

# DECLARATION OF DEATH OF NATURAL PERSON WHOSE LOSS IS ASSOCIATED WITH WAR OR MILITARY ACTIONS IN THE LIGHT OF THE INTRODUCTORY REGULATIONS OF THE CIVIL CODE

ARKADIUSZ BIELIŃSKI

## 1. Introduction

Recognition of the deceased, is a classic institution of private law, which is associated with the legal subjectivity of the individual. Undoubtedly, the most desirable situation is when the death of the individual results in the cessation of its legal personality, and simultaneously, causes in other effects, e.g. in the field of inheritance law. Sometimes, however, we do not have a positive knowledge as to whether the person is still alive or not, so we have to deal with the state within the meaning of loss – Art. 29 of the Civil Code.<sup>1</sup> As Jerzy Strzebińczyk remarks the term “loss” has not been specified by the legislature, but the doctrine and judicature agree that it is a person that cannot be stated whether s/he is still alive or already dead, thus, there is no information in this aspect available for the court to declare this person dead. One cannot exclude the fact that the applicant or participants in such proceedings, know that a particular person is alive but conceal this information because they may benefit from the fact that this person is

---

1 The Act of 23.04.1964, Civil Code (Dz.U. z 1964 r. Nr 16, poz. 94).

declared dead.<sup>2</sup> Disappearances and deaths are not extraordinary events nowadays. They are inextricably linked with the development of the civilization. Moreover, apart from typical examples as war, crime, sea and air travel, there are always new threats, arising, for example, from the severity of the terrorist attacks on an unprecedented scale. The people who disappear regardless of specific danger constitute a serious problem as well. More than twenty thousand people go missing every year in Poland and the number is constantly growing.<sup>3</sup>

## 2. War and military actions as a cause of people missing

Unquestionably, large-scale disappearances are grounded in wars, hostilities (as a particularly destructive phenomenon) and factors associated with them. As W. Zylber clearly highlights, the issues of disappearance and declaration of death are particularly present as regards wars and periods of internal strife. It can be stated that in 1946 that the significance of this issue was exceptional in history. Total war and barbarism of the Germans resulted in the disappearance of the facts without a trace, the phenomenon which was of mass character in Poland. Hence, a new, specific social problem arose. After the loss of the close family member, almost everyone, sooner or later, has to put financial and family relationships in order affected by tragic events of the last war.<sup>4</sup> There are also interesting cases as they clearly break out from the provisions which are devoted to typical cases of loss that could result in declaring the death. Simultaneously, introductory provisions of Civil Code are now slightly forgotten although, as it will be shown

---

2 J. Strzebińczyk, (in:) E. Gniewek, P. Machnikowski (eds.), *Kodeks cywilny. Komentarz*, Warszawa 2013, p. 76.

3 A. Bartoszewicz, *Przesłanki materialnoprawne uznania za zmarłego i stwierdzenia zgonu w prawie polskim na tle prawnoporównawczym*, „Kwartalnik Prawa Prywatnego” 2005, no. 4, pp. 922–923. The 2013 statistical data of the ITAKA Foundation indicates that for 1169 reports of the disappearance, 967 people were found, including 185 of them were dead – the report available at <http://zaginieni.pl/files/Statystyki/2013%20cay%20rok%20-%20obowizujce%20statystyki.pdf>

4 W. Zylber, *Unifikacja przepisów o uznaniu za zmarłego i stwierdzeniu zgonu (jej zalety i braki)*, „Państwo i Prawo” 1946, nr 1, p. 40.

further in the article, they refer not only to World War II, but to any kind of war or armed conflict.

