

CRIME OF ANIMAL ABUSE

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1. HISTORY

Article 1 of the Regulation of the President of the Republic of Poland of 22 March 1928 on the protection of animals¹ banned animal abuse and defined the concept of animals². Another provision (Article 2) defined the concept of animal abuse providing examples of abuse³ (subparagraphs (a) to (i)); however, the above-mentio-

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¹ Journal of Laws [Dz.U.] of 1932, No. 42, item 417, as amended. For more on the legislation concerning the protection of animals, compare A. Habuda, W. Radecki, *Przepisy karne w ustawach o ochronie zwierząt oraz o doświadczeniach na zwierzętach*, Prokuratura i Prawo No. 5, 2008, pp. 23–24.

² The provision of Article 1 stipulated: “Animal abuse shall be prohibited. Animals, in the meaning of this Regulation, are all domestic and domesticated animals and birds as well as wild animals and birds, and fish, reptiles, insects, etc.”

³ In accordance with Article 2, “Animal abuse should be understood as:

- a) using sick, injured or lame animals to work and keeping them in the state of exceptional untidiness;
- b) beating animals on the head, abdomen and lower parts of limbs;
- c) beating animals with the use of hard and sharp objects or ones having devices designed to inflict extraordinary pain;
- d) overloading draft or pack animals with loads that are inadequate to their strength or the state of routes, or forcing those animals to run too fast, inadequately to their strength;
- e) transporting, carrying or herding animals in the way, in the position or in conditions causing unnecessary suffering;
- f) using a harness, chains, tethers, etc. causing pain or using them in the way that may cause pain or body injury, with the exception of situations when the use of such objects is necessary because of and in the course of training in the interest of the public;
- g) using animals for all types of experiments causing death, body injury or physical pain with the exception of cases laid down in Article 3;
- h) conducting operations on animals with the use of inappropriate tools and without necessary carefulness and prudence in order to save them unnecessary pain;
- i) malicious threatening or teasing animals;
- j) inflicting all kinds of suffering on animals without really important and justified purposes”.

ned listing was not exhaustive because in subparagraph (j) it was added that any cruelty to animals in general without a serious and real need constitutes abuse. The provision of Article 3 Regulation stipulated that experiments conducted for scientific purposes, provided they were necessary for serious scientific work and research and were conducted by authorised persons, did not constitute abuse. In accordance with Article 4, animal abuse could be subject to a fine of PLN 2,000 or imprisonment for up to six weeks, or both penalties combined. The owner of an animal who “consciously allows committing one of the acts referred to in Article 2 or causes the commission of such an act or forces someone into doing it” is subject to the same penalty. The same concerns an employer, a superior, an entrepreneur and any other person on whose order or in whose interest animals are used to work, provided they consciously let or allowed someone to commit one of the acts enumerated in Article 2 or induced or forced someone to commit them. In case of animal abuse committed in the way showing a perpetrator’s extraordinary cruelty, he was subject to a penalty of imprisonment for up to one year, however, in the territory where the (Austrian) Criminal Act of 1852 was in force, close confinement was applied (Article 5) instead. In accordance with Article 6, “In case of the commission of the above-mentioned offences by minors below 14 years of age, parents or guardians guilty of failure to supervise them shall be subject to a fine of up to PLN 50”. Article 7 penalised (a fine of up to PLN 1,000) scientific experiments on animals violating the provisions of Article 3 or regulations enacted based thereon.

Article VI para. 1 of the Act of 20 May 1971: Provisions introducing the Misdemeanour Code⁴ repealed Articles 4, 6 and 8⁵ Regulation of 22 March 1928, and the provisions concerning basic misdemeanours were transferred to the Act of 20 May 1971: Misdemeanour Code.⁶ The offence classified in Article 5 (animal abuse with extraordinary cruelty) and the misdemeanour referred to in Article 7 (scientific experiments on animals violating the provisions in force) remained in the Regulation. The first version of Article 62 MC classified two misdemeanours. Article 62 §1 MC stipulated a misdemeanour (carrying a penalty of imprisonment, limitation of liberty, a fine or reprimand) consisting in animal abuse, especially beating an animal in an extraordinarily painful way, using a sick animal to work, overloading an animal or making an animal suffer physically in another way. In accordance with Article 62 §2, the owner of an animal or a person taking care of an animal, or a person using an animal to work or ordering this use and parents or guardians of a juvenile perpetrator, if they consciously allowed the commission of an act referred to in §1, were subject to the same penalty. Pursuant to Article 62 §3 MC, aiding and abetting an act referred to in §1 was subject to punishment.⁷

⁴ In accordance with Article 8, “County courts (lower courts) shall have jurisdiction over offences laid down in this Regulation”.

⁵ Journal of Laws [Dz.U.] of 1971, No. 12, item 115, as amended.

⁶ Uniform text: Journal of Laws [Dz.U.] of 2015, item 1094, as amended; hereinafter: MC.

⁷ As it is seen, the legislator noticed the importance of the issue and decided that animal abuse should carry a penalty of imprisonment, extended the group of persons liable for abuse and also decided that aiding and abetting should be punished. W. Radecki, *Ustawa o ochronie zwierząt z komentarzem*, Wrocław 1988, p. 11.

In accordance with Article 43 of the Act of 21 August 1997 on the protection of animals⁸ (hereinafter: APA), the Regulation on the protection of animals of 22 March 1928 ceased to be effective and Article 62 MC was repealed (Article 41 APA). Penal aspects of the Act were laid down in Chapter 11 (Articles 35 to 40 APA) and offences were defined in Articles 35 and 36. Article 35 APA in the original version stipulated the following:

- “1. Whoever kills an animal violating Article 6 para. 1, Article 33 or Article 34 paras. 1 to 4 or abuses it in the way laid down in Article 6 para. 2 shall be subject to a penalty of deprivation of liberty for up to one year, limitation of liberty or a fine.
2. If a perpetrator of an act referred to in para. 1 acts with extraordinary cruelty, he shall be subject to a penalty of deprivation of liberty for up to two years, limitation of liberty or a fine.
3. In case of a conviction for an offence referred to in para. 1, a court may adjudicate on the forfeiture of the animal, and in case of a conviction for an offence referred to in para. 2, a court shall adjudicate on the forfeiture of the animal provided the perpetrator is its owner.
4. In case of a conviction for an offence referred to in para. 1 or para. 2, a court may ban a perpetrator from entering a certain profession, doing a certain business or performing activities that require a licence connected with the use of animals or affecting them as well as adjudicate on the forfeiture of tools and objects used to commit a crime and objects obtained by the commission of a crime.
5. In case of a conviction for an offence referred to in para. 1 and para. 2, a court may award Towarzystwo Opieki nad Zwierzętami w Polsce (Society for Taking Care of Animals in Poland) PLN 25 to PLN 2,500 in damages or adjudicate on the sum to be paid for another purpose related to the protection of animals indicated by the court.”

Originally, Article 36 para. 1 APA also classified an offence in the form of violation of a ban on keeping and breeding beasts of prey and venomous animals outside zoological gardens, scientific institutions and circuses (carrying a penalty of a fine, limitation of liberty or deprivation of liberty for up to one year). On the other hand, Article 36 para. 2 APA penalises keeping, trading in and transporting across the border without the required permit animals, their parts and animal products that are subject to limitation based on international agreements concluded by the Republic of Poland.⁹ Article 36 paras. 2 to 4 was repealed by Article 2 para. 3 of the Act of 7 December 2000 amending the Act on the protection of nature¹⁰ that entered into force on 2 February 2001. Article 36 para. 1 APA, on the other hand, was repealed by Article 138 para. 3 of the Act of 16 April 2004 on the protection of nature¹¹ that entered into force on 1 May 2004.

⁸ Uniform text: Journal of Laws [Dz.U.] of 2017, item 1840.

⁹ For more thoroughly on the issue, compare M. Mozgawa, *Prawonokarna ochrona zwierząt*, Lublin 2001, pp. 22–25.

¹⁰ Journal of Laws [Dz.U.] of 2001, No. 3, item 21.

¹¹ Journal of Laws [Dz.U.] of 2016, item 2134, as amended.

