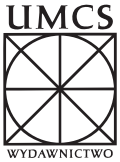
LEGAL PROTECTION of ANIMALS

EDITORIAL TEAM

Emil Kruk
Grzegorz Lubeńczuk
Hanna Spasowska-Czarny

Maria Curie-Skłodowska University Press

LEGAL PROTECTION of ANIMALS


UMCS
WYDAWNICTWO

LEGAL PROTECTION of ANIMALS

EDITORIAL TEAM

Emil Kruk
Grzegorz Lubeńczuk
Hanna Spasowska-Czarny

Maria Curie-Skłodowska University Press
Lublin 2020

Reviewers
Anna Haładyj
Olga Suszyk

Editor
Marta Mazur

Technical editor
Agnieszka Muchowska

Cover and front page design
Krzysztof Trojnar

Typesetting
Marcin Wachowicz

International conference "Domestic, European Union and International Standards in Legal Protection of Animals"- a task supported financially under the agreement No. 530/P-DUN/2019 by a Minister of Science and Higher Education with funds dedicated to research disseminating activities.

Ministry of Science and Higher Education
Republic of Poland

Publication supported financially by Academic Initiatives Foundation.

ACADEMIC INITIATIVES FOUNDATION

ISBN 978-83-227-9387-9

Maria Curie-Skłodowska University Press
ul. Idziego Radziszewskiego 11, 20-031 Lublin, Poland
tel. +48 81 537 53 04
www.wydawnictwo.umcs.eu
e-mail: sekretariat@wydawnictwo.umcs.lublin.pl

Sales Department
tel./fax +48 81 537 53 02
Online bookstore: www.wydawnictwo.umcs.eu
e-mail: wydawnictwo@umcs.eu

Printed by
Mazowieckie Centrum Poligrafii Wojciech Hunkiewicz, ul. Lisi Jar 29, 05-270 Marki, Poland

Contents

Introduction

The present publication is the result of research on the state of animal protection legislation, which was presented at the International Scientific Conference "Domestic, European Union and International Standards in Legal Protection of Animals", which took place on 17 October 2019 at the Faculty of Law and Administration of Maria Curie-Skłodowska University (MCSU) in Lublin.

The aim of the conference was to draw attention to the contradiction of some regulations introduced into the national legal framework, including those providing "enhanced" standards of animal protection, with higher-level standards; as well as to their conformity with social conditions, and to the fact that in many cases they are not enforced, therefore, they are of a superficial nature. Moreover, regulations state a different level of protection for domestic animals, homeless animals, livestock, laboratory animals, animals used for specific purposes and, finally, free-living animals. An invitation to participate in the discussion concerning this issue met with great interest of the scientific community, which resulted in various considerations on the current state of regulation setting legal standards for the protection of animals. The scope of these considerations reflects the complexity of issues related to animal protection. They refer to humanitarian protection, species protection as well as animal protection. Some research papers are devoted to the general status of the animal, others focus on detailed solutions and differences in the protection of individual species of animals, or on the differentiation of the principles of animal protection depending on the purpose given to them by humans.

These considerations resulted in a number of conclusions and observations, in particular in the field of the effectiveness of the current model of animal protection, its adaptation to the current state of veterinary knowledge, social and economic conditions, as well as compliance of the adopted solutions with the requirements of international and European Union law. We would like these conclusions to be at least the starting point for further discussion on optimizing the animal protection system. In this regard, it is significant that some of the considerations refer to the solutions which have already been adopted in the legal system of Ukraine.These considerations may become a valuable material for all kinds of comparative legal analyzes.

Presenting the publication to the reader, we would like to thank all those who have helped in the making of this book, in particular the contributors. We would like to

express our particular thanks to the Dean of the Faculty of Law and Administration (MCSU), Prof. Anna Przyborowska-Klimczak, PhD, who has placed a great deal of trust in us and supported our actions at every stage of the project.

Editors

ADAM HABUDA

Institute of Law Studies of the Polish Academy of Sciences,
Unit of Environmental Law
https://orcid.org/0000-0002-7306-6217
adh@interia.pl

Animal Protection in Environmental Law *

Introduction

Animals, from a different perspective, have long been the subject of legal regulation. They are also the subject of interest in legal philosophy and doctrine.[1] The current law, both international and domestic, indicates a variety of normative contexts in which animals occur. The protective context dominates, manifesting itself in particular in: 1) keeping the animal as a valuable element and resource of the natural environment, 2) treating the animal as a sentient being, also suffering – and in this sense requiring care and respect, 3) protecting man against the animal, above all, all dangerous.

Protection is guided by natural (environmental) motives related to treating the animal as a component of nature and a fragment of biological diversity, economic motives – treating animals as a certain economic resource, also important for human biological existence, sanitary considerations (aimed at protecting man and other animals against [animal-borne] diseases), and "humanitarian" motives arising from the development of human culture, civilization, and, perhaps paradoxically, a certain departure from anthropocentrism by recognizing that some principles of human

* The paper is a scientific result of the research project "Natura 2000 Areas in Polish, Czech and Slovak Law. Comparative Analysis", financed by the National Science Center (No. UMO-2014/13/B/HS5/01318).

1 See, e.g., *Prawna ochrona zwierząt*, red. M. Mozgawa, Lublin 2002; J. Białocerkiewicz, *Status prawny zwierząt. Prawa zwierząt czy prawna ochrona zwierząt*, Toruń 2005; *Status zwierzęcia. Zagadnienia filozoficzne i prawne*, red. T. Gardocka, A. Gruszczyńska, Toruń 2012.

behavior should be transferred to human behavior towards animals. The motives indicated are not mutually exclusive.

It seems that more specific areas of regulation are emerging on the foundation of this protective orientation of animal law. For example, regulations governing trade in animals, regulations on the transport of animals, veterinary and sanitary regulations, provisions indicating the conditions to be maintained at the place of residence of the animals, provisions on the slaughter of animals, provisions on obtaining animals (e.g. fishing, hunting), provisions governing the handling of endangered species, provisions on animals used for scientific and experimental purposes. Often, there is a difference between legal regulations that apply to animals living under the direct care of man (especially farm animals, domestic animals) and the regulations dealing with animals living "in the wild", in forms of nature protection, or – more broadly – in the natural environment. Levels of regulation – both at national and supranational level – overlap these divisions and classifications. As for the methods of regulation, there are administrative, criminal or civil law instruments.

In this perspective, the question arises whether animal law (legal protection of animals) can and should be classified as environmental law, and what the consequences may be. It cannot be denied that some of the above provisions are part of environmental law. However, it is necessary to consider whether the broadly understood legal protection of animals can be contained within the scope of environmental law.

Concept, subject, directions and motives of environmental law

In foreign literature, especially the one related to international and EU law, the term "environmental law" is exposed at least in the definition layer. This is the most accurate way to translate this term. Take, for example, the work of Philippe Sands[2] (he defines international environmental law as material, procedural and organizational regulations of international law whose primary purpose is environmental protection), as well as other items.[3] The term "environmental law" also holds primacy in EU environmental (protection) law. Such a convention was adopted in particular by Ludwig Kramer,[4] Jan Jans and Hans Vedder,[5] or Martin Hedemann-Robinson.[6]

The subject of environmental law is very extensive. It is the environment understood as all natural elements, including those transformed as a result of human activity, in particular the surface of the earth, minerals, water, air, landscape, climate and other

[2] P. Sands, *Principles of International Environmental Law*, Cambridge 2003, p. 15.

[3] D. Bodansky, J. Brunnee, E. Hey, *The Oxford Handbook of International Environmental Law*, New York 2010.

[4] L. Kramer, *EU Environmental Law*, London 2012, p. 4.

[5] J.H. Jans, H.H.B. Vedder, *European Environmental Law*, Groningen 2008, p. 3.

[6] M. Hedemann-Robinson, *Enforcement of European Union Environmental Law*, London 2007, p. 10.

elements of biodiversity, as well as the interaction between these elements (Art. 3 point 39 of the Environmental Protection Law of 27 April 2001[7]). According to Art. 5 point 20 of the Act on Nature Protection of 16 April 2004,[8] the natural environment is a landscape together with inanimate nature creations and natural and transformed natural habitats with plants, animals and fungi occurring on them. The animals fall within the environmental definitions cited. Environmental protection is often equated with the protection of biodiversity, which the Convention on Protection of Biological Diversity defines as the diversity of all living organisms from all sources including, among others, terrestrial, marine and other aquatic ecosystems and ecological assemblies of which they are part (Art. 2).

Maria Kenig-Witkowska, analyzing the concept of the environment in EU law, states the general nature of the definition of the natural environment including everything that is universally and intuitively included in this formulation.[9] This wide range of the concept of environment sometimes leads to the conclusion that the concept of environmental law is useless; what a lawyer specializing in water protection has in common with a lawyer dealing with regulations regarding endangered plant species.[10] Following such a comprehensive subject, there are directions of environmental law regulation, among which the following are traditionally indicated: 1) regulating the protection against pollution (emission law), 2) regulating the protection of naturally valuable phenomena (nature protection law), 3) regulating the use of natural resources, 4) regulating procedural and organizational issues, 5) regulating product control from the point of view of environmental protection requirements.[11]

Individual elements of the environment are also an impulse to create fields or sub-disciplines under broadly understood environmental law. Based on this principle, for example, water law, geological and mining law, nature protection law or recently climate protection law stand out. Some environmental impacts of human existence and economic activity also serve to create disciplines within environmental law – I will illustrate this with the waste law. Legal regulations determining the principles of shaping space are also included in the scope of environmental law. I am thinking here in particular of landscape law (after all, landscape is a normative element of nature and the foundation of the natural environment) together with the provisions on spatial development.

Obviously, some definitions, divisions or classifications can be discussed, showing their imprecision, and some views of the science of law may also be questioned. Certainly,

---

[7] Journal of Laws of 2019, item 1396.

[8] Journal of Laws of 2018, item 1614.

[9] M.M. Kenig-Witkowska, *Prawo środowiska Unii Europejskiej. Zagadnienia systemowe*, Warszawa 2005, p. 10.

[10] *Environmental Law and Policy. Nature, Law and Society*, eds. Z. Plater, R. Abrams, W. Goldfarb, R. Graham, L. Heinzerling, D. Wirth, New York 2004, p. 5.

[11] J. Sommer, *Efektywność prawa ochrony środowiska i jej uwarunkowania – problemy udatności jego struktury*, Wrocław 2005, pp. 39–40.

however, the scope of the term "environment" is huge, and, thus, the legal regulation is also devoted to it. There is no doubt that environmental issues are becoming more "media" and are gaining political significance, both internationally and nationally.

There are two basic motives in the legal regulation of the environment and its protection. The first is expressed by these legal provisions, which are intended primarily to protect, preserve, not deteriorate, i.e. what was formerly called conservation of natural resources and creations.[12] In the Act on nature protection, the literal confirmation of this idea is the very title of the Act, but also the content of the legal regulation, in which the emphasis is much more on protection than on use. In particular, the objectives of nature protection indicated in Art. 2(2) are primarily conservative (protective). Chapter 9 of the Act is entitled "Management of nature resources and components", but the provisions that make it up clearly show that this is about the management oriented towards ensuring sustainability, optimal number, protection of genetic diversity (Art. 117 section 1), or about such management of inanimate nature, which will provide the protection of other resources, creations and components of nature, preservation of particularly valuable inanimate creations, as well as efficient use of space (Art. 121(1) of the Nature Conservation Act). The second motive is related to the use of the environment, i.e. prudent, sustainable and rational use of its resources. It can be argued that the latter idea aptly corresponds to the term "sustainable development". It seems that the latter motive plays a leading role in the Environmental Protection Law. I read it in such a way that, although it explicitly refers to environmental protection in linguistic terms, the "first fiddle" is played by regulations specifying the use of the environment and its resources, while the protective aspect is "somewhat" in the background. In other words, using environmental resources should be rational, sustainable, and organized in such a way as to eliminate, or at least reduce, negative effects on the environment. This convention includes provisions, for example, on the use of the environment (which is obvious but may be subject to certain conditions).

Directions of legal protection of animals

Most often, legal literature on the subject suggests that there are three directions of legal protection of animals.[13] First of all, it is traditionally understood environmental law, including nature protection law, where we deal primarily with conservative protection, especially with species protection, restoration of animal population, limitation on the possibility of obtaining wild animals, generally ensuring continuity of existence of animal species as a legal goal of nature protection. The second (classic) direction of regulation

[12] W. Radecki, *Zarys dziejów prawnej ochrony przyrody i środowiska w Polsce*, Kraków 1990, pp. 35–37.

[13] L. Jastrzębski, *Prawo ochrony środowiska w Polsce*, Warszawa 1990, p. 106ff.; W. Radecki, *Ustawy o ochronie zwierząt. Komentarz*, Warszawa 2015, p. 15.

appears on the edge of the conservative protection, namely preservation of use value. It is also included in nature protection, and its specificity is sometimes expressed by the term "nature protection *sensu largo*". This is primarily the Hunting Act of 1995, the Inland Fisheries Act of 1985 or the Fisheries Act of 2014. What connects them is that they capture a given activity as environmental protection, and, at the same time, regulate the principles of obtaining or using animals for economic, recreational or cultivation purposes. This aptly reflects the legal terms of a sustainable economy, for example, in hunting, fishing, agriculture or forestry. The third direction is best reflected in the Act on the Protection of Animals of 1997[14] and the Act on the Protection of Animals Used for Scientific or Educational Purposes of 2015.[15] These acts create a framework for protecting animals against suffering, taking into account the needs of the animal – in legal terms this is called "humane treatment of animals". The Act on Animal Health Care Facilities of 2003[16] can also be included here. Usually, the scope of interest in environmental law includes the above-mentioned first and second directions of legal protection of animals. If we look at Polish legal literature, especially in the field of environmental law, then the fundamental positions treat these three directions of legal regulation of animal protection quite unanimously, and, thus, include them in the scope of environmental law.

Animals in international and EU environmental law

The doctrine of international environmental law emphasizes the transition from the protection of specific species to the protection of biodiversity. The evolution of international nature protection has progressed from the protection of individual species to the protection of ecosystems and further – the protection of biodiversity. Biodiversity is a broad concept, and covers not only wild species, but also domesticated as well as breeding ones. Discussing the Convention on Biological Diversity, Anna Przyborowska-Klimczak pointed out that its feature is that the protection of species refers not only to wild animals, but also to domesticated or breeding species that were influenced by humans to meet their needs.[17] Therefore, also in the acts of international environmental law we find arguments allowing to combine different directions of animal protection. I take the Convention on Biological Diversity (Rio de Janeiro, 1992) and the Convention on International Trade in Endangered Species of Wild Fauna and Flora (Washington, 1973) as the flagship examples of international environmental law. It would be trivial to mention EU legislation on the environment and its protection, so I will indicate only two less known items. First, a fragment of

[14] Journal of Laws of 2019, item 122.

[15] Journal of Laws of 2019, item 1392.

[16] Journal of Laws of 2017, item 188.

[17] A. Przyborowska-Klimczak, *Ochrona przyrody. Studium prawnomiędzynarodowe*, Lublin 2004, p. 130.

the Community plan adopted in 2006 for the protection and welfare of animals. The European Parliament emphasized that animal protection is an expression of humanity and a challenge for European civilization and culture.

Secondly, the Protocol on the protection and good treatment of animals, which is an annex to the Amsterdam Treaty. Additionally, in foreign literature on environmental law and nature protection, various directions of animal protection are part of the environmental protection bracket. And so in one of the German comments on the Act on nature protection there is a position that the general idea of nature protection is developing in various areas of law, including the Act on the protection of animals providing for ethical protection of animals. Also in the Czech Republic, as I mention after Wojciech Radecki, the issue of protecting animals against bullying is one of the provisions in the field of nature protection.

Animals as the subject of standardization of the Environmental Protection Law and the Nature Conservation Act

In the Environmental Protection Act, animals are mentioned in the following provisions:

- Art. 73 section 2 point 2: Design of communication lines, pipelines and other line objects in a way that ensures the movement of wild animals,
- Art. 81 section 4 point 1: Detailed rules for the protection of animals threatened with extinction are set out in the provisions of the Act on nature protection,
- Art. 81 section 4 point 3: Detailed rules for the protection of wild animals – references to the Fisheries Act, the Nature Conservation Act, Hunting Law Act,
- Art. 81 section 4 point 4: Detailed rules for the protection of farm and domestic animals are set out in the provisions of the Act on the protection of animals.

Section VIII of the Environmental Protection Act, entitled "Animal and plant protection", is entirely devoted to animal protection, which consists of:

- Art. 127 section 1 indicating the directions of animal (and plants) protection:
  1) preserving valuable ecosystems, biodiversity and maintaining natural balance,
  2) creating conditions for the proper development and optimal fulfillment of biological function by the animals in the environment,
  3) preventing or limiting negative impacts on the environment that could adversely affect the resources and condition of animals,
  4) preventing threats to natural complexes and creations of nature,
- Art. 127 section 2, indicating examples of instruments with the help of which animal protection is carried out. The Art. covers, among others, protecting natural valuable areas and objects, establishing species protection, limiting the possibilities of obtaining wild animals, restoring animal populations and ensuring reproduction of wild animals, protecting forests against pollution and fires,

- Art. 128: Protection of animals in training areas, for example, by placing proving grounds in areas of low nature value or marking breeding places for animals,
- Art. 400a section 1 point 28 including financing of environmental protection projects related to the protection and restoration of protected animal species.

In turn, in the Act on Nature Protection, the following provisions apply directly to animals:

- Art. 2 section 2 of the Act on Nature Protection, expressing its meaning and defining the subject, provides for the preservation, sustainable use and renewal of resources, creations and components of nature such as wild animals, animals under species protection, and migratory animals,
- Art. 2 section 2: among the objectives of nature protection one may find ensuring continuity of animal species, including their habitats, by maintaining or restoring them to their proper conservation status,
- Art. 5 point 11: a zoo as a place of keeping and displaying live animals of wild species,
- Art. 5 point 12: a refuge as a place with favorable conditions for the existence of endangered animals or rare species,
- Art. 5 point 13: animal rehabilitation center as a place where treatment and rehabilitation of wild animals that require periodic human care in order to restore them to the natural environment are carried out,
- Art. 5 point 15a: wild animal is a non-breeding animal as well as an animal introduced into the natural environment for the purpose of rebuilding or feeding the population,
- Art. 5 point 18: the habitat of animals is the area of their occurrence during the whole life or at any stage of the animal's development,
- Art. 5 point 20: an animal as part of the natural environment, also created by natural habitats in which animals occur,
- Art. 6 clause 1 point 10: an animal as an object of species protection understood as a form of nature protection,
- Art. 15 section 1 point 3: an animal as a subject of protection in a national park, covered by appropriate prohibitions,
- Art. 47: an animal of a species threatened with extinction in the natural environment as an object of *ex situ* protection in a zoo, aimed at restoring individuals of these species to the natural environment,
- Art. 57 section 1: an animal as an object of protection in the program of protection of endangered species of animals developed by the General Directorate for Environmental Protection,
- Art. 64 section 1: animals of species listed in the Annexes to Council Regulation 338/97 on the protection of species of wild fauna and flora by regulating trade therein in the context of the obligation of their holder to register,
- Art. 117 section 1: an indication of the management directions of wild animals to ensure their sustainability, optimal numbers and protection of genetic diversity,

- Art. 119: prohibition to erect near the sea, lakes and other water reservoirs, rivers and canals of building objects preventing or obstructing wild animals access to water,
- Art. 125: indication of situations justifying the killing of animals (and destruction of animal habitats) not covered by forms of nature protection,
- Art. 126 section 1: legal effects of protection in the context of compensation for damage caused by certain animals (for example, wolf–livestock conflict).

Cited provisions of both laws rather indisputably point to such shaping of the subject of environmental law, where the most important are species of wild animals, threatened with extinction, for various reasons requiring protection. Of course, one can point to the arguments for the acceptance that all animals, not just wild or protected species, fall under the scope of interest in environmental law. For example, the wording of Art. 125 of the Nature Conservation Act indicates a closed catalog of situations where animals can be killed, regardless of whether they are covered by any special protection, including a form of nature protection. The content of Art. 2(1) of the Nature Conservation Act states that the regulation provides for nature conservation within the meaning of the Act. And although it does not refer to animals, or greenery in cities and villages, it is by adding the phrase "within the meaning of the Act" that the legislator enables to assume that beyond this Act, animal protection is included in nature and environmental protection. This makes sense when we agree that nature protection is not covered only by the Nature Conservation Act. When Ewa Symonides writes about historical and religious motives of protection, she refers to all "creatures", not only to wild or covered by some form of special legal protection.[18] In addition, the question may be asked, what is the difference between the legal protection of trees, regardless of whether they occur in the forest, on a private plot or in a national park – indisputably included in environmental law (although regulated by other legal acts) and the legal protection of animals.

The importance of placing animal protection provisions

The question arises as to the consequences of placing all animal protection provisions, especially in the context of appropriate (humanitarian) treatment under environmental law. Is it a purely theoretical, academic dispute, or is it of greater practical significance? In other words, does assigning these provisions to legal regulation of environmental protection strengthen the legal protection of animals? There is a view that such an attribution enables the transfer of what has been worked out or interpreted from environmental law, including nature protection law, to the plane of animal protection in general. In this sense, it is possible to stave off possible interpretation problems and

[18] E. Symonides, *Ochrona przyrody*, Warszawa 2007, p. 67.

to "fill" some places in the animal protection acts.[19] One can raise the argument that everything depends on whether domestic and farm animals are included in the natural environment, biodiversity. If so, they thus fall under the scope of environmental law, because the provisions of environmental law relate to the protection of biodiversity. If not, this will exclude these animals from the legal interest in environmental protection. On the other hand, it is worth considering whether in environmental protection, and especially in the protection of animals, for example, endangered, rare or protected species, it is the same as in the postulate of such treatment of animals to spare them unnecessary suffering. I think that attempts to include all animal protection provisions in the scope of environmental law may raise doubts. Of course, I do not undermine the fact that all animals create biodiversity, and thus, the environment. Some statements of the doctrine go in this direction, as well as there are legal, international and domestic regulations. However, it is not that every animal protection law belongs to environmental law. It seems that some abuse is the attempt to include in the scope of environmental law provisions regulating humanitarian protection of animals, i.e. provisions that make up the third of the previously mentioned directions of animal protection. In environmental law, we do not perceive the animal as a single, individual being, capable of feeling. We treat them more as a representative of a larger whole (e.g. endangered species). In the area of Natura 2000, i.e. the European and national form of nature protection, it is not about the welfare of a particular animal but about ensuring the species and habitat such conditions that they constitute value from the point of view of European natural environment. Of course, instruments of environmental law, in particular bans against forms of nature protection, cover individual animal specimens. However, this is done in the light of the species' behavior and the impact of this species on an even greater whole – biodiversity. In humane or ethical protection of animals, the natural (environmental) value of the animal, the number of its species, or the fact that this species is threatened with extinction is of no importance. What matters is the animal itself, its welfare, the animal's experiences related to the feeling of pain or suffering. In other words, the basic difference lies in other protection motives. In environmental law, animals are treated as one of the elements of the natural environment (biodiversity) and function as part of a wider whole. The provisions on humane animal protection are not about the animal's suitability for the environment, but about its status. The legal regulations that state that an animal is not a thing, and the statements of some lawyers who give the animal something like legal subjectivity and even speak about animal rights seem to go in this direction. Although animals do not fit into the classic definition of the subjects of law, it is not entirely clear what they are from a legal point of view, since they are not things. However, the provisions regarding things apply to them, in matters not regulated by law.

The legal concept of dereification, i.e. the normative statement that an animal is not a thing, has its origin in Jeremy Bentham's treatise *An Introduction to the Principles of*

[19] W. Radecki, *Ustawy*…, pp. 34–35.

Morals and Legislation, published at the end of the 18th century. According to this lawyer and philosopher, the source of mistreatment of animals is treating them as things, which is derived from Roman law. Meanwhile, as Bentham pointed out, animals do suffer. Although its legal effects of dereification are considered to be quite doubtful, Ewa Łętowska rightly pointed out that the sense of the whole operation depended on whether law-enforcement bodies, including courts, would be willing and able to draw practical conclusions from dereification, translating them into improvement of animal welfare.[20] Mirosław Nazar accurately noted that normative dereification does not mean automatic impersonation.[21] Art. 5, ordering animals to be treated in a humane manner, has its legal definition. It seems that the proposals to include all animal protection provisions, including humanitarian protection, in environmental law may be missed for one more reason. Namely, humanitarian protection under the Animal Protection Act is *lex generalis* and applies to all animals. The Animal Protection Act is a general law that applies to matters not covered by specific provisions. Since the Hunting Law allows hunting and specifies its conditions, it cannot be assumed that killing an animal while hunting is contrary to the Animal Protection Act. This is indicated by the provision of Art. 6(1) item 6 of the Animal Protection Act, which prohibits killing animals, but with the exception of hunting. In the same way, the legislator treated fishing in accordance with the (inland) Fisheries and (maritime) Fisheries Acts. If it is allowed to obtain fish – pursuant to the Inland Fisheries Act, there are special provisions derogating from the prohibition of inflicting pain (due to the use of fishing tackle) resulting from the Act on the protection of animals. This is confirmed by the provision of Art. 6(1) point 2 referring to inland fisheries and maritime fisheries regulations.

References

Białocerkiewicz J., *Status prawny zwierząt. Prawa zwierząt czy prawna ochrona zwierząt*, Toruń 2005.

Bodansky D., Brunnee J., Hey E., *The Oxford Handbook of International Environmental Law*, New York 2010.

Environmental Law and Policy. Nature, Law and Society, eds. Z. Plater, R. Abrams, W. Goldfarb, R. Graham, L. Heinzerling, D. Wirth, New York 2004.

Hedemann-Robinson M., *Enforcement of European Union Environmental Law*, London 2007.

Jans J.H., Vedder H.H.B., *European Environmental Law*, Groningen 2008.

Jastrzębski L., *Prawo ochrony środowiska w Polsce*, Warszawa 1990.

[20] E. Łętowska, *Dwa cywilnoprawne aspekty praw zwierząt: dereifikacja i personifikacja*, [in:] *Studia z prawa prywatnego. Księga pamiątkowa ku czci profesor Biruty Lewaszkiewicz-Petrykowskiej*, red. A. Szpunar, Łódź 1997, p. 86.

[21] M. Nazar, *Normatywna dereifikacja zwierząt – aspekty cywilnoprawne*, [in:] *Prawna ochrona zwierząt*, red. M. Mozgawa, Lublin 2002, p. 134.

Kenig-Witkowska M.M., *Prawo środowiska Unii Europejskiej. Zagadnienia systemowe*, Warszawa 2005.

Kramer L., *EU Environmental Law*, London 2012.

Łętowska E., *Dwa cywilnoprawne aspekty praw zwierząt: dereifikacja i personifikacja*, [in:] *Studia z prawa prywatnego. Księga pamiątkowa ku czci profesor Biruty Lewaszkiewicz-Petrykowskiej*, red. A. Szpunar, Łódź 1997.

Nazar M., *Normatywna dereifikacja zwierząt – aspekty cywilnoprawne*, [in:] *Prawna ochrona zwierząt*, red. M. Mozgawa, Lublin 2002.

Prawna ochrona zwierząt, red. M. Mozgawa, Lublin 2002.

Przyborowska-Klimczak A., *Ochrona przyrody. Studium prawnomiędzynarodowe*, Lublin 2004.

Radecki W., *Zarys dziejów prawnej ochrony przyrody i środowiska w Polsce*, Kraków 1990.

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

Sands P., *Principles of International Environmental Law*, Cambridge 2003.

Sommer J., *Efektywność prawa ochrony środowiska i jej uwarunkowania – problemy udatności jego struktury*, Wrocław 2005.

Status zwierzęcia. Zagadnienia filozoficzne i prawne, red. T. Gardocka, A. Gruszczyńska, Toruń 2012.

Symonides E., *Ochrona przyrody*, Warszawa 2007.

Abstract: The animal has become not only the subject of legal regulation, but also a kind of subject of law. It is treated legally as a living being, capable of suffering, requiring humane treatment. Animals are also an element of the natural environment. In the classic approach to environmental protection, the protection of animals was basically limited to wild species, or for example, those subjected to species protection. In the meantime, the question arises whether the scope of environmental law, including nature protection law, covers the protection of animals in general. This is done in the doctrine of international environmental law emphasizing the transition from the protection of specific species to the protection of biodiversity. The question arises whether treating each animal as a fragment of the natural environment contributes to strengthening its legal protection. The paper aims to answer the question of whether this approach is appropriate, and, thus, to confront the subject of environmental law with animals – without limiting them to protected species or those whose acquisition is legally regulated, for example, for economic reasons. It seems that attributing humane animal protection to environmental law is not justified.

Keywords: legal protection of animals; environmental law; dereification; nature conservation; biodiversity

MICHAŁ BOCZEK

University of Social Sciences and Humanities
Faculty of Law
https://orcid.org/0000-0002-2784-5973
michal.boczek@vp.pl

Animals – Like Fish – Don't Have a Say?

Introduction

There will never be legal regulations that in themselves will cause that animal rights will be fully protected, because it is not about the law but about people and their approach to animals. What use is such law to our smaller brothers when man is not going to fulfil it. What law is it if it is not possible to implement or is a law that does not protect the interests of animals. What "increased" animal protection standards can be mentioned if a minimum protection is not met. The treatment of domestic animals, stray animals, farm animals, laboratory animals, animals used for special purposes and free-living animals can be called a paradox, although the façade policy, the façade nature of dealing with the fate of animals seems to be an even greater paradox, expressed only in a commercial attitude to animals. On the one hand, under the so-called dereification, the law prohibits cruel treatment of animals, and on the other – it allows for their slaughter, according to special methods required by religious rites, which is very cruel to the animals being killed. Should the law be this way?

The idea that animal rights and their interests should be respected in the same way as human interests and rights seems to be a pure illusion. According to the *Encyclopaedia Britannica*, animal rights are moral or legal rights attributed to animals, because of the complexity of their lives in the cognitive, emotional, social sphere, the ability to experience physical, emotional pain and pleasure.[1] Hence the conclusion: if an animal has interests and rights like humans do, who and in what form should

[1] *Animal rights*, http://www.britannica.com [access: 23.08.2011].

look after these interests and rights? If an animal, like a human, due to the complexity of life in the cognitive, emotional, social sphere, the ability to experience physical, emotional pain and pleasure has moral or legal rights assigned to it, then what is the difference between these rights and the rights and morals towards people? Then: what does it mean than an animal has a moral or legal right, is animal's moral law illegal, and legal is not moral?

Despite many animal right activities undertaken, despite many differences in the subject of animals, there is a far-reaching consent – even agreement that animals should be treated as persons and incorporated into the human community. They should not be treated as objects, but as entities. They should not be killed thoughtlessly and without restrictions beyond the need for human food. They should not be used in medical experiments, entertainment for the games in a modern edition.

In the era of ever-widening penetration of the universe, dynamic development of cybernetics, digitization, genetics without secrets, it is time to sort out the affairs of those without whom the world cannot exist. Should the animals' right only include the right to live, the right to freedom and the right to suffer? This is not enough. Since a dog can see, hear and feel, reacting to external stimuli, there is no reason not to consider him a being close to man. An animal kills for survival, man – usurper – in the name of God, for imaginary claims, for pleasure, beyond the need to maintain the species.

The leading sceptic of the idea of animal rights, Roger Scruton, says: "(…) animals have no obligations, so they have no rights, they are not able to make a social contract, they are not able to make moral choices".[2] And how does he know that? The fact that there is no thorough research that would confirm the animal's abilities close to human does not exclude that among animals, as among humans, there are no similar solutions. A different position is expressed by the proponents of animal welfare, who believe that there is nothing fundamentally wrong in the mere use of animals as resources, unless it involves unnecessary suffering. Which one can partially agree with, because animals have the same right to the world, because they are on it and the world also belongs to them. The concept of eliminating animals from the world is not a philosophy of nature, but rather a philosophy of shame. Despite the differences between man and animal, animals should be treated subjectively, and not as a dead object. It remains open to what extent they can be killed for food, used scientifically and for entertainment. Are restrictive laws a good example of regulating this matter? A big question mark should be put here, because no law, even the most severe one, will solve this problem, will not force a man to think radically about animals in terms of human dignity and respect.

The world consisting of people is an incomplete world, the world consisting only of animals, without people, is a world closer to nature, and at the same time further from civilisation. How to reconcile the interests of people and animals – it is a challenge for many generations for today and tomorrow, as well as how to stop the deaths of millions

[2] G. Reale, *Historia filozofii starożytnej*, t. 1, Lublin 2000, pp. 70–72.

of hungry people, giving up expenditure on weapons aimed at destruction of people and animals. In the stories entitled *Medallions*, Zofia Nałkowska writes: "(…) it is man who has brought this fate about for man" – and these words say it all. Man is able to create, discover, invent great things, and on the other hand, simply destroy everything. Whoever does not grow up to humanity lives away from it. And yet you need so little, it is enough to give what is divine to God and what is imperial to the emperor.

Man, human being

In the search for examples of human behaviour, one should begin by determining who a man is, what his basic goals are and how he accomplishes them. Quite often, man realizes that he is a human and nothing else. Few people are able to undergo self-evaluation. We say that man is a secret, arrives and disappears just as secretly. But is a man really an unknown and unpredictable being?

Just as suppositions do not give certainty, it cannot be said that man is the only being who has the ability to think in abstract terms and reflect on the complexity of the world and his own being, the only rational being called to creative action. There are situations when a person is not able to even understand himself, there are also those when he notices the need for joint action and goes in that direction, but there are also situations where human action goes in the opposite direction.

What does it mean to be a man? Many things come to mind. To be human means to have reason and… use it.[3] According to Socrates, man is virtuous, just, brave, strives for happiness, but often errs. Antisthenes believed that it is only up to man whether he chooses material or spiritual goods. According to Aristippus, man only strives for pleasure, mainly material goods, and avoids unpleasantness. Plato claimed that man consist of a body with senses and a soul. According to Aristotle, man is mortal, but he has a thinking soul, by nature he has free will, is an individualist and is intelligent.[4] The activity of human reason is dualistic. Man cannot live only by theory, knowledge, spiritual matters, he also needs more mundane matters, such as food, material goods and health. According to Pascal, man is the most amazing object in nature for himself: he cannot understand what a body is and what a spirit is. A similar statement was at the heart of Socrates' philosophy, the Greek thinker remained faithful throughout his life: "know yourself". Heraclitus described the path of his thought by saying: "I was looking for myself". The question "Who is a man?" can only be asked by him. Perhaps in this skill lies the solution to the mystery of man.[5]

[3] M. Drzewiecki, *Kim jest człowiek*, https://opoka.org.pl/biblioteka/F/FA/kimjest_md.html [access: 20.12.2019].

[4] W. Tatarkiewicz, *Historia filozofii*, t. 1, Warszawa 2003, p. 112.

[5] C. Wodziński, *Filozofia jako sztuka myślenia. Zachęta dla licealistów*, Warszawa 1993, p. 76ff.

Animal – subject or object?

According to the PWN dictionary, an animal is every living creature except man. It is also a heterotroph, multicellular organism with eukaryotic cells (genetic material), surrounded by a thin cell membrane, usually having the ability to move independently and actively.[6] In addition to settled sponges, coelenterate and few other invertebrates, animals have the ability to move; they all react to stimuli of the external environment, thanks to specialized receptors. More organized organisms are equipped with sense organs, transmitting stimulations to the appropriate centres of the nervous system. The nervous, cardiovascular and endocrine systems are stimulated with the help of cell organelles, tissues, organs, digestive, respiratory, vascular and genital systems. Are all these elements not a vital system close to human structure? And if they are, why are the animals treated by law as a thing? There is no rational explanation for this question.

In the literature devoted to the philosophy of human existence, a story is known in which Plato, searching for a definition of man, described him as "a two-legged, non-feathered animal". When Diogenes of Sinop heard about this, he came to the Academy with a plucked cock, saying: "Here is Plato's man!".[7] Socrates described cynics as bipedal, non-feathered animals. According to Marcus Tullius Cicero, the order of the world that subordinates living beings to the human species is justified by the uniqueness of the human species.[8] The vast developmental superiority of man, manifesting itself not only in the external shape, has its source in divine perfection. Man surpasses animals with the ability to abstract thinking, and descriptions of behaviour of some animals may indicate that in some sense they also have this ability.[9]

Aristotle believed that every being is perfect in its own kind, because it is created for a specific purpose and possesses appropriate properties for this purpose – nothing is accidental here.[10] He also did not deny that humans came from animals: he defined man as a political or intelligent animal with intellect. The philosopher did not deny animals the soul, the ability to feel and follow their drive. In his opinion, the dependence of people and animals is a *sine qua non* condition for important and needed beings in the society.

The cynics went even further, including Diogenes of Sinop, who recognized animals as being superior to humans, as well as representatives of the Neoplatonic school, such as Porphyry or Tire, who noticed a lot of anatomical, physiological and intellectual similarities between humans and animals. In the book of Ecclesiastes, we find the

[6] *Wielki słownik języka polskiego PWN*, Warszawa 2018; A. Bogusławski, *Logiczne, nielogiczne, pozalogiczne*, „Przegląd Humanistyczny" 1996, Vol. 40(5), pp. 109–142.

[7] Diogenes Laertios, Żywoty i poglądy słynnych filozofów, Warszawa 2011, p. 331.

[8] Z. Danek, *Rozumne zachowania zwierząt w relacji Marka Tulliusza Cycerona*, „Collectanea Philologica" 2017, Vol. 20, pp. 53–62.

[9] Cicero, *De natura deorum*, Stuttgart 1980.

[10] Arystoteles, *Polityka*, [in:] *Dzieła wszystkie*, t. 6, Warszawa 2001, p. 30.

words: "The fate of man is similar to the fate of animals. (…) God wants to experience them so that they know they are only animals themselves. For the fate of the sons of men is the same as the fate of animals; their fate is one; the death of one is the death of the other, and the breath of life is the same. In no way does man surpass animals, because everything is vanity".[11]

Saint Augustine described the animals as "mindless flying, swimming, walking and crawling creatures, since they do not have reason that connects them with us".[12] St. Thomas Aquinas claimed that man, as a perfect and intelligent being, has the right to kill animals for his own purposes, even if this is not a prerequisite for survival. Cruelty to animals is not a sin, and goodness shown to them is not a sign of generosity, because unreasonable beings do not understand the meaning of good and do not share experiences with man. Unreasonable beings can only be loved by man as a good in itself which man wishes for another man. They are therefore treated instrumentally as a means to an end.

The French humanist, Michel de Montaigne, stated that in nature there do not have to be relationships in which one will be the ruler and the other the subject. Man, despite his predispositions, should not feel distinguished from the group of animals, because he does not belong to any higher species. Animal nature often exceeds human nature when it comes to the ability to make friends or control emotions. There are clear similarities between people and animals, animals – just like people – are not free from the jealousy or drives they give in.[13] The theory of René Descartes seems unacceptable. He considered animals as material creations, machines, comparing animals to the clock and making the conclusion: animals do not know suffering, and the sounds the animal makes when it is deprived of life mean nothing more than the ticking of the clock.

Alexander Pope, the English poet, claimed that people deliberately and sickly use their advantage over animals, their power over them is the rule of tyranny. The more the animal is dependent on man's good will, the more he should feel his defeat when it leads to the animal's suffering.[14] Jean-Jacques Rousseau believed that the differences between humans and animals are not as significant as one might think – they often divide one man from another than from an animal. A man living in the wilderness takes over the behaviour of animals, who were equipped by nature with excellent mechanisms for survival, so the superiority of man over other beings is primarily his egoistic invention.[15]

The creator of the categorical imperative, Immanuel Kant, in the idea of consent says: "if certain acts of animals are analogous to human deeds and result from the same

[11] Św. Augustyn, *O Państwie Bożym. Przeciw poganom ksiąg XXII*, Warszawa 1977, p. 170.

[12] F. Kwiatkowski, Filozofia wieczysta w zarysie, t. 1, Kraków 1947, pp. 213–215.

[13] M. Jakubczak, *Filozofia kultury jako filozofia kultur*, [in:] *Co to jest filozofia kultury?*, red. Z. Rosińska, Warszawa 2007, p. 104.

[14] G.L. Francione, *Animals as Persons. Essays on the Abolition of Animal Exploitation*, New York 2008.

[15] J.-J. Rousseau, *Umowa społeczna*, Warszawa 1966, p. 49.

principles, we have obligations to animals, because in this way we cultivate corresponding obligations to people. If a man kills a dog because the latter is no longer able to work, he does not violate his duty to the dog, because the dog is not capable of making moral judgments, but his act is inhuman and destroys the attitude in himself that he should show to the human society". Animals do not belong to a moral and logically thinking community, whose members can only be people with powers to each other.[16]

According to Arthur Schopenhauer, despite the fact than animals have the ability to understand the situations they are in, they do not have a predisposition to cause and effect thinking. Animals' lack of memory differentiates them from people. They do not suffer like people do, do not analyse or ponder the situations they found. The surrounding environment is perceived directly. Schopenhauer's views gave a solid foundation for the development of a modern trend of denying the uniqueness and perfectionism of human beings, and also highlighted the needs to protect animals not for the good of humanity, but for the good of the animals themselves.[17]

Jeremy Bentham argued that feelings accompany all living beings. He said: "The question is not Can they reason? nor, Can they talk? but, Can they suffer?". In a letter to the publisher of "The Morning Chronicle", he also stated that he did not consider it morally wrong to conduct animal experiments if they were to serve the good of humanity. He agreed with the necessity of using animals, but only to the extent necessary and only when the effect of animal suffering was translated into a higher good. If, however, the torments of the animals used in the experiments were to be pointless, they would be synonymous with cruelty.[18]

Charles Darwin claimed that animals lead a social, internal and moral life similar to human, and that between man and higher mammals there is no fundamental and significant intellectual difference: "We have seen that all these powers and feelings that man boasts with, namely love, memory, attention, curiosity, imitation, and reason and other similar things also exist in animals, sometimes even perfected, and sometimes in a state of beginning".[19]

Among the many theories proclaiming the greatness of man, there was also a non-anthropocentric current, and one of its most important ethics was "the ethics of honour for life" of Albert Schweitzer, who formulated the moral imperative of human responsibility for all forms of life. In his theory, man adopts a pathocentric attitude towards nature, he is not a manager, but a guardian of all living things. In his words, "I am life that wants to live, among life that wants to live", he included not only the idea of the equality of existence of man and animal, but also confirmation that all living beings feel the same way, suffer and are aware of their existence. He perceived man as one of the beings of

[16] O. Höffe, *Immanuel Kant*, Warszawa 2003.

[17] A. Skórski, *O prawie zwierząt*, Lwów 1895.

[18] J. Bentham, *Wprowadzenie do zasad moralności i prawodawstwa*, Warszawa 1958, p. 418.

[19] A. Marek-Bieniasz, *Kategoria odpowiedzialności w myśli Karola Darwina. O pochodzeniu człowieka*, Warszawa 2009, pp. 161–162.

nature that can affect its further fate – he can either destroy it, or take responsibility for it and protect it. Schweitzer considered this direction as right and the only one that gives meaning to human existence. He claimed that listening to himself and the world allows him to discover the responsibility that lies dormant in every human being. According to the philosopher, there is no division between higher and lower life, because each has the same value. In this regard, Schweitzer adhered to the Darwinian principle of minimizing the suffering of all beings, mainly with animals in mind: "If I harm a life, I must be clearly aware of whether this is really necessary. I cannot go beyond what is necessary, even in seemingly trivial matters". He condemned every manifestation of inflicting unnecessary pain and suffering, destroying the fundamental value that is life.[20]

Henry Salt, the creator of *Animals' Rights: Considered in Relation to Social Progress*, wondered about the existence of rights: do people have rights or are they only endowed with a sense of justice that sets the line between consent and resistance? Salt assumed that if people have rights, also animals can have them. He was close to Herbert Spencer's theory that everyone has the free will to do what they want to do as long as they do not violate the freedom of others. Real humanity connects all living beings with bonds of brotherhood – this relationship was also to apply to people and animals.[21]

Donald VanDeVeer pointed to the relationship between the perception of pain and the rights of people and animals. For if there is a person's ability to feel pain, it automatically raises his interests in not suffering. Captivity and experiments on animals harm their interest, which is not feeling the pain, which in effect causes the violation of animal rights by people.[22]

In Tom Regan's study *The Case for Animal Rights* it was found that the primary shared value possessed by every human being and by some animals is the so-called subjectivity of life, which consists of beliefs and preferences, desires, memory, ideas about the future, emotional life along with a sense of pleasure or pain, ideas about one's own well-being, and the ability to act to achieve one's goals. Therefore, he claims that almost every animal has a personality and its own original character, and also cares for its own fate and wants to live – therefore, each of these creatures should be subject to moral laws. Not only people, but also some animals can be right-holders, because they create special bonds and relationships with each other. As contacts with animals tend to be different, so can relationships between people be different, which in no way indicates the dominance of man over the animal. Many animals also share

[20] A. Marek-Bieniasz, *Kategoria odpowiedzialności w myśli Alberta Schweitzera*, „Problemy Ekorozwoju" 2006, Vol. 1(2), p. 115.

[21] L. Gruen, *The Moral Status of Animals*, [in:] *Stanford Encyclopaedia of Philosophy*, https://plato.stanford.edu/entries/moral-animal/ [access: 23.08.2017].

[22] A. Ganowicz-Bączyk, *Narodziny i rozwój etyki środowiskowej*, „Studia Ecologiae et Bioethicae" 2016, Vol. 13(4), p. 68.

certain types of behaviour with people, such as fear, joy, the ability to make simple decisions and make choices.[23]

Gary L. Francione argues with the views of Bentham, who did not believe in the developed consciousness of animals – he only recognized that they live in the present moment, so death is not a problem for them, unless they experience suffering before it. Francione argued here that the animals have sensitivity and full capacity to receive stimuli from the environment, which are the will and need for life. Hence, animals with such a highly developed instinct, focused only on preserving life, cannot be a thing.[24]

Law – illusion or reality

Ius est ars boni et aequi ("Law is the art of what is good and right") – this is one of the main sentences of Roman law, which finds its reference in many European legal orders and more. The law is to safeguard justice, form a guarantee – but for whom? Only for man? And other living creatures of planet Earth? Could what was good and right only apply to the chosen?

The animal protection in the Polish legal order results from the fact that the animal is a living being, capable of suffering. Man owes the animal respect, protection and care. The Act on the Protection of Animals regulates liability for the bad treatment of farm and domestic animals, but does not regulate the issue of animals used in entertainment and those on which experiments and research are conducted.[25]

Article 1.1 of the Act on the Protection of Animals provides that an animal, as a living being capable of suffering, is not a thing. Man owes him respect, protection and care. Then, Art. 1.2 states that in matters not covered by the Act, the provisions on things shall apply to animals accordingly. What matters could these be, if the act is devoted to regulating the legal status of animals, i.e. beings capable of suffering? It is not known how to treat this inconsistency – or a mistake, or maybe the deliberate action of art for art's sake?

The responsible legislator should specify clearly: either the animals is a thing or it is not. There should be no such inconsistencies in the respectable legal order. In a democratic state of law, where there is a letter and a spirit of law, such constructions do not take place, otherwise it is neither a democratic state nor a legal state.

The rules that protect animals in Europe depend largely on the national authorities. In Austria, the ban on raising livestock for fur was introduced almost 20 years ago; in turn, among others, in Italy, Spain or Portugal, these restrictions do not apply.[26] When

[23] T. Regan, *The Case for Animal Rights*, Los Angeles 2004, pp. 17–21.

[24] G.L. Francione, *op. cit.*, p. 146.

[25] The Act on the Protection of Animals of 21 August 1997 (Journal of Laws of 1997, No. 111, item 724).

[26] Article 13. Principle of protection of animal welfare (Journal of Laws of 2004.90.864/2) – Treaty on the Functioning of the European Union – consolidated text including the changes introduced by the Treaty of Lisbon.

formulating and implementing the Union's agricultural, fishery and transport policy and its policies relating to the internal market, research and technological development and space, the Union and the Member States shall take full account of animal welfare requirements as beings capable of feelings, while complying with legal and administrative provisions and customs of the Member States, in particular regarding religious customs, cultural traditions and regional heritage. When establishing the common agricultural policy, the European Union and the Member States should take into account the idea of dereification. This concept was introduced to Polish law in 1997. Pursuant to Art. 1 para. 1 of the Act on the Protection of Animals, modelled on Austrian and German law, it changes the reasoning of the animal's legal status.

According to Ewa Łętowska, the criticism of animal empowerment is primarily due to the historical developments in the field of ecology, which is contrary to the current system of values, today it seems inappropriate to use the term "thing" for animals. As emphasized by Łętowska, this care for appropriateness in the use of legal nomenclature in the context of animals results from respect for animals as living beings, capable of suffering, as well as care for the precision of the language, its suitability for the described reality, and maybe even caution.[27]

Animal welfare has been recognized in the European Union, resulting in two strategies for the protection and welfare of animals – for the period 2006–2010 and 2012–2015, but is that enough? Both strategies were adopted in the form of a soft law act – a resolution of the European Parliament. This demonstrates that the issue of animal welfare is important for European society, and the reflections on this topic are the manifestation of constant search of a solution that satisfies both humans and animals.[28] Legal regulations on the transport of animals, the directive of animals used for scientific purposes are the confirmation.[29]

The quality of animal welfare depends not only on the quantity and quality of legal regulations, but also on the general will to improve the situation of animals and how the issues of existential protection can be reconciled with other human needs. Today it is difficult to discuss whether humanity can do without meat-based food, but it is even more difficult to discuss human needs beyond measure – using animals for entertainment. No animal will answer these questions, it is man that has to find the answer.

---

[27] E. Łętowska, *Dwa cywilnoprawne aspekty prawa zwierząt: dereifikacja i personifikacja*, [in:] *Studia z prawa prywatnego. Księga pamiątkowa ku czci Profesor Biruty Lewaszkiewicz-Petrykowskiej*, red. A. Szpunar et al., Łódź 1997, pp. 77–86.

[28] Strategy for the protection and welfare of animals. European Parliament resolution of 4 July 2012 on the strategy of the European Union in the field of animal protection and welfare for 2012–2015 (2012/2043(INI)), P7_TA(2012)0290.

[29] Directive 2010/63/EU of the European Parliament and of the Council of 22 September 2010 on the protection of animals used for scientific purposes (Journal of Laws of the EU L of 2010, No. 276, item 33).

Conclusions

A world without values is a world of nothingness, a world of nothingness is a world without future. What would the world be without people and what would the world be without animals? Everyone has to answer these questions alone. The national, EU and international standards for the legal protection of animals, without which it is impossible to regulate the legal status of animal welfare, must obtain the status of a universal principle. EU and national regulations regarding animal welfare are constantly evolving, although they are still too slow. The expansion of humanitarian ideology for animal protection, ecology ethics, awareness of local, national and European communities will not help much without proper human involvement.

One could venture to say that the European legislator has recognized the need to ensure an appropriate level of animal welfare, as evidenced by the setting of minimum standards in a number of legal acts. Nevertheless, the foundation for animal welfare in European Union law seems to be the dereification of animals rule, their "de-objectification". In the 21st century, it is inappropriate for humanity to treat animals as a thing. The consequence would be the recognition of the special legal status of animals in the European Union and the necessity to implement the principle of their welfare.

Legal protection of animals is one of the elements of the contractual whole, in which not the law itself but the upbringing, awareness and sense of value play a key role, including in the field of animal protection. A legal obligation alone is not enough, social recognition, social determination and widespread conviction of a real and not virtual need for animal protection are needed. You can create great laws, precise regulations, but can you change your human mentality and human habits overnight? According to the author, it is, next to the ritual slaughter, the main barrier of incapability and reluctance to empower animals. Until a man grants the animal's right to have a say, animals – like fish – will not have their own voice. Just look into the eyes of any animal, which eyes say it all. Sigmund Freud said you cheat on speech but you do not cheat on body. The animal's view as body language leaves no doubt. At the same time, it all depends on how we humans receive this animal signal and what are we going to do with it.

References

Animal rights, http://www.britannica.com [access: 23.08.2011].
Arystoteles, *Polityka*, [in:] *Dzieła wszystkie*, t. 6, Warszawa 2001.
Augustyn Św., *O Państwie Bożym. Przeciw poganom ksiąg XXII*, Warszawa 1977.
Bentham J., *Wprowadzenie do zasad moralności i prawodawstwa*, Warszawa 1958.
Bogusławski A., *Logiczne, nielogiczne, pozalogiczne*, „Przegląd Humanistyczny" 1996, Vol. 40(5).
Cicero, *De natura deorum*, Stuttgart 1980.

Danek Z., *Rozumne zachowania zwierząt w relacji Marka Tulliusza Cycerona*, „Collectanea Philologica" 2017, Vol. 20.
Diogenes Laertios, *Żywoty i poglądy słynnych filozofów*, Warszawa 2011.
Drzewiecki M., *Kim jest człowiek?*, https://opoka.org.pl/biblioteka/F/FA/kimjest_md.html [access: 20.12.2019].
Francione G.L., *Animals as Persons: Essays on the Abolition of Animal Exploitation*, New York 2008.
Ganowicz-Bączyk A., *Narodziny i rozwój etyki środowiskowej*, „Studia Ecologiae et Bioethicae" 2016, Vol. 13(4).
Gruen L., *The Moral Status of Animals*, [in:] *Stanford Encyclopedia of Philosophy*, https://plato.stanford.edu/entries/moral-animal/ [access: 23.08.2017].
Höffe O., *Immanuel Kant*, Warszawa 2003.
Jakubczak M., *Filozofia kultury jako filozofia kultur*, [in:] *Co to jest filozofia kultury?*, red. Z. Rosińska, Warszawa 2007.
Kwiatkowski F., *Filozofia wieczysta w zarysie*, t. 1, Kraków 1947.
Łętowska E., *Dwa cywilnoprawne aspekty praw zwierząt: dereifikacja i personifikacja*, [in:] *Studia z prawa prywatnego. Księga pamiątkowa ku czci Profesor Biruty Lewaszkiewicz-Petrykowskiej*, red. A. Szpunar et al., Łódź 1997.
Marek-Bieniasz A., *Kategoria odpowiedzialności w myśli Alberta Schweitzera*, „Problemy Ekorozwoju" 2006, Vol. 1(2).
Marek-Bieniasz A., *Kategoria odpowiedzialności w myśli Karola Darwina. O pochodzeniu człowieka*, Warszawa 2009.
Reale G., *Historia filozofii starożytnej*, t. 1, Lublin 2000.
Regan T., *The Case for Animal Rights*, Los Angeles 2004.
Rousseau J.-J., *Umowa społeczna*, Warszawa 1966.
Skórski A., *O prawie zwierząt*, Lwów 1895.
Tatarkiewicz W., *Historia filozofii*, t. 1, Warszawa 2003.
Wielki słownik języka polskiego PWN, Warszawa 2018.
Wodziński C., *Filozofia jako sztuka myślenia. Zachęta dla licealistów*, Warszawa 1993.

Abstract: When we talk about the legal protection of animals, we need to keep in mind who the human being is and who/what the animal is. Is the animal a thing or not? If not, then who is the animal – a subject, object? You can try to create the perfect law, but can you change a man? Human approach to smaller brothers, human habits, human behaviour towards animals… There is talk of respect for animals, but not much is done in this direction. In addition to the promises of subsequent groups of politicians, the problem of animals has been and will be marginalized, because animals – like fish – don't have a say. Man has pushed animals into the background of his interests. Unfortunately, man-made reality is life without animals and without nature. In turn, the legal protection of animals is one of the elements of the contractual whole, in which the main role is played not by law itself, but by upbringing, awareness and sense of value, also including the value of animals. The legal obligation alone is not enough, social recognition, social determination and conviction about a real and not virtual need to protect animals are needed.