It should be noted that the number of deaths as a direct result of the Second World War is shocking – a total of between 35 and 40 million. This is roughly the average pre-war Polish population (35 million) and France (42 million).<sup>5</sup> This war also contributed to population movements on an unprecedented scale. In the spring of 1945 there were plenty of employees of foreign origin in Germany. At the end of the war there were almost 8 million forced laborers who were brought from all the corners of Europe to work on farms and factories. In the same western part of Germany UNRRA<sup>6</sup> sought out, and then repatriated 6.5 million displaced people. Most came from the Soviet Union, Poland and France, although they were also Italians, Belgians, Dutch, Czechs and Yugoslavs. It should also be noted that one of the many factors that distinguish the Second World War from contemporary conflicts is that apart from soldier prisoners of war a large number of civilians were imprisoned. Women and children, like men, were in fact treated as the spoils of war.<sup>7</sup> Therefore, there is no doubt that the war fostered creating the circumstances which conduced “disappearances” often, unfortunately, associated with the actual death of the missing person. However, if there are no doubts that a certain person is still alive or is dead as the result of war or hostilities but there is a conviction that the person died, it is necessary to find them dead, not declare them dead.<sup>8</sup>

### **3. The analysis of art. XXVIII–XXX provisions introducing the Civil Code**

The legislature in a separate way referred to the institution of declaration of death for persons missing in connection with military operations. Under the law in force these issues are regulated under art. XXVIII–XXXII introducing the Civil Code. It is worth noting that previous provisions did not do so. The main example is art. 14 of Personal Law of

---

5 K. Lowe, *Dziki kontynent. Europa po II wojnie światowej*, Poznań 2013, pp. 35–36.

6 United Nations Relief and Rehabilitation Administration.

7 K. Lowe, *op. cit.*, p. 52.

8 J.M. Kondek, (in:) K. Osajda (ed.), *Kodeks cywilny. Komentarz*, t. 1, Warszawa 2013, p. 121.

1945,<sup>9</sup> where the institution of declaration of death of man's missing in connection with the activities of war was explicitly included in general premises to declare somebody dead. The current isolation of cases of missing persons during the war in the provisions implementing Civil Code was stimulated by the conviction of the legislature that the cases are of episodic character. The historical considerations confirmed that normalization is of a particularly powerful character although it refers to armed conflicts in general. It has been closely aligned to the realities of World War II (see the aforementioned art. 14 of Personal Law).<sup>10</sup> Firstly, it is necessary to refer to this "episodic character" of the provision. On the one hand, placing the rules which relate to declaring persons missing in connection with military operations dead out of Civil Code and in implementing regulations, especially bearing in mind that they were previously placed in acts of "main" and not "introductory" character, under the provisions of transition, which suggested that in fact these are the episodic rules referring only to the war of 1939–1945, and regulating the matter, which, as a "transient" over the years has become irrelevant. On the other hand, it should be noted that the legislation introducing the Civil Code, as well as the Personal Law of 1945, and the general provisions of civil law in 1950,<sup>11</sup> were formulated in a sufficiently abstract and general way and any limitation to the effects of World War II cannot be concluded, although it was undoubtedly affected by the events of the war. Thus, in the essence these provisions constitute the whole with art. 29–30 of the Civil Code. An additional argument for the accuracy of such a position is, undoubtedly, the content of art. XXXII of the implementing provisions of the Civil Code, which directly stipulates the beginning of the period for the disappearances associated with the war of 1939–1945, which clearly indicates the general nature of the remaining legislation. If these provisions were superfluous, its normative content should be included in other legislation.<sup>12</sup> The nature of the rules governing the institution of declaration of death in case

9 Decree of 29.08.1945 (Dz.U. z 1945 r. Nr 40, poz. 223); Due to the close relationship with the Decree Rights of Persons the Decree of 29.08.1945 on the Procedure for Recognition and Declaration of Death (Dz.U. z 1945 r. Nr 40, poz. 226) should also be mentioned.

10 A. Bartoszewicz, *op. cit.*, pp. 947–948. See also: A. Bartoszewicz, *Postępowanie o uznanie za zmarłego i stwierdzenie zgonu*, Warszawa 2007.