Thus, further considerations will focus on the provisions of Article 35 APA, which were amended many times.¹² The first amendment was introduced by the Act of 6 June 1997: Regulations introducing the Criminal Code¹³ and was organising in nature because it only laid down the sequence of sanctions¹⁴ (in order to adjust it to the concept adopted in the Criminal Code). The second amendment was introduced by the Act of 6 June 2002 amending the Act on the protection of animals.¹⁵ The Act extended the concept of abuse (by adding subparagraphs 14 and 15 to Article 6 para. 2 APA¹⁶) and laid down that the conduct referred to in Article 31 APA constitutes abuse (this way, penalisation was extended).¹⁷ Apart from the word “kills”, the Act introduced the concepts “slays an animal” and “butchers an animal” to Article 35 para. 1 APA.¹⁸ The words “Towarzystwo Opieki nad Zwierzętami w Polsce (...) or for another (...)” meaning that damages might be awarded for the purpose related to the protection of animals were repealed from Article 35 para. 5 APA. The third amendment was introduced by the Act of 21 January 2005 on experiments on animals,¹⁹ which repealed the indication of Article 31 APA from the description of an act (which resulted from repealing Chapter 9 of the Act, i.e. Articles 28 to 32).²⁰ The next amendment to Article 35 APA was introduced by the Act of 16 September 2011 amending the Act on the protection of animals and the Act on maintaining cleanliness and order in communes,²¹ based on which the following changes were made:²²

¹² I focus on amendments concerning Article 35 APA and not on all amendments to the Act on the protection of animals. For all amendments to APA, compare W. Radecki, *Ustawy o ochronie zwierząt. Komentarz*, Warsaw 2015, pp. 18–24.

¹³ Journal of Laws [Dz.U.] of 1997, No. 88, item 554, as amended; henceforth also: CC.

¹⁴ In para. 1, instead of: “is subject to a penalty of deprivation of liberty for up to one year, limitation of liberty or a fine”, there is: “is subject to a penalty of a fine, limitation of liberty or deprivation of liberty for up to one year”, and in Article 2, instead of: “is subject to a penalty of deprivation of liberty for up to two years, limitation of liberty or a fine”, there is a phrase: “is subject to a fine, a penalty of limitation of liberty or deprivation of liberty for up to two years”.

¹⁵ Journal of Laws [Dz.U.] of 2002, No. 135, item 1141.

¹⁶ This way, it was assumed that animal abuse also concerns: (subpara. 14) keeping animals on a chain, which causes bodily injury or suffering and does not provide the possibility of necessary movement, (subpara. 15) organising animal fights.

¹⁷ The provision of Article 35 para. 1 APA was given the following wording: “Whoever kills, slays or butchers an animal violating the provisions of Article 6 para. 1, Article 33 or Article 34 paras. 1–4 or abuses an animal in the way determined in Article 6 para. 2 and Article 31 shall be subject to a penalty of deprivation of liberty for up to one year, limitation of liberty or a fine”.

¹⁸ As a result of that, the provision was given the wording: “Whoever kills, slays or butchers an animal violating the provisions of Article 6 para. 1, Article 33 or Article 34 paras. 1–4 or abuses it in the way determined in Article 6 para. 2 and Article 31 shall be subject to a penalty of deprivation of liberty for up to one year, limitation of liberty or a fine”.

¹⁹ Journal of Laws [Dz.U.] of 2005, No. 33, item 289, as amended.

²⁰ Subparagraphs (2) (experiments on animals inflicting suffering conducted with the violation of statutory provisions) and (13) (testing cleaning products and cosmetics on animals, which causes suffering when other alternative methods are known) were repealed from Article 6 para. 2 APA, which indicates examples of animal abuse. As W. Radecki states, “this way the area of criminalisation under Article 35 Act on the protection of animals has been narrowed down again, but instead adequate criminalisation was laid down in the Act on experiments on animals”. W. Radecki, *Ustawy...*, p. 222.

²¹ Journal of Laws [Dz.U.] No. 230, item 1373.

²² Article 2 APA was also amended and, consequently, the provisions of the statute only regulate the treatment of vertebrates. Also Article 6 APA was amended and, as a result, the

- 1) two different types of offences were specified (unlawful killing of animals – Article 35 para. 1 APA and abuse of animals – Article 35 para. 1a APA) instead of one alternative approach (“whoever kills, slays or butchers an animal (...) or abuses it (...)”);
- 2) Article 35 para. 2 APA laid down a common aggravated type of both basic offences under Article 35 paras. 1 and 1a APA (“If a perpetrator of an act under Article 35 paras. 1 and 1a acts with extraordinary cruelty (...)”);
- 3) penalties for offences were raised;²³
- 4) it was decided that a penal measure in the form of the forfeiture of an animal should be obligatory in case of a perpetrator who is the animal’s owner;²⁴
- 5) in accordance with the doctrine’s suggestions, a penal measure in the form of a ban on possessing animals was introduced (Article 35 para. 3a APA)²⁵ and the range of damages was extended from the former amount of PLN 25–2,500 to PLN 500–100,000.²⁶

The latest change was made by the Act of 6 March 2018 amending the Act on the protection of animals and the Act: Criminal Code²⁷ which introduced the following modifications:

- 1) penalties were raised;²⁸

relative ban on killing (para. 1) was separated from an absolute ban on abusing (para. 1a). Exceptions to the ban on killing animals were indicated in Article 6 para. 1 APA and Article 33 para. 1 APA was repealed. At the same time, the wording of some provisions of Article 6 para. 2 APA was modified and four new forms of abuse were added to the catalogue of example conduct: Article 6 para. 2(16) to (19): sexual intercourse with an animal (zoophilia); exposure of a domestic or farm animal to the influence of atmospheric conditions that are dangerous for its health or life; transporting or keeping live fish for sale without the necessary amount of water, which makes breathing impossible; keeping animals without appropriate food or water for a period exceeding the minimum needs typical of the species.

²³ In case of basic types, a fine, a penalty of limitation of liberty or deprivation of liberty for up to two years were introduced instead of a fine, a penalty of limitation of liberty or deprivation of liberty for up to one year. On the other hand, in case of the aggravated type, a penalty of deprivation of liberty for up to three years was introduced instead of a fine, limitation of liberty or deprivation of liberty for up to two years.

²⁴ Formerly, it was facultative in case of a conviction for the offence under Article 35 para. 1 APA, and obligatory in case of a conviction for the offence under Article 35 para. 2 APA (of course, provided that a perpetrator is an animal’s owner).

²⁵ Compare, 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 No. 9, 2011, p. 80; S. Rogala-Walczyńska, *Prawnokarna ochrona zwierząt*, Prokurator No. 3–4, 2009, p. 107.

²⁶ According to the comments *de lege ferenda* by M. Mozgawa, M. Budyn-Kulik, K. Dudka, M. Kulik, *Prawnokarna...*, p. 80.

²⁷ Journal of Laws [Dz.U.] of 2018, item 663.

²⁸ Thus, in case of Article 35 para. 1, the penalty was a fine, limitation of liberty or deprivation of liberty for up to two years. After the amendment of 6 March 2018, it was a penalty of deprivation of liberty for up to three years. Due to the phrase in Article 35 para. 1a (“Whoever abuses an animal shall be subject to the same penalty”), the amendment also raised penalty for an offence of animal abuse to the same level (thus, it is a penalty of deprivation of liberty for up to three years). In case of an offence classified in Article 35 para. 2, it carried a penalty of deprivation of liberty for up to three years and after the amendment of 6 March 2018, a penalty of deprivation of liberty for a period from three months to five years.

- 2) Article 35 para. 3a laying down the use of a penal measure in the form of a ban on possessing animals was divided into two separate provisions (Article 35 para. 3a and Article 35 para. 3b²⁹),
- 3) the wording of Article 35 para. 4 was changed modifying the scope of bans that can be imposed on perpetrators of acts classified in APA,
- 4) the provisions of Article 35 paras. 4a to 4c were added: (a) laying down obligatory adjudication on bans specified in Article 35 para. 2; (b) extending the time scope of bans (up to 15 years); (c) envisaging a possibility of adjudicating on the forfeiture of objects that were used or were intended for the commission of one of the offences under Article 35 APA, even if they were not owned by the perpetrator,
- 5) it was decided that the adjudication on damages should be obligatory in case of a conviction for one of the offences classified in Article 35 APA and the lowest rate of damages was raised (from PLN 500 to PLN 1,000), while the highest rate remained the same (PLN 100,000),
- 6) it was envisaged that it should be possible to impose a ban on possessing all animals or a specific type of animals for up to two years, provided that criminal proceedings were conditionally discontinued.

De lege lata, the provision of Article 35 para. 1 APA penalises killing, slaying or butchering animals, which violates the provisions of Article 6 para. 1, Article 33 or 34 paras. 1 to 4 APA.³⁰ Article 35 para. 1a APA classifies the offence of animal abuse and Article 35 para. 2 APA lays down an aggravated type (common for Article 35 para. 1 and Article 35 para. 1a), i.e. a perpetrator's act committed with extraordinary cruelty.³¹ In accordance with the adopted assumption, the provisions of Article 35 paras. 1a and 2 APA will be subject to analysis.