Discussing individual legal regulations and comments, court judgments and glosses on the legal protection of animals is invaluable, as is the attempt to approximate the spirit of the law associated with

human animal protection activities. What we say, what language we use and how we evaluate human behaviour about and in the interest of animals translates into human attitudes. The message of the thoughts undertaken by the author is directed at drawing attention to an element no less important than law – social activity or its lack in the relations: animal – human – law. All considerations were embedded within the theoretical analysis of the legal, sociological and cultural discourse, which intend to popularize the legal awareness of animal protection.

Keywords: animal; human; law

AGNIESZKA KORZENIOWSKA-POLAK

University of Social Sciences, Lodz
Institute of Management and Law
https://orcid.org/0000-0002-7151-002X
adkorzeniowska@interia.pl

Indefinite Phrases vs Real Animal Protection in Poland

Law making is an attempt to reconcile two contradictions: preserving conceptual precision and semantic openness of concepts in order to maintain the freedom of their interpretation. In order to meet this challenge, the legislator deliberately creates certain legal constructs which broaden the discretionary power of the law-applying authorities. They empower these entities to reach outside the legal system, to resort to non-legal criteria in the process of applying the law. Examples of such constructions include indefinite phrases creating legal concepts (e.g. necessity, necessary defence), quantifying phrases (e.g. important reasons, gross violation of the law, cruel methods, gross negligence, extreme cruelty) and general clauses which require recourse to non-legal criteria for their content to be revealed (social interest, public interest, the good of the family, established custom, social justice, the good of the child, principles of social conduct).[1]

There is a specific link between an indefinite concept and a general clause. Two different meanings are assigned to the notion of a general clause in the doctrine.[2] The volume of this study does not allow to elaborate on this issue. It can only be indicated that every general clause is an indefinite phrase, but not every vague phrase can be considered a general clause. The Constitutional Tribunal stipulated that vagueness of a phrase used in a legal provision does not determine whether or not we are deal-

[1] A. Korybski, L. Leszczyński, A. Pieniążek, *Wstęp do prawoznawstwa*, Lublin 2007, p. 163.

[2] Cf. A. Wolter, J. Ignatowicz, K. Stefaniuk, *Prawo cywilne. Zarys części ogólnej*, Warszawa 1996, p. 73; *Mała encyklopedia prawa*, red. Z. Rybicki, Warszawa 1980, p. 228.

ing with a general clause.[3] According to Leszek Leszczyński, typical references are intentional, therefore, their indefiniteness should result from the adopted legislative policy and not only from the characteristics of the legal language. The condition for considering that a vague phrase is at the same time a general clause is the intention of the legislator, who, by creating phrases with indefinite meaning, deliberately authorises the law-applying entity to use non-legal criteria to determine their content.[4] However, Sławomira Wronkowska and Maciej Zieliński believe that indefinite phrases are functional general clauses, as opposed to classical general clauses referring to non-legal principles with axiological justification in general assessments.[5]

The notion of "indefiniteness" is sometimes considered synonymous with the notion of "vagueness" of linguistic phrases. The Constitutional Tribunal uses these terms alternatively in some of its rulings. In the doctrine, however, it is noted that "indefiniteness", as a property of a phrase, refers to its meaning, while "vagueness" – to its scope.[6] Zieliński defines these terms as follows: Indefiniteness means that "the dictionary-defined content of a given phrase is incomplete, but it is not a set of constitutive features, or it is a set of constitutive features, but one of the features of this set is non-diagnostic". In case of vagueness, on the other hand, "despite getting to know the features of given objects, it is not possible to decide whether or not each of them is a designatum of a given name, so whether or not it is included in its current scope".[7] It can, therefore, be assumed that indefiniteness – when referring to the content of a phrase – is primarily a linguistic property, while vagueness, focusing on the scope of the phrase, is logical.

Ambiguity of phrases is not desirable in a legal text. However, the Constitutional Tribunal stipulated that the ban on formulating vague and imprecise provisions does not mean that the legislator may not use indefinite phrases.[8] Inclusion of indefinite phrases in a legal act is most often intended by the legislator as necessary to ensure an adequate degree of flexibility of legal regulation. The legislator is not in a position to foresee and specify in the regulations all possible situations that may occur in a time horizon that in most cases is unknown at the time when a general act is adopted. Indefinite phrases help to avoid "over-legalisation" and make the whole legal system more dynamic.[9] Decreasing the necessity to use a case-based approach is the basic

---

3 S. Tracz, *Rozumienie sprawiedliwości w orzecznictwie Trybunału Konstytucyjnego*, Katowice 2003, p. 18.

4 L. Leszczyński, *Tworzenie generalnych klauzul odsyłających*, Lublin 2000, p. 18.

5 S. Wronkowska, M. Zieliński, *Komentarz do zasad techniki prawodawczej z dnia 20 czerwca 2002 r.*, Warszawa 2004, p. 296.

6 Z. Radwański, M. Zieliński, *Uwagi de lege ferenda o klauzulach generalnych w prawie prywatnym*, „Biuletyn Legislacyjny" 2002, Nr 2, p. 12.

7 M. Zieliński, *Wykładnia prawa. Zasady – reguły – wskazówki*, Warszawa 2002, p. 163.

8 Judgment of the Constitutional Tribunal of 2 October 2006, SK 34/06.

9 Judgment of the Constitutional Tribunal of 7 December 1999, K 6/99.

role that is assigned to indefinite phrases. The Constitutional Tribunal emphasises that the use of indefinite phrases is a traditional legislative technique,[10] commonly used both in Polish and in other legal systems. "There is no properly functioning legal and social system that would eliminate the existence of indefinite phrases. Such an inflexible system would have to lead to unfair rulings".[11]

By using indefinite concepts in the law-making process, the law is opened to values and non-legal assessments that previously created only its surroundings. This happens notwithstanding the intention of the legislator. These non-legal values and assessments are beginning to play an important role in the law applying process. In addition, indefinite phrases "shift the obligation to specify the norm to the law application stage and therefore grant some liberty to the courts (or administrative authorities – for example, in case of discretionary administrative decisions)".[12]

It should be remembered, however, that in every legal system indefinite phrases included in legal acts may give rise to the phenomena that are evaluated negatively. Undoubtedly, vague, indefinite phrases and concepts are the basic cause of doubts in interpretation. They may lead to the risk that the law-applying entity issues arbitrary rulings. "The practice of applying these provisions may be relatively easily distorted as a result of invoking such phrases without an attempt to fill them with specific content resulting from the circumstances of a given case and without a reliable justification of the decision communicated to the addressees".[13] It is necessary to respect and control the principle that discretionary power of a law-applying entity does not mean unrestricted liberty. Its boundaries are described by the doctrine of "vague bands".[14]

In the literature and jurisprudence – primarily that by the Constitutional Tribunal – the prerequisites for the proper use of indefinite phrases are specified. Firstly, it is reserved that they should be included in a legal text only if they are the most advantageous means to ensure legal flexibility. In addition, the contextual name should be specified as precisely as possible. Wherever possible, the phrase should be replaced by one that clarifies the boundaries of the "vague band". Furthermore, it is reserved that indefinite phrases which require several criteria to be taken into account at the same time should be avoided.[15] The Constitutional Tribunal also stresses the great importance of procedural guarantees defined for law-applying entities' filling indefinite concepts with real content.

---

[10] Judgment of the Constitutional Tribunal of 8 May 2006, P 18/05.

[11] Judgment of the Constitutional Tribunal of 9 October 2007, SK 70/06. See also judgment of the Constitutional Tribunal of 22 November 2005, SK 8/05; ruling of the Constitutional Tribunal of 27 April 2004, P 16/03; judgments of the Constitutional Tribunal of 19 June 1992, U 6/92, of 1 March 1994, U 7/93, of 26 April 1995, K 11/94.

[12] Judgment of the Constitutional Tribunal of 9 October 2007, SK 70/06.

[13] Judgment of the Constitutional Tribunal of 12 September 2005, SK 13/05.

[14] M. Zieliński, *op. cit.*, p. 171.

[15] S. Wronkowska, M. Zieliński, *op. cit.*, p. 295.

In the opinion of the Constitutional Tribunal, the status of an entity using indefinite phrases is of crucial importance. Therefore, "independent courts should be called upon to determine *in casu* the designata of general clauses and indefinite phrases".[16] Where an act of applying law requires a court to exercise the discretionary power conferred on it, it is necessary "to indicate the specific circumstances which, in the opinion of the law-applying entity, determine the existence of circumstances justifying the use of an indefinite phrase in a given case".[17] In the opinion of the Constitutional Tribunal, an entity applying the law should clearly indicate any circumstances that justify the use of an indefinite phrase, and at the same time explain in detail the understanding of a given phrase in a specific case. Judgments given on the basis of provisions containing indefinite concepts should be predictable and verifiable.[18] The use of indefinite phrases is subject to assessment in the course of instances and carried out by way of administrative court review. The legislator introducing indefinite phrases into the legal regulation should also specify clear – from the point of view of potential recipients of rulings to be issued – mechanisms of review (including extrajudicial review) of the use of the discretionary power granted to the courts.[19] However, verification of the correct use of indefinite phrases can only take place through the review of the justification of the ruling based on the provisions containing such phrases. It is in this justification, which should be particularly clear and understandable, that the entity applying the law is obliged to state its reasoning.[20]

In the opinion of the Constitutional Tribunal, the existence of indefinite phrases in legal texts provides the entities applying the law with some freedom of judgement.[21] In case of indefinite concepts contained in animal protection legislation, it is assessed that this freedom is too great and in practice leads to the lack of protection.

Legislation on animals contains a great deal of vague concepts. This applies both to the Universal Declaration of Animal Rights of 21 September 1977,[22] which is considered as a constitution paving the way for further legal solutions, and to legal acts adopted in Poland. The notions used in the first of the acts referred to above include for example: "ill-treated", "cruel", "distress", "degrading", "necessary nourishment", "wanton". This declaration is not conclusive even to the same extent as the provisions of international conventions. However, it had a major impact on the legal solutions introduced into the legal systems of many countries, including Poland. In the legal acts regulating the protection of animals in our country, there is no doubt that some phrases come from the Universal Declaration of Animal Rights. The need to use

[16] Judgment of the Constitutional Tribunal of 8 May 2006, P 18/05.
[17] Judgment of the Constitutional Tribunal of 12 September 2005, SK 13/05.
[18] Judgment of the Constitutional Tribunal of 22 November 2005, SK 8/05.
[19] Judgment of the Constitutional Tribunal of 16 January 2006, SK 30/05.
[20] Judgment of the Constitutional Tribunal of 2 October 2006, SK 34/06.
[21] Judgment of the Constitutional Tribunal of 9 October 2007, SK 70/06.
[22] Adopted in London and presented to UNESCO along with signatures of 2.5 million people.

vague concepts in legal acts concerning animals arises, *inter alia*, from the fact that the general subject of legal protection connects all categories of animals, regardless of which group they belong to and where they live, whether on land or in water, in the soil or in the air. It was therefore necessary to provide for as much flexibility as possible. In the process of applying the law, this flexibility allows to protect animals that differ in species (bears and bees), habitat (air, water, soil), relation with humans (domestic animals and wild animals), and the way they are used by humans (laboratory animals, farm animals).

Legal protection of animals in Poland has a long history. In the literature it is noted that already in the 11th century, King Bolesław Chrobry ordered the protection of the beaver,[23] establishing a special beaver office for this purpose. This regulation inspired other rulers. Władysław Jagiełło ordered the protection of wild horses, aurochs, elk and deer in the Warta Statute granted on 28 October 1423 at the General Sejm in Warta. On 5 October 1868, the Diet of Galicia passed in Lwów a law "on the ban on catching, eradicating and selling alpine animals indigenous to the Tatra Mountains, marmots and chamois". It is believed to have been the first parliamentary law on animal species protection in the world. Numerous regulations from the beginning of the 20th century concerned animal transport conditions, disease control, veterinary inspection, breeding, reproduction, warfare as well as trade taxes and customs. On 22 March 1928, the President of the Republic of Poland issued a regulation on the protection of animals, which concerned all their species.[24] After World War II, the Nature Conservation Act[25] was passed on 7 April 1949, and by the amendment of 10 February 1976[26] environmental protection was raised to the status of a fundamental issue. At that time, the provisions of Art. 12(2) and Art. 71 were introduced into the Constitution of the Polish People's Republic,[27] reading as follows: "The Polish People's Republic ensures protection and sensible management of the natural environment, which is a national good", and "[t]he citizens of the Polish People's Republic have the right to benefit from the values of the natural environment and have the obligation to protect it".

Nowadays, the issues of legal protection of animals are included in numerous legal acts of varying significance. The major ones include the Animal Protection Act of 21 August 1997,[28] the Act of 11 March 2004 on the Protection of Animals' Health

[23] B. Kurzępa, *Ochrona zwierząt. Przepisy, piśmiennictwo*, Bielsko-Biała 1999, pp. 163–164; M. Jarosz, *Ochrona zwierząt w Polsce na przestrzeni dziejów*, „Wiadomości Zootechniczne" 2016, Vol. 54(3), pp. 111–113; B. Klimek, *Przemoc wobec zwierząt i prawna ochrona zwierząt w Polsce*, „Życie Weterynaryjne" 2018, Vol. 3(9), p. 609.

[24] Journal of Laws No. 36, item 332.

[25] Journal of Laws No. 25, item 180.

[26] The Act Amending the Constitution of the Polish People's Republic, Journal of Laws No. 5, item 29.

[27] The Act of 22 July 1952, Journal of Laws No. 33, item 232.

[28] Consolidated text, Journal of Laws of 2018, item 122, as amended (hereinafter referred to as APA).

and the Act of 15 January 2015 on Combating Infectious Diseases of Animals,[29] and the Act on the Protection of Animals Used for Scientific or Educational Purposes.[30]

Each of the acts referred to above contains definitions of terms used by the legislator, regulating in detail the scope and methods of animal protection. The introduction of a legal definition of a concept is not an easy task. The result that the legislator strives to attain in this way is the achievement of normative certainty. Such a definition should clarify the meaning of the term, with a view to applying it as defined by the legislator. The concept defined by the legislator should no longer give rise to interpretation doubts in practice but should fully reflect Ronald Dworkin's assertion that for each situation, or in any case for most of them, there is only one correct solution and not only different solutions.[31] If the normative shape of a given concept obtained at the stage of application in comparison with that introduced by the legislator raises doubts as to the scope of definition, then the question about the sense of introducing such a means of legislative technique becomes justified.

The rudiments of phrasing a legal definition of a given concept are specified in par. 146 sec. 1 item 1–4 of the Principles of Legislative Technique.[32] This provision requires that vagueness shall be reduced when a legal definition is created (phrased). At the same time, it should be worded in as flexible a way as possible, but the degree of flexibility should not lead to an increase in the vague area in relation to the starting point.

Already in the first definition contained in Art. 4 APA, an indefinite phrase "animal's needs" was used to explain the statutory understanding of the term "humane treatment of animals" (item 2). On the other hand, the notion of the "necessity to put to death immediately" has been defined in Art. 4(3) APA by using as many as 4 indefinite phrases: "objective circumstances", "moral duty of man", "as far as possible", "animal's suffering". When defining the concept of "procedure" (Art. 2(1)(6) APAUSEP, the legislator used the terms "pain", "suffering", "distress or lasting injury". Explaining the terms used in the Act on the Protection of Animals' Health and the Act on Combating Infectious Diseases of Animals, such indefinite phrases as "natural environment" (Art. 2(1a)), "ornamental purposes" (item 3b), "aquaculture animals" (item 3c), "free spaces" (item 8), "biological material" (item 9) were used. In Art. 6(1) APA, the legislator prohibits the killing of animals, specifying, however, one of the exceptions by the indefinite phrase "with the exception of the removal of individuals posing a direct threat to humans or other animals" (item 5). Animal abuse is defined, *inter alia*, as beating the animals with "hard and sharp objects or objects equipped

[29] Consolidated text, Journal of Laws of 2018, item 1967 (hereinafter referred to as ACIDA).

[30] Consolidated text, Journal of Laws of 2019, item 1392, as amended (hereinafter referred to as APAUSEP).

[31] R. Dworkin, *Biorąc prawa poważnie*, Warszawa 1998, p. 155ff.

[32] Ordinance of the Prime Minister of 20 June 2002 on the "Principles of legislative technique", Journal of Laws of 2016, item 283.

with devices designed to cause special pain" (Art. 6(2)(4) APA). The legislator also uses such indefinite phrases as "unnecessary suffering", "slovenliness", "cruel methods".

Legal definitions contained respectively in Art. 4 APA, Art. 2 APAH and Art. 2 APAUSEP include a significant number of quantifying phrases which broaden the vague area. For example, in Art. 4 APA, the following phrases are used: "severe pain", "excessive energy input", "gross deviation", "excessive tightness of space", "drastic forms and methods", "acting in an elaborate or prolonged manner". The legislator also indicates – as a premise for certain actions of law-applying entities – a situation described as "gross negligence".

As pointed out above, the main advantage of including indefinite phrases and vague concepts in legal acts is that they provide the necessary flexibility. However, what is considered to be an advantage can also, in some cases, be interpreted as a disadvantage. A large area of freedom of interpretation may give rise to unsatisfactory practice on the part of entities applying broadly understood provisions on animal protection. It is particularly dangerous to cross the boundary of free interpretation and move on to arbitrary interpretation.

The literature often expresses a negative assessment of the activities of law enforcement bodies and courts, but also public administration authorities legally obliged to supervise the implementation of acts on animal rights. Attention is drawn to the "surprising gap between the assessment of the situation made by the police and by the prosecutor's office".[33] There has been a steady increase in the number of criminal proceedings initiated in cases involving the abuse, suffering and cruel killing of animals. In 1999, there were 751 such proceedings, in 2014 – 2,214, and in 2017 – 2,767. However, in these proceedings in 1999, the detection rate was 81%, in 2014 – only 58% and in 2017 – 59.7%.[34] The perpetrators were identified in ca. 70% of cases. However, the data of the prosecutor's office show that in the years 2012–2014, only in fewer than one in five cases a bill of indictment against perpetrators was filed (19.2%), many proceedings were discontinued (42.6%), including, regrettably, due to insignificant noxiousness of the act, and in as many as 31.5% of cases the initiation of proceedings was refused altogether.[35] Courts adjudicating on cases concerning crimes specified in Art. 35 APA are reproached for protracted proceedings, a small number of convictions, lenient treatment of perpetrators, frequent suspending the execution of sentences (86%) and invoking the criterion of "insignificant social noxiousness of the act".

The legislator's own performance in relation to animal welfare issues has also received a negative assessment in literature. Andrzej Elżanowski draws attention to "the possibility of unfair manipulation of the legislative process, which the Ministry

[33] K. Sławik, *Traktowanie i ochrona prawna zwierząt w Polsce*, „Ius Novum" 2011, Nr 4, p. 19.

[34] Ustawa o ochronie zwierząt, http://statystyka.policja.pl/st/wybrane-statystyki/wybrane-ustawy-szczegol/ustawa-o-ochroniezwier/50889,Ustawa-o-ochronie-zwierzat.html [access: 13.10.2019].

[35] For the summary of the statistical data for various periods, see: *Jak Polacy znęcają się nad zwierzętami. Raport z monitoringu sądów, prokuratur i policji*, Kraków–Wrocław 2016, pp. 30–47.

of Agriculture uses to worsen the fate of millions of animals".[36] It is a well-known fact that the failure to define certain concepts or the use of phrases which allow for an excessively free interpretation of the rules in situations which should be regulated unequivocally and in a binding manner negatively affects the application of the rules in force.

Conclusions

One of the contemporary problems of civilization is the attitude of people to animals. Attention is drawn not only to the cruel acts of individuals but also to the far-reaching acceptance in society of the abuse and cruel killing of animals based on stereotypes and the conviction that they can be harmed with impunity.[37] However, one should agree with the statement that humane protection of animals is a matter of maintaining legal order and observing a well-understood public morality, and not a side aspect of food production.[38] The source of the moral imperative governing the relationship between man and animal lies not in the animal, but in man. It is the latter, as the "moral subject and the foundation of the moral order",[39] who bears responsibility for the implementation of legal protection of animals in Poland.

It is rightly pointed out that the current disregard for animal life and welfare would not be possible with sufficient social interest and pressure, without which no law would be enforced. According to Elżanowski, low social prominence of this issue is the most fundamental problem of animal protection in general.[40] In the opinion of the author, more important than legal regulations is to popularize the social order to treat animals in a humane way and to make it commonly known that animals are beings capable of feeling. Indefinite phrases contained in legal acts regulating animal-related issues should be used in accordance with the intention of the legislator, i.e. in a manner allowing for protection of all animals and in as many cases as possible. The use of indefinite phrases, vague concepts, general clauses and quantifying phrases to justify the inaction of those who are to uphold animal rights is contrary to the legislator's will.

[36] A. Elżanowski, *Polskie problemy ochrony zwierząt*, „Pressje", Vol. 19, boz.org.pl/art/polskie_problemy.htm [access: 10.10.2019].

[37] K. Sławik, *op. cit.*, p. 22.

[38] A. Elżanowski, *op. cit.*, p. 2.

[39] J. Łapiński, *Etyczne podstawy prawnej ochrony zwierząt*, „Studia z Prawa Wyznaniowego" 2002, Vol. 4, p. 158.

[40] A. Elżanowski, *op. cit.*, p. 2.

References

Dworkin R., *Biorąc prawa poważnie*, Warszawa 1998.
Elżanowski A., *Polskie problemy ochrony zwierząt*, „Pressje", Vol. 19, boz.org.pl/art./polskie_problemy.htm [access: 10.10.2019].
Jak Polacy znęcają się nad zwierzętami. Raport z monitoringu sądów, prokuratur i policji, Kraków–Wrocław 2016.
Jarosz M., *Ochrona zwierząt w Polsce na przestrzeni dziejów*, „Wiadomości Zootechniczne" 2016, Vol. 54(3).
Klimek B., *Przemoc wobec zwierząt i prawna ochrona zwierząt w Polsce*, „Życie Weterynaryjne" 2018, Vol. 3(9).
Korybski A., Leszczyński L., Pieniążek A., *Wstęp do prawoznawstwa*, Lublin 2007.
Kurzępa B., *Ochrona zwierząt. Przepisy, piśmiennictwo*, Bielsko-Biała 1999.
Leszczyński L., *Tworzenie generalnych klauzul odsyłających*, Lublin 2000.
Łapiński J., *Etyczne podstawy prawnej ochrony zwierząt*, „Studia z Prawa Wyznaniowego" 2002, Vol. 4.
Mała encyklopedia prawa, red. Z. Rybicki, Warszawa 1980.
Radwański Z., Zieliński M., *Uwagi de lege ferenda o klauzulach generalnych w prawie prywatnym*, „Biuletyn Legislacyjny" 2002, Nr 2.
Sławik K., *Traktowanie i ochrona prawna zwierząt w Polsce*, „Ius Novum" 2011, Nr 4.
Tracz S., *Rozumienie sprawiedliwości w orzecznictwie Trybunału Konstytucyjnego*, Katowice 2003.
Wolter A., Ignatowicz J., Stefaniuk K., *Prawo cywilne. Zarys części ogólnej*, Warszawa 1996.
Wronkowska S., Zieliński M., *Komentarz do zasad techniki prawodawczej z dnia 20 czerwca 2002 r.*, Warszawa 2004.
Zieliński M., *Wykładnia prawa. Zasady – reguły – wskazówki*, Warszawa 2002.

Abstract: The legal acts regulating the status and protection of animals in Poland contain – just like any other acts – indefinite concepts. However, low effectiveness of their provisions makes it necessary to consider the reasons for this, and whether one of them can be a significant number of indefinite concepts in the regulations as regards criminal, administrative or civil aspects necessary for full legal protection of animals. This study attempts to find an answer to this question.

Keywords: indefinite phrases; general clauses; animals; interpretation of the law

KINGA PANASIUK-FLAK

University of Life Sciences in Lublin
Faculty of Veterinary Medicine
https://orcid.org/0000-0002-7243-9907
kinga.panasiuk-flak@up.lublin.pl

BEATA JEŻYŃSKA

Maria Curie-Skłodowska University in Lublin
Faculty of Law and Administration
https://orcid.org/0000-0001-6753-5673
beata.jezynska@poczta.umcs.lublin.pl

RADOSŁAW PASTUSZKO

Maria Curie-Skłodowska University in Lublin
Faculty of Law and Administration
https://orcid.org/0000-0002-2062-3622
rpastuszko@poczta.umcs.lublin.pl

PIOTR LISTOS

University of Life Sciences in Lublin
Faculty of Veterinary Medicine
https://orcid.org/0000-0003-3289-9615
piotr.listos@up.lublin.pl

Legal Protection of Animals in the Provision of Forensic Veterinary Opinions

Initial remarks

The development of the relationship between humans and animals has a history as long as the existence of humanity. People only began to treat animals as entities requiring legal protection[1] at the beginning of the 19th century. The development of human thought regarding the legal status of animals over the years has gradually led to the realization that human beings should respectfully participate in the world of nature surrounding them. The aims and content of animal protection regulations have been shaped according to human needs, changing in each historical era. Economics has played a significant role, and obligations and prohibitions affecting the animal species used by humans have been meant to safeguard the privileges of certain individuals and the material interests of owners and users of nature.[2]

The conviction that animals deserve more effective protection, as living beings constituting an equal element of biological diversity surrounding humans, has gradually taken shape. With the progressive development of civilization, science and culture, the exploitation of natural resources, and the associated increase in ecological hazards and awareness of its consequences, new standards of animal protection and status have taken shape and continue to develop. One manifestation of changing views and approaches to animals is the evolution and development of veterinary law, whose fundamental goal is to protect public health and create conditions for the welfare of animals coexisting with humans.

Veterinary protection

Veterinary protection is understood as protection of the health, life and welfare of animals, but it has no uniform scope or degree. On the basis of applicable legal provisions, the literature classifies and categorizes animal protection, referring to some extent to the classification of protective functions in the Environmental Protection Law. The division proposed by Ludwik Jastrzębski is of fundamental importance. It distinguishes the following:

– humanitarian protection,
– conservation, i.e. species protection,

[1] The oldest international regulations regarding environmental protection date back to ancient times in Egypt, India and Babylonia, about 4,000 years ago.

[2] In 1420, King Władysław Jagiełło, in the Statute of Warta, established the first game protection period in the history of hunting law: "(...) because the rabbit hunter has done serious damage to poor people, destroying their crops and grains, we order the cessation of all hunting henceforth from the day of St. Wojciech (23 April) until harvesting of winter and summer crops". For more, see A. Milke, *Miejsce ochrony prawnej zwierząt w obszarze wolności gospodarczej człowieka*, [in:] *Prawo ochrony przyrody a wolność gospodarcza*, red. M. Górski, Łódź 2011, p. 21.

– utilitarian protection of animals with regard to their intended use, distinguishing protection of wild game, fish, crayfish and lampreys in inland waters, as well as fish in marine waters.[3]

Veterinary protection and the animal protection system

Regulations on veterinary protection of animals focus on animal welfare, based on medical and veterinary knowledge. They constitute a coherent system of regulations, separated as a whole among animal protection regulations.

There are many issues within the concept of legal protection of animals. In addition to utilitarian, humanitarian, veterinary and species protection of animals, it also covers the effort to maintain the biological balance and natural living spaces of free-living animals, as the development of civilization has disturbed the functioning of many ecosystems and reduced their natural productivity. There are practically no natural biotopes that feature harmonious coexistence of diverse species of plants and animals. They are all more or less transformed by human activity.

Constitutional basis of veterinary protection of animals

In Poland, the legal framework for the protection of animals, including veterinary protection, is shaped by numerous legal acts belonging to various legal regimes and branches of law and with various positions in the hierarchy of the system of sources of law. Not all of them relate directly to animals, sometimes including them as part of the natural environment, biodiversity, ecosystems or natural resources.

The Polish Constitution does not explicitly refer to the protection of animals. The provisions of Art. 5, 31, 68, 74 and 86 of the Polish Constitution regulate issues of the protection and use of the natural environment. Starting from the principle of sustainable development (Art. 5), the Constitution recognizes environmental protection as a value that can justify the limitation of personal rights and freedoms (Art. 31), obliges public authorities to take actions necessary to protect health, including combating epidemics and preventing the negative effects of degradation of the environment (Art. 68) and environmental protection (Art. 74), and also imposes on all citizens the obligation to care for the environment and to take responsibility for damage caused (Art. 86). The inclusion of environmental protection in the Constitution meant that this issue acquired the position of one of the basic values protected by the legal order in Poland.[4]

[3] L. Jastrzębski, *Prawo ochrony środowiska w Polsce*, Warszawa 1990, p. 106ff.

[4] According to Michał Gabriel-Węglowski, in the rule of law there is no stronger justification for undertaking specific actions than placing guidelines regarding them in a normative act of the rank of the Constitution (*Przestępstwa przeciwko humanitarnej ochronie zwierząt*, Toruń 2008, p. 43).

The provisions of Art. 68, para. 1 and 4 of the Constitution, which imposes an obligation on public authorities to combat epidemic diseases and prevent negative effects of environmental degradation, is of fundamental importance.[5] Article 68, para. 4 of the Constitution may constitute a justification and basis for assessing environmental protection laws, provided they affect individual or public health. Here, too, protection of animal health and the safety of food of animal origin relate to veterinary protection as a manifestation of public health protection measures.

It can be concluded from the remarks presented above regarding the constitutional protection of animals that it has been incorporated into the broad concepts of environmental protection and health protection.

Veterinary protection of animals in international law, EU law and national law – an outline

Acts of international law allow the regulation on protection of animals. What is more, animal protection as part of environmental protection was one of the earlier areas of international agreements, which has not lost its relevance and even now is one of the fastest growing areas of international law. Legal solutions regarding animal protection, developed in the course of international cooperation, reflect a compromise combining the interests of states and the right to development with the need to protect the environment.[6] International law pertaining to environmental protection began to develop quite dynamically in the second half of the 20th century.[7] The Universal Declaration of Animal Rights, adopted by the International League of Animal Rights on 21 September 1977 in London, was of particular importance for the protection of animals.[8] According to Wojciech Radecki[9] and Jan Białocerkiewicz,[10] one of the most

[5] Public authorities should take measures not only to prevent damage, but also to ensure that available protective measures are applied when the harmful environmental impact of certain activities has not been proven, but is likely (J. Boć, E. Samborska-Boć, *Postanowienia Konstytucji z zakresu ochrony środowiska*, [in:] *Ochrona środowiska*, red. J. Boć, K. Nowacki, E. Samborska-Boć, Wrocław 2008, p. 158).

[6] Z. Bukowski, *Prawo międzynarodowe a ochrona środowiska*, Toruń 2005, p. 119.

[7] The population of the Earth has doubled in the last century. In the 19th and 20th centuries, industrialization was very rapid, which had a very significant degrading impact on the natural environment. The effects of this process as the population on Earth grows are felt on a global scale. Examples of negative environmental impacts include pollution of the seas and oceans and ozone depletion (Z. Bukowski, *op. cit*., p. 119).

[8] UNESCO, Paris 1978.

[9] W. Radecki, *Ustawy: o ochronie zwierząt, o doświadczeniach na zwierzętach – z komentarzem*, Warszawa 2007, p. 21.

[10] J. Białocerkiewicz, *Status prawny zwierząt. Prawa zwierząt czy prawna ochrona zwierząt*, Toruń 2005, p. 233.

important elements of this document is the statement that an animal is not a thing.[11] The declaration was approved by the United Nations Educational, Scientific and Cultural Organization (UNESCO) in October 1978, and despite the lack of binding force in the international community, it was important because it set ideas and trends in legal protection of animals that were further developed later on.[12]

In Europe, measures for legal protection of animals were initiated by the Council of Europe. The work of this organization resulted in extremely important conventions in the area of animal protection.[13] These include the following:

- European Convention for the Protection of Animals during International Transport of 13 December 1968,[14]
- European Convention for the Protection of Animals kept for Farming Purposes of 10 March 1976,[15]
- European Convention for the Protection of Animals for Slaughter of 10 May 1976,[16]
- European Convention for the Protection of Vertebrate Animals used for Experimental and other Scientific Purposes of 18 March 1986,[17]
- European Convention for the Protection of Pet Animals of 13 November 1987.

By implementing the provisions of the Convention in the system of European and national law, a number of supervisory and control powers have been entrusted to the appropriate veterinary services. Due to the need to make use of the achievements of veterinary sciences and to exercise medical care over animals as well as feed and food products of animal origin, authority was also entrusted to the appropriate veterinary services, and medical care is the core of the implemented functions of treatment, care, supervision and prevention. Veterinary protection understood in this way is a reference point for regulations included in EU secondary legislation and national regulations.

---

[11] Until the Act of 21 August 1997 on the protection of animals came into force, animals were included in the category of things in civil law (A. Habuda, W. Radecki, *Przepisy karne w ustawach o ochronie zwierząt oraz o doświadczeniach na zwierzętach*, „Prokuratura i Prawo" 2008, nr 5, p. 21). Owing to this solution, the legal status of animals changed. The doctrine of civil law introduced the concept of dereification, meaning the exclusion of an object from the category of things, to which it had previously belonged (Z. Radwański, *Prawo cywilne. Część ogólna*. Warszawa 2011, p. 114).

[12] M. Gabriel-Węglowski, *op. cit.*, p. 34.

[13] A. Przyborowska-Klimczak, *Ochrona zwierząt w świetle dokumentów międzynarodowych*, [in:] *Prawna ochrona zwierząt*, red. M. Mozgawa, Lublin 2002, pp. 95–113.

[14] Council Decision of 21 June 2004 (2004/544/ EC) (Official Journal of the EU, L 241, 2004, p. 21).

[15] European Convention for the Protection of Animals kept for Farming Purposes, drawn up in Strasbourg on 10 March 1976 (Official Journal of the EU of 2008, No. 104, item 665).

[16] European Convention for the Protection of Animals for Slaughter, drawn up in Strasbourg on 10 May 1979 (Official Journal of the EU of 2008, No. 126, item 810).

[17] European Convention for the Protection of Vertebrate Animals used for Experimental and other Scientific Purposes (Official Journal of the EU, L 222, 1999, p. 31, as amended).

Given that the criterion for distinguishing veterinary legislation is based on the objective of protecting the health, life and welfare of animals, as well as securing conditions for the protection of public health of humans, the above-mentioned provisions constitute the core of European law and, as a result of their implementation, are part of national veterinary law.

The adopted canon of acts shaping the legal status of animals in Poland includes numerous regulations. The following are of fundamental importance:

– Act of 18 April 1985 on Inland Fisheries,[18]

– Act of 21 December 1990 on the Profession of Veterinarian and Veterinary Chambers,[19]

– Act of 13 October 1995 – Hunting Law,[20]

– Act of 21 August 1997 on the Protection of Animals,[21]

– Act of 29 January 2004 on Veterinary Inspection,[22]

– Act of 11 March 2004 on the Protection of Animal Health and Controlling Infectious Diseases in Animals,[23]

– Act of 29 June 2007 on the Organization of Breeding and Reproduction of Farm Animals,[24]

– Act of 15 January 2015 on the Protection of Animals Used for Scientific or Educational Purposes.[25]

This list does not include all the regulations that can be said to be covered by the concept of veterinary legislation. However, they fulfil its main goal to the greatest extent, i.e. protection of animal health, life and welfare, and they protect human public health.

Veterinarian as a profession of public trust

On 21 December 1990, the Sejm of the Republic of Poland passed the Act on the Profession of Veterinarian and Veterinary Chambers, under which persons practising the profession of veterinarian constitute a community forming a professional self-governing body.[26] Persons practising the profession of veterinarian are obliged by law to belong to the professional self-governing body.

---

[18] Consolidated text, Journal of Laws of 2018, item 1476.

[19] Consolidated text, Journal of Laws of 2016, item 1479.

[20] Consolidated text, Journal of Laws of 2017, item 1295, as amended.

[21] Consolidated text, Journal of Laws of 2017, item 1840, as amended.

[22] Consolidated text, Journal of Laws of 2018, item 1557.

[23] Consolidated text, Journal of Laws of 2017, item 1855, as amended.

[24] Consolidated text, Journal of Laws of 2017, item 2132.

[25] Consolidated text, Journal of Laws of 2018, item 1207.

[26] Pursuant to Art. 17 para. 1 of the Constitution of the Republic of Poland, persons practising a profession defined as a profession of public trust may establish a professional self-governing body. From a formal point of view, it is only after the adoption of an applicable law that a given pro-

Pursuant to Art. 10 of the Act of 21 December 1990 on the Veterinary Profession, the tasks of the veterinary self-governing body relate in particular to the supervision of proper and diligent performance of the profession, establishing the principles of veterinary ethics and deontology applicable to veterinarians, and efforts to ensure compliance with them. According to the Article, the veterinary self-governing body also takes positions on matters of animal health, veterinary protection of public health and the environment, and state policy in this area. Tasks of veterinary protection of animals are carried out in part by granting the right to practise the profession of veterinarian and by keeping registers of chamber members and lists of veterinarians authorized to practise the profession. The veterinary self-governing body cooperates in matters of professional specialization, giving opinions on draft laws and other legal acts regarding the protection of animal health, veterinary protection of public health, environmental protection and veterinary practice. The self-governing body of veterinary surgeons also issues opinions and puts forward motions in matters of training veterinary surgeons and auxiliary staff, organizing research on veterinary protection of public health and veterinary practice. The legislator has also entrusted the veterinary chambers with the exercise of professional administration of justice as regards the professional responsibility of veterinarians and arbitration. The wide range of tasks of the veterinary chambers, laid down by the provisions of the Act of 21 December 1990, also includes cooperation with administrative bodies of local government units, professional self-governing bodies, trade unions, and civic organizations, in matters of veterinary prevention and treatment as well as improvement of livestock farming conditions and sanitary conditions in rural areas. This is reflected in the method of controlling food of animal origin and the effectiveness of combating infectious and parasitic animal diseases and zoonotic diseases.

Due to the multifaceted nature of veterinary protection of animals, it is linked to the protection of public health. Proper exercise of certain aspects of veterinary protection influences the implementation of tasks of public health protection. An example of this connection is the issuing of passports for companion animals[27] and the keeping of records of veterinary establishments[28] by the veterinary chamber.

Article 2 of the Act on Veterinary Establishments[29] clearly defines the concept of veterinary service as an activity which the legislator has entrusted to veterinary surgeons having the right to practise the profession and, to some extent, to persons holding the title of veterinary technician, as part of the operation and activity of an

fessional group is given the status of a profession of public trust, and its activities are organized into a specific legal framework (M. Rudy, *Wstęp do prawa sanitarnego i weterynaryjnego*, Wrocław 2010, p. 217).

[27] Article 24d–g of the Act of 11 March 2004 on the Protection of Animal Health.

[28] Article 16 para. 2 of the Act of 18 December 2003 on Veterinary Establishments.

[29] Act of 18 December 2003 on Veterinary Establishments (consolidated text, Journal of Laws of 2019, item 24).

appropriate veterinary establishment. The Act defines veterinary service as an activity serving to preserve, save or improve an animal's health and productivity. In addition, a veterinarian performing activities defined as veterinary services is entitled to issue opinions and rulings on the subject of his specialty, competence and best knowledge.

When there is a need to clarify facts related to veterinary matters during preparatory or judicial proceedings, when a case in civil, criminal, administrative or commercial proceedings has a direct relationship with an animal or if an animal itself has been involved in an incident, a veterinarian is then appointed as an expert witness.[30]

Evidence from an expert opinion, due to the element of specialized knowledge, cannot be replaced by other evidence, e.g. by questioning a witness.[31] Expert veterinarians often have the task of issuing an opinion after first analysing the material evidence contained in the case files received, or directly conducting veterinary activities based on which they draw up a protocol containing the answers to the questions posed to the expert.[32] Forensic veterinary opinions by expert veterinarians may be written or oral.[33] Veterinarians, as persons with specialized knowledge in the field of veterinary medicine, are often appointed as expert witnesses by common courts, the public prosecutor's office, the police, or state administration authorities at various stages of the proceedings.[34]

The diversity of cases involving the need to admit evidence from the opinion of a veterinary expert witness is very broad, but difficult to enumerate.[35] The most common circumstances for appointing veterinarians as expert witnesses include contracts for the sale of animals with physical defects (in particular major defects), the death of an animal,[36] an infectious disease occurring in animals,[37] errors in veterinary medicine associated with the treatment of animals, issues involving protection of animal

[30] Ordinance of the Minister of Justice of 21 January 2005 on Expert Witnesses (Journal of Laws of 2005, No. 15, items 132, 133).

[31] Judgement of the Supreme Court of 24 November 1999, I CKN 223/98, LEX No. 39411.

[32] For example, a post-mortem examination of the animal's body to answer the questions contained in the document received by the expert.

[33] In practice, however, most forensic and veterinary opinions are written. Oral opinions are usually issued to supplement previously issued written opinions in a given case or opinions originally issued during hearings by a procedural authority.

[34] See Art. 193 para. 1 of the Act of 6 June 1997 Code of Criminal Procedure (consolidated text, Journal of Laws of 2018, item 1987); Art. 278 para. 1 of the Act of 17 November 1964 Code of Civil Procedure (consolidated text, Journal of Laws of 2018, item 1360, as amended); Art. 84 para. 1 of the Act of 14 June 1960 Code of Administrative Procedure (consolidated text, Journal of Laws of 2018, item 2096).

[35] An example of circumstances in which procedural organs seek the opinion of expert veterinarians is the adulteration or sale of food of animal origin that is spoilt or harmful to health – see C. Kąkol, *Mięsne paragrafy*, „Rzeczpospolita", 20 March 2013, p. C7.

[36] E.g. unexplained or sudden death, gunshot, or fatal intoxication in animals.

[37] Especially zoonotic diseases.

health[38] and hygiene, and safety of food of animal origin,[39] and thus situations that are important for the protection of public health of humans and animals, public order, and stable commerce conditions. In this sense it performs public functions.

When preparing a veterinary opinion, the expert witness is often obliged to examine a living animal or, in the event of the animal's death, to perform a post-mortem examination of the material provided to the expert by the appropriate authority. The person appointed to prepare the opinion, in addition to conducting the necessary examinations, is obliged to become familiar with the circumstances of the event that necessitate the examination. This information is obtained by interviewing the animal's owner or consulting with the employees of the judicial body commissioning the opinion. It also may be contained in the document delivered to the expert. In many cases it is not possible to obtain important information for forensic veterinary assessment, because, for example, the circumstances in which an animal has suffered a mechanical injury are not always known to either the judicial body or the animal's owner. In this case, the opinion is based solely on knowledge combined with the veterinarian's experience. Before proceeding with the examination of a living animal or an autopsy, there is an extremely important step that is fundamental to the accuracy of a forensic veterinary opinion: identification of the material evidence being examined, e.g. an animal. This is done by providing an accurate description of the animal in the introductory part of the forensic veterinary opinion.[40]

Examination of a living animal is carried out according to the plan of a clinical examination, which determines the current condition of the animal with a thorough analysis of its external appearance. A detailed examination is conducted and, if necessary, additional tests are performed. In the case of a post-mortem examination, the veterinarian acts in accordance with the post-mortem examination procedure, drawing up a protocol specifying all pathological changes and stating the cause of the animal's death, which then serves as the basis for the veterinary opinion.

The expert witness should secure the material delivered by the authority or person commissioning the opinion, e.g. the animal's carcass and other items received or encountered during the post-mortem examination, as they constitute evidence, and they are to be disposed of by the authority or person ordering the opinion. After the post-mortem examination, they cannot be disposed of without obtaining consent. In the absence of consent, after the examination, the carcass should be secured and kept until the decision regarding it has been made by the competent authority or person.

[38] E.g. forensic veterinary examination of a living animal.

[39] Z. Michalski, *Weterynaria sądowa*, Wrocław 1993, p. 13.

[40] Species, gender, breed or resemblance to a breed, name, weight, coat colour and type, and distinguishing features, e.g. a tattoo, or a chip number.

Forensic veterinary service with regard to animal protection

The multifaceted nature of veterinary protection of animals in Poland is reflected in the scientific achievements of one of the disciplines of veterinary science, i.e. forensic veterinary medicine.[41] This area of veterinary protection of animals constitutes a distinct and specific form of it.

The origins of the emergence and development of forensic veterinary medicine can be traced back to antiquity. Roman law, which has been a fundamental source for current legal systems in many countries of the world, was also the beginning of the emergence and development of veterinary law and the associated emergence and development of forensic veterinary medicine. At present, forensic veterinary medicine is an applied veterinary science, a scientific discipline closely related to forensic medicine. Its creation and development have been an inseparable element of the evolution of common law over the years, in particular veterinary law and veterinary medical knowledge. It stands out significantly from other scientific disciplines in veterinary medicine, as a combination of typical veterinary medical knowledge and legal sciences.

Forensic veterinary medicine as a scientific discipline does not cover animal protection issues. It is only its practical application that allows mainly judicial authorities and private individuals to implement animal protection, a significant part of which is veterinary protection. Forensic veterinary medicine as an applied science deals with the mechanism of action of various types of injuries to an animal's body and other factors; explaining the effects of these injuries and determining the circumstances in which they could have arisen; examining live and other material evidence related to veterinary medicine; the issue of animal death and changes occurring in the carcass after the death of the animal; veterinary toxicology; giving opinions in cases of suspected diagnostic or treatment error; and giving opinions on matters of food of animal origin.

The specific nature of veterinary protection of animals by forensic veterinary medicine is also influenced by the fact that its significance as an applied science has markedly increased in recent years. This is due to the development of veterinary legislation and legislation related to the protection of animals. Increased public awareness and associated demands regarding animal protection also contribute to the significant interest in forensic veterinary medicine.[42]

---

[41] Forensic veterinary medicine can be defined as a veterinary medical specialization forming a bridge linking biological veterinary knowledge and legal sciences. This discipline provides professional assistance primarily to criminal prosecution and judicial authorities. See T. Marcinkowski, *Medycyna sądowa dla prawników*, Warszawa 1993, p. 19.

[42] Practice of the profession of veterinarian in the form of both animal treatment services and supervision of hygiene of food of animal origin may often give rise to conflict situations, whose resolution by a judicial authority necessitates the use of forensic veterinary knowledge.

Additional tests in forensic veterinary medicine

The dynamic development of forensic veterinary medicine as an applied science allows veterinarians to outline a highly probable course of the event about which an opinion is needed, which often requires additional specialized tests. Along with the increase in public awareness and associated demands regarding animal protection, there is a greater need for additional specialized tests, particularly modern imaging methods and toxicological and genetic tests. Analysis of gunshot injuries, because they affect numerous organs of the body, is a challenge for doctors of both human and veterinary medicine.

Adequate protection of the area of the entry wound, determination of the bullet trajectory in tissues, examination of the exit wound, and isolation of the bullet and all of its fragments are extremely important for subsequent analyses.[43] Additional histopathological, chromatographic and spectrometric tests, as well as imaging techniques, provide answers to a number of questions raised by judicial bodies. Given that animal carcasses are often among the major pieces of evidence in gunshot cases, well-conducted examinations are an essential element of forensic veterinary opinions.

The use of firearms always leaves numerous traces that provide great opportunities for examination, evidence, and more importantly – detection. These characteristic traces make it possible to carry out a series of tests whose results can be used to reconstruct the event. For accurate results, the material must be secured and the secured weapon,[44] bullets, shells and other traces[45] must be analysed as soon as possible. The abrasion collar, burn zone and fouling around the entry wound, the presence of unburned gunpowder particles (stippling) (powder tattoo) or products of its combustion, and the presence of any particles from the barrel, bullet and shell components are analysed. Visual examination of the mechanical damage to the soft tissues and the skeleton of the victim together with determination of the projectile path also provide a great deal of relevant information about the event.

The mechanism by which bullet injuries occur is extremely complex and depends on the type of weapon used, the type and speed of the projectile, and the distance from which the shot was fired. Examination of gunshot residues makes it possible to determine the position of the shooter relative to the victim and provides the basis for ballistics experts to identify individual weapons and dedicated ammunition used in the incident.

Modern imaging techniques, i.e. radiography and computed tomography, are important methods in the analysis of gunshot injuries, as they enable reconstruction of

[43] L. Bieliński, W. Miś, *Kryminalistyczno-procesowe zabezpieczanie śladów na miejscu zdarzenia*, Piła 2009, pp. 17–18.

[44] With fingerprints, biological traces, or GSR (gunshot residue).

[45] E.g. tissue that has been shot through, blood spatters, or the animal's skin with the hair coat.

the tracks of the wounds. This provides information about the position of the shooter, the distance from which the shot was fired, and the type of weapon and projectile. In veterinary medicine, radiography is a basic and obligatory examination when there is a suspicion that an animal has been shot with a firearm or pneumatic weapon. This applies to both animals injured during the incident and carcasses. Entire carcasses are X-rayed to determine the presence of contrasting foreign bodies in the material, i.e. gunshot residue in the area surrounding the track of the bullet.

A technique often used for analysis of gunshot wounds is post-mortem computed tomography (PMCT),[46] which owes its popularity to its non-invasiveness and effective imaging, especially for reconstruction of the track of the bullet. This method enables accurate bone analysis in terms of individual characteristics and injuries, such as fractures, which is the basis for the graphic 3D reconstructions.[47] Computed tomography can be used to define the spaces containing gases, which makes it possible to determine post-traumatic changes, and also to reconstruct the wound track, i.e. the path of the projectile in the body. Because PMCT is performed on a carcass, it is not limited in terms of the dose of radiation or exposure time, which in the case of living organisms is a major obstacle. PMCT makes it possible to obtain a significant number of cross-sections, and thus, high-quality reconstructions. Another unquestionable advantage of computed tomography imaging is that it enables examination in spite of advanced decomposition, when dissection of the body and removal of the internal organs would damage important structural elements of the body.

Conclusions

The considerations outlined above clearly indicate the significant role of the practical use of forensic veterinary knowledge in the legal protection of animals, mainly by judicial authorities. In particular, these considerations underscore the importance of additional tests, the results of which, in conjunction with the basic clinical or post-mortem examination, indicate the macroscopic nature of the pathological changes and the circumstances of their occurrence, thus enabling the competent authorities to discover the truth in proceedings associated with protection of animals.

[46] E. Scaparra, J. Grimm, M. Scherr, M. Graw, M. Reiser, O. Peschel, S. Kirchhoff, *Postmortem Computed Tomography (PMCT) and Autopsy in Deadly Gunshot Wounds – a Comparative Study*, "The International Journal of Legal Medicine" 2016, No. 130, pp. 819–826.

[47] K. Woźniak, A. Moskała, A. Urbanik, P. Kopacz, M. Kłys, *Pośmiertne badania obrazowe z rekonstrukcją 3D: nowa droga rozwoju klasycznej medycyny sądowej?*, „Archiwum Medycyny Sądowej i Kryminologii" 2009, Nr 59, pp. 124–130.

References

Białocerkiewicz J., *Status prawny zwierząt. Prawa zwierząt czy prawna ochrona zwierząt*, Toruń 2005.

Bieliński L., Miś W., *Kryminalistyczno-procesowe zabezpieczanie śladów na miejscu zdarzenia*, Piła 2009.

Boć J., Samborska-Boć E., *Postanowienia Konstytucji z zakresu ochrony środowiska*, [in:] *Ochrona środowiska*, red. J. Boć, K. Nowacki, E. Samborska-Boć, Wrocław 2008.

Boć J., Nowacki K., Samborska-Boć E., *Ochrona środowiska*, Wrocław 2008.

Bukowski Z., *Prawo międzynarodowe a ochrona środowiska*, Toruń 2005.

Gabriel-Węglowski M., *Przestępstwa przeciwko humanitarnej ochronie zwierząt*, Toruń 2008.

Habuda A., Radecki W., *Przepisy karne w ustawach o ochronie zwierząt oraz o doświadczeniach na zwierzętach*, „Prokuratura i Prawo" 2008, nr 5.

Jastrzębski L., *Prawo ochrony środowiska w Polsce*, Warszawa 1990.

Marcinkowski T., *Medycyna sądowa dla prawników*, Warszawa 1993.

Michalski Z., *Weterynaria sądowa*, Wrocław 1993.

Milke A., *Miejsce ochrony prawnej zwierząt w obszarze wolności gospodarczej człowieka*, [in:] *Prawo ochrony przyrody a wolność gospodarcza*, red. M. Górski, Łódź 2011.

Przyborowska-Klimczak A., *Ochrona zwierząt w świetle dokumentów międzynarodowych*, [in:] *Prawna ochrona zwierząt*, red. M. Mozgawa, Lublin 2002.

Radecki W., *Ustawy: o ochronie zwierząt, o doświadczeniach na zwierzętach – z komentarzem*, Warszawa 2007.

Radwański Z., *Prawo cywilne. Część ogólna*, Warszawa 2011.

Rakoczy B., *Prawo ochrony przyrody*, Warszawa 2009.

Rudy M., *Wstęp do prawa sanitarnego i weterynaryjnego*, Wrocław 2010.

Scaparra E., Grimm J., Scherr M., Graw M., Reiser M.F., Peschel O., Kirchhoff S., *Postmortem Computed Tomography (PMCT) and Autopsy in Deadly Gunshot Wounds – a Comparative Study*, "The International Journal of Legal Medicine" 2016, No. 130.

Woźniak K., Moskała A., Urbanik A., Kopacz P., Kłys M., *Pośmiertne badania obrazowe z rekonstrukcją 3D: nowa droga rozwoju klasycznej medycyny sądowej?*, „Archiwum Medycyny Sądowej i Kryminologii" 2009, Nr 59.

Abstract: The development of the relationship between humans and animals has a history as long as the existence of humanity. The conviction that animals deserve more effective protection, as living beings constituting an equal element of biological diversity surrounding humans, has gradually taken shape. One manifestation of changing views and approaches to animals is the evolution and development of veterinary law. The multifaceted nature of veterinary protection of animals in Poland is reflected in the scientific achievements of one of the disciplines of veterinary science, i.e. forensic veterinary medicine. The dynamic development of forensic veterinary medicine as an applied science allows veterinarians to outline a highly probable course of the event about which an opinion is needed, which often requires additional specialized tests. Analysis of gunshot injuries, because they affect numerous organs of the body, is a challenge for doctors of both human and veterinary medicine. Given that animal carcasses are often among the major pieces of evidence in gunshot cases, well-conducted examinations are an

essential element of forensic veterinary opinions. The use of firearms always leaves numerous traces that provide great opportunities for examination, evidence, and more importantly – detection. Modern imaging techniques, i.e. radiography and computed tomography, are important methods in the analysis of gunshot injuries, as they enable reconstruction of the tracks of the wounds. This provides information about the position of the shooter, the distance from which the shot was fired, and the type of weapon and projectile.

Keywords: protection of animals; forensic veterinary; gunshot injuries; radiography; computed tomography

SŁAWOMIR PAWŁOWSKI

Adam Mickiewicz University in Poznań, Faculty of Law and Administration
https://orcid.org/0000-0002-2060-6638
womir@amu.edu.pl

Towards High Standards of Animal Rights Protection on the Example of Protection from Suffering in "the States of Necessity"

Introduction

One of the basic obligations towards animals, or rather the directional directive on treating them, has been expressed in Art. 1 clause 1 of the Act of 21 August 1997, on the protection of animals (Animal Protection Act – APA).[1] At present, therefore, an animal in the Polish legal system is perceived as a living being, capable of experiencing suffering and a human owes it respect, care and protection. This provision emphasizes the empowerment of animals,[2] which is reflected in the explicit rule that an animal is not an object, although the issue is more complex[3] because of clause 2 of this Art. The above is complemented by Art. 5 of APA which expresses the obligation to treat them in a humane manner. Satisfaction of the indicated duties may not be simple in a specific factual state, and sometimes even involve the violation of other provisions of law of a universally binding statutory rank. The basis for this paper is a case study of a horse owner who, in connection with saving the life of the animal despite the fact that his vehicle was not equipped with an on-board device used for calculating and

[1] Consolidated text, Journal of Laws of 2019, item 122, as amended.

