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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Summary

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

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

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

Streszczenie

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

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

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

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