It must be considered that the basic idea behind the new statute is expressed in Article 1, which stipulates that: "an animal, being a living creature able to suffer, is not a thing. A man should respect, protect and take care of it". Obviously, such an approach cannot lead to the conclusion that animals being the object of law shall automatically become the subject of law.³² Thus, dereification of animals has not caused their personification resulting in empowerment and ability to obtain and have rights.³³ It must be remembered that the Act on the protection of animals

²⁹ Article 35 para. 3a. A court may adjudicate a ban on possessing any animals whatsoever or a certain category of animals as a penal measure in case of a conviction for an offence laid down in para. 1 or 1a; para. 3b. A court shall adjudicate a ban on possessing any animals whatsoever or a particular category of animals as a penal measure in case of a conviction for an offence laid down in para. 2.

³⁰ What draws attention is the inappropriate edition of the penal provision in Article 35 para. 1 APA (in fact, the same as in Article 37 APA), where the specification of the features requires checking the provisions that were referred to. This causes trouble and interpretational problems; compare, W. Radecki, *Ustawa...*, p. 101 ff.

³¹ For more on the issue of the offence under Article 35 para. 1 APA, compare M. Mozgawa, *Ustawa z 21.08.1997 r. o ochronie zwierząt*, [in:] M. Mozgawa (ed.), *Pozakodeksowe przestępstwa przeciwko zasobom przyrody i środowisku*, Warsaw 2017, p. 56 ff.

³² P. Kozłowska, M. Szwarczyk, *Prawnokarna ochrona zwierząt*, Zamojskie Studia i Materiały No. 1, 2000, p. 62.

³³ M. Nazar, *Normatywna dereifikacja zwierząt – aspekty cywilnoprawne*, [in:] M. Mozgawa (ed.), *Prawna ochrona zwierząt*, Lublin 2002, p. 138.

regulates the treatment of vertebrates,³⁴ including vertebrates used for scientific or educational purposes in the scope that is not regulated in the Act of 15 January 2015 on the protection of animals used for scientific and educational purposes (hereinafter: APAUSEP).³⁵

2. ANALYSIS OF STATUTORY FEATURES OF THE OFFENCE OF ANIMAL ABUSE – BASIC TYPE UNDER ARTICLE 35 PARA. 1A APA

Animals' immunity from unnecessary pain and suffering caused by conduct that is statutorily defined as abuse is an object of protection.³⁶

The provision of Article 35 para. 1a APA bans animal abuse, which means mainly all examples listed (which is confirmed by the phrase "in particular") in Article 6 para. 2 APA. Pursuant to this provision, animal abuse means inflicting or consciously letting someone to inflict pain or suffering, in particular:

- 1) consciously hurting or injuring an animal that does not constitute a lawful treatment or procedure in accordance with Article 2 para. 1(6) APAUSEP,³⁷ including identification marking of warm-blooded animals with the use of hot or freeze branding and all measures aimed at changing an animal's appearance conducted for the purpose other than saving its health or life, especially the removal of part of an animal's tail or ears (docking or cropping);
- 2) identification marking of warm-blooded animals with the use of hot or freeze branding;
- 3) using sick, too young or too old animals to work or for sporting or entertainment purposes and making them do things that may cause pain;
- 4) beating animals with the use of hard or sharp objects or such that are designed to inflict special pain, beating on the head, abdomen and lower parts of legs;

³⁴ The particular, chapters of the statute concern: domestic animals (Chapter 2, Articles 9–11), farm animals (Chapter 3, Articles 12–14), animals used for the purpose of entertainment, shows, films, sport, and special needs (Chapter 4, Articles 15–18), animals living at large (Chapter 6, Articles 21–22a). Although the Act does not stipulate it directly, it undoubtedly also concerns treating other categories of animals not indicated therein (e.g. those kept in zoological gardens or alien to the given environment).

³⁵ Journal of Laws [Dz.U.] of 2015, item 266.

³⁶ W. Radecki, *Ustawy...*, p. 222. Also compare, W. Radecki, [in:] M. Bojarski, W. Radecki, *Przewodnik po pozakodeksowym prawie karnym*, Wrocław 1998, p. 169; W. Radecki, [in:] M. Bojarski, W. Radecki, *Pozakodeksowe prawo karne*, Vol. II: *Przestępstwa gospodarcze oraz przeciwko środowisku*. *Komentarz*, Warsaw 2003, p. 356; M. Mozgawa, *Prawnokarna ochrona...*, 2001, p. 16; W. Kotowski, B. Kurzepa, *Przestępstwa pozakodeksowe. Komentarz*, Warsaw 2007, p. 171.

³⁷ Pursuant to Article 2 para. 1(6) APAUSEP, the procedure means any form of using animals for the purposes determined in Article 3, which may cause pain, suffering or distress to an animal or permanent damage to its body to the extent equal to or higher than a prick of a needle as well as activities that are aimed at causing or can cause a birth or hatching of animals or the creation and maintenance of a genetically modified line of animals in the conditions of pain, suffering, distress or permanent damage to the body to the extent equal to or higher than a prick of a needle; killing an animal only in order to use its organs or tissues for the purposes determined in Article 3 is not a procedure.

- 5) overloading draft or pack animals with loads that are inadequate to their strength and physical condition or the state of routes, or forcing those animals to run too fast;
- 6) transporting animals, including farm animals, meat animals and ones for sale on a market, carrying or herding them in the way causing unnecessary suffering and stress;
- 7) using a harness, chains, tethers, racks or other devices forcing an animal to stay in an unnatural position causing unnecessary pain, injury or death;
- 8) carrying out surgery by persons who have no required qualifications or not in conformity with the principles of medical and veterinary science, without necessary carefulness and prudence and in a manner causing pain that can be avoided;
- 9) malicious threatening or teasing animals;
- 10) keeping animals in inappropriate living conditions, including keeping them in the state of flagrant neglect or slovenliness or in enclosures or cages, in which they cannot maintain their natural positions;
- 11) abandoning animals, especially a dog or a cat, by an owner or another person taking care of an animal;
- 12) using cruel methods in animal breeding and rearing;
- 13) organising animal fights;
- 14) sexual intercourse with animals (zoophilia);³⁸
- 15) exposing a domestic or farm animal to atmospheric conditions that pose a threat to its health or life;
- 16) transporting live fish or keeping them for sale without providing enough water for breathing;³⁹
- 17) keeping an animal without appropriate food or water for a period exceeding the minimum needs typical of the given species.⁴⁰

³⁸ The fact that the legislator narrowed the scope of sexual conduct to sexual intercourse with an animal (thus, excluded other sexual activities) draws attention. The issue is discussed in the section analysing the concurrence of provisions.

³⁹ In the judgement of 13 December 2016, II KK 281/16, LEX No. 2237277, the Supreme Court stated: "The introduction of the provision of Article 6 para. 2(18) Act on the protection of animals of 1997 does not mean penalisation of the new conduct matching the features of abuse but is only a more detailed specification of the catalogue of activities recognised as animal abuse. Thus, the legislator's indication of this type of conduct as a form of fish abuse excludes the possibility of ignoring such circumstances at present as the features of an offence under Article 35 APA. However, in accordance with the wording of the statute before the amendment, any type of conduct listed in Article 6 para. 2 APA and any type of conduct not listed in this provision but leading to inflicting pain or suffering to an animal could be recognised as abuse. The catalogue laid down in this provision is open in nature and only indicates example and most characteristic forms of animal abuse.

(...) Water is the most natural environment for fish. Thus, there should be a rule that fish should be transported and carried in water environment, which ensures appropriate living conditions for them, i.e. the possibility of existing in conformity with the species' needs.

(...) While retailers cannot be responsible for the way in which customers carry live fish when they leave a shop and they cannot have influence on the time of carrying them, for which individual customers can certainly be liable in case of potential charges, each retailer should have impact on the way in which live fish are packed when being sold. Not only inflicting pain or suffering to animals but also allowing to do so constitutes abuse".