[2] See D. Malinowski, *Problematyka podmiotowości prawnej zwierząt na przykładzie koncepcji utylitaryzmu Petera Singera*, „Przegląd Prawa Ochrony Środowiska" 2014, Nr 2, pp. 185–221.

[3] See M. Rudy, *Dlaczego potrzebujemy nowej ustawy o humanitarnej ochronie zwierząt?*, „Przegląd Prawa i Administracji" 2017, Nr 108, pp. 73–86, and J. Białocerkiewicz, *Status prawny zwierząt. Prawa zwierząt czy prawna ochrona zwierząt*, Toruń 2005, pp. 61–67.

collecting electronic toll charges, and as a result of the failure to pay the applicable charge, used the public road. Non-compliance with the obligations imposed on owners of vehicles with trailers over 3.5 tonnes by the Act of 21 March 1985 on Public Roads (APR)[4] resulted in the imposition of a severe fine, and it was even imposed twice. The presented factual state, *prima facie* obvious, raises a fundamental systemic issue: can the fulfilment of public-private obligations imposed by one act simultaneously constitute a violation of another obligation contained in a normative act of the same rank? This is all the more important because it is assumed that an administrative penalty is imposed on a person who has committed a tort without any connection with his or her guilt, since liability for that tort is objective in nature. It should be emphasized that at the time of committing it, the provisions of the Code of Administrative Procedure, amended in 2017, allowing for waiver of an administrative penalty (Art. 189f) or cancellation in full of the administrative penalty (Art. 189k para. 1 point 4) were not in force then.[5] Nevertheless, the administrative court made a pro-constitutional interpretation and despite the lack of an explicit *lex specialis* established high standards of animal protection in the spirit of values expressed in Art. 1 clause 1 of APA.[6]

Protection of animals from suffering (obligation of humane treatment)

It is argued in the doctrine that one of the reasons for the change in relation to animals was the birth of the Renaissance and one of its main mode of thought – humanism.[7] Thus, a new approach appeared in this period, according to which even if animals are subordinate to man, it does not result from the imposed theological hierarchy, which was based on the concept of micro and macrocosm.[8] When getting to know himself through researching the surrounding world, especially nature, man also studied animals. In the 17th century, the view that animals can feel was becoming more and more present, which should change the perception of human relation to them.[9] Initially, this was evident in the works of prominent English thinkers of the 18th

4 Consolidated text, Journal of Laws of 2018, item 2060, as amended.

5 Act of 7 April 2017, amending the Act – Code of Administrative Procedure and certain other acts (Journal of Laws of 2017, item 935), which entered into force on 1 June 2017. It added in particular Section IVa to the general administrative procedure entitled "Administrative Monetary Penalties". As a result, there were, *inter alia*, provisions concerning the guidelines for the authority regarding their application, *force majeure*, statute of limitations or reliefs in their application.

6 Judgment of the Supreme Administrative Court of 18 October 2017, II GSK 134/16, ONSAiWSA 2018, no. 6, item 111.

7 M. Gabriel-Węglowski, *Przestępstwa przeciwko humanitarnej ochronie zwierząt*, Toruń 2008, p. 28.

8 B. Suchodolski, *Narodziny nowoczesnej filozofii człowieka*, Warszawa 1963, p. 187, 211.

9 J. Serpell, *W towarzystwie zwierząt: analiza związków ludzie – zwierzęta*, Warszawa 1999, p. 179.

century, who asked, among other things, whether an animal could suffer.[10] For this and other reasons, England became the first country where animal rights protection was given a normative approach.[11] Charles Darwin contributed to the further development of this way of thinking in his work *On the Origin of Species*, and despite the initial opposition of the Catholic Church, progress was also made in this area, particularly thanks to John Paul II, who in the encyclical *Redemptor hominis*, among other things, pointed out that: "The Creator wanted man to deal with nature as its wise and noble »master« and »guardian«, not as a ruthless »exploiter«".[12]

In the Polish legal thought, the normative expression of the above trend is the regulation of the President of the Republic of Poland of 22 March 1928 on the protection of animals.[13] Its provisions consisted primarily in prohibiting animal abuse and inflicting unnecessary suffering on animals, penalizing these acts, and the whole regulation was closer to criminal law. They did not, therefore, fully grasp the idea of humanitarianism,[14] the intellectual trend which was born in France in the 19th century, and which today has evolved in such a way that it "means not only an attitude of respect and minimization of human suffering, but of all living beings in general".[15] The regulation in force has been inspired by the Universal Declaration of Animal Rights of 21 September 1977, adopted in London by the International League of Animal Rights.[16] Currently, there is no doubt that an animal is capable of suffering and the obligation of humane treatment is explicitly mentioned in Art. 5 of APA. At the same time, unlike the Act of 1928, the binding legal act constitutes a significant development of the perception of animals and the problems of their protection, while being holistic in nature.

As Ludwik Jastrzębski notes, "[h]umane protection of animals is one of the types of protection of animals against man, against their actions which in the most general sense bring suffering to animals. It stems from ethical and human motives, which prohibit inflicting unnecessary suffering on an animal as a living being equal to a human. It performs a kind of personification of an animal, protecting its life and health".[17]

---

[10] Initially, J.-J. Rousseau, *Discours sur l'origine et les fondements de l'inégalité parmi les hommes* (1775), https://www.rousseauonline.ch/pdf/rousseauonline-0002.pdf [access: 27.08.2019] or H. Primatt, *A Dissertation on the Duty of Mercy and Sin of Cruelty to Brute Animals*, London 1776, https://archive.org/details/adissertationon00primgoog/page/n13 [access: 27.08.2019] and later J. Bentham, *Wprowadzenie do zasad moralności i prawodawstwa* (1780), Warszawa 1958.

[11] 1821 – ban on horse abuse, 1822 – ban on animal abuse, 1835 – ban on dog fighting, or a first comprehensive regulation of the Cruelty to Animals Act of 1835.

[12] Jan Paweł II, *Redemptor hominis. Tekst i komentarze*, Lublin 1982, p. 28.

[13] Journal of Laws of 1932, item 417, as amended.

[14] One of the meanings of the word "humane" is: "related to good treatment, sparing suffering" (*Wielki słownik języka polskiego*, red. B. Dunaj, Warszawa 2009, p. 178).

[15] M. Gabriel-Węglowski, *op. cit.*, p. 32.

[16] K. Sławik, *Traktowanie i ochrona prawna zwierząt w Polsce*, „Ius Novum" 2011, Nr 4, p. 15.

[17] L. Jastrzębski, *Prawo ochrony środowiska w Polsce*, Warszawa 1990, p. 124.

However, this paper does not focus on the protection of animals against man but, on the contrary, on the relationship between them, which is manifested, *inter alia*, in the imperative to take all necessary measures to prevent their suffering. This is all the more important because while Art. 6 of APA sets out an implicit catalogue of behaviours, the desired behaviours are defined by means of general clauses.[18]

Administrative monetary penalties as a type of administrative sanctions

Although the term "sanctions" originally referred to criminal law, with the development of the organizational structures of the modern state it was also used in administrative law.[19] At present, there is no doubt that it is justified to distinguish administrative sanctions.[20] As Marek Szewczyk noticed, in administrative law they are most often used by authorities performing the function of administrative police, and their aim is primarily to maintain order, ensure public, sanitation, road and construction safety as well as health care.[21] The concept of sanctions was also expressed in Recommendation No. R (91) of the Committee of Ministers of the Council of Europe of 13 February 1991 on administrative sanctions.[22] It states that the purpose of the sanction is repression, causing discomfort for behaviour contrary to legal norms. It is applied by means of an administrative act and is therefore imposed by the administration bodies.[23] As Lucyna Staniszewska indicates, "(…) granting of powers to the contemporary administration in order to apply administrative sanctions, especially administrative monetary penalties, allows it to effectively achieve the objectives and tasks set for it".[24] In fact, there is a tendency to reclassify certain illegal behaviours, crimes and offences, precisely into one that will be penalised administratively, in particular in the form of monetary penalties.

---

[18] D. Malanowski, *op. cit*., p. 190.

[19] See J. Filipek, *Sankcja prawna w prawie administracyjnym*, „Państwo i Prawo" 1963, Vol. 12, p. 873ff. or L. Dziewięcka-Bokun, *Sankcja prawna w prawie administracyjnym*, „Acta Universitatis Wratislaviensis", Nr 169, „Prawo", t. 36, Wrocław 1972, p. 37ff.

[20] M. Lewicki, *Pojęcie sankcji prawnej w prawie administracyjnym*, „Państwo i Prawo" 2002, Vol. 8; M. Wincenciak, *Sankcje w prawie administracyjnym i procedura ich wymierzania*, Warszawa 2008, or *Sankcje administracyjne*, red. M. Stahl, R. Lewicka, M. Lewicki, Warszawa 2011.

[21] M. Szewczyk, *Nadzór w materialnym prawie administracyjnym. Administracja wobec wolności i innych praw podmiotowych jednostki*, Poznań 1995, p. 59.

[22] Wording of Recommendation No. R (91) 1 of the Committee of Ministers to Member States on administrative sanctions, adopted on 13 March 1991, published in: T. Jasudowicz, *Administracja wobec praw człowieka*, Toruń 1996, pp. 129–132.

[23] M. Wincenciak, *Sankcje*…, p. 73.

[24] L. Staniszewska, *Administracyjne kary pieniężne. Studium z zakresu prawa administracyjnego materialnego i procesowego*, Poznań 2017, p. 357.

The genesis of separating administrative sanctions, including monetary penalties, should be sought in the problem of punishing organizational units, enterprises or other similar entities, usually with legal personality, that have committed an administrative tort without the issue of guilt. Thus, the penalty is to be objective, and the failure to comply with statutory obligations (orders and prohibitions) is a sufficient condition for its imposition. Such a perception is particularly justified where the identification of the perpetrator is difficult, time-consuming and the offence is undisputed. Thus, administrative penalties were intended to enable efficient judgments to be made in respect of organisational units, but not necessarily towards natural persons. The application of the same rigid rules to individuals whose dignity must be respected in accordance with the constitutional imperative aroused legitimate opposition, both from the society and from the doctrine, since aspects such as the degree of contribution to the violation of the law, the reprehensibility of the act and others were completely ignored in their application.[25]

Staniszewska explicitly states that when separating administrative monetary penalties, the legislator should also refer to the subjective criterion, i.e. if the liability is to be closely related to the behaviour of a natural person, the legislator should give primacy to criminal liability; however, if related to the behaviour of a legal person or a collective entity without legal personality – it should always consider whether it is appropriate to make use of administrative sanctions.[26] At the same time, criminal sanctions are accompanied by a negative moral assessment, while the administrative sanction focuses on ensuring that administrative obligations are met, and this assessment is often not a point of reference. This is all the more important as monetary penalties are one of the most severe and frequently applied administrative sanctions, and in Poland until 1 April 2017 there were no general rules concerning their imposition and application.

Administrative monetary penalties and "the state of necessity" – towards higher standards

The brief introduction to the factual state concerns the need to save the life and health of a large animal transported in a vehicle combination in order to provide it with medical care as quickly as possible. Article 13 clause 1 point 3 of APR provides that users of public roads are obliged to pay tolls for driving on national roads of motor vehicles within the meaning of Art. 2 point 33 of the Act of 20 June 1997 – Road Traffic Law,[27] which also shall be understood as a vehicle combination consisting of

[25] M. Wincenciak, *Przesłanki wyłączające wymierzenie sankcji administracyjnej*, [in:] *Sankcje administracyjne*, red. M. Stahl, R. Lewicka, M. Lewicki, Warszawa 2011, pp. 601–615.

[26] L. Staniszewska, *Administracyjne…*, p. 358.

[27] Consolidated text, Journal of Laws of 2018, item 1990, as amended.

a motor vehicle and a trailer or semi-trailer with a maximum permissible weight of over 3.5 tonnes. Having regard to Art. 1 clause 1 and Art. 5 of APA at the same time, the addressee of those provisions, since he does not have suitable equipment to pay the toll and it is not possible to purchase it without impairment to health or the loss of life of the animal, has been placed in conflict with those standards. Granting immediate assistance to the suffering animal was linked to the failure to make the electronic payment of the toll fee and thus the exposure to a monetary penalty.

Despite the lack of a clear and specific provision, the complexity of this issue was captured by the Supreme Administrative Court in its judgement of 18 October 2017 (II GSK 134/16). Being aware of the essence of administrative sanctions, including administrative monetary penalties, in particular the assumption that they are imposed on an entity committing a tort without any connection with guilt (objective character of the tort), at the same time, it did not lose sight of the consequences resulting from the constitutional principle of democratic rule of law and the principle of proportionality, which are an element of the interpretation of the law – guidelines already present in the legal discourse.[28] From these currently indisputably accepted basic principles, it concluded that the prerequisite for imposing an administrative penalty is also, *inter alia*, ensuring the possibility of defence and proving that the failure to fulfil the obligation was a consequence of circumstances for which the individual is not responsible. The above is an expression of the extension of procedural guarantees of a citizen in the process of interpretation of sanctioning provisions[29] and at the same time it poses a question about the permissibility of the application in such situations *per analogia* of the provisions on "the state of necessity". All the more so as this institution is not alien to administrative law, both material[30] and procedural.[31]

Referring to the judicature of the Constitutional Tribunal (CT), it should be pointed out that the legislator's freedom to impose such administrative penalties is not unlimited and requires respect for the fundamental principles contained in the Constitution of the Republic of Poland,[32] in particular the principle of trust in the state and the

[28] L. Staniszewska, *Rozważania w przedmiocie adekwatności i sprawiedliwości administracyjnych kar pieniężnych na gruncie ustawy o ochronie przyrody, ze szczególnym uwzględnieniem kar z tytułu usunięcia drzew i krzewów bez wymaganego zezwolenia*, „Studia Prawa Publicznego" 2013, Nr 3, pp. 151, 154–157.

[29] Cf. A. Skoczylas, [in:] B. Adamiak, J. Borkowski, A. Skoczylas, [in:] *Prawo procesowe administracyjne. System prawa administracyjnego*, t. 9, red. R. Hauser, Z. Niewiadomski, A. Wróbel, Warszawa 2010, p. 310.

[30] E.g. Art. 17, clause 2, point 3 of the Act of 16 April 2004 on Nature Conservation (consolidated text, Journal of Laws 2018, item 1614, as amended) indicates that prohibitions serving nature conservation do not apply to rescue operations or activities related to public safety.

[31] See Art. 161 of the Code of Administrative Procedure and G. Łaszczyca, *„Stan wyższej konieczności" w ogólnym postępowaniu administracyjnym*, „Samorząd Terytorialny" 2007, Nr 4, pp. 55–65.

[32] Constitution of the Republic of Poland of 2 April 1997, Journal of Laws of 1997, No. 78, item 483, as amended.

law it creates, and the principle of justice (Art. 2 of the Constitution of the Republic of Poland) or the principle of proportionality (Art. 31 clause 3 of the Constitution of the Republic of Poland), deriving from the principle of the democratic rule of law. As it has been pointed out in judicature, the legislator cannot apply sanctions that are manifestly inadequate or irrational, or disproportionately ailing, dissociated from the degree of reprehensibility of the individual's behaviour in applying the law in force.[33] Those rulings restrict the legislator's autonomy, which is all the more justified as the administrative monetary penalty constitutes an interference in the property rights of its addressees.

Thus, an individual giving priority to the obligation to treat animals in a humane manner, manifested, *inter alia*, in the treatment taking into account the needs of the animal and providing them with care and protection, which obligation – as it should also be emphasized – is remedied by criminal law regulations establishing the supervision of competent authorities over compliance with the provisions of this Act, cannot be exposed to the risk of imposing an administrative monetary penalty without the possibility of defence.

This case has updated the need for a wider debate on justifications in administrative law.[34] This is all the more justified because since, in the case under consideration, the penalised action was undoubtedly taken in order to eliminate the direct danger to animal's life and health, i.e. to protect another value protected by law, to which one is bound by a legal norm, and such an action should be considered constitutionally justified. Undoubtedly, the value of the good sacrificed – the obligation to pay the toll – in relation to the value of the good saved – the life and health of the animal – was much lower. Such an interpretation was all the more desirable given that the Constitutional Tribunal had already pointed out in its judgement of 1 March 1994, that in relation to an administrative penalty, there must be a subjective element of guilt in order for it to be imposed. An entity which fails to fulfil an administrative duty must therefore be able to defend and demonstrate that the failure to fulfil that obligation is the consequence of circumstances for which it is not responsible.[35] The action of *force majeure*, "the state of necessity", the action of third parties for which it is not liable[36] are considered by the Constitutional Tribunal as such circumstances.

Mirosław Wincenciak has no doubt that the construction of rules of exclusion of liability for violation of norms of administrative law should be supported by the scien-

[33] Cf. judgement of the Constitutional Tribunal of 7 July 2009, K 13/08, OTK-A 2009, No. 7, item 105, Journal of Laws of 2009, No. 112, item 936.

[34] See judgement of the Constitutional Tribunal of 11 October 2016, K 24/15, OTK-A 2016, item 77, Journal of Laws of 2016, item 2197.

[35] Judgement of the Constitutional Tribunal of 1 March 1994, U 7/93, OTK ZU 1994, part 1, item 5.

[36] Judgement of the Constitutional Tribunal of 1 July 2014, SK 6/12, OTK-A 2014, No. 7, item 68, Journal of Laws of 2014, item 926.

tific output of criminal law.[37] Such circumstances include, apart from those indicated above, justified ignorance of the law or inability to assign blame. Their inclusion is all the more justified because in administrative law, unlike in criminal law, an entity obliged to observe norms cannot be guided by morality as a decoder of prescribed and prohibited actions. As a rule, "the state of necessity" is understood differently in the administrative law than in the criminal law.[38] Moreover, in the science of administrative law there have been sporadic statements about it in the past.[39] In his opinion, a legal action, i.e. an action excluding the illegality of an act, will be an action aimed at avoiding a threat to human health or life, impairment to property and other values protected by law, and this action must be undertaken without undue delay. It is also important that it is not possible to obtain the standpoint of the authority.[40] He is also in favour of taking the perpetrator's motivation and degree of awareness of the harmfulness of the act into account when assessing the unlawfulness of the act. Moreover, in his opinion, the obligation to examine the guilt may also result from the general principles of the Code of Administrative Procedure, in particular the principle of legality and the principle of objective truth (Art. 6 and 7 of the Code of Administrative Procedure). However, it should be emphasized that in administrative proceedings, material and procedural guarantees will never be applicable to the same extent as in criminal proceedings because of the different nature of the procedure,[41] *inter alia*, because the latter is adversarial.

Conclusions

The prohibition of conscious permission to inflict pain or suffering on an animal, in particular exposing it to unnecessary suffering and stress, should be derived from the assumption adopted in the Polish legal system that an animal is a creature capable of feeling. This injunction is all the more justified when the life and health of an animal is at risk.

The case in question clearly shows that even in the absence of a specific provision, countries that are a part of a legal culture that respects the principle of a democratic state of law are able to interpret provisions which protect individuals who sacrifice other goods protected by law to ensure the proper treatment of animals. As the Supreme Administrative Court rightly pointed out in the judgement of 18 October 2017, the rules of interpretation of legal norms do not function in complete isolation

[37] M. Wincenciak, *Przesłanki…*, p. 605.

[38] See A. Agopszowicz, *„Stan wyższej konieczności" w prawie administracyjnym*, „Problemy Prawne Górnictwa" 1986, t. 8, pp. 85–93.

[39] See G. Łaszczyca, *op. cit.*, p. 55.

[40] M. Wincenciak, *Przesłanki …*, p. 608.

[41] L. Staniszewska, *Administracyjne…*, p. 360.

from each other, but in a uniform and, in their assumption, complete and internally non-contradictory system of norms. Consequently, in case of doubt, a pro-constitutional interpretation should be made. Thus, although the Supreme Administrative Court could not include Section IVa ("Administrative Monetary Penalties") of the Code of Administrative Procedure because it was not in force at the time of committing the tort, it applied high standards of legal protection of animals. In particular, it examined whether the individual was afforded the opportunity to defend itself and to demonstrate that the failure to comply with its statutory obligation was the result of circumstances for which it was not responsible.

It should be noted that the search for such high standards was already present in the judicature of the Constitutional Tribunal and the doctrine, but the direct application of the Constitution of the Republic of Poland (Art. 8) by administrative courts is not obvious and common. At the same time, it should be emphasized that this ruling was made at the time when Section IVa of the Code of Administrative Procedure was in force, which toned down the previous inevitability of the administrative monetary penalty, hence, to a certain extent, a decision respecting extraordinary circumstances should have been expected. However, only one justification – *force majeure* – has been taken into account in the adopted regulations. Therefore, it should be proposed *de lege ferenda* to extend these provisions to "the state of necessity". However, even in the absence of this justification, pro-constitutional interpretation, which is not only possible but also appropriate, should be required of public administration bodies and administrative courts. It should be borne in mind that the absence in administrative law of such general clauses as the negligible social harmfulness of an act (criminal law[42]) or the principles of social coexistence (civil law[43]) makes them "soulless", which in the light of the development of humanitarianism observed since the end of the Second World War makes it necessary to move away from the original role of this branch of law.

To sum up, the entirety of the presented considerations proves irrefutably that the legal standards of animal protection in Poland are increasing and the view formulated in the judicature that "all legal measures undertaken in relation to animals should take into account their welfare, and first of all the right to exist"[44] is as up-to-date as possible. Therefore, great caution should be exercised in situations where a general (statutory) prohibition or obligation of specific conduct may, in certain situations, lead to inhumane actions.[45]

---

[42] Article 1 para. 2 of the Act of 6 June 1997 – Penal Code, consolidated text, Journal of Laws of 2018, item 1600, as amended.

[43] Article 5 of the Act of 24 April 1964 – Civil Code, consolidated text, Journal of Laws of 2019, item 1145.

[44] Judgement of the Provincial Administrative Court in Poznań of 29 August 2018, IV SA/Po 332/18, CBOSA.

[45] See judgement of the Supreme Administrative Court of 13 September 2012, II OSK 1492/12, CBOSA.

References

Agopszowicz A., *„Stan wyższej konieczności" w prawie administracyjnym*, „Problemy Prawne Górnictwa" 1986, t. 8.

Bentham J., *Wprowadzenie do zasad moralności i prawodawstwa* (1780), Warszawa 1958.

Białocerkiewicz J., *Status prawny zwierząt. Prawa zwierząt czy prawna ochrona zwierząt*, Toruń 2005.

Dziewięckaj-Bokun L., *Sankcja prawna w prawie administracyjnym*, „Acta Universitatis Wratislaviensis" Nr 169, „Prawo", t. 36, Wrocław 1972.

Filipek J., *Sankcja prawna w prawie administracyjnym*, „Państwo i Prawo" 1963, nr 12.

Gabriel-Węglowski M., *Przestępstwa przeciwko humanitarnej ochronie zwierząt*, Toruń 2008.

Jan Paweł II, *Redemptor hominis. Tekst i komentarze*, Lublin 1982.

Jastrzębski L., *Prawo ochrony środowiska w Polsce*, Warszawa 1990.

Jasudowicz T., *Administracja wobec praw człowieka*, Toruń 1996.

Lewicki M., *Pojęcie sankcji prawnej w prawie administracyjnym*, „Państwo i Prawo" 2002, Vol. 8.

Łaszczyca G., *„Stan wyższej konieczności" w ogólnym postępowaniu administracyjnym*, „Samorząd Terytorialny" 2007, Nr 4.

Malinowski D., *Problematyka podmiotowości prawnej zwierząt na przykładzie koncepcji utylitaryzmu Petera Singera*, „Przegląd Prawa Ochrony Środowiska" 2014, Nr 2.

Prawo procesowe administracyjne procesowe. System prawa administracyjnego, t. 9, red. R. Hauser, Z. Niewiadomski, A. Wróbel, Warszawa 2010.

Primatt H., *A Dissertation on the Duty of Mercy and Sin of Cruelty to Brute Animals*, London 1776, https://archive.org/details/adissertationon00primgoog/page/n13 [access: 27.08.2019].

Rousseau J.-J., *Discours sur l'origine et les fondements de l'inégalité parmi les hommes* (1755), https://www.rousseauonline.ch/pdf/rousseauonline-0002.pdf [access: 27.08.2019].

Rudy M., *Dlaczego potrzebujemy nowej ustawy o humanitarnej ochronie zwierząt?*, „Przegląd Prawa i Administracji" 2017, Nr 108.

Sankcje administracyjne, red. M. Stahl, R. Lewicka, M. Lewicki, Warszawa 2011.

Serpell J., *W towarzystwie zwierząt: analiza związków ludzie – zwierzęta*, Warszawa 1999.

Sławik K., *Traktowanie i ochrona prawna zwierząt w Polsce*, „Ius Novum" 2011, Nr 4.

Staniszewska L., *Rozważania w przedmiocie adekwatności i sprawiedliwości administracyjnych kar pieniężnych na gruncie ustawy o ochronie przyrody, ze szczególnym uwzględnieniem kar z tytułu usunięcia drzew i krzewów bez wymaganego zezwolenia*, „Studia Prawa Publicznego" 2013, Nr 3.

Staniszewska L., *Administracyjne kary pieniężne. Studium z zakresu prawa administracyjnego materialnego i procesowego*, Poznań 2017.

Suchodolski B., *Narodziny nowożytnej filozofii człowieka*, Warszawa 1963.

Szewczyk M., *Nadzór w materialnym prawie administracyjnym. Administracja wobec wolności i innych praw podmiotowych jednostki*, Poznań 1995.

Wielki słownik języka polskiego, red. B. Dunaj, Warszawa 2009.

Wincenciak M., *Sankcje w prawie administracyjnym i procedura ich wymierzania*, Warszawa 2008.

Wincenciak M., *Przesłanki wyłączające wymierzenie sankcji administracyjnej*, [in:] *Sankcje administracyjne*, red. M. Stahl, R. Lewicka, M. Lewicki, Warszawa 2011.

Abstract: The subject of the analysis are one of the basic obligations towards animals, contained in Art. 1 clause 1 and Art. 5 of the Act of 21 August 1997 on the Protection of Animals (protection of life and health, prevention of suffering) and their implementation in collision with another obligation expressed in the provision of generally applicable statutory law in a situation of "the states of necessity". The basis for this paper is a case study of a horse owner who, in connection with saving the life of the animal despite the fact that his vehicle was not equipped with an on-board device used for calculating and collecting electronic toll charges, and as a result of the failure to pay the applicable charge, used the public road. Non-compliance with the obligations imposed on owners of vehicles with trailers over 3.5 tonnes by the Act of 21 March 1985, on Public Roads resulted in the imposition of a severe fine, and it was even imposed twice. The collision of norms could therefore lead to inhumane treatment of the animal. This issue is all the more important because an administrative financial penalty is imposed on the subject of the delict without any connection with his fault, since liability for this tort is objective in nature. However, it turns out that in the absence of specific provisions enabling the waiver of punishment, such a role may be played by the pro-constitutional interpretation of these provisions, in particular by relying on the principle of a democratic state ruled by law and the principle of proportionality. This means that high standards of animal protection can be derived from the basic regulations in the spirit of the values expressed in Art. 1 clause 1 of the Animal Protection Act.

Keywords: protection of animals; animal rights; administrative financial penalty; the states of necessity

KAMIL SŁOMIŃSKI

University of Warsaw, Faculty of Law and Administration
https://orcid.org/0000-0002-8851-6284
kskamil06@gmail.com

The Status of Ritual Slaughter in the Multicentric Legal System

Introduction

The perception of animal's role in a society has recently changed significantly. In the pre-modern law animals were predominantly treated as things. This view was supported by the influential part of philosophers and theologians. In the *Summa Theologica*, Thomas Aquinas highlighted that "(…) according to the Divine ordinance the life of animals and plants is preserved not for themselves but for man". His opinion interconnects with Aristotle's concept of hierarchy of being. The age of Enlightenment brought another ways of thinking. John Locke was in favour of the view that animals feel pain and can suffer. That belief had its own justification even in ancient times. Pythagoras maintained that animals were in a way equal to people and had immortal souls.

Contemporary law formulates principles of humanitarian treatment of animals and prescribes their rights. Article 1 of the Animal Protection Act (hereinafter referred to as APA)[1] holds that an animal is not a thing. Nevertheless, rights of animals are not absolute. Humans possess the rights to use them in strictly regulated situations for justified purposes. The simple question arises – who has the right to regulate relation of humans towards animals and how it should be done? Clearly, national legislation is the institution that, on the one hand, may enact laws that protect animals, and on

[1] The Animal Protection Act of 21 August 1997 (Journal of Laws of 1997, No. 111, item 724, as amended).

the other, it may allow killing animals for economic reasons, only if such regulations are in accordance with the Constitution. These days, in the age of globalization and interconnection between countries and institutions new law sources have been created. Rights and obligations of citizens are regulated not only by national laws but also by such acts like EU directives or international conventions. A strongly controversial issue, concerning human exploitation of animals, is the legal status of the ritual slaughter. This issue exemplifies not only legal dispute but also a situation in which the status of animals is regulated by many institutions, in other words, in a multicentric way.

Ritual slaughter in Polish law

The slaughter of animals is a procedure of killing animals for economic reasons. Ritual slaughter applies to specific religious procedure of Judaism (*Shechita*) and Islam (*ḎabīḎah*). It involves prescribed method of slaughtering an animal for food production purposes. The definition, according to the Jewish and the Muslim law, comes down to slaughter of a religiously acceptable species, by a slaughterman, by cutting the neck in order to sever the jugular veins and carotid arteries, oesophagus and trachea of a conscious animal, without severing the spinal cord.[2]

The legal regulation of animal slaughter is based on the rule that before the slaughter the animal must be stunned. At the same time, this method takes into account the necessity of animal protection and of providing people with food. If ritual slaughter (which is part of slaughter of animals) is allowed, it is an exemption constructed for religious purposes. When the process of integration with the European Union began, Poland had to implement European legal standards of animal protection in the internal law. In 1997, Poland enacted the Animal Protection Act. Articles 34(1) and 34(3) define that animals shall only be killed after stunning. Initially, the Act contained an exemption regulated in Art. 34(5)of APA. Pursuant to this provision, in the case of animals subjected to particular methods of slaughter used during religious rites, the requirements regarding prior stunning shall not apply. Article 34(5) was a legal basis that allowed ritual slaughter in Poland. The Art. had been repealed in 2002. However, in 2004, the Minister of Agriculture and Rural Development ordered the Regulation that allowed ritual slaughter.[3] Paragraph 8.2 of this Regulation directly excluded stunning requirements for slaughter prescribed by religious rites.

[2] A. Shimshony, M.M. Chaudry, *Slaughter of Animals for Human Consumption*, "Revue scientifique et technique (International Office of Epizootics)" 2005, Vol. 24(2), pp. 693–710.

[3] Regulation of the Minister of Agriculture and Rural Development of 9 September 2004 on the Qualifications of the Persons Entitled to the Professional Slaughter and Conditions and Methods of Slaughter and Killing of Animals (Journal of Laws of 2004, No. 205, item 2102).

The Polish Constitution[4] defines the hierarchy of sources of law. Regulations must be compatible with Statutes and Constitution. Paragraph 8.2 of the 2004 Regulation directly breached the statutory prohibition on the ritual slaughter (introduced in 2002). It was affirmed by the Constitutional Tribunal's adjudication of 27 November 2012.[5]

In Poland, the legal status of ritual slaughter is regulated by: the APA, 2004 Regulation, Act on Relations Between the State and Jewish Religious Communities (ARSJC)[6], European Convention for the Protection of Animals for Slaughter and, first of all, by the Constitution. The ARSJC stipulates that Jewish Communities care about meat supply. This provision is not the sufficient legal basis to draw conclusions that Jewish Communities have the right to ritual slaughter.

Polish Constitution is adapted to European standards when it comes to human and citizen rights. Article 53(1) guarantees freedom of conscience and religion. Article 53(5) stipulates that the freedom to publicly express religion may be limited only by means of law and only where it is necessary for the defence of State security, public order, health, morals or the freedoms and rights of others. Public expression of religion may include such practices like ritual slaughter. The APA might limit this freedom when limitation is proportionate. The ban on ritual slaughter that had been created after legal basis in the APA was eliminated, caused a constitutional problem. Is the lack of possibility for religious communities to execute ritual slaughter compatible with constitutional freedom of religion? This dilemma was resolved by the 2014 judgment of Constitutional Tribunal.[7] Judges decided that the regulation concerning the ban on ritual slaughter executed in specific slaughterhouses was contrary to the Constitution. This decision *de facto* allowed ritual slaughter in Poland not only for religious reasons but also for economic ones. Poland ratified the European Convention for the Protection of Animals for Slaughter.[8] This Act stipulates that animals should be stunned before slaughter (Art. 12). Each Party to the Convention may permit derogations from the provisions concerning prior stunning when slaughtering is in accordance with religious rituals (Art. 17). The State has the power to decide whether it allows ritual slaughter or not.

Legal status of ritual slaughter is also regulated by European Union's sources of law. In Poland, *acquis communautaire* is fully binding. Primarily, legal protection of

---

4 The Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws No. 78, item 483, as amended).

5 Judgement of the Constitutional Tribunal of 27 November 2012, ref. No. U 4/12 (Journal of Laws of 2012, item 1365).

6 Act on Relations Between the Polish State and the Jewish Religious Communities (Journal of Laws of 1997, No. 41, item 251, as amended).

7 Judgement of the Constitutional Tribunal of 10 December 2014, ref. No. K 52/13 (Journal of Laws of 2014, item 1794).

8 European Convention for the Protection of Animals for Slaughter (Journal of Laws of 2008, No.126, item 810).

animals was included in Council Directive 93/119/EC of 22 December 1993 on the protection of animals at the time of slaughter or killing (Directive 93/119). That Act was superseded by Council Regulation (EC) No. 1099/2009 of 24 September 2009 on the protection of animals at the time of killing (Regulation 1099/2009). It was enacted because the previous Directive 93/119 did not encompass the best available technical conditions to reduce pain experienced by animals.[9] Council Regulation 1099/2009 accepted the rule that animals shall only be killed after stunning in accordance with the methods and specific requirements (Art. 4(1)). Article 4(4) stipulates that in the case of animals subject to particular methods of slaughter prescribed by religious rites, stunning requirements shall not apply provided that the slaughter takes place in a slaughterhouse. The rule is the following: slaughter of animals shall be conducted after prior stunning. Council Regulation 1099/2019, as well as European Convention for the Protection of Animals for Slaughter, encompasses an exemption reserved for religious communities and their specified procedures of slaughter. At the same time, it is possible for Member States to maintain national rules aimed at ensuring more extensive protection of animals at the time of killing (Art. 26(1)). Moreover, pursuant to Art. 26(2), Member States may adopt national rules aimed at ensuring more extensive protection of animals at the time of killing than those contained in this Regulation in relation to strictly described fields:

– the killing and related operations of animals outside of a slaughterhouse;

– the slaughtering and related operations of farmed game, including reindeer;

– the slaughtering and related operations of animals in accordance with Art. 4(4) (exemption to stunning obligation).

Exemption reserved for religious communities is allowed because Art. 10 of Charter of Fundamental Rights of the European Union foresees the right to manifest religion or belief, in worship, teaching, practice and observance. Regulation 1099/2019 respects this standard. At the same time, Member States have the right to extend the protection of animals. European law grants permission to completely ban ritual slaughter for religious aims.[10] Freedom given to the States is in accordance with the European subsidiarity rule. It is worth highlighting that Member States shall not prohibit or impede putting into circulation within its territory of products of animal origin derived from animals that have been killed in another Member State on the grounds that the animals concerned have not been killed in accordance with its national rules aimed at a more extensive protection of animals at the time of killing. Within this standard, supply of meat for religious rites is provided.

[9] Point 1 and 2 of Preamble to the Council Regulation No. 1099/2009.

[10] E. Łętowska, M. Grochowski, M. Namysłowska, A. Wiewiórowska-Domagalska, *Prawo UE o uboju zwierząt i jego polska implementacja: kolizje interesów i ich rozwiązywanie, cz. I.*, „Europejski Przegląd Sądowy" 2013, nr 11, p. 16.

Legal issues concerning the status of ritual slaughter

European law

The multiplicity of law sources raises both problems and opportunities. So, to make use of opportunities that law creates, one should have good interpretative skills. Specific legal problems arise when more than one centre of power regulates the same sphere. Such a situation is common in EU law. The European Union has exclusive, shared and supporting competences. Protection of animal welfare has its own legal justification in Art. 13 of Treaty on the Functioning of the European Union. The EU has the right to enact Regulations and Directives in this sphere.

Before the Constitutional Tribunal's decision K 52/13, the application of the provisions of Regulation 1099/2009 aroused strong emotions in legal and political terms. Polish Minister of Agriculture considered that the Regulation directly allows ritual slaughter in Poland.[11] In legal doctrine, however, a contrary view was predominant.[12] EU Regulations are entirely binding and directly applicable. They standardize the law. The European Court of Justice held that the national court had a duty to give full effect to Community provisions, even if a conflicting national law was adopted later.[13] EU law takes precedence over national law.

Regulation 1099/2009 has its own specificity. It stipulates that Member States have had discretion as to whether or not to accept ritual slaughter. Even if ritual slaughter of animals is allowed by the law, specific restrictions are binding (i.a. slaughter must take place in a slaughterhouse). In Poland, the APA did not allow ritual slaughter. Provisions of internal Regulation allowing such a practice were repealed.[14] In the internal law there were no such norms allowing ritual slaughter of animals. In this situation some politicians were arguing that directly applicable Regulation 1099/2019 can serve as such a norm. This opinion, however, seems erroneous. Regulation gave the right to allow ritual slaughter provided that such a concrete norm (allowing it) exists in the internal system. In 2011, Katarzyna Lipińska rightly highlighted that "(…) currently, ritual slaughter in Poland is not allowed".[15] This view was afterward supported by the

[11] *Ubój rytualny będzie dozwolony na podstawie rozporządzenia UE*, https://www.tygodnik-rolniczy.pl/articles/aktualnosci_/uboj-rytualny-bedzie-dozwolony-na-podstawie-rozporzadzenia-ue/ [access: 5.10.2019].

[12] K. Lipińska, *Czy w Polsce jest dozwolony rytualny ubój zwierząt?*, „Przegląd Prawa Ochrony Środowiska" 2011, Nr 1, pp. 9–31.

[13] Judgement of the European Court of Justice of 9 March 1978, *Simmenthal II*, case No. 106/77, point 24.

[14] Judgement of the Constitutional Tribunal of 27 November 2012, ref. No. U 4/12 (Journal of Laws of 2012, item 1365).

[15] K. Lipińska, *op. cit.*, p. 30.

fact that Poland notified that the country will respect more restrictive standards of animals protection.

Summing up, before 2014, in Poland ritual slaughter was not authorized by the law. Despite the fact that Regulation 1099/2009 allowed the State to make a decision concerning the legal status of ritual slaughter, in Poland there were no provisions that would allow such practice.

Judgement K 52/13

The existing ban on ritual slaughter of animals gave rise to objections formulated by the representatives of the Union of Jewish Religious Communities in Poland (*Związek Gmin Wyznaniowych Żydowskich w Rzeczypospolitej Polskiej*). They claimed that freedom of religion, articulated by the Constitution and international law, covers slaughter of animals for religious purposes. The Community applied to the Constitutional Tribunal so as to derogate from the provisions prohibiting ritual slaughter. The purpose of the motion was to explicitly declare unconstitutionality of the APA provisions which prohibited specific forms of killing animals, provided for by religious practices of religious associations recognized by Polish law. Religious associations, business representatives, animal rights organizations and lawyers were expecting a reasonable judgment which would resolve a very complicated legal situation and determine the boundaries of freedom of religion and animal protection. The ultimate sentence disappointed these hopes.

The first problem with the judgment was a logical one. The Constitutional Tribunal decided that the provisions of APA, which prohibited ritual slaughter, were contrary to the Constitution in terms of prevention of slaughter of animals in a slaughterhouse in accordance with specific methods required by religious rites. These provisions were contrary to the principle of freedom of religion. The Constitutional Tribunal is obliged to respect the rule of accusatorial procedure. It cannot adjudicate beyond the motion. The Jewish Community demanded only a declaration of unconstitutionality of the ban on ritual slaughter reserved for religious needs. Such a statement like in the Tribunal's judgement *de facto* allowed slaughter of animals (carried out in a slaughterhouse according to religious ceremony) for economic reasons – that is to say – for the export. It was highlighted in the legal doctrine that the Tribunal infringed the rule of accusatorial procedure, deciding beyond the motion.[16] These arguments seem to be accurate. The range of motion did not go beyond the principle of freedom of religious communities to supply in meat accordingly with specific requirements. Creating a legal

[16] E. Łętowska, M. Grochowski, A. Wiewiórowska-Domagalska, *Wiąże, ale nie przekonuje (wyrok Trybunału Konstytucyjnego w sprawie K 52/13 o uboju rytualnym)*, „Państwo i Prawo" 2015, Nr 6, p. 54; J. Woleński, *Trybunału Konstytucyjnego kłopoty z logiką*, https://krytykapolityczna.pl/kraj/wolenski-trybunalu-konstytucyjnego-klopoty-z-logika/[access: 13.10.2019].

possibility for exporting meat produced in specific conditions regulated by Judaism and Islam provisions did not fall within the sphere of the Tribunal's competences.

As regards the Tribunal's judgement, it raises serious doubts as far as European law is concerned. When a ban on ritual slaughter was in force, Poland notified higher standards of animal protection to the European Commission. Regulation 1099/2009 does not cover a legal possibility of withdrawal of such notification. It does not mean that such withdrawal is legally impossible.[17] What is really important – the Constitutional Tribunal did not indicate the impact of its adjudication on the prior notification.[18] In judgement K 52/13, no statement can be found as to whether such notification was illegal, whether a new notification is needed or whether the Constitutional Tribunal's adjudication has a direct impact on the notification. Solving these problems is crucial for Poland's compliance with its obligations within the European Union. In this point one can see clearly how multicentric the system of law is. The same field of regulation is not only preoccupied by few sources of law but also by few judiciary institutions. It is easy to imagine the proceeding before the European Court of Justice which will refer to the problem of proper notification and most likely will lead to imposing sanctions on Poland.

The ritual slaughter case may serve as a perfect example of conflict over legal values. Three rudimentary issues are in collision here – freedom to express religion by minorities, protection of animal welfare and taking care of economic issues (export of meat received from ritual slaughter).[19] The way the Constitutional Tribunal resolved that conflict may give rise to doubts. The Polish Constitution and European law adopted the same mechanism that serves the legal resolution of problems of colliding values. This mechanism is based on the proportionality principle. Juridical exemplification of this rule is contained in Art. 31(3) of the Polish Constitution: "Any limitation upon the exercise of constitutional freedoms and rights may be imposed only by statute, and only when necessary in a democratic state for the protection of its security or public order, or to protect the natural environment, health or public morals, or the freedoms and rights of other persons. Such limitations shall not violate the essence of freedoms and rights". In case of restrictions on public expression of religion, the protection of the natural environment is not included (Art. 53(5)). The Constitutional Tribunal clearly defined the level of protection of mentioned values in a different way in comparison with the European regulation.

According to the Constitutional Tribunal judgement, the freedom of religion prevails over the protection of animals. The Tribunal excluded the thesis that the protection of public morality can justify the ban on ritual slaughter. Moreover, the President of the Tribunal highlighted that the State cannot interfere in the sphere of

[17] E. Łętowska, M. Grochowski, A. Wiewiórowska-Domagalska, *op. cit*., p. 57.

[18] *Ibidem*.

[19] E. Łętowska, M. Grochowski, M. Namysłowska, A. Wiewiórowska-Domagalska, *op. cit*., p. 13.

freedom to express the religion. Judge Teresa Liszcz criticized this statement saying that such reasoning may serve as justification for many controversial practices which may resemble a religious fundamentalism.[20] The Constitutional Tribunal accepted the specific hierarchy of values in which freedom of religion plays a primary role.

The reasoning of the Constitutional Tribunal presented in the verdict K 52/13 does not correspond with the regulation at the European level, specifically with the Regulation 1099/2009. The European lawmaker adopted a balanced statement which includes different axiological claims. Performing ritual slaughter is possible for religious aims. The ban is fully enforceable because the issue of meat supply (intended for religious purposes) is not ignored because of the mechanism that allows kosher and *halal* meat to be imported. It seems that the Constitutional Tribunal fully allows not only slaughtering animals for meat in the context of a religious ritual but also its export. There are many doubts as to whether animals protection standards, especially when it comes to the slaughter for profit, are respected in Polish law after K 52/13 judgement.

Multicentric system of law and friendly interpretation of law directive

Dilemmas which arise in the case at hand are strictly combined with the contemporary complications concerning the multiplicity of law-making institutions. National laws, treaties, conventions are interrelated. Provisions for such acts are often in direct or implicit conflict. The old hierarchical method – "A prevails over B" – is usually insufficient and cannot be used. Today instead of a monocentric legal system there appeared a multicentric one. The new situation means the necessity of accepting the fact that different institutions can operate in the same legal field.[21]

The concept of multicentric (polycentric) legal system is neither a legal doctrine nor a paradigm, it rather describes social and legal reality and indicates certain solutions. The notion was introduced into the Polish legal debate by Ewa Łętowska.[22] The reality of polycentric system is characterized by numerous opportunities and challenges. The application of law may take into consideration different points of view but it requires the actors to have sophisticated skills, especially in combination with interpretation. An additional problem is related with the fact that political and legal culture are at a low level.

---

[20] Dissenting opinion of Judge Teresa Liszcz to the judgement of the Constitutional Tribunal, ref. No. K 52/13, p. 73: "(…) in this way the Constitutional Tribunal may legitimize circumcision of women".

[21] E. Łętowska, *„Multicentryczność" systemu prawa i wykładnia jej przyjazna*, [in:] *Rozprawy prawnicze. Księga pamiątkowa Profesora Maksymiliana Pazdana*, red. L. Ogiegło, W. Popiołek, M. Szpunar, Kraków 2005, p. 1129.

[22] Eadem, *Multicentryczność współczesnego systemu prawa i jej konsekwencje*, „Państwo i Prawo" 2005, nr 4; eadem, *„Multicentryczność" systemu…*, pp. 1127–1146.

A multicentric legal system can be defined as a coexistence in the single legal system of many sources of law which do not constitute a hierarchic structure.[23] One shall agree that the main problem with this coexistence is not about sovereignty but effective and correct interpretation.[24] That means that polycentrism must be accepted. But how to correctly apply the provisions deriving from different sources and regulating the same field?

Generally, this problem cannot be solved. However, there is an indication – the friendly interpretation of law principle. Such interpretation shall enable the coexistence (*współfunkcjonowanie*) between different legal orders.[25] That means not only the obligation to take into consideration the diversity of law systems but also effective application of multiple norms in the single case. Such interpretation can provide *effet utile*– the fundamental principle of EU law.

The fundamental principle in the contemporary law is that the state cannot invoke the provisions of its internal law as justification for its failure to perform international treaty law. The problem of multicentrism has its exemplification in EU law. National courts are obliged to apply directly applicable provisions and to interpret the legislation in conformity with requirements of EU law.[26] If the court does not comply with this commitment, it may give rise to proceedings before the Court of Justice of the European Union. The legislative and judiciary power shall at the same time act for the implementation of obligations adopted by EU institutions.

The multicentric legal system demands an interpretation which leaves a certain new way of understanding norms. In the context of pro-EU interpretation one can see a new "European shadow" – "semantic shadow" or "axiological shadow".[27] The impact of EU law requires a new way of perceiving certain situations. For example, the boundaries of freedom of contract or ethical borders of exploitation of some goods may be reinterpreted in a new situation. One should be ready for that new application because multicentrism is rather necessity than possibility. That means that the legislator (and first of all courts) must include international and EU *acquis* in the complicated process of interpretation. Especially "axiological shadow" may give rise to opposition but solving every situation which is in a way combined with ethical dilemmas is based upon the principle of proportionality. That rule guarantees a balance between different claims. Surely, the result of interpretation may be unusual at different levels, hence the dialogue between legal entities is needed. It seems that the only way to solve the problems deriving from multicentrism is developing a culture of persuasive decisions and dialogue. It may be difficult especially in those countries that did not have a long tradition of democratic governance.

[23] W. Lang, *Wokół „Multicentryczności systemu prawa"*, „Państwo i Prawo" 2005, nr 7.
[24] E. Łętowska, *„Multicentryczność" systemu…*, p. 1130.
[25] Eadem, *Multicentryczność współczesnego…*, p. 9.
[26] Judgement of the European Court of Justice of 10 April 1984, *Von Colson*, case No. 14/83.
[27] E. Łętowska, *„Multicentryczność" systemu…*, p. 1141.

In the analysis presented, the issue of multicentrism refers to two legal difficulties. First – interpretation of the Constitution and EU law which arise from the K 52/13 judgement and second – acts of Polish Sejm (lower house of Parliament) concerning regulation on the ritual slaughter. It should be taken into account that problems arising from the regulations of both the Constitutional Tribunal and Sejm are strictly combined with two factors: 1) the inability to effectively apply European norms, and 2) low possibility of taking into account the axiological differences which characterize the multicentric legal system. Interconnection of sources of law is really demanding for actors in the legal field. Two abilities seems indispensable in effective application of "multicentric norms":

– mutual respect for institutions which enact law (frequently based on different values),

– convincing justification of courts' verdicts.

These measures can serve as an effective tool provided that the following thesis will be understood: mutual dialogue and legal culture are often more important than traditional hierarchical thinking that does not lead to the solution of contemporary problems. Unfortunately, it is necessary to emphasize that the status of ritual slaughter in Poland was not settled upon this rule.

Ritual slaughter in Poland – what went wrong?

The status of ritual slaughter in Poland was uncertain and the constant legal amendments jeopardize the legal certainty. The ritual slaughter case is an example of weighing values in the legal field. In that case this procedure was carried out incorrectly. The first cause of disappointment is that national law-making institutions were not able to take advantage of the opportunities created by EU law. Omission of the European aspect (e.g. when it comes to notification in the K 52/13 case) may be evaluated as an imperfection. Moreover, the lawmaker was not able to justify the grounds for introducing these acts.

The K 52/13 judgement did not resolve any doubts combined with the contradictory claims and created a new uncertainty. The friendly interpretation of law directive was not sufficiently applied. Additionally, the Constitutional Tribunal exposed itself to criticism in terms of compliance with the principle of accusatorial procedure. The way the Constitutional Tribunal decided on the conflict between values did not correspond with the carefulness of the EU legislator. One can say that the reasoning of the verdict did not sufficiently dispel doubts whether the right pertaining to freedom of religion has supremacy over that of animal welfare.

The conclusion of this article is not an optimistic one. The friendly interpretation of law directive was not fully accepted by the Constitutional Tribunal. Moreover, the multicentric legal system did not contribute to any constructive dialogue between the Polish and EU legislature. It is highly probable that in the near future some ethical conflicts will arise between animal protection and economic use of meat.

References

Lang W., *Wokół „Multicentryczności systemu prawa"*, „Państwo i Prawo" 2005, nr 7.

Lipińska K., *Czy w Polsce jest dozwolony rytualny ubój zwierząt?*, „Przegląd Prawa Ochrony Środowiska" 2011, Nr 1.

Łętowska E., *„Multicentryczność" systemu prawa i wykładnia jej przyjazna*, [in:] *Rozprawy prawnicze. Księga pamiątkowa Profesora Maksymiliana Pazdana*, red. L. Ogiegło, W. Popiołek, M. Szpunar, Kraków 2005.

Łętowska E., *Multicentryczność współczesnego systemu prawa i jej konsekwencje*, „Państwo i Prawo" 2005, Nr 4.

Łętowska E., Grochowski M., Namysłowska M., Wiewiórowska-Domagalska A., *Prawo UE o uboju zwierząt i jego polska implementacja: kolizje interesów i ich rozwiązywanie, cz. I.*, „Europejski Przegląd Sądowy" 2013, Nr 11.

Łętowska E., Grochowski M., Wiewiórowska-Domagalska A., *Wiąże, ale nie przekonuje (wyrok Trybunału Konstytucyjnego w sprawie K 52/13 o uboju rytualnym)*, „Państwo i Prawo" 2015, Nr 6.

Shimshony A., Chaudry M.M., *Slaughter of Animals for Human Consumption*, "Revue scientifique et technique (International Office of Epizootics)" 2005, Vol. 24(2).

Ubój rytualny będzie dozwolony na podstawie rozporządzenia UE, https://www.tygodnik-rolniczy.pl/articles/aktualnosci_/uboj-rytualny-bedzie-dozwolony-na-podstawie-rozporzadzenia-ue/ [access: 5.10.2019].

Woleński J., *Trybunału Konstytucyjnego kłopoty z logiką*, https://krytykapolityczna.pl/kraj/wolenski-trybunalu-konstytucyjnego-klopoty-z-logika/ [access: 13.10.2019].

Abstract: This article addresses the problem of the legal status of ritual slaughter in Poland. The author presents the complexity of the problem in legal and comparative terms. The case law of Polish and international courts was included. The author analyses the problem with reference to a multicentric legal system concept, and in the conclusion there is a reference to the principle of friendly interpretation of law.

Keywords: ritual slaughter; EU law; the Constitutional Tribunal; multicentrism; proportionality

JAKUB POLANOWSKI

Provincial Administrative Court in Lublin
https://orcid.org/0000-0003-3401-7479
jpolanowski@wp.pl

The Order to Kill (Slaughter) Animals in the Context of the Proportionality Principle *

Introduction

Over twenty years ago, a principle was introduced in Polish law, stating that "an animal, as a living creature capable of experiencing suffering, is not an object" and a human being is obliged to respect, protect and care for animals – Art. 1(1) of the Act of 21 August 1997 on the Protection of Animals (hereinafter referred to as APA).[1] This change led to an increase in the scope of obligations resulting from the precept to treat animals in a humane manner and was a huge step forward, which was an expression of civilisational progress.[2] A provision was also introduced at that time, prohibiting the unjustified and inhumane killing of animals, which was replaced on 1 January 2012 by a clear ban on killing animals, except for the cases specified in the Act (Art. 6 para. 1 APA).

Such exceptional circumstances are listed, *inter alia*, in the provision of Art. 48b para. 1 point 2 of the Act of 11 March 2004 on the Protection of Animal Health and Combating Infectious Diseases of Animals (hereinafter referred to as APAH),[3] which constitutes the legal basis for the ordering by a district (*powiat*) veterinarian – by way of an administrative decision – of the emergency killing (slaughter) of animals. There

* This article was prepared on the basis of the legislation in force as of 17 October 2019.

1 Journal of Laws of 2019, item 122, as amended.

2 A. Nałęcz, *Ochrona zwierząt a postęp cywilizacyjny*, [in:] *Wpływ przemian cywilizacyjnych na prawo administracyjne i administrację publiczną*, red. J. Zimmermann, P.J. Suwaj, Warszawa 2013, p. 674f.