11 The Act of 18.07.1950 (Dz.U. z 1950 r. Nr 34, poz. 311).

12 J.M. Kondek, *op. cit.*, pp. 120–121.

of war or hostilities is similarly treated by S. Grzybowski who clearly states that neither those provisions, nor the nature of the implementing legislation is episodic, but they form the complete merit whole with the provisions of art. 29–52 Civil Code.<sup>13</sup>

Each of these provisions implementing Civil Code i.e. art. XXVIII–XXX refers to a different situation, although in each case the loss is related to the hostilities. Under previous regulations, these issues were comprehensively regulated, respectively by art. 14 of Personal Law and art. 17–19 the general rules of civil law. It should be noted that apart from subtle editorial differences, their substantive content is identical, therefore, the doctrine on the topic can fully be applied to the current provision. The analysis of art. XXVIII of the provisions implementing Civil Code can, first of all, concern its content – “who disappeared taking part in hostilities, may be declared dead after one year from the end of the calendar year in which the war has ended. The same applies to a person who went missing while staying in the war zone, if there is a likelihood that her/his disappearance results from the actions are danger to life”. The legislator refers to the concept of hostilities, not a war, which is a concept in international law. It is about a certain state of facts, and not a legal concept. Thus, this provision can be used not only for members of the armed forces, but also the people who were involved in the fight against the insurgency in action, the active resistance against the occupiers, the uprising in the expeditions of a war, even if they were covered by the concept of war within the meaning of the law of nations.<sup>14</sup> Indeed, as regards the war under international law special rules apply, namely the law of war. The provisions of the laws of war apply in a state of war, regardless whether the war is waged or not. The law of war for the start of the war provides guidance in case of the state of war.<sup>15</sup> Therefore, it can be concluded that the concept of war only partially overlaps the concept of war under international law, and approaches to the concept of war in the military sciences.<sup>16</sup> It must,

---

13 S. Grzybowski, *System prawa cywilnego, część ogólna*, Warszawa 1974, p. 311.

14 I. Różanski, *Prawo osobowe. Postępowanie o ubezwłasnowolnienie – postępowanie o uznanie za zmarłego i stwierdzenie zgonu. Komentarz*, Kraków 1946, p. 62.

15 R. Bierzanek, *Wojna a prawo międzynarodowe*, Warszawa 1982, pp. 15–16.

16 See S. Koziej, *Teoria sztuki wojennej*, Warszawa 2011, pp. 10–17, (in:) J.M. Kondek, *op. cit.*, p. 121.

therefore, be assumed that the war within the meaning of art. XXVIII-XXXI implementing provisions is an armed conflict, regardless whether it takes place between subjects of international law or the regular armed forces, and military operations are turned under the conflict of military operations (combats).<sup>17</sup> There is no need to demonstrate the probability that the loss results from the danger caused by these actions as far as the missing persons who take part in hostilities are concerned. We are therefore faced with the undeniable presumption that there exists the alleged relationship between participation in hostilities, and the disappearance (unlike the relationship between passive staying in the war zone and the disappearance). There is thus no differentiation between rules for declaring death depending on whether missing was a member of the armed forces or a civilian person. However, not the formal membership of the armed forces but actual involvement in the fight is a relevant criterion here.<sup>18</sup> Therefore, it should be noted that the provision requires the active involvement in the fight against the enemy. The second sentence of art. XXVIII is constructed differently because the possibility to take advantage of the institution of declaring death was subject to two conditions cumulatively. Firstly, it was the condition of being in the war zone. Another one was the likelihood that loss is due to the danger caused by these actions (the probability exists if the person was just a part of the country covered by the struggle, insurrection, guerrilla action). The legislature does not require finding the absolute causality, since it is sufficient to state the probability that existed at the time of specific events, such as the Warsaw Uprising).<sup>19</sup> Problematic as it turns out may be to determine designation of the concept “area of hostilities.” Generally, it is the territory where armed clashes take place and the activities involved in the conflict, armed forces (there is not therefore a simple ratio that the area of war is always the whole territory of the country participating in the war, and even the territory of a neutral). It is necessary to agree with the statement that such regularity is not always there,<sup>20</sup> as in the case of any armed conflict, the area should be determined independently, and not all conflicts are equally total like

17 J.M. Kondek, *op. cit.*, pp. 121–122.

18 *Ibidem*, p. 122.