⁴⁰ The Poland-wide empiric research (covering the period from 24 December 1997 to 30 June 1999), which I conducted, indicates that in case the features of animal abuse are matched (without

The Supreme Court in its judgement of 16 November 2009, V KK 187/09,⁴¹ rightly stated that: “The phrase used in the definition in Article 6 para. 2 of the Act makes it possible to assume that not only a person who inflicts pain or suffering but also a person who consciously allows someone else to inflict pain or suffering to an animal is guilty of an offence of animal abuse (...). Allowing practically consists in failing to prevent, i.e. giving permission, and is conscious when a perpetrator is aware of the consequences of his conduct, i.e. that another person will act in the way referred to in Article 6 para. 2”. Although the legislator rather clearly presented possible methods of animal abuse, the list is not exhaustive. As the Supreme Court rightly noticed in the already-mentioned judgement of 13 December 2016, II KK 281/16:⁴² “The catalogue of Article 6 para. 2 Act of 1997 on the protection of animals is open and contains mainly the typical but not all cases of animal abuse. Thus, any instance of inflicting or allowing to inflict pain or suffering can be treated as animal abuse even if it is not directly referred to in any of the items of the provision. It is enough to indicate in such situations that the conduct was inhumane, thus failing to consider animals’ needs or to provide them with care or protection”. It should be deemed that in the practical application of the statute to assess whether certain conduct constitutes animal abuse it is necessary to apply the opinions worked out in the doctrine and case law based on the provision of Article 184 Criminal Code of 1969 and Article 207 Criminal Code of 1997, obviously taking into consideration the specificity of the object of the act. For example, based on the Supreme Court case law,⁴³ it can be stated that the statutory phrase “abuses an animal” means an action or omission consisting in intentional inflicting physical pain and, in exceptional cases, also moral suffering repeated or single but intense and lengthy. It is doubtful whether “severe moral suffering” can be considered in case of animal abuse (in the context of animals, psychical rather than moral suffering should be discussed). However, it seems that the legislator gave a positive answer to this question recognising that, e.g. malicious threatening or abandoning an animal (especially a dog or a cat) may be treated as animal abuse. For example, abandoning a faithful dog that for some reasons started to be a nuisance for its master is something different from inflicting psychical pain.⁴⁴ The Appellate Court in Kraków was right to express the opinion in its ruling of 8 September 2011, II AKo 36/11, that: “An animal’s death is not typical

causing death), a general statement that a perpetrator abused an animal is the most frequent one in the description of an act (197 cases – 15.9% of the total of 1,242 cases examined). Among the frequent ways of matching the verb feature of “abusing animals”, the following ones should be distinguished: keeping animals in inappropriate living conditions – 114 cases (9.2%); intentionally injuring or disabling – 50 cases (4.0%); shooting – 38 cases (3.1%); kicking – 24 cases (1.9%); abandoning – 19 cases (1.5%); abusing for sexual purposes – 7 cases (0.6%), leaving unattended – 6 cases (0.5%); throwing out through the window – 6 cases (0.5%). M. Mozgawa, *Prawnokarna ochrona...*, 2011, pp. 34–35.

⁴¹ LEX No. 553896.

⁴² LEX No. 2237277.

⁴³ Compare, e.g. the administration of justice and court practice recommendations in the area of legal protection of a family (VI KZP13/75) of 9 June 1976, OSNKW 1976, 7–8, item 86.

⁴⁴ M. Mozgawa, *O prawnokarnej ochronie zwierząt*, Rzeczpospolita of 28/02/2001, p. C3; M. Mozgawa, *Prawnokarne aspekty ochrony zwierząt*, [in:] M. Mozgawa (ed.), *Prawna ochrona zwierząt*, Lublin 2002, p. 172.

of the offence of animal abuse under Article 35 para. 1 Act of 21 August 1997 on the protection of animals (...) and if such a consequence occurs, it can be an aggravating circumstance for penalty imposition".⁴⁵

One of the issues raised in the context of animal abuse (due to the open definition of abuse laid down in Article 6 para. 2 APA) is whether live-bait angling (i.e. the use of live fish as bait) may be treated as animal abuse. The Regulation of the Minister of Agriculture and Rural Areas Development of 12 November 2001 concerning fishing and the conditions for breeding, rearing and catching other creatures living in water,⁴⁶ in which §2(2(3)) definitely states that: "Amateur angling shall be practiced without the use of live fish as bait", is especially significant. As W. Radecki notices, "the introduction of this ban seemed to have modified one of the basic arguments presented in this commentary: the Act on the protection of animals cannot ban something that is allowed in the Act on fishing. Of course, angling as such cannot be banned by the Act on the protection of animals but live-bait angling can be because, although the Act on fishing does not, the Regulation implementing it does ban it".⁴⁷ It is worth highlighting, however, that before the cited Regulation entered into force, the lawfulness of live-bait angling had not been questioned in Poland (and it seems to have been a method commonly used by anglers). The same Regulation, which bans live-bait angling, in §11(2(4)), determines that the minimum mesh size of nets for catching fish with the use of bait should be 5 mm. Why does it do so if it bans the use of live fish as bait? According to W. Radecki, it can be explained in two ways. Firstly, anglers are not allowed to use live fish bait, however, fishermen are (yet it would be an obvious breach of the principle of equal rights). Secondly, it is allowed to catch fish with the use of dead fish bait (i.e. killed before it is put on a single, double or triple hook).⁴⁸ Undoubtedly, there was a positive motive behind the attempt to introduce a ban on live-bait angling, however, it is indicated in the doctrine, it was done incompetently (because of internal contradictions in the Regulation) as well as inappropriately (because a potential ban should be laid down in statute and not in a ministerial regulation).⁴⁹ Nevertheless, it must be admitted that after the Regulation of 12 November 2001 entered into force, there were justified doubts whether live-bait angling could be treated as animal abuse under Article 35 APA. As a result of anglers' protests, the Regulation of the Minister of Agriculture and Rural Areas Development of 17 January 2003 amended the Regulation concerning fishing and the conditions for breeding, rearing and catching other creatures living in water,⁵⁰ which repealed the controversial provision of §2(2(3)). Thus, *de lege lata*, there is no provision directly banning live-bait angling. Moreover, the Act of 18 April 1985 on fresh water fishing⁵¹ does not list this method as banned (Article 8 para. 1) and Article 7 para. 1 allows "fishing with the use of

⁴⁵ KZS 2011/10, item 42.

⁴⁶ Journal of Laws [Dz.U.] of 2001, No. 138, item 1559, as amended.

⁴⁷ W. Radecki, *Ustawy...*, p. 225.

⁴⁸ *Ibid.*, p. 226.

⁴⁹ *Ibid.*, p. 226.

⁵⁰ Journal of Laws [Dz.U.] of 2003, No. 17, item 160.

⁵¹ Journal of Laws [Dz.U.] of 2015, item 652, as amended.

bait and a scoop net" (thus, it legalises this controversial method of catching fish). Therefore, it can be assumed that in the present legal state, an angler using a live-bait method cannot incur criminal liability under Article 35 APA (for animal abuse), although the issue whether this method of fishing should be banned or not remains open. If it should happen, it should be introduced to statute (e.g. the Act on the protection of animals or the Act on fresh water fishing) and not in a legal act such as a ministerial regulation.⁵²

The offence classified in Article 35 para. 1 APA is a common one that can be committed in the form of action (e.g. beating an animal) as well as omission (e.g. failure to feed an animal). It is a formal offence (because the criminal result does not belong to its features).⁵³ However, doubts arise in connection with the subjective aspect. As far as animal abuse is concerned (although mainly based on Article 207 CC, which may be transferred to the sphere of Article 35 para. 1a APA), the opinion that only direct intent can be considered seems to be dominating.⁵⁴ Also the Supreme Court stated in its judgement of 16 November 2009, V KK 187/09,⁵⁵ that the offence of animal abuse (under Article 35 para. 1a APA) may be committed only intentionally and only with direct intent⁵⁶ (although earlier, in accordance with Article 184 CC of 1969, also oblique intent was assumed⁵⁷). However, it seems that the minority opinion is right as it is for the possibility of committing an offence under Article 35 para. 1a APA with both types of intent. One cannot exclude that a perpetrator, directly pursuing another objective (not necessarily a criminal one), at the same time agrees that his conduct will cause an animal's specific suffering (e.g. a truck driver transporting animals does not stop to give them water or food because he wants to reach the destination on time). A. Wąsek is right to state that the concept of abuse is so extensively tinged with respect to the subjective aspect that it is just misinterpretation.⁵⁸

⁵² W. Radecki, *Ustawy...*, p. 226.

⁵³ M. Mozgawa, *Ustawa...*, p. 80.

⁵⁴ For this issue, compare M. Mozgawa, [in:] M. Mozgawa (ed.), *Kodeks karny. Komentarz*, Warsaw 2017, p. 650; M. Szewczyk, [in:] A. Zoll (ed.), *Kodeks karny. Część szczególna*, Vol. 2: *Komentarz do art. 117–277 k.k.*, Warsaw 2013, p. 894.

⁵⁵ LEX No. 553896.