3 Journal of Laws of 2018, item 1967, as amended.

are several reasons behind the interest in this. Firstly, the decision is used as an instrument to control the infectious animal disease spreading currently in Poland – African swine fever (ASF). Secondly, because of the very general definition of the statutory conditions, doubts arise as to whether this Act should be adopted. Thirdly, as is rightly pointed out in the prevailing scholarly opinion, the dominant legal form of action by public administration bodies in the field of animal protection is an administrative act in the form of an administrative decision, rather than general administrative act.[4]

It is therefore necessary to indicate, at least partially, the interpretative directives binding the authorities when taking decisions in this manner. Since the Act does not specify these directives, it should be recognised that the assessment in this respect is made by the authorities independently, however, it cannot be arbitrary. The authorities are bound in this respect primarily by constitutional principles, including the principle of proportionality (Art. 31 para. 3 of the Constitution[5]), combined with the constitutional principle of protection of property rights (Art. 31 para. 3 in conjunction with Art. 64 para. 1 and para. 2 of the Constitution).

The thesis hereof is based on the statement that the above decisions, due to the radical nature of the obligation imposed on the individual, should be treated as introducing legal measures *ultima ratio*. For this reason, the duty of the body issuing the order to kill (slaughter) animals is to demonstrate the necessity of taking such a decision, in accordance with the principle of proportionality. The analysis of this issue will be presented on the example of the jurisprudence of administrative courts.

The essence of the decision to order the killing (slaughter) of animals

Any juridical reflection on the limitation of individual rights by public authorities requires a reference to the fundamental values that help to balance the optimal model of adjudication in such cases.

First of all, it should be emphasized that the decision in question is extremely radical. Looking for an analogy in administrative law, it can be compared to a decision ordering the demolition of a building. It may be pointed out that the common denominator of the two decisions described above is, first and foremost, the radical and final nature, consisting in the complete destruction of the substance covered by the obligation imposed by the decision. An analogy can also be found in the fact that the provisions of the law, although in a partially different way, in both cases mentioned above – as a rule – provide for the possibility of remedying the deficiencies noticed

[4] J. Stelmasiak, *Administracyjnoprawne aspekty ochrony zwierząt*, [in:] *Prawna ochrona zwierząt*, red. M. Mozgawa, Lublin 2002, p. 160.

[5] Constitution of the Republic of Poland of 2 April 1997, Journal of Laws No. 78, item 483, as amended (hereinafter referred to as the Constitution).

during the inspection activities of the authority, in order to avoid the decision of radical nature, because it aims at the annihilation of a building structure or animals. Moreover, similarities may be observed in the oppressive manner of action of authorities obliged to take action *ex officio* in order to guarantee protection of goods ranked higher in the hierarchy of protected values than the property rights of the owner of a building structure or animals. The purpose of both these decisions is also to restore the state of compliance with the law.

However, there is an important difference between these acts, by its very nature "reparative". Namely, the subject of the order for these decisions is different, because the decisions of the Veterinary Inspectorate concern the deprivation of life of living beings, capable of suffering pain and fear. This difference, even if in practice not seen in the grounds for the decision of the authorities, should be fundamental in order to assess whether the circumstances of the case justify the application of this irreversible remedy.

The decision to order the killing (slaughter) of animals is one of the administrative instruments for combating infectious animal diseases which must be eradicated. The catalogue of these instruments is extremely broad, and – as is clear from the provisions of Chapter 8 of APAH – the vast majority of them are preservative. It is assumed that even if an infectious animal disease is found, sick animals are eliminated either by a radical method by killing all the animals of susceptible species on the farm or by a method of gradual elimination and healing of the herd. The latter method consists in killing or slaughtering only sick and infected animals and testing the rest of the herd until it becomes disease-free.[6] It is therefore the duty of the authorities, in any event, to rule out, as a first step, the application of countermeasures other than the killing of animals. Such a decision is particularly negative for the owner of the animals, but also for the State Treasury, which is in principle obliged to pay compensation for the damage suffered on that account.

Consequently, when taking that decision, the administrative authorities are required to consider whether it is justified in the light of the requirements of the principle of proportionality. It follows, *inter alia*, that the limitation of constitutionally protected rights is permissible only when it is necessary to protect such goods as public safety and public health. This principle is fulfilled by the authority when it has used a means which actually serves the purpose specified in the act and is as little harmful to the individual as possible, and the good to be sacrificed is of a lesser value than the good the authority intends to protect.[7]

---

[6] I. Lipińska, *Zwalczanie chorób zakaźnych zwierząt gospodarskich – wybrane aspekty prawne*, „Studia Iuridica Agraria" 2017, Vol. 15, pp. 161–163.

[7] See, e.g., the following judgments of the Constitutional Tribunal: of 9 June 1998, K 28/97, OTK 1998, No. 4, item 50; of 26 April 1999, K 33/98, OTK 1999, No. 4, item 71; of 2 June 1999, K 34/98, OTK 1999, No. 5, item 94.

The fundamental issue that arises in such cases is therefore the need to strike a balance between the social interest and the legitimate interest of the individual. Social interest should be considered as an essential interest of the state, including its safety and public health, expressed in the need to maintain health safety, food hygiene and animal health. This category also includes values derived from EU law, as defined, *inter alia*, in the provisions of Regulation (EC) No. 882/2004 of the European Parliament and of the Council of 29 April 2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules.[8] Pursuant to Art. 3(1) point 1 and (4b) of the Act of 29 January 2004 on Veterinary Inspectorate,[9] these tasks are performed by the Veterinary Inspectorate in Poland. The legitimate interest of the unit is expressed in its expectation of causing the least possible ailment, sufficient to achieve the objective of combating an infectious animal disease.

At the same time, it is obvious that regardless of what has been said above, the obligation of the authorities is to guarantee the only party to the proceedings (the animals owner) the procedural rights to which he is entitled.

Order to kill (slaughter) animals pursuant to Art. 48b para. 1 point 2 APAH

In the light of the provisions of APAH, the order to kill or slaughter animals may result not only from individual but also general administrative acts. For example, it should only be pointed out that pursuant to Art. 45 para. 1 points 8, 8a, 8b and para. 3 of this Act, a district veterinarian issues an ordinance on the order of sanitary cull of wild boars in one district,[10] and pursuant to Art. 46 para. 3 point 1, paras. 2, 3, 4, 7, 8d, 8f APAH, provincial governor issues an ordinance on the order of sanitary cull

[8] Official Journal of the EU 2004, L 165, p. 1, as amended. It should be noted that the provisions of this Act shall be repealed with effect from 14 December 2019 – pursuant to Art. 146 of Regulation (EU) No. 2017/625 of the European Parliament and of the Council of 15 March 2017 on official controls and other official acts performed to ensure the application of feed and food law, animal health and welfare rules, plant health and plant protection products, amending Regulations (EC) No. 999/2001, (EC) No. 396/2005, (EC) No. 1069/2009, (EC) No. 1107/2009, (EU) No. 1151/2012, (EU) No. 652/2014, (EU) 2016/429 and (EU) 2016/2031, Council Regulations (EC) No. 1/2005 and (EC) No. 1099/2009 and Council Directives 98/58/EC, 1999/74/EC, 2007/43/EC, 2008/119/EC and 2008/120/EC, and repealing Regulations (EC) No. 854/2004 and (EC) No. 882/2004 of the European Parliament and of the Council, Council Directives 89/608/EEC, 89/662/EEC, 90/425/EEC, 91/496/EEC, 96/23/EC, 96/93/EC and 97/78/EC and Council Decision 92/438/EEC (Official Control Regulation), Official Journal of the EU 2017, L 95, p. 1.

[9] Journal of Laws of 2018, item 1557, as amended.

[10] Instead of many, see Ordinance No. 3/2019 of the District Veterinarian in Parczew of 10 September 2019 on the ordinance on the sanitary cullof wild boars in the Parczew district, Journal of Laws of Lublin Province, item 5041.

of wild boars in more than one county.[11] In the case of an order to kill (slaughter) animals, the rule is that for animals killed or slaughtered, compensation is payable from the national budget (Art. 49 para. 1 APAH).

A specific basis for ordering the killing of animals is provided for in Art. 48b APAH. If it is found that the animals owner does not comply with the orders, prohibitions or restrictions referred to in the provisions issued on the basis of Art. 45 para. 1, Art. 46 para. 3, Art. 47 paras. 1 and 2, Art. 48 paras. 2 and 3, and Art. 48a para. 3 of this Act, the district veterinarian is obliged to order, by way of a decision, the removal of the identified deficiencies within a specified period (para. 1 point 1) or the killing or slaughtering of animals of specific species and the banning of breeding animals of these species on the farm (para. 1 point 2). Moreover, when the authority determines that the entity will not comply with the order to remove the identified deficiencies within a specified period of time, the authority obligatorily issues a decision referred to in section 1 item 2 (section 3). These decisions are *ex officio* made immediately enforceable, and for animals killed or slaughtered in this manner no compensation is due from the national budget (sections 2 and 5).

Such decisions shall be issued in particular when the district veterinarian stated that the animals owner had not complied with the orders, prohibitions or restrictions resulting from the Regulation of the Minister of Agriculture and Rural Development of 6 May 2015 on measures to be taken in relation to the occurrence of ASF,[12] issued on the basis of Art. 47 para. 1 and Art. 48a para. 3 APAH.

As an example illustrating the doubts related to the application of these provisions, the judgements of the Provincial Administrative Court in Lublin of 8 November 2018 (file No. II SA/Lu 786/18)[13] and of 4 July 2019 (file No. II SA/Lu 233/19)[14] will be cited. As can be seen from the Central Database of Decisions of Administrative Courts,[15] these are the only judgements issued in such cases. In the first of these judgments, upholding the appeal, the court overturned the decisions of the bodies of both instances ordering the killing of animals, while in the second, the court dismissed the appeal against the decision of the appeal body in this respect.

---

[11] Instead of many, see Ordinance No. 17 of the Lublin Provincial Governor of 31 July 2019 on combating African swine fever in the territory of the districts of Radzyń and Parczew, Journal of Laws of Lublin Province, item 4589.

[12] Journal of Laws of 2018, item 290, as amended (hereinafter referred to as the Regulation of the Minister of Agriculture and Rural Development of 6 May 2015).

[13] http://orzeczenia.nsa.gov.pl/doc/307E47E763 [access: 17.10.2019].

[14] http://orzeczenia.nsa.gov.pl/doc/6FBAFFFFB1 [access: 17.10.2019].

[15] The Central Database of Administrative Court Decisions was established by virtue of Ordinance No. 9 of the President of the Supreme Administrative Court of 11 July 2007 on establishing the Central Database of Administrative Court Decisions and Information on Administrative Court Matters and Making Decisions Available via the Internet (http://www.nsa.gov.pl/zarzadzenia-prezesa-nsa/utworzenie-centralnej-bazy-orzeczen). It is available on the SAC's website.

In first case (file No. II SA/Lu 786/18) it was undisputed that the applicant had failed to comply with the bio-insurance obligations laid down in the Regulation of the Minister of Agriculture and Rural Development of 6 May 2015. The authorities therefore ordered the applicant to kill or slaughter all the animals of the pig species held by the applicant and prohibited her from breeding animals of the pig species on her farm. By setting aside the decisions of the first and second instance authorities adopted pursuant to Art. 48b para. 1 point 2 APAH, the Court states that the grounds behind the authorities' decisions do not explain why a more radical measure should have been taken immediately. The deficiencies found in the inspection report and not challenged by the applicant did not constitute a prerequisite for the adoption of a decision ordering the slaughter (killing) of animals. Pursuant to Art. 48b para. 1 APAH, the failure to comply with the obligations relating to protection against the spread of an infectious disease resulted in the adoption of both decisions referred to therein. That provision allows the authority to apply one of two alternative decisions: either the authority orders the correction of the deficiencies within a specified period, and only if the deficiencies are not remedied does it order the killing or slaughtering of the animals, or immediately resort to a more radical measure, which is an order to kill (slaughter) the animals. However, the alternative solutions cannot be understood in such a way that would allow an arbitrary choice. The authority must justify why it chose one of the two alternative solutions, and the choice of the authority limits the obligation to respect the principle of proportionality. Moreover, as the court pointed out, which was also important in this case, the post-inspection protocol ordered the correction of the deficiencies found.

A completely different decision was taken by the court in the latter case (file No. II SA/Lu 233/19). In this case, during the inspection carried out on the applicant's farm, it was found that the bio-insurance requirements set out in the Regulation of the Minister of Agriculture and Rural Development of 6 May 2015, as well as the identification and registration of pigs, which resulted from other national provisions, were not met, which, in the opinion of the authorities, resulted in animals being "unidentifiable, i.e. of illegal origin". Although the Court of First Instance did not indicate those other national provisions in the grounds for the judgment, it follows from the search of those files carried out by the author hereof that the provisions in question were those of Art. 12 para. 3, Art. 17 para. 2 point 3, Art. 20 para. 2, Arts. 20a and 23 para. 3 of the Act of 2 April 2004 on the system of identification and registration of animals (hereinafter referred to as the ASIRA) [16] and para. 1 point 4 and 6 of the Regulation of the Minister for Agriculture and Rural Development of 18 September 2003 on detailed veterinary conditions to be met by farms when animals or foodstuffs of animal origin from such farms are placed on the market (hereinafter referred to as the Regulation of the Minister of Agriculture and Rural Development

[16] Journal of Laws of 2019, item 1149, as amended.

of 18 September 2003).[17] Due to these deficiencies, the authority of the first instance obliged the party – in the post-inspection protocol – to remove the deficiencies found. With that in mind, the applicant took a number of measures to comply with that obligation. However, eight days later, the first-instance authority issued a decision ordering the immediate killing of all the pigs, prohibiting the breeding of pigs and recognising the meat obtained by killing those animals as a category 2 animal by-product. That decision was made immediately enforceable. It was served on the applicant a few days later, on the same day as the veterinarian acting on behalf of the authority, assisted by police officers, compulsorily executed the order for the killing of animals. As a result of the fact that the meat obtained by killing the animals was considered to be a category 2 animal by-product, it was disposed of. Having considered the appeal, the second-instance authority overturned that decision because of a flawed indication of the legal grounds and the factual and legal justification. In re-examining the case, the authority of first instance ruled on the merits in the same way. The appeal body overturned that decision in so far as it concerned the order to kill animals and discontinued the proceedings as devoid of purpose in that part and upheld the decision of the first-instance body in the remaining part. The provincial veterinarian stated that since the farm of the party did not meet the requirements of the bio-insurance law, the animals were not properly marked and entered in the relevant registers, and the applicant did not explain the origin of the animals, the meat could not be marketed and the animals should have been considered unidentifiable, thus – illegal. However, in view of the previous killing of animals, the case became devoid of purpose in that part, which justified the annulment in that respect of the decision of the authority of first instance and the discontinuance of the proceedings. On the other hand, as indicated by the provincial veterinarian, the party who breeds animals was legitimately forbidden in the face of the above described deficiencies and the threat of ASF spreading in the region.

Rejecting the complaint, the court stated that the authorities correctly justified the use of the most radical measure among those mentioned in Art. 48b para. 1 APAH. According to the court, the number of infringements of the law committed by the applicant was "enormous". Since the animals were unidentifiable, it was correctly ordered to kill the animals and destroy the remaining meat as unfit for consumption within the meaning of Art. 9 letter f point i in conjunction with Art. 3 point 1 of Regulation No. 1069/2009.[18] In the court's opinion, such a large scale of infringements proved that breeding the animals on the farm alive posed a real risk of ASF's appearance and spread in the future. Therefore, it was not relevant to the outcome of the case that the

[17] Journal of Laws, No. 168, item 1643.

[18] Regulation (EC) No. 1069/2009 of the European Parliament and of the Council of 21 October 2009 laying down health rules concerning animal by-products not intended for human consumption and repealing Regulation (EC) No. 1774/2002 (Regulation on animal by-products), Official Journal of the EU 2017, L 300, p. 1.

inspection report (drawn up by the first-instance authority with the participation of the applicant) contained a recommendation to remedy the identified infringements and the applicant undertook to comply with the recommendation without delay. Such a circumstance, as the court pointed out, is only of such significance that if the applicant remedied the said infringement, then – in accordance with Art. 48b para. 3a APAH – may apply for the lifting of the ban on breeding animals on his farm, but not earlier than one year from the date of issue of that ban. Finally, the court found it appropriate to annul the decision of the authority of first instance and to discontinue the proceedings in respect of the order to kill the animals, in view of the fact that those animals had previously been killed.

With regard to those judgments, the following points should be stated. In the first case (file No. II SA/Lu 786/18), the need for the authority, in accordance with the requirements of the principle of proportionality, to state correctly why it adopted the most radical legal measure of all those provided for in Art. 48b para. 1 APAH, was aptly stated. It was also correctly pointed out by the court that the fact that the inspection report ordered the applicant to remedy the deficiencies found had a significant impact on the outcome of the case. Undoubtedly, such action by the authority showed that, in the event of the rectification of the deficiencies noted during the inspection, it would not take further, more radical decisions.

However, one cannot fully approve the position expressed in the latter case (file No. II SA/Lu 233/19). First of all, the court did not assess the consequences of the infringement by the authorities of the principle according to which the application of Art. 48b para. 1 APAH is possible only if the initial condition specified in this provision is fulfilled, namely if the holder of the animals violated the orders, prohibitions or restrictions referred to in the provisions issued on the basis of Art. 45 para. 1, Art. 46 para. 3, Art. 47 paras. 1 and 2, Art. 48 paras. 2 and 3 and Art. 48a para. 3 APAH. The grounds for the decision referred to in Art. 48b para. 1 point 2 APAH could not be based on improper identification of animals and failure to notify them to the relevant registers, as those obligations were not introduced by the provisions issued under Art. 45 para. 1, Art. 46 para. 3, Art. 47 paras. 1 and 2, Art. 48 paras. 2 and 3 and Art. 48a para. 3 APAH, in particular, they were not imposed by the Regulation of the Minister of Agriculture and Rural Development of 6 May 2015, issued pursuant to Art. 47 para. 1 and Art. 48a para. 3 APAH, as indicated by the authorities. Those obligations, as the appeal body stated in the justification for the contested decision, stemmed from other provisions: Art. 12 para. 3, Art. 17 para. 2 point 3, Art. 20 para. 2, Art. 20a and Art. 23 para. 3 ASIRA and para. 1 point 4 and 6 of the Ordinance of the Minister of Agriculture and Rural Development of 18 September 2003. That is to say, the authorities could not justify the order to kill animals in this case on the ground that the applicant had infringed the latter provisions. Secondly, the Court failed to assess the consequences of the breach by the authorities of the principle of legitimate expectations (Art. 8 para. 1 of the Code of Administrative

Procedure[19]) and of the right to an effective remedy (Art. 13 of the European Convention on Human Rights[20]). Primarily, the authority of first instance was particularly inconsistent in its decision to order the killing of animals. Firstly, during the inspection, it assured the party that immediate elimination of the detected irregularities would be sufficient to remove the illegality. Then, disregarding the fact that the party, acting in confidence with the authority, had taken such action, the authority ordered the immediate killing of all the pigs kept on the farm. Moreover, it is beyond dispute that the authority of the first instance enforced its final decision without even waiting for the expiry of the time limit for its appeal in the administrative course of the instance. Such a measure cannot be justified by the real risk of ASF spreading. Moreover, although the court did not mention it in the justification of the cited judgment, the analysis of administrative files carried out by the author hereof shows that all the animals killed were healthy. This was confirmed by blood tests performed by a specialized research unit commissioned by the first-instance authority. In such circumstances, the instance-based review became "illusory and, in fact, pointless".[21] Thirdly, the court did not pay due consideration to whether it was justified that the authorities did not order an examination of the state of health of the animals before issuing the decision on ordering their killing. This could not be supported only by the "enormous" scale of infringements emphasised by the Court, especially as – as indicated above – the breach of information and registration obligations could not justify the decision referred to in Art. 48b para. 1 point 2 APAH. Fourthly, one cannot accept the Court's position that the origin of those animals was not known at all, so that the authorities correctly assessed that the meat left over after the animals had been killed could only be disposed of as unfit for consumption. Even if the applicant was unable to explain the origin of some of the animals, such a position was simply unreasonable since they were healthy, which the authority could not rule out without first examining them. Fifthly, having regard to all the irregularities committed by the authorities as described above, which have been overlooked by the Court, the Court should not have agreed that in this case there were no grounds for ordering the applicant to remedy the infringements under Art. 48 para. 1 point 1 APAH, and that it was necessary to impose the most radical, i.e. irreversible, administrative penalty.

---

[19] Act of 14 June 1960 – The Code of Administrative Procedure, Journal of Laws of 2018, item 2096, as amended.

[20] Convention for the Protection of Human Rights and Fundamental Freedoms drawn up in Rome on 4 November 1950, subsequently amended by Protocols Nos. 3, 5 and 8 and supplemented by Protocol No. 2, Journal of Laws of 1993, No. 61, item 284 as amended.

[21] Instead of many, see the judgements of the European Court of Human Rights: of 3 May 2007 in *Bączkowski and Others v. Poland* – 1543/06 and of 6 December 2018 in *Słomka v. Poland* – 68924/12 (M. Szwast, *Glosa do wyroku Europejskiego Trybunału Praw Człowieka z dnia 6 grudnia 2018 r. w sprawie Słomka przeciwko Polsce (skarga nr 68924/12)*, „Zeszyty Naukowe Sądownictwa Administracyjnego" 2019, Nr 4, *passim*.

Conclusions

That judgment is likely to indicate that the administrative practice for issuing the animal slaughter order does not take sufficient account of the requirements of the principle of proportionality. The reasons for this are as follows.

The lack of interpretative directives binding the authorities when taking decisions under this procedure facilitates the application of the most radical legal measure among those indicated in Art. 48b para. 1 APAH. In case of doubt, the safest solution from the point of view of the authority is to take a decision which should be final and thus, as a rule, respond to the ineffectiveness of earlier lenient legal remedies. It is obvious that when in a situation of threat one usually takes the least risky decision. Such a threat situation is the risk of the emergence and spread of an infectious animal disease, which is to be compulsorily controlled. Possible negative consequences of making an erroneous decision enforce on the authorities a kind of radicalisation of attitudes. It is easier to decide to kill all the animals when there is a likelihood of such a disease occurring than to impose on the holder the obligation to remedy the deficiencies found. Where an order to kill animals has been enforced, there is no longer any basis for even hypothetical consideration as to whether they could constitute a source of danger in this respect in the future.

These doubts could be solved by supplementing the content of Art. 48b para. 1 APAH in such a way as to make it more effective as a guarantee for holders of animals at risk with infectious diseases. In line with the guiding principle of animal welfare, stating that animals must not be killed unless absolutely necessary, this provision should prevent the oversimplified interpretation that has been adopted in the two cases discussed above.

The specificity of the administrative order for the slaughter of animals leads to the conclusion that the emergency killing of animals should be reduced to an absolute minimum as indicated above, i.e. where, in view of the specificity of the contagious disease, this solution is necessary to avoid unnecessary suffering by the animals, the spread of disease, etc. It is incomprehensible and contrary to the constitutional principle of proportionality to order the killing of animals where the irregularities found by the authority can be remedied using other, less intrusive means. This applies in particular to situations where the order is issued for a breach of information or record-keeping obligations. It is always difficult to agree with such a decision when the reason for deciding on the obligation to kill animals is not their disease, but only the risk of its occurrence resulting from, for example, the failure of the animals owner to comply with their bio-insurance obligations. Such an automatic sanction imposed by the veterinary inspection authorities cannot usually be regarded as an absolutely necessary means of restoring legality.

The system of keeping records of animals cannot be absolutised and, as a paradigm, the claim that a healthy animal which is not properly registered with the records is

unidentifiable, justifying its immediate killing and destruction of its meat as unfit for human consumption. Certainly, this was not the purpose of the introduction of the obligation to keep records of livestock. If these animals are healthy, it would be unreasonable to rule out the possibility of slaughtering them for personal use, subject to the rules laid down in this respect. The *a priori* assumption that food which is healthy but not derived from an animal of documented origin is unfit for consumption should be regarded as an excessive simplification. It does not take account of the meaning of that institution, leading to a denial of the idea of justice. The automatic imposition of an order for the killing of animals and the destruction of material left over from the slaughter of animals is a completely disproportionate penalty for failure to comply with the obligation to guarantee the traceability of the animal. Taking the opposing view is based on a misunderstanding of the aims and objectives of the administrative duty described. At the same time, it leads to a kind of objectification of the animal and, consequently, to a different value attached to it, which in this case is its health and, in the long term, food safety.

The source of problems resulting from such an understanding of the essence of the adopted regulation is probably an unconscious tendency to apply methodology and objectives of technical sciences, according to the paradigm which, applied to animals, determines not only the health and functioning of these animals. It was rightly noted, when analysing a similar problem in relation to the degradation of the natural environment, that the application of such a model of action to the whole human and social reality is a symptom of reductionism, which undermines the life of people and societies in many of its dimensions. It is clear that "(…) decisions which may seem purely instrumental are in reality decisions about the kind of society we want to build".[22]

The philosophical and ethical aspects of depriving animals of their lives must not be completely overlooked. The issues discussed in the paper are inevitably connected with the evaluation of the legitimacy of killing animals for the protection of higher-valued goods. In today's world, the ambivalent status of animals is evidenced by the fact that parallel to the appreciation of the position of animals, through the introduction of legislation on animal welfare, there has been a radical intensification of meat production. Thus, as long as the paradigmatic imperative to maximise the economic benefits from animal life prevails, the law serving this free market will ensure a legal regime that treats animals as a form of property.[23]

The value of the life of animals, beings capable of experiencing pain and suffering, should also be an important interpretative guidance for veterinary inspection author-

[22] Franciscus, *Encyclical Letter Laudato Si'* (4 September 2015), 9: AAS 107 (2015), 106–107, Polish edition, Wrocław 2015, p. 95.

[23] T. Menely, *The Animal Claim. Sensibility and the Creaturely Voice*, Chicago 2015, pp. 202–203, and the literature indicated therein.

ities recognising the matters under discussion. Balancing this value is significant from a humanistic point of view. The naturalisation of legal humanism makes it possible to reconcile it with the concept of non-personal subjectivity of animals.[24] We must not forget, therefore, that even when animals are bred for the purpose of slaughter and the economic use of their meat, skins, fur, etc., this cannot justify killing them without a valid reason. This argument also speaks for the claim that the order to kill animals – by administrative decision – should be used only in a state of absolute necessity.

References

Franciscus, *Encyclical Letter Laudato Si'* (4 September 2015), 9: AAS 107 (2015), 106–107, Polish edition, Wrocław 2015.

Helios J., Jedlecka W., *Okrucieństwo wobec zwierząt – zarys problemu*, „Przegląd Prawa i Administracji" 2017, Vol. 108.

Lipińska I., *Zwalczanie chorób zakaźnych zwierząt gospodarskich – wybrane aspekty prawne*, „Studia Iuridica Agraria" 2017, Vol. 15.

Menely T., *The Animal Claim. Sensibility and the Creaturely Voice*, Chicago 2015.

Nałęcz A., *Ochrona zwierząt a postęp cywilizacyjny*, [in:] *Wpływ przemian cywilizacyjnych na prawo administracyjne i administrację publiczną*, red. J. Zimmermann, P.J. Suwaj, Warszawa 2013.

Pietrzykowski T., *Problem podmiotowości prawnej zwierząt z perspektywy filozofii prawa*, „Przegląd Filozoficzny – Nowa Seria" 2015, Nr 2.

Prawna ochrona zwierząt, red. J. Helios, W. Jedlecka, Wrocław 2017.

Stelmasiak J., *Administracyjnoprawne aspekty ochrony zwierząt*, [in:] *Prawna ochrona zwierząt*, red. M. Mozgawa, Lublin 2002.

Szwast M., *Glosa do wyroku Europejskiego Trybunału Praw Człowieka z dnia 6 grudnia 2018 r. w sprawie Słomka przeciwko Polsce (skarga nr 68924/12)*, „Zeszyty Naukowe Sądownictwa Administracyjnego" 2019, Nr 4.

[24] T. Pietrzykowski, *Problem podmiotowości prawnej zwierząt z perspektywy filozofii prawa*, „Przegląd Filozoficzny – Nowa Seria" 2015, Nr 2, pp. 255–256; see also J. Helios, W. Jedlecka, *Okrucieństwo wobec zwierząt – zarys problemu*, „Przegląd Prawa i Administracji" 2017, Vol. 108; *Prawna ochrona zwierząt*, red. J. Helios, W. Jedlecka, Wrocław 2017, p. 41. I do not share further arguments of the aforementioned authors, who claim that the limited subjectivity of animals does not, however, lead to a complete break with the attitude of species chauvinism, whose quintessence is the metaphysical understanding of human dignity.

Abstract: The paper concerns the issue of application of Art. 48b(1) point 2 of the Act of 11 March 2004 on the protection of animal health and combating infectious diseases of animals (Journal of Laws of 2018, item 1967, as amended), which constitutes the legal basis for the ordering by a district (*powiat*) veterinarian – by way of an administrative decision – of the emergency killing (slaughter) of animals. The thesis hereof is based on the statement that the above decisions, due to the radical nature of the obligation imposed on the individual, should be treated as introducing legal measures *ultima ratio*. For this reason, the duty of the body issuing the order to kill (slaughter) animals is to demonstrate the necessity of taking such a decision, in accordance with the principle of proportionality. The fundamental issue that arises in such cases is therefore the need to strike a balance between the social interest and the legitimate interest of the individual. Social interest should be considered as an essential interest of the state, including its safety and public health, expressed in the need to maintain health safety, food hygiene and animal health. The legitimate interest of the unit is expressed in its expectation of causing the least possible ailment, sufficient to achieve the objective of combating an infectious animal disease. The analysis of this issue will be presented on the example of the jurisprudence of administrative courts.

Keywords: order to kill (slaughter) animals; principle of proportionality; combating infectious diseases of animals; veterinary inspectorate; administrative courts

MICHAŁ RUDY

SWPS University of Social Sciences and Humanities, Faculty of Law
Scientific Workshop of Food Law and Right to Food
RESULT Witkowski, Woźniak, Mazur i Wspólnicy LP Law Firm
https://orcid.org/0000-0003-2323-1058
mrudy@swps.edu.pl

Why Control over Compliance with the Provisions of the Animal Protection Act Mainly Consists of Administrative Supervision

Introduction

Being a participant in one of the conferences concerning humanitarian protection of animals, I have noted that the majority of speakers emphasize criminal liability for violating the standards of conduct arising from the Animal Protection Act (hereinafter referred to as APA). That is, speakers have mainly focused on responsibility regime, in which the majority of reprehensible actions are treated as crime or offense. This drew my attention to such an extent that at the said conference, I partly changed the content of my speech and pointed out that the idea of humanitarian protection of animals is expressed also in criminal liability.

Also, in the doctrine, if the subject of compliance with the provisions of APA is raised, then individual actors emphasize primarily crimes and offenses against animals. This is particularly the case for Karolina Kuszlewicz, who, despite declaring that in her book she focuses "on practical issues of protecting animals from inhumane treatment",[1] does not mention administrative supervision and its practical consequences.

[1] K. Kuszlewicz, *Prawa zwierząt. Praktyczny przewodnik*, Warszawa 2019, p. 23.

It also concerns Wojciech Radecki[2] who, on the one hand, rightly indicates control and supervisory competence of the veterinary administration in the field of animals' humanitarian protection, but on the other, reduces them to: carrying out control and notifying the law enforcement authorities of suspected crime or independent response to committed offenses[3] (without bearing in mind at the same time that the Police have the leading competence in prosecuting offenses, not public administration bodies).

Why is the idea of the humanitarian protection of animals expressed also in criminal liability? The term "also" means "as well". Does it mean that in addition to criminal liability in the event of a breach of the provisions of APA, we can speak of some other legal liability? We truly can or even should talk about it, even before focusing on criminal liability. Since most of the legal standards of APA belong to the administrative regulations, the field of administrative law, then its violation concerns administrative responsibility. While asking the question posed in the title, we should firstly explain the main reasons and arguments why we think so.

At the same time, it should be noted that posing that kind of question and providing an answer to it is of great practical importance in the field of humanitarian protection of animals. Properly conducted administrative supervision over compliance with regulations on animal protection may be of crucial importance in the process of improving animal living conditions much faster and more effectively than any criminal proceeding or offense.

Law on the humanitarian protection of animals as a subject of the administrative law

In the Polish doctrine of the administrative law, provisions in the field of humanitarian protection of animals were not of particular interest for many years. However, the term "humanitarian protection of animals" was developed by the doctrine of law to designate all provisions aimed at protecting animals from suffering caused by the actions of man.[4] That is correct: from the actions of men (from human side). Who do the standards for humanitarian protection of animals apply to and who can cause the suffering to an animal? Of course, such norms are directed at people and it is the man who, unfortunately, is the cause of such suffering, which lawyers often call "inhumane treatment of an animal".

---

[2] W. Radecki, *Czego oczekiwać i wymagać od Inspekcji Weterynaryjnej*, [in:] *Praktyczne procedury ochrony zwierząt. Poradnik dla administracji publicznej wszystkich szczebli*, red. A. Elżanowski, https://docplayer.pl/2123596-Praktyczne-procedury-ochrony-zwierzat-poradnik-dla-administracji-publicznej-wszystkich-szczebli.html [access: 29.10.2019].

[3] *Ibidem*.

[4] W. Radecki, *Ustawa o ochronie zwierząt z komentarzem*, Wrocław 1998, p. 9.

This way of defining the law on the humanitarian protection of animals also takes into account the purpose of the regulations. At the same time, it is about the protection of specific individual or collective goods. These goods, apart from the legal entity, and not the state and its tasks should be considered the central point of legal regulations.[5]

Currently, the basic legal act concerning humanitarian protection of animals in Poland is the Animal Protection Act of 21 August 1997.[6] The essence of humanitarian protection of animals was expressed in Art. 1, para. 1, second sentence of the Act as well as in Arts. 5 and 6. Pursuant to these provisions, man has to respect the animal, and each animal requires humane treatment, which should be understood as treatment that takes into account the animal's needs and provides care and protection. Therefore, the above-mentioned issues should be considered as the main ones in the field of relations under the law on humanitarian protection of animals.

At the same time, since most of the legal standards of APA belong to the regulations in the field of administrative regulation, field of administrative law, then violation of these regulations concerns administrative responsibility. Administrative and criminal liability may perform similar functions, i.e. preventive and repressive. However, it should be remembered that in the case of administrative responsibility, the emphasis is, however, on the preventive function, while in the case of criminal liability – on repression.[7] What is more, public administration bodies will always have competences to the final implementation of the administrative law standards, in other words, the power to take measures to bring conditions existing in the supervised (controlled) entity to the postulated one – set in APA or in the implementing acts. It is rather unnecessary to say that the realization of criminal liability for violation of the law in the field of humanitarian protection of animals takes place in forms and with effect appropriate for the criminal law system, while administrative responsibility – in forms and with effect appropriate for the administrative law system.

Defining the place of the provisions of the law on humanitarian protection of animals in the legal system no longer presents such difficulties as defining the concept itself. The provisions of the law in the field of humanitarian protection of animals show certain specific features, which, taken together, give a characteristic image of this administrative law subject. In particular, it is determined by the public nature of the law on humanitarian protection of animals. As a rule, these standards are mandatory. That means that they contain solutions that on the one hand, introduce the obligation to take specific behaviors (or refrain from them),[8] on the other hand, they cannot be freely changed by agreement

[5] Z. Leoński, *Materialne prawo administracyjne*, Warszawa 2006, p. 2; see also Z. Bukowski, *Polskie administracyjne prawo materialne*, Toruń 2005, p. 18.

[6] Journal of Laws of 2019, item 122.

[7] See W. Radecki, *Odpowiedzialność prawna w ochronie środowiska*, Warszawa 2002, p. 62; E. Łętowska *Odpowiedzialność w aparacie administracyjnym* [in:] *Prawo administracyjne i funkcjonowanie aparatu państwowego Polski i NRD*, red. G. Schulz, J. Łętowski, Wrocław 1981, p. 228.

[8] J. Zimmermann, *Prawo administracyjne*, Kraków 2005, p. 35ff.

of the parties, which is the characteristic feature of the civil law. The regulations concerning humanitarian protection of animals also give public administration bodies the power to unilaterally resolve individual situations. Entity to which an obligation arising from the regulation of the law on humanitarian protection of animals has been imposed may not effectively transfer responsibility for such an obligation to another entity.[9] In addition, if it fails to comply with the obligation required by law (or specified by an administrative act), this obligation will be enforced by using state coercion (although in this respect there is some doubt whether, if the commune does not perform – in the field of humanitarian protection of animals – its own tasks, government administration bodies can implement such coercion in relation to it).

The public nature of legal standards in the field of humanitarian protection of animals will also be discussed for public objectives pursued under this law.[10] It is about values due to which the law on humanitarian protection of animals is meant to be an instrument ordering specific manifestation of social life. As Mieczysław Goettel pointed out: "Proper treatment of an animal and ensuring its safe and proper existence (and not only in relation to animals constituting public property) is identified with the public interest, whose implementation and protection are best guaranteed by the regulations of public law, especially administrative".[11]

Considering the above-mentioned features, the issue of belonging the law on humanitarian protection of animals to the field of administrative law should not raise any doubts, regardless of which of the main ways of creating the definition of administrative law in the doctrine we will choose as a reference.[12] It can be shown with equal effectiveness that the standards of the law on humanitarian protection of animals regulate the behavior of a specific part of public administration, as well as the behavior of individuals and other entities in the field which does not belong to other branches of law,[13] and that they contain an element of power enabling public administration bodies to unilaterally resolve individual situations, to make permanent decisions, binding all legal entities in the state which are threatened by state coercion,[14] or that they regulate performing administration functions by public administration bodies.[15]

[9] J. Starościak, *Prawo administracyjne*, Warszawa 1978, p. 21.

[10] J. Boć, *Prawo administracyjne*, [in:] *Prawo administracyjne*, red. J. Boć, Wrocław 2005, p. 39.

[11] M. Goettel, *Sytuacja zwierzęcia w prawie cywilnym*, Warszawa 2013.

[12] The definition of the term "administrative law" raises constant disputes in the doctrine. Therefore, some of its representatives only talk about the search for such a definition or they point out that it is more important to enumerate the basic features of administrative law than to make attempts to build it (e.g. J. Zimmermann, *op. cit*., p. 34ff).

[13] This concept of administrative law, built from an entity point of view, is cited by J. Lang, *Zagadnienia wstępne*, [in:] *Prawo administracyjne*, red. M. Wierzbowski, Warszawa 2007, p. 21.

[14] If we consider the definition built on the basis of the way public administration bodies work, we need to cite J. Boć, *Prawo administracyjne*, [in:] *Prawo administracyjne*, red. J. Boć, Wrocław 2004, p. 35.

[15] See the definition of "administrative law" presented by J. Starościak, *Określenie administracji i prawa administracyjnego*, [in:] *Prawo administracyjne*, red. J. Starościak, Warszawa 1966, p. 17.

Quoting Goettel again: "Although legal protection of animals is a very diverse matter, present in numerous branches of law in the most comprehensive way, (...) it is included in administrative law regulations. This is justified by the specificity of the subject of protection. By means of its regulations, it is possible to define a system of orders and prohibitions in the field of animal handling, tasks of public authorities and obligations of other entities in this field, as well as instruments to ensure their enforcement, rules for conducting specific activities using various categories and groups of animals, etc.".[16]

For the purposes of this study, when defining the concept of "the law on humanitarian protection of animals", it is proposed to systematize administrative law by indicating the basic subject of protection and thus defining the field of social relations governed by the given provisions. The areas of regulation highlighted in this way will bind specific areas to normatively defined issues. This part of administrative law will not be distinguished by a specific subject of regulation, method of regulation or legal form of implementation, but due to at least partial possibility of indicating specific legal protection institutions, as well as the importance attached by the European Union and the society to humanitarian protection of animals,[17] it may be called a "subject branch of administrative law". In this way, under administrative law, we can separate environmental law, food law, construction law,[18] sanitary and veterinary law[19]or law on humanitarian protection of animals.

The branches distinguished in this way are characterized by comprehensive regulations. Law on humanitarian protection of animals accepts administrative law regulations and includes the standards of conduct from other branches of law, most often civil law (the animal is not a thing, but provisions on things apply accordingly) or criminal (crime and offenses for animal abuse, unjustified killing or violating its welfare). It is not about a simple juxtaposition of regulations from various legal systems, but on their binding into one functional whole.[20] At the same time, their presence in

[16] M. Goettel, *op. cit*.

[17] Such criteria are indicated by J. Boć and E. Samborska-Boć, when talking about the separation of the legal basis for environmental protection and the independence of normative protective regulations in this field of law (*Uwagi o polskim systemie regulacji prawnej ochrony środowiska*, [in:] *Ochrona środowiska*, red. J. Boć, Wrocław 2005, p. 159ff).

[18] A. Błaś, J. Boć, *Źródła prawa administracyjnego*, [in:] *Prawo administracyjne*, red. J. Boć, Wrocław 2005, p. 62; B. Wierzbowski, B. Rakoczy, *Podstawy prawne ochrony środowiska*, Warszawa 2004, p. 21ff; S. Jędrzejewski, *Prawo budowlane*, Toruń 1998, p. 17ff. See also W. Nosek, *Uwagi wstępne*, [in:] *Prawo budowlane z umowami w działalności inwestycyjnej. Komentarz*, red. H. Kisielowska, Warszawa 2008, p. 12.

[19] At the same time, we should be aware that due to the lack of codification of administrative law, the material scope of each of the proposed sub-headings will be the subject of a long-term debate (Z. Leoński, *op. cit.*, p. 8).

[20] The parts of administrative law created in this way were called "comprehensive branches" (F. Longchamps, *W sprawie pojęcia administracji państwowej i pojęcia prawa administracyjnego*, „Zeszyty

the administrative law gives hope for ensuring proper and comprehensive protection of a given social interest. These standards do not lose their original affiliation to their parent branch by incorporating them into administrative law.

Enforcement of APA regulations

Since the provisions on humanitarian protection of animals are primarily included in the administrative law regulations, the supervision over compliance with them was also assigned, first of all, to the public administration bodies. In the Polish legal system, it results explicitly from Art. 34a of APA. According to it, the bodies of the Veterinary Inspection (organs of the government's special administration) are competent to supervise compliance with all provisions on humanitarian protection of animals. Within the scope of this supervision, employees of the Veterinary Inspection and persons appointed by the authorities of this Institution have very broad powers specified in the Act on Veterinary Inspection,[21] including the right to perform inspections at animal-keeping facilities and to control the process of killing animals (in terms of its compliance with the law, that is in accordance with the principle of legality).

It is worth noting that APA intentionally uses the term "supervision" of government administration bodies, and not the term "control". Supervision is a qualified form of control, under which government administration authorities check not only whether the condition postulated in the regulations (for example, to avoid any unnecessary suffering of animals) is consistent with the condition found in the given breeder / animal owner, but also in the case of violations of administrative law, they may interfere in the controlled entity's activities with the use of state coercion.[22]

Do the government administration bodies have appropriate "tools" to enforce standards in the field of humanitarian protection of animals? It has been pointed out for many years that their role in verifying the humane treatment of animals boils down to the issue of controlling violations and possible redirection of the case to criminal procedure, that is to the competent law enforcement authorities. Also, the media (radio, press, television and the Internet), at least until now, have been part of this narrative, primarily publicizing criminal matters related to animal abuse.

Naukowe Uniwersytetu Wrocławskiego, Seria A. Prawo" 1958, Nr 10, p. 20. See also A. Błaś, J. Boć, *op. cit.*, p. 62 and Z. Rybicki, S. Piątek, *Zarys prawa administracyjnego i nauki administracji*, Warszawa 1984, p. 107). The complexity of regulation of administrative acts is inscribed in the specifics of administrative law, as F. Longchamps indicates, administrative law "(…) is a concept which is intended to cover certain elements of different legal systems" (F. Longchamps, *op. cit.*, p. 19). See also M. Goettel, *op. cit*.

[21] Journal of Laws of 2018, item 1557.

[22] See W. Radecki, *Czego…*, p. 10ff.

Pointing out the obligation to refer such cases to the law enforcement authorities, as well as hoping that the penalties imposed for crimes and offenses against humanitarian protection of animals have an appropriate educational value, it should be emphasized at the same time that the purpose of criminal or offence proceedings is not, in principle, to bring the factual state to the postulated one by the provisions of administrative law, but only to punish the perpetrator for a committed crime or offence. Therefore, it cannot be assumed that law enforcement authorities can act instead of public administration to enforce requirements referring to humanitarian protection of animals.

In this case, we must return to the issue of administrative enforcement of orders arising from the provisions on humanitarian protection of animals. The question is, however, how to do it, since the Polish Act (excluding the competence provisions related to the regulation of EU law on the transport of animals and the decision on the temporary taking an animal by the executive body of local self-government) does not provide for the possibility of issuing administrative acts (i.e. decisions). The answer to this question is quite simple. The method of formulating the majority of administrative law regulations adopted in the field of humanitarian protection of animals, including the provisions on killing animals, indicates that these are non-monetary obligations arising directly from the law. In relation to such obligations, there are often no grounds for initiating and conducting administrative proceedings. Why? Because they should be enforced immediately by way of administrative enforcement proceedings. So, there is no obligation to issue an administrative decision in the matter. To initiate enforcement proceedings, it is sufficient to deliver a written warning and issue an enforceable order, to which the relevant voivode shall give an enforcement clause.

It is worth noting that the legislator applies the structure of enforcement of a non-monetary obligation arising directly from a legal provision, in those places where compliance with the administrative law regulations cannot bear the delay by conducting administrative proceedings. And so, it certainly is the case of proceedings related to humanitarian protection of animals.

The lack of competence to issue an administrative act does not mean, however, that the standards of conduct specified in Council Regulation (EC) No. 1099/2009 of 24 September 2009 on the protection of animals at the time of killing are exceeded.[23] In the event of a breach of the above-mentioned Act, the competent control authority may institute proceedings and issue an administrative decision on the basis of Art. 22. Pursuant to Art. 22, for the purpose of Art. 54 of Regulation (EC) No. 882/2004 of the European Parliament and of the Council of 29 April 2004 on official controls performed to ensure the verification of compliance with feed and food law, animal health and animal welfare rules,[24] the competent authority may in particular:

[23] Official Journal of the EU 2009, No. 303, p. 1, as amended.

[24] Official Journal of the EU 2004, No. 165, p. 1, as amended.

- require business operators to amend their standard operating procedures and, in particular, slow down or stop production,
- require business operators to increase the frequency of the checks referred to in Art. 5 and amend the monitoring procedures referred to in Art. 16,
- suspend or withdraw certificates of competence issued under this Regulation from a person who no longer shows sufficient competence, knowledge or awareness of his/her tasks to carry out the operations for which the certificate was issued,
- suspend or withdraw the delegation of power referred to in Art. 21(2),
- require the amendment of the instructions referred to in Art. 8 with due regard to the scientific opinions provided pursuant to Art. 20(1)(b).

The above Regulation requires the competent authorities to take such actions that the economic entity should apply remedial measures to eliminate detected non-compliances, however, it should be noted that the catalog of actions under Art. 22 of the above-mentioned Act is an open catalog, and therefore the official control authority may also apply other activities, including those specified in Art. 54(2) of Regulation 882/2004.

It follows from the above that the Veterinary Inspectorate authorities may take appropriate action in the event of violations arising from the provisions of the law on the protection of animals at the time of killing (also applies to ritual slaughter). In accordance with the judgement of the Constitutional Tribunal of 10 December 2014, "Supervision over slaughterhouses is exercised by the Veterinary Inspectorate (see Art. 3 of the Act on Veterinary Inspectorate). The inspections in slaughterhouses are carried out by the official or regional veterinarian. They include, *inter alia*, the verification of adherence to provisions on animal protection at the time of slaughter". The Tribunal also indicated that "When ritual slaughter is permitted, the observance of religious norms will be scrutinised by competent religious organizations (i.e. Jewish religious communities pursuant to Art. 9, para. 2 of the Act on Jewish Religious Communities)".

In this case, controls carried out by both government administration bodies and registered religious associations are mentioned. However, from a legal point of view, the detection of irregularities by the Veterinary Inspectorate body may result in imposing administrative restrictions on the plant. In turn, the effects of any irregularities detected by a religious association will rather be related to the civil law (e.g. refusal to collect the goods, no further orders, etc.). Moreover, both the Veterinary Inspectorate bodies and religious associations will be able – independently of each other – to report suspected crime or offences in connection with violation of APA. The issue of the supervision of government administration bodies over the establishment and implementation of commune programs to prevent animal homelessness should be separated from the above issues.

The obligation to provide proper care and protection to homeless animals was imposed on communities pursuant to Art. 11 para. 1 of APA. This is a task which could

be called the "commune's own task", and the basic method of its implementation is the development, adoption and implementation of the program of care for homeless animals and prevention of homelessness of animals. The legislator has set out mandatory elements of the program to be adopted by the commune council annually by March 31, listing among them: providing homeless animals with a place in an animal shelter, care for free-living cats, including feeding them, catching homeless animals, mandatory sterilization or castration of animals in animal shelters, looking for owners for homeless animals, putting blind litters to sleep, indicating a farm to provide space for farm animals, providing 24-hour veterinary care in cases of road incidents involving animals. The program of care for homeless animals and prevention of homelessness of animals should also include an indication of the financial resources allocated for its implementation and the method of their spending.[25]

The basic legal regulation regarding supervision over the activity of local self-government is provided in Art. 171 of the Constitution of the Republic of Poland, according to which, the activity of local self-government is subject to supervision on the basis of legality criterion. The above constitutional norm was specified in Art. 85 of the Act on Local Self-Government,[26] according to which, the supervisory authorities, including the voivode, supervise commune activities on the basis of the criterion of compliance with the law. And according to Art, 87 of the above-mentioned Act, supervisory authorities may enter the activities of local self-government units only in cases specified by other acts. In this case, it is worth pointing out that in the model approach, described supervision of government administration over the self-government of a commune should consists of two things – on the one hand, it should consist of supervision over the commune's law-making process, and on the other, in should consist of supervision over its implementation.

Supervision within the scope of communal law-making process covers resolutions of commune bodies as well as decrees of a single-person authority (village head, mayor, president of the city). The supervisory bodies are the Prime Minister and voivode (Art. 86 of the Act on Communal Self-Government). Pursuant to Art. 90 para. 1 of the Act, the head of the commune (mayor, city president) is obliged to submit to the voivode resolutions of the commune council within 7 days of their adoption. The voivode has the right to annul a resolution if it is contrary to the law. This invalidity can be ruled in relation to the entire resolution or to its part. The voivode may, when initiating proceedings regarding the annulment of a resolution or in the course of those proceedings, suspend its implementation or, in the event of an insignificant breach of law, confine itself to indicating that the resolution has been adopted in breach of law.

[25] For more on the adoption of such care programs, see M. Rudy, *Program opieki nad zwierzętami bezdomnymi oraz zapobiegania bezdomności zwierząt, jako podstawowa forma realizacji zadania gminy z zakresu opieki nad zwierzętami*, „Samorząd Terytorialny" 2018, Nr 9(333), pp. 31–41.

[26] Journal of Laws of 2019, item 506, as amended.

The supervisory body shall declare annulment in whole or in part within 30 days of the date of delivery of the resolution or decree. The supervisory decision should contain factual and legal justification and instruction on the admissibility of lodging a complaint with the administrative court. After the expiry of the above-mentioned deadline, the voivode can no longer annul the resolution of the commune council independently, but he can appeal the resolution to the administrative court. In addition to the above, one should also pay attention to the supervisory powers of this body in the process of applying the law by the commune. In this case, it seems appropriate that this supervision should also be provided with reference to the program of care for homeless animals and prevention of homelessness of animals.

In this respect, the voivode has the right to request information and data from local self-government units regarding the organization and functioning of the commune (control rights). In this area, the voivode can, among others, scrutinize documents and reports sent or conduct control of the activities carried out in local self-government units. These activities can be used in terms of exercising the statutory supervisory powers of government administration within the scope of applying the law by the commune self-government, in particular those related to disciplining self-government bodies in the event of continuous violations of law.

In such cases, the parliament, at the request of the Prime Minister, may dissolve the commune council through a relevant resolution. In the event of dissolution of the commune council, the Prime Minister, at the request of the minister competent for public administration, shall appoint a person who, by the time of election of the commune council, fulfills its function. If the head of the commune commits a repeated violation of the Constitution or other acts, the voivode calls him/her to bring such infringements to an end, and if the notice has no effect – shall make a request to the Prime Minister to dismiss the head of the commune. In the event of dismissal of the head of the commune, the Prime Minister, upon a request of the minister competent for public administration, shall appoint a person who, until the head of the commune is elected, performs this function.

In the event of little chance for rapid improvement and prolonged inefficiency in the performance of public tasks by commune bodies, the Prime Minister, at the request of the minister competent for public administration, may suspend the commune bodies and appoint an administrator for up to two years, but no longer than to the next election of the head of the commune. Establishment of a receivership may take place after the statement of objections and after calling upon the commune authorities to immediately submit a program to improve the commune's situation. The government commissioner (administrator) is appointed by the Prime Minister at the request of the voivode, submitted through the minister competent for public administration. The government commissioner takes over the tasks and competences of the commune authorities on the day of appointment.

From the above-mentioned powers of the voivode, we should clearly distinguish the competences of other government administration bodies in the voivodeship, namely the Veterinary Inspectorate organs. Bearing in mind that the activity of preventing homelessness of animals is associated with the need to cooperate with registered animal shelters and entities involved in the transport of animals, it should be noted that the Veterinary Inspectorate authorities play a more significant role in control than would formally arise from Art. 34 of APA.

In this case, there is a doubt whether the bodies of the Veterinary Inspectorate, in the event of irregularities in the functioning of the commune, can also refer to the Act on administrative enforcement proceedings. With the proviso that the obligations to be enforced will result directly from a legal provision (APA and other implementing provisions), the Veterinary Inspectorate authority will be a creditor here, while the enforcement authority – a voivode.

Conclusions

Regarding the question posed in the introduction, it can be stated that supervision over compliance with the provisions of APA mainly consists of the administrative supervision, because:

- most of the legal standards of APA belong to the field of administrative law,
- in the event of a breach of APA standards, we should primarily talk about administrative responsibility,
- in the case of administrative responsibility, the emphasis is on the preventive function,
- public administration bodies will always have competences to the final implementation of the administrative law standards, i.e. competences to taking steps to bring the conditions existing in the supervised (controlled) entity to the postulated one,
- the implementation of administrative responsibility always takes place in forms and with effects appropriate to the administrative law system, i.e. it contains an element of power enabling public administration bodies to unilaterally resolve individual situations, to make permanent decisions, binding all legal entities in the state which are threatened by state coercion,
- government administration bodies possess appropriate "tools" to enforce the provisions of law on humanitarian protection of animals, including, above all, using in controlled entities state coercion,
- it cannot be assumed that law enforcement authorities can act instead of public administration to enforce the requirements on humanitarian protection of animals,

- the method of formulating the majority of administrative law regulations adopted in the field of humanitarian protection of animals, including the provisions on killing animals, indicates that these are non-monetary obligations arising directly from the law, and such obligations can be enforced immediately by means of enforcement proceedings in administration (without the obligation to issue an administrative decision in a case),
- the legislator applies the structure of enforcement of a non-monetary obligation arising directly from a legal provision, in those places where compliance with the administrative law norm cannot bear any delay by conducting administrative proceedings.

References

Błaś A., Boć J., *Źródła prawa administracyjnego*, [in:] *Prawo administracyjne*, red. J. Boć, Wrocław 2005.

Boć J., *Prawo administracyjne*, [in:] *Prawo administracyjne*, red. J. Boć, Wrocław 2004.

Boć J., *Prawo administracyjne*, [in:] *Prawo administracyjne*, red. J. Boć, Wrocław 2005.

