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FORFEITURE OF AN ANIMAL THAT HAS BEEN THE VICTIM OF ABUSE WITH PARTICULAR REFERENCE TO THE CASE OF DISCONTINUANCE AND CONDITIONAL DISCONTINUANCE OF CRIMINAL PROCEEDINGS

Abstract

The forfeiture of an animal is a specific measure regulated by the Act of 21 August 1997 on the Protection of Animals. The rules for imposing the forfeiture of an animal are not questionable in the case of convictions for the offence of animal abuse. The adjudication of forfeiture is obligatory in such a situation. However, the legitimacy and legal basis for imposing forfeiture of an animal in cases of conditional discontinuance or discontinuance of criminal proceedings requires consideration. The authors believe that under current legislation, the courts can make use of this legal instrument. The analysis conducted in this article reveals that the legal basis for adjudicating the forfeiture of an animal in cases of conditional discontinuance or discontinuance of criminal proceedings is Article 45a of the Act of 6 June 1997 – Penal Code.

KEYWORDS

legal protection of animals, conditional discontinuance of criminal proceedings, forfeiture of an animal

SŁOWA KLUCZOWE

prawna ochrona zwierząt, warunkowe umorzenie postępowania karnego, przepadek zwierzęcia

1. INTRODUCTION

The ongoing changes in the public awareness of the need, or even the necessity, to strengthen the legal protection of animals and the increasing pressure from public opinion in this area impose new challenges on the legislator. Despite the fact that Article 1(1) of the Act of 21 August 1997 on the Protection of Animals¹ formally stipulates that animals, as living beings capable of suffering, are not things and obliges humans to ensure their respect, protection and care. It often appears that the norm formulated in this way does not have as much practical significance as it should. The subjective perception of animals inherent in regulations designed to ensure their humanitarian protection – of which the APA is one – has not yet become established in the public consciousness. It is not uncommon that the behaviour of the animal owner or carer causes pain or suffering to the animal, which in turn requires appropriate action to protect the legal good, which is the life and health of the animal.²

The statement that the law as a regulator of social relations, and the way in which it is applied, significantly contributes to maintaining, or even shaping desired social attitudes, even though it is not a revealing observation, will be of crucial importance in the context of this article. The criminal protection of animals is the most far-reaching mechanism for ensuring compliance with the provisions of the APA. The penalties imposed on the perpetrators of crimes against animals are of significant justice and preventive importance. However, in order to ensure the protection of the legal good in the form of the life and health of an animal, it is also often necessary to apply measures aimed at restoring to the animal

¹ Consolidated text: Journal of Laws of 2022, item 572; hereinafter: the APA.

² M. Mozgawa, *Komentarz do niektórych przepisów ustawy o ochronie zwierząt* (in:) M. Mozgawa (ed.) *Pozakodeksowe przestępstwa przeciwko zasobom przyrody i środowisku. Komentarz*, Warszawa 2017, p. 56.

as a victim of a crime of abuse the proper living conditions, respect, protection and care due to it. In this context, the institution of forfeiture of an animal and the decisions of the courts on its application are of considerable importance. This publication is intended to explain the institution of forfeiture of an animal against the perpetrator of animal abuse.

It is indisputable that in cases of, *inter alia*, abuse of an animal by its owner, the court is obliged to impose forfeiture of an animal on the basis of Article 35(3) of the APA in the event of conviction of the offender.³ However, the application of the forfeiture of an animal institution may cause interpretational problems in the case of court decisions other than conviction. In particular, such doubts arise with regard to the possibility of ruling on the forfeiture of an animal in the case of discontinuance or conditional discontinuance of criminal proceedings. This publication also attempts to indicate and clarify the legal basis for such rulings.

2. THE ORIGIN OF HUMANITARIAN ANIMAL PROTECTION UNDER POLISH LAW

The roots of the protection of animals against cruel treatment by humans in Polish legislation can be found in the Ordinance of the President of the Republic of Poland on the Protection of Animals of 22 March 1928,⁴ which was the first act to introduce a legal definition of animal abuse. This regulation conformed with the international trend⁵ at the time to distinguish the legal protection of animals as living beings capable of suffering – a protection of a completely different quality – from the protection of animals seen merely as valuable natural resources or valuable ‘things’. The Ordinance applied to animals, defined as all domestic and tame animals and birds, as well as wild animals⁶ and birds, fish, amphibians and insects. Under the Ordinance, the abuse of animals was prohibited and abuse was defined in nine forms of behaviour listed in Article 2, such as, *inter alia*, using sick or injured animals for work; beating animals on the head, lower abdomen or lower limbs; hitting them with hard or sharp objects; overloading draught or pack animals beyond their strength; transporting or herding animals in a manner, position or under conditions causing unnecessary physical suffering; or maliciously frightening or teasing animals. However, both the enumeration and

³ M. Goettel, „Czasowe odebranie” oraz „przepadek” jako szczególne środki prawnej ochrony zwierząt, „Studia Prawnoustrojowe” 2011, No. 13, p. 142.

⁴ Journal of Laws of 1928, No. 36, item 332, as amended.