19 I. Różanski, *op. cit.*, p. 63.

20 For the correctness advocates I. Różanski, *op. cit.*, p. 63; A. Bartoszewicz, *op. cit.*, p. 44.

the World War II. The area of military operations will, therefore, be such an area where actually at least one of the parties is engaged in military operations. However, it is not required that fighting forces occur in the area. The area is also the area covered by the bombardment by enemy aircraft, even if it is not met with an armed response defenders.<sup>21</sup> Once these conditions are met, the missing person taking part in hostilities or staying in the war zone after one year counted from the end of the calendar year in which the war has been completed<sup>22</sup> can be considered dead.

Art. XXIX stipulates another situation stating that “who went missing while in time of war or acts of war detained by the authorities of a foreign country and put in a place where his life was threatened specific risk can be declared dead after one year from the end of the calendar year in which the war or action of war have been completed”. The legislator distinguishes between the concept of war and the concept of military action. It is worth recalling that the war is a state of ongoing armed conflict, and by acts of war we may understand an armed action, leading to armed conflict, preparing it or as its direct consequence undertaken by the armed forces and other entities involved in the fighting.<sup>23</sup> The reasons for the application of this provision are as follows: firstly, the deprivation of liberty (arrest, internment) in time of war or acts of war, regardless of whether the missing person took part in actions or was in the area covered by these actions; secondly, there has been a deprivation of liberty by the authorities of a foreign country; thirdly, embedding in a place where the lost’s life is especially endangered like in the concentration camp or ghettos.<sup>24</sup> The concept of deprivation of liberty should be interpreted broadly, not limiting it only to the ruling punishment within the meaning of the criminal law, or the arrest, but it should refer to any actual imprisonment as lawful and offending a foreign state. Foreign country is any country different from the country of nationality of the missing persons concerned (ambivalent issue is whether it is a state that is hostile to the state of nationality of the

---

21 J.M. Kondek, *op. cit.*, p. 124.

22 The concept of the end of war should be understood as actual completion of these actions, not formal conclusion of peace.

23 J.M. Kondek, *op. cit.*, p. 125.

24 I. Różanski, *op. cit.*, p. 64.

persons concerned, or is it a neutral state). The authorities of a foreign state are construed as any civilian authorities and the military, regardless of whether they act within the limits of their competence or exceed them (e.g. the occupying authorities are the authorities of a foreign country because of their origin and subordination, not because of the territory, which manages this power).<sup>25</sup> Another controversial issue is to determine the condition of the area, which in principle means finding a person in a certain place who is staying against his/her will, as a result of coercion on the part of the authorities of a foreign state. J. Kondek stresses that the term 'deposit' means both to find out how long and continuous stay is in a certain place without his /her will and as a result of coercion (e.g. exile in the Soviet Union). Moreover, it is not necessary that deprivation of liberty and confinement were illegal actions but also that they are related to ongoing military operations.<sup>26</sup> The legislature also requires an additional condition in the form of special status to demonstrate the danger to the missing person in the place where s/he was seated. It refers to much higher level of danger than the average, characterized by this "detail" i.e. distinctive specificity of the circumstances surrounding the rear. In each case it needs therefore to be examined whether actually specified place of detention was particularly dangerous, however, this examination should not be limited to the formal classification of the place.<sup>27</sup> A question arises in the context of the German POW camps. I. Różanski assessed them as particularly dangerous places due to the fact that the Germans did not follow the principles of the law of nations in relation to prisoners of the Slavic peoples.<sup>28</sup> Nevertheless, the doctrine and judiciary are of the opinion that the camps were not particularly dangerous places (which cannot be said about the Soviet and Japanese POW camps).<sup>29</sup> In accordance with the provisions of art. XXIX introducing the person to be regarded as lost, the loss must be the result of deprivation of liberty and rear. It must be demonstrated that the person has been detained and incarcerated in a place where his/her life was threatened by special danger and there is

---

25 J.M. Kondek, *op. cit.*, p. 126.

26 *Ibidem*, p. 127.

27 J.M. Kondek, *op. cit.*, p.127.

28 I. Różanski, *op. cit.*, p. 64.

29 J.M. Kondek, *op. cit.*, p. 127.

no information about that person.<sup>30</sup> Declaration of death is possible after one year from the end of the calendar year in which the war or military actions have been completed.