Boć J., Samborska-Boć E., *Uwagi o polskim systemie regulacji prawnej ochrony środowiska*, [in:] *Ochrona środowiska*, red. J. Boć, Wrocław 2005.

Bukowski Z., *Polskie administracyjne prawo materialne*, Toruń 2005.

Goettel M., *Sytuacja zwierzęcia w prawie cywilnym*, Warszawa 2013.

Jędrzejewski S., *Prawo budowlane*, Toruń 1998.

Kuszlewicz K., *Prawa zwierząt. Praktyczny przewodnik*, Warszawa 2019.

Lang J., *Zagadnienia wstępne*, [in:] *Prawo administracyjne*, red. M. Wierzbowski, Warszawa 2007.

Leoński Z., *Materialne prawo administracyjne*, Warszawa 2006.

Longchamps F., *W sprawie pojęcia administracji państwowej i pojęcia prawa administracyjnego*, „Zeszyty Naukowe Uniwersytetu Wrocławskiego, Seria A. Prawo" 1958, Nr 10.

Łętowska E., *Odpowiedzialność w aparacie administracyjnym* [in:] *Prawo administracyjne i funkcjonowanie aparatu państwowego Polski i NRD*, red. G. Schulz, J. Łętowski, Wrocław 1981.

Nosek W., *Uwagi wstępne*, [in:] *Prawo budowlane z umowami w działalności inwestycyjnej. Komentarz*, red. H. Kisielowska, Warszawa 2008.

Radecki W., *Ustawa o ochronie zwierząt z komentarzem*, Wrocław 1998.

Radecki W., *Odpowiedzialność prawna w ochronie środowiska*, Warszawa 2002.

Radecki W., *Czego oczekiwać i wymagać od Inspekcji Weterynaryjnej*, [in:] *Praktyczne procedury ochrony zwierząt. Poradnik dla administracji publicznej wszystkich szczebli*, red. A. Elżanowski, https://docplayer.pl/2123596-Praktyczne-procedury-ochrony-zwierzat-poradnik-dla-administracji-publicznej-wszystkich-szczebli.html [access: 29.10.2019].

Rudy M., *Program opieki nad zwierzętami bezdomnymi oraz zapobiegania bezdomności zwierząt, jako podstawowa forma realizacji zadania gminy z zakresu opieki nad zwierzętami*, „Samorząd Terytorialny" 2018, Nr 9(333).

Rybicki Z., Piątek S., *Zarys prawa administracyjnego i nauki administracji*, Warszawa 1984.

Starościak J., *Określenie administracji i prawa administracyjnego*, [in:] *Prawo administracyjne*, red. J. Starościak, Warszawa 1966.
Starościak J., *Prawo administracyjne*, Warszawa 1978.
Wierzbowski B., Rakoczy B., *Podstawy prawne ochrony środowiska*, Warszawa 2004.
Zimmermann J., *Prawo administracyjne*, Kraków 2005.

Abstract: While asking the question posed in the title, we should firstly explain the main reasons and arguments why we think so. At the same time, it should be noted that stating that kind of question and providing an answer to it is of great practical importance in the field of the humanitarian protection of animals. Properly conducted administrative supervision over compliance with regulations concerning the protection of animals may have crucial importance in the process of improving animals living conditions much faster and more effectively than any criminal or any offense proceedings can.

Keywords: humanitarian protection of animals; animal rights; Animal Protection Act; administrative supervision; administrative law

EWA SZEWCZYK

Branch of the University of Zielona Góra in Sulechów, Chair of Administration
https://orcid.org/0000-0002-2980-6564
eszewczyk@uz.zgora.pl

Administrative Procedure for Temporary Removal of an Animal from the Custody of Its Owner or Guardian

Introduction

Over the centuries, many thinkers have devoted their deliberations to the subject of animals and their protection. One of the most well-known quotations referring to the problem of the proper treatment of animals, attributed to Mahatma Gandhi, is contained in the words: "The greatness of a nation and its moral progress can be judged by the way its animals are treated". This may lead to a simple conclusion that the better the animals are treated in a given society, the higher in civilizational development it is in.

Even though in the 20th century much suffering has been inflicted on animals, often under "pseudo-scientific" research and experiments,[1] nowadays social movements can be observed which strive to secure animals a separate legal status, which would mean their legal personification.[2] One of the best known initiatives in this area was taken several years ago in Romania. Its aim was to grant dolphins known for their advanced intelligence and ability to form complex social relationships – the status of

[1] See P. Singer, *Wyzwolenie zwierząt*, Warszawa 2004, pp. 62–94.

[2] T. Pietrzykowski, *Problem podmiotowości prawnej zwierząt z perspektywy filozofii prawa*, „Przegląd Filozoficzny" 2015, Nr 2, p. 251ff.

non-human persons. This would guarantee them the right to live, to physical integrity and to stay in the natural environment in social groups.[3]

Nowadays, in Poland, the issues of proper treatment of animals manifest themselves, *inter alia*, in the context of providing them with proper care and inflicting no suffering on them by owners or guardians. In the legal system of our country, animals are protected under the provisions of the Animal Protection Act of 21 August 1997 (consolidated text, Journal of Laws of 2019, item 122, as amended, hereinafter referred to as APA or the Act). According to its provisions in Art. 1(1), an animal is not an object but a living being capable of suffering. "Man owes it respect, protection and care". According to Art. 5 of the Act, every animal requires humane treatment. It consists in taking into account the needs of a given animal and providing it with care and protection (Art. 4(2) APA).

Nature of the procedure for temporary removal of an animal from the custody of its owner or guardian

If an animal's existence is jeopardised as a result of actions or omissions of its owner or guardian, the legislator has provided for the possibility of its temporary removal under administrative law. It can be carried out in one of two modes: normal or emergency mode.[4] This institution is regulated in Art. 7 APA, which provides in Art. 7(3) for the so-called "*ex post facto* issuance of a decision on removal of the animal from the custody of its owner or guardian", and in Art. 7(1) for the issuance of the relevant decision if the animals have not been taken away yet. It consists in securing the animal's welfare until the judicial authorities determine whether the abuse has taken place and decide on the animal's future.[5]

The administrative procedure for removal of an animal is ancillary and auxiliary to criminal proceedings and is conducted in parallel with the latter with the offence of animal abuse under Art. 35(1a) APA, consisting in inflicting pain or suffering, or knowingly allowing such infliction, as its subject matter. The return of the animal to its owner or guardian depends on the final decision of a common court in a given case. In fact, the time limits for the enforcement of the decision on temporary removal of an animal are determined by the duration of the criminal proceedings. Pursuant to Art. 7(6) of the Act, the collected animal shall be returned if the court does not rule

[3] *Dolphins deserve same rights as humans, say scientists*, BBC News, https://www.bbc.com/news/world-17116882 [access: 2.09.2019].

[4] P. Janiak, *Czasowe odebranie zwierząt w trybie administracyjnym – podstawowe zagadnienia*, „Casus" 2019, p. 45.

[5] M. Sługocka, *Praktyczny wymiar instytucji czasowego odebrania zwierzęcia właścicielowi lub opiekunowi*, „Acta Universitatis Wratislaviensis. Przegląd Prawa i Administracji" 2017, Vol. 108, p. 45.

on its forfeiture in accordance with Art. 35(3) APA, or if criminal proceedings in this matter is discontinued. This leads to the conclusion that each time a decision under Art. 7(1) APA is issued, the head of the commune is obliged to simultaneously submit a notification on the commission of a crime by the owner or guardian of the animal in criminal proceedings.[6]

Removal of an animal pursuant to Art. 7(1)

In accordance with Art. 7(1a) APA, a decision on temporary removal of an animal from the custody of its owner or guardian is "taken *ex officio*". This provision refers to the procedure for initiating proceedings in these cases and should be understood as meaning that the initiation of proceedings for temporary removal of an animal by a head of the commune (mayor or city president) takes place *ex officio*, even though it takes place after the initiative being taken by the entities listed in Art. 7(1a) of the Act: Police, commune guard, veterinarian or authorised representative of a social organization whose statutory aim is to protect animals. The initiation of proceedings shall in this case be subject to the submission of a notification by an institutional body referred to in Art. 7(1a). This should lead to the conclusion that the notification by an ordinary citizen should have this effect if it is submitted not directly to the head of the commune (mayor or city president) but to the police, commune guard, veterinarian or the relevant social organisation.

A decision issued pursuant to Art. 7(1) of the Act shall anticipate the animals' collection. Its adoption pursuant to Art. 7(1) APA depends on whether a local government body states that the premise referred to in Art. 6(2) of the Act – animal abuse, in particular (but not exclusively) when it takes the form referred to by the legislator in Art. 6(2)(1) to (19) APA – is fulfilled. Therefore, in order to apply Art. 7(1) APA, the head of the commune (mayor or city president) should reasonably suspect that the owner or guardian of the animal has committed a crime of animal abuse. This suspicion shall be subject to appropriate verification in criminal proceedings. This is the only way to confirm it and result in the application of appropriate consequences in terms of penalties and punitive measures.

An animal collected in this mode shall be transferred to an animal shelter, if it is a domestic or laboratory animal, or to an agricultural holding designated by the authority issuing the decision, if it is a farm animal, or to a zoo or animal shelter, if it is used for amusement, entertainment, filming, sporting activities or kept in zoos. The transfer of an animal pursuant to Art. 7(1b) APA shall be subject to the consent of the entity that the animal is to be transferred to. However, if no such consent is given,

[6] M. Górski, *Odpowiedzialność administracyjnoprawna w ochronie środowiska*, Warszawa 2008, chapter III, section 3.1.4 – published by Lex Omega 2019.

the animal may be transferred free of charge to another legal or organisational entity without legal personality or to a natural person who will provide it with appropriate care. Similarly, the competent public administration authority shall transfer the animal to another entity in the event of circumstances preventing its transfer to the entities mentioned in Art. 7(1)(1) to (3) APA, if, for example, it is necessary to ensure special conditions for the animal, in particular appropriate medical treatment, which cannot be provided in shelter conditions.

Pursuant to Art. 7(2) APA, the decision issued pursuant to Art. 7(1) APA is immediately enforceable by law. It should include an additional (accessory) element in the form of an order of immediate enforceability.[7] This means that the decision on the temporary removal of an animal becomes enforceable even though it is not yet final and despite the fact that it may be appealed against to the second instance authority. It shall be enforceable as soon as it has been effectively served or announced to the party in the person of the animal's owner or guardian.

Two types of decisions may be made in administrative proceedings concerning removal of an animal from the custody of its owner or guardian pursuant to Art. 7(1) of the Act: a decision to remove an animal or a decision to refuse to remove an animal. The latter is taken when no grounds have been found for temporary removal of the animal. In the case of the former, the legislator provided for a fast-track procedure for lodging and processing of appeals. Pursuant to Art. 7(2a) APA, an appeal shall be lodged within 3 days of the date the decision has been served. The local government board of appeal shall process it within 7 days. However, regarding the decision on refusal to remove the animal, the 14-day period for lodging an appeal under Art. 129(2) of the Code shall apply.[8]

Removal of an animal pursuant to Art. 7(3)

A decision pursuant to Art. 7(3) APA shall result in the deprivation of the owner of control over the animal without the simultaneous issuance of a decision on the temporary removal of the animal. It concerns animals that actually have already

[7] See more about accessory elements of an administrative decision – E. Szewczyk, M. Szewczyk, *Zlecenie jako element akcesoryjny decyzji administracyjnej*, [in:] *Idea kodyfikacji w nauce prawa administracyjnego. Księga pamiątkowa ku czci Profesora Janusza Borkowskiego*, red. Z. Kmieciak, Warszawa 2018, p. 318ff.

[8] See judgements of the Voivodeship Administrative Court in Poznań: II SA/Po 254/12 of 27 June 2012; IV SA/Po 142/15 of 8 July 2015, IV SA/Po 327/15 of 10 September 2015; judgement of the Voivodeship Administrative Court in Łódź of 10 January 2014, II SA/Łd 1052/13 and judgement of the Voivodeship Administrative Court in Warsaw of 9 October 2014, IV SA/Wa 1188/14, and judgement of the Voivodeship Administrative Court in Gliwice of 6 December 2017, II SA/Gl 707/17 and the rationale referred to therein; available at CBOSA.

been collected. The intervention referred to in this provision may take place if two conditions are met at the same time. Namely, if leaving an animal in the care of its former owner or guardian is likely to endanger its health or life by reason of abuse, and if, at the same time, the case is urgent.[9] This mode allows for urgent intervention, for example, where it is established that the animals are kept in inappropriate housing conditions[10] by not providing adequate shelter from cold, heat, rain, snow, or kept in areas where they are liable to be harmed, or are grossly neglected or unattended by being kept in rooms or cages that prevent them from maintaining their natural posture (Art. 6(2)(10) and (17) APA). An administrative decision pursuant to Art. 7(3) of the Act is issued *ex post facto*.[11] It is taken when the animal is no longer with its owner or guardian – contrary to the procedure provided for in Art. 7(1) APA. This means that in this case the evidence and investigation procedure taken by the administrative body is aimed at a consecutive and, at the same time, thorough examination of factual and legal circumstances related to the removal of the animal and existing at the moment of its removal, and not at the moment of issuing a decision. As a consequence, the proceedings by the head of the commune (mayor or city president) cannot be limited to the acceptance of the actual actions of the entity that collected the animal, but must be preceded by proceedings in which the authority examines the legitimacy of the animal having been collected.[12] The head of the commune (mayor or city president) is obliged to exhaustively and completely determine the facts of the case and make a legal assessment of the same.[13] Circumstances accompanying the receipt of an animal should be documented by the authority and presented in the rationale for the decision, so that it is possible to verify whether a situation justifying the issuance of a decision pursuant to Art. 7(3) of the Act actually occurred.[14]

Although the provision does not explicitly specify this, the notification referred to in Art. 7(3) APA, submitted to the public administration body whose task will be to issue the *ex post facto* decision, should be sufficiently detailed so that the head of the commune (mayor or city president) who will issue the decision has full data concerning the case at its disposal. The person carrying out the removal should indicate in it

[9] Judgement of the Supreme Administrative Court of 26 April 2019, II OSK 1135/18, Lex 2683925.

[10] The Supreme Administrative Court in its judgement of 15 January 2019, II OSK 656/18, available at CBOSA, ruled that leaving a dog unattended, without food and tied up on a chain is a form of animal abuse.

[11] Judgement of the Supreme Administrative Court of 25 April 2017, II OSK 1678/16, available at CBOSA.

[12] Judgement of the Supreme Administrative Court of 11 June 2013, II OSK 2417/12, available at CBOSA.

[13] Judgement of the Voivodeship Administrative Court in Poznań of 6 June 2013, IV SA/Po 165/13, available at CBOSA.

[14] Judgement of the Voivodeship Administrative Court in Opole of 24 October 2013, II SA/Op 348/13, available at CBOSA.

the date of collection, the place where it took place and the name of the entity which carried it out and, in addition, the animal, its owner and the reasons for the removal.

a) Death of an animal and insubstantiality of the proceedings under Art. 7(3) of the Act

A decision under Art. 7(3) of the Act is issued *ex post facto*. It is taken when the animal has already been collected. The issuing authority is obliged to assess whether the premises for removing the animal occurred when it was being done. It is therefore issued on the basis of the facts existing at the time of the act of collection and not at the time of that decision. This leads to the conclusion that events that will take place after the date of removal of the animal – such as the death of the animal – shall not render the administrative proceedings pursuant to Art. 105(1) of the Code of Administrative Procedure unsubstantiated.[15] For this reason, the proceedings for temporary removal of an animal from the custody of its owner or guardian shall not be discontinued.

b) Evidence proceedings

With regard to the evidence and investigation procedure preceding the issuance of a decision on the removal of an animal in the mode laid down in Art. 7(3) of the Act, adequate preparation of the entities collecting the animal becomes particularly important. As already mentioned, the decision is issued *ex post facto* (several or ten or so days) after the event justifying the decision. It is therefore important that the circumstances justifying the removal are properly documented. While this does not cause any problems for institutional entities, such as police officers or commune guards, it may be problematic if the animal is collected by an authorized representative of a social organization. Both police officers and commune guards can prepare valid reports in which all circumstances and facts accompanying a given event are recorded in detail. However, practical experience shows that an employee of a social organization does not always possess adequate qualifications. In any such case, reliable photographic documentation of the state of the animal and its housing conditions is essential.

Other evidence frequently used in this procedure includes an opinion of an expert veterinarian to whom the animal is transported immediately on collection, indicating the psycho-physical condition of the animal. In addition, it may be justified during the procedure to carry out a visual inspection of the animal and of the housing provided to it by the owner.

[15] Judgement of the Supreme Administrative Court of 29 November 2016, II OSK 442/15; judgement of the Supreme Administrative Court of 14 January 2016, II OSK 782/15, available at CBOSA.

Participants of the proceedings for temporary removal of an animal from the custody of its owner or guardian

Pursuant to Art. 7(1) and (3) of the Act, the entity conducting proceedings as a body of first instance is the head of the commune (mayor or city president). The local jurisdiction of these authorities shall be determined by the location of the animal at the time of its collection. Pursuant to the provisions of Art. 17(1) of the Code of Administrative Procedure[16] – the body adjudicating in the second instance shall be the local government board of appeal. In turn, a party to the proceedings conducted in the aforementioned modes shall be the owner or guardian/guardians of the animal, who are entitled to carry out all procedural activities in the administrative proceedings.[17] The Act does not define the term "guardian". It should therefore be understood, in accordance with its universal meaning, as a person who takes care, looks after, attends to an animal.[18]

However, the person who collects the animal under Art. 7(3) APA – i.e. a policeman, a commune guard or a representative of a social organisation whose statutory objective is to protect animals, who is authorised to collect the animal – shall not be the party to the proceedings. The legislator authorised these persons only to collect the animal and then obliged them to immediately notify about this fact the body authorised to issue an administrative decision. The fact that an association or other social organisation has submitted a notification of the animals' removal does not mean that they have a legal interest within the meaning of Art. 28 CAP, which would allow such an organisation to be considered a party to the administrative proceedings. Its participation in the proceedings would be possible only if it applied to be admitted to participate in it with the rights of a party.[19] Both in administrative proceedings conducted in accordance with the procedure set out in Art. 7(1) and 7(3) there may appear entities with the rights of a party. They do not substitute a party but appear next to and independently of the party. In practice it occurs most frequently when a social organisation expresses its will to participate in the proceedings. A relevant decision is taken by the head of the commune (mayor or city president) by way of a resolution appealed against by a complaint pursuant to Art. 31(2) CAP. In each case,

[16] The Act of 14 June 1960, consolidated text, Journal of Laws of 2018, item 2096, as amended (hereinafter referred to as CAP or the Code).

[17] Judgement of the Voivodeship Administrative Court in Gliwice of 13 March 2019, II SA/Gl 936/18, Lex 2644312; The party to the proceedings will not be a social organization to which the animal worker has been admitted. See more widely E. Szewczyk, M. Szewczyk, *Status organizacji społecznej w postępowaniu prowadzącym do wydania decyzji na podstawie art. 7 ust. 3 in fine ustawy z dnia 21 sierpnia 1997 r. o ochronie zwierząt (t.j. Dz.U. z 2019 r. poz. 122 ze zm.), Gloss to the judgement of the Supreme Administrative Court of 24 February 2020, II OPS 2/19*, in print.

[18] Judgement of the Voivodeship Administrative Court in Warsaw of 18 March 2014, IV SA/Wa 2877/13, available at CBOSA.

[19] Judgement (not final) of the Voivodship Administrative Court in Wrocław of 10 January 2018, II SA/Wr 637/17, available at CBOSA.

possible participation of a social organisation in administrative proceedings shall be decided by the administrative body conducting the proceedings, provided that such organisation proves that its participation is justified by its statutory objectives and there is a public interest in this (Art. 31(1) of the Code).

Removal of an animal from the custody of its owner/ guardian and financial consequences of this action

Pursuant to the provisions of Art. 7(4) APA, in the event of issuing a decision pursuant to Art. 7(1) or (3) APA, "the costs of transport, subsistence and necessary medical treatment of the animal shall be charged to its former owner or guardian". It should be stressed that it is not always possible to specify – as it were "in advance" – the specific cost of subsistence and necessary medical treatment in the decision on the temporary removal of animals. At this initial stage of the procedure, it is often impossible to predict the duration of the treatment required for an animal, as well as the actual costs of its maintenance. This is generally impossible, e.g. because it is not clear whether the treatment will be effective immediately and how long it will last, or because it is difficult to predict in advance the length of the criminal proceedings in which the final decision on the animal's forfeiture or return to the owner will be taken. For this reason, in the jurisprudence of administrative courts it is assumed that a decision on the temporary removal of an animal may but does not have to include a determination of the costs of transport, subsistence and necessary treatment.[20] Therefore, the amount of those costs does not have to be determined in the same decision in which the authority decides on the temporary removal of the animal from the custody of its owner. However, in order for the owner or guardian of the animal – in the absence of a decision on costs in the decision on temporary removal – to be aware of the necessity to pay them in the future, it is necessary to include a relevant instruction in the said decision.

In cases referred to in Art. 7(1c) APA, if the entity the animal is to be transferred to does not consent to this, or if other circumstances occur preventing the transfer of the animal to the entities referred to in Art. 7(1), the animal may be transferred free of charge to another legal or organisational entity without legal personality or to a natural person who will provide it with appropriate care. In such a situation, it will only be permissible to charge the owner with transport costs and documented medical costs, since it follows from the provision that the animal is transferred free of charge, which means that there will be no costs for the animal's subsistence on the part of the authority.[21]

[20] Judgement of the Voivodeship Administrative Court in Kielce of 24 July 1997, II SA/Ke 461/14, available at CBOSA.

[21] Judgement of the Voivodeship Administrative Court in Opole of 24 October 2013, II SA/Op 348/13, available at CBOSA.

The adoption of a decision on costs at a later date must therefore be regarded as admissible and not contrary to Art. 7(4) APA. However, prior issuance of the decision on temporary removal is necessarily required.[22] In this context, the decision on costs appears to be a decision dependent on the decision on the temporary removal. The preceding decision – i.e. one on the temporary removal of the animal – determines the content of the decision on the costs of transport, subsistence and medical treatment. A decision on costs shall be given in separate proceedings but a precedent decision on the removal of the animal is necessary for the former being issued.[23] Therefore, the decision on costs is a decision linked to the decision on the animal's removal.

The obligation to pay the costs of transport, maintenance and necessary treatment of the animal is a public-law obligation. To order the party to pay these costs, the administration authority must provide detailed reasons for doing so. The amount of these costs and the way in which they are calculated cannot be arbitrary. It shall correspond to the actually incurred expenditure.[24]

Rationale for the decision

The adoption of a decision to remove an animal from the custody of its owner/guardian, as in the case of any administrative decision, requires the public authority to take a fair account of the facts of the case, in this case by establishing that the animal was actually kept in improper housing conditions, in a state of gross negligence, in rooms or cages preventing it from maintaining its natural posture. At the same time, however, the interest of the owner (guardian) of the animal should be taken into account, as well as the arguments and evidence presented by them which may justify that it is not necessary to collect the animal.

Controversies arising from the application of Art. 7 APA concerning the issuance of a decision on the temporary removal of an animal

One of the controversies arising from the application of Art. 7(3) of the Act is the insufficiently specified deadline for submitting a notification on the collection of an animal to the administration body of the first instance. The legislator referred to the

[22] Judgement of the Voivodeship Administrative Court in Olsztyn of 21 November 2013, II SA/Ol 815/13, available at CBOSA.

[23] More on subsidiary decisions see E. Szewczyk, *Współdziałanie organów administracji publicznej a decyzje zależne na przykładzie unormowań dotyczących planu ruchu zakładu górniczego*, „Studia Prawa Publicznego" 2019, Nr 2, p. 90.

[24] Judgement of the Voivodeship Administrative Court in Kraków of 21 February 2018, II SA/Kr 1566/17, available at CBOSA.

term as "immediate", which means that this should be done as soon as possible. In practice, however, due to the lack of sanctions for failure to meet the deadline, such notifications are often submitted after several or even ten or so several days. Undoubtedly, this may have a negative impact on the findings made in the course of evidence and investigation proceedings. The collected animal should be treated and cared for. Due to the passage of time, it is more difficult to prove that at the time of taking it away from the owner or guardian it was in a much worse condition. The legislator should therefore specify a definite, relatively short period within which the notification should be made (e.g. 2 days) and the penalties for failure to meet it.

Moreover, in practice there are also numerous problems related to the taking an animal back by the owner from the entity to which it was transferred, if the court neither rules on the animal's forfeiture nor discontinues the proceedings. The emergency procedure for the collection of animals, linked to the immediate enforceability of the decision, undoubtedly constitutes a significant interference in the rights of animal owners. Therefore, the legislator should supplement the Act with regulations providing for a "fast track" of animal collection by the owner, who often has problems with determining where the animal actually stays, as it happens that it is transferred from one entity to another. These difficulties arise also due to the fact that the provision of Art. 7(1)(1–3) APA does not require that the indication of the entity to which the animal is to be transferred should take place in some special form.

In addition, attention should also be paid to the time limits applicable in proceedings on issuance of a decision on the animal's removal. Since the appeal and its consideration by the local government board of appeal are conducted in a faster procedure (3 and 7 days respectively), it would be worth shortening the time for issuing a decision by the first instance authority, which, in accordance with Art. 35(3) CAP, is obliged to take a decision within one month, and in cases it considers to be particularly complicated – within two months.

References

Dolphins deserve same rights as humans, say scientists, BBC News, https://www.bbc.com/news/world-17116882 [access: 2.09.2019].

Górski M., *Odpowiedzialność administracyjnoprawna w ochronie środowiska*, Warszawa 2008, chapter III, section 3.1.4 – published by Lex Omega 2019.

Janiak P., *Czasowe odebranie zwierząt w trybie administracyjnym – podstawowe zagadnienia*, „Casus" 2019.

Pietrzykowski T., *Problem podmiotowości prawnej zwierząt z perspektywy filozofii prawa*, „Przegląd Filozoficzny" 2015, Nr 2.

Singer P., *Wyzwolenie zwierząt*, Warszawa 2004.

Sługocka M., *Praktyczny wymiar instytucji czasowego odebrania zwierzęcia właścicielowi lub opiekunowi*, „Acta Universitatis Wratislaviensis. Przegląd Prawa i Administracji" 2017, Vol. 108.

Szewczyk E., *Współdziałanie organów administracji publicznej a decyzje zależne na przykładzie unormowań dotyczących planu ruchu zakładu górniczego*, „Studia Prawa Publicznego" 2019, Nr 2.

Szewczyk E., Szewczyk M., *Zlecenie jako element akcesoryjny decyzji administracyjnej*, [in:] *Idea kodyfikacji w nauce prawa administracyjnego. Księga pamiątkowa ku czci Profesora Janusza Borkowskiego*, red. Z. Kmieciak, Warszawa 2018.

Szewczyk E., Szewczyk M., *Status organizacji społecznej w postępowaniu prowadzącym do wydania decyzji na podstawie art. 7 ust. 3 in fine ustawy z dnia 21 sierpnia 1997 r. o ochronie zwierząt (t.j. Dz.U. z 2019 r. poz. 122 ze zm.), Gloss to the judgement of the Supreme Administrative Court of 24 February 2020, II OPS 2/19*, in print.

Abstract: In Polish legal system, animals are protected under the provisions of the Animal Protection Act of 21 August 1997 (consolidated text, Journal of Laws of 2019, item 122, as amended, hereinafter referred to as APA or the Act). According to its provisions in Art. 1(1), an animal is not an object but a living being capable of suffering. "Man owes it respect, protection and care." If its existence is jeopardised as a result of actions or omissions of its owner or guardian, the legislator has provided for the possibility of its temporary removal under administrative law. It can be carried out in one of two modes: normal or emergency mode. This institution is regulated in Art. 7 APA, which provides in Art. 7(3) for the so-called "*ex post facto* issuance of a decision on removal of the animal from the custody of its owner or guardian", and in Art. 7(1) for the issuance of the relevant decision if the animals have not been taken away yet. It consists in securing the animal's welfare until the judicial authorities determine whether the abuse has taken place and decide on the animal's future. Numerous controversies have arisen in relation to the application of the Act's provisions on removing an animal from the custody of its owner or guardian. They are related, *inter alia*, to the deadline for the persons who collect the animal for submitting a relevant notification to the competent administrative authority, which has an impact on evidence in administrative proceedings. In addition, due to insufficient regulation of these issues, there are difficulties in determining the location of the animal by the owner and taking it back if the court neither rules on the animal's forfeiture nor discontinues the proceedings. Moreover, the time limit for the first instance authority to decide on the animal's removal – which may last one or even two months – should be considered as too long, especially in case of the second instance proceedings, which must be finalised within 7 days.

Keywords: administrative procedure for removal of an animal from the custody of its owner or guardian

EMIL KRUK

Maria Curie-Skłodowska University in Lublin, Faculty of Law and Administration
https://orcid.org/0000-0002-7954-0303
emil.kruk@umcs.pl

The Cooperation of Polish Social Organisations with the Competent State and Self-Government Institutions in the Detection and Prosecution of Crimes and Petty Offences Specified in the Animal Protection Act*

Social organisations play an extremely important role in the process of humanitarian animal protection. In a sense, this is reflected in the provisions of the Act of 21 August 1997 on the Protection of Animals[1] (hereinafter referred to as APA) in which the legislature requires public authorities to cooperate in this respect with the relevant national and international institutions and organisations, including those whose statutory aim is the protection of animals (Art. 1(3) and Art. 3 of APA). This

* The publication was prepared within the research entitled "The Administrative Law Animal Protection Model" included in the application registered in the Funding Stream Service system administered by National Information Processing Institute No. 2016/23/D/HS5/01820 and accepted for financing within the competition announced by the National Science Centre, Poland – "SONATA 12" on the basis of the decision made by the Director of National Science Centre in Kraków of 16 May 2017 (decision No. DEC-2016/23/D/HS5/01820, contract No. UMO-2016/23/D/HS5/01820). This article is an amended and supplemented version of an article published in Polish, entitled *The Cooperation of Social Organisations with the Competent State and Local Government Institutions in Detecting and Prosecuting Crimes and Offences Specified in the Animal Protection Act*, which appeared in 2019 in the periodical "Studia Prawnoustrojowe" (No. 43) published by the University of Warmia and Mazury Press in Olsztyn. The aim of this measure is to disseminate the results of academic research as widely as possible.

1 Consolidated text, Journal of Laws of 2019, item 122.

concerns in particular such matters as: the temporary seizure of a maltreated animal and enforcement of the court's ruling on the forfeiture of an animal (Art. 7(1a) Art. 7(3) and Art. 38 of APA);[2] running shelters for animals (Art. 11(4) of APA); district (*gmina* level) programmes for the care of homeless animals and the prevention of their homelessness (Art. 11a(7)(2) of APA); action aimed at limiting the population of animals constituting an extraordinary threat to life, health or human economy (Art. 33a(2) of APA); the supervision over the observance of regulations on the protection of animals (Art. 34a(3) of APA).

Such social organisations were also authorised to: determine the necessity of an immediate killing of an animal in order to put an end to its suffering (Art. 33(3) of APA);[3] exercising the victim's right in criminal proceedings[4] in proceedings in petty offence cases and in proceedings in cases of juveniles, the subject matter of which are the acts specified in APA (Art. 39 of APA); as well as to cooperate with relevant state and local government institutions in the detection and prosecution of crimes and petty offences specified in APA (Art. 40 of APA). Unfortunately, the normative value of these provisions and the scale of their practical application are small.[5] This is best illustrated by the above-mentioned possibility of cooperation in the area of detection and prosecution of crimes and offences. This leads to a situation in which social organisations themselves often propose that the regulations they are the addressees of should be removed from APA; the regulations which in their opinion, due to their generality and anachronism, lead only to dilution of the responsibility for the fate of animals.

---

[2] For more on this subject, see, e.g. M. Goettel, *„Czasowe odebranie" oraz „przepadek" jako szczególne środki prawnej ochrony zwierząt*, „Studia Prawnoustrojowe" 2011, Nr 13, pp. 135–147.

[3] The right of an inspector of a social organisation whose statutory aim is to protect animals, provided for in Art. 33(3) of APA, to determine the need for immediate killing of an animal in order to put an end to its suffering, is questioned in some opinions. They point out that this provision gives the possibility to decide to kill an animal to persons who "do not have adequate knowledge concerning the available options to provide assistance other than euthanasia", which, according to the authors of these opinions, should be reserved to the exclusive prerogative of veterinary surgeons. See, e.g. *Opinia Krajowej Izby Lekarsko-Weterynaryjnej (KILW/03210/02A/11) dotycząca poselskiego projektu ustawy o zmianie ustawy o ochronie zwierząt oraz ustawy o utrzymaniu czystości i porządku w gminach (druk nr 4257)*, Warszawa, 17 czerwiec 2011, www.sejm.gov.pl [access: 05.05.2019].

[4] For more on this subject, see, e.g. A. Choromańska, *Status pokrzywdzonego w sprawach o przestępstwo znęcania się nad zwierzętami. Uwagi na tle wyroku Sądu Najwyższego z 16 stycznia 2014 r. (VKK 370/13)*, [in:] *Przeciwdziałanie międzynarodowej przestępczości przeciwko środowisku naturalnemu z perspektywy organów ścigania*, red. W. Pływaczewski, A. Nowak, M. Porwisz, Szczytno 2017, pp. 197–206; M. Porwisz, *Udział w postępowaniu karnym organizacji społecznych działających na rzecz ochrony zwierząt*, [in:] *Przeciwdziałanie…*, pp. 207–224.

[5] Łukasz Smaga expresses a similar view: "In the context of legally sanctioned humanitarian protection of animals, social organizations, in accordance with the will of the legislator, play a relatively marginal role, and regulations concerning their activities are characterised by a far-reaching randomness. It seems that the legislator, without any concept of shaping the position of the social factor, only to preserve the appearance of social control, assigned specific competences to these organisations". See idem, *Ochrona humanitarna zwierząt*, Białystok 2010, p. 270.

For example, in the explanatory memorandum to the "Concept of changes in animal protection law" published by the Animal Protection Office of the ARGOS Foundation for Animals, we can read: "The Act [on the protection of animals – E.K.] in many places refers directly to social organisations with the statutory objective of animal protection, both in general provisions on cooperation with state authorities with such organisations and indicating their specific roles. However, no provision on the cooperation is formulated in a manner that would make it binding for state bodies or the organisations in question, and the special role of such organisations is established in particular where it is necessary to replace the responsibility of public authorities for the fate of animals. The effect of such provisions is general helplessness and the lack of influence of social organisations on the state of animal protection, except the extent to which they act as entrepreneurs in the sector of cleaning and waste management, conducting agreements with *gmina* authorities".[6] Significantly, it should be borne in mind that the level of cooperation between society and state institutions is a measure of democracy in a given society and a distinctive feature of civil society.

It is worth mentioning here that the first Polish legal act providing for the humanitarian protection of animals, which was the Ordinance of the President of the Republic of Poland of 22 March 1928 on the Protection of Animals, [7] provided in Art. 10 for the possibility that the Ministers of Justice and Internal Affairs, by way of ordinance, may authorise individual societies and organisations aimed at the protection of animals or their breeding or supporting their breeding, as well as hunting societies to cooperate with state authorities in the disclosure of crimes provided for in the Ordinance. Associations and organisations authorised in such a way were also granted the right to support prosecution in courts as an auxiliary prosecutor.

The first such ordinance was issued on 27 December 1930.[8] On its basis, the Society for the Care of Animals in Warsaw, the Polish League of Friends of Animals in Warsaw, the Łódź Society for the Care of Animals, the Society for the Care of Animals in Poznań, the Kraków Society for the Protection of Animals and Nature, the Association for the Care of Animals in Kraków, the Society for the Care of Animals in Lviv, the Voivodeship Society for the Protection of Animals in Stanisławów, the Vilnius Society for the Care of Animals, the Society for the Care of Animals in Częstochowa and provincial branches of these societies were authorised to cooperate with state

[6] The ARGOS Foundation for Animals, ul. Garncarska 37A, 04-886 Warszawa, KRS [National Court Register]: 0000286138. See *Koncepcja zmian prawa ochrony zwierząt*, http://www.boz.org.pl/fz/prawo/k.htm#k5c [access: 05.05.2019].

[7] Consolidated text, Journal of Laws of 1932, No. 42, item 417.

[8] The Ordinance of the Minister of the Interior in agreement with the Minister of Justice of 27 December 1930 on authorising certain associations to cooperate with state authorities in revealing crimes against animal protection, Journal of Laws of 1931, No. 3, item 17. This Ordinance came into force on 23 January 1931 and was repealed on 5 August 1957.

authorities in the disclosure of crimes provided for in the Ordinance of the President of the Republic of Poland of 22 March 1928 on the Protection of Animals.

Such cooperation included: a) participation in Police investigations, namely: attendance at investigation activities; asking questions to the examined persons with the consent of the investigator; putting forward conclusions, which the investigator was obliged to take into account as far as possible; b) independent investigations as a substitute for the Police in cases where the Police have not yet started an investigation or have transferred the investigation to the association.

Pursuant to Art. 243 of the Ordinance of the President of the Republic of Poland: the Code of Penal Procedure of 19 March 1928,[9] the aim of such an investigation was to clarify whether a crime was actually committed, to clarify who may be suspected of it and whether there is a sufficient basis for the prosecutor to demand the initiation of court proceedings. Activities undertaken within the framework of the investigation consisted in: questioning suspects and persons who could have known something about the crime or its perpetrator; collecting necessary information about the suspect, in particular about his or her motives, attitude to the victim, the degree of mental development, personality, earlier life and behaviour after the crime was committed; conducting interviews and other activities resulting from the essence of the investigation. These activities were performed by the above-mentioned associations through delegates appointed from among the members of the association by its board. It is worth noting that the activities related to the independent conduct of investigations in place of the Police could be performed only by those delegates who received, at the request of the association's board, a separate authorisation to do so from the *powiat* district authority of general administration. This authorisation allowed them to perform the relevant activities in the whole territory of the state and could be revoked.

The delegates of the associations did not have any investigation powers of the Police. If it was necessary to perform an act exceeding the delegate's powers, the delegate was obliged to refer the matter to the Police, which performed this act, if the request was justified. Delegates were required to notify the Police (either verbally or in writing) of the start of the investigation (within 48 hours) and, once the investigation had been completed, of its outcome (also within 48 hours). The State Police could at any time take over the investigation conducted by a delegate who was then entitled to be only a participant of the Police investigation. Associations authorised to cooperate in detecting crimes were required to issue a card to their delegates in accordance with the models set out in the Annex to the Regulation (model "a" – white: card of a delegate authorised to participate in a Police investigation; model "b" – pink: card of a delegate authorised to conduct investigations himself o herself). These cards became valid after being certified by the district (*powiat* level) authority of the general administration (signature of the *starosta*). Delegates, on the other hand, were obliged to carry the

[9] Journal of Laws No. 33, item 313, as amended.

card with them while performing their duties and to present it at the request of the security authorities and interested parties.

The ordinance of 15 July 1957[10] authorised only the League for the Protection of Nature and the Society for the Care of Animals in the Polish People's Republic to cooperate with state authorities in the detection and prosecution of crimes provided for in the provisions of the Regulation of the President of the Republic of Poland on the Protection of Animals of 22 March 1928. This cooperation included: a) the right to check the identity of persons committing offences against animal protection; b) assistance provided to the authorities of Citizen's Militia in conducting an investigation as well as participation in an investigation, namely being present during investigation activities, questioning the investigated persons with the consent of the investigator and presenting conclusions which the investigator was obliged to take into account as far as possible. These associations carried out these activities through delegates appointed from among the members of the association. The delegates acted on the basis of the authorisation of the presidium of the *powiat* (or town, city) national council with jurisdiction over the place of their residence. The authorisation was granted at the request of the main board of the association or the branch offices of the association indicated by this board. The authorisation was valid for the entire territory of the state and could be revoked. The associations mentioned above were required to issue to their delegates cards prepared in accordance with the model which constituted an annex to the Regulation. The cards were valid after being certified by the presidium of the *powiat* (or town, city) national council.

The legislation currently in force lacks a legal regulation that would provide a similar specification of the rights of social organizations with regard to their cooperation with relevant state and local government institutions in the disclosure and prosecution of crimes and offences specified in APA. It seems surprising, all the more so because the rate of detection of crimes under Art. 35(1–2) of APA has decreased in recent years (this Art. applies to acts such as: killing, killing or slaughtering an animal in violation of the provisions of the Act and abuse of an animal).[11] Therefore, in order to increase

[10] The Ordinance of the Ministers of Justice and Internal Affairs of 15 July 1957 on authorising certain associations to cooperate with state authorities in the detection and prosecution of crimes against animal protection, Journal of Laws No. 41, item 185. This Ordinance entered into force on 5 August 1957 and was repealed on 24 October 1998, following the repeal of the legal basis.

[11] According to the Police statistics, the detection rate of offences under Art. 35(1–2) of APA between 1999 and 2017 was as follows: 2017 – 59.7%; 2016 – 55.9%; 2015 – 64.5%; 2014 – 58.0%; 2013 – 60.1%; 2012 – 60.4%; 2011 – 62.0%; 2010 – 65.4%; 2009 – 66.5%; 2008 – 65.6%; 2007 – 70.2%; 2006 – 69.5%; 2005 – 69.1%; 2004 – 69.4%; 2003 – 64.8%; 2002 – 69.4%; 2001 – 69.9%; 2000 – 79.2%; 1999 – 81.0%. See the data published on http://statystyka.policja.pl/st/wybrane-statystyki/wybrane-ustawy-szczegol/ustawa-o-ochronie-zwier/50889,Ustawa-o-ochronie-zwierzat.html [access: 05.05.2019]. The statistical picture of offences against humanitarian animal protection is presented in: M. Gabriel-Węglowski, *Przestępstwa przeciwko humanitarnej ochronie zwierząt*, Toruń 2008, pp. 183–198; D. Karaś, *„Niech zwierzęta mają prawa!" Monitoring ścigania oraz*

the effectiveness of the activities of the Police in the field of animal protection,[12] the Police should cooperate more closely with non-governmental organisations in this respect.[13] Dawid Karaś seems to be right when he claims that non-governmental organisations can make an important contribution to Police work by: providing advice and guidance on how to proceed in a given situation; making an initial assessment of the animals' living conditions and fitness; providing temporary care for animals that have been taken away from their owners (guardians) by Police officers or that need to be taken away from their owners (guardians); providing direct assistance to animals which have suffered or may suffer as a result of human activities (e.g. animals affected by road accidents; abandoned, lost or wild animals which pose a threat by being outside the place they usually live); supplying evidence of acts prohibited by APA, secured as a result of the activity of these organisations, which significantly limits the scope of evidence-gathering acts that the Police needs to conduct.[14]

The aforementioned lack does not mean that in the current legislation in force, social organisations whose statutory aim is to protect animals cannot cooperate with competent state and local government institutions in detecting and prosecuting offences specified in APA. Obviously, such cooperation is sometimes undertaken, but it is not specified in any procedures, and the representatives ("inspectors") of social organisations, whose role is, to a certain degree, emphasised in the provisions of APA, act in principle within the framework of general civil rights, which significantly hinders their effective performance of their tasks, especially in situations where immediate intervention is necessary. In addition, as Wojciech Radecki rightly pointed out, even if the provision of Art. 40 of APA did not exist, cooperation of an organisation with

---

karania sprawców przestępstw przeciwko zwierzętom, „Przegląd Prawa i Administracji" 2017, Vol. 108, pp. 17–30; L. Drwęski, *Ocena skuteczności ścigania przestępstw związanych z ochroną zwierząt – obraz statystyczny*, [in:] *Status zwierzęcia. Zagadnienia filozoficzne i prawne*, red. T. Gardocka, A. Gruszczyńska, Toruń 2012, pp. 231–242; A. Habuda, W. Radecki, *Przepisy karne w ustawach o ochronie zwierząt oraz o doświadczeniach na zwierzętach*, „Prokuratura i Prawo" 2008, Nr 5, pp. 33–35.

[12] On the role of the Police in the protection of animals, see, e.g. K. Siedlarz, *Interwencje Policji w sprawie zwierząt*, [in:] *Urzędnik jako strażnik realizacji ustawowych obowiązków wobec zwierząt*, red. T. Pietrzykowski, A. Bielska-Brodziak, K. Gil, M. Suska, Katowice 2016, pp. 155–167; J. Zaborowski, *Ściganie przestępstw i wykroczeń godzących w zwierzęta oraz zapobieganie im*, [in:] *Status*…, pp. 245–252.

[13] Urszula Szymańska and Arleta Lepa argue that "(…) the practice shows that activities aimed at improving animal welfare are more effective when they are supported by citizens' initiatives and by non-governmental organisations set up by citizens to help animals". See idem, *Rola społeczeństwa i organizacji pozarządowych w ochronie zwierząt przed przestępstwami*, [in:] *Perspektywy rozwoju sektora organizacji pozarządowych*, red. U. Szymańska, M. Falej, P. Majer, M. Hejbudzki, Olsztyn 2015, p. 201.

[14] D. Karaś, *Postępowanie w przypadku przyjęcia zgłoszenia o zdarzeniu z udziałem zwierząt. Algorytm dla policji*, Kraków–Wrocław 2016, p. 8, https://zwierzetaiprawo.org/wp-content/uploads/2018/05/CzarnaOwca-NiechMajaPrawa-ReagowaniePolicja-PUBLIC.pdf [access: 05.05.2019].

state and self-government institutions would be acceptable,[15] also as regards cooperation in the area of detection and prosecution of criminal offences, especially if this cooperation was limited to the notification of a criminal offence. This is because according to Art. 304 para. 1 of the Act of 6 June 1997 – The Code of Criminal Procedure,[16] whoever learns that an offence prosecuted has been committed, shall be under civic duty to inform the state prosecutor or the Police. The cooperation in question can also be initiated by the Police. Such possibility is provided for by Art. 15(1)(7) of the Act on the Police of 6 April 1990,[17] according to which, the Police, when carrying out preliminary investigation, criminal investigation as well as administration and order-keeping activities in order to identify, prevent and detect crimes and petty offences, have the right to request necessary assistance from entrepreneurs and social organisations – and in cases of emergency, from any person – to provide temporary assistance, under the legal provisions in force. All this significantly diminishes the importance of the commented provision and, consequently, makes one reflect on the advisability of keeping it in its present form.

Finally, it is worth noting that regardless of the state of affairs presented above, Polish social organisations quite often cooperate with the Police. According to the report on the state of cooperation of non-governmental organisations with public and self-government administration and uniformed services in carrying out animal protection tasks,[18] the representatives of most of the surveyed social organisations favourably assessed this cooperation, in particular with the Police and the municipal police, and the participation of the officers of these services in joint interventions was considered "helpful". Interestingly, such a high assessment of cooperation with uniformed services was not even affected by the fact that at the same time, in the opinion of the representatives of the surveyed organisations: a) officers of uniformed

[15] W. Radecki, *Ustawy o ochronie zwierząt. Komentarz*, Warszawa 2015, p. 263.

[16] Consolidated text, Journal of Laws of 2018, item 1987, as amended

[17] Consolidated text, Journal of Laws of 2019, item 161.

[18] The report *Stan współpracy organizacji pozarządowych z administracją publiczną i samorządową oraz służbami mundurowymi w realizacji zadań z zakresu ochronyzwierząt* (Kraków, April 2013) was prepared on the basis of the results of the survey conducted from 23 January to 28 February 2013 by the Foundation "Czarna Owca Pana Kota" within the framework of the project co-financed by the European Social Fund: "Sieć OFF – Ogólnopolskie Forum Fauna", https://czarnaowca.org/download/raport_2013.pdf [access: 05.11.2019]. 224 social organisations whose main or secondary statutory aim is to protect animals were invited to participate in the survey. The questions were directed primarily at the analysis of forms of interaction and cooperation between non-governmental organisations and public administration in the field of animal protection. Cf. a report on the monitoring of courts, prosecutors' offices and the Police: *Jak Polacy znęcają się nad zwierzętami?*, Kraków–Wrocław 2016, prepared by the Foundation "Czarna Owca Pana Kota" in partnership with the Ekostraż Association for the Protection of Animals in Wrocław, within the framework of the project "Niech mają prawa!" implemented as part the programme "Obywatele dla Demokracji", financed by EEA grants, https://czarnaowca.org/wp-content/uploads/2016/05/CzarnaOwca-NiechMajaPrawa-RaportRozszerzony-PUBLIC-20160516.pdf [access: 05.11.2019].

services tend to have little knowledge of animal protection law regulations and, additionally, are definitely not willing to acquire knowledge and experience in this field; b) uniformed services are rather reluctant to cooperate with social organisations in the field of animal protection (although the opposite assertion had almost as many supporters in the survey); c) officers of the uniformed services sometimes have a dismissive attitude towards issues related to the protection of animals. In the opinion of the authors of the survey, the high assessment of cooperation of social organisations with relevant state and local government institutions results to some extent from its formal nature (its course and possible forms are defined by the law), and what may additionally strengthen it is the constant raising of legal awareness on both sides. This is all the more important due to the fact that, as the survey in question shows, the vast majority (87.65%) of the surveyed organisations cooperated with uniformed services within the scope of their statutory activities for the protection of animals. These organisations usually cooperated with the Police (77.78%) and the municipal police (70.37%). They much less frequently cooperate with the Fire Service (38.27%). Only three surveyed organisations cooperated with other uniformed services (Customs Service, Prison Service, Railway Protection Guard). Cooperation of social organizations with uniformed services concerned mainly intervention in cases of suspected animal abuse by their guardians (76.54%) and providing assistance to injured, homeless or free-living animals (54.32%). In the remaining cases (7.41%), the scope of cooperation covered such issues as: using the 112 emergency number in cases related to animals; organising speed measurements of vehicles in speed limit zones where protected animals migrate; joint educational activities; collection of animal feed.

References

Choromańska A., *Status pokrzywdzonego w sprawach o przestępstwo znęcania się nad zwierzętami. Uwagi na tle wyroku Sądu Najwyższego z 16 stycznia 2014 r. (VKK 370/13)*, [in:] *Przeciwdziałanie międzynarodowej przestępczości przeciwko środowisku naturalnemu z perspektywy organów ścigania*, red. W. Pływaczewski, A. Nowak, M. Porwisz, Szczytno 2017.

Drwęski L., *Ocena skuteczności ścigania przestępstw związanych z ochroną zwierząt – obraz statystyczny*, [in:] *Status zwierzęcia. Zagadnienia filozoficzne i prawne*, red. T. Gardocka, A. Gruszczyńska, Toruń 2012.

Gabriel-Węglowski M., *Przestępstwa przeciwko humanitarnej ochronie zwierząt*, Toruń 2008.

Goettel M., *„Czasowe odebranie" oraz „przepadek" jako szczególne środki prawnej ochrony zwierząt*, „Studia Prawnoustrojowe" 2011, Nr 13.

Habuda A., Radecki W., *Przepisy karne w ustawach o ochronie zwierząt oraz o doświadczeniach na zwierzętach*, „Prokuratura i Prawo" 2008, Nr 5.

Karaś D., *„Niech zwierzęta mają prawa!" Monitoring ścigania oraz karania sprawców przestępstw przeciwko zwierzętom*, „Przegląd Prawa i Administracji" 2017, Vol. 108.

Karaś D., *Postępowanie w przypadku przyjęcia zgłoszenia o zdarzeniu z udziałem zwierząt. Algorytm dla policji*, Kraków–Wrocław 2016, https://zwierzetaiprawo.org/wp-content/uploads/2018/05/CzarnaOwca-NiechMajaPrawa-ReagowaniePolicja-PUbLIC.pdf [access: 05.05.2019].

Porwisz M., *Udział w postępowaniu karnym organizacji społecznych działających na rzecz ochrony zwierząt*, [in:] *Przeciwdziałanie międzynarodowej przestępczości przeciwko środowisku naturalnemu z perspektywy organów ścigania*, red. W. Pływaczewski, A. Nowak, M. Porwisz, Szczytno 2017.

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

Siedlarz K., *Interwencje Policji w sprawie zwierząt*, [in:] *Urzędnik jako strażnik realizacji ustawowych obowiązków wobec zwierząt*, red. T. Pietrzykowski, A. Bielska-Brodziak, K. Gil, M. Suska, Katowice 2016.

Smaga Ł., *Ochrona humanitarna zwierząt*, Białystok 2010.

Szymańska U., Lepa A., *Rola społeczeństwa i organizacji pozarządowych w ochronie zwierząt przed przestępstwami*, [in:] *Perspektywy rozwoju sektora organizacji pozarządowych*, red. U. Szymańska, M. Falej, P. Majer, M. Hejbudzki, Olsztyn 2015.

Zaborowski J., *Ściganie przestępstw i wykroczeń godzących w zwierzęta oraz zapobieganie im*, [in:] *Status zwierzęcia. Zagadnienia filozoficzne i prawne*, red. T. Gardocka, A. Gruszczyńska, Toruń 2012.

Abstract: In the process of humanitarian protection of animals social organisations play an extremely significant role. To some extent, it is reflected in the regulations of the Animal Protection Act of 21 August 1997 (consolidated text, Journal of Laws of 2019, item 122), where the legislator obligates the Veterinary Inspection and other competent authorities of government administration and local government to cooperate in the field of animal protection with social organisations whose statutory purpose is animal protection. Unfortunately, the normative value of these regulations is insignificant, as is the scale of their practical application. The best example of that is the possibility of cooperation in the field of revealing and prosecuting crimes and petty offences, mentioned in the title. That leads to the situation where social organisations themselves frequently postulate removing from the Animal Protection Act of the regulations they are the addressees of, and which, in their assessment, due to their general character and anachronism, lead exclusively to blurring of the responsibility for the fate of animals. Meanwhile, it must be taken into consideration that the level of cooperation between the society and state institutions is the measure of democracy in a given society and a feature characterising civil society.

Keywords: animals; protection of animals; humanitarian protection; social organisations; cooperation; crimes

MACIEJ P. GAPSKI

John Paul II Catholic University of Lublin, Faculty of Law, Canon Law and Administration
https://orcid.org/0000-0002-5454-6645
mgapski@kul.pl

The Costs of Maintaining an Animal as the Indispensable Existential Need under the Social Welfare Act

Introductory remarks

In the Constitution of the Republic of Poland of 2 April 1997,[1] which is currently in force, no norms can be found, which directly enact the right to social welfare or to a specific benefit arising from it. However, the constitutional principles, norms and values can be indicated, referring to the issues under discussion.

Among the whole set of values and norms that regulate the domain of welfare rights, defined in the Constitution, in the context of the right to welfare benefits human dignity deserves special attention, as it is the foundation of all freedoms and rights. The principles of subsidiarity and social justice are equally important. Dignity, subsidiarity and justice seem to have the deepest reference to welfare (social aid) issues. These principles are specified in detailed constitutional norms regulating the scope of freedom, as well as economic, social and cultural rights.[2] It should be also emphasized that constitutional values and norms constitute the source of guarantees, and not rights. Especially with reference to welfare benefits they act as a standard

[1] The Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws of 1997, No. 78, pos. 483, as amended).

[2] With reference to welfare, special attention should be paid to Arts. 67, 68, 69, 71, 72 of the Constitution.

that is detailed only in ordinary legislation.[3] As to the specification of basic principles according to which the right to welfare aid is executed, currently the most significant legal act in Poland is the Social Welfare Act of 12 March 2004.[4]

Right to welfare aid, i.e. to obtaining from public bodies appropriate support by a person or family in difficult living conditions and circumstances, depends upon meeting conditions specified in the indicated law. The prerequisites for granting welfare aid can be divided into the following: basic ones – stemming from general regulations of the law, and detailed ones, related to the specific kind of performance (e.g. permanent benefit – Art. 37 of the Social Welfare Act, expedient benefit – Art. 39, placing in a social welfare home – Art. 54).