⁵⁶ LEX No. 553896; the thesis of the judgement is the following: "An offence of animal abuse determined in Article 35 para. 1 of the Act of 21 August 1997 on the protection of animals may be committed only intentionally and only with direct intent. The phrase used in Article 6 para. 2 APA makes it possible to assume that not only a person who personally inflicts pain or suffering on an animal but also the one who consciously allows another person to inflict pain or suffering on an animal is liable for animal abuse. Abuse, on the other hand, is every instance of direct conduct towards an animal listed in Article 6 para. 2 APA that is subject to a perpetrator's direct intent; thus, intent refers just to the action and not causing pain or suffering. Allowing consists practically in failure to prevent, i.e. giving consent, and is conscious when a perpetrator realises the consequences of his conduct, i.e. that another person will behave in any of the ways listed in Article 6 para. 2".

⁵⁷ Supreme Court resolution of 9 June 1976, VI KZP 13/75, OSNKW 1976, 7–8, item 86.

⁵⁸ A. Wąsek, [in:] A. Wąsek (ed.), *Kodeks karny. Część szczególna*, Vol. 1, Warsaw 2004, p. 988.

3. AGGRAVATED TYPE: ANIMAL KILLING OR ABUSE WITH EXTRAORDINARY CRUELTY UNDER ARTICLE 35 PARA. 2

Article 35 para. 2 lays down an aggravated type of the offence when a perpetrator kills (slays or butchers) an animal or abuses it with extraordinary cruelty, which carries a penalty of deprivation of liberty for a period from three months to five years. The object of protection is the same as in case of Article 35 paras. 1 and 1a APA (animals' life and their immunity from unnecessary pain and suffering). The Act on the protection of animals defines the concept of extraordinary cruelty, which should be understood as undertaking activities characterised by drastic forms and methods, in particular acting in a sophisticated or slow way deliberately intended to increase suffering and its duration (Article 4 para. 12 APA). Due to the subject matter of the present article, the interpretation of the concept of "killing an animal with extraordinary cruelty" is not discussed.⁵⁹ As far as animal abuse with extraordinary cruelty is concerned, it seems that the feature of "extraordinary cruelty" in a perpetrator's conduct mainly refers to the type and method of acting rather than the results of an act. The feature should always be considered *in concreto*, with reference to a given animal, inter alia with regard to its health. The difference between abuse referred to in Article 35 para. 1a APA and extraordinary cruelty referred to in Article 35 para. 2 APA is expressed in the intensity of suffering inflicted on a given animal.⁶⁰ It should be noticed that the Act on the protection of animals as such refers to "cruel methods of breeding and rearing animals" (Article 4 para. 7) and "cruel treatment" of animals (Article 4 para. 8), and defines the terms (which has been mentioned above). Those cruel methods in breeding and rearing animals or cruel treatment of animals will usually imply a perpetrator's liability for animal abuse but, as a rule, will not lead to liability under Article 35 para. 2 APA because cruelty towards animals is not sufficient for the occurrence of this offence; this cruelty must be aggravated, i.e. extraordinary. As the Appellate Court in Kraków in its judgement of 11 July 2012, II AKa 99/12,⁶¹ noticed: "The concept of 'extraordinary cruelty' is evaluative in nature. It should be referred to especially drastic and disgusting conduct and the feature classifying it is not 'cruelty' itself (common cruelty) but 'extraordinary' cruelty, which is a comparative description of this feature".

The offence classified in Article 35 para. 2 APA is common and may be committed only intentionally, in the form of both action and omission. Here, a certain problem also occurs with respect to forms of intent in case of abuse with extraordinary cruelty. Although there are opinions in the doctrine that it may be direct intent as well as oblique one, this is not so obvious.⁶² W. Radecki states that: "it is possible to think of an offence under Article 35 para. 2 as one committed with oblique

⁵⁹ For this issue, compare, e.g. M. Gabriel-Węglowski, *Przestępstwa przeciwko humanitarnej ochronie zwierząt*, Toruń 2008, p. 104; M. Mozgawa, *Ustawa...*, p. 82. Also compare the judgement of the Appellate Court in Gdańsk 15 October 2015, II AKa 319/15, LEX No. 1993183.

⁶⁰ Compare considerations by M. Szewczyk based on Article 207 CC, [in:] A. Zoll (ed.), *Kodeks karny...*, p. 893.

⁶¹ KZS 2012/7-8, item 51.

⁶² P. Kozłowska, M. Szwarczyk, *Prawnokarna...*, p. 67.

intent if a perpetrator envisages and agrees that his conduct might be assessed as extraordinarily cruel in the perception of an ordinary man".⁶³ However, it should be noticed that extraordinary cruelty is a feature containing not only an objective but also a subjective element indicating a perpetrator's special attitude.⁶⁴ And this raises serious doubts concerning the possibility of assuming oblique intent in case of abuse with extraordinary cruelty.⁶⁵

4. CONCURRENCE OF PROVISIONS

The analysed provisions of Article 35 paras. 1 and 1a APA may quite often be in real, typical concurrence with other provisions classifying offences (which can result in the adoption of cumulative classification). Thus, e.g. real, typical concurrence of provisions of Article 35 paras. 1a or 2 APA with Article 52 para. 4 of the Act of 13 October 1995: Hunting law⁶⁶ may occur in case a perpetrator breeds or keeps pedigree sighthounds or their crossbreeds without a permit and abuses them. Similarly, a perfect (single act) concurrence of a provision classifying a misdemeanour of breeding or keeping a breed of dogs recognised as aggressive without a permit (Article 37a para. 1 APA) with Article 35 paras. 1a or 2 APA is possible if a perpetrator abuses the dogs he breeds or keeps.

Also real, typical concurrence of the provisions of Article 35 paras. 1, 1a or 2 APA (mainly in the context of animal abuse) with the provisions of Article 128 para. 1 of the Act of 16 April 2004 on the protection of nature⁶⁷ is possible because it may happen that in the course of smuggling animals they are hidden (often anaesthetised with tied or taped up limbs or other parts of the body), which undoubtedly may constitute animal abuse (and sometimes even leads to an animal's death).⁶⁸

The provisions of Article 35 paras. 1, 1a or 2 APA may be in cumulative classification with the provisions of Article 66 APAUSEP. For example, Article 66 para. 1(1) APAUSEP criminalises exposing animals to unnecessary pain, suffering, distress or permanent damage to their body as a result of activity of using animals for scientific or educational purposes, and Article 66 para. 2 APAUSEP lays down an aggravated type in the form of causing an animal's death in cases referred to in Article 66 para. 1 APAUSEP. Of course, experiments on animals are usually connected with certain hardship, pain or suffering (and even deprivation of life) but the point is that it should be limited to activities necessary and justified by

⁶³ W. Radecki, *Ustawy...*, p. 228.

⁶⁴ A. Zoll, [in:] A. Zoll (ed.), *Kodeks karny...*, p. 277.

⁶⁵ M. Mozgawa, *Ustawa...*, p. 84.

⁶⁶ Journal of Laws [Dz.U.] of 2017, item 1295.

⁶⁷ In accordance with Article 128 Act on the protection of nature, "Whoever, without a document required pursuant to the provisions referred to in Article 61 para. 1 or with the violation of its conditions, transports an animal being the species that is protected pursuant to the provisions referred to in Article 6 para. 1 across the European Union borders (...) shall be subject to a penalty of deprivation of liberty for a period from three months to five years".

⁶⁸ M. Gabriel-Węglowski, *Przestępstwa...*, p. 140; W. Radecki, *Ustawy...*, p. 231; M. Mozgawa, M. Budyn-Kulik, K. Dudka, M. Kulik, *Prawnokarna...*, pp. 50–51.

the interest of science, and distinguished from cases when in the course of those experiments there is misuse in the form of inflicting suffering (abuse). In the event a perpetrator consciously inflicts unnecessary pain or suffering on test animals (or those used for educational purposes) or exposes them to distress or permanent body damage, it is undoubtedly justified to apply cumulative classification (Article 66 para. 1 APAUSEP in concurrence with Article 35 paras. 1, 1a or 2 APA in conjunction with Article 11 §2 CC, and in case of causing an animal's death – Article 66 para. 2 APAUSEP in concurrence with Article 35 paras. 1, 1a or 2 APA in conjunction with Article 11 §2 CC).⁶⁹

W. Radecki draws attention to an interesting issue concerning concurrence of provisions. He notes that Article 16 APA bans organising bull, dog and cock fights and the breach of this ban is a misdemeanour under Article 37 para. 1 APA. At the same time, the legislator recognised organising animal fights as animal abuse in accordance with Article 6 para. 2(15) APA, and each case of abuse is an offence under Article 35 APA. Therefore, a problem occurs whether a perpetrator organising, e.g. a dogfight should be liable for an offence under Article 35 paras. 1a or 2 APA and a misdemeanour under Article 37 APA being in the perfect (single act) concurrence. However, W. Radecki rightly states that: “the features of a misdemeanour do not contain anything else that is included in the features of an offence; that is why, the classification of an act as a misdemeanour is excluded based on the principle of consumption and a perpetrator is liable only for an offence under Article 35”.⁷⁰

⁶⁹ For this issue, compare M. Gabriel-Węglowski, *Przestępstwa...*, p. 138. Of course, one can consider whether the principle of consumption is applicable here (thus, e.g. whether animal abuse, i.e. the phase of infringing an interest under Article 35 para. 1a APA, may cover exposing it to unnecessary pain, suffering, distress or permanent damage to the body under Article 66 para. 1(1) APAUSEP), however, the adoption of such a solution would make the penal-law assessment of an act incomplete (because the fact that an offence has been committed in connection with a business activity in the area of using animals for scientific and educational purposes would disappear from sight) so it should be negated.