⁵ Ł. Smaga, *Ochrona humanitarna zwierząt*, Białystok 2010, pp. 71-77.

⁶ Until 1932, the ordinance only applied to animals and wild birds that had been captured by humans.

the definition of animal abuse were left open due to the wording of Article 2(k) which indicates that abuse is any infliction of suffering on animals without a sufficiently compelling and legitimate need.

It must be assumed that animal abuse under the 1928 Ordinance was relatively broadly criminalised, due to the sanctions provided for in the Ordinance in the form of fines, imprisonment or even – in cases of abuse in a manner indicating exceptional cruelty of the perpetrator – imprisonment of up to one year. However, there was a growing perception that the level of humanitarian protection afforded to animals by the regulation was inadequate, primarily due to the problems associated with its practical application by law enforcement authorities as well as the courts adjudicating on its basis,⁷ but this did not prevent the ordinance from gaining international recognition at the time.

After the ordinance had been in force for almost seventy years, due to international trends, increased awareness among the public and the activities of social organisations with animal protection as their statutory objective, legislative work in parliament in the early 1990s led to the enactment of the current Act of 21 August 1997 on the Protection of Animals.

The fundamental principles of the Act, which are at the same time interpretative directives,⁸ are contained in Articles 1(1) and 5, providing an unequivocal and formal separation of animals as living beings capable of suffering from the category of things, and the obligation to treat animals humanely, by which the Act means treating them in a manner that respects their needs and ensures their protection and care by humans.⁹ It should be emphasised at this point that the case law indicates that “the needs [of animals – M.J. and K.S.] must be considered broadly, taking into account the psychophysical characteristics of the species and the breed of the animal, the extent to which it perceives external phenomena and the manner and capacity in which it reacts to them (...)”.¹⁰

As already mentioned in the introduction, although the problem of legal humanitarian protection of animals has been more comprehensively standardised in the regulations from the area of administrative law,¹¹ it is the criminal law in the protection of animals that is the most far-reaching mechanism ensuring the obedience of the provisions of the APA. Despite the still dominant views denying the possibility of treating animals who are victims of crimes as victims within the meaning of Article 49 § 1 of the Act of 6 June 1997 of the Code of Criminal Pro-

⁷ Ł. Smaga, *Ochrona humanitarna ...*, pp. 77-78.

⁸ Judgment of the Voivodship Administrative Court in Poznań of 6 June 2013, IV SA/Po 165/13, LEX No. 1333697.

⁹ Article 5 in connection with Article 4 point 2 of the APA.

¹⁰ See judgment of the Voivodship Administrative Court in Gdańsk of 6 February 2019, II SA/Gd 644/18, LEX no 2621957.

¹¹ M. Rudy, *Prawo humanitarnej ochrony zwierząt jako dział kompleksowy prawa administracyjnego*, “Radca Prawny. Zeszyty Naukowe” 2021, No. 4(29), pp. 70-71.

cedure,¹² it should be emphasised, following T. Pietrzykowski, that “the obvious normative consequence of Article 1 of the APA is to make the life and welfare of the individual animal an intrinsic legal value”.¹³ Sanctions for committing acts prohibited by the provisions of the APA are therefore a response to the violation of the legally protected good of the life of an animal and its freedom from suffering.¹⁴

3. CRIMINAL PROVISIONS OF THE ACT ON THE PROTECTION OF ANIMALS

The APA distinguishes only two main types of offences: the offence of depriving an animal of its life in breach of the law and the offence of animal abuse.¹⁵ Following the wording of Article 35(2), for both of these offences, the Act also provides for liability in an aggravated form where the actions of the perpetrator of the act are characterised by particular cruelty. The main difference between the two basic prohibitions set by the provisions of the APA and concerning conduct with animals, that is between the prohibition of depriving animals of life and the prohibition of animal abuse, is the construction of the first of them as a relative prohibition,¹⁶ and the second one as an absolute prohibition, with no exceptions. The authors will primarily focus on the offence of animal abuse, because it is directly linked with the institution of forfeiture of an animal. In the case of the commission of the offence of depriving an animal of life, ruling on its forfeiture is pointless. It is accepted that with regard to the offence under Article 35(1) APA, forfeiture may be ordered when the perpetrator has attempted to kill the animal but unsuccessfully.¹⁷

The legislator, using an exemplary catalogue of human behaviour – as evidenced by the use of the phrase ‘in particular’ – indicated that abuse of an animal would be, *inter alia*, intentionally injuring it, beating it with hard or sharp objects, forcing it to perform activities that may cause pain, overloading it, maliciously frightening it, keeping it in inappropriate living conditions, abandoning it, organ-

¹² Consolidated text: Journal of Laws of 2022, item 1375, as amended; hereinafter: the CCP.

¹³ T. Pietrzykowski, *Prawo ochrony zwierząt. Pojęcia, zasady, dylematy*, Warszawa 2022, p. 133.

¹⁴ W. Radecki, *Ustawy o ochronie zwierząt. Komentarz*, Warszawa 2015, p. 222.