The general (basic) prerequisites may include: being a Polish citizen (principally welfare aid is designed for Polish citizens and certain categories of foreigners), meeting the income criterion specified in Art. 8 pass. 1 of the Social Welfare Act (exceptionally that criterion is not taken into consideration on the basis of special regulations – Arts. 40 and 41 of the Social Welfare Act), as well as the occurrence of difficult living circumstances (examples of such situations are indicated in Art. 7 of the Social Welfare Act). The Act also introduces negative premises, such as the lack of cooperation between the beneficiary of benefits and a social worker or the waste of social assistance benefit (Art. 11 pass. 1–2).

The fundamental principle affecting all activities in the field of social welfare system is the principle of subsidiarity expressed both in the preamble to the RP Constitution and in Arts. 2 and 3 of the Social Welfare Act. The above principle sets out the basic conditions for the granting of all welfare benefits and the limits for the interference of welfare authorities.

This article will present remarks regarding the possibility of granting a welfare aid benefit to support a person or a family in maintaining an animal. The considerations focus primarily on the prerequisites arising from the subsidiarity principle and on determining whether the costs of maintaining an animal can be considered as the indispensable existential need justifying the possibility of granting the welfare aid benefit.

The principle of subsidiarity in the Social Welfare Act

The subsidiarity principle, expressed in the preamble to the RP Constitution and developed in its subsequent norms, significantly affects the whole system of welfare law. The idea of subsidiarity, taken from Greek philosophy and developed in the Catholic

[3] Judgement of the Supreme Administrative Court of 29 November 2016, I OSK 836/15, LEX No. 2169834.

[4] Consolidated text, Journal of Laws of 2017, pos. 1769.

social science, like any other principle, assigns duties for public authority and demarcates limits of supporting persons who found themselves in difficult living conditions.[5]

Although the subsidiarity principle has no legal definition, its content is uniformly decoded in the doctrine of law and its basic dimension refers to the appropriate relationships between an individual, communities and state. The commonly quoted definition of subsidiarity has been contained in the encyclical issued by Pope Pius XI *Quadragesimo anno* in 1931, where the following is indicated: "Just as it is gravely wrong to take from individuals what they can accomplish by their own initiative and industry and give it to the community, so also it is an injustice and at the same time a grave evil and disturbance of right order to assign to a greater and higher association what lesser and subordinate organizations can do. For every social activity ought of its very nature to furnish help to the members of the body social, and never destroy and absorb them". The principle under discussion constitutes the basis for dividing tasks between citizens, different social structures (associations, foundations), local government and the state.[6] From the point of view of subsidiarity it is significant to secure the possibility of acting freely by citizens, and only the tasks they are unable to perform on their own should be ascribed to the higher social structures: first to the local government and then to the state.[7] Subsidiarity principle on the one hand assumes that citizens are responsible for their own business and free to accomplish their own intentions and plans, which higher structures should respect. On the other hand, in turn, it imposes upon public subject the necessity to support individuals when they are unable to accomplish their tasks and satisfy their basic living needs on their own.

When referring the subsidiarity principle to the sphere of social rights, it should be noted that public subjects are obliged to support individuals in ensuring a minimal level of existence corresponding to their dignity, but they cannot do everything for them and replace the individual activity.[8] In its significance the activity of public subjects is only of auxiliary (subsidiary) nature when compared with the activity of an individual. The state and its structure are not, in accordance with the above, appointed to satisfy the existential needs of the population, but they are only to support individuals or families who, for reasons other than their fault, found themselves in difficult living conditions. The correct understanding of the subsidiarity principle with reference to welfare aid assumes that the aid is of supplementary, accessory nature and can be rendered exclusively to the persons or families who cannot satisfy their basic needs. The welfare aid in the whole system of social security is the last possibility to

[5] T. Bąkowski, *Administracyjnoprawna sytuacja jednostki w świetle zasady pomocniczości*, Kraków 2007, p. 31ff.

[6] W. Łączkowski, *Etyczne aspekty finansowania potrzeb socjalnych ze środków publicznych*, „Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2004, z. 1, p. 8.

[7] *Ibidem*.

[8] See more extensively, K. Stopka, *Zasada pomocniczości w prawie pomocy społecznej*, Warszawa 2009, p. 61.

overcome difficult life situations and is granted by public authorities after other rights or possibilities have been exhausted.[9]

As emphasized before, the subsidiarity principle assumes the possibility of granting welfare aid exclusively in the case when persons or families are no longer self-sufficient and, in spite of their own attempts, are unable to effectively overcome difficulties.[10] Subsidiarity, on the grounds of welfare law, like in the whole legal area, provides the activity of local and regional communities in terms of granting aid, as well as independence of individuals.[11] Supporting the assistance system based on the principle of subsidiarity reflects the constitutional principle of subsidiarity in the sphere of substantive administrative law.[12]

In order to emphasize the subsidiarity principle and give it an exceptional position within the system under discussion, the legislature defined welfare aid referring to subsidiarity. In accordance with Art. 2 pass. 1 of the Social Welfare Act, social security is the institution of state social policy which aims at enabling persons and families to overcome difficult life situations that they cannot overcome using their own rights, resources and capabilities. Therefore, it can be pointed out that any public action in the field of rendering all kinds of aid must depend on real possibilities of independent facing up to problems by an individual or a family. Here it should be emphasized that if the value, which is the dignity of a human being (a person), requires the state to provide the citizens with the possibility of existence on the basic level, then the subsidiarity principle assumes that the activity of public subjects in satisfying needs cannot restrict the independence and initiative of the individual. Welfare services should be addressed exclusively to persons who are unable to take care of their basic, indispensable existential needs and interests on their own. All welfare services constructed without respect for the subsidiarity principle not only break it, but also negatively affect social justice.

The subsidiarity principle is implemented primarily through provisions setting income criteria, the fulfillment of which conditions the granting of aid (Art. 8 pass. 1 of the Social Welfare Act) and other detailed prerequisites relating to specific benefits. In addition, as emphasized, assistance should be provided to meet the indispensable existential need. The reasons for which assistance may be provided are indicated,

[9] See M.P. Gapski, *Prawo do pomocy społecznej w orzecznictwie sądów administracyjnych (wybrane zagadnienia)*, [in:] *Problemy z sądową ochroną praw człowieka*, t. 1, red. R. Sztychmiler, J. Krzywkowska, Olsztyn 2012, pp. 591–592.

[10] See the judgement of the Provincial Administrative Court in Poznań of 6 November 2009, II SA/Po 307/09, LEX No. 531606.

[11] T. Bąkowski, *op. cit.*, p. 59; M. Kulesza, *Zasada subsydiarności jako klucz do reform ustroju administracyjnego państw Europy Środkowej i Wschodniej (na przykładzie Polski)*, [in:] *Subsydiarność*, red. D. Milczarek, Warszawa 1998, pp. 122–123.

[12] T. Bąkowski, *op. cit.*, pp. 59–60. This author emphasizes that the actual functioning of subsidiarity principle as a systemic principle is a consequence of the primary realization of subsidiarity principle in the sphere of substantive law.

for example, in Art. 7 of the Social Welfare Act and include, among others: poverty, orphanage, homelessness, unemployment, disability, long or severe illness, domestic violence, alcoholism or drug addiction, natural disaster.

The indispensable existential need in the light of the Social Welfare Act

Welfare benefits may be granted only to satisfy the indispensable existential need. In the Social Welfare Act, the indicated condition is included in Art. 3 pass. 1, as a general prerequisite for granting all kinds of aid. That term has not been normatively defined, so it requires an individual approach and adjustment to the circumstances of the particular case.[13] It should be borne in mind that welfare bodies are obliged not only to meet the indispensable existential needs on an *ad hoc* basis, but to act in a preventive manner to empower individuals and families.

In the doctrine of the welfare law, it is emphasized that the indispensable existential need is the one without which a minimum standard of human existence could not be maintained.[14] It is assumed that these types of needs relate primarily to food, clothing and shelter.[15] This way of understanding the premise leads to providing the person in need with the minimum goods necessary to survive. However, at present, the purpose of welfare aid is not only to provide its beneficiaries with the minimum necessary to secure biological existence, but also to raise the standard of living of people in need so that they do not deviate significantly from the situation of other members of society.[16] The situation of each person and family must be assessed individually, because it depends on the specific facts determining whether there is an indispensable existential need.[17] Interpretative guidance on determining these indispensable needs may be the Regulation of the Minister of Social Policy of 7 October 2005 on the threshold for social intervention, which in para. 3 pass. 3 specifies that the scope of indispensable needs applies to food, housing, clothing and footwear, education, health and hygiene, transport and communications, culture, sport and leisure[18]. Pursuant to Art. 39 pass. 1 and 2 of the Social Welfare Act, it can be inferred that the indispensable existential need is in particular: the costs of purchasing food, medicine and treatment, fuel, clothing, basic household items, minor renovations and repairs in the apartment, as well as the cost of funeral.

---

[13] Judgement of the Supreme Administrative Court of 20 September 2009, I OSK 1962/06, LEX No. 467105.

[14] W. Maciejko, [in:] W. Maciejko, P. Zaborniak, *Ustawa o pomocy społecznej. Komentarz*, Warszawa 2013 (see notes on Art. 3).

[15] *Ibidem.*

[16] I. Sierpowska, *Pomoc społeczna. Komentarz*, Warszawa 2017 (see notes on Art. 3).

[17] Cf. *Ibidem*.

[18] Journal of Laws of 2005, No. 211, item 1762.

At the same time, it should be stressed that welfare bodies have limited financial resources to meet the needs of people in difficult situations, and that meeting the needs of each person is a continuous process. It is not possible to satisfy all existential or social needs all at once. Welfare aid is not an institution that can meet all the needs of members of a given community, but only periodically support those in need. Welfare services are, in principle, of optional nature and the applicant cannot request payment of a benefit in a particular amount, satisfying them; the task of welfare aid is not to support persons who found themselves in difficult or unsatisfactory living conditions or to meet all their needs and expectations.[19] The general principles of granting services also reveal that the needs of persons and families taking advantage of welfare aid should be taken into consideration if they correspond to the goals and are included in the possibilities of welfare, which are limited by funds held by welfare bodies.[20] In the case that welfare benefits are refused or restricted due to insufficient financial means of the welfare center, it is necessary to demonstrate this circumstance (providing reasons for that decision) by specifying what amount was in possession of the center and how it was distributed among the persons in need, as well as to support it with specific evidence and documents.[21]

The possibility of granting welfare benefits to maintain an animal

As regards the essence of the issue, it should be borne in mind that social funds are directed to meet the basic living needs of people. It is obvious that welfare aid refers to individuals and families, nevertheless, it cannot be excluded that the indispensable existential needs of these entities will be related to maintain an animal. In the doctrine of law and the jurisprudence of administrative courts there is presented a common view that the cost of maintaining an animal cannot be regarded as an indispensable existential need.[22] However, the above thesis has been neither widely referred to nor deeply justified.

[19] Judgement of the Provincial Administrative Court in Warsaw of 17 May 2007, I SA/Wa 272/07, LEX No. 328249; of 6 June 2008, I SA/Wa 527/08, LEX No. 527554.

[20] Judgement of the Provincial Administrative Court in Łódź of 13 October 2010, II SA/Łd 404/10, LEX No. 755793; judgement of the Provincial Administrative Court in Warsaw of 21 December 2009, VIII SA/Wa 592/09, LEX No. 583659.

[21] Judgement of the Provincial Administrative Court in Łódź of 2 April 2008, II SA/Łd 157/08, LEX No. 509567; judgement of the Provincial Administrative Court in Gdańsk of 13 March 2008, II SA/Gd 796/07, LEX No. 369001; judgement of the Provincial Administrative Court in Kraków of 30 January 2008, II SA/Kr 925/07, LEX No. 500936; judgement of the Provincial Administrative Court in Warsaw of 8 December 2006, I SA/Wa 1515/06, LEX No. 320619.

[22] I. Sierpowska, *op. cit*. (notes on Art. 39). Judgement of the Provincial Administrative Court in Białystok of 15 September 2011, II SA/Bk 442/11, LEX No. 1085783; judgement of the Provincial Administrative Court in Kielce of 28 February 2008, II SA/Ke 655/07, LEX No. 500614.

It has been stated above that each case concerning granting of welfare benefits should be assessed individually with regard to its concrete aspects. In relation to the costs of maintaining an animal, two fundamentally different situations can be distinguished. The applicants may request the welfare benefit in order to keep farm animals that are bred to obtain consumer goods and financial means. In addition, individuals and families might apply for aid in maintaining animals kept for company, pleasure or other purposes.

These two situations should be discussed separately in order to ensure their correct assessment. As far as maintaining farm animals is concerned, it is difficult to find justification for spending welfare funds for this purpose. However, even small-scale livestock farming can secure some of the food and financial needs of individuals and families. It is similar to business activity. If it does not bring benefits that allow it to be carried out, then it becomes pointless because it worsens the material situation. The welfare aid does not serve to subsidize any business, moreover, there are specialized public administration bodies established to support agricultural activities. However, the problem of keeping domestic animals may be of a different nature. These animals might be bred not for material gain, but primarily for company and pleasure. Modern research in the field of medicine, veterinary medicine and sociology indicate the positive, even therapeutic impact of domestic animals on human well-being.[23] It is emphasized that regular contact with pets has a positive effect on the cardiovascular, immune, endocrine system, on physical activity and mental condition, as well as on the functioning of the elderly and children.[24] In some health care facilities, nursing homes, orphanages and addiction treatment centers, animals are used with a positive therapeutic effect which cannot be achieved by any other methods.[25] The literature cited below emphasizes the general positive impact of domestic animals on human health and life. However, the fact that a dog or a cat becomes part of the family and positively affects the life of the owner does not justify the assumption that the cost of maintaining pets is the indispensable existential need.

Nevertheless, such a conclusion cannot be excluded and granting welfare aid to support a person in maintaining an animal may be lawful. However, before taking such a decision, a community interview should be thoroughly conducted. It may be even necessary to obtain a medical certificate stating that possession of the animal is

[23] See K. Chmiel, Z. Kubińska, T. Derewiecki, *Terapie z udziałem zwierząt w rehabilitacji różnych form niepełnosprawności*, „Problemy Higieny i Epidemiologii" 2004, Vol. 95(3), pp. 591–595; H. Mamzer, *Stary człowiek i pies*, „Horyzonty Wychowania" 2015, Nr 32, pp. 70–78; J. Nawrocka-Rohnka, *Wpływ kontaktu z psem na organizm człowieka – przegląd literatury*, „Nowiny Lekarskie" 2011, Vol. 80(2), pp. 147–152; K. Girczys-Połedniok, R. Pudlo, A. Szymlak, N. Pasierb, *Zastosowanie terapii z udziałem zwierząt w praktyce psychiatrycznej*, „Psychiatria" 2014, Vol. 11(3), pp. 171–176; M. Goleman, L. Drozd, M. Karpiński, P. Czyżowski, *Felinoterapia jako alternatywna forma terapii z udziałem zwierząt*, „Medycyna Weterynaryjna" 2012, Vol. 68(12), pp. 72–75.

[24] J. Nawrocka-Rohnka, *op. cit.*, pp. 148–150.

[25] Cf. *Ibidem*.

a vital need due to the specific illness or psychophysical state of the person. In such cases, it can be reasonably assumed that the welfare benefit realizes the goals specified in the Social Welfare Act. The analyzed regulations, however, do not allow to assume in each case that keeping an animal is necessary for the owner. As emphasized, each case must be considered individually and in some exceptional cases, when possession of the animal has a significant therapeutic effect, the granting of social support for the maintenance of the pet may be justified. It is obvious that a person applying for such assistance must meet all statutory conditions for granting a specific benefit.

It is necessary to add that according to the principle of subsidiarity, the benefit may be granted only if a person cannot overcome his/her difficult life situation by him/herself. Dealing with such situations should cover asking for assistance in maintaining an animal in non-governmental and social organizations involved in protection of animals and support of their owners. Only when such efforts are ineffective, can it be concluded that the applicant finds him/herself unable to overcome the difficult situation. It should also be taken into account that in case of disabled persons, some forms of help in maintaining assisting dogs are guaranteed in a separate mode, that is by provisions of the Regulation of the Minister of Labor and Social Policy of 19 December 2007 on the company fund for the rehabilitation of the disabled.[26]

Having the above considerations in mind it should be concluded that granting the welfare benefit for maintaining an animal should be exceptional in practice of social assistance bodies. The provision of social assistance should always be connected with the needs of man and cannot be aimed at protecting or improving the living conditions of animals.

Conclusions

Based on the above considerations it should be pointed out that the principle of subsidiarity sets the basic framework for bodies granting welfare aid and orders to address it exclusively to persons and families in difficult life situations which they are unable to overcome on their own. The welfare bodies are entrusted with reliable and accurate establishing the actual state in any case, so that the aid is addressed to the appropriate subjects. The cost of maintaining an animal may be, in exceptional circumstances, considered as the indispensable existential need justifying the granting of welfare benefits, including in particular expedient benefit provided for in Art. 39 of the social welfare law. It should be emphasized, however, that before granting this type of aid it is necessary to consider carefully all the aspects of the individual case. The social welfare body must also have sufficient funds to grant this type of assistance. In the activities of the authorities it is important not only to adapt the aid to

[26] Journal of Laws of 2007, No. 245, item 1810.

the individual situation of applicants, but also to create a transparent, fair hierarchy of the beneficiaries' needs. If the possession of an animal has an undoubted, positive therapeutic effect for a given person or family, then granting of a social welfare aid for its maintenance should be considered as being in accordance with law.

References

Bąkowski T., *Administracyjnoprawna sytuacja jednostki w świetle zasady pomocniczości*, Kraków 2007.

Chmiel K., Kubińska Z., Derewiecki T., *Terapie z udziałem zwierząt w rehabilitacji różnych form niepełnosprawności*, „Problemy Higieny i Epidemiologii" 2004, Vol. 95(3).

Gapski M.P., *Prawo do pomocy społecznej w orzecznictwie sądów administracyjnych (wybrane zagadnienia)*, [in:] *Problemy z sądową ochroną praw człowieka*, t. 1, red. R. Sztychmiler, J. Krzywkowska, Olsztyn 2012.

Girczys-Połedniok P., Pudlo R., Szymlak A., Pasierb N., *Zastosowanie terapii z udziałem zwierząt w praktyce psychiatrycznej*, „Psychiatria" 2014, Vol. 11(3).

Goleman M., Drozd L., Karpiński M., Czyżowski P., *Felinoterapia jako alternatywna forma terapii z udziałem zwierząt*, „Medycyna Weterynaryjna" 2012, Vol. 68(12).

Kulesza M., *Zasada subsydiarności jako klucz do reform ustroju administracyjnego państw Europy Środkowej i Wschodniej (na przykładzie Polski)*, [in:] *Subsydiarność*, red. D. Milczarek, Warszawa 1998.

Łączkowski W., *Etyczne aspekty finansowania potrzeb socjalnych ze środków publicznych*, „Ruch Prawniczy Ekonomiczny i Socjologiczny" 2004, z. 1.

Maciejko W., [in:] W. Maciejko, P. Zaborniak, *Ustawa o pomocy społecznej. Komentarz*, Warszawa 2013.

Mamzer H., *Stary człowiek i pies*, „Horyzonty Wychowania" 2015, Nr 32.

Nawrocka-Rohnka J., *Wpływ kontaktu z psem na organizm człowieka – przegląd literatury*, „Nowiny Lekarskie" 2011, Vol. 80(2).

Sierpowska I., *Pomoc społeczna. Komentarz*, Warszawa 2017.

Stopka K., *Zasada pomocniczości w prawie pomocy społecznej*, Warszawa 2009.

Abstract: The constitutional principle of subsidiarity developed in social welfare aid assumes that the aid is of supplementary, accessory nature and as such it can be rendered exclusively to the persons or families who cannot satisfy their basic needs. The benefits granted should aim at meeting basic human needs, which include expenditure on food, clothing, shelter, medicines and medical treatment. Granting welfare benefits for maintaining an animal is controversial and in most cases unacceptable. In case where the possession of a pet has a therapeutic purpose and is necessary for a given person, it may be assumed that granting the benefits lies within the scope of social assistance purposes, and thus remains in accordance with the Social Welfare Act.

Keywords: social welfare aid; granting welfare benefits; maintaining an animal; indispensable existential need

ELŻBIETA ZĘBEK

University of Warmia and Mazury in Olsztyn, Faculty of Law and Administration
https://orcid.org/0000-0002-8637-8391
elzbieta.zebek@uwm.edu.pl

NATALIA KULBACKA

University of Warmia and Mazury in Olsztyn, Faculty of Law and Administration
https://orcid.org/0000-0002-3289-9810
n.kulbackaburakiewicz@gmail.com

International and National Legal Standards for the Protection of Wild Animals

Introduction

Wild animals are inseparable from the natural systems of Earth and have existed ever since the beginning of the *Homo sapiens* species.[1] Human relations with animals can be observed in the centuries-old history, originating from pre-history or from the biblical paradise, where the first people lived in symbiosis and harmony with the surrounding flora and fauna.[2] However, it must not be forgotten that at the beginning of mankind's history, humans hunted and killed animals in order to obtain food (meat) or to prevent themselves from freezing (heating with animal skin). These behaviors were motivated by the need for the survival of the human species. Nevertheless, this was not always the case, because the evolutionary development of humanity caused animals to be used for various other purposes, including entertainment, thus, resulting in the fact that the relationship between the human species and the world of animals was based

[1] Z. Litwińczuk, *Zwierzęta w życiu człowieka*, „Przegląd Hodowlany" 2013, Nr 5, p. 17.
[2] G. Rejman, *Ochrona prawna zwierząt*, „Studia Iuridica" 2006, Vol. 46, p. 253.

solely on their domination and command – despite the fact that many philosophical thinkers promoted different ideas concerning the position of animals in the world.[3]

The perception of animals in terms of their protection began to change around the 17th century. During that period, the first legal regulations were introduced, e.g. prohibiting animal cruelty,[4] and immediately followed by a number of local and global legal instruments regarding that matter.

The central point of the considerations is to first define what an animal is. In the current legal status there is no legal definition of an animal. Only in Art. 1(1) of the Act of 21 August 1997 on the Protection of Animals[5] one can find a reference to animals, recognizing them as living beings capable of experiencing pain and suffering (therefore, not being inanimate objects) which humans should respect, protect and care for. This act is therefore relevant to all animals, including wild animals, which are legally called "free-living animals" understood as non-domestic animals living in conditions independent of humans (Art. 4(21) of the Act on the Protection of Animals).

Due to the dynamic civilizational and industrial development, as well as the pollution and degradation of the environment, deterioration of natural habitats, including irreversible changes in ecosystems, and infectious diseases, have a major impact on the life of these animals while also being a threat to them. Due to the fact that the animal world, apart from the floral one, constitutes an essential component of the natural world without which the biological existence of humans would not be possible, it is important to point out that free-living animals are exposed to the activities of humans, such as poaching. These animals are mostly species in danger of extinction, which means that there is a need to protect both them and their natural habitats. For example, the Polish Red List of Threatened Animals, which classifies animals into 7 groups according to their level of endangerment, is an assisting instrument in the protection of wildlife.

The subject of this study are free-living, so-called wild animals. The aim is to present the system of legal protection of wild animals on the international, EU and national levels in the context of threats to their habitats and existence. Due to the wide scope of the aforementioned issue, the attention was focused mainly on the existing legal regulations. The source base for this study are international, EU and national documents.

---

[3] Some people believed that: "Animals are the lesser brothers of the people" (St. Francis of Assisi), "animal souls are the place of rebirth or reincarnation" (Plato, Pythagoreans), while others were of the opinion that animals have a lesser intellect than humans, and therefore must be completely subordinate to humans. See J. Serpell, *W towarzystwie zwierząt. Analiza związków ludzie – zwierzęta*, Warszawa 1999, p. 169; M. Gabriel-Węglowski, *Przestępstwa przeciwko humanitarnej ochronie zwierząt*, Toruń 2008, p. 24.

[4] R.D. Ryder, *Animal Revolution: Changing Attitudes Towards Speciesism*, Oxford 2000, p. 49.

[5] Journal of Laws of 2019, item 122, as amended.

Conventions and other international initiatives regarding the protection of wildlife

International environmental law encompasses all the standards of international law, including norms intended not only to regulate pollution and other damaging effects on the environment, but also those designed to prevent or counteract risks to the environment.[6] Animal protection under international law has developed on the basis of two directions, namely:

– the first trend was that animals are a living biological resource of the environment, which should be protected for present and future generations,

– the second trend regarded wild animals as living beings capable of experiencing pain and suffering.[7]

These two trends are not mutually exclusive, but are complementary and interlinked, as can be seen in many international documents.

One of the most important legal acts on the international level is the Universal Declaration of Animal Rights, which was initially conceived and approved at the Third International Meeting on Animal Rights in the 1970s, namely on 21 September 1977 in London by the International Federation for Animal Rights. Nevertheless, it was adopted by UNESCO on 15 October 1978 in Paris, with 2.5 million signatures of members of various animal welfare and protection societies around the world attached to it. The main purpose of this document was to promote the assertion that not only does a person (as a living being) have rights, but that animals also have them (in the moral sense), and that the ignorance or non-recognition of these rights has led, leads and will lead a human towards crimes against nature and animals.[8] It is beyond doubt that the Preamble to this Act states that an animal has certain subjective rights, and that humans, as living and rational beings, should be respectful and caring for animals. In the literature on the subject, it is emphasized that the aforementioned document does not provide a source of universally binding law, but only ethical postulates, which in some states may become an inspiration for the establishment of legislative norms in this matter. It is also worth mentioning that, with the adoption of the above-men-

---

[6] E. Zębek, *Międzynarodowe i krajowe podstawy prawne i bioindykatory (glony) oceny stanu jakości wód powierzchniowych*, [in:] *Odpowiedzialność za środowisko w ujęciu normatywnym*, red. E. Zębek, M. Hejbudzki, Olsztyn 2017, p. 120. See also J. Ciechanowicz-McLean, *Prawo ochrony środowiska jako kompleksowa dziedzina prawa – ustawa organiczna?*, [in:] *Zagadnienia systemowe prawa ochrony środowiska*, red. P. Korzeniowski, Łódź 2015, p. 62.

[7] M. Kotowska, *Wybrane problemy prawnokarnej ochrony zwierząt. Perspektywa krajowa i międzynarodowa*, [in:] *Kryminologia wobec współczesnych zagrożeń ekologicznych*, red. M. Kotowska, W. Pływaczewski, Olsztyn 2011, p. 98.

[8] J. Białocerkiewicz, *Status prawny zwierząt. Prawa zwierząt czy prawna ochrona zwierząt*, Toruń 2005, p. 233. See more M. Perkowski, *Podmiotowość prawa międzynarodowego współczesnego uniwersalizmu w złożonym modelu klasyfikacyjnym*, Białystok 2008, p. 139.

tioned document, the treatment of animals as objects was abandoned, granting them a certain quasi-subjectivity through the so-called dereification.[9]

In the literature, the Universal Declaration of Animal Rights is considered to be a type of constitution that has resulted in the creation of other international legal acts regulating the legal protection of animals, including free-living animals. Of all the acts of international law concerning animal matters, for the purposes of this publication only the act that strictly regulates the legal protection of wildlife must be identified, namely the Berne Convention of 19 September 1979 on the Conservation of European Wildlife and Natural Habitats, which plays a major role in the legal protection of these species under international law.[10] In the Preamble to that Convention, it is emphasized that wild fauna and flora constitute a natural heritage of aesthetic, scientific, cultural, recreational and economic value, which should be preserved for the benefit of future generations. Unfortunately, the number of many species of wild animals is drastically decreasing, which is why it is important to consciously protect their natural habitats. The Convention therefore insists on the need for each government to take into consideration the protection of wildlife in its national programs and plans and to cooperate internationally with regard to the protection of wildlife and migratory species. The main objective of this Convention is to protect and promote the preservation of species of wild fauna and flora and their habitats, in particular of those species and habitats whose conservation requires the cooperation of several states. Particular emphasis is put on the conservation of endangered and dying species, including endangered and dying migratory species (Art. 1 of the Convention on the Conservation of European Wildlife and Natural Habitats). In order to ensure specific protection of wildlife species, the following actions are forbidden: all forms of deliberate capture and keeping and deliberate killing; the deliberate damage to or destruction of breeding or resting sites; the deliberate disturbance of wild fauna, particularly during the period of breeding, rearing and hibernation, insofar as disturbance would be significant in relation to the objectives of this Convention; the deliberate destruction or taking of eggs from the wild or keeping these eggs even if empty; the possession of and internal trade in these animals, alive or dead, including stuffed animals and any readily recognizable part or derivative thereof, where this would contribute to the effectiveness of the provisions of the aforementioned article of the Convention. The following measures and methods are also prohibited:

1) in relation to mammals: snares, live animals used as decoys which are blind or mutilated, tape recorders, electrical devices capable of killing or stunning, artificial

[9] According to Jan Białocerkiewicz, the subjectivisation of animals does not in any way mean that the *homo sapiens* species is equal to other animal species, nor does it mean that the subject-animal will have and exercise the same rights as man, or that it will be subject to the same obligations as man. See also A. Zbaraszewska, *Przegląd Piśmiennictwa*, „Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2007, Nr 3, p. 257.

[10] Journal of Laws of 1996, No. 58, item 263, as amended.

light sources, mirrors and other dazzling devices, devices for illuminating targets, sighting devices for night shooting comprising an electronic image magnifier or image converter, explosives, nets, traps, poison and poisoned or anesthetic bait, gassing or smoking out, semi-automatic and automatic weapons with a magazine capable of holding more than two rounds of ammunition, aircrafts, motor vehicles in motion,

2) in relation to birds: snares, limes, hooks, live birds used as decoys which are blind or mutilated, tape recorders, electrical devices capable of killing or stunning, artificial light sources, mirrors and other dazzling devices, devices for illuminating targets, sighting devices for night shooting comprising an electronic image magnifier or image converter, explosives, nets, traps, poison and poisoned or anesthetic bait, gassing or smoking out, semi-automatic and automatic weapons with a magazine capable of holding more than two rounds of ammunition, aircrafts, motor vehicles in motion,

3) for freshwater fish: explosives, firearms, poisons, anesthetics, gassing or smoking out, electricity with alternating current, artificial light sources,

4) for crayfish (Decapoda): explosives, poisons (Art. 6 of Annex IV of the Convention on the Conservation of European Wildlife and Natural Habitats).

Appendix II of the aforementioned Convention contains strictly protected fauna species, while Appendix III contains protected fauna species animals, which should be maintained at an appropriate level, which means that states that have ratified the Convention should take specific measures to ensure that these species will not be included on the list of strictly protected fauna species in the future, e.g. by introducing legal regulations concerning their exploitation or sale, or by setting protection periods for these animals. The provisions of the Berne Convention should be respected by the states ratifying it, although their implementation is overseen by the Standing Committee, which supervises whether the states comply with its provisions, and assists in resolving disputes between the Parties by proposing measures to improve the implementation of the provisions of this legal act.

Legal provisions based on EU law

The Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora,[11] known as the Habitats Directive, is a valuable initiative of the member states of the European Union regarding the protection of free-living animals.

The priority objective of this Act is to ensure biodiversity through the conservation of natural habitats of wild fauna and flora on the territories of the EU member states (Art. 2 of the directive). This is, in particular, due to the fact that an increasing number of wildlife is in danger on those territories and that the condition of their

[11] OJ L 1992, No. 206, p. 7, as amended.

natural habitats leaves much to be desired. The main causes of species extinction and the vanishing of natural habitats include, *inter alia*, the seizure of animal habitats by humans through rapid urbanization, road construction, deforestation, intensification (including chemicalization) of agriculture, forest and fishery management, as well as the pollution originating from agriculture and municipal management.[12] For clarification, it must be mentioned that the member states are not only interested in protecting endangered species of free-living animals (not including those naturally of a minor range on their territories, not endangered or vulnerable in the Western Palaearctic region, or species susceptible to this threat), but also in species of wild fauna which are:

1) of priority importance to which the European Community has a particular responsibility due to the extent of their natural range within its territory,

2) rare, i.e. of small populations which, in the absence of a present risk, may be subject to future risk, or

3) endemic because of the particular value of their habitat and/or the potential impact of their use of these habitats and/or the potential impact of their exploitation on their conservation status.

Wild animals are subject to a sum of interactions that may affect their long-term distribution and their populations within the territory. This situation is determined by the conservation status of the species, which may be considered "appropriate" if data on population changes of the species in question indicate that they maintain themselves over a long period of time as a permanent component of natural habitats; and that the natural range of the species is not decreasing, including in the future, and that there is, and is likely to be, a habitat of a sufficient size to maintain their populations in the long term.[13]

Given the threats posed to certain wildlife, it is essential that measures to protect them are promptly implemented and that they are considered as being of major importance. The aim is to preserve or restore, at favorable conservation status, natural habitats and species of wild fauna and flora, while respecting economic, social and cultural requirements as well as regional and national characteristics. Conversely, the establishment of a system of strict protection for animal species requires measures which, in their natural range, prohibit: first, any form of deliberate capture or killing of specimens of those species in the wild; second, deliberate disturbance of those species, in particular during the period of breeding, rearing, hibernation and migration; third, deliberate destruction or removal of eggs; and fourth, deterioration or destruction of breeding or resting sites. However, such species are subject to prohibitions, e.g. regarding their sale, transport, confinement or exchange (Art. 12 of

[12] M. Szramka, E. Zębek, *Ograniczenia realizacji przedsięwzięć na obszarach Natura 2000*, „Studia Prawnoustrojowe" 2013, Vol. 22, p. 195.

[13] See Art. 1(i) of the Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora (OJ L 1992, No. 206, p. 7, as amended).

the Habitats Directive). The measures for the protection of species of wild fauna may include, among others, regulations concerning: a) the access to certain properties, b) regulations regarding time periods and/or methods of obtaining specimens, c) the acquisition of specimens, their sale, offers for sale, confinement for sale or transport for sale, and the temporary or local prohibition of the acquisition of specimens from the wild and the exploitation of certain populations; the establishment of a permit or quota system; the application, when specimens are acquired, of rules on hunting and fishing which take into account the preservation of such populations; the breeding of animal species in captivity and the artificial reproduction of plant species, under strictly controlled conditions, in order to reduce the acquisition of specimens of wild species, or the assessment of the effects of the adopted measures.

The Habitats Directive has been supplemented by annexes providing for animal species of importance to the member states that require: 1) the designation of special areas of conservation (SACs) for habitats where protection legislation is in force, 2) strict protection, 3) specific wild collection and exploitation which may be subject to management measures. The Directive, as well as the Convention on the Conservation of European Wildlife and Natural Habitats, provides the same prohibited methods and means of capture, killing and transport of wild animals.

Legal regulations at the national level

Due to the fact that Poland has been a member of the European Union since 1 May 2004, it was obliged to implement the provisions of the Habitats Directive into national legal regulations. As regards national legal regulations governing the protection of free-living animals, one must mention the Act of 21 August 1997 on the Protection of Animals[14] (abbreviated in Polish and hereinafter referred to as u.o.z.), which establishes that free-living animals, so-called wild animals, constitute a national asset and must be ensured with conditions for their development and free existence, except for those which pose an extraordinary threat to life and health or human economy, including hunting economy, it is permissible to take measures aimed at limiting the number of such animals (Art. 22 in conjunction with Art. 33a(1) of u.o.z.). Nevertheless, according to this Act, it is forbidden to take possession of animal carcasses and create their collections.[15] An exception to this is a permit to process animal carcasses only for scientific, didactic or educational purposes. The permit is issued by the marshal of the voivodeship responsible for the location of the production of exhibits, who determines

[14] Journal of Laws of 2019, item 122, as amended.

[15] J. Miłkowska-Rębowska, *Postępowanie ze zwierzętami dziko żyjącymi*, [in:] *Prawo ochrony środowiska*, red. M. Górski, Warszawa 2014, p. 626.

the conditions and method of obtaining animals, and at the same time obtains the opinion of the starost responsible for the location of the acquisition of these animals.

The handling of wild animals contained in the aforementioned act is only a general one, as the handling of particular categories of these animals is regulated by other detailed acts, i.e. the Act of 16 April 2004 on the Protection of the Environment[16] (abbreviated in Polish and hereinafter referred to as u.o.o.p.), the Act of 18 April 1985 on Inland Fishing,[17] the Act of 13 October 1995 on the Hunting Law.[18] In the context of the regulation on the protection of the environment, it consists of the preservation, sustainable use and restoration of resources, creations and components of nature, such as for example:

– wild plants, animals and fungi,
– plants, animals and fungi protected by species preservation,
– migratory animals,
– natural habitats,
– habitats in danger of extinction, rare and protected species of plants, animals and fungi.

The primary objective of this protection is, first of all, to preserve biodiversity, ensure continuity of existence of plant, animal and fungi species, including their habitats, by maintaining or restoring them to proper protection status; to maintain or restore natural habitats to proper protection status, as well as other resources, creations and components of nature; and to maintain ecological processes and stability of ecosystems (Art. 2(2) of u.o.o.p.).

The continuing need to protect wildlife requires species protection, which includes the protection of wild animals, in particular rare or endangered species, as well as preserving genetic diversity. The objective of such protection is to ensure the survival and favourable conservation status of wildlife, of rare, endemic, vulnerable to various threats and endangered species, and of species which are protected under international treaties.[19] This protection is based on the provisions of the Regulation of the Minister of the Environment of 16 December 2016 on the protection of animal species (Journal of Laws of 2016, No. 2183, item 2183)[20] defining the species that are subject to:

1) strict protection, detailing the species requiring active protection (592 animal species, including the Aesculapius snake, white stork, bittern, European bison),

[16] Journal of Laws of 2018, item 1614, as amended.
[17] Journal of Laws of 2018, item 1476, as amended.
[18] Journal of Laws of 2018, item 2033, as amended.
[19] U. Szymańska, E. Zębek, *Ochrona środowiska jako interdyscyplinarna dziedzina wiedzy*, Olsztyn 2014, p. 184. See Art. 46(2) of the Act of 16 April 2004 on the Protection of the Environment.
[20] This is not the first regulation involving species conservation. The first regulation was introduced already in the interwar period, or more precisely in 1935, where the species of turtle was protected, and then in 1938 – the European bison. See more J. Boć, E. Samborska-Boć, *Ochrona gatunkowa zwierząt*, [in:] *Ochrona środowiska*, red. J. Boć, K. Nowacki, E. Samborska-Boć, Kolonia 2008, p. 264.

2) partial protection (211 animal species such as grey toad, feral pigeon, otter),

3) partial protection, which may be sourced, and the ways of their sourcing (2 animal species, including European beaver and *Helix pomatia*),

4) requiring the establishment of protection zones for places of stay, breeding sites or regular occupancy; and the inclusion of prohibitions and exceptions from certain prohibitions for particular species or groups of animal species and ways of protecting species, including the size of protection zones.

Species protection is one of the forms of protecting the environment, and it includes in particular:

– partial protection – protection of animal species allowing for the possibility of population reduction and acquisition of specimens of these species or their parts,

– active protection – applying, if necessary, protective measures to restore the natural state of ecosystems and components of the environment or to preserve natural habitats and habitats of plants, animals or fungi,

– *ex situ* protection – protection of animal species outside their natural habitat and the protection of rocks, fossils and minerals in places of their storage,

– *in situ* protection – protection of animal species and elements of inanimate nature in their natural habitats,

– strict protection – total and permanent abandonment of direct human intervention in the condition of ecosystems, creations and components of environment and in the course of natural processes in the areas under protection, and in the case of species – year-round protection of their members and their development stages.

According to Art. 52 of u.o.o.p., the following prohibitions may be introduced in relation to wild animals of species under protection:

1) intentional: killing, mutilation or capture, destruction of eggs, juvenile forms or developmental forms; scaring or disturbance; scaring or disturbance at resting, breeding or rearing sites or feeding sites for migratory or wintering birds; relocation from regular places of stay to other places; deliberate introduction into the natural environment; preventing access to shelters,

2) transport,

3) rearing or breeding,

4) the collection, acquisition, holding, possession or preparation of specimens,

5) destroying habitats or places of stay, which are the breeding, rearing, resting, migration or feeding sites,

6) destroying, removing or damaging nests, anthills, burrows, lairs, feeding grounds, dams, spawning grounds, wintering grounds or other shelters,

7) disposing of, offering for sale, exchange, donation or transport for the purpose of selling specimens,

8) transporting specimens from abroad or exporting them abroad,

9) photographing, filming or observing, which may cause their scaring or disturbance.

If a situation occurs in which free-living animals become an endangered species not covered by species protection, then the Regional Director for Environmental Protection may issue an order for a definite period of time in the territory of a given voivodeship for the protection of such animals.

As already mentioned, the Polish Red List of Threatened Animals, developed by the Institute of Nature Conservation of the Polish Academy of Sciences in Kraków in cooperation with numerous scientists from all over Poland, is an instrument supporting the protection of wildlife. In this register, the list of animals (extinct – labeled as EX (e.g. aurochs), extinct – EXP (European mink), extremely endangered – CR (Tatra chamois), high risk (in danger of extinction) – VU (Aquatic warbler), lower risk (near danger) – NT (Eurasian lynx), not yet endangered – LC) with their exact description and maps of their location as well as the applied and proposed methods of protection is provided.

Summary

To summarize the argumentation so far, it must be emphasized that wild animals play an extremely important role in the ecosystem. It can be said that they are its essential link, because without them the natural world would not exist, and the interdependencies between organisms would be disturbed. The environment is created by organisms and the proper functioning of this system depends on them through non-antagonistic and antagonistic interdependencies. The extinction of one species has often shown that it leads to an unstable natural balance, or to irreversible changes in the entire ecosystem. Wild animals are often endangered species due to human anthropogenic activity. Therefore, humans as rational beings should take care of every animal species and not only those that satisfy their life needs. In this regard, it should be pointed out that wild animals need to be subject to comprehensive legal protection at international, EU and national level. This is why the issue of the protection of wild animals is reflected in:

1) the Universal Declaration of Animal Rights,

2) the Convention of 19 September 1979 on the Conservation of European Wildlife and Natural Habitats,

3) Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora,

4) the Act of 21 August 1997 on the Protection of Animals,

5) the Act of 16 April 2004 on the Protection of the Environment

by granting the animals the status of protected species and protecting their habitats, e.g. establishing protected areas (reserves, etc.).

References

Białocerkiewicz J., *Status prawny zwierząt. Prawa zwierząt czy prawna ochrona zwierząt*, Toruń 2005.

Boć J., Samborska-Boć E., *Ochrona gatunkowa zwierząt*, [in:] *Ochrona środowiska*, red. J. Boć, K. Nowacki, E. Samborska-Boć, Kolonia 2008.

Ciechanowicz-McLean J., *Prawo ochrony środowiska jako kompleksowa dziedzina prawa – ustawa organiczna?*, [in:] *Zagadnienia systemowe prawa ochrony środowiska*, red. P. Korzeniowski, Łódź 2015.

Gabriel-Węglowski M., *Przestępstwa przeciwko humanitarnej ochronie zwierząt*, Toruń 2008.

Kotowska M., *Wybrane problemy prawnokarnej ochrony zwierząt. Perspektywa krajowa i międzynarodowa*, [in:] *Kryminologia wobec współczesnych zagrożeń ekologicznych*, red. M. Kotowska, W. Pływaczewski, Olsztyn 2011.

Litwińczuk Z., *Zwierzęta w życiu człowieka*, „Przegląd Hodowlany" 2013, Nr 5.

Miłkowska-Rębowska J., *Postępowanie ze zwierzętami dziko żyjącymi*, [in:] *Prawo ochrony środowiska*, red. M. Górski, Warszawa 2014.

Perkowski M., *Podmiotowość prawa międzynarodowego współczesnego uniwersalizmu w złożonym modelu klasyfikacyjnym*, Białystok 2008.

Rejman G., *Ochrona prawna zwierząt*, „Studia Iuridica" 2006, Vol. 46.

Ryder R.D., *Animal Revolution: Changing Attitudes Towards Speciesism*, Oxford 2000.

Serpell J., *W towarzystwie zwierząt. Analiza związków ludzie – zwierzęta*, Warszawa 1999.

Szramka M., Zębek E., *Ograniczenia realizacji przedsięwzięć na obszarach Natura 2000*, „Studia Prawnoustrojowe" 2013, Vol. 22.

Szymańska U., Zębek E., *Ochrona środowiska jako interdyscyplinarna dziedzina wiedzy*, Olsztyn 2014.

Zbaraszewska A., *Przegląd Piśmiennictwa*, „Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2007, Nr 3.

Zębek E., *Międzynarodowe i krajowe podstawy prawne i bioindykatory (glony) oceny stanu jakości wód powierzchniowych*, [in:] *Odpowiedzialność za środowisko w ujęciu normatywnym*, red. E. Zębek, M. Hejbudzki, Olsztyn 2017.

Abstract: The considerations in this article will focus primarily on wild animals, i.e. free-living animals, so-called non-domesticated animals, exposed to human activities, such as poaching. These animals are mostly endangered species, hence there is a need to protect these animals and their natural habitats. The main aim of the paper is to present the legal protection of wild animals at international, EU and national level in the context of threats to their lives and their living environment. The most important legal acts regarding the protection of these animals and their habitats are the Bern Convention of 1979 and the so-called habitat directive No. 92/43/EEC, which includes endangered, rare and endemic species of special protection. On the other hand, in Polish legislation, these regulations were included primarily in the Act on the Protection of Animals of 1997 and the Act on Protection of the Environment of 2004, taking into account strict and partial protection of the animal species concerned, including *in situ* (e.g. reserves, Natura 2000 sites) and *ex situ* (zoological gardens) protection. An auxiliary instrument in the protection of wild animals is the Polish Red Book of Animals, classifying animals into 7 groups due to their degree of threat.

Keywords: wild animals; endangered species; natural habitats

ELINA POZNIAK

Taras Shevchenko National University of Kyiv, Faculty of Law
https://orcid.org/0000-0001-5515-4849
elina_pozniak@ukr.net

Establishment of the Chornobyl Radiation and Ecological Biosphere Reserve in Ukraine: An Innovation or a Nonsense?

In the conditions of an environmental crisis, special attention should be paid to the problems related to the development of the culture of inter-relations between man and nature, and the provision by the state of the environmental, nuclear and radiation safety. The proper attitude to legal forms, directions and specific features of the said inter-relation is aimed at improvement of the level of the environmental and legal culture.

One of the problems of the development of the environmental legal culture in Ukraine is social awareness of the needs to increase the legal protection of wild animals and their habitats (environmental conditions). Important directions are as follows: taking into consideration international legal and European approaches to the definition of the legal regime of utilization, reproduction and protection of the world of wild animals (wholly or in part); harmonisation of the conditions for transporting, trading and using of the world of wild animals and its facilities; protection of the place of the wild animals dwelling; provision of their environmental safety, primarily of the radiation safety. The natural reserve seems to be the most optimal form of protecting the world of wild animals.

The science of the legal environmental protection is based on complex and systematic environmental approaches to the protection, reasonable utilization and reproduction of the world of wild animals, it takes into consideration the biological mutual connections between all the elements of the environment. The subject of legal protection and reproduction of the world of wild animals was studied by such Soviet and Ukrainian scholars as V.I. Andreitsev, H.I. Baliuk, A.P. Hetman, O.S. Kolbasov, S.S. Konstantinidi, M.V. Krasnova, V.L. Muntian, V.V. Petrov, P.V. Tykhyi, Yu.S. Shemshuchenko, V.V. Sjekhovtsev

and others. The legal problems in the sphere of the natural-reserve based protection of the wild animals were also considered by A.Yo. Hodovaniuk, O.M. Kovtun, N.D. Krasilich and others. The issues of the legal regulation of relations aimed at providing the environmental, nuclear and radiation safety of man and of the natural environment were studied by H.I. Baliuk, Yu.M. Krupka, S.H. Plachkova, O.V. Sushyk and others. Of significant importance are works devoted to the man–nature relationship written, *inter alia*, by T.L. Andriyenko, V.I. Vernadskyi, A.I. Ioirysh, M.F. Reimers, F.R. Shtilmark and others.

However, the scientific and practical aspect of the legal protection and reproduction of the world of wild animals in radiation-contaminated areas through making natural reserves, has been considered insufficiently. Such an aspect has not been studied either in the context of the social environmental and legal culture. This accounts for particular importance of the topic suggested by the author of this publication.

The purpose of this study is to analyse the socio-legal preconditions for the formation of the Chornobyl Radiation and Ecological Biosphere Reserve (hereinafter referred to as the Reserve), to examine the issue of protection and reproduction of the world of wild animals as an important element of biodiversity within this territory. The attention was also paid to the provision of the environmental and radiation safety. To achieve the said purpose the following tasks were set up in the work: to study the scientific, regulating and legal as well as practical approaches of representatives of the legal and environmental fields to the environmental preservation of radioactively contaminated territories, formation of the Reserve, as well as protection and reproduction of the world of wild animals within its area.

In Ukraine, the legal protection of the world of wild animals is an important trend in the state environmental policy, which was demonstrated for the first time in the Constitution of Ukraine of 28 June 1996.[1] According to Art. 13 of the Constitution, the natural resources (and, thus, the world of wild animals) belong to the people of Ukraine. Pursuant to Art. 16, the state shall undertake the obligation to provide the environmental safety and support the environmental balance on the territory of Ukraine, while overcoming the consequences of the Chornobyl disaster – a planetary-scale catastrophy.

The modern status of the policy of Ukraine in the field of natural and anthropological protection is based on the foundations (Strategy) of the state environmental policy of Ukraine for the period of up to 2030, which were approved by the law of Ukraine of 28 February 2019[2] (this Strategy shall be practically commenced on 1 January 2020). The Strategy provides the below data in regard to biodiversity.

Ukraine, which occupies less than 6% of the area of Europe, possesses about 35% of its biological diversity. Ukraine's biosphere includes above 70,000 species of flora

[1] The Constitution of Ukraine of 28 June 1996, https://www.rada.gov.ua [access: 15.10.2019].

[2] Law of Ukraine on the Basic Principles (Strategy) of the State Environmental Policy of Ukraine for the Period till 2030 of 28 February 2019, https://www.rada.gov.ua [access: 26.10.2019].

(above 27,000 species) and fauna (above 45,000 species). For several years now, there has been an increase in the number of the flora and fauna species included in the Red List of Threatened Species of Ukraine (Chapter I). A few provisions of this document characterized the legal protection of the world of wild animals, protection of the rare and endangered species, the conditions of the areas of the natural reserves, and formation of a national environmental network and preservation of the biological and landscape biodiversity in Ukraine in general. The Law of Ukraine on Environmental Protection of 25 June 1991[3] determines the basics of the protection and reproduction of the natural resources. The aspects of the legal protection and reproduction of the wild animals world are considered in a separate chapter in the Law of Ukraine on the World of Wild Animals of 13 December 2001[4] (Arts. 36–54 in Chapter IV).

First of all, it is claimed that protection of the world of wild animals shall provide a complex approach to studying the situation, development and implementation of measures aimed at the protection and improvement of environmental systems, of which the world of wild animals is a component (Part 2, p. 36). Formation of an environmental network, establishment of state nature reserves, as well as determination of other natural territories and facilities (that are liable to a special protection), implementation of measures aimed at providing environmental safety (Art. 37) – it is only a part of the elements of the legal protection of the wild animals world. In Ukraine, they are provided by the norms of the Laws of Ukraine on the Nature Reserve Fund of Ukraine of 16 June 1992,[5] on the Environmental Network in Ukraine of 24 June 2004,[6] the Land Code of Ukraine of 25 October 2001,[7] the Law of Ukraine on the Red List of Threatened Animals of Ukraine of 7 February 2002,[8] and others.

Scholars who studied the said problems state that these measures make a system of legal and other guarantees of protecting the wild animals world.[9] They also underline the need for special protection of the animal species, included in: the Red List of Threatened Animals of Ukraine, the European Red List of flora and fauna threatened with extinction at the global scale, the Red List of the International Union for Conservation of Nature and in lists of the regionally rare and threatened species of flora and fauna. The system

[3] Law of Ukraine on Environmental Protection of 25 June 1991, https://www.rada.gov.ua [access: 26.10.2019].

[4] Law of Ukraine on the World of Wild Animals of 13 December 2001, https://www.rada.gov.ua [access: 26.10.2019].

[5] Law of Ukraine on the Nature Reserve Fund of Ukraine of 16 June 1992, https://www.rada.gov.ua [access: 26.10.2019].

[6] Law of Ukraine on the Environmental Network of Ukraine of 24 June 2004, https://www.rada.gov.ua [access: 26.10.2019].

[7] Land Code of Ukraine of 25 October 2001, https://www.rada.gov.ua [access: 26.10.2019].

[8] Law of Ukraine on the Red List of Threatened Animals of Ukraine of 7 February 2002, https://www.rada.gov.ua [access: 26.10.2019].

[9] *Tvarynnyi svit Ukrainy: pravova okhorona, vykorystannia ta vidtvorennia* [Fauna of Ukraine. Legal Protection, Use and Reproduction], red. H.I. Baliuk, Kyiv 2010, p. 157 (in Ukrainian).

of protection of such animals is complex. And it is not limited by the legislation on the Nature Reserve Fund of Ukraine.[10] Partially, this is reflected in Art. 43 of the Law of Ukraine on the World of Wild Animals, which states that providing protection of the wild animals world on the territories and facilities of the Nature Reserve Fund of Ukraine shall be implemented according to this Law, the Law of Ukraine on the Nature Reserve Fund of Ukraine, and other legal acts.

The above-mentioned provisions of the national legislation on the protection of the world of wild animals correspond to the legal norms of sources of international environmental laws. Primarily, it is the Convention on Biological Diversity of 5 June 1992 (opened for signature in Rio de Janeiro) ratified according to the Law of Ukraine of 29 November 1994.[11] This Convention provides measures for the preservation and sustainable use of the biological diversity, and particularly establishment of protective territories, or territories where it is necessary to undertake special measures for the preservation of the biological diversity; promotion of the protection of ecosystems, preservation of vital populations of species in their natural conditions; reproduction of the endangered species, etc.

According to the Law of Ukraine of 29 October 1996, the country joined the Convention on the Conservation of European Wildlife and Natural Habitats of 19 September 1979.[12] Its main goal was to provide conservation of wild flora and fauna and their natural habitats, especially environments of the species, preservation of which requires cooperation of several states, as well as promotion of such a cooperation. Particular emphasise is given to endangered and vulnerable species.

Determination and preservation of a special area of conservation as a place, where the necessary conservation measures are applied for the maintenance or restoration, at a favourable conservation status, of the natural habitats and/or the populations of the species for which the site is designated (in the process of the formation of a Unified European environmental network of nature protection areas Natura 2000), are in the focus of the provisions of the Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora.[13]

When analyzing the legal aspects of providing the nuclear and radioactive (radio ecological) safety in Ukraine after "the catastrophy of the century at the Chornobyl

[10] *Ibidem*, pp. 190–191.

[11] The Convention on Biological Diversity of 5 June 1992, https://www.rada.gov.ua [access: 27.10.2019]; Law of Ukraine on Ratification of the Convention on Biological Diversity of 29 November 1994, https://www.rada.gov.ua [access: 27.10.2019].

[12] The Convention on the Conservation of European Wildlife and Natural Habitats of 19 September 1979, https://www.rada.gov.ua [access: 27.10.2019]; Law of Ukraine on Accession of Ukraine to the Convention on the Conservation of European Wildlife and Natural Habitats of 29 October 1996, https://www.rada.gov.ua [access: 27.10.2019].