⁷⁰ W. Radecki, *Ustawy...*, p. 231. In addition to the above considerations, just in passing, it should be pointed out that the Act on the protection of animals criminalises (in the form of misdemeanours) dozens of different types of conduct. Without an analysis of the issue of misdemeanours determined in detail in this Act, it should be highlighted that matching the features of some of them may be at the same time perceived as animal abuse, e.g. keeping domestic animals on chains for a period longer than non-stop 12 hours a day or in the way causing a body damage or suffering and not giving an animal a possibility of necessary movement (Article 37 para. 1 in conjunction with Article 9 para. 2 APA), forcing animals to perform activities that inflict pain or are in conflict with their nature (Article 37 para. 1 in conjunction with Article 17 para. 4 APA), taming animals in the way causing suffering (Article 37 para. 1 in conjunction with Article 17 para. 2 APA), breeding or rearing animals in the way that can inflict injuries and body damage or other suffering (Article 37 para. 1 in conjunction with Article 12 para. 2 APA). M. Mozgawa, M. Budyn-Kulik, K. Dudka, M. Kulik, *Prawnokarna...*, p. 58. Therefore, how to classify a perpetrator's act that matches the features of an offence and a misdemeanour at the same time (and the scope of features is the same)? It seems that in such a case, a perpetrator's liability shall be limited to an offence under Article 35 para. 1a APA (with respect to the principle of consumption), certainly, under the condition of intentionality. If a perpetrator does not act intentionally (if it is possible in the actual conditions at all), a perpetrator's liability shall be limited to a misdemeanour under Article 35 para. 1 APA because a misdemeanour (in accordance with a general rule under Article 5 MC) may be committed both intentionally and unintentionally. However, in case the features of an offence and a misdemeanour overlap, it is

Real typical concurrence of the provisions of Article 207 CC (abuse) and Article 35 paras. 1, 1a or 2 APA is possible. This is also the opinion of the Appellate Court in Katowice adjudicating in the case in which the accused caused the death of his children's guinea pig and a canary when shooting an airgun.⁷¹ The court rightly stated: "The accused consciously and intentionally caused the death of those animals and it was an element of psychological abuse of his family members. In addition, his activity also resulted from his desire to upset his family members, an expression of his strength, the feeling of impunity and subordinating them to his will. The violence used in this case was addressed to the surrounding of the aggrieved, i.e. their animals, and was aimed at influencing their conscience and will. The accused party's acts were elements of the features of the offence of abuse referred to in Article 207 CC on the one hand, and they matched the features of an offence referred to in Article 35 para. 1 Act of 21 August 1997 on the protection of animals, on the other hand, so it was necessary to apply cumulative concurrence of statutory provisions based on the wording of Article 11 §2 CC".

Cumulative classification of the provision of Article 35 para. 1a (or para. 2) APA with Article 202 §3 CC cannot be excluded (producing, recording the hard pornography with the use of animals). It should be remembered that in accordance with Article 6 para. 2(16) APA, sexual intercourse with animals (zoophilia) is treated as abuse (regardless of whether an animal really feels pain because of that). It should be pointed out that it concerns only sexual intercourse, while other sexual activities are not covered by this provision (in the meaning of Article 197 §2 CC). In case of other sexual activities with animals (that are not sexual intercourse), every case must be analysed individually and just a fact of using animals to such activities cannot be interpreted directly as animal abuse (in some cases, it is necessary to request an expert opinion).⁷²

Cumulative classification of Article 35 paras. 1, 1a or 2 APA with Article 196 CC is a rather unusual instance of real typical concurrence of provisions (hardly probable in the Polish reality) as it concerns the killing or abuse of an animal and at the same time insulting someone's religious feelings, of course provided that a given animal is an object of veneration in a given religion (e.g. cattle in Hinduism).⁷³

necessary to apply the rules of perfect (single act) concurrence of an offence and a misdemeanour. On the other hand, one cannot approve of M. Gabriel-Węglowski's incorrect opinion that in a situation in which a perpetrator has committed an act that has identical features of an offence and a misdemeanour, his act should be classified only as a misdemeanour in compliance with the *in dubio pro reo* principle. See, M. Gabriel-Węglowski, *Przestępstwa...*, pp. 176–177. Reference to the principle is inappropriate because we do not deal with a doubt (either legal or factual in nature) which cannot be removed. However, the issue does not raise doubts if an act is more than a misdemeanour, i.e. an offence. In such a situation, a perpetrator must be liable for "something more" than just a misdemeanour (i.e. an offence) and there are no arguments for rewarding him. M. Kulik, M. Mozgawa, *Zbieg przepisów art. 35 ustawy o ochronie zwierząt z przepisami typizującymi uszkodzenie rzeczy*, Prokuratura i Prawo No. 6, 2011, p. 23.

⁷¹ Judgement of the Appellate Court in Katowice of 22 June 2006, II AKa 199/06, LEX No. 196090.

⁷² M. Mozgawa, *Ustawa...*, p. 89.

⁷³ M. Gabriel-Węglowski mentions such a concurrence, see *Przestępstwa...*, p. 142.

However, the concurrence of the provisions of Article 35 APA with Article 288 CC (destruction of someone else's thing⁷⁴) is the biggest problem. First of all, a question must be answered if an animal is a thing. The problem raises many controversies (although mainly in the foreign doctrine⁷⁵) because the Polish Act on the protection of animals gives a negative answer to the question (in Article 1 para. 1). On the other hand, the provision of Article 1 para. 2 APA stipulates that in cases that are not regulated in statute, the provisions concerning things should be applied respectively. Thus, it should be assumed that the wording of the provision of Article 1 *in fine* APA stipulates that an animal can be the object of direct action within a series of prohibited acts against property because, based on criminal law, provisions concerning things are applied to it respectively.⁷⁶ Therefore, *prima facie*, there are no obstacles to an assumption that an animal can be an object of direct action within prohibited acts under Article 288 CC and Article 124 MC.⁷⁷ Of course, the above comments refer to a live animal. The provisions of the Act on the protection of animals are applied only to such animals, which results directly from the definition laid down in Article 1 APA. A dead animal constitutes a thing that may be an object of direct action of a crime under Article 288 CC (and a misdemeanour under Article 124 MC); however, the provisions of Article 35 APA are not applied to it.⁷⁸

⁷⁴ For more on this issue, compare M. Kulik, M. Mozgawa, *Zbieg...*, pp. 5–23.

⁷⁵ For this issue, compare especially E. Fraul, *Zum Tier als Sache i.S. des StGB*, Jus No. 2, 2000, pp. 215–220. The author analyses the issue focusing on the relations between the approach of civil law and criminal law to the concept of a thing, especially in the context of the change that resulted from introduction of §90a BGB by the Act of 20 August 1990 on the improvement of the legal position of animals in civil law (BGBl I, 1762), and stipulating that animals are not things. Still, more serious problems occur in French law, the example of which can be the analysis by J.P. Marguenaud, *L'animal dans le nouveau code penal*, Recueil Dalloz Sirey, 25 Cahier-Chronique, 1995, pp. 187–191. The author discusses the consequences of the assumption that animals are not things, which raises a series of important problems of legal and penal nature (inter alia, the issues of legal classification of an act of stealing an animal). The author also presents philosophical considerations: "If they [animals – note by M.M.] are no longer things, what are they? Are they a category that is not specified and being somewhere between things and people? Maybe, although one can bet (...) that the assumption of personification of animals, considerably strengthened by the new Criminal Code, will not last long.