¹⁵ Regarding the previous Ordinance of 1928, it should be indicated that only animal abuse was criminalised under this Ordinance and that its provisions did not regulate the issue of the permissibility of killing animals.

¹⁶ Article 6(1) of the APA provides a closed catalogue of situations (points 1-9) in which depriving an animal of its life will not be treated as an offence under Article 35(1).

¹⁷ See K. Kuszlewicz, *Ustawa o ochronie zwierząt. Komentarz*, Warszawa 2021, pp. 366-367.

ising animal fights or exposing it to weather conditions that endanger its life or health. However, according to the legal definition included in Article 6(2) of the APA, animal abuse should be understood as inflicting or consciously allowing pain or suffering to an animal, which means that any human behaviour that is not permitted by law and that fulfils the general definition of animal abuse, i.e. that involves inflicting pain or suffering on an animal or consciously allowing this to happen, is a criminal offence penalised in Article 35(1a) of the APA.¹⁸

The commission of the offence of animal abuse has two implications, as Articles 7 and 35 of the APA provide for administrative and criminal law consequences.¹⁹ However, their common denominator is the court's obligation to order the forfeiture of the animal in the case of a conviction of the perpetrator, provided he/she is the owner of the animal.

4. THE INSTITUTION OF FORFEITURE IN THE ACT ON THE ANIMAL PROTECTION

The court will obligatorily forfeit an animal if the perpetrator is convicted of the offence of animal abuse or if the perpetrator is convicted of either of the two offences under the qualified type, i.e. when the perpetrator acted with extreme cruelty. Furthermore, pursuant to Article 38a(7) of the APA, the court obligatorily orders the forfeiture of an animal in the case of a conviction for an offence of non-compliance with an animal possession prohibition measure previously imposed on the offender. It is worth pointing out that before 1 January 2012, the imposition of forfeiture was obligatory only in the case of committing the offence of killing an animal or animal abuse of the qualified type. The change in the form of extending the obligatory forfeiture to cases of conviction for the indicated offences also in the basic type²⁰ should be assessed in the most positive light, since by its very definition, animal abuse consists in each case of inflicting or knowingly allowing to inflict pain or suffering on an animal, which should in each case determine the separation of the victim from the perpetrator.

Although forfeiture is a mechanism governed by public law, its ruling results in interference in the civil law sphere, involving the legal bond between the animal owner and the animal itself.²¹ The obvious consequence of a forfeiture deci-

¹⁸ *Ibidem*, pp. 114-115.

¹⁹ T. Pietrzykowski, *Prawo ochrony zwierząt...*, p. 189.

²⁰ Act of 16 September 2011 amending the Act on the Protection of Animals and the Act on Maintaining Cleanliness and Order in Municipalities (Journal of Laws of 2011, No. 230, item 1373).

²¹ M. Goettel, *Sytuacja zwierzęcia w prawie cywilnym*, Warszawa 2013, pp. 257-258.

sion for the owner of an animal is the loss of his or her ‘ownership’²² right to the animal as soon as the judgment becomes final. Although the special type of forfeiture regulated by the APA results in a certain pecuniary disadvantage for the offender, concerning animal abuse it is primarily intended to protect the animal from possible further infringements detrimental to its welfare.²³ At this point, an extremely important – both from the point of view of this publication and of great practical significance – function of imposing animal forfeiture in cases of committing offences penalised under the APA becomes apparent, which is to ensure that the animal is properly cared for, away from the perpetrator of the offence to which the animal has fallen victim. As M. Goettel indicates, “the need to resort to such drastic measures is justified by the need to protect an exceptionally valuable good, which is life, health and the safe existence of an animal”.²⁴ The forfeiture of an animal should not only be seen as a means of increasing the repressiveness of the punishment imposed on the owner of an animal but, above all, as a kind of ‘compensation’ for the harm caused to an animal by the offence and preventing the animal from contacting the offender. There should be no doubt that the essential function of the forfeiture of an animal is to prevent further harm to the animal by the perpetrator and to ensure that the animal has proper living conditions, as well as respect, protection and care.

An analysis of the provisions of the APA relating to forfeiture indicates that its adjudication may also be facultative. The decision to rule on the forfeiture of an animal is left to the discretion of the court when misdemeanors under Articles 37(1) and 37a of the APA are committed.

In the context of the aforementioned provisions of the APA, it is not difficult for courts to order the forfeiture of an animal in the event of a criminal conviction or punishment for a misdemeanour. However, doubts arise with regard to the court’s adjudication of the forfeiture of an animal outside of the situations explicitly indicated in the APA, which particularly concerns cases of discontinuance or conditional discontinuance of criminal proceedings. Although some authors explicitly indicate such a possibility,²⁵ at the same time they do not comprehensively explain their position.

²² Use of quotation marks by the authors in relation to animal ownership is further explained in M. Januszczyk, *Ograniczenia uprawnień właścicielskich wyznaczone przez przepisy regulujące prawną ochronę zwierząt* (in:) J. Jędrzejewska, J. Kozłowska (eds.), *Wybrane zagadnienia z zakresu prawa, bezpieczeństwa i terroryzmu*, Lublin 2021, pp. 95-96.