[13] Council Directive 92/43/EEC of 21 May 1992 on the conservation of natural habitats and of wild fauna and flora, https://menr.gov.ua/news/31295.html [access: 27.10.2019].

NPP", Prof. Halyna I. Baliuk underlined the need to form a system of scientific, technical, economic, organisational, state-legal and other social measures for providing regulation of the radioactively dangerous activity in Ukraine. According to Baliuk, the radio-ecological safety was considered as the most significant element of the environmental safety on the national and global scale. That is why it is extremely important to provide a legal regulation of performing activities related with radioactive materials, to establish the system of using the nuclear energy in order to save lives and health of man, to protect the environment from the radioactive contamination resulting from the migration of radioactive substances in the biosphere and their accumulation in living organisms.[14]

The establishment of the Reserve was an innovation in terms of legal regulation in the sphere of the protection of the wild animals world by establishing nature reserves and territories, where wild animal species dwell. After making appropriate amendments to the legislation, the development of a new legal mechanism in regard to making nature reserves on the radioactively contaminated lands, and a new trend in the culture of the legal environmental protection – the legal culture of making nature reserves – began. Therefore, a new version of Art. 11 emerged in the Law of Ukraine on Legal Regime of Territories Exposed to Radioactive Contamination as a Result of the Chornobyl Disaster of 27 February 1991.[15]

This provision refers to the implementation of studies devoted to environmental protection, preservation of the natural diversity of the landscapes, gene pool of flora and fauna, supporting the overall environmental balance, provision of background monitoring of the environment in the Exclusion Zone and the Zone of Unconditional (Obligatory) Resettlement. Moreover, according to the legislation, there may be formed territories and facilities of the nature reserve fund. In addition, it was found that only those activities may be carried out, which are specified in relevant provisions, taking into account the restrictions provided for in that Law. Support of a special nature protecting system within such territories shall be performed due to the legislation (Parts 2 and 3, Art. 11).

The need to form a nature reserve within the so-called "Chornobyl Area", was felt long before the establishment of the reserve. Just 5 years after the accident at the Chornobyl Nuclear Power Plant (ChNPP), scientists noted a gradual reproduction of flora and fauna. There was an increase in the number of typical and the emergence of rare species of flora and fauna. Forecasts for the future were good – there were expected gradual transformation of anthropogenic landscapes into natural complexes typical for the Polissia Area. Only 20 years after the accident at the ChNPP, a territory of several thousand hectares became a reserve. Hundreds of not only typical, but rare species in-

[14] H.I. Baliuk, *Pravovi aspekty zabezpechennia yadernoi ta radiatsiinoi (radioekolohichnoi) bezpeky v Ukraini* [Legal Aspects of Ensuring Nuclear and Radiation (Radioecological) Safety in Ukraine], Kyiv 1997, pp. 8–9 (in Ukrainian).

[15] Law of Ukraine on Legal Regime of Territories Exposed to Radioactive Contamination as a Result of the Chornobyl Disaster of 27 February 1991, https://www.rada.gov.ua [access: 26.10.2019].

cluded in the Red List of Threatened Species found shelter and comfortable conditions for their multiplication.[16]

For this reason, the formation in 2007, within the borders of the Chornobyl Zone, of a Common Zoological Wildlife Area was – from the legal point of view – the beginning of the creation of a special legal system for the facilities and territories which were declared as reserved areas. According to Decree of the President of Ukraine on the Announcement of the Natural Territory as the General Zoological Reserve of the National Significance "Chornobyl Special" of 13 August 2007, No. 700/2007,[17] a natural area of 48,870 ha within the borders of the Exclusion Zone and the Zone of Unconditional (Obligatory) Resettlement (Kyiv Oblast) was announced to be a Common Zoological Wildlife Area of Significant Importance "A Chornobyl Special Wildlife Area" (item 1).

The aim of establishing the wildlife area was to preserve the unique properties of forestry plants in the Exclusion Zone and the Zone of Unconditional (Obligatory) Resettlement within the Kyiv Polissia Area, which is the largest wildlife area in Ukraine that requires protecting and regulation of its amount of populations, in accordance with Art. 53 of the Law of Ukraine on the Nature Reserve Fund of Ukraine (the Preamble).

Improvement of the degree of protecting the biological diversity within the said territory in general, increasing the amount of territories of the nature reserve fund, development of research studies became possible due to efforts of researches and environmentally-oriented community only after less than 10 years from the time of establishment of the "A Chornobyl Special Wildlife Area".

Resolution No. 1089-VIII of 13 April 2016 of the Verkhovna Rada of Ukraine on the approval of recommendations of the parliamentary hearings devoted to "30 Years after the Chornobyl Catastrophy: Lessons and Prospects"[18] took place on 16 March 2016. Overcoming the consequences of the Chernobyl accident was recognized by the participants of the Parliamentary Hearings as one of the priorities in the state policy of Ukraine. There was recommended to legally regulate the problematic points by: implementing scientific and legally protected environmental activities on the territory of the Exclusion Zone and in the Zone of Unconditional (Obligatory) Resettlement (with the help of an international scientific cooperation); conducting activities aimed at the

[16] *V Minpryrody vidkrylasia vystavka, prysviachena stvorenniu Chornobylskoho radiatsiino-ekolohichnoho biosfernoho zapovidnyka* [The Ministry of Environment Has Opened an Exhibition Dedicated to the Creation of the Chornobyl Radiation and Ecological Biosphere Reserve], https://menr.gov.ua/news/33351.html [access: 12.10.2019] (in Ukrainian).

[17] The Decree of the President of Ukraine on the Announcement of the Natural Territory as the General Zoological Reserve of the National Significance "Chornobyl Special" of 13 August 2007, No. 700/2007, https://www.rada.gov.ua [access: 30.10.2019].

[18] Resolution No. 1089-VIII of 13 April 2016 of the Verkhovna Rada of Ukraine on the approval of recommendations of the parliamentary hearings devoted to "30 Years after the Chornobyl Catastrophy: Lessons and Prospects", https://www.rada.gov.ua [access: 01. 11.2019].

legal preservation of reserved areas; and promoting work related to the formation of a Chornobyl Biosphere Reserve (sections 1 and 16, item 1).

Under the presidential Decree No. 174/2016 of 26 April 2016 on the Formation of the Chornobyl Radiation and Ecological Biosphere Reserve,[19] the said wildlife area was finally established. The purpose of its creation was as follows: to conserve the most typical natural complexes of the Polissia in their natural state, to support and enhance the barrier function of the Exclusion Zone and the Zone of Unconditional (Obligatory) Resettlement, to stabilise the hydrological regime and to rehabilitate areas contaminated with radionuclides, and to facilitate the organisation and implementation of international scientific research (the Preamble).

The Reserve, according to item 1 in the said Decree, was created at the territory of Ivankiv and Polissia districts, of Kyiv Oblast, within the borders of the Exclusion Zone and the Zone of Unconditional (Obligatory) Resettlement. It was part of the territory that suffered from the radioactive contamination resulting from the Chornobyl disaster. The territory of the Reserve covers 226,964.7 ha of the state property land, which had been in permanent use of the State Agency of Ukraine for Exclusion Zone Management.

Reference has also been made to the provision of the said Decree on a legal regulation of the problem concerning the division of land from the Exclusion Zone and the Zone of Unconditional (Obligatory) Resettlement from the territory affected by radioactive contamination; environmental protection regime for the territories and facilities of the nature reserve fund which are formed on the territories of the said zones; abolition of the requirement of establishing biosphere wildlife areas exclusively on the basis of natural wildlife areas and national nature parks.

The regulation on the Reserve was approved by Order No. 43 of 3 February 2017 of the Ministry of Ecology and Natural Resources of Ukraine.[20] It follows that the Reserve shall be a budget-funded, non-commercial, research institution of the state significance, and that it was formed with the purpose of: preserving the most typical natural complexes of the biosphere in their natural state, putting in practice the background environmental monitoring; researching the environment and its changes resulting from anthropogenic factors (item 1.2). According to the provided procedure, the Reserve shall be included to the World Network of Biosphere Reserves within the UNESCO framework "Man and the Biosphere", and it shall acquire an international status (item 1.3). The Reserve belongs to the sphere of regulation by the State Agency of Ukraine for Exclusion Zone Management (item 1.5).

[19] The Decree of the President of Ukraine on the Formation of the Chornobyl Radiation and Ecological Biosphere Reserve of 26 April 2016, No. 174/2016, https://www.rada.gov.ua [access: 31.10.2019].

[20] The Order of the Ministry of Ecology and Natural Resources of Ukraine of 3 February 2017, No. 43 on the approval of the regulation on the Chornobyl Radiation and Ecological Biosphere Reserve, https://www.rada.gov.ua [access: 30.10.2019].

The Director of the Reserve speaks of the contradiction existing between the Law of Ukraine on the Nature Reserve Fund and the legislation concerning the Exclusion Zone. According to him, the point is that the Exclusion Zone is a unique territory. Although natural environment has recovered after 30 years, there are areas which are still contaminated. He presented two priority tasks for the Reserve: preservation of flora and fauna, and prevention of the radionuclides spreading onto the clean territories, that is the Area shall perform its barrier-protecting functions.

Some rumors were circulating about two- and three-head monsters found in the Chornobyl Zone. In reality, however, nothing like this has ever happened. The Director denied those rumors and organized a series of meetings with schoolchildren and students from Kyiv schools and higher educational institutions. Experts from the Management Group of the Reserve constantly work with the public; tell about Reserve mission, or read lectures for young people. One of the most important tasks of the Reserve is to present true information about the situation in the Exclusion Zone, which gradually changes into the Recovery Zone.[21] Therefore, the largest Reserve Area in Ukraine formed within the 30-km Exclusion Zone became a basis for conducting an extremely important environmental experiment, which is unique not only in the country, but in the whole world.[22]

Nowadays, according to the data provided by the scientists from the Reserve, there were registered above 320 species of vertebrates (out of the total number of 410 species that can be found in the region), out of which 55 species (out of 97 probable ones) are included in the Red List of Threatened Animals of Ukraine. The number of ungulate animals, predators and vultures as well as other wild animals reached the highest level in the history of the Reserve. There have been recorded rising population of mammals, e.g. lynx, bear, elk, royal deer, wild boar, roe deer and of rare birds – the while-tail eagle, spotted eagle, black stork, crane, eagle-owl and others. It is a habitat for 14 species of the Chiroptera order, some of which (the pond bat, barbastelle bat and the greater noctule) are rare even in Europe.[23]

At the same time, the attention of researchers is mainly focused on studying the rare and typical species of flora and fauna – large predators (the brown bear, lynx, wolf) and ungulates (the elk, dear, roe deer), whose population increased significantly over the recent years. Scientists who visit the Exclusion Zone pay particular attention to the unique population of Przewalski's horses, introduced in the 1990s. Nowadays the species composition of animals inhabiting the territory of the Reserve is adequate to the fauna of Polissia.[24] The process of forming nature reserves in the state shows a high

[21] T. Melnychuk, *"Iz zony vidchuzhennia namahaiemosia zrobyty zonu vidrodzhennia"* ["From the zone of alienation we try to make a zone of revival"], https://zapovidnyk.org.ua/index.php?fn=novp&f=php&pid=2019-04-16-19-58-58-9209 [access: 11.10.2019] (in Ukrainian).

[22] *V Minpryrody…*

[23] *Ibidem*.

[24] *Chornobylskyi radiatsiino-ekolohichnyi biosfernyi zapovidnyk* [Chornobyl Radiation and Ecological Biosphere Reserve], https://zapovidnyk.org.ua/ [access: 15.10.2019] (in Ukrainian).

level of environmental culture, while providing appropriate level of practical functioning (using legal mechanisms) characterises the degree of environmental and legal culture of the society. The territory where the Reserve is located is an important historical and ethnographical region of Ukraine. The area is covered with thick forests and impassable swamps and bogs, in which the oldest relics of the pre-Slavic culture are still preserved. The area of Ukrainian Polissia is the subject of regular studies conducted by archeologists, historians, folklorists and ethnographers. Recently, it has also become interesting for specialists conducting active research in the field of environmental problems of flora and fauna which are connected with different radiation levels and lack of human activities.[25]

Scientists say that there is now a unique opportunity to recover quasi-natural environmental systems, similar to those that existed around 5,000–2,000 years ago in the forested zone of Europe. The "Fauna" program (2000) largely provides the opportunity to reconstruct similar environmental systems by recovering large herbivores (Przewalski's horse, bison). In the case of Przewalski's horse, it supports the natural growth of the population from about 100–150 to 300–500 individuals. What is of great importance is the settlement of all ecotopes with the appropriate species (providing them with adequate protection and increasing genetic biodiversity). Przewalski's horse would be introduced to all fallow land, meadows and rather poor and dry forest conditions.[26]

In order to successfully reintroduce the European bison, scientists suggest that at the initial stage, there should be provided a system of forage fields under power transmission lines and in fallow lands with the best soil on the left bank of the Pripyat (about 10 fields, the area is approximately 20 hectares each) to the north of the railway line (about the same size). After that it is necessary to introduce the European bison in the quantity of not less than 10 individuals to each of these plots of land. Besides, there are animals which regularly migrate from Belarus. In 30 years, the population of the European bison in the Reserve may reach 300–500 individuals and occupy forests with small meadow areas as well as the nearby pastures with better environmental conditions.[27]

As far as the reintroduction of aurochs (its reconstructed analogues) is concerned, it is suggested at first to provide a population of domesticated populations of cattle of the protomorphic species, which would make their habitation in the wild world possible, and then to make their selection and increase their population. The creation of semi-wild populations by using their natural selection will result in the occurrence of an analogue of the aurochs. As the natural habitats of aurochs were flood plains (water-meadows

[25] *V Minpryrody…*

[26] Ye.O. Vorobiov, S.M. Bidna, D.O. Vyshnevs'kyy, S.O. Yevdokymova, O.A. Borsuk, *Ekosystemy Chornobylskoho radiatsiino-ekolohichnoho biosfernoho zapovidnyka: kryzovi yavyshcha mynuloho i suchasnosti ta shliakhy optymizatsii* [Ecosystems of the Chornobyl Radiation and Ecological Biosphere Reserve: Crisis Phenomena of the Past and Present and Ways of Optimization], https://zapovidnyk.org.ua/index.php?fn=novp&f=php&pid=2019-04-16-19-32-40-3325 [access: 15.10.2019] (in Ukrainian).

[27] *Ibidem*.

and thin forests) with rich vegetation, the places suggested to be used for the formation of two more herds are the flood plains of the Uzh and Pripyat rivers. If these works are implemented, in 30 years we can expect spreading of the species around all suitable ecotopes and stabilisation of the population at the level of 300–500 individuals.[28]

At present, we should note that the process of the formation of the legal mechanism in relation to nature reserves in the Chornobyl Zone, and provision of the environmental and radiation safety within the borderline of that one is continually evolving. According to the data from the Reserve Administration, the Reserve will not only perform its primary function – preserving local biodiversity – but it will become an important element of the "outdoor laboratory". On this basis, there have been defined 3 priorities that will contribute to the development of the Reserve in the coming years. These are:

1) environmental protection – preservation of the most typical natural complexes in Polissia Area in the natural state, conservation of the natural diversity of landscapes, gene pool of flora and fauna; maintenance of the ecological balance, improvement of the barrier function of the Exclusion Zone and the Zone of Unconditional (Obligatory) Resettlement; stabilization of the hydrological regime and rehabilitation of the territories contaminated with radionuclides;

2) conducting researches – ecological monitoring of the environment, periodic inventory of natural resources; keeping records of the Nature Chronicles; development of scientific recommendations on the preservation and reproduction of rare species of flora and fauna, restoring of natural ecosystems; preparation of scientific materials and recommendations necessary for the implementation of environment-related activities;

3) informational measures – enhancing awareness and knowledge of values of the biological and landscape diversity of the Reserve, shaping environmental awareness.[29]

The recent presidential Decree No. 196/2018 of 5 July 2018, on additional measures aimed at recovering the territories that were radioactively contaminated as a result of the Chornobyl catastrophy – the social protection of affected individuals, and safe radioactive waste management,[30] concerns the necessity to undertake measures aimed at reconstruction of the territories that have been radioactively contaminated as a result of the Chornobyl catastrophy. Particularly, the measures include the following: the endorsement, by the end of 2018, of the draft strategy for overcoming consequences of the Chornobyl catastrophy and recovery of territories that suffered from the radioactive contamination; considering of a cross-border Ukrainian-Belarus Biosphere Reserve Area on the territories that suffered from the radioactive contamination (item 3).

[28] *Ibidem*.

[29] *Chornobylskyi…*

[30] The Decree of the President of Ukraine on additional measures aimed at recovering the territories that were radioactively contaminated as a result of the Chornobyl catastrophy – the social protection of affected individuals, and safe radioactive waste management of 5 July 2018, No. 196/2018, https://www.rada.gov.ua [access: 31.10.2019].

At the same time, particular attention was paid to the problem of development of the Reserve as a unique environmental facility. Point 5 of the Decree includes, *inter alia*, the implementation of a radiological monitoring system for the territories in question by the end of 2018 to assess and determine prospects for their further development; and examining the aspect of possible improvement in the administration and functioning of the Reserve system. Although not all of the tasks have been fulfilled completely till the end of the last year, the importance of their implementation in the future is beyond all doubts. In addition, the government should provide many legal, organisational, financial, technical and technological, as well as a number of other guarantees to fully implement the tasks.

In conclusion, developing and adopting a strategy to overcome the effects of the Chernobyl disaster and recover the territories affected by radioactive contamination is still crucial. The idea is contained in point 1 of presidential Decree No. 141/2016 of 13 April 2016 on additional measures to transform "the shelter object" into an ecologically safe system, and on recovering the territories that were radioactively contaminated as a result of the Chornobyl catastrophy.[31] The Strategy shall aim at the following: normalisation of the aspects related to recovering the territories that were radioactively contaminated; activation of scientific works in the field of nuclear and radiation safety, and the ones devoted to the effects of ionising radiation on human beings and environment.

In this context we also support the proposals of scientists who considered the problems connected with the formation and protection of nature reserves, and with the needs to develop and adopt the national Concept of the Reserved Areas oriented at international standards.[32] This document should also provide a chapter devoted to the specific features of the legal regime in the territories and facilities of the Nature Reserve Fund located in the Chornobyl Zone.

References

Baliuk H.I., *Pravovi aspekty zabezpechennia yadernoi ta radiatsiinoi (radioekolohichnoi) bezpeky v Ukraini* [Legal Aspects of Ensuring Nuclear and Radiation (Radioecological) Safety in Ukraine], Kyiv 1997 (in Ukrainian).

Chornobylskyi radiatsiino-ekolohichnyi biosfernyi zapovidnyk [Chornobyl Radiation and Ecological Biosphere Reserve], https://zapovidnyk.org.ua/ [access: 15.10.2019] (in Ukrainian).

[31] The Decree of the President of Ukraine on additional measures to transform "the shelter object" into an ecologically safe system, and on recovering the territories that were radioactively contaminated as a result of the Chornobyl catastrophy of 13 April 2016, No. 141/2016, https://www.rada.gov.ua [access: 30.10.2019].

[32] *Pravovyi rezhym pryrodno-zapovidnoho fondu Ukrainy: istoriia formuvannia, yurydychni aspekty ta zakordonnyi dosvid* [Legal Regime of the Nature Reserve Fund of Ukraine: History of Formation, Legal Aspects and Foreign Experience], red. O. Kravchenko, Lviv 2017, p. 44 (in Ukrainian).

Melnychuk T., *"Iz zony vidchuzhennia namahaiemosia zrobyty zonu vidrodzhennia"* ["From the zone of alienation we try to make a zone of revival"], https://zapovidnyk.org.ua/index.php?fn=novp&f=php&pid=2019-04-16-19-58-58-9209 [access: 11.10.2019] (in Ukrainian).

Pravovyi rezhym pryrodno-zapovidnoho fondu Ukrainy: istoriia formuvannia, yurydychni aspekty ta zakordonnyi dosvid [Legal Regime of the Nature Reserve Fund of Ukraine: History of Formation, Legal Aspects and Foreign Experience], red. O. Kravchenko, Lviv 2017 (in Ukrainian).

Tvarynnyi svit Ukrainy: pravova okhorona, vykorystannia ta vidtvorennia [Fauna of Ukraine. Legal Protection, Use and Reproduction], red. H.I. Baliuk, Kyiv 2010 (in Ukrainian).

V Minpryrody vidkrylasia vystavka, prysviachena stvorenniu Chornobylskoho radiatsiino-ekolohichnoho biosfernoho zapovidnyka [The Ministry of Environment Has Opened an Exhibition Dedicated to the Creation of the Chornobyl Radiation and Ecological Biosphere Reserve], https://menr.gov.ua/news/33351.html [access: 12.10.2019] (in Ukrainian).

Vorobiov Ie.O., Bidna S.M., Vyshnevs'kyy D.O., Yevdokymova S.O., Borsuk O.A., *Ekosystemy Chornobylskoho radiatsiino-ekolohichnoho biosfernoho zapovidnyka: kryzovi yavyshcha mynuloho i suchasnosti ta shliakhy optymizatsii* [Ecosystems of the Chornobyl Radiation and Ecological Biosphere Reserve: Crisis Phenomena of the Past and Present and Ways of Optimization], https://zapovidnyk.org.ua/index.php?fn=novp&f=php&pid=2019-04-16-19-32-40-3325 [access: 15.10.2019] (in Ukrainian).

Abstract: The paper is devoted to the issue of protection and reproduction of the world of wild animals within the radioactively contaminated territories. The author pays attention to the socio-legal aspects of: the legal regulation in Ukraine with reference to the process of the formation of the Chornobyl Radiation and Ecological Biosphere Reserve within the Exclusion Zone and the Zone of Unconditional (Obligatory) Resettlement, intensification of the measures aimed at protection, and reproduction of the world of wild animals as an important element of biodiversity within this area.

Keywords: biodiversity; Chornobyl Radiation and Ecological Biosphere Reserve; Chornobyl Zone; ecological and legal culture; nature reserve fund; nuclear and radioactive safety; radioactively contaminated territories; wild animals

HANNA SPASOWSKA-CZARNY

Maria Curie-Skłodowska University in Lublin,
Faculty of Law and Administration
https://orcid.org/0000-0003-4000-5837
hanna.spasowska@poczta.umcs.lublin.pl

Raising and Breeding of Free-Living Animals under Polish Law Based on the Example of Cervids (*Cervidae*)*

The objectives and content of the statutory law relating to the protection of animals were shaped according to human needs, changing in each epoch. Initially, the intention to protect selected animal species was based on religious beliefs,[1] and, later, economic considerations played a significant role. The first orders and prohibitions concerned specific species of animals and were aimed at securing the privileges of rulers – the owners and users of nature.[2]

* The publication was prepared as part of the research project entitled "The Administrative Law Animal Protection Model" under the application registered in the Funding Stream Service system administered by the National Information Processing Institute No. 2016/23/D/HS5/01820 and accepted for financing as part of the competition announced by the National Science Centre, Poland – "SONATA 12" on the basis of the decision made by the Director of National Science Centre in Kraków of 16 May 2017 (decision No. DEC-2016/23/D/HS5/01820, contract No. UMO-2016/23/D/HS5/01820).

1 See, e.g. J. Helios, W. Jedlecka, *Zwierzęta w głównych religiach świata*, [in:] *Aspekty prawne, filozoficzne i religijne ochrony roślin i zwierząt – wybrane zagadnienia*, red. J. Helios, W. Jedlecka, A. Ławniczak, Wrocław 2016, pp. 51–72; C. Janik, *Status zwierzęcia w głównych systemach religijnych*, [in:] *Status zwierzęcia. Zagadnienia filozoficzne i prawne*, red. T. Gardocka, A. Gruszczyńska, Toruń 2012, pp. 77–104; J. Woleński, *Podmiotowość zwierząt w aspekcie filozoficznym*, [in:] *Status*…, pp. 11–28.

2 King Boleslaw I the Brave banned hunting beavers and appointed guards (known as *bobrownicy*) to watch over them. See K. Bronowska, *Ochrona środowiska w prawodawstwie polskim – rys histo-*

It was not before the early 19th century, when humanitarianism was born in France, that humans discovered animals as an issue requiring legal regulations. Humanitarianism meant the recognition of human dignity, fraternity and equality between people as the highest value. A humanitarian stance required respect for human beings and a desire to spare them suffering. In previous centuries, the value of human life was not very high. And if the value of human life was low, one should not be surprised that – in the light of the widespread opinion that humans were superior to animals – the life of animals was of little value. The spread of the idea of humanitarianism led to a situation in which the reasoning that initially concerned only humans translated into reasoning concerning animals. Today, humanitarianism does not only mean respect for other people and minimizing their suffering, it concerns all living beings and constitutes the axiological foundation for the protection and proper treatment of animals. There is no doubt that animals have been granted the right to effective protection in every aspect, since every animal, whether or not it is free, constitutes an inherent part of the natural environment and bears witness to its richness and diversity to which it contributes. Caring for animals has become not only a legal imperative but also an ethical one.[3]

Doubts about the legal nature of free-living animals existed long before the principle of dereification appeared in Polish legislation. Judicial decisions took the position that although animals cannot be denied the attribute of material goods, they are not things. The adoption of such an assumption led to the conclusion that neither the state nor any other entity is entitled to property rights to animals. This was justified by the fact that it was not possible to subject a freely living animal to the authority of human beings.[4] The Supreme Court also questioned the classification of free-living animals as things

ryczny, „Ochrona Środowiska. Przegląd" 2002, Nr 1, p. 46. Piotr Listos, Małgorzata Dylewska, and Magdalena Gryzińska say that in 1420, King Władysław II Jagiełło established, as the first in the history of hunting acts, a period of protection for game. In the Statute of Warta, which confirms the above decision, he justifies it as follows: "because hare hunters used to do considerable damage to poor people by destroying their crops and grains, we order from now on, starting from St. Adalbert's Day (23 April), until the harvest of winter and summer crops, the cessation of all hunting" (P. Listos, M. Dylewska, M. Gryzińska, *Rys historyczny prawnych aspektów ochrony weterynaryjnej zwierząt w Polsce*, „Przegląd Prawa i Administracji" 2017, Vol. 108, p. 115). For more, see also W. Radecki, *Zarys historii prawnej ochrony przyrody w Polsce*, [in:] *Prawne formy ochrony przyrody*, red. J. Sommer, Warszawa 1990, p. 12ff; A. Samsonowicz, *Łowiectwo w Polsce Piastów i Jagiellonów*, Wrocław 1991, p. 39ff; J. Sobczak, *Ochrona zwierząt w prawie karnym*, [in:] *Status*…, pp. 167–168 and the literature indicated therein; M. Raba, *Karnoprawna ochrona zwierząt łownych*, „Prokuratura i Prawo" 2010, Nr 9, pp. 151–152 and the literature indicated therein.

[3] The history of legal regulations concerning humanitarian protection of animals in Poland dates back to the 1920s. On 22 March 1928, the President of the Republic of Poland issued a regulation on the protection of animals (Journal of Laws of 1932, No. 42, item 417, as amended). In Art. 1, the legislator prohibited the abuse of all domestic and domesticated animals and birds, as well as animals and wild birds, fish, amphibians and insects. See A. Habuda, W. Radecki, *Przepisy karne w ustawach o ochronie zwierząt oraz o doświadczeniach na zwierzętach*, „Prokuratura i Prawo" 2008, Nr 5, p. 21.

[4] M. Goettel, *Sytuacja zwierzęcia w prawie cywilnym*, Warszawa 2013, pp. 37–39.

and described them as "no one's material objects (which are not things)".[5] The dispute as to the legal nature of free-living animals became obsolete due to the unambiguous wording of the aforementioned Art. 1 para. 1 of the Polish Animal Protection Act, but this provision did resolve the essence of the doubts mentioned above.[6]

Art. 4 (21) of the Animal Protection Act of 21 August 1997[7] defines "free-living (wild) animals" as non-domesticated animals living in conditions which are independent of humans. Undoubtedly, these are both native animals living in the state of natural freedom, as well as foreign animals – e.g. migratory species. Wojciech Radecki divides free-living animals into game, protected species and other wild animals.[8]

The legal protection of free-living animals dates back to antiquity. The first regulations were already in force around 2000 BCE in India, Egypt and Babylonia.[9] The issue of legal protection of animals in Poland, which is a part of material administrative law, has been regulated in a number of acts. In the context of the protection of free-living animals, the following acts should be mentioned: the Animal Protection Act of 21 August 1997;[10] the Act of 13 October 1995 – Hunting Law;[11] the Act of 16 April 2004 on Nature Protection;[12] the Act of 29 June 2007 on the Organisation of Breeding and Reproduction of Farm Animals;[13] the Act of 22 June 2001 on Genetically Modified Organisms;[14] the Act of 27 April 2001 – Environmental Protection Law;[15] the Veterinary Inspection Act of 29 January 2004;[16] the Act on Animal Health Protection and Combating Infectious Animal Diseases of 11 March 2004;[17] the Act on Medical Establishments for Animals of 18 December 2003;[18] the Act of 13 April

[5] J.S. Piątowski, [in:] *System prawa cywilnego*, t. 2: *Prawo własności i inne prawa rzeczowe*, red. J. Ignatowicz, Wrocław 1977, pp. 352–353; S. Grzybowski, *System prawa cywilnego*, t. 1: *Część ogólna*, red. S. Grzybowski, Wrocław 1985, p. 462.

[6] The assumptions of the legal concept of the animal is analysed by Mieczysław Goettel, *op. cit.*, pp. 41–42.

[7] Journal of Laws of 2019, item 122.

[8] W. Radecki, *Ustawa o ochronie zwierząt. Komentarz*, Warszawa 2012, p. 31. Łukasz Smaga points out that feral animals are not free-living animals. They cannot be regarded as undomesticated, because becoming feral consists in changing the conditions of life activity to independent from humans. They will continue to be pets or farm animals that have adapted to life in the wild (see idem, *Ochrona humanitarna zwierząt*, Białystok 2010, p. 260).

[9] A. Przyborowska-Klimczak, *Ochrona przyrody. Studium prawnomiędzynarodowe*, Lublin 2004, p. 35 and the literature indicated therein; G. Grabowska, *Europejskie prawo środowiska*, Warszawa 2001, p. 13.

[10] Journal of Laws of 2013, item 856.

[11] Journal of Laws of 2015, item 2168.

[12] Journal of Laws of 2018, item 1614.

[13] Journal of Laws of 2007, No. 133, item 921.

[14] Journal of Laws of 2007, No. 36, item 233, as amended.

[15] Journal of Laws of 2019, item 1396.

[16] Journal of Laws of 2015, item 1482.

[17] Journal of Laws of 2014, item 29.

[18] Journal of Laws of 2015, item 1047.

2007 on Prevention and Repair of Environmental Damage;[19] the Marine Fishing Act of 19 December 2014;[20] and the Inland Fishing Act of 18 April 1985.[21]

The starting point for considerations concerning the status of all animals in the Polish legal system is the Animal Protection Act and, consequently, the adoption of the principle that animals, as living beings, capable of suffering, are not things. Therefore, people owe them respect, protection and care. The Animal Protection Act contains very few provisions applicable to free-living animals – all of them are included in Art. 21, in which the legislator calls for their development and free existence to be ensured, and its implementation seems to consist in human non-interference in the life of such animals.[22] The provision of Art. 12 of the Animal Protection Act stipulates that such animals should be bred and raised in such a way so as not to cause bodily damage, injuries or other forms of suffering.

In accordance with Art. 1 of the Hunting Law, hunting is one of the elements of environmental protection. This concept covers both the protection of game and the management of game resources in accordance with the principles of ecology, rational agricultural, forest and fishing management.[23]

The scope of protection covers wild game, which includes species listed in the Regulation of the Minister of the Environment of 11 March 2005 on the establishment of a list of wild game species.[24] According to Section 1(1), game animals are divided into large game (elk, red deer, sika deer, fallow deer, European roe deer, wild boar and mouflon) and small game (fox, raccoon dog, badger, pine marten, beech marten, American mink, European polecat, raccoon, muskrat, European hare, European rabbit, hazel grouse, pheasant, partridge, greylag goose, bean goose, greater white-fronted goose, mallard, Eurasian teal, common pochard, tufted duck, common wood pigeon, Eurasian woodcock and Eurasian coot).

In addition to the protection of game, the Hunting Law also regulates issues related to the so-called game management.[25] Apart from hunting, the basic regulatory and protective institutions of the Hunting Law are, *inter alia*, animal breeding centres. A permit for closed breeding[26] and raising[27] of game animals which are not farm

[19] Journal of Laws of 2007, No. 75, item 493, as amended.

[20] Journal of Laws of 2015, item 222.

[21] Journal of Laws of 2015, item 652.

[22] Ł. Smaga, *op. cit.*, p. 256.

[23] J. Skrocka, A. Szczepański, *Prawo łowieckie. Komentarz,* Warszawa 1998, p. 2.

[24] Journal of Laws of 2005, No. 45, item 433.

[25] Ł. Smaga, *op. cit.*, pp. 255–256.

[26] The legal definition of animal breeding (Art. 2(4) on the organisation of breeding and reproduction of farm animals) states that it is a set of measures aimed at improving the hereditary bases (genotype) of farm animals, including the assessment of the value in use and breeding of farm animals, selection and choice of individuals for mating carried out under conditions of proper breeding. Animal breeding, in contrast to animal raising, leads to changes in the frequency of genes and genotypes in the herd. S. Mroczkowski, A. Frieske, *Regulacje użytkowania zwierząt*, Bydgoszcz 2016, p. 38.

[27] The provision of Art. 2 of the Act on the Organisation of Breeding and of Farm Animals defines "animal raising" as a set of human efforts aimed at full use of genotypic values of animals in order

animals is issued by the minister in charge of the environment. Such centres may be run by State Forest Enterprises, State Forests, the Polish Hunting Association as well as scientific and educational institutions and other units which, until the entry into force of the Law, ran such centres; and only for the purpose of scientific research and education as well as the settlement or export of live animals.[28]

In 2001, due to the need to adapt the national legal regulations to the requirements of the European Union, an amendment was introduced to the whole package of acts in the field of veterinary medicine and animal husbandry. As a result of the amendments, farming of free-living animals was granted the status of the farming of stock and slaughter animals. Therefore, it is possible to establish animal farms for commercial production of meat and hides without the obligation to obtain any special permits.[29]

The farming of free-living animals for the production of meat and hides is made possible by the provisions of the Act on the Organisation of Breeding and on the Reproduction of Farm Animals. Breeding of cervids is a commercial agricultural activity that does not require special permits. According to the provisions of the Act, deer and fallow deer kept under the above conditions are classified as farm animals and are the property of the breeder, provided that they were acquired legally. This provision made it possible to slaughter cervids kept on farms all year round.[30]

Detailed regulations concerning the conditions of keeping farm deer and fallow deer are provided for in the Regulation of the Minister of Agriculture and Rural Development of 13 September 2004 on detailed veterinary requirements for raising or breeding of wild animals kept by people as farm animals,[31] and the minimum requirements for the farming of cervids are specified in the Regulation of the Minister of Agriculture and Rural Development of 28 June 2010 on minimum conditions of

to obtain specific products from them (e.g. milk, eggs, wool, meat). The scope of breeding includes maintenance, care, reproduction, use, nutrition and rearing young animals. S. Mroczkowski, A. Frieske, *Prawna ochrona zwierząt gospodarskich*, Bydgoszcz 2015, p. 9. See also L. Zimny, *Mały leksykon rolniczy*, Warszawa 1995, p. 21, 41; cited after W. Radecki, *op. cit.*, p. 110.

[28] S. Mroczkowski, A. Frieske, *Prawna ochrona zwierząt wolno żyjących*, Warszawa 2017, p. 124. For more, see, e.g. *Chów i hodowla fermowa jeleniowatych*, red. P. Janiszewski, Olsztyn 2014, pp. 51–57; *Fermowy chów jeleni i danieli*, red. A. Karpowicz, Karniowice 2012, pp. 21–24.

[29] B. Borys, Z. Bogdaszewska, M. Bogdaszewski, *Dynamiczny wzrost fermowej hodowli danieli i jeleni w Polsce*, „Wiadomości Zootechniczne" 2012, Vol. 50(1), p. 32.

[30] Therefore, cervids kept on farms are not subject to the Regulation of the Minister for the Environment of 16 March 2005 on the determination of hunting periods for game (Journal of Laws of 2005, No. 48, item 459).

[31] Journal of Laws of 2004, No. 215, items 2187 and 2188. The Regulation mainly sets out the conditions to be met by livestock buildings. The housing and equipment should be dry and have a surface appropriate to the species of animals kept, constructed of materials that are harmless to the animals and are easy to clean and disinfect, with no sharp edges that could cause injury to the animals; watering and feeding equipment should be designed in such a way as to minimize the possibility of the contamination of water or fodder and to ensure that animals have conflict-free access to it.

keeping farm animals species other than those for which the standards of protection were specified in the European Union regulations.[32]

According to Bronisław Borys, Zofia Bogdaszewska and Marek Bogdaszewski, the growing popularity of free-living animals farming is caused, *inter alia*, by the increasing demand for game in Europe, considerably exceeding the potential to acquire it from wild populations; the high health quality and the highest culinary attractiveness of the meat resulting from ecological condition of raising the animals; the possibility of the economically effective use of weaker soils, which are not suitable for more intensive cultivation; increasing affluence of the Polish society, creating opportunities for the development of the domestic market and sale of meat at satisfactory prices and proximity to the largest and most absorptive German market; extensive (very often ecological) nature of the production.[33]

The commercial significance is mainly due to the breeding of two species of cervids: the fallow deer and the deer. Increasingly popular, especially in park farming, hobby farming and on agritourism farms, is maintaining exotic ruminant species, such as mouflon, alpacas and reindeer. However, these species are not covered by the provisions of the Act on the Organisation and Breeding of Farm Animals. Their maintenance requires the application of other provisions, e.g. on the nature protection, the functioning of zoos or the introduction of alien species.[34]

The provisions of the Regulation on Minimum Conditions for Keeping Farm Animal Species other than those for which standards of protection are laid down in the European Union legislation relate to facilities, equipment and the maintenance of the animals themselves. A farm where deer or fallow deer are kept should be equipped with a pen enabling veterinary or zootechnical treatments (the so-called manipulation pen). The pen is used to perform all procedures on animals (marking, deworming, weighing, cutting antlers, collecting blood, etc.), segregating (weaning calves) and catching them. The pen must consist of a system of corridors (tunnels), doors and movable (sliding) walls making it possible to direct the animals properly and to separate individual animals at the right time.[35]

In addition, animals kept in an open system should be protected from adverse weather conditions and predatory animals; they should be able to use shady areas and have permanent access to pastureland of not less than 1 ha during the grazing period; they should have permanent access to fresh and clean water. If the accommodation for animals does not have natural water sources, it should be provided to the animals by the installation of troughs.

[32] Journal of Laws of 2010, No. 116, item 778.

[33] B. Borys, Z. Bogdaszewska, M. Bogdaszewski, *op. cit*., p. 33.

[34] *Ibidem*, p. 34.

[35] A. Karpowicz, *op. cit.*, p. 14.

Where deer are kept, the stocking density per hectare of pastureland must not exceed 7 deer or 15 fallow deer. The number of animals depends mainly on the quality and productivity of the pasture sward, which depends on the class of soil, rainfall, fertilization, number of plots, etc. The number of deer kept should amount to not more than 7 and the number of fallow deer no more than 15. In the case of poorer pastures, the stocking density should not exceed 3 deer and 5 fallow deer per hectare. The pasture area is protected by a permanent and durable fence at least 2 m high, made of mesh, which prevents animals from getting out. The minimum size of a pen, regardless of the number of animals, should be 1 ha. Pastures are divided into plots of about 3–5 ha, connected either by gates with a width of 3.6 m or driving corridors. In the event of disease or quarantine and outside the grazing period, the regulations allow deer or fallow deer to be temporarily kept in a closed system, in stalls, individually or in groups. The regulation precisely defines the surface area of a stall per unit. Stocking densities exceeding the established area standards for a given species age and physiological status are prohibited. It is forbidden to import animal products obtained from animals which were bred or raised in violation of the provisions of this Act.

The slaughter regulations, which allow shooting animals on a farm where farm deer and farm fallow deer were kept, are very important for the breeders.[36] The condition is that the approval of the district (*powiat*) veterinarian is obtained. The decision to allow animals to be shot on the farm is issued on the basis of the provisions of the Act on Veterinary Inspection[37] and the Regulation of the European Community laying down specific hygiene rules for food of animal origin.[38]

According to the Act on the Protection of Animal Health and Combating Communicable Diseases,[39] deer and fallow deer kept in farm conditions are classified as slaughter animals. The owner of the herd is obliged to inform the veterinary services about the suspicion of a communicable disease. The regulations also specify the issues concerning the compensation to be paid to the breeder for the loss resulting from the need to carry out sanitary slaughter or loss as a result of treatments ordered by the decision of the Veterinary Inspection. The compensation is granted from the state budget and is equal to the market value of the animal. Another provision of the Act on the Protection of Animal Health and Combating Communicable Animal Diseases requires notification of a farm (in writing) at least 30 days before its commencement

[36] See, e.g. B. Dzierżyński-Cybulko, B. Fruziński, *Dziczyzna jako źródło żywności. Wartość żywieniowa i przetwórcza*, Warszawa 1997.

[37] Act on Veterinary Inspection of 29 January 2004 (Journal of Laws of 2010, No. 112, item 744, as amended).

[38] Regulation (EC) No. 853/2004 of the European Parliament and of the Council of 29 April 2004 laying down specific hygiene rules for food of animal origin, Official Journal L 139 of 30 April 2004, p. 55.

[39] Act on the Protection of Animal Health and Combating Communicable Infectious Diseases of 11 March 2004 (Journal of Laws of 2004, No. 69, item 625, as amended).

and informing the Veterinary Inspection about the suspension of the activity 7 days after its cessation. The farm is registered, numbered and supervised by a district (*powiat*) veterinarian. The principles of humanitarian protection apply to all forms of use and exploitation of free-living animals. Compliance with these principles is of paramount importance.

All over the world, including Poland, farming of cervids is developing dynamically. The first farm was established in 1956 at a Research Station of the State Academy of Sciences in Popielno for research purposes; and the first commercial farm – in 1986. It still functions today as a Research Station of the Polish Academy of Sciences.[40] Cervid farms are considered to be highly ecological forms of production, based on keeping animals in pastures. They offer the possibility of using areas that are not attractive for agriculture (lower class land, set-aside land or hilly areas), conducting multidirectional breeding (milk, meat, hides, antlers and musk), allowing healthy animals to be allocated to natural hunting ground. Cervid farms have a chance to maintain full animal welfare through extensive grazing, natural production cycles and feeding animals exclusively with fodder produced in the farm. In addition, cervids grazing on grassland contribute to landscape protection and the preservation of grassland ecosystems. They also do not degrade or burden the natural environment.

References

Borys B., Bogdaszewska Z., Bogdaszewski M., *Dynamiczny wzrost fermowej hodowli danieli i jeleni w Polsce*, „Wiadomości Zootechniczne" 2012, Vol. 50(1).

Bronowska K., *Ochrona środowiska w prawodawstwie polskim – rys historyczny*, „Ochrona Środowiska. Przegląd" 2002, Nr 1.

Chów i hodowla fermowa jeleniowatych, red. P. Janiszewski, Olsztyn 2014.

Dmochowski B., Krzywiński A., *Hodowla fermowa jeleniowatych – światowe trendy a sytuacja w Polsce*, „Przegląd Hodowlany" 1997, Nr 4.

Dzierżyński-Cybulko B., Fruziński B., *Dziczyzna jako źródło żywności. Wartość żywieniowa i przetwórcza*, Warszawa 1997.

Goettel M., *Sytuacja zwierzęcia w prawie cywilnym*, Warszawa 2013.

Grabowska G., *Europejskie prawo środowiska*, Warszawa 2001.

Grzybowski S., *System prawa cywilnego*, t. 1: *Część ogólna*, red. S. Grzybowski, Wrocław 1985.

Habuda A., Radecki W., *Przepisy karne w ustawach o ochronie zwierząt oraz o doświadczeniach na zwierzętach*, „Prokuratura i Prawo" 2008, Nr 5.

Helios J., Jedlecka W., *Zwierzęta w głównych religiach świata*, [in:] *Aspekty prawne, filozoficzne i religijne ochrony roślin i zwierząt – wybrane zagadnienia*, red. J. Helios, W. Jedlecka, A. Ławniczak, Wrocław 2016.

[40] B. Dmochowski, A. Krzywiński, *Hodowla fermowa jeleniowatych – światowe trendy a sytuacja w Polsce*, „Przegląd Hodowlany" 1997, Nr 4, pp. 17–18.

Janik C., *Status zwierzęcia w głównych systemach religijnych*, [in:] *Status zwierzęcia. Zagadnienia filozoficzne i prawne*, red. T. Gardocka, A. Gruszczyńska, Toruń 2012.
Karpowicz A., *Fermowy chów jeleni i danieli*, Karniowice 2012.
Listos P., Dylewska M., Gryzińska M., *Rys historyczny prawnych aspektów ochrony weterynaryjnej zwierząt w Polsce*, „Przegląd Prawa i Administracji" 2017, Vol. 108.
Mroczkowski S., Frieske A., *Prawna ochrona zwierząt gospodarskich*, Bydgoszcz 2015.
Mroczkowski S., Frieske A., *Regulacje użytkowania zwierząt*, Bydgoszcz 2016.
Mroczkowski S., Frieske A., *Prawna ochrona zwierząt wolno żyjących*, Warszawa 2017.
Piątowski J.S., [in:] *System prawa cywilnego*, t. 2: *Prawo własności i inne prawa rzeczowe*, red. J. Ignatowicz, Wrocław 1977.
Przyborowska-Klimczak A., *Ochrona przyrody. Studium prawnomiędzynarodowe*, Lublin 2004.
Raba M., *Karnoprawna ochrona zwierząt łownych*, „Prokuratura i Prawo" 2010, Nr 9.
Radecki W., *Zarys historii prawnej ochrony przyrody w Polsce*, [in:] *Prawne formy ochrony przyrody*, red. J. Sommer, Warszawa 1990.
Radecki W., *Ustawa o ochronie zwierząt. Komentarz*, Warszawa 2012.
Samsonowicz A., *Łowiectwo w Polsce Piastów i Jagiellonów*, Wrocław 1991.
Skrocka J., Szczepański A., *Prawo łowieckie. Komentarz*, Warszawa 1998.
Smaga Ł., *Ochrona humanitarna zwierząt*, Białystok 2010.
Sobczak J., *Ochrona zwierząt w prawie karnym*, [in:] *Status zwierzęcia. Zagadnienia filozoficzne i prawne*, red. T. Gardocka, A. Gruszczyńska, Toruń 2012.
Woleński J., *Podmiotowość zwierząt w aspekcie filozoficznym*, [in:] *Status zwierzęcia. Zagadnienia filozoficzne i prawne*, red. T. Gardocka, A. Gruszczyńska, Toruń 2012.
Zimny L., *Mały leksykon rolniczy*, Warszawa 1995.

Abstract: The principles of humanitarian protection apply to all forms of use and exploitation of animals, including free-living animals. The basic regulatory and protective institutions of the Hunting Law include, *inter alia*, the creation and maintenance of animal breeding centres. In 2001, due to the need to adapt Polish national legal regulations to the requirements of the European Union, the entire package of acts in the field of veterinary medicine and zootechnics was amended. As a result of the amendments, farming of free-living animals was granted the status of farming stock and slaughter animals. This made it possible to establish animal farms for commercial production of meat and hides without the obligation to obtain special permits. All over the world, including Poland, farming of wild animals, especially cervids, is developing dynamically. Cervid farms have a chance to maintain full animal welfare through extensive grazing, natural production cycles and feeding animals exclusively with fodder produced in the farm.

Keywords: wild animals; livestock farming; animal protection; hunting

MAŁGORZATA EWELINA SZYMAŃSKA

Maria Curie-Skłodowska University in Lublin, Faculty of Law and Administration
https://orcid.org/0000-0001-5976-496X
malgorzata.szymanska@poczta.umcs.lublin.pl

Livestock Welfare – Legal Aspects

The increase in ecological awareness in society observed since the second half of the 20th century leads to the development of legal regulations in the field of environmental protection, nature protection and animal protection. The basis for maintaining biological balance is the harmonious coexistence of people, plants and animals, and guaranteeing effective protection of the natural environment has a direct impact on the conditions of human existence. Creating and applying legal regulations can lead to the realization of balance in the natural environment. Diverse ways of using animals by man in the modern world determine the need to protect them by preventing excessive exploitation of animals and guaranteeing their welfare.

The topics of well-being are undertaken by various fields of science: economics, zootechnics, veterinary medicine, ethics, including law. The proper living conditions for animals are subject to legal regulation at the domestic, European and international level. They are intended to ensure appropriate treatment during production. The addressees of legal norms are both agricultural producers, entities involved in the transport of animals, their slaughter, as well as state administration bodies entrusted with control functions in this respect.[1] Welfare in relation to farm animals will be achieved through the selection and application of such techniques and production methods that take into account the quality of life of animals by eliminating to the maximum extent all unnecessary nuisances of their lives, and allow achieving the most favorable standard of living.

[1] E. Jachnik, *Zasada dobrostanu zwierząt we wspólnej polityce rolnej Unii Europejskiej*, „Studia Iuridica Lublinensia" 2017, Vol. 26, p. 289ff.

Citing statistical surveys, nearly half of Europeans (46%) identify well-being in terms of compliance with obligations for all animals, while slightly less (40%) associates well-being with farm animals only in terms of maintaining them and ensuring a better quality of life. In Poland, these proportions are 33 and 30%, respectively. Interestingly, the percentage of citizens who view animal welfare as going beyond animal protection alone (minimum farming conditions) is 18% in the EU and 14% in Poland, and is very close to those in which welfare is considered equivalent to protection (17% EU and Poland). A similar percentage of respondents believe that animal welfare contributes to better quality animal products (17% EU, 12% Poland). The vast majority of Europeans (94% EU, 86% Poland) believe that it is important to protect farm animal welfare. However, over half (57%) of EU respondents (36% in Poland) consider it "very important" and 37% as "rather important" (52% in Poland). Only a small proportion of respondents (4% EU, 7% Poland) do not recognize animal welfare as an important issue. More than four out of five (82%) respondents in the EU (77% in Poland) believe that the welfare of farmed animals should be better protected than now. Almost two-thirds (64%) of Europeans (59% of Poles) indicated that they would like to receive more information about the conditions of animal husbandry in their country. Europeans strongly argue that imported products from outside the EU should meet the same animal welfare standards as those used in the EU (93%). Nine out of ten respondents (90%) agree to set animal welfare standards around the world. Overall, 59% of EU citizens (44% of Poles) declare that they would be willing to pay more for products from animal-friendly farming conditions, with 35% (27% Poland) willing to pay up to 5% more and 16% (EU and Poland) from 6 to 10% more. Over half (52%) of EU citizens (41% of Poles) are looking for labels that identify animal welfare during breeding when purchasing products. It is worth noting that 47% of Europeans (37% of Poles) state that the current selection of animal-friendly food products in shops and supermarkets is insufficient; this result is 9 percentage points higher than in the previous survey.[2]

The discussion on animal welfare has involved specialists from various fields since the 20th century. The report prepared by the Brambell committee in 1965 is important for addressing the issue of animal welfare. Its authors postulated that animals domesticated by humans in terms of living conditions should have five freedoms: freedom from hunger, thirst and malnutrition by providing access to fresh water and food that will keep animals healthy and strong; freedom from psychological trauma and pain by providing adequate shelter and a place of rest; freedom from pain, wounds and diseases due to prevention, timely diagnosis and treatment; freedom to express natural behavior by providing adequate space, conditions and the company of other animals of the same species, and freedom from fear and stress by providing care

[2] See E. Herbut, J. Walczak, *Dobrostan zwierząt w nowoczesnej produkcji*, „Przegląd Hodowlany" 2017, Nr 5, p. 3ff.

and treatment that does not cause animal mental suffering. The above-mentioned freedoms have been defined as values that have become a commonly accepted basis for assessing well-being. They are the basis for legislative solutions and continuous research on improving the conditions for keeping farm animals from the point of view of their needs.[3]

The sensitivity of societies to the pain and suffering arising from the animal husbandry system has caused social pressure on politicians, international authorities and organizations that allow it to pass a number of legal acts regarding animal protection.

On 15 October 1975, the Declaration of Animal Rights was adopted under the auspices of UNESCO. Under the influence of the public opinion of European societies, the following conventions on animals were adopted by the Council of Europe for the adopted Declaration: the European Convention for the Protection of Animals kept for breeding purposes of 10 March 1976; the European Convention for the Protection of Animals for Slaughter of 10 May 1979; the European Convention on the International Transport of Animals of 13 December 1986, and the European Convention for the Protection of Pets of 13 November 1987.[4]

The signatories of the European Convention for the protection of Animals kept for Farming Purposes have committed themselves to establishing common legal standards for housing, feeding and care in accordance with the needs of animals and to ensuring their protection in the conditions of modern intensive farming systems. The convention also indicated the need to take into account the living requirements of animals when developing and implementing European rules. Its importance and the demands expressed in it were contained in Decision 78/923/EEC issued by the European Council. According to its content, the protection of animals is not in itself one of the objectives of the Community. However, the Council recognized a certain relationship between the protection of farm and farm animals and the functioning of the common market in the context of unequal conditions of competition. The latter was influenced by the heterogeneous legislative approach of the Member States, which resulted in divergent legal norms.

The issue of animal welfare at the Community level as a value was also raised in the Treaty of Amsterdam in 1997, which adopted the Additional Protocol on the protection and good treatment of animals. It had a significant impact on the subsequent legislative process. The European Parliament also adopted a Community action plan for the protection and welfare of animals in 2006. It stated that the protection of animals is an expression of humanity and a challenge for European civilization and culture, which was the inspiration for other official documents.

[3] I. Lipińska, *Z prawnej problematyki dobrostanu zwierząt gospodarskich*, „Przegląd Prawa Rolnego" 2015, Nr 1, p. 64ff.

[4] R. Kołacz, Z. Dobrzański, *Higiena i dobrostan zwierząt gospodarskich*, Wrocław 2006, p. 147.

The principle of animal welfare seems to have a special position in the system of values of the European legislator. This rule has been incorporated into the legal system under the Lisbon Treaty and is now expressed in Art. 13 of the Treaty on the functioning of the European Union. The commented provision is included in Title II of the Treaty, which sets out the general principles and objectives of the European Union. The catalog of general principles of the EU's functioning reflects the system of values approved by the EU legislator. As is the case with other adopted legislative solutions, the shape finally given to the principle of respect for animal welfare is the result of axiological currents clashing and a manifestation of frequently understood international law in the forum and this is undoubtedly EU law – a compromise.

According to the content of Art. 13, the principle of EU law is care for animal welfare in the formulation and implementation of those EU policies that, by their very nature, may have an impact on this welfare. The inclusion of the discussed principle in the circle of the principles of EU law was influenced by the development of the trend belonging to the so-called ideal nature protection, which is humane protection of animals. We define protection as motivated by non-economic reasons other than utilitarian ones. Humanitarian protection, i.e. based on the conviction that animals are capable of suffering, and inflicting suffering on them beyond a duly justified dimension is unethical and should be prohibited, is undoubtedly motivated by non-economic considerations.