The last variant of loss in connection with the war or hostilities is governed by the provisions of art. XXX introducing the Civil Code. They state that “who went missing while in time of war or hostilities forcibly deported outside the country, may be presumed dead after three years from the end of the calendar year in which, according to the existing messages, was still alive, but not earlier than after two years from the end of the calendar year in which the war or acts of war have been completed.” As we can see the legislature included a longer term, the three-year deadline after which a missing person can be declared dead. The reasons for the application of this provision are as follows: first, the loss in time of war or hostilities; second, the forced deportation outside the country, regardless of who ordered them. The fact that somebody was sent from the area annexed to the Reich to the so-called General Government,<sup>31</sup> cannot be deemed being transported outside the state. Conversely, this provision applies to the deportation to work in the Reich and the disappearance of prisoners in the camps. The forced deportation should be understood not only as physical coercion, but also under the psychological threat by the Reich penalties in the event of non-compliance with the orders of the authorities.<sup>32</sup> In contrast to the art. XXIX provisions implementing Civil Code the provision does not require that the place to which the person missing was transported is dangerous for their life. It should indeed be noted that the place often provided better security (as it was located further from the front), however, in the application of the commented provision also particularly dangerous places can fit.<sup>33</sup> It is unimportant to which place s/he was forcibly taken away – it only matters that it is located outside the country of nationality

---

30 *Ibidem*

31 The administrative and political unit, founded in 1939, consisting of originally four districts: Cracow, Lublin, Radom and Warsaw. Then the district Lviv was formed; <http://encyklopedia.pwn.pl/haslo/4575166/polska-wiadomosci-wstepne-podzialy-administracyjne.html>

32 I. Różanski, *op. cit.*, p. 65. It is worth noting that it is postulated that the application of art. XXX provisions introducing Civil Code should be limited only to the transportation under duress (respecting the principle of *exceptiones non sunt extendendae*). The directness of duress is proved by the term “transported”, whereas those leaving under indirect duress and leave voluntarily on their own, and are not “deported” – see J.M. Kondek, *op. cit.*, p. 129.

33 J.M. Kondek, *op. cit.*, p. 129.

of the missing person. As it has already been mentioned, the legislature included a long term resulting in the possibility of declaring the missing dead which is justified by the fact that deportation was not frequently carried out in the place which is particularly dangerous (and therefore the probability of death is smaller), and also the deported person can have more problems returning to their country or giving of any sign of life.<sup>34</sup> The lost may be presumed dead after three years from the end of the calendar year in which, according to the existing messages, the person was still alive, but not earlier than after two years from the end of the calendar year in which the war or acts of war have been completed.

Art. XXXII of the provisions implementing Civil Code stipulates the moment of the beginning of the period of waiting with art. XXVIII-XXX provisions introducing Civil Code, in the case where the Second World War was considered as war and hostilities. It provides that the time limits for the declaration of dead count from the end of the calendar year in which the war or military actions have been completed, starts for the missing in connection with 1939–1945 war, on 9 May 1945. The legislature left it to the principle of taking into account the facts and not the formal end of hostilities. On 9 May 1945, at the time of signing the surrender of Germany, the war did not succeed. The war in the Far East still lasted, and in Poland the people took the underground struggle for independence from the Soviet Union imposed by the authorities and actions against the Ukrainian partisans of the UPA.<sup>35</sup>

## 4. Conclusions

It may be concluded that the issues concerning missing persons in connection with the war or war actions are interesting, but at the same time complex, deviating its specificity from the regulations contained strictly in the Civil Code. Obviously, the question may be posed whether such a degree of detail of these regulations is recommended. It can be argued following A. Bartoszewicz's opinion that such an assumption seems to be correct in so far as the hypothesis of individual standards

---

34 J.M. Kondek, *op. cit.*, p. 131.

35 *Ibidem*, p. 134.