²³ Z. Gądzik, *Środki karne, przepadek zwierzęcia i nawiązka w ustawie z dnia 21 sierpnia 1997 r. o ochronie zwierząt*, “Prokuratura i Prawo” 2019, No. 3, p. 97.

²⁴ M. Goettel, “Czasowe odebranie”..., p. 146.

²⁵ See W. Radecki, *Ustawy o ochronie zwierząt...*, p. 254.

5. THE FORFEITURE OF AN ANIMAL IN THE CASE OF DISCONTINUANCE OR CONDITIONAL DISCONTINUANCE OF CRIMINAL PROCEEDINGS CONCERNING THE ABUSE OF ANIMALS

1. GENERAL RULES ON ADJUDICATION OF FORFEITURE

The rules on the adjudication of forfeiture have been constitutionally regulated in the Polish legal system. Pursuant to Article 46 of the Constitution of the Republic of Poland of 2 April 1997,²⁶ substantive adjudication on the subject of forfeiture has been entrusted exclusively to courts (the principle of exclusive jurisdiction of a court in matters of adjudicating the forfeiture of an item). The decision on the forfeiture must have a clear statutory basis (principle of exclusive statutory determination of the prerequisites for imposing the forfeiture).²⁷ The requirement of a statutory regulation of the forfeiture is undoubtedly fulfilled by the APA. This condition is also fulfilled by the Act of 6 June 1997 – Penal Code,²⁸ which contains a separate chapter Va, with the title “Forfeiture and compensatory measures”.

In the light of the PC regulations, forfeiture constitutes a measure of criminal law response which is not a penal measure *sensu stricto*. Indeed, the PC does not mention it in the catalogue of penal measures in Article 39 of the PC. The forfeiture in the Code regulation includes: objects directly derived from the crime (*producta sceleris*), objects which served or were intended for the commission of the crime (*instrumenta sceleris*), financial gain and enterprise.

The forfeiture of an animal does not belong to any of these categories. In this sense, the APA establishes the specific type of object which is subject to forfeiture.

As a rule, forfeiture is adjudicated in a court decision if the perpetrator is convicted of an offence or sentenced for a misdemeanour. Therefore, the possibility of its adjudication in a conviction is not in doubt. Depending on the type of object that is subject to forfeiture or specific provisions in this regard, the decision on forfeiture is either mandatory or facultative. On the other hand, the decision to adjudicate forfeiture of an animal in sentences conditionally discontinuing and discontinuing criminal proceedings appears to be more problematic.

²⁶ Journal of Laws of 1997, No. 78, item 483, as amended.

²⁷ J. Raglewski, *Materialnoprawna regulacja przypadku w polskim prawie karnym*, Kraków 2005, p. 64.

²⁸ Consolidated text: Journal of Laws of 2022, item 1138, as amended; hereinafter: the PC.

2. ADJUDICATION OF FORFEITURE IN CASE OF DISCONTINUANCE OR CONDITIONAL DISCONTINUANCE OF CRIMINAL PROCEEDINGS

The substantive legal grounds for adjudicating forfeiture in the event of conditional discontinuance or discontinuance of criminal proceedings are stipulated in Article 45a of the PC.²⁹ This provision was introduced by the Act of 20 February 2015 amending the Act – Penal Code and certain other acts.³⁰ This Act repealed Article 100 of the PC, which had a similar content and allowed for the imposition of forfeiture as a precautionary measure. By the Act of 23 March 2017 amending the Act – Penal Code and certain other acts,³¹ the previous content of Article 45a of the PC was marked as § 1 and § 2 was added, the wording of which has remained unchanged since then.

The essence of Article 45a of the PC is to enable the court to order forfeiture in the situation of absence of conviction of a perpetrator who has nevertheless committed a prohibited act. The provision of Article 45a of the PC enumerates exhaustively the prerequisites, the fulfilment of which binds the court's authority to order this measure in the case of discontinuance or conditional discontinuance of criminal proceedings.³² The Act provides that in the case of, for example, discontinuance of criminal proceedings due to negligible social harmfulness of an act, "the court may order forfeiture". In the light of the indicated formulation of the text of the provision of Article 45a of the PC, there is no doubt that the institution regulated therein is of a facultative nature.³³ The doctrine aptly indicates that when assessing the legitimacy of a forfeiture decision under Article 45a of the PC, the court should take into account considerations of purpose.³⁴ When

²⁹ § 1. The court may impose the forfeiture when the social harmfulness of an act is negligible, and also while conditionally discontinuing the criminal proceedings or establishing that the perpetrator has committed a prohibited act in a state of insanity referred to in Art. 31 § 1, or when the circumstances excluding the imposition of punishment upon the perpetrator of a prohibited act have been established.

§ 2. If the gathered evidence indicates that in case of conviction, the forfeiture would have been imposed, the court may impose it also in case of the death of the perpetrator, discontinuation of the proceedings due to failure to detect the perpetrator, and also in case of suspension of the proceedings due to failure to apprehend the perpetrator or the perpetrator's inability to participate in the proceedings resulting from a mental illness or another serious illness.