Instead of being inclined to rejecting the assumption, would it not be better to focus the attempts on narrowing it [i.e. personification – note by M.M.] in the technical limits of jurisdiction already applied to moral persons and to protect against obscuring the issue by anthropomorphism? It would be less troublesome to grant animals certain personality, purely legal, than to mix it up with a human embryo in the criminal code" (J.P. Marguenaud, *L'animal...*, p. 191). There are also works on this issue in the Polish doctrine; compare, e.g. M. Nazar, *Normatywna dereifikacja...*, [in:] M. Mozgawa (ed.), *Prawna ochrona...*, pp. 129–151; M. Goettel, *Sytuacja prawna zwierząt w świetle przepisów kodeksu cywilnego o porzuceniu i zawłaszczeniu rzeczy*, [in:] J. Gołaczyński, P. Machnikowski (ed.), *Współczesne problemy prawa prywatnego. Księga pamiątkowa ku czci Profesora Edwarda Gniewka*, Warsaw 2010, pp. 159–170; E. Łętowska, *Dwa cywilnoprawne aspekty praw zwierząt: dereifikacja i personifikacja*, [in:] *Studia z prawa prywatnego. Księga pamiątkowa ku czci Profesor Biruty Lewaszkiewicz-Petrykowskiej*, Łódź 1997.

⁷⁶ M. Kulik, M. Mozgawa, *Zbieg...*, p. 7.

⁷⁷ It cannot raise doubts that animals may be the object of sale, gift, exchange, etc. in accordance with the provisions of civil law, compare M. Mozgawa, M. Budyn-Kulik, K. Dudka, M. Kulik, *Prawnokarna...*, p. 53.

⁷⁸ M. Kulik, M. Mozgawa, *Zbieg...*, p. 8.

As a rule,⁷⁹ it should be assumed that in every case when an animal does not constitute a perpetrator's property (i.e. is someone else's in the meaning of Article 288 CC) and its value (or the value of loss) exceeds one-fourth of the minimum remuneration (in accordance with Article 124 §1 MC) but the act is expressed as intentional (inhumane or unjustified) killing or body damage (as a result of abuse or an attempt to kill), there are grounds for the application of cumulative classification: Article 35 paras. 1, 1a or 2 APA in concurrence with Article 288 §1 (possibly §2) CC in conjunction with Article 11 §2 CC.⁸⁰

5. PENALTIES

After the latest amendment to APA (of 6 March 2018), the commission of an offence under Article 35 para. 1a APA carries a penalty of deprivation of liberty for up to three years (formerly it was a fine, limitation of liberty or deprivation of liberty for up to two years). On the other hand, in case of an offence under Article 35 para. 2 APA, it is a penalty of deprivation of liberty for a period from three months to five years (before the latest amendment, it was a penalty of deprivation of liberty for up to three years). In accordance with Article 69 §1 CC, the execution of the penalty of deprivation of liberty for up to one year may be conditionally suspended (for a probation period from one year to three years – Article 70 §1 CC, and in case of a minor: from two to five years – Article 70 §2 CC). Due to maximum limits of sanctions laid down in Article 35 paras. 1a and 2 APA (not exceeding five years), conditional discontinuation of criminal proceedings is possible (in accordance with Article 66 §2 CC), of course provided that all other conditions laid down in Article 66 §1 CC are met. Discontinuing criminal proceedings conditionally, a court may adjudicate on a ban on possessing any animals whatsoever or a certain category of animals for up to two years (Article 35 para. 6 APA). It is also possible to refrain from imposing a penalty (in accordance with Article 59 CC) for an offence under Article 35 para. 1a APA, due to the fact that a potential penalty does not exceed three years of deprivation of liberty, provided that the social harmfulness of an act is not considerable. In such a case, a court adjudicates on a penal measure, forfeiture or compensation (provided that the measure meets the aim of punishment). It should be pointed

⁷⁹ The possibility of eliminating the provision of Article 124 MC or Article 288 §2 CC (a case of lesser significance) by Article 35 paras. 1, 1a or 2 APA cannot be excluded only in extraordinary situations. Due to the object of protection of prohibited acts in Article 124 MC and Article 288 CC, it is justified that the application of compensation should depend on the amount of loss; the bigger it is, the lower the possibility of eliminating the provision on damage made to a thing. It can happen, e.g. in case of killing an animal of a low financial value, e.g. a mouse, a guinea pig, a hamster. In such a case, it seems that the classification of a perpetrator's act under Article 35 APA is sufficient to express the whole criminal content of an act; see, M. Kulik, M. Mozgawa, *Zbieg...*, p. 21.

⁸⁰ In case of the value of an animal (or damage) below one-fourth of the minimum monthly remuneration (and fulfilling all other requirements of the provisions), we would deal with the perfect (single act) concurrence of an offence and a misdemeanour: Article 35 paras. 1, 1a or 2 APA in concurrence with Article 124 §1 MC in conjunction with Article 10 §1 MC; compare, M. Kulik, M. Mozgawa, *Zbieg...*, p. 21.

out that in case of offences laid down in Article 35 paras. 1a and 2 APA, it is possible to adjudicate on the mixed penalty (Article 37b CC) or an alternative sanction (Article 37a CC).

In case of a conviction for an offence laid down in Article 35 para. 1a APA, a court may adjudicate on a penal measure in the form of a ban on possessing any animals whatsoever or a particular category of animals (Article 35 para. 3a) and in case of a conviction for an offence laid down in Article 35 para. 2 APA, a court shall adjudicate on a penal measure in the form of a ban on possessing any animals whatsoever or a particular category of animals (Article 35 para. 3b). In case of an offence referred to in Article 35 para. 1a APA committed by a perpetrator in connection with his job, business or licensed activities that involve the use of animals or affecting them, a court may adjudicate penal measures in the form of a ban on: (1) performing all professions or particular professions, (2) conducting all or a particular type of business activities, or (3) performing all or particular types of licensed activities that involve the use of animals or affecting them (Article 35 para. 4). In case of an offence referred to in Article 35 para. 2 APA committed in connection with a perpetrator's profession, business activity or licensed activities that involve the use of animals or affecting them, the above-mentioned bans are obligatory (Article 35 para. 4a). The bans laid down in Article 35 paras. 3a to 4a shall be adjudicated for yearly periods, from one year to 15 years (Article 35 para. 4b). Attention should be drawn to the fact that in accordance with the amended Article 244 CC, failure to comply with the court bans on performing a profession, conducting business activities or licensed activities that involve the use of animals or affecting them or the ban on possessing any animals whatsoever or a particular category of animals constitutes an offence carrying a penalty of deprivation of liberty for a period of three months to five years.⁸¹ A court may adjudicate on a forfeiture of objects used for or designed for the commission of an offence even if they are not a perpetrator's possession, provided that their owner or another person who was entitled to have them at their disposal based on accompanying circumstances envisaged or could envisage that they might be used to commit an offence (Article 35 para. 4c). In case of a conviction for an offence laid down in Article 35 paras. 1, 1a or 2 APA, a court adjudicates on compensation of PLN 1,000 to PLN 100,000 paid for an indicated aim connected with animal protection (Article 35 para. 5 APA). As far as other types of penal response laid down in the Criminal Code (which are applicable to APA based on Article 116 CC) are concerned, there are mainly: an obligation to redress the loss (Article 46 CC), forfeiture of profits obtained as a result of crime (Article 45 CC) or publicising of a sentence (Article 50 CC).

⁸¹ The amendment was introduced by the Act of 6 March 2018 amending the Act on the protection of animals and the Act: Criminal Code (Journal of Laws [Dz.U.] of 2018, item 663). Formerly, it was rightly indicated in the doctrine that it was necessary to amend Article 244 CC so that a perpetrator breaking the ban on possessing animals could be made liable under this provision. Compare, C. Kąkol, *Lepsza, choć dziurawa ochrona zwierząt*, Rzeczpospolita of 1/06/2012.

**Valid convictions for offences under the Act on the protection of animals
in the period 2014–2016**

	Convictions	Self-standing fine	Limitation of liberty	Suspended deprivation of liberty	Absolute deprivation of liberty	Penal measures
2014						
Total	568	134	126	277	31	
Article 35 para. 1	205	57	41	102	5	
Article 35 para. 1a	282	76	82	119	5	
Article 35 para. 2	81	1	3	56	21	
2015						
Total	536	167	120	209	39	
Article 35 para. 1	175	48	43	71	13	
Article 35 para. 1a	281	117	71	87	6	
Article 35 para. 2	80	2	6	51	20	
2016						
Total	592	187	183	164	56	2
Article 35 para. 1	223	76	71	57	18	1
Article 35 para. 1a	287	105	94	73	15	
Article 35 para. 2	82	6	18	34	23	1

Source: Ministry of Justice.