actually reflect the specificities of the cases of disappearances, such as when sea travel, whether by air. Only in such circumstances detailed normalization will provide those interested in obtaining more rapid decision to declare somebody dead. On the other hand, the casuistic regulation, completely incompatible with the reality may hinder the removal of legal problems regarding disappearance. This is illustrated under the Polish law by adopted normalization conditions for the declaration of death in cases of disappearances in war. Although it refers to the disappearances in any kind of armed conflicts, it has been closely adapted to the realities of World War II. Technological advances and new ways of conducting fights cause that disappearances may occur in completely different circumstances. Therefore, it seems appropriate to replace the extensive and not fully congruent general norm appropriate for disappearances in connection with the danger caused by the war with the current conditions of the regulation.<sup>36</sup> Perhaps this postulate *de lege ferenda* can be achieved by future codification of civil law, which was strongly supported by Z. Radwański. Currently, any changes are not likely to be introduced. First of all, the position of the provision in question itself is not conducive to the general perception that the regulation of such matter we have to deal with, and secondly, there are few (fortunately) situations in which the provisions of the Civil Code, for the disappearance of a man in connection with the war or hostilities apply. It is also very hard to opt for the solution resulting in the general location of the aforementioned regulations in the Civil Code, which will undoubtedly increase its rank, and also will be a continuation of historical rules regulating the matter.

Keywords: loss, war, hostilities, declaration of death

---

36 A. Bartoszewicz, *op. cit.*, pp. 977–978.

BIBLIOGRAPHY

- Bartoszewicz A., Postępowanie o uznanie za zmarłego i stwierdzenie zgonu, Warszawa 2007.
- Bartoszewicz A., Przesłanki materialnoprawne uznania za zmarłego i stwierdzenia zgonu w prawie polskim na tle prawno porównawczym, „Kwartalnik Prawa Prywatnego” 2005, nr 4.
- Bierzanek R., Wojna a prawo międzynarodowe, Warszawa 1982.
- Grzybowski S., System prawa cywilnego, część ogólna, Warszawa 1974.
- Kondek J.M., (in:) K. Osajda (ed.), Kodeks cywilny. Komentarz, t. I, Warszawa 2013.
- Koziej S., Teoria sztuki wojennej, Warszawa 2011.
- Lowe K., Dziki kontynent. Europa po II wojnie światowej, Poznań 2013.
- Różański I., Prawo osobowe. Postępowanie o ubezwłasnowolnienie – postępowanie o uznanie za zmarłego i stwierdzenie zgonu. Komentarz, Kraków 1946.
- Strzebińczyk J., (in:) E. Gniewek, P. Machnikowski (eds.), Kodeks cywilny. Komentarz, ed. 5, Warszawa 2013.
- Zylber W., Unifikacja przepisów o uznaniu za zmarłego i stwierdzeniu zgonu (jej zalety i braki), „Państwo i Prawo” 1946, nr 1.

## UZNANIE ZA ZMARŁĄ OSOBY ZAGINIONEJ W ZWIĄZKU Z WOJNĄ LUB DZIAŁANAMI WOJENNYMI W ŚWIETLE PRZEPISÓW WPROWADZAJĄCYCH KODEKS CYWILNY

W niniejszym artykule poruszone zostały zagadnienia związane z zaginięciem spowodowanym wojną lub działaniami wojennymi, czyli kwestie uregulowane w przepisach wprowadzających kodeks cywilny. Jest to materia dosyć specyficzna, po pierwsze z uwagi na fakt okoliczności jej zastosowania, a po drugie, położenia przepisów tę instytucję określających (przez to trochę zapomnianą). Jak się bowiem okazuje, wbrew dosyć powszechnemu myśleniu, iż przepisy te miały związek wyłącznie z drugą wojną światową, mają one potencjalnie zastosowanie do wszystkich konfliktów zbrojnych, w trakcie których dochodzi do zaginięć. Opracowanie zawiera analizę przesłanek zastosowania art. XXVIII-XXX przepisów wprowadzających, wskazując przy tym na odmienną okoliczność regulowanych poszczególnymi przepisami (mimo czasami pojawiających się wątpliwości w tej materii) oraz odwołując się do poprzednio obowiązujących regulacji przede wszystkim Prawa osobowego z 1946 r., z których obecna regulacja przejęła praktyczne wszystko.