³⁰ Journal of Laws of 2015, item 396.

³¹ Journals of Laws of 2017, item 768.

³² The case described in Article 45a § 2 of the PC *in fine* is exceptionally combined with the suspension of criminal proceedings.

³³ J. Raglewski, *Komentarz do art. 45a* (in:) W. Wróbel, A. Zoll (eds.), *Kodeks karny. Część ogólna. Tom I. Część I. Komentarz do art. 1-52*, Vol. V, Warszawa 2016, p. 890; K. Szczucki, *Komentarz do art. 45a* (in:) M. Królikowski, R. Zawłocki (eds.), *Kodeks karny. Część ogólna. Komentarz do artykułów 1-116*. Vol. 5, Warszawa 2021, Legalis, marginal number 3.

³⁴ K. Szczucki, *Komentarz...*, Legalis, marginal number 3.

possibly deciding on the forfeiture of an animal, the court should first and foremost consider the welfare of the animal in relation to the fact that an offence has previously been committed on it.

The fundamental premise for the adjudication of forfeiture on the basis of Article 45a of the PC is the commission of a prohibited act. Therefore, it is excluded to decide on forfeiture, pursuant to this provision if the criminal proceedings are discontinued due to the lack of the elements of a prohibited act.³⁵ Another of the prerequisites for the application of the analysed institution is conditional discontinuance or discontinuance of criminal proceedings in cases covered by the disposition of Article 45a § 1 and 2 of the PC. Briefly, the forfeiture is adjudged in the absence of conviction of the perpetrator. At the same time, there is no doubt that a ruling conditionally discontinuing criminal proceedings is not a conviction.³⁶ The absence of a conviction, pursuant to Article 45a of the PC, does not exclude the need to apply forfeiture. This measure is in fact supposed to fulfil its preventive aims despite the fact that criminal liability has not been ascribed in the judgment, but on the condition that the commission of a prohibited act has been established *in concreto*.

In the case of discontinuation of criminal proceedings at the pre-trial stage for the reasons described in Article 45a of the PC, the prosecutor should, pursuant to Article 323 § 3 of the CCP apply to the court for a forfeiture order. The court, when taking measures in pre-trial proceedings, will then make a procedural decision on this motion, guided by the rules of purposefulness. Far-reaching doubts are raised as to the possibility of ruling on forfeiture under Article 45a of the PC in the event of refusal to initiate pre-trial proceedings. *Prima facie*, the possibility of establishing the commission of a prohibited act in a situation where criminal proceedings have not been initiated at all seems doubtful. However, the doctrine allows for such a possibility.³⁷ Nevertheless, it should be noted that in situations covered by Article 45a of the PC, the conduct of criminal proceedings is necessary to identify the commission of a criminal act. What is more, the CCP stipulates that the condition for the request referred to in Article 323 § 3 of the CCP is that the decision to discontinue an investigation or prosecution becomes final. Thus, it is inadmissible to apply for ruling on forfeiture after the ruling on the refusal to initiate proceedings has become final.³⁸

³⁵ See decision of the Supreme Court of 8 April 2010, IV KK 52/10, LEX No. 583910.

³⁶ J. Lachowski, *Komentarz do art. 66* (in:) M. Królikowski, R. Zawłocki (eds.), *Kodeks karny. Część ogólna. Komentarz do artykułów 1–116*, Vol. 5, Warszawa 2021, Legalis, marginal numbers 3-5.

³⁷ K. Szczucki, *Komentarz...*, Legalis, marginal number 7.

³⁸ See R. A. Stefański, S. Zabłocki, *Komentarz do art. 323* (in:) R. A. Stefański, S. Zabłocki (eds.), *Kodeks postępowania karnego. Tom. III. Komentarz do art. 297-424*, Warszawa 2021, pp. 313-314. It is indicated in the cited commentary that “it is also necessary to establish that the perpetrator has committed a specific act prohibited by statute”.

Doubts are expressed with regard to the application of the institution of Article 45a § 1 of the PC in the event of conditional discontinuance of criminal proceedings after the successful expiry of the probation period. The Supreme Court opted for such a possibility in its resolution of 29 September 1987, VI KZP 9/87.³⁹ Under the current state of the law, the procedural basis for such a decision could be Article 420 § 1 of the CCP, which allows for supplementation of the judgment with regard to the decision on forfeiture. However, a different view should be advocated, according to which the ruling on forfeiture pursuant to Article 45a of the PC after the expiry of the probation period is excluded.⁴⁰ After the expiry of the probationary period and a further 6 months during which the court can still resume the conditionally discontinued proceedings, the discontinuance of these proceedings becomes definitive. Such a possibility, a ‘supplementary’ forfeiture order against the perpetrator, pursuant to Article 45a of the PC is excluded due to the postulate of treating a person, in relation to whom the probation period for which the conditional discontinuance of criminal proceedings has been set, as not bearing any criminal law consequences of the act committed. Moreover, if the possibility of imposing forfeiture after the expiry of the probationary period was allowed, it would not be clear until when such a measure could be applied, that is how long after the end of the probationary period the court could still rule on it.⁴¹

3. THE APPLICATION OF ARTICLE 45A OF THE CRIMINAL CODE TO THE FORFEITURE OF AN ANIMAL

Article 35(3) of the APA obliges the court to adjudicate the forfeiture of an animal in the case of a conviction, *inter alia*, for the offence of animal abuse. The aforementioned Act does not provide a separate basis for such forfeiture in the case of conditional discontinuance or discontinuance of criminal proceedings. However, the legitimacy of applying a provision of the general part (Article 45a of the PC) to the adjudication of the forfeiture of an animal victim of abuse requires consideration.