Analysing the presented statistics, one should take into consideration the fact that they refer to the period when the commission of an offence under Article 35 para. 1a APA carried an alternative penalty of a fine, limitation of liberty or deprivation of liberty for up to two years, and the commission of an act under Article 35 para. 2 – a penalty of deprivation of liberty for up to three years. According to the above

data, 1,696 people were convicted in Poland for offences under Article 35 paras. 1, 1a and 2 APA in the period 2014–2016, including 850 (50.1%) for animal abuse (in its basic type under Article 35 para. 1a).⁸² In total 243 people were convicted for an aggravated offence (Article 35 para. 2), however, because of the fact that it is a common aggravated type for both basic types (killing and abuse), it is not possible to state in how many cases the conviction concerned animal abuse with extraordinary cruelty. Looking at the total number of convictions, one should notice that deprivation of liberty with conditional suspension of its execution (48.8% in 2014 and 39.0% in 2015) was the most common penalty in 2014 and 2015. The penalty of a fine was second most common (23.6% in 2014 and 31.2% in 2015) and limitation of liberty was third (22.2% in 2014 and 22.4% in 2015). The penalty of absolute deprivation of liberty was relatively rare (5.5% in 2014 and 7.3% in 2015). The situation changed considerably in 2016, which directly resulted from the fact that since 1 July 2015 a court has been able to suspend the execution of the penalty of deprivation of liberty for up to one year (and not for up to two years as it used to be). Therefore, a fine was the most frequent penalty in 2016 (31.6%), followed by the penalty of limitation of liberty (30.9%) and deprivation of liberty with conditional suspension of its execution (27.7%). The penalty of absolute deprivation of liberty was adjudicated more often than in previous years (9.5%), and in two cases a court adjudicated only on a penal measure. Focusing only on the offence of animal abuse (in its basic form – Article 35 para. 1a), one can see that the penalty of deprivation of liberty with the conditional suspension of its execution was the most frequent sentence in 2014 (42.2% of all convictions under Article 35 para. 1a APA), followed by the limitation of liberty (29.1%) and a fine (27.0%). The penalty of absolute deprivation of liberty was very seldom applied (1.8%). However, the situation changed in the successive years (2015–2016). Thus, in 2015 a fine was most common (41.6%), followed by the conditionally suspended penalty of deprivation of liberty (31.0%) and the limitation of liberty (25.3%). The application of absolute deprivation of liberty was as rare as in the past (2.1%). In 2016 (like in the former year), a fine was most frequently applied (36.6%), followed by the limitation of liberty (32.8%) and the conditionally suspended deprivation of liberty (25.4%). Courts applied the penalty of absolute deprivation of liberty much more often than in former years (5.2%). Based on the above data, it is difficult to unambiguously evaluate the penal policy of courts in cases concerning offences under APA (especially in the context of the 2015 amendments to CC). Undoubtedly, (in the analysed period) non-custodial penalties dominated, however, penalties of absolute deprivation of liberty were more often adjudicated, which can indicate that the justice system attaches more importance to humanitarian protection of animals.

⁸² As far as the Police data on offences under Article 35 APA are concerned, it should be pointed out that they are provided in total (thus, Article 35 para. 1 together with 1a and 2). Unfortunately, the data do not indicate the number of cases of animal abuse. Thus, 1,483 offences under Article 35 paras. 1–2 APA were registered in 2014; 860 offences were detected (58.0% detection rate). In 2015, the figures were 1,846, 1,191 and 64.5%, respectively, and in 2016: 1,673, 937 and 55.9%; see, statystyka.policja.pl/st/wybrane-statystyki/wybrane-ustawy-szczegol/ustawa-o-ochronie-zwier/50889,Ustawa-o-ochronie-zwierzat.html [accessed on 25/02/2018].

It should be deemed that the latest amendments to the Act on the protection of animals (in the context of stricter sanctions for offences classified there) are also going to have impact on courts' sentences for offences under Article 35 APA.

6. CONCLUSIONS

The present wording of the provisions of Article 35 paras. 1a and 2 APA does not raise serious interpretational doubts (unlike in case of an offence under Article 35 para. 1 APA). The amendments introduced by the Act of 16 September 2011⁸³ were especially important (and positive) because they laid down two separate types of offences (unlawful killing – Article 35 para. 1 APA and animal abuse – Article 35 para. 1a APA), instead of one alternative approach. Penalties for offences were raised, a penal measure in the form of a ban on possessing animals was introduced and compensation was considerably extended. The successive decisions to introduce stricter sanctions for offences classified in APA (Act of 6 March 2018) show that the significance of interests protected there is perceived as considerable. It seems that all this causes that the law provides appropriate measures for legal protection of animals against their abuse. Obviously, it must be remembered that development of relevant social awareness in this area is still a basic task, and attitude to animals and sensitivity to their harm is an important component of humanity.

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⁸³ Act amending the Act on the protection of animals and the Act on maintaining cleanliness and order in communes, Journal of Laws [Dz.U.] of 2011, No. 230, item 1373. I write on the issues in more detail in the historical section of the foregoing paper.

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CRIME OF ANIMAL ABUSE

Summary

The offence of animal abuse is defined in the Act on the protection of animals under Article 35 para. 1a APA (basic type) and Article 35 para. 2 APA (aggravated type: killing and abuse of animals with extraordinary cruelty). The legislator understands animal abuse as inflicting or consciously allowing someone to inflict pain or suffering and lists the most typical instances of such conduct under Article 6 para. 1 APA. The crime under Article 35 para. 1a APA is a common offence that can be committed as both action and omission. It is an offence that is formal in nature. As far as the subjective aspect of it is concerned, both forms of intent can occur. The aggravated type of the offence referred to in Article 35 para. 2 APA can only be committed intentionally (direct intent) in both forms of an act (action and omission). The provisions of Article 35 paras. 1a and 2 are often in real typical concurrence with other provisions (e.g. Article 52(4) Act of 13 October 1995: Hunting law; Article 128(1) Act of 16 April 2004 on the protection of nature; Article 207 CC, Article 288 CC, and Article 202 §3 CC). It should be remembered that in accordance with Article 1 APA, "an animal, as a living creature able to feel pain, is not a thing"; however, dereification of animals has not resulted in their personification with a consequence of their empowerment and ability to obtain and possess rights.

Keywords: animal, abuse, extraordinary cruelty

PRZESTĘPSTWO ZNEĆANIA SIĘ NAD ZWIERZĘTAMI

Streszczenie

Przestępstwo znęcania się nad zwierzętami określone jest w ustawie o ochronie zwierząt w art. 35 ust. 1a (typ podstawowy) oraz art. 35 ust. 2 u.o.z. (typ kwalifikowany: zabijanie zwierzęcia lub znęcanie się nad nim ze szczególnym okrucieństwem). Przez znęcanie się nad zwierzętami ustawodawca rozumie zadawanie albo świadome dopuszczanie do zadawania bólu lub cierpień, wymieniając w art. 6 ust. 2 u.o.z. najbardziej typowe przypadki takich zachowań. Występek z art. 35 ust. 1a u.o.z. jest przestępstwem powszechnym, które może zostać popełnione zarówno w postaci działania, jak i zaniechania. Jest to przestępstwo o charakterze formalnym. W zakresie strony podmiotowej w grę wchodzi umyślność w obu postaciach zamiaru. Przestępstwo stypizowane w art. 35 ust. 2 u.o.z. (typ kwalifikowany) ma charakter powszechny oraz może zostać popełnione tylko umyślnie (w zamiarze bezpośrednim), zarówno w formie działania, jak i zaniechania. Często przepisy art. 35 ust. 1a i 2 pozostają w rzeczywistym właściwym zbiegu z innymi przepisami (np. z art. 52 pkt 4 ustawy z 13.10.1995 r. – Prawo łowieckie; z art. 128 pkt 1 ustawy z 16.04.2004 r. o ochronie przyrody; z art. 207 k.k., art. 288 k.k., art. 202 §3 k.k.). Należy pamiętać, że zgodnie z art. 1 u.o.z. „zwierzę, jako istota żyjąca, zdolna do odczuwania cierpienia, nie jest rzeczą”, jednakże dereifikacja zwierząt nie spowodowała ich personifikacji ze skutkiem w postaci upodmiotowienia i zdolności nabywania i posiadania praw.

Słowa kluczowe: zwierzę, znęcanie się, szczególne okrucieństwo

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