account of its ever greater availability and a consequently increasing social role. The Internet is no longer a mere network for exchanging information. Over the last decades, it has become a trading place (e.g. auction sites), working

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[1] Act of 6 June 1997 (consolidated text: Journal of Laws 2018, Item 1600 as amended).

[2] See: M. Nawrocki, *Miejsce popełnienia czynu zabronionego*, Warszawa 2016, pp. 45–113.

[3] M. Nawrocki, *Miejsce popełnienia*…, pp. 153–179.

[4] See: M. Nawrocki, *Miejsce popełnienia*…, *passim*; M. Nawrocki, *Przestępstwa dystansowe i tranzytowe*, *Acta Iuris Stetinensis* 2016, No. 2(14), pp. 89–104; A. Światłowski, *Miejsce popełnienia przestępstwa a odpowiedzialność karna – zarys problematyki*, „Monitor Prawniczy" 1993, No. 4, pp. 103–105; J. Warylewski, *Pornografia w Internecie – wybrane zagadnienia karnoprawne*, „Prokuratura i Prawo" 2002, No. 4, pp. 52–61; M. Sowa, *Odpowiedzialność karna sprawców przestępstw internetowych*, „Prokuratura i Prawo" 2002, No. 4, pp. 62–79; A. Błachnio, *Miejsce popełnienia czynu zabronionego przed podżegacza i pomocnika – zarys problematyki*, „Palestra" 2006, No. 7–8, pp. 82–91; B. Hołyst, *Internet jako miejsce zdarzenia*, „Prokuratura i Prawo" 2009, No. 4, pp. 5–20; R.A. Stefański, *Miejsce popełnienia przestępstwa. Problemy materialno-karne i procesowe* [in:] *Problemy wymiaru sprawiedliwości karnej. Księga Jubileuszowa Profesora Jana Skupińskiego*, A. Błachnio-Parzych, J. Jakubowska-Hara, J. Kosonoga, H. Kuczyńska (eds.), Warszawa 2013, pp. 515–526; D. Zając, *Odpowiedzialność karna za czyny popełnione za granicą*, Kraków 2017, pp. 332–345.

[5] See: judgment of CoA in Łódź of 24 January 2001, II AKa 240/01, LEX No. 84224; SC decision of 29 September 2010, IV KO 99/10, OSNwSK 2010, No. 1, Item 1827; decision of CoA in Katowice of 6 September 2017, II AKz 582/17, LEX No. 2440802 and SC decision of 17 April 2018, IV KK 296/17, LEX No. 2481975.

place (e.g. for professional computer-game players or bloggers), space for doing business (today, almost any branch of the economy is present on the Internet, if only for advertising its services or products). On the Internet, you can carry out the largest financial transactions (accessing bank accounts, exchanging traditional currencies and so-called crypto-currencies, trading in securities, immovables, collector's items or antiques). There are also huge spaces on the Internet that are used as social networking sites (e.g. Facebook, Twitter, and *Nasza Klasa,* a school-based social networking service functioning in Poland some years ago) or applications for professional data exchange (electronic mail known already for a long time, but also such applications as Messenger or WhatsApp, and *GaduGadu,* a communication app which was very popular in Poland some years ago).

The broad availability of the Internet and its widespread use in society and the economy must necessarily make it a virtual space where and with the help of which ever more often a number of offence types are committed. This, in turn, must inevitably raise legal questions. Recently, one of such questions has appeared before the Supreme Court that has ruled the Internet to be a public place[6]. The Supreme Court, in its own words, has fully agreed with the view that the Internet, although it is a virtual space, has the nature of a public place. Specifically, it ruled that in the event the Internet is used to publish an indecent announcement, inscription and/or a drawing or foul language is used on the Internet, publicly available website services, that is to say, not protected by a login and password[7], should be considered a public place within the meaning of Art. 141 of the Code of Petty Offences. The Supreme Court narrowed its arguments down to teleological considerations. It maintained

that the Code of Petty Offences has been in force for almost half a century and its provisions, including Article 141, entered into force as of 1 January 1972 when the Internet was not there yet. Of course, successive amendments made over the last one or two decades aimed at adjusting these provisions to evolving socio-economic changes. However, in the context of behaviour on the Internet, the process is not over yet due to its special character and continuing advances of computer technology. For these reasons, in the opinion of the Supreme Court, when interpreting the Code of Petty Offences, Art. 141, which has not been amended since the day it entered into force, teleological interpretation should be used to discern if it is possible to establish the meaning of specific legislative provisions, taking into account technological and civilization advances and today's needs (dynamic interpretation). The purport of the Code of Petty Offences, Art. 141, changes thus with time together with a change of the situation. Since the legislator has not amended the provision in question so far, it must be assumed that the legislator wishes it to continue in force but under new conditions, i.e. after taking into account computer science advances. In the context of Internet use, it must be noted that it certainly is a space for both doing business and presenting artistic performances, that it has its own currency and leaves no doubt as to being a space

[6] SC decision of 17 April 2018, IV KK 296/17, LEX No. 2481975; Legalis No. 1766222. The decision is also available in the database of decisions on the Supreme Court webpage: www. sn.pl

[7] See: opinion to the SC decision of 17 April 2018, IV KK 296/17.

suitable for committing an offence or a petty offence as attested actually by various acts classified in the Criminal Code and Code of Petty Offences, as appropriate.

Although this article is not devoted to the detailed discussion of the above-mentioned Supreme Court decision, it must be stressed that the position taken by the Court is not correct and its opinion is unconvincing. Suffice it to say that the Supreme Court, relying solely on reasons of a teleological nature, has completely ignored the linguistic and systemic meaning of the distinguishing characteristic 'public place', leaving it out of the discussion[8]. Nevertheless, the added value of the decision is the undeniable fact that it shows how necessary it is to regulate legally the question of the place of the commission of acts done on the Internet.

The question is in principle uncontroversial when it comes to the establishing of the place of commission of offences characterized by result, that is, acts that can be located in both the place where the perpetrator acted or the place where the criminal result occurred or – according to the perpetrator's intent – was to occur. As uncontroversial can be considered also formal (resultless) offences, the distinguishing characteristics of the causative act of which can be located in a perceivable space. Controversies do arise, however, when the act is not materially perceivable or its consequences do not share such a character either. It is here that acts committed in the virtual world, above all on the Internet, come into play.

The first thing that ought to be preliminarily decided is the meaning of the term 'Internet offences'. The task is by no means simple, because to denote this category of offences various terms are used such as computer offences, digital offences, offences perpetrated with the use of advanced technologies or cybercrimes[9]. As Hołyst writes, in the past, there were attempts made to classify cybercrimes, applying the criteria of the techniques used by offenders and the nature of committed acts. Six categories of cybercrimes were proposed:

(1) Offences made easier to commit by a computer,
(2) Offences the commission of which is made possible by a computer,
(3) Offences that cannot be committed without computer technology,
(4) Offences that can be committed in a conventional way but also with the use of the Internet,
(5) Offences that are easier to commit using the Internet, and
(6) Offences the commission of which is possible only using the Internet[10].

In the opinion of Hołyst, Internet offences include only such offences in the commission of which the Internet is used or which directly influence the provision of specific Internet services[11].

[8] The Supreme Court has offered only the linguistic interpretation of the distinguishing characteristic 'publicly' and only in relation to it did the Court refer to (very briefly as a matter of fact) a public place. It said that 'In the purely semantic sense, the word "public" means one that is happening in the place that is accessible to all, done in front of witnesses, visibly and openly (…). It follows from these senses without doubt that the public character of some action does not depend solely on the place where it happens but can follow also from certain situations'.

[9] For a broader treatment see: M. Siwicki, *Cyberprzestępczość*, Warszawa 2013, pp. 9–21, M. Siwicki, *Podział i definicja cyberprzestępstw*, „Prokuratura i Prawo" 2012, No. 7a–8, pp. 241–252; B. Hołyst, J. Pomykała, *Cyberprzestępczość, ochrona informacji i kryptologia*, „Prokuratura i Prawo" 2011, No. 1, pp. 17–19 and C. Nowak, *Wpływ procesów globalizacyjnych na polskie prawo karne*, Warszawa 2014, p. 329.

[10] B. Hołyst, *Internet*…, p. 19.

[11] B. Hołyst, *Internet*…, p. 19.

Speaking of Internet offences, the position of Adamski who suggested a definition of the term 'computer offences' is worth noting. Regarding it from the substantive law perspective, he held it to mean attacks on computer systems, data and software, as well as offences involving the use of electronic information processing systems to infringe legal interests traditionally protected by criminal law. From the procedural perspective, in turn, he defined computer offences as prohibited acts the prosecution of which requires the administration of justice authorities to gain access to information processed in computer or data-communications systems[12].

Treating of Internet offences, the Council of Europe's Convention on Cybercrime[13] undertaken in Budapest on 23 November 2001 is worth taking a closer look at. Under its Article 1, giving definitions of terms used therein, 'computer system' means any device or a group of interconnected or related devices, one or more of which, pursuant to a program, performs automatic processing of data, while 'computer data' means any representation of facts, information or concepts in a form suitable for processing in a computer system, including a program suitable to cause a computer system to perform a function. 'Information system' has been defined in a similar way in EU law. There it means a device or group of interconnected or related devices, one or more of which, pursuant to a programme, automatically processes computer data, as well as computer data stored, processed, retrieved or transmitted by that device or group of devices for the purposes of its or their operation, use, protection and maintenance[14].

Taking into account suggestions made in the authoritative juristic literature and in acts of international law, it can be assumed that cybercrimes encompass all these acts that are committed through the (broadly understood) use of an information system.

The clarifying of terminological issues does not settle the question of possible loci for committing cybercrimes. Typically, at least two solutions are possible. One, dominant in the European legal orders, has the *locus delicti,* including that of computer offences (Internet offences, cybercrimes), determined in the traditional way, i.e. following the formula that the Polish legislator employed in the Criminal Code, Art. 6(2). The other, prevailing in other legal orders, mostly in the US and in some Asian countries, refers to the location of a computer system affected by the perpetrator from abroad through a telecommunications network[15].

The question of cybercrimes is additionally complicated on account of the fact that the commission of this type of offences is not fully dependent on the perpetrator him-/herself. Hence, it falls outside the places, mentioned in the Criminal Code, Art. 6(2), where the perpetrator acted or failed to act or where the result materialized or was to materialize according to the perpetrator's intent. After all, when the perpetrator uses information systems, the transport and recording of

[12] A. Adamski, *Prawo karne komputerowe*, Warszawa 2000, pp. 30–35.
[13] Journal of Laws f 2005, Item 728; https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680081561
[14] Directive 2013/40/EU of the European Parliament and of the Counsil of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA, Art. 2(a) (EU Official Journal L of 14 August 2013, No. 218, p. 8).
[15] A. Adamski, *Podstawy jurysdykcji cyberprzestępstw w prawie porównawczym* [in:] *Księga pamiątkowa ku czci Profesora Jana Białocerkiewicza*, T. Jasudowicz, M. Balcerzak (eds.), Vol. II, Toruń 2009, pp. 940–941.

data is done automatically. Sometimes, the perpetrator is not even aware that the computer data he/she uses may be recorded in many unconnected places. This is so because website fragments (i.e. computer data) may be stored on various servers located anywhere in the world[16].

Moreover, it is necessary to bear in mind how illegal content is disseminated on the Internet or, in more general terms, how information is spread on the Internet. There are two technologies: push and pull. The push technology involves sending information to receivers or making it available to them (e.g. sending e-mails or posting messages on social networking sites), whereas the pull technology assumes that the web user, to access this information, must make an effort to look for it (e.g. web browsing or searching blogs)[17]. Polish criminal law theoreticians, relying on the opinions propounded in the German authoritative juristic literature, claim that only in the former case can the territory of a foreign country be considered a *locus delicti*[18]. This follows from the fact that as a *locus delicti* is also considered the place the perpetrator intended to affect – the place where he/she expected specific content to be presented. Furthermore, it seems right to maintain, at least in the light of the Criminal Code, Art. 6(2), thatpull technology may not serve as the reason for extending the concept of *locus delicti* to include the place where a web user accessed on his/her own information posted there, since the perpetrator has not disseminated the information in that place, nor made it available there. It has come into the possession of the web user only because of his/her own activity[19].

A universal access to the Internet makes illegal content easily accessible almost around the world. A universal and territorially unlimited availability of the Internet makes the location of the producer(s) and addressee(s) of this content irrelevant. Given these circumstances, the traditional connecting factor joining a territory with the perpetrator's behaviour does not work as it should. Allowing for the specific nature of cybercrimes, one can distinguish four potential types of behaviour by the perpetrator:

(1) The perpetrator is located outside Poland and affects an information system located outside Poland,
(2) The perpetrator is located outside Poland and affects an information system located inside Poland,
(3) The perpetrator is located inside Poland and affects an information system located outside Poland,
(4) The perpetrator and information system he/she affects are located inside Poland.

The Polish authoritative juristic literature has already discussed the possibility of classifying the above behaviour types in compliance with the principles of criminal liability laid down in the Criminal Code currently in force. As Sowa

[16] M. Siwicki, *Podstawy określenia jurysdykcji karnej przestępstw prasowych w Internecie*, „Przegląd Sądowy" 2013, No. 11–12, pp. 45–46. See also J. Czekalska, *Jurysdykcja w cyberprzestrzeni a teoria przestrzeni międzynarodowych*, „Państwo i Prawo" 2004, Vol. 11, pp. 73–81.
[17] For a broader treatment of *push* & *pull* technology see: A. Adamski, *Podstawy jurysdykcji*..., pp. 947–948; M. Siwicki, *Podstawy określenia jurysdykcji*..., pp. 41–42.
[18] A. Adamski, *Podstawy jurysdykcji*..., p. 947; M. Siwicki, *Podstawy określenia jurysdykcji*..., p. 42.
[19] A. Adamski, *Podstawy jurysdykcji*..., p. 947.

rightly observed, the situations listed under (1) and (4) above pose no problem, because the principle of universal jurisdiction may be applied under the Criminal Code (Art. 113) in respect of the perpetrator who committed an offence outside the country by affecting an information system located outside the country as well (provided the conditions stipulated in the Code are met). The perpetrator, on the other hand, located in the country and affecting an information system located inside the country as well, will be subject to the classic grounds of criminal liability under the Criminal Code, Art. 5 and Art. 6(2)[20].

The legal situation of the perpetrator is somewhat different if he/she is located outside Poland and affects an information system located inside Poland or vice versa. In these cases, the division of offences into result-producing and resultless is crucial. The latter, with the perpetrator acting outside Poland but affecting an information system located inside the country, rule out Polish criminal jurisdiction[21]. The reason being in the opinion of Sowa that resultless (formal) Internet offences consist mostly in only recording specific content on a server supporting a given network. The recording in itself is not a result, being a distinguishing characteristic of an offence type, hence it falls outside the Criminal Code, Art. 6(2) in connection with Art. 5 thereof[22]. Sowa further suggests that the phrase 'place where the perpetrator acted', used in the Criminal Code, Art. 6(2), should be subject to an appropriate interpretation. The phrase should encompass not only the place where the perpetrator acted but also the place where the information system affected by the perpetrator is located[23]. It appears that continental criminal law rules out such a possibility on account of the breach of the principle *nullum crimen sine lege stricta* and the ban on extensive interpretation to the disadvantage of the perpetrator following from it.

It must be remembered, however, such a solution is employed in other jurisdictions, e.g. English or American. In English criminal law, offences involving tampering with information systems may also be committed by persons not holding UK citizenship and located outside the UK. The British law enforcement and administration of justice authorities have jurisdiction over such matters inasmuch as there is a 'significant link' between the committed act and the territories of England, Wales, Scotland or Northern Ireland[24]. The Anglo-American authoritative juristic literature and judicial decisions maintain that a 'significant link' is present when at the moment of offending, the perpetrator stays in his/her native country and uses a computer for specific purposes or when at the moment of offending he /she is in his/her native country and attempts to gain or gains unauthorized access to any computer containing any program or data[25]. As far as the American system is concerned, it is worth noting that US courts, with respect to offences committed through the use of a computer, refer to the location of the information system made use of for a criminal purpose. Counter-terrorist legislation is a case in point.

[20] M. Sowa, *Odpowiedzialność karna*..., pp. 73, 75.
[21] M. Sowa, *Odpowiedzialność karna*..., p. 75.
[22] M. Sowa, *Odpowiedzialność karna*..., p. 75. See also R.A. Stefański, *Miejsce*..., pp. 519–520.
[23] M. Sowa, *Odpowiedzialność karna*..., pp. 75–76.
[24] M. Siwicki, *Pojęcie locus delicti i zasady jurysdykcji karnej w ujęciu prawnoporównawczym* (part II), „Europejski Przegląd Sądowy" 2011, No. 10, pp. 27–28.
[25] M. Siwicki, *Pojęcie locus delicti*..., p. 28.

Where the perpetrator of a terrorist offence acts inside the US and where a telecommunication system or a computer system located inside the US is used to commit an offence in another country, American courts usurp the right to try the case[26].

In order to introduce a similar solution to the Polish legal system, new legislation would be necessary. The authoritative juristic literature has already offered suggestions of amending the Criminal Code, Art. 6, by adding para. 3, worded as follows: 'a prohibited act committed through the use of or against a computer system shall be considered committed in the place specified in para. 2 and also in the place where the computer system was located'[27].

A problem of this kind does not arise with result-producing offenses where the perpetrator acts abroad but affects an information system located at home. For the result, as long as it has occurred inside Poland, by virtue of the Criminal Code, Art. 6 (2) and Art. 5, locates the act at home[28].

A still different situation occurs when the perpetrator acts at home, but affects an information system located outside Poland. Under the Criminal Code, Art. 6 (2), there is no doubt that the *locus* of such an act is the place where the perpetrator acted, i.e. Poland[29]. For the same reason, the place where the information system affected by the perpetrator is located, if it is located outside Poland, is not covered by the Criminal Code, Art. 6 (2). Thus, it is inadmissible to invoke it as grounds for the jurisdiction of the Polish State in criminal matters, unless the committed act can be prosecuted under the Criminal Code, Art. 113.

To recapitulate, the law as it stands now, namely the Criminal Code, Art. 6 (2), does not fully regulate the *locus* of cybercrimes as it leaves out all the situations where the perpetrator commits a resultless Internet offence, acting from outside the country but affecting an information system located inside it. To the fact that this category of offences is a serious one attest the following examples from the Criminal Code: displaying and disseminating pornographic content (obscenity offences) (Art. 200(3), Art. 200(5), Art. 202(1)), sexually accosting a minor (Art. 200a(1 & 2)), publicly promoting or approving of paedophile behaviour (Art. 200b), libelling (Art. 212(2)), abusing in mass media (Art. 216(2)), publicly abetting a fiscal misdemeanour and/or offence (Art. 255(1)), publicly abetting a felony (Art. 255(2)), disseminating and/or publicly presenting content that may facilitate the commission of a terrorist offence (Art. 255a(1)), participating intraining that may enable a person to commit a terrorist offence for the purpose of committing such an offence (Art. 255a(2)), publicly promoting a totalitarian political system and/or inciting national, ethnic, racial or denominational hatred or one on

[26] M. Siwicki, *Pojęcie locus delicti*…, p. 30. See also A. Adamski, *Podstawy jurysdykcji*…, p. 956.
[27] M. Sowa, *Odpowiedzialność karna*…, p. 76.
[28] M. Nawrocki, *Miejsce popełnienia*…, p. 103.
[29] A similar opinion is expressed by Siwicki, who writes: 'In the case of offences related to the information content, the criminal statute of the country where it has been posted in a telecommunication network or a computer system should be given precedence in terms of applicability. (…) Internet users should be expected to comply at least with the law of the place where they act'. M. Siwicki, *Podstawy określenia jurysdykcji cyberprzestępstw na gruncie polskiego ustawodawstwa karnego w świetle międzynarodowych standardów normatywnych*, "Palestra" 2013, No. 3–4, pp. 107–108. Not without reason, either, is the view that a result-producing computer offence is (if only potentially) committed in all places where the result of a given prohibited act occurred or was to occur according to the perpetrator's intent – see J. Giezek [in:] *Kodeks karny. Część ogólna. Komentarz*, J. Giezek, N. Kłączyńska, G. Łabuda (eds.), Warszawa 2012, p. 50; R.A. Stefański, *Miejsce*…, p. 520.

account of a non-denominational status (Art. 256(1)), publicly abusing a group of people or a person on account of their national, ethnic, racial and denominational affiliation or on account of their non-denominational status (Art. 257), making available to other people computer programs or devices adapted to the commission of offences specified in Art. 165 (1)(4), Art. 267(3), Art. 268a(1) or (2) in connection with para. 1, Art. 269(1) or (2),or Art. 269a, as well computer passwords, access codes or other data enabling unauthorized access to information stored in an information system, data communication system or a data communication network (Art. 269b(1)).

The above considerations prompt this author to formulate at least one suggestion for an amendment to the law. This involves the extension of the Criminal Code formula of *locus delicti* used in Art. 6(2). The technological progress of today calls for such a definition of *corpus delicti* that would cover Internet offences (cybercrimes).

In reliance on the above discussion, Art. 6(2) may be amended as appropriate or Art. 6(3) may be added to the Criminal Code. An amended wording of Art. 6(2) could read as follows: 'An offence is believed to be committed in the place where the perpetrator acted or failed to act or where the result being the distinguishing characteristic of an offence occurred or was to occur according to the perpetrator's intent. As the place of offence commission shall be also considered the place where the information system affected by the perpetrator or one that served the perpetrator to commit an offence was located'. Alternatively, the second sentence of this provision could be placed in a separate textual unit as Art. 6(3): 'As the place of offence commission shall be also considered the place where the information system affected by the perpetrator or one that served the perpetrator to commit an offence was located'.

It is also possible to apply an analogous solution to that used in Art. 115(15), namely: 'As defined herein, as the place of offence commission shall be also considered the place where the information system affected by the perpetrator or one that served the perpetrator to commit an offence was located'. This provision could be introduced to the Criminal Code either as Art. 6(3) or one of the definitions in Art. 115 thereof. It seems that it would be necessary to have the Criminal Code define the concept of 'computer/information system', following the model of the Council of Europe Convention on Cybercrime or the DIRECTIVE 2013/40/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 12 August 2013 on attacks against information systems and replacing Council Framework Decision 2005/222/JHA. It also appears that to avoid interpretation problems it would be necessary to reformulate the distinguishing characteristics of several types of prohibited acts in which the legislator has alternatively used such terms as: information system, data communication system, data communication network (Criminal Code, Art. 269a, Art. 269b, Art. 269c).

The suggested extension of the *locus delicti* definition describes another two locations that determine the place of commission of cybercrimes. One is the place where the information system affected by the perpetrator was located, while the other is the place where the information system used by the perpetrator to commit a prohibited act was located. It appears that both locations ought to be covered by the new definition, because only jointly can they ensure that it will cover all

possible places where a prohibited act can be potentially committed. This is seen in the above list of offence types that can be committed through the use of the Internet (understood as an information system), which may be the object of a causative act (e.g. in Art. 269b(1)) or – far more often – the implement of an offence.

The above suggestions for regulating the *loci* of cybercrimes are a response meant to fill the gap in the Criminal Code in this respect. The discussion shows that the current wording of its Art. 6(2) does not cover all the possible locations where the offences of this category may be committed. Consequently, there is a risk that at least some criminal acts may fall outside the jurisdiction of the Polish criminal justice authorities. Bearing in mind the continual development of technology, one may expect an increase in cybercrime. This situation, in turn, calls on the legislator to take appropriate measures to ensure that the legal order will be always capable of responding to the commission of an offence. One may only hope that the suggestions will improve the law as it stands now or at least provoke a constructive discussion in this respect.

Summary

Mariusz Nawrocki, *Cybercrime locus as defined now and in amendments suggested*

The article deals with the issue of how to determine the place where cybercrimes are committed. This is a problematic issue, as the Criminal Code, Art. 6(2), regulating the place of committing a prohibited act, does not fully cover all the possible locations of this category of offences. The article proposes amendments to the provisions that aim to extend the definition of a prohibited act so as to include also those locations in which there is an IT system (including the Internet) used to commit an offense or one which the perpetrator has affected, committing the act.

Keywords: *criminal liability, place of committing offence, cybercrime*

(przekład na język angielski: Tomasz Żebrowski)

Streszczenie

Mariusz Nawrocki, *Miejsce popełnienia przestępstw internetowych de lege lata i de lege ferenda*

Artykuł dotyczy zagadnienia sposobu określania miejsca popełnienia przestępstw internetowych. Jest to zagadnienie problematyczne, gdyż przepis art. 6 § 2 Kodeksu karnego, regulujący miejsce popełnienia czynu zabronionego, nie obejmuje w pełni wszystkich możliwych lokalizacji tej kategorii przestępstw. W artykule zaproponowano zmiany przepisów, które zmierzają do rozszerzenia definicji miejsca popełnienia czynu zabronionego tak, aby objąć tym pojęciem również te lokalizacje, w których znajduje się system informatyczny (obejmujący również Internet) służący do popełnienia czynu zabronionego lub na który sprawca oddziaływał, popełniając ten czyn.

Słowa kluczowe: *odpowiedzialność karna, miejsce popełnienia przestępstwa, przestępstwo internetowe*

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PRAWO W DZIAŁANIU
LAW IN ACTION
36/2018

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Polish criminal law on 'Work of a forced nature'

1. INTERPRETATION OF THE EXPRESSION 'WORK OF A FORCED NATURE'

As is generally known, the Criminal Code[1] currently in force in Poland defines 'human trafficking' in its Art. 115(22). To remind, under this provision, 'Human trafficking shall consist in recruiting, transporting, delivering, handing over, keeping or receiving a person and resorting to:

(1) violence or an unlawful threat,
(2) abduction,
(3) deceit,
(4) deception or taking advantage of the person's error and/or inability to properly understand an undertaken action properly,
(5) abuse of the relationship of dependence, desperate situation or helplessness of a person,
(6) material or personal gain or promise thereof, offered or received by the person in whose care another person is or who supervises that person

– for the purpose of exploiting him/her, even with his/her consent, in particular in prostitution, pornography or other forms of sexual exploitation, in work or service of a forced nature, beggary, slavery or other forms of exploitation degrading human dignity or for the purpose of unlawfully obtaining cells, tissues or organs. If the behaviour concerns a minor, it shall constitute human trafficking even if the methods or means listed under items 1–6 have not been resorted to'.

As can be seen, the quoted definition contains the expression 'work of a forced nature' of interest to us here that – alas – is not defined in the Criminal Code itself, thus giving rise to undesirable disputes of interpretation over the scope of its legal meaning.

Perhaps, including a relevant definition in the Criminal Code was found to be unnecessary, because at the time when the Code was adopted, the Polish legal system already had a legally defined concept of forced labour. The definition had been introduced – to remind – by virtue of the *Convention Concerning Forced or*

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[1] See: Act of 6 June 1997 – Criminal Code (Journal of Laws of 1997, No. 88, Item 533 as amended; consolidated text: Journal of Laws 2018, Item 1600 as amended).

Compulsory Labour (*No. 29)* adopted in Geneva on 28 June 1930[2], under which – as laid down in its Art. 2(1) – the term *forced or compulsory labour* is to mean all work or service that is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily. Nevertheless, the Convention, in Art. 2(2), excludes from the meaning of the term in question:

(a) any work or service exacted in virtue of compulsory military service laws for work of a purely military character
(b) any work or service that forms part of the normal civic obligations of the citizens of a fully self-governing country
(c) any work or service exacted from any person as a consequence of a conviction in a court of law, provided that the said work or service is carried out under the supervision and control of a public authority, and the said person is not hired to or placed at the disposal of private individuals, companies or associations
(d) any work or service exacted in cases of emergency, that is to say, in the event of war or of a calamity or threatened calamity, such as fire, flood, famine, earthquake, violent epidemic or epizootic diseases, invasion by animal, insect or vegetable pests and in general any circumstance that would endanger the existence or the well-being of the whole or part of the population
(e) minor communal services of a kind which, being performed by the members of the community in the direct interest of the said community, can therefore be considered as normal civic obligations incumbent upon the members of the community, provided that the members of the community or their direct representatives shall have the right to be consulted in regard to the need for such services.

In a word, perhaps it was believed that introducing to the Criminal Code a definition of the expression 'work of a forced nature' would be redundant and thus praxeologically wrong since the Polish legal system, by virtue of the cited Convention, already featured a definition of forced labour[3].

This argument, however, would prove not be entirely valid.

Firstly, it must be noted that the Criminal Code, Art. 115(22), speaks not of forced labour but of work of a forced nature. Although these expressions differ only – as it seems – in their grammar and not in content, the difference must not be easily dismissed as the rules of interpretation of statutes insist – with much and justified emphasis – that a synonymous interpretation must be avoided whereby a single identical meaning is given to the statutory text components of a different form.

Secondly and obviously more important, the Convention, Art. 2(1), does not

[2] See: Journal of Laws 1959, No. 20, Item 122.

[3] The fact that the definition in question is an element of the Polish legal system has already been mentioned – see: Z. Lasocik, Ł. Wieczorek, *Handel ludźmi do pracy przymusowej – raport z badań*, Warszawa 2010, p. 12, which reads: 'We refer to this Convention and devote to it so much attention, because Polish legislation does not offer a definition of forced labour. However, by virtue of the Constitution, Art. 91, international agreements ratified by Poland become part of the Polish legal order. Hence, it can be assumed that the definition discussed above [of forced or compulsory labour – Ł.P.] is also a legal definition applicable in Poland'.

define forced labour as such but gives the definition of the expression 'forced or compulsory labour' without explaining the role of the conjunction 'or' used in it. After all, the conjunction may indicate, depending on the context, either an alternative or the synonymous, equivalent, or substitutive character of two words or phrases it joins[4]. This makes the definition less than fully practicable in the interpretation of the provision, one that at least verbally does not speak of forced labour but work of a forced nature. Its application in the interpretation would subject the interpreter to criticism that would be largely valid then for ignoring a very strong interpretation rule derived from the principle *nullum crimen sine lege* [no crime without law]. This would disallow an extensive interpretation, one very much to the perpetrator's disadvantage – that is to say, the rule known as *nullum crimen sine lege stricta* in the theory of criminal law.

Thirdly, let us observe that invoking the definition from the Convention would provoke opposition from those who assert, not without reason, that a legal definition is binding only within the normative act in which it has been formulated[5]. On the other hand, however, let us note, refuting this argument to a degree – a significant degree in our opinion – that the Convention is undeniably a normative act of paramount importance for combating forced labour. In such situations, the rules of legal text interpretation direct that the reach of a legal definition formulated in such an act be extended to other normative acts less significant for the problem to be regulated[6]. As a matter of fact, it must be added right away that in the case of the problem under discussion, the rule is not so obvious, as there would certainly be many who would doubt the legitimacy of the opinion about the secondary role of the Criminal Code in combating forced labour. Yet, it ought to be made absolutely clear in this context that we believe such doubts to be unfounded; we take the position that criminal law has a supplementary role to play in combating and controlling all social ills, force labour included.

Fourthly and finally, the argument could – although we do not accept this view either – result in questioning the rationality of the legislator's linguistic endeavours. Indeed, let us observe that the Criminal Code, Art. 15(22), says that human trafficking mentioned therein is not eliminated by the consent of the person aggrieved to be exploited in a manner degrading human dignity. Meanwhile, the Convention definition has as a constitutive condition of forced or compulsory labour the fact that the person from whom such labour is exacted has not offered him- or herself voluntarily to perform it. This condition could be interpreted by some (let us, however, make it absolutely clear that we believe such an interpretation to be false) as the absence of consent, i.e. its absence manifested by involuntary offering oneself for any form of exploitation mentioned earlier[7]. This interpretation – in our opinion – is fallacious, because consent to exploitation degrading human dignity does not mean that the person who has given it, did so voluntarily. For it must

[4] However, it must be noted that in the relevant literature, a view can be found, maintaining that forced labour does not differ from compulsory labour. This view is propounded by Z. Lasocik, Ł. Wieczorek, *Handel ludźmi*..., p. 11.

[5] For this question see: M. Zieliński, *Wykładnia prawa*..., p. 212.

[6] On this issue see: M. Zieliński, *Wykładnia prawa*..., p. 212.

[7] Thus – with this interpretation – human trafficking would be questioned in the event consent would be given, which would significantly restrict the scope of its punishability in Polish criminal law.

be noted that consent to exploitation may result from both a fully independent decision and a decision that is actually dependent on the external forces exerted by another person, or the decision-maker's own situation, especially financial. In the case of a dependent decision – by reason of factors inducing it – it cannot be said to be a manifestation of the free, unrestrained will of the decision-maker.

In a word, in the case of volitionally dependent consent, the condition of voluntariness is not met as the consent in question is not a product of the decision-maker's free will, but the consequence of an external force, over-restraining his/her will. Hence, the force is quite rightly classified as coercion. Moreover, in the case of coercion applied by an individual, the coercion is actually compulsive (mental) or one that is described in the theory of criminal law by pointing out that under it, the person being coerced cannot be expected to undertake any behaviour other than that to which he/she is coerced[8]. Here, in the context of the interpretation of consent, mentioned in the Criminal Code, Art. 115(22), it would be necessary – understandably – to liberalize the impossibility of an expectation requirement and replace it with a less rigorous condition. The above should assume that the consent in question will be given also when the decision-maker can hardly be expected not to give it. Invoking mental coercion has yet another advantage – as it seems – namely, it makes one realize that under coercion it is often the case that the person being coerced wants to behave in the way expected by the coercer. This situation is aptly described by the Latin phrase *coactus tamen voluit* that can be rendered in English as 'forced, yet of volition'. Without risking a major mistake, it can be claimed that the phrase fully corresponds with the majority of cases of giving consent to perform forced labour as it perfectly illustrates the common situation whereby a person has to agree to do forced labour or perform one of its component acts.

Summing up, all this makes one believe that it was a mistake not to define the concept of work of a forced nature in the Criminal Code. Furthermore, it follows that the expression 'work of a forced nature' is subject to interpretation rules developed by the theory of legal text interpretation[9].

The doubts outlined above – concerning the possibility of considering its meaning to constitute information being the definiens (defining part) from the Convention definition – prevent us from accepting that the expression under discussion has a legal definition binding on interpretation of the Criminal Code, Art. 115(22). Hence, further interpretative steps must be taken to decode its legal meaning.

The first step consists in exploring the position of the authoritative juristic literature to learn whether it confers on the expression in question one sense per se or – on the contrary – many inconsistent ones. This is necessary, because – according to the theory of legal text interpretation – an interpretation must not pick and choose a singular sense out of a number presented in the authoritative juristic literature. Instead, there is allowance for choosing a sense it universally approves[10].

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[8] On mental coercion see: Ł. Pohl, *Prawo karne. Wykład części ogólnej*, Warszawa 2015, p. 299 ff.

[9] The most comprehensive and detailed flowchart of legal text interpretation is offered by the derivative conception; for the flowchart description see: M. Zieliński, *Wykładnia prawa*..., p. 313 ff.

[10] This is stressed by M. Zieliński, who writes: 'As the established meaning in the language of the law, only this one should be adopted which beyond any doubt is universally adopted in the language of the law (i.e. there is complete agreement on what it means)' – M. Zieliński, *Wykładnia prawa*..., p. 334.

Unfortunately, the relevant literature lacks any analyses of the meaning of the expression in question. This hiatus as it were – it seems – is due for the most part to the failure to notice the subtle difference between the expressions 'forced labour' and 'work of a forced nature'. A consequence that follows is a tacitly implied treatment of both expressions as being synonymous. Thus, available discussions as a rule have concerned forced labour and not directly work of a forced nature.

Specifically, in the opinion of Lasocik and Wieczorek[11], who recognize the binding role of the Convention in this respect, forced labour is defined in the Convention. The definition, the cited authors believe, should be understood as follows:

> (…) *all work or service* means every type of work, employment or occupation, with an employment relationship or even legality of employment being of no significance. Hence, as forced labour must be considered also these acts which are illegal in a given country, as for instance prostitution, or which have not been regulated by labour law, for instance housework or the use of family members to do housework. The expression *any person* refers to both adults and children. It is of no significance whether the aggrieved person is the citizen of the country in which he/she has been identified as a victim of forced labour. In turn, the *menace of any penalty* refers not only to criminal law sanctions but also to various forms of coercion, including the threat of violence (punishable threat), withholding identification documents, deprivation of liberty and failure to pay for work done[12].

The definition mentions also – the quoted authors emphasize –

> (…) the fact that *the said person has not offered himself voluntarily* for a given work or service. This expression refers not only to the situation where a worker is forced to work but also where the employer misleads the employee as to the terms and conditions of work, employment or wages and at the same time, prevents the worker from repudiating the contract and quitting work[13].

In turn, Karsznicki[14] is of the opinion that forced labour covers all the actions that deprive performed work of the attribute of voluntariness[15]. According to him:

> For instance, it does not constitute forced labour to fail to pay an employee statutory minimum wages. However, any actions to prevent an employee from leaving the place of work would be covered by the concept of forced labour. For this reason, when assessing a specific type of behaviour, the following criteria should be applied:
> - Has physical or sexual violence been used?
> - Has the employee been restricted in his/her movements?
> - Has work been performed for alleged debts (the person becomes a security for debt)?

[11] Expressed – importantly – still when the Criminal Code did not contain a definition of human trafficking.
[12] Z. Lasocik, Ł. Wieczorek, *Handel ludźmi*..., p. 11.
[13] Z. Lasocik, Ł. Wieczorek, *Handel ludźmi*..., p. 12.
[14] Expressed when the Criminal Code did not contain a definition of human trafficking as well.
[15] See: K. Karsznicki, *Analiza polskiego prawa pod kątem efektywności ścigania handlu ludźmi*, Raport IWS, Warszawa 2008, p. 3.

- Has the payment of wages been delayed or withheld?
- Have passports or other identification documents been confiscated?
- Has the employee been threatened by the employer (including threats of reporting an illegal immigrant to the authorities)?[16].

Łabuz, Malinowska, Michalski and Safjański observe, in turn, already under the rule of the definition included in the Criminal Code, Art. 115(22), that to be able to speak of forced labour

> (…) neither work nor services may be performed voluntarily (employee must be forced to perform them) and for fear of being punished by the employer, the employee may not abandon same without negative consequences, nor negotiate the terms of performing them. Punishment is defined broadly. It covers also the employee's fear that if he/she abandons work, he/she will lose rights or privileges (e.g. he/she will not be paid for the work already performed or he/she will be forced to perform work with threats or even physical violence to his/her person or his/her family members)[17].

The quoted authors continue by saying that:

> Today, the International Labour Organization takes the view that in order to be able to speak of forced labour other elements are needed than those mentioned in Convention 29. For this purpose, it prepared (…) indicators to identify human trafficking for forced labour.
> - Has the employer resorted to violence (physical or sexual)?
> - Has the employee been restricted in his/her movements?
> - Has work been performed for alleged debts?
> - Has the employer withheld all or part of the money due to the employee but counted it instead towards the debt the employee incurred to cover the costs of travel to the country in which he/she works and/or the costs of his/her room and board (the person becomes a security for debt)?
> - Has the payment of wages been withheld or delayed or have wages been substantially reduced?
> - Have passports or other identification documents been confiscated by the employer?
> - Has the employee been threatened by the employer in respect to reporting the stay of undocumented foreigners or their illegal performing work to the authorities, entailing deportation or other consequences provided for in domestic law?[18].

They also stress the fact that forced labour is often opposed to dignified work. The latter – in their opinion – is characterized by four aspects:

[16] K. Karsznicki, *Analiza...*, p. 3.
[17] P. Łabuz, I. Malinowska, M. Michalski, T. Safjański, *Handel ludźmi. Przestrzeń prawnokarna i kryminalistyczno-kryminologiczna*, Warszawa 2017, p. 102.
[18] P. Łabuz, I. Malinowska, M. Michalski, T. Safjański, *Handel ludźmi...*, p. 102.

- guarantee of workers' rights (including the right to minimum wages and safe and healthy work conditions)
- right to employment (including assistance in seeking employment, welfare benefits in the case of unemployment, prevention of discrimination in employment)
- welfare benefits (in the event of sickness, old age, unemployment or other accidents)
- social dialogue (including the guarantee of the workers' right to organize and bargain with the employer)[19].

Since the current version of the Criminal Code came into force, the subject of forced labour has also been raised by Dąbrowski, who maintains that forced labour '[…] can be taken to be a form of human trafficking for the purpose of exploiting the victim, even with his/her consent, in work or services of a forced nature, including begging'[20].

In turn, in a monograph by Wieczorek – relying on the law as it stands now – it is said that forced labour

> […] was first defined in the ILO *Convention concerning Forced or Compulsory Labour* (*No. 29)*, Art. 2, adopted in Geneva on 28 June 1930. Under the definition, forced or compulsory labour is '[…] all work or service which is exacted from any person under the menace of any penalty and for which the said person has not offered himself voluntarily'[21].

Moreover, the expression 'all work or service' – in Wieczorek's opinion – covers

> every type of work, employment or occupation, with employment relationship or even legality of employment being of no significance. Hence, as forced labour must be considered also these acts that are illegal in a given country […] or which have not been regulated by labour law […]. It is of no significance, either, whether the aggrieved person is the citizen of the country in which he /she has been identified as a victim of forced labour[22].

Wieczorek goes on to say that an important distinction must be made between forced labour and exploitation, maintaining that the former is

> a much broader category and a far more serious and complex phenomenon. In the first place, the victim of forced labour is in a sense exploited, too, because his/her work benefits the person who exploits him/her. However, a person whose work is exploited cannot be said to be forced to work at the same time, because he/she may not meet all the conditions of performing forced labour as such[23].

[19] P. Łabuz, I. Malinowska, M. Michalski, T. Safjański, *Handel ludźmi*..., p. 103.
[20] P. Dąbrowski, *Praca przymusowa cudzoziemców w Polsce. Analiza zjawiska w wybranych grupach imigranckich*, Warszawa 2014, p. 32.
[21] Ł. Wieczorek, *Praca przymusowa. Zagadnienia prawne i kryminologiczne*, Warszawa 2017, p. 23.
[22] Ł. Wieczorek, *Praca przymusowa*..., p. 23.
[23] Ł. Wieczorek, *Praca przymusowa*..., p. 27.

Wieczorek continues by saying that forced labour, economic exploitation and slavery

> […] not only contradict the fundamental human rights and freedoms, but also the very idea of work as such, as the immanent characteristic of human work is its performance for the purpose of earning a living. Furthermore, forced labour, slavery and exploitation do not bring any socially notable advantages in contrast to work performed under normal conditions. Finally, forced labour does not share the basic functions of work, especially the most important one, namely the protective one, whereby workers' rights are privileged as the worker, in relation to the employer, is an economically weaker party and fully dependent on the employer, and harms its victims in a number of ways: physical, mental, economic, social, etc.[24]

According to Mozgawa: 'No doubts are raised by the phrase speaking of exploitation in "work or services of a compulsory character". Their obvious purpose is to provide cheap labour, while the work (services) is performed in contravention of employment rules (wages, work safety, working time, etc.)'[25].

In turn, according to Klaus:

> […] forced labour may not be simply reduced to low wages and bad working conditions. Nor can it refer solely to a pure economic constraint when an employee believes that he/she cannot quit work due to the absence of any real or imagined alternative employment. Forced labour is a serious infringement of human rights and a restriction of human freedom […]. Forced labour ought to be viewed as a process, as part of the continuum of employee exploitation, beginning with a minor infringement of an employee's rights and possibly ending in grave violations of fundamental rights […]. The defining of forced labour is complicated by the fact that […] various behaviour is subsumed under it. The most common is forcing to beggary or, unknown to our legislation, "exploitation of criminal activity", which should be understood as the use of a person to commit offences for somebody else's benefit (these are most often instances of theft, including pickpocketing or shop-lifting, drug trafficking or other similar activities that are punishable by law but gainful). Some documents consider sexual exploitation for gain as an element of forced labour. This may cause additional complications in practice, especially if one considers the Criminal Code, Art. 115(22), which lists these types of behaviour separately from forced labour. Thus, it is not known if it sees any relationships between them and, if it does, what they are[26].

The above quotations, fully representative of the position of the Polish authoritative juristic literature on the question under discussion, show that in spite of having

[24] Ł. Wieczorek, *Praca przymusowa*..., p. 27–28.
[25] M. Mozgawa, *Handel ludźmi (Art. 189a k.k.)* [in:] *System Prawa karnego,* v. 10, *Przestępstwa przeciwko dobrom indywidualnym*, J. Warylewski (ed.), Warszawa 2012, p. 403.
[26] W. Klaus, *Cudzoziemcy jako ofiary pracy przymusowej w Polsce* [in:] *Ofiary handlu ludźmi*, L. Mazowiecka (ed.), Warszawa 2014, p. 88 ff.

many elements in common, they can hardly be considered identical, apragmatically understood, explanations of the concept of forced labour. Therefore, and on account that the Criminal Code, Art. 115(22), speaks of work of a forced nature, let us try to delineate the meaning of this concept by referring to dictionary definitions, being – as we all know – the lexical foundation of a legal text[27].

In the first place, it should be noted that the phrase in question is a set one, consisting of five elements, i.e. three content words: *work, character, forced* and two function words: preposition *of* and article *a*. What makes it a set expression is the circumstance that the key word *work* is complemented by the other elements – after all what is meant is work of a forced nature[28].

Since general language dictionaries do not give a definition of the expression 'work of a forced nature', its dictionary meaning can be established only by decoding the meaning of its components[29].

One should start with the preposition 'of' about which there can be no doubt that it introduces a characteristic of the denotatum of the noun 'work'. The preposition is part of the expression 'of forced nature', which makes it necessary to examine the word 'character'. Nor in this case are there any doubts that it means 'main or essential nature especially as strongly marked and serving to distinguish'[30], as in the combination with the word 'forced', it will serve to distinguish work of a forced nature from that of a voluntary character.

As far as the word 'forced' is concerned, its dictionary definitions are alike too, but not as much as in the previous case. They define 'forced' as 'compelled by force: involuntary, compulsory'[31], while 'compelled' in this definition can be paraphrased as 'to obtain (a response) by force, violence, or coercion; to force or cause irresistibly: call upon, require, or command without possibility of withholding or denying'[32]. These definitions, as can be seen, correspond closely to the concept of compulsive coercion discussed earlier. Its essence – to remind – is the situation where the coercer significantly constraints the will of the 'coercee', making the latter undertake or perform work expected by the former. The work so undertaken or performed is not a result of the coerced person's free will but rather of his/her volitionally dependent decision, induced by the pressure from the person responsible for coercion.

In fact, the pressure is often reinforced by the decision-maker's dire situation. However, the compulsive behaviour approach is not fully adequate as it does not cover the so-called solely inner coercion[33], which does not come from another person, but is rather a psychological fact, stemming from necessity and imposed only by extra-personal, overwhelming external circumstances. They can be reduced

[27] On the question of the lexis (vocabulary) of legal texts see: M. Zieliński, *Wykładnia prawa*..., p. 139 ff.
[28] On set phrases see: M. Zieliński, *Wykładnia prawa*..., p. 330.
[29] This is stressed by Zieliński, who points out that when there is no dictionary meaning for the whole set phrase, the meaning must be established by skilfully joining the meanings of its components, see: M. Zieliński, *Wykładnia prawa*..., p. 330.
[30] Webster's Third New International Dictionary, Unabridged, s.v. "character", http://unabridged.merriam-webster.com
[31] Webster's Third New International Dictionary, Unabridged, s.v. "forced", http://unabridged.merriam-webster.com
[32] Webster's Third New International Dictionary, Unabridged, s.v. "compel", http://unabridged.merriam-webster.com
[33] The fact that it can be distinguished is attested by the fact of distinguishing the expression referring to it in the lexical base of a legal text.

to the objectively dire situation of the internally coerced person, manifested by his /her penury. There can be no doubt that inner coercion is covered by the dictionary meaning of the word 'forced' as it is included in the definitions quoted above: 'to obtain (a response) by force, violence, or coercion; call upon, require, or command without possibility of withholding or denying'.

What is left to be explored is the meaning of the word 'work'. In this case – on account of the context of its use in the Criminal Code, Art. 115(22) – such definitions as the following are thinkable: 'the labour, task, or duty that is one's accustomed means of livelihood' or possibly 'a specific task, duty, function, or assignment often being a part or phase of some larger activity'[34].

Keeping in mind the definition of the meaning of 'work of a forced nature', it has to be observed that in the language of the law, i.e. in the language of the Criminal Code, the meaning is considerably restricted by the phrase used in its Art. 115(22) that qualifies work of a forced nature as being an exploitation degrading human dignity. Thus, owing to this phrase not all work of a forced nature is work of this character within the meaning used in the Code, because a necessary condition for the latter to arise is the requirement that it degrade human dignity. By this is meant an extremely dehumanizing treatment of employees by employers – a treatment that utterly rejects the principles of work humanization by making work absolutely incompatible with psychophysical abilities and needs of man. Examples of such treatment include working hours and conditions not complying with established standards.

Thus, work of a forced nature within the meaning of the Criminal Code, Art. 115(22), will be all work performed in submission (subservience) and under coercion (compulsive and/or inner[35]) in a manner degrading human dignity.

With the matters being as they are, it is obvious that the concept of work of a forced nature adopted in the Criminal Code is dissimilar to that of forced or compulsory labour defined in ILO Convention No. 29. For the Code does not require the existence of a broadly understood sanction, while the Convention does not require the performed work to be a form of employee exploitation, degrading human dignity. Moreover, work of a forced nature is defined by reference (not entirely adequate as it turns out) to the Convention definition of forced or compulsory labour. Therefore, we believe it is necessary – and urgently too – to introduce to the Criminal Code (i.e. as Art. 115(22a) a definition of work of a forced nature. It might be worded thus: 'Work of a forced nature shall be human work performed under coercion and degrading human dignity'. Since the Criminal Code, Art. 115(22), contains also the concept of service of a forced nature, it is suggested that an analogous definition of such a service be introduced to the Criminal Code as its Art. 115(22b).

The Criminal Code meaning of work of a forced nature expounded above bears out the pertinence of many observations on forced labour to be found in the authoritative juristic literature. Namely, for work of a forced nature to exist, it does not matter if the activity performed is legal or not; it can be – quite rightly in fact – a legal or prohibited activity. It follows, therefore, that the employee may be also a person who is not an employee as defined in labour law. Indubitably, one

[34] Webster's Third New International Dictionary, Unabridged, s.v. "work", http://unabridged.merriam-webster.com
[35] The use of this conjunction is fully justified as compulsive coercion and inner coercion often coincide.

may opine this is absolutely right and axiologically justified. Nor does it matter – quite rightly – if the employee is an adult or a child. A fully positive assessment is attracted by the fact that the employee's citizenship is of no significance either. He/she may be a Polish national, foreigner or a stateless person for that matter. Nor indeed does it matter if the employee is gainfully employed, for instance if he/she receives any remuneration – work of a forced nature may be performed without being paid. This consequence of the scope of meaning given to work of a forced nature in the Criminal Code must be considered desirable as well, because it is fully justified axiologically by referring to the concept of human dignity.

2. THE RELATIONSHIP BETWEEN HUMAN TRAFFICKING AND WORK OF A FORCED NATURE

A careful reading of the Criminal Code, Art. 115(22), shows the relationship to be one of precedence: human trafficking in principle precedes work of a forced nature. The provision in question says that recruiting, transporting, delivering, handing over, keeping or receiving a person – making use of violence or an unlawful threat, abduction, deceit, deception or taking advantage of the person's error and/or inability to understand properly undertaken action, dependence, desperate situation or helplessness of the person, material or personal gain or promise thereof, offered or received by the person in whose care another person is or who supervises that person – are undertaken to use him/her in work of a forced nature. These types of behaviour precede such work, because they only make it possible.

3. SUGGESTIONS TO AMEND THE POLISH CRIMINAL CODE

Failure to extend the concept of human trafficking to cover work of a forced nature poses – quite naturally – a question if it was the right thing to do.

This question entails another concerning the ability of current Polish criminal law to combat and restrict work of a forced nature. To this end, the current Criminal Code offers of course a number of means – depending on specific facts in a case. To name a few: there are norms in place, prohibiting the deprivation of liberty, punishable threats, stalking, violence or exploitation. A question arises in this context if these means are really an appropriate reaction to work of a forced nature, if they are specifically designed to combat it. What gives rise to serious doubts in this respect is a review of the detailed conditions that must be met for the norms to be considered broken. They prevent making the exploitation of man by having him/her perform work of a forced nature, as defined in the Criminal Code, an offence, covering all its aspects.

With matters being as they are, we believe a discussion should be commenced about amending the Criminal Code by introducing to it appropriate provisions, designed directly to make the abuse in question an offence. Perhaps, such provisions could be worded as follows:

Art. 189a.

§ 3. Any person who forces an individual with his/her consent to perform work degrading human dignity or render a service degrading such dignity

shall be liable to a fine, community work or imprisonment for a term not exceeding 2 years.

§ 4. If the act mentioned in § 3 has been committed to the detriment of a minor, the perpetrator shall be liable to imprisonment for a term of 3 months to 5 years.

§ 5. If the act mentioned in § 3 has been committed to the detriment of a person incapable of realizing the significance of the act due to mental handicap or illness, the perpetrator shall be liable to punishment specified in § 4.

§ 6. Any person who forces an individual without his/her consent to perform work degrading human dignity or render a service degrading such dignity shall be liable to imprisonment for a term of 3 months to 5 years.

§ 7. If the act mentioned in § 6 has been committed to the detriment of a minor, the perpetrator shall be liable to imprisonment for a term of 1 year to 10 years.

§ 8. If the act mentioned in § 6 has been committed to the detriment of a person incapable of realizing the significance of the act due to mental handicap or illness, the perpetrator shall be liable to punishment specified in § 7.

§ 9. Any person who receives an individual into their employ in order to perform work degrading human dignity or render a service degrading such dignity shall be liable to a fine, community work or imprisonment for a term not exceeding 1 year.

Formulating these suggestions, we of course have in mind a possible charge about the disproportionality between the severity of statutory punishability suggested there and that of the offence of human trafficking. The disproportionality follows from the fact that human trafficking – in spite of the fact that it comprises, in the scope discussed here, types of behaviour evidently preceding the performance of work or a service of a forced nature – carries a more severe sanction than sanctions suggested above. In an attempt to rebut this charge, let us point out in our defence that the range of behaviour to be made offences in the draft proposal is very broad indeed, and – more importantly – covers diverse types of behaviour characterized by various degrees of reprehensibility. Moreover, it is very important to preserve the cohesion of the entire Criminal Code, including the cohesion of the criminal policy as formulated by its provisions. Insisting on more severe statutory punishability than that provided for in Art. 189a(1) could – in our opinion – considerably destabilise it. After all, one must consider the gravity of other offence types, entailing a specific level of severity of punishments they carry, so that a socially undesirable impression of depreciating the gravity of those other, equally grave, offence types, is not created.

Summary

Łukasz Pohl, *Polish Criminal Law on 'Work of a forced nature'*

This article discusses Polish criminal law and its outlook on work of a forced nature. The discussion has three distinguishable aspects: (1) interpretation of the expression 'work of a forced nature', (2) relationship between human trafficking and work of a forced nature,

and (3) suggestions for adequate amendments to criminal law provisions. Under (1), it is observed that the concept of work of a forced nature calls for an autonomous interpretation and that references to the Convention concerning Forced or Compulsory Labour (No. 29) of 1930, Art. 2(1 & 2) of which defines such labour, are not fully justified in the interpretation of this concept. Under (2), it is shown that human trafficking – within the meaning given to it by the Polish Criminal Code – covers only behaviour preceding the performance of work of a forced nature. Finally, under (3), a suggestion is made to introduce suitable amendments to the Polish Criminal Code, thereby creating new offence types, involving coercion of people to perform work or a service of a forced nature.

Keywords: *forced labour, coercion, forms of exploitation degrading human dignity*

(przekład na język angielski: Tomasz Żebrowski)

Streszczenie

Łukasz Pohl, *Stosunek polskiego prawa karnego do zjawiska pracy o charakterze przymusowym*

Niniejszy artykuł dotyczy stosunku polskiego prawa karnego do zjawiska pracy o charakterze przymusowym. Zawarte w nim rozważania odnoszą się do trzech dających wyodrębnić się aspektów: 1) wykładni wyrażenia „praca o charakterze przymusowym", 2) relacji pomiędzy handlem ludźmi a pracą o przymusowym charakterze, oraz 3) postulatów adekwatnej zmiany przepisów prawa karnego. W ramach pierwszego z nich spostrzeżono, iż pojęcie pracy o charakterze przymusowym wymaga autonomicznie przeprowadzonej wykładni, że – tym samym – nie w pełni uzasadnione są przy interpretacji tego pojęcia odniesienia do Konwencji Nr 29 z 1930 r. o pracy przymusowej lub obowiązkowej, w której art. 2 ust. 1 i 2 zdefiniowano ową pracę. W ramach drugiego aspektu wskazano z kolei, że handel ludźmi – w znaczeniu tego pojęcia nadanym przez polski Kodeks karny – obejmuje jedynie zachowania leżące na przedpolu świadczenia pracy o charakterze przymusowym. Wreszcie, jeśli chodzi o trzeci z wyróżnionych aspektów, to zaproponowano wprowadzenie do polskiego Kodeksu karnego stosownych zmian, polegających na utworzeniu nowych typów przestępstw wiążących się z przymuszaniem człowieka do wykonywania pracy oraz usługi o charakterze przymusowym.

Słowa kluczowe: *praca przymusowa, przymus, formy wykorzystania poniżające godność ludzką*

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