According to Article 116 of the PC, the provisions of the general part of the Code shall be applied to other laws providing criminal liability, unless these laws

³⁹ The thesis of this judgment is the following statement: “The precautionary measure set out in Article 104 of the PC may also be applied after the successful expiry of the probationary period designated – pursuant to Article 29 § 1 of the PC – in connection with conditional discontinuance of proceedings”. – Supreme Court resolution of 29 September 1987, VI KZP 9/87, OSNKW 1987, No. 11-12, item 101.

⁴⁰ See M. Błoński, *Kilka uwag o wyroku warunkowo umarzającym postępowanie*, “Kwartalnik Krajowej Szkoły Sądownictwa i Prokuratury” 2015, No. 1(16), p. 67; L. Sługocki, *Glosa do uchwały z 29 IX 1987, VI KZP 9/87*, “Państwo i Prawo” 1988, 10, pp. 148-149; K. Szczucki, *Komentarz...*, Legalis, marginal number 9.

⁴¹ As pointed out by L. Sługocki (in:) L. Sługocki, *Glosa...*, p. 149.

specifically exclude their application.⁴² The issue of the application of Article 116 of the PC has significant practical relevance, considering the scope of non-PC criminal law, which also includes the norms of the penal provisions of the APA. The applicability of Article 45a of the PC to the adjudication of the forfeiture of an animal will be determined by the result of an analysis prejudging whether Article 35(3) of the APA expressly excludes the application of the provision in question of the general part of the PC.

‘Explicit exclusion’ mentioned in Article 116 of the PC may take the form of a formal exclusion, which consists in indicating a specific article of the general part of the PC, the application of which is excluded by the specific regulation.⁴³ However, the different regulation does not have to be characterised by such far-reaching bluntness in every case. It may also be expressed by “a precise regulation in a non-Codex Act (substantive exclusion) which does not leave any interpretative doubts”,⁴⁴ replacing the regulation of the general part of the PC. There is no formal exclusion in the provisions of the APA concerning Article 45a of the PC.

According to the opinion of the authors, the criminal provisions of the APA also do not provide any basis for stating that the Act envisages an unambiguous, unquestionable regulation excluding the application of Article 45a of the PC. Indeed, it can hardly be argued that the mere wording “in the case of conviction” contained in Article 35(3) of the APA clearly and undoubtedly excludes the application of the provision of Article 45a of the PC with regard to the adjudication of the forfeiture of an animal. Undeniably, Article 45a of the PC is, under Article 116 of the PC ‘pre-paragraph’ regulation, specifying the rules for the adjudication of forfeiture. Therefore, rulings of common courts concerning adjudication of forfeiture of an animal in the case of conditional discontinuance of criminal proceedings are adequate.⁴⁵ Approval of the opposite view, according to which Article 35(3) of the APA excludes the application of Article 45a of the PC, by merely including the phrase “in the case of conviction” in it, would significantly weaken the principle of supremacy of the general part of the criminal law. Thus, the APA does not envisage any provision which would allow adjudicating the forfeiture of an animal “only in the event of conviction”. The fact that the general part of the

⁴² Article 121 of the 1969 Penal Code provided that “the provisions of the general part of this Code shall apply to offences envisaged by other laws, if these laws do not contain any other provisions”.

⁴³ M. Błaszczuk, *Komentarz do art. 116* (in:) M. Królikowski, R. Zawłocki (eds), *Kodeks karny. Część ogólna. Komentarz do artykułów 1–116*, Vol. 5, Warszawa 2021, Legalis, marginal number 33.

⁴⁴ *Ibidem*; similarly J. Raglewski, *Komentarz do art. 116* (in:) W. Wróbel, A. Zoll (eds.), *Kodeks karny. Część ogólna. Tom I. Część II. Komentarz do art. 53–116*, Vol. V, Warszawa 2016, Lex, marginal numbers 14–15.

⁴⁵ See judgment of the District Court in Piotrków Trybunalski of 2 February 2021, IV Ka 647/20, LEX No. 3160681.

PC does not recognise the forfeiture of an animal, or more broadly the forfeiture of the object of an executive act, is also not indicative of a substantive exclusion. The APA only provides for a further type of forfeiture, without affecting the judgement concerning the possibility of imposing the forfeiture of an animal in the lack of a conviction.

Although Article 35(3) of the APA provides for the institution of mandatory forfeiture of an animal, the forfeiture of an animal adjudicated under Article 45a of the PC remains facultative. Indeed, the proper basis for adjudication in such a case is Article 45a (§ 1 or 2) of the PC. In a judgement conditionally discontinuing or discontinuing criminal proceedings, the ruling on the forfeiture of an animal should be contained in a separate paragraph thereof and preceded by an indication of the legal basis – Article 45a (§ 1 or 2) of the PC. Following the wording of Article 413 § 1 point 6 of the CCP, each judgment should contain an indication of the applied provisions of the PC.⁴⁶ On the other hand, indicating an erroneous legal basis will not lead to a change in the verdict. Pursuant to Article 438 point 1a of the CCP, violation of substantive law other than in terms of legal qualification does not occur when despite the erroneous legal basis, the judgement is in conformity with the law. Similarly, Article 45a (§ 1 and 2) of the PC will be the legal basis for the decision on forfeiture of an animal passed in pre-trial proceedings by the court at the prosecutor's request in the case of discontinuation of criminal proceedings, in situations covered by the disposition of Article 45a of the PC.

6. EXECUTION OF THE ORDERED FORFEITURE OF AN ANIMAL

Detailed aspects related to the execution of forfeiture of an animal are regulated by Article 38 of the APA. The forfeiture of an animal has far-reaching consequences in the civil law field, because as soon as the judgement on forfeiture becomes final, the previous owner loses ownership of the animal and the State Treasury becomes its new owner. The court which has ruled on the forfeiture of an animal shall forward a notice of the judgment becoming final to a social organisation, the statutory objective of which is the protection of animals. In most cases, this will be the organisation that took part in the pending proceedings, but the legislator also allows the animal to be passed on to another organisation – so the only condition is that the statutory purpose of the activity is animal protection.

⁴⁶ Which certainly include provisions of substantive criminal law – see the judgment of the Court of Appeal in Gdańsk of 23 August 2000, II AKa 193/00, Prok. i Pr.-wkł. 2001, No. 4, item 25.

These organisations only perform the executive function of the judgment, as they take possession of the animal, but do not acquire ‘ownership’ over it.⁴⁷

The organisation to which the animal is given must immediately notify the district veterinarian, who should also examine the animal without undue delay. Depending on the species, the animal is then passed on to a shelter, holding or zoo on the basis of their permission. If neither of the aforementioned bodies gives their consent, the organisation may pass the animal on to a legal person, an unincorporated organisational unit or a natural person, if they can guarantee that the animal will be properly cared for. The handover of an animal shall require a protocol to be drawn up containing basic information about the person or body obliged to take care of the animal and information about the animal itself.

According to Article 38(8) APA, the costs of executing the judgment of forfeiture of the animal shall be borne by the convicted person. However, the decision on costs will not be included in the judgment, due to the impossibility of determining them at the jurisdictional stage. It seems that in this case, Article 626 § 2 of the CCP, which is a competence provision applicable to the costs of the trial, will be applicable when “there is a need for additional determination of their amount or a decision on the costs of the execution proceedings”. The decision on the costs will therefore be made in the form of a decision at a sitting, in the procedure regulated by the provisions of the CCP.⁴⁸ The organisation that is taking care of the animal therefore does not receive the funds for the execution of the forfeiture and has to enforce them against the convicted person at a later stage.

It must be emphasised that the mode of forfeiture of the animal execution provided for Article 38 of the APA applies to any forfeiture of the animal, regardless of the act under which it was passed unless that act expressly envisages a different mode of execution.⁴⁹ As there is a lack of any regulation on the execution of the forfeiture of an animal other than that contained in Article 38 of the APA, it should be assumed that it will apply not only to animal forfeiture judgments passed under the provisions of the APA but also to judgments based on Article 45a of the PC.

7. CONCLUSIONS

There is no doubt that legal protection of animals seen as a separate sphere of law is beginning to gain a more significant role in Poland, which in turn is

⁴⁷ K. Kuszlewicz, *Ustawa o ochronie zwierząt...*, p. 366.

⁴⁸ S. Steinborn, *Komentarz do art. 626* (in:) L. K. Paprzycki (ed.), *Komentarz aktualizowany do art. 425-673 Kodeksu postępowania karnego*, LEX/el. 2015; Decision of the Court of Appeal in Warsaw of 25 May 1999, II AKz 186/99, OSA 2000, No. 5, item 39.

⁴⁹ M. Siwek, *Glosa do uchwały SN z dnia 20 czerwca 2012 r.*, I KZP 4/12, LEX/el. 2012.

a pretty obvious result of the increased public awareness of the necessity to treat animals appropriately. As T. Pietrzykowski points out, “this forces legal professionals, instead of reflexively reaching for established lines of jurisprudence, collections of well-known landmark cases or well-established notions and theoretical concepts already taught at university, to rather resort to an independent searching for the basis on which they can support their views and arguments”.⁵⁰

It is of crucial importance in this context for the courts to make use of the powers they have been provided with by the legislator, which fulfil the purpose of protecting the legal good which is an animal’s life and health.

Specifically, such a need should be identified in relation to situations where, despite the lack of a conviction, there is a need to separate the animal from the person who committed the offence against the animal. This would also apply to situations where the animal has been seized in accordance with Article 7 of the APA and the proceedings in this case do not provide sufficient evidence to file an accusation against the owner, or where there are other premises for ruling a forfeiture on the basis of Article 45a of the PC. The conducted analysis proves that it is possible and justified to order the forfeiture of an animal in the case of conditional discontinuance or discontinuance of criminal proceedings for animal abuse.

REFERENCES

- Błaszczak M., *Komentarz do art. 116* (in:) M. Królikowski, R. Zawłocki (eds.), *Kodeks karny. Część ogólna. Komentarz do artykułów 1–116, Vol. 5*, Warszawa 2021
- Błoński M., *Kilka uwag o wyroku warunkowo umarzającym postępowanie*, “Kwartalnik Krajowej Szkoły Sądownictwa i Prokuratury” 2015, No. 1(16)
- Gądzik Z., *Środki karne, przepadek zwierzęcia i nawiązka w ustawie z dnia 21 sierpnia 1997 r. o ochronie zwierząt*, “Prokuratura i Prawo” 2019, No. 3
- Goettel M., *„Czasowe odebranie” oraz „przepadek” jako szczególne środki prawnej ochrony zwierząt*, “Studia Prawnoustrojowe” 2011, No. 13
- Goettel M., *Sytuacja zwierzęcia w prawie cywilnym*, Warszawa 2013
- Januszczak M., *Ograniczenia uprawnień właścicielskich wyznaczone przez przepisy regulujące prawną ochronę zwierząt* (in:) J. Jędrzejewska, J. Kozłowska (eds.), *Wybrane zagadnienia z zakresu prawa, bezpieczeństwa i terroryzmu*, Lublin 2021
- Kuszelewicz K., *Ustawa o ochronie zwierząt. Komentarz*, Warszawa 2021
- Lachowski J., *Komentarz do art. 66* (in:) M. Królikowski, R. Zawłocki (eds.), *Kodeks karny. Część ogólna. Komentarz do artykułów 1–116, Vol. 5*, Warszawa 2021, Legalis

⁵⁰ T. Pietrzykowski, *Prawo ochrony zwierząt – między praktyką a teorią nowej galezi prawa. Artykuł recenzyjny dotyczący książki Prawa zwierząt. Praktyczny przewodnik*, “Krytyka Prawa” 2020, vol. 12, p. 212.

- Mozgawa M., *Komentarz do niektórych przepisów ustawy o ochronie zwierząt* (in:) M. Mozgawa (ed.), *Pozakodeksowe przestępstwa przeciwko zasobom przyrody i środowisku. Komentarz*, Warszawa 2017
- Pietrzykowski T., *Prawo ochrony zwierząt – między praktyką a teorią nowej gałęzi prawa. Artykuł recenzyjny dotyczący książki Prawa zwierząt. Praktyczny przewodnik*, “Krytyka Prawa” 2020, Vol. 12
- Pietrzykowski T., *Prawo ochrony zwierząt. Pojęcia, zasady, dylematy*, Warszawa 2022
- Radecki W., *Ustawy o ochronie zwierząt. Komentarz*, Warszawa 2015
- Raglewski J., *Komentarz do art. 116* (in:) W. Wróbel, A. Zoll (eds.), *Kodeks karny. Część ogólna. Tom I. Część II. Komentarz do art. 53-116*, Vol. V, Warszawa 2016
- Raglewski J., *Komentarz do art. 45a* (in:) W. Wróbel, A. Zoll (eds.), *Kodeks karny. Część ogólna. Tom I. Część I. Komentarz do art. 1-52*, Vol. V, Warszawa 2016
- Raglewski J., *Materialnoprawna regulacja przypadku w polskim prawie karnym*, Kraków 2005
- Rudy M., *Prawo humanitarnej ochrony zwierząt jako dział kompleksowy prawa administracyjnego*, “Radca Prawny. Zeszyty Naukowe” 2021, No. 4(29)
- Siwek M., *Glosa do uchwały SN z dnia 20 czerwca 2012 r.*, I KZP 4/12, LEX/el. 2012
- Sługocki L., *Glosa do uchwały z 29 IX 1987*, VI KZP 9/87, „Państwo i Prawo” 1988, No. 10
- Smaga Ł., *Ochrona humanitarna zwierząt*, Białystok 2010
- Stefański R. A., Zabłocki S., *Komentarz do art. 323* (in:) R. A. Stefański, S. Zabłocki (eds.), *Kodeks postępowania karnego. Tom. III. Komentarz do art. 297-424*, Warszawa 2021
- Steinborn S., *Komentarz do art. 626* (in:) L. K. Paprzycki (eds.), *Komentarz aktualizowany do art. 425-673 Kodeksu postępowania karnego*, LEX/el. 2015
- Szczucki K., *Komentarz do art. 45a* (in:) M. Królikowski, R. Zawłocki (eds.), *Kodeks karny. Część ogólna. Komentarz do artykułów 1–116*, Vol. 5, Warszawa 2021