Legislative solutions undertaken under EU law are often an expression of a compromise between competing values. It is no different in the case of respect for animal welfare, the implementation of which sometimes conflicts with religious customs, cultural heritage or regional traditions. The rule adopted in Art. 13 of the Treaty on the Functioning of the European Union is not an absolute rule. The legislator emphasizes that in the process of adopting and applying provisions regarding or taking into account animal welfare, account should be taken of tradition and legislation existing in the Member States to the extent that they may affect the understanding of animal welfare, and indicates the exceptions that may be made in the protection system due to the indicated elements, namely religious customs, cultural heritage or regional traditions.[5]

The most important EU secondary legislation regulating animal welfare issues is Regulation 1099/2009 on the protection of animals at the time of killing,[6] Regulation 1/2005 on the protection of animals during transport and related operations, and amending the Directorate 64/432 and 93/119 and Regulation 1255/97[7] and Directive 98/58 regarding the protection of farm animals.[8] The handling of individual categories

[5] M. Górski, J. Miłkowska-Rębowska, *Komentarz do art. 13 Traktatu o funkcjonowaniu Unii Europejskiej*, Warszawa 2012, p. 261.

[6] Official Journal of 2009 L 303/1.

[7] Official Journal of 2005 L 3/1.

[8] Official Journal of 1998 L 221/23.

of livestock is regulated by Directive 2008/119 concerning minimum standards for the protection of calves,[9] Directive 2008/120 regarding minimum standards for the protection of pigs[10] and directives regarding the protection and minimum standards in the farming of laying hens and chickens, including providing these animals with adequate surface.

The EU has one of the highest animal welfare regulatory standards in the world that includes general requirements for the farming, transport and slaughter of farm animals, and specific requirements for individual species. The Common Agricultural Policy provides an opportunity to increase farmers' level of knowledge about their legal obligations (through cross compliance, which makes the payments they receive under the common agricultural policy conditional on meeting minimum requirements), and encourages farmers to apply higher standards (through financial support provided in under rural development policy). Knowledge about animal welfare has grown rapidly in recent years and is of great interest to the media. The European Parliament adopted two resolutions (in 2010 and 2015) on EU animal welfare policy. Actions taken in the EU for animal welfare come from four main sources, each with a separate control mechanism.[11]

The common agricultural policy contributes to the achievement of animal welfare goals through cross compliance (making most payments to farmers under the common agricultural policy subject to compliance with minimum requirements) and the financing of animal welfare activities and projects. Cross compliance is a mechanism that makes the majority of payments under the Common Agricultural Policy[12] (about EUR 46 billion in 2016) conditional on compliance with a number of environmental rules, maintaining land in good agricultural condition, animal welfare and public and animal and plant health. It does not apply to small agricultural producers, who account for around 40% of the total number of farmers in the EU.[13] Payments under the common agricultural

[9] Official Journal of 2009, L 10/7.

[10] Official Journal of 2009, L 47/5.

[11] European Parliament resolution of 5 May 2010 on evaluation and assessment of the Community Action Plan on Animal Welfare 2006–2010 (2009/2202 (INI)) and European Parliament resolution of 26 November 2015 on the new strategy on animal welfare for 2016–2020 (2015/2957 (RSP)).

[12] Direct payments in accordance with Regulation (EU) No. 1307/2013 of the European Parliament and of the Council of 17 December 2013 laying down provisions on direct payments to farmers under support schemes under the common agricultural policy (OJ L 347, 20.12.2013, p. 608); and area and animal welfare payments under rural development in accordance with Regulation (EU) No. 1305/2013 of the European Parliament and of the Council of 17 December 2013 on support for rural development by the European Agricultural Fund for Rural Development (EAFRD) (OJ L 347, 20.12.2013, p. 487).

[13] Article 92 of Regulation (EU) No. 1306/2013 of the European Parliament and of the Council of 17 December 2013 on the financing, management and monitoring of the common agricultural policy (OJ L 347, 20.12.2013, p. 549). Small-scale agricultural producers are, however, not exempt from the obligation to comply with relevant animal welfare legislation and are subject to official controls to verify compliance with these provisions.

policy for farmers who do not meet these standards and requirements may be reduced by an amount of between 1 and 5% of the payment, or more if the non-compliance is intentional. In exceptional cases, the authorities may exclude farmers from aid schemes. The cross-compliance system does not cover all legal requirements regarding animal welfare, but includes provisions on the protection of calves and pigs and provisions laying down general requirements for all farmed animals.[14]

General requirements apply to all farms keeping livestock regardless of the species and number of animals are defined in Directive 98/58/EC concerning the protection of farmed animals. These requirements specify: the qualifications of the persons handling the animals; guarding animals; storage of documentation regarding the treatment and deaths of animals; ensuring freedom of movement for individuals; the quality of buildings and premises where animals are kept; ensuring species-specific environmental conditions for animals; animal nutrition; dealing with sick, injured animals and performing veterinary procedures and technologies used in breeding. The requirements for calves are additional guidelines that calf owners must comply with. These requirements are defined in Council Directive 2008/119/EC establishing minimum standards for the protection of calves, whereby a calf is considered to be an animal up to the age of 6 months, regardless of its sex. For calves, the requirements relate to: ensuring an adequate surface area; indoor environmental conditions; a ban on tying calves and muzzling them; controlling calves and caring for sick calves; proper feeding of calves. The requirements for pig farming in Council Directive 2008/120/EC40 establishing minimum protection standards for this species have been regulated separately. Pigs should be kept in groups due to intense social behavior. This causes maintaining such breeding conditions that in addition to maintaining proper surface and environmental conditions, there is no aggressive behavior, and veterinary treatments are performed on animals isolated from the group.

In maintaining animal welfare, which is dependent on the will of man, verification and supervision is an extremely important aspect. These issues were included in Parliament's Regulation No. 882/2004 of the European Council of 29 April 2004 on official controls carried out to check compliance with feed and food law as well as animal health and animal welfare rules. The basis of this normative act is the assumption that animal health and animal welfare are important factors, which contribute to improving the quality and safety of food. From this, Member States have an obligation to both enforce animal health and animal welfare rules and monitor compliance by operators at all stages of production, processing and distribution. Therefore, according to Art. 3 of Regulation 882/2004, official controls should be organized in each country. Rules for carrying them out and, above all, appointing the competent bodies were left to the

[14] A. Bartkowiak, Ł. Namyślak, P. Mielcarek, *Działania strategiczne w zakresie dobrostanu zwierząt jako element zrównoważonego rozwoju rolnictwa*, „Problemy Inżynierii Rolniczej" 2012, z. 1, p. 99ff.

national legislator. The basic legal act regulating the treatment of vertebrate animals, including farm animals, is the Act of 21 August 1997 on the Protection of Animals.[15] Each animal requires humane treatment. An animal as a living being, capable of feeling suffering, is not a thing – man owes him respect, protection and care (Art. 1(1) in conjunction with Art. 5 of the Act of 21 August 1997).

In accordance with Art. 2 point 1 of the Act of 29 June 2007 on the organization of breeding and reproduction of farm animals, used in the Act, livestock means: a) equidae: horse (*Equus caballus*) and donkey (*Equus asinus*), b) cattle: domestic cattle (*Bos taurus*) and buffaloes (*Bubalus budbalus*), c) deer: red deer (*Cervus elaphus*), sika deer (*Cervus nippon*) and fallow deer (*Dama dama*) kept in farm conditions to obtain meat or hides, if they come from rearing or closed breeding, referred to in the provisions of hunting law, or rearing or farming, d) poultry, e) pigs (*Sus scrofa*), f) sheep (*Ovis aries*), g) goats (*Capra hircus*), h) honey bee (*Apis mellifera*), i) fur animals. In accordance with Art. 4 point 2 of the Act on the Protection of Animals, "humane treatment of animals" means treatment that takes into account the animal's needs and provides care and protection. In Poland, the provisions on breeding and welfare requirements are set out in the Regulation of the Minister of Agriculture and Rural Development of 15 February 2010 on the requirements and procedures for keeping livestock for which protection standards have been laid down in EU regulations[16] (entered into force on 30 June 2010) and the aforementioned Act of 21 August 1997. In the case of other species of livestock or groups of cattle (e.g. cows and heifers), welfare provisions were set out in the Regulation of the Minister of Agriculture and Rural Development of 28 June 2010 on minimum conditions for keeping farmed animal species other than those for which protection standards have been laid down in EU legislation.[17] This regulation sets protection standards for: cattle (excluding calves), horses, sheep, goats, ostriches, guinea fowls, polar foxes, common foxes, raccoon dogs, mink, cowards, rabbits, chinchillas, nutria, deer, fallow deer and turkeys, geese and ducks on farms keeping at least 100 of these birds.[18]

The concept of animal welfare is not defined in any act of European law, although the term is increasingly used by both the European legislator, legislators of individual Member States and representatives of the doctrine. In 2008, the World Organization for Animal Health (OIE) developed the following definition of animal welfare: "Welfare is achieved if the animal is healthy, safe and well fed, does not suffer from discomfort and has the ability to express inborn (natural) behavior and does not experience such inconvenient conditions like pain, fear and anxiety". The concept of animal welfare has

[15] Journal of Laws of 2019, pos. 122, 1123.

[16] Journal of Laws of 2010, No. 56, pos. 344, as amended.

[17] Journal of Laws of 2019, pos. 1966.

[18] See A. Reinholz-Trojan, *Znaczenie wiedzy o zachowaniu zwierząt w kontekście dobrostanu na przykładzie bydła domowego (Bos taurus)*, [in:] *Zachowanie się zwierząt*, red. M. Trojan, Warszawa 2007.

been the subject of disputes in the doctrine of biological and veterinary sciences as well as ethics and law for several decades. The term is associated with such biological qualities as stress, tolerance, adaptation, fitness and homeostasis. The same indicates that the concept of well-being applies to the body as a whole and embraces all its functions, from psychological reactions (emotions, feelings) to phenomena occurring at the cellular level.[19] The following examples of attempts to define this term can be indicated: Barry Hughes defines well-being as a state of physical and mental health achieved in conditions of full harmony of the system in its environment.[20] According to David Sainsbury, well-being is a set of conditions that cover the biological and behavioral needs of the body, which allows the full disclosure of its genetic potential.[21] Donald Broom states that well-being is a state of the system in which an animal can cope with the circumstances surrounding it.[22]

Welfare is disturbed when the intensity of stimuli acting on physiological systems goes beyond the ability to maintain balance in these systems. A clear distinction should be made here between adaptive responses with stress symptoms and welfare threshold responses. The concept of well-being is not easy to define. This expression is very broad and there is no single, generally accepted definition. In general, well-being is defined either very generally, without going into details as in the case of Broom's proposal, which claims that it is a state in which the animal can cope with the environment in which it resides, or more precisely specified criteria are proposed by defining it as a set of environmental conditions satisfying not only the basic biological needs of the individual, but also, and perhaps above all, behavioral needs, allowing the expression of the entire genetic potential of the individual. Because even at a fairly low level of behavior organization, in instinctive activities, animals exhibit the accompanying emotions. Many researchers place special emphasis on the emotional aspect of well-being, and thus provide animals with the ability to express behavior with the participation of appetite stimuli while minimizing aversive situations.

According to the Farm Animal Welfare Code, developed by the English specialists from the Farm Animals Welfare Council, the concept of animal welfare can be reduced to the following points: freedom from hunger and thirst, freedom from discomfort, freedom from pain, injury and disease, freedom from fear and stress and the ability to express normal behavior. Freedom from pain, disability and disease – by guaranteeing animals prevention, early diagnosis and treatment. Freedom from hunger and thirst – by providing access to food and fresh water that guarantees proper physical condition and energy. Freedom from discomfort – by providing the right environment, including

[19] R. Kołacz, E. Bodak, *Dobrostan zwierząt i kryteria jego oceny*, „Medycyna Weterynaryjna" 1999, Nr 3, p. 147.

[20] B.O. Hughes, *Welfare of Intensively Housed Animals*, "Veterinary Research" 1988, No. 33, p. 123.

[21] D.W.B. Sainsbury, *Pig Housing and Welfare*, "Pig News and Information" 1984, No. 4, p. 337.

[22] D.M. Broom, *The Veterinary Relevance of Farm Animal Ethology*, "Veterinary Record" 1987, No. 17, p. 400.

shelter and a place to relax. Freedom from fear and anxiety – by providing the right conditions and treatment of animals, which allows animals to avoid mental discomfort, and freedom of expression of natural behavior by providing sufficient physical space, proper indoor conditions, and the company of other animals of the same species. Lack of assurance of those "five freedoms" can be described on a continuum from the individual's complete lack of coping with the environment to the shortage in this area indicating a low level of welfare, to the complete assurance of freedom for animals in this area.[23] In biological sciences, animal welfare science is currently one of the most comprehensive sciences, a discipline that includes behavioral ecology, evolutionism, neuroscience, animal behavior, genetics as well as cognitive behavior science and consciousness research.[24] Ensuring the welfare of animals concerns both the conditions in which the animals are kept, the conditions in which they are transported, and the methods of killing them. In the research and measurement of welfare since 1993, you can use the indications of the Farm Animal Welfare Council (FAWC), which proposed to measure well-being based on the so-called five freedoms. Well-being can take different levels – from good welfare to poor welfare, and the criteria for this assessment can be multi-threaded. When considering the above definitions, a reflection arises that welfare is basically not synonymous. The semantic capacity of this term inclines us to perceive the individual's situation in a holistic context and may be the direction of development of many scientific disciplines in the 21st century.

Livestock are the largest group of species at risk of poor welfare. This is mainly due to the economic focus on lowering agricultural production costs, low sensitivity and knowledge on the part of people taking care of animals. Initially, the minimum criteria were used to assess the level of farm animal welfare: ensuring constant access of animals to water – both in the pen, on the stand, or in the paddock and pasture; ensuring at least the minimum dimensions of the stands and the surface of the pen in which the individual is to be kept; proper functioning of the ventilation and proper lighting of livestock buildings; proper collection, storage and disposal of manure.[25]

The official control systems in place in the Member States play a key role in ensuring the proper enforcement of animal welfare standards. Good practices in this area, in particular regarding the consistency of official controls, and the need to focus on areas and entities conducting business are the basis for efficient control. Public interest in animal welfare has become particularly important in recent years, which is mainly due to the growing awareness of consumers regarding the methods of producing raw materials of animal origin. The attitudes presented are in line with the theory of

[23] K. Durka, J. Sikorska, M. Trojan, *Postrzeganie oraz przestrzeganie dobrostanu zwierząt laboratoryjnych, hodowlanych oraz przetrzymywanych w ogrodach zoologicznych w kontekście obowiązującego prawa*, „Wschodni Rocznik Humanistyczny" 2015, t. 11, p. 313ff.

[24] M.S. Dawkins, *A User's Guide to Animal Welfare Science*, "Trends in Ecology and Evolution" 2006, Vol. 2, pp. 77–82.

[25] K. Durka, J. Sikorska, M. Trojan, *op. cit*., 324ff.

democratic society development and the principle of the expanding circle, proposed by Peter Singer. This principle says that as humanity improves, the extent of human intimacy with the surrounding world increases. Currently, the area of kindness and empathy also directs people to the animal world. The voices of public opinion express the desire to limit animal suffering as much as possible and seek educational, legal and scientific ways to achieve this goal.[26]

The European legislator has recognized the need to ensure that animals are adequately adapted the welfare level and has set a minimum in a number of legal acts on animal handling standards so that physical and mental health and the general condition of the organism may have been determined to be sufficient for individual animal species. Animal welfare directly or indirectly determines their health and productivity, as well as the quality of animal products. Welfare issues are the subject of many interdisciplinary studies aimed at optimizing animal welfare, transport and slaughter. The protection of animal health is also an important element of protecting public health. Food safety control of animal origin monitors every link in its production chain, from herd monitoring, strategies for welfare protection through biosecurity and preventive and therapeutic programs to quality control of the final product. Attention should also be paid to the economic dimension of well-being, which translates into production efficiency. Future actions should develop farming methods in which the maximization of economic profit does not translate into the exploitation of animals.

References

Bartkowiak A., Namyślak Ł., Mielcarek P., *Działania strategiczne w zakresie dobrostanu zwierząt jako element zrównoważonego rozwoju rolnictwa*, „Problemy Inżynierii Rolniczej" 2012, z. 1.

Broom D.M., *The Veterinary Relevance of Farm Animal Ethology*, "Veterinary Record" 1987, No. 17.

Dawkins M.S., *A User's Guide to Animal Welfare Science*, "Trends in Ecology and Evolution" 2006, Vol. 2.

Durka K., Sikorska J., Trojan M., *Postrzeganie oraz przestrzeganie dobrostanu zwierząt laboratoryjnych, hodowlanych oraz przetrzymywanych w ogrodach zoologicznych w kontekście obowiązującego prawa*, „Wschodni Rocznik Humanistyczny" 2015, t. 11.

Górski M., J. Miłkowska-Rębowska, *Komentarz do art. 13 Traktatu o funkcjonowaniu Unii Europejskiej*, Warszawa 2012.

Herbut E., Walczak J., *Dobrostan zwierząt w nowoczesnej produkcji*, „Przegląd Hodowlany" 2017, Nr 5.

Hughes B.O., *Welfare of Intensively Housed Animals*, "Veterinary Research" 1988, No. 33.

Jachnik E, *Zasada dobrostanu zwierząt we wspólnej polityce rolnej Unii Europejskiej*, „Studia Iuridica Lublinensia" 2017, Vol. 26.

[26] W. Matuszewski, J. Walczak, *Dobrostan zwierząt gospodarskich – regulacje prawne i ich konsekwencje. Opracowanie monograficzne*, Kraków 2005, p. 3.

Kołacz R., Dobrzański Z., *Higiena i dobrostan zwierząt gospodarskich*, Wrocław 2006.
Kołacz R., Bodak E., *Dobrostan zwierząt i kryteria jego oceny*, „Medycyna Weterynaryjna" 1999, Nr 3.
Lipińska I., *Z prawnej problematyki dobrostanu zwierząt gospodarskich*, „Przegląd Prawa Rolnego" 2015, Nr 1.
Matuszewski W., Walczak J., *Dobrostan zwierząt gospodarskich – regulacje prawne i ich konsekwencje. Opracowanie monograficzne*, Kraków 2005.
Mroczkowski S., Frieske A., *Prawna ochrona zwierząt gospodarskich*, Bydgoszcz 2015.
Reinholz-Trojan A., *Znaczenie wiedzy o zachowaniu zwierząt w kontekście dobrostanu na przykładzie bydła domowego (Bos taurus)*, [in:] *Zachowanie się zwierząt*, red. M. Trojan, Warszawa 2007.
Sainsbury D.W.B., *Pig Housing and Welfare*, "Pig News and Information" 1984, No. 4.

Abstract: The article tackles the issue of farm animals welfare as a constituent factor of animal health protection and an important element of proper management of agricultural production. The starting point for the deliberations is an assumption that each animal is capable of suffering and should therefore be treated in a proper way. In the authoress' opinion the current legislation ensures animal welfare and covers in a comprehensive manner all respective issues starting from animal maintenance at a farm, through the transporting of animals, to the conditions of their slaughter. Further simplification and harmonisation of the existing legislative norms is nevertheless necessary, as well as formulation of clear principles of support to farmers who satisfy the basic requirements of animal welfare, and to those who maintain standards even higher than prescribed. Regulations regarding respect for animal welfare were shaped independently of the evolution of regulations concerning environmental protection (including in the context of sustainable development) and nature protection in other aspects. Undoubtedly, however, humane protection of animals is a fragment of comprehensively understood nature protection and thus broadly understood environmental protection.

Keywords: animal welfare; common agricultural policy; legal animal protection

WANDA KRUPA

University of Life Sciences in Lublin
Sub-Department of Animal Behavior and Welfare
https://orcid.org/0000-0002-0148-2115
wanda.krupa@up.lublin.pl

JADWIGA TOPCZEWSKA

University of Rzeszów
Department of Animal Production and Poultry Products Evaluation
https://orcid.org/0000-0003-3921-5116
jtopczewska@ur.edu.pl

MIROSŁAW KARPIŃSKI

University of Life Sciences in Lublin
Sub-Department of Animal Behavior and Welfare
https://orcid.org/0000-0003-3325-4894
miroslaw.karpinski@up.lublin.pl

Do Current Legal Provisions Guarantee a High Level of Welfare of Domestic Animals?

The changes in the process of defining animal welfare are associated with the progress in many research fields on the one hand, and with the increase in public awareness on the other hand. It is also increasingly being highlighted that the perception of welfare in relation to the Five Freedoms formulated by the Brambell Commission in the 1960s is highly inadequate in the case of both livestock and pet animals. In recent years, the methods for assessment of welfare have been revised in many countries to

take into account the quality of life criterion. These activities should be reflected in educational programs and legislative solutions.[1]

Keeping various species as companion animals is a relatively common phenomenon in Poland,[2] but the owners do not always have adequate knowledge of the species-specific requirements. This problem is also reported in the case of individuals involved in breeding/rearing of livestock animals. It is most often associated with the traditional approach to keeping, using, or feeding animals and sometimes with an attempt to maximize profits. It has to be considered whether the applicable law obliges owners to provide their animals with a high level of welfare.[3] Even the term "minimum living standards" for livestock may arouse considerable controversy. It also seems that the provisions on keeping companion animals define imprecisely the matter of ensuring a high level of welfare, mainly in the sense of meeting species-specific needs.[4] The current knowledge of animals' behavioral needs necessitates urgent verification of legislative solutions to ensure real animal protection and oblige keepers to provide animals with appropriate welfare.[5]

The basic legal act ensuring proper treatment of pet and livestock animals is the Animal Protection Act of 21 August 1997 with later amendments.[6] Undoubtedly, increasing attention is paid to the insufficient protection of animals in various areas. Provisions that were supposed to guarantee real protection of animals are often clearly incompatible with their species-specific needs. This is the case of livestock animals, where the regulation defining the "minimum living standards" legalizes practices that disregard many behavioral needs of animals. A good example is the horse; in this case, the minimum dimensions of boxes/stands have been established, but the obligation to provide these animals with movement, diet, and social contacts adequate to the age

[1] D.J. Mellor, N.J. Beausoleil, *Extending the 'Five Domains' Model for Animal Welfare Assessment to Incorporate Positive Welfare States*, "Animal Welfare" 2015, No. 24, pp. 241–253; T. Green, D.J. Mellor, *Extending Ideas about Animal Welfare Assessment to Include 'Quality of Life' and Related Concepts*, "New Zealand Veterinary Journal" 2011, Vol. 59(6), pp. 263–271; I. Veissier, A. Butterworth, B. Bock, E. Roe, *European Approaches to Ensure Good Animal Welfare*, "Applied Animal Behaviour Science" 2008, Vol. 113(4), pp. 279–297; D.M. Broom, *Animal Welfare: Concepts and Measurements*, "Journal of Animal Science" 1991, No. 69, pp. 4167–4175.

[2] *Zwierzęta w polskich domach*, http://www.tnsglobal.pl/archiwumraportow/files/2014/11/K.073_Zwierz%C4%99ta_w_polskich_domach_O10a-14.pdf [access: 01.10.2019].

[3] K. Adamczyk, T. Kaleta, J. Nowicki, *W obronie dobrostanu zwierząt w ujęciu zootechnicznym*, „Przegląd Hodowlany" 2017, Nr 1, pp. 1–3; E. Herbut, J. Walczak, *Dobrostan zwierząt w nowoczesnej produkcji*, „Przegląd Hodowlany" 2017, Nr 5, pp. 3–7.

[4] E. Herbut, J. Walczak, *op. cit*.

[5] M.B.M. Bracke, H. Hopster, *Assessing the Importance of Natural Behavior for Animal Welfare*, "Journal of Agricultural and Environmental Ethics" 2006, Vol. 19(1), pp. 77–89; A.C. Bayvel, T.J. Diesch, N. Cross, *Animal Welfare: A Complex International Public Policy Issue: Economic, Policy, Societal, Cultural and Other Drivers and Constraints. A 20-Year International Perspective*, "Animal Welfare" 2012, No. 21, pp. 11–18.

[6] The Animal Protection Act of 21 August 1997 (consolidated text, Journal of Laws of 2019, item 122).

and breed has been ignored.[7] As indicated in many studies, these three key factors may contribute to the development of severe behavioral disorders with a negative effect on the quality of animal life and health, which in turn significantly reduces their welfare.[8] In the case of riding horses, there may be many more welfare-deteriorating factors, but they are most often not considered by the legislator. Despite their ambivalence, the practices used are not regarded as bullying and/or cruelty, as in the case of the use of various aids (whips, spurs) or some parts of the bridle. Although the provisions and regulations of competitions or equestrian shows are supposed to protect horses from cruel treatment, they usually focus on such issues as the acceptable length of the whip or the type of mouthpiece.[9]

Transportation often poses a risk to livestock welfare, especially given the fact that the current Council Regulation (EC) No. 1/2005 on the protection of animals during transport and related operations does not refer to animal transport over distances lower than 50 km or to non-commercial transport.[10]

Effective legal protection of companion animals seems even more debatable. The only precise provisions have been formulated in the case of dogs; they prohibit keeping dogs tethered on a leach shorter than 3 m for more than 12 hours a day.[11] However, a question should be asked about the possibility of satisfying species-specific behavioral needs of dogs kept in a pen (even larger than a pen ensuring the possibility of "free change of body position"). A controversial issue in terms of the quality of life is the practice of keeping dogs in apartments by owners who spend a considerable amount of time out of home. The possibility to explore the environment, sniff, mark, or establish social relationships is a key factor ensuring a high level of welfare.[12]

The way cats are kept has changed considerably in recent years. Many of these animals are kept in houses without the possibility to leave. With the simultaneous lack of adequate enrichment of the environment, this may constitute a clear limitation of the possibility to satisfy the species-specific needs determining the level of welfare. There are increasing numbers of reports indicating that cats that are not allowed to go out of home more frequently exhibit various forms of behavioral disorders reducing

[7] Regulation of the Minister of Agriculture and Rural Development of 28 June 2010 on the minimum conditions for keeping farm animals other than those for which protection standards have been laid down in EU provisions (consolidated text, Journal of Laws of 2010, No. 116, item 778).

[8] D.S. Mills, K.J. Nankervis, *Equine Behaviour: Principles and Practice*, Oxford 1998.

[9] M. Uldahl, H.M. Clayton, *Lesions Associated with the Use of Bits, Nosebands, Spurs and Whips in Danish Competition Horses*, "Equine Veterinary Journal" 2019, Vol. 51(2), pp. 154–162.

[10] Council Regulation (EC) No. 1/2005 of 22 December 2004 on the protection of animals during transport and related operations, and amending Directives 64/432/EEC and 93/119/EC and Regulation (EC) No. 1255/97 (OJ EU L 3/1).

[11] The Animal Protection Act of 21 August 1997…

[12] K. Stafford, *The Welfare of Dogs*, Dordrecht 2007, pp. 8–11, 83–111; K. Svartberg, B. Forkman, *Personality Traits in the Domestic Dog (Canis familiaris)*, "Applied Animal Behaviour Science" 2002, No. 79, pp. 133–155.

the quality of their life. The failure to meet the species needs in pet animals is often caused by owners' insufficient knowledge.[13] In turn, precise legal regulations usually mobilize pet owners to comply. A good example is the Directive 2008/120/EC of 18 December 2008 on the need to use environmental enrichments in swine breeding.[14] As shown by practice, most owners use enrichments through various solutions.

In the case of some animal species, it is very difficult or impossible to provide conditions that would provide them with a high level of welfare. This is most often the case of various species of exotic animals, which in recent years have become an attractive alternative to dogs or cats.[15] They include, e.g. some species of the family Callitrichidae, which are becoming increasingly popular. Tamarins and marmosets have a very wide range of behavioral needs, which are impossible to satisfy in home conditions. These are needs related to the nutrition and function in a social group or adequate space. These animals live in groups (often composed of different species) with an established social structure, whereas in home conditions they are most often kept singly (exceptionally in pairs).[16] Their basic diet in natural conditions comprises fruits, resins, plant secretions, and insects, whereas the owners most frequently they feed them only with fruits and vegetables.[17] Such problems also affect other species of exotic animals, including those kept for commercial purposes. Parrot aviaries, which have gained popularity in recent years, are an unquestionable attraction. Yet, keeping birds living in nature in different conditions and having different food strategies and specific social needs in a relatively small space excludes a high level of welfare.[18]

These examples show only some areas where the applicable law does not impose the obligation to ensure a high level of animal welfare on owners or keepers. Therefore, it seems advisable to take actions aimed at introduction of issues related to animal protection into school curricula, to provide animals with adequate living standards guaranteeing welfare, and to change legislative solutions.

---

[13] I. Rochlitz, *A Review of the Housing Requirements of Domestic Cats (Felis silvestris catus) Kept in the Home*, "Applied Animal Behaviour Science" 2005, No. 93, pp. 97–109; Q. Sonntag, K.L. Overall, *Key Determinants of Dog and Cat Welfare: Behaviour, Breeding and Household Lifestyle*, "Revue scientifique et technique (International Office of Epizootics)" 2014, Vol. 33(1), pp. 213–220; S. Schroll, J. Dehasse, *Zaburzenia zachowania kotów*, Wrocław 2018.

[14] Council Directive 2008/120/EC of 18 December 2008 laying down minimum standards for the protection of pigs (OJ EU L of 18 February 2009, OJ EU L 09.47.5).

[15] R.A. Grant, V.T. Montrose, A.P. Wills, *ExNOTic: Should We Be Keeping Exotic Pets?*, "Animals" 2017, No. 7(6), p. 47.

[16] G. Anzenberger, B. Falk, *Monogamy and Family Life in Callitrichid Monkeys: Deviations, Social Dynamics and Captive Management*, "International Zoo Yearbook" 2012, No. 46, pp. 109–122.

[17] E. Bairrão Ruivo, *EAZA Husbandry Guidelines for Callitrichidae* (2nd ed.), Saint-Aignan 2010.

[18] M. Engebretson, *The Welfare and Suitability of Parrots as Companion Animals: A Review*, "Animal Welfare" 2006, No. 15, pp. 263–276; J. Karocka, *Wprowadzenie do problemu dobrostanu papug w papugarniach w Polsce*, https://docplayer.pl/53148124-Wprowadzenie-do-problemu-dobrostanu-papug-w-papugarniach-w-polsce-joanna-karocka-kwiecien-2017.html [access: 01.10.2019].

References

Adamczyk K., Kaleta T., Nowicki J., *W obronie dobrostanu zwierząt w ujęciu zootechnicznym*, „Przegląd Hodowlany" 2017, Nr 1.

Anzenberger G., Falk B., *Monogamy and Family Life in Callitrichid Monkeys: Deviations, Social Dynamics and Captive Management*, "International Zoo Yearbook" 2012, No. 46.

Bairrão Ruivo E., *EAZA Husbandry Guidelines for Callitrichidae* (2nd ed.), Saint-Aignan 2010.

Bayvel A.C., Diesch T.J., Cross N., *Animal Welfare: A Complex International Public Policy Issue: Economic, Policy, Societal, Cultural and Other Drivers and Constraints. A 20-Year International Perspective*, "Animal Welfare" 2012, No. 21.

Bracke M.B.M., Hopster H., *Assessing the Importance of Natural Behavior for Animal Welfare*, "Journal of Agricultural and Environmental Ethics" 2006, Vol. 19(1).

Broom D.M., *Animal Welfare: Concepts and Measurements*, "Journal of Animal Science" 1991, No. 69.

Engebretson M., *The Welfare and Suitability of Parrots as Companion Animals: A Review*, "Animal Welfare" 2006, No. 15.

Grant R.A., Montrose V.T., Wills A.P., *ExNOTic: Should We Be Keeping Exotic Pets?*, "Animals" 2017, Vol. 7(6).

Green T., Mellor D.J., *Extending Ideas about Animal Welfare Assessment to Include 'Quality of Life' and Related Concepts*, "New Zealand Veterinary Journal" 2011, Vol. 59(6).

Herbut E., Walczak J., *Dobrostan zwierząt w nowoczesnej produkcji*, „Przegląd Hodowlany" 2017, Nr 5.

Karocka J., *Wprowadzenie do problemu dobrostanu papug w papugarniach w Polsce*, https://docplayer.pl/53148124-Wprowadzenie-do-problemu-dobrostanu-papug-w-papugarniach-w-polsce-joanna-karocka-kwiecien-2017.html [access:01.10.2019].

Mellor D.J., Beausoleil N.J., *Extending the 'Five Domains' Model for Animal Welfare Assessment to Incorporate Positive Welfare States*, "Animal Welfare" 2015, No. 24.

Mills D.S., Nankervis K.J., *Equine Behaviour: Principles and Practice*, Oxford 1998.

Rochlitz I., *A Review of the Housing Requirements of Domestic Cats (Felis silvestris catus) Kept in the Home*, "Applied Animal Behaviour Science" 2005, No. 93.

Schroll S., Dehasse J., *Zaburzenia zachowania kotów*, Wrocław 2018.

Sonntag Q., Overall K.L., *Key Determinants of Dog and Cat Welfare: Behaviour, Breeding and Household Lifestyle*, "Revue scientifique et technique (International Office of Epizootics)" 2014, Vol. 33(1).

Stafford K.J., *The Welfare of Dogs*, Dordrecht 2007.

Svartberg K., Forkman B., *Personality Traits in the Domestic Dog (Canis familiaris)*, "Applied Animal Behaviour Science" 2002, No. 79.

Uldahl M., Clayton H.M., *Lesions Associated with the Use of Bits, Nosebands, Spurs and Whips in Danish Competition Horses*, "Equine Veterinary Journal" 2019, Vol. 51(2).

Veissier I., Butterworth A., Bock B., Roe E., *European Approaches to Ensure Good Animal Welfare*, "Applied Animal Behaviour Science" 2008, Vol. 113(4).

Zwierzęta w polskich domach, http://www.tnsglobal.pl/archiwumraportow/files/2014/11/K.073_Zwierz%C4%99ta_w_polskich_domach_O10a-14.pdf [access: 01.10.2019].

Abstract: The report is an attempt to indicate some issues related to animal handling and deterioration of animal welfare due to the lack of precise legislative solutions. The focus is placed mainly on the problem of keeping domestic animals, as the relevant regulations are formulated in a very general way in the Polish legal system, which may have a negative effect on the quality of animal life.

Keywords: animal welfare; Polish legal system

GRZEGORZ LUBEŃCZUK

Maria Curie-Skłodowska University in Lublin
Faculty of Law and Administration
https://orcid.org/0000-0001-5028-8020
lubenczuk@poczta.umcs.lublin.pl

Administrative Restrictions with Respect to Keeping Pet Animals in the Light of Polish Law and the Convention for the Protection of Pet Animals

People have long kept animals by their side, often allowing them to live in their own homes. Throughout the centuries, this has primarily aimed at using the skills of an animal or obtaining products of animal origin. Keeping animals as companions to humans has also had a long history and examples can be seen even in the earliest times, but on a mass scale it became popular as late as in the 20th century.[1] As the custom of keeping animals as companions became more widespread, legal regulations began to emerge, setting out the rules for keeping, reproduction and trade of such animals. Their aim is to protect animals in a humanitarian way, prevent their overpopulation, reduce animal homelessness, protect endangered animal species, as well as to ensure the safety of people and other animals.

* The publication was prepared within the research entitled "The Administrative Law Animal Protection Model" included in the application registered in the Funding Stream Service system administered by the National Information Processing Institute No. 2016/23/D/HS5/01820 and accepted for financing within the competition announced by the National Science Centre, Poland – "SONATA 12" on the basis of the decision made by the Director of National Science Centre in Kraków of 16 May 2017 (decision No. DEC-2016/23/D/HS5/01820, contract No. UMO-2016/23/D/HS5/01820).

1 Cf. Ł. Smaga, *Ochrona humanitarna zwierząt*, Białystok 2010, p. 232.

One of the most important regulations in this respect is the European Convention for the Protection of Pet Animals (hereinafter referred to as the Convention) adopted within the Council of Europe.[2] The Convention was signed on 13 November 1987 in Strasbourg and entered into force on 1 May 1992. The aim of the Convention is to ensure the well-being of animals, including above all pets kept for private pleasure and company.[3]

According to Art. 2(2) of the Convention, none of its provisions may affect the implementation of other instruments for the protection of animals or for the preservation of endangered species. It does not therefore preclude the application of the provisions of other international agreements aimed at the protection of animals, including, in particular, the Convention on International Trade in Endangered Species of Wild Fauna and Flora signed on 3 March 1973 in Washington,[4] the Convention on the Conservation of European Wildlife and Natural Habitats signed on 19 September 1979 in Bern[5] and the Convention on the Conservation of Migratory Species of Wild Animals signed on 23 June 1979 in Bonn.[6]

To date, 24 of the 47 Member States of the Council of Europe have ratified the Convention, including Austria, Azerbaijan, Belgium, Bulgaria, Cyprus, the Czech Republic, Denmark, Finland, France, Germany, Greece, Italy, Latvia, Lithuania, Luxembourg, Norway, Portugal, Romania, Serbia, Spain, Sweden, Switzerland, Turkey and Ukraine. The Netherlands has also signed the Convention, but has not ratified it to date.

Poland has not signed the Convention and the protection of pets in the Polish legal system is based on the provisions of the Animal Protection Act of 21 August 1997 (hereinafter referred to as APA).[7] What has been indicated as the reason for the lack of ratification is the fact that the scope of the Convention has been partially specified in the provisions of APA, which in some cases are more stringent than the provisions of the Convention, and also that the possible binding by the provisions of the Convention will result in the need to make significant changes to these provisions, including the

[2] The European Convention for the Protection of Pet Animals signed in Strasbourg on 13 November 1987, https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/090000168007a67d [access: 20.01.2010].

[3] https://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/125 [access: 20.01.2020].

[4] The Convention on International Trade in Endangered Species of Wild Fauna and Flora signed in Washington on 3 March 1973, Official Journal of the EU L, 75, p. 4.

[5] The Convention on the Conservation of European Wildlife and Natural Habitats signed in Bern on 19 September 1979, Journal of Laws 1996, No. 58, item 263.

[6] The Convention on the Conservation of Migratory Species of Wild Animals signed in Bonn on 23 June 1979, Official Journal of the EU L 1982 No. 210, p. 11; Explanatory Report to the European Convention for the Protection of Pet Animals, European Treaty Series, No. 125, p. 4.

[7] The Animal Protection Act of 21 August 1997 (consolidated text, Journal of Laws of 2019, item 122, as amended).

introduction of a universal system for the identification and registration of dogs.[8] It has also been stressed that it is necessary to carry out the assessment of the impact of such measures and broad consultations (also with local authorities), which will make it possible to determine the scope of necessary changes in the current regulations and to indicate sources of financing new tasks, resulting from the Convention, for state bodies.[9] This raises the need to analyse the compliance of the regulation contained in the provisions of APA, including in particular those in Chapter 2 relating to pets, with the provisions of the Convention.

The starting point for both regulations is the definition of pets in their provisions. In the light of Art. 1(1) of the Convention, a pet animal is defined as any animal which is kept or intended to be kept for private enjoyment and companionship of people, including, in particular, animals kept at home. In accordance with Art. 4(17) of APA, whenever the Act refers to pet animals, it is understood to mean animals traditionally staying with people at home or in other appropriate accommodation, kept as companions.

The most important element of the definitions in both cases is "keeping the animal as a human companion". On the basis of the definition in Art. 4(17) of APA, it is often pointed out that a pet is an animal kept in a house or a flat to satisfy human emotional needs, as a human companion or some form of a decoration or attraction of the household.[10] It seems that the phrase "keeping an animal for private enjoyment and companionship" used in Art. 1(1) of the Convention should be understood in the same way.

In contrast to the definition in Art. 4(17) of APA, which stipulates that only an animal "traditionally residing with a human being in his or her home or in another suitable place" can be considered a pet animal, the definition in Art. 1(1) of the Convention states that a pet animal is understood to mean any animal kept for pleasure or companionship, including in particular an animal kept indoors. The reference in the definition in Art. 4(17) of APA to the criterion of "traditionally residing with a human being in his or her home" raises important questions. It can in many cases be difficult to determine which animals "traditionally reside with a human being in his or her home". In particular, multiculturalism and the progressive globalisation of the modern world may be an obstacle in this respect. While the presence of certain animals (e.g. dogs) under one roof with humans is obvious in some parts of the world,

[8] Letter of the Minister of Agriculture and Rural Development of 21 October 2016, ref. No. DSPiO. WI.4810.436.2016, containing a response to parliamentary question No. 6834 of 20 October 2016 on the ratification of the European Convention for the Protection of Pet Animals.

[9] *Ibidem*.

[10] Judgement of the Supreme Administrative Court of 8 November 2012, II OSK 2023/12; judgement of the Supreme Administrative Court of 29 April 2009, II OSK 1953/08; judgement of the Voivodeship Administrative Court in Gorzów Wielkopolski of 4 December 2014, II SA/Go 784/14; judgement of the Voivodeship Administrative Court in Lublin of 10 November 2016, II Sa/Lu 656/16.

in others it can be assessed negatively (e.g. in terms of religious beliefs). Secondly, it is important to note that habits of keeping different animal species in homes are evolving rapidly. In this context, the legal doctrine points out that pets are also those animals that people only recently started to keep, under the influence of a certain fashion,[11] and that the statutory definition of pets is open and subject to expansion as the circle of animals kept by humans as companions expands.[12] While accepting the accuracy of both statements, it should be pointed out that even those animal species that are kept by humans as companions very rarely, or even exceptionally, if they are kept as companions, should be in any case treated as pets despite the fact that they do not meet the requirement under Art. 4(21) of APA to belong to animals that have traditionally been kept with humans in their home or other appropriate accommodation. If interpreted differently, such situations would remain outside the existing legal framework. For these reasons, the solution adopted in Art. 1(1) of the Convention should be considered much more appropriate. The reference to the element of keeping an animal at home appears in this case to be merely an indication to assess in what role an animal is kept, but determining this circumstance is not necessary to qualify an animal as a pet.

In the light of Art. 1(1) of the Convention, a pet animal is understood to mean not only an animal which is kept by humans for their pleasure and company, but also intended for such purposes. Art. 2(1) of the Convention states which are parties to the Convention are required to implement the provisions of the Convention with regard to companion animals kept in households, in establishments for trading and commercial breeding, in animal sanctuaries, and also with regard to stray animals. The definition contained in Art. 4(17) of APA does not explicitly refer to the category of animals which are intended to be kept as companions to humans, but the content of the provisions of Chapter 2 of APA, which lay down, *inter alia*, restrictions on the reproduction, placing on the market and acquisition of pet animals, makes it clear that this definition should also cover animals which are intended to be kept as companions to humans within the meaning of Art. 1(1) of the Convention, but can only potentially be acquired for that purpose.

On the basis of the definition in Art. 4(17) of APA, judicial decisions have expressed the view that an animal becomes a pet animal only when emotional ties are established between a human being and that animal and the human herd grants it the right to live with people in their immediate vicinity as a member of the herd, and that a pet animal is treated by its members as a favourite (i.e. an individual which is liked more than other individuals of the same species, a pupil or a foster child) or a member of the family herd.[13] The Preamble to the Convention also points to the

[11] W. Radecki, *Ustawa o ochronie zwierząt. Komentarz*, Wrocław 2003, p. 29.

[12] K. Kuszlewicz, *Prawa zwierząt. Praktyczny przewodnik*, Warszawa 2019, p. 82.

[13] Judgement of the Supreme Administrative Court of 29 April 2009, II OSK 1953/08, Legalis.

element of pets remaining in a special bond with people. However, it seems that the existence of an emotional bond between a human being and an animal cannot be taken into account for the qualification of an animal as a pet animal either under the definition in Art. 4(17) of APA or Art. 1(1) of the Convention. This would lead to the conclusion that the restrictions and requirements for keeping pets laid down in the provisions of APA and the Convention only apply to animals for which an emotional bond with a particular trait has been established and which have therefore acquired a specific status as a member of the family herd. Leaving aside the difficulty of how to determine the existence of such a bond in specific situations, it should be noted that in many cases such a bond may not exist at all (e.g. for the offspring of an animal kept as a pet, or for animals which are intended for sale and are pets as defined in Art. 1(1) of the Convention), or it may be of completely differently nature, possibly marked by negative emotions. Such a situation must not mean an exemption from the obligations related to keeping a pet animal.

For the same reasons, it should be concluded that, for the purposes of classifying an animal as a pet animal within the meaning of either of the two definitions, the species it belongs is irrelevant. On the basis of the definition in Art. 4(17), judicial decisions explicitly indicate that reptiles, birds and insects may possibly be considered to be pet animals.[14] Animals occurring in nature as free-living (wild) within the meaning of Art. 4(21) of APA, including exotic animals, may also be kept as human companions. Contrary to the position presented in the doctrine, animals of predatory or venomous species, dangerous for human or animal life, may also be considered pets.[15] It should be assumed that in every case when animals are kept as human companions they should be treated as pets. Also the definition in Art. 1(1) of the Convention does not preclude that animals which are wild in nature may be kept as pets. Although the Preamble to the Convention states that the keeping of specimens of wild fauna as pet animals should not be encouraged, this stipulation does not amount to a prohibition.

The provisions of the Convention do not prohibit the keeping of wild animals. They only impose an obligation on the parties to the Convention to pay particular attention to the possible negative consequences for the health and well-being of wild animals if they are acquired and kept as pets. This should be done through the development of information and education programmes so as to promote awareness and knowledge concerning the keeping, breeding, training, and trading of pet animals in accordance with the requirements of the Convention. There should be no doubt that a wild animal kept as a pet animal is protected under the Convention. In this context, it should be concluded that the view in the doctrine – that the provisions of APA do not provide

[14] Judgement of the Voivodeship Administrative Court in Lublin of 10 November 2016, II Sa/Lu 656/16.

[15] For a different view, see W. Radecki, *Ustawa o ochronie zwierząt...*, p. 29 and idem, *Ustawy o ochronie zwierząt, o doświadczeniach na zwierzętach – z komentarzem*, Warszawa 2007, p. 47.

the slightest basis for differentiating the situation of animals from a humanitarian point of view according to their degree of aggressiveness or the risk they pose to their environment[16] – remains fully valid also under the Convention.

Taking into account both definitions, it should be concluded that both the definition in Art. 4(17) of APA and the definition in Art. 1(1) of the Convention make it possible to classify animals which are kept as companions to humans and at the same time act as livestock or animals used for special purposes to both categories simultaneously and consequently to apply to them, to the relevant extent, the provisions relating to specific categories of animals.[17] Under both definitions, it should also be possible to change the status of an animal during the period when it is kept.

From the point of view of the scope of application of the regulation contained in the provisions of APA, it is important that according to its Art. 2(1), the provisions of this Act regulate only the treatment of vertebrate animals. Thus, keeping, raising, breeding of and trade in pet animals which are invertebrates remain outside the scope of the regulation of APA. The Convention does not provide for an analogous exclusion, and in view of Art. 1(1) of the Convention, according to which a pet is every animal kept in a household for enjoyment and companionship or intended for such a purpose, it should be assumed that the rules of keeping animals specified in the Convention also apply to invertebrate animals.

When laying down the rules on the keeping of pets, Art. 6 of the Convention introduces a restriction that an animal may only be sold to a person under 16 years of age if the legal guardian of that person gives his or her consent to purchase the animal. As a rule, the provisions of Polish law do not make the acquisition of the right to an animal dependent on having any specific qualifications.[18] In particular, they do not explicitly require a certain age. It should be noted, however, that in the light of Art. 12 of the Act of 23 April 1964 – Civil Code,[19] persons who have not attained 13 years of age do not have capacity for legal acts and must not perform legal acts. According to Art. 15 of the Civil Code, minors who have attained 13 years of age have limited capacity for legal rights, and pursuant to Art. 17 of the Civil Code, subject to the exceptions provided for by the law, to be valid, a legal act whereby such a person assumes an obligation requires the consent of his or her statutory representative. The most important exception to the rule, according to which the validity of a legal act whereby a person without full capacity for legal acts assumes an obligation requires the consent of his or her statutory representative, is the possibility, pursuant to Art. 20 of the Civil Code, that such a person may, without the consent of his or her statutory

[16] Cf. Ł. Smaga, *op. cit.*, p. 232.

[17] For a different view, see K. Kuszlewicz, *op. cit.*, p. 82. The author points out that on the basis of the provisions of APA, the concepts of a pet animal and a farm animal are disjoint, and also that if an animal has a status of a pet, it is not a farm animal.

[18] Cf. M. Goettel, *Sytuacja zwierzęcia w prawie cywilnym*, Warszawa 2013, p. 61.

[19] The Act of 23 April 1964 – Civil Code (consolidated text, Journal of Laws of 2019, item 1145).

representative, execute contracts of a type commonly executed in minor current day-to-day matters. It seems that the activities related to the purchase of an animal, due to the wide range of requirements as regards keeping it, should not be included in such contracts, but it cannot be excluded that a different classification may be accepted in a specific situation. In order to exclude the possibility of an animal being purchased by a person under 16 years of age without the consent of the statutory representative, an appropriate regulation should be introduced into APA. It is worth noting that neither the Convention nor APA prejudges the possibility to purchase animals by persons who have been partially or fully incapacitated. It is also important to note that the way an animal is acquired and the legal basis for controlling it are irrelevant from the point of view of both regulations.

Notwithstanding all the above considerations, the provisions of the Convention do not seem to exclude the possibility of introducing additional restrictions on keeping animals as human companions. In the light of Polish law, such restrictions include, *inter alia*: the total prohibition, under Art. 73 of the Act of 16 April 2004 on Nature Conservation,[20] of owning and keeping live animals of species which, for reasons of natural aggressiveness or biological properties, may constitute a serious threat to human life or health and the possibility of keeping animals of other species dangerous to life and health only on the basis of an administrative decision repealing such a prohibition; the obligation, under Art. 10 of APA, to obtain a permit to keep dogs belonging to breeds considered to be aggressive; the obligation, laid down in Art. 10 of the Hunting Law,[21] to obtain a permit to keep greyhounds and their crossbreeds, and also restrictions, under the provisions of APA and, adopted on its basis, the Regulation of the Minister of the Environment on the Protection of Animal Species of 16 December 2016,[22] concerning the possession of animals, indicated in the Annexes to this Regulation, which belong to species under strict or partial protection.

Art. 4(1) of the Convention puts the responsibility for the health and well-being of a pet animal on the person who owns it or has agreed to take care of it, while Art. 3(1) of the Convention prohibits causing unnecessary pain, suffering or distress to a pet animal. There are no provisions in APA which would be a direct equivalent to the above-mentioned regulation with regard to pets. However, Art. 1(1) of APA provides that a person owes respect, protection and care to the animal, while Art. 6(1a) of APA prohibits the abuse of animals, which according to Art. 6(2) of APA, is understood as inflicting or knowingly allowing pain or suffering to an animal. In

[20] The Nature Conservation Act of 16 April 2004 (consolidated text, Journal of Laws of 2018, item 1614, as amended).

[21] The Hunting Law of 13 October 1995 (consolidated text, Journal of Laws of 2018, item 2033, as amended).

[22] The Regulation of the Minister of the Environment on the Protection of Animal Species of 16 December 2016 (Journal of Laws of 2016, item 2183).

this respect, the regulation contained in APA and the regulation in the Convention should be considered equivalent.

Art. 4(2) of the Convention puts on any person who keeps a pet animal or has agreed to look after it the obligation to provide it with accommodation, care and attention, taking account of the ethological needs of the animal in accordance with its species and breed, in particular to give it suitable food and water; to provide it with adequate opportunities for exercise and take measures preventing its escape. What might be considered the equivalent of this regulation is Art. 9(1) of APA, which requires any person who keeps a pet animal to provide it with space protecting it from cold, heat and precipitation, with access to daylight and allowing it to change its position freely, suitable animal feed and permanent access to water, as well as Art. 9(2) APA, which prohibits keeping a pet on a tether shorter than 3 m and permanently for more than 12 hours per day, or causing it injury or suffering and not providing it with the necessary movement. The scope of obligations imposed by Art. 9 of APA on a person keeping a pet animal does not fully coincide with the obligations set out in Art. 4(2) of the Convention. However, the regulation in APA may be considered as more detailed and even more far-reaching than the requirements set out in the Convention. In accordance with Art. 6(2) of APA, keeping animals in inadequate living conditions, including keeping them in a state of gross negligence or sloppiness, or in spaces or cages which make it impossible for them to maintain their natural position; keeping animals without adequate food or water for a period which exceeds the minimum needs appropriate to the species, and using harnesses, tethers, frames, ties or other devices which force an animal to remain in an unnatural position causing unnecessary pain, injury or death, constitutes a sign of abuse of an animal which, in the light of Art. 35(1a) in conjunction with (1) of APA constitutes an offence punishable by imprisonment of up to 3 years

Art. 10(1) and (2) of the Convention prohibits surgical operations designed to change the appearance of an animal for purposes other than medical treatment, unless they are necessary for medical reasons, are intended for the welfare of the animal or serve to prevent reproduction. This provision excludes in particular the possibility of tail clipping, ear clipping and the removal of claws and fangs. At the same time, Art. 10(3) of the Convention requires that medical procedures during which an animal may experience serious pain must be performed under anaesthesia, applied only by or under the control of a veterinary surgeon, and Art. 10(4) of the Convention requires the performance of procedures during which anaesthesia is not necessary by persons qualified to do so under the national legislation of the state concerned. The equivalent of this regulation is the prohibition, specified in Art. 6(2)(1) of APA, of intentional injuring or mutilating an animal which does not constitute a lawful treatment or procedure, as well as any treatment aimed at changing the animal's appearance and performed for purposes other than saving its health or life, and in particular the cutting of dogs' ears and tails (docking); the prohibition, under Art.

6(2)(1) and (1a) of APA, on marking warm-blooded animals by burning or freezing and the prohibition, under Art. 6(2)(8) of APA, on the performance of surgical procedures and operations by persons without the required licence or in contravention of the medical and veterinary practice, without taking the necessary precautions and in a way that causes avoidable pain. In the light of the provisions of APA, each of these behaviours is treated as a manifestation of animal abuse and constitutes an offence for which there is a penalty of imprisonment of up to 3 years pursuant to Art. 35(1a) in conjunction with (1) of APA.

Art. 5 of the Convention provides that any person who selects a pet animal for breeding should take into account the anatomical, physiological and behavioural characteristics which are likely to put at risk the health and welfare of either the offspring or the female parent. The provisions of Polish law do not contain a similar regulation and, as a rule, do not introduce any requirements or restrictions on the selection of pets for breeding and reproduction. However, what might be considered a restriction in this respect is the prohibition, laid down in Art. 119a of the Nature Conservation Act of 16 April 2004,[23] on crossbreeding animals under strict protection, alien species of animals and also animals obtained as a result of crossbreeding without the permission of the General Director of Environmental Protection. Neither the Convention nor APA impose restrictions on the use of artificial selection methods in view of the possibility of the genes which may be harmful are perpetuated in the population, including in particular methods based on the mating of related animals.[24]

Art. 7 of the Convention provides that a pet animal should not be trained in a way that might be detrimental to its health, in particular by forcing it to exceed its natural capacities or strength or by employing artificial aids which cause injury or unnecessary pain, suffering or distress. In addition, Art. 9(1) of the Convention stipulates that a pet animal may be used in advertising, entertainment, exhibitions, competitions and similar events only on the condition that the organiser has created appropriate conditions for the pet animals to be treated in accordance with the requirements of Art. 4(2) concerning suitable accommodation, care, attention and ethological needs and that the pet animals' health and welfare are not put at risk. Art. 9(2) prohibits the use of any substances, treatments or devices for the purpose of increasing or decreasing its natural level of performance during competition or at any other time when this would put at risk the health and welfare of the animal. The provisions of APA regulate training rules only for animals used in entertainment, shows, films, sports and for special purposes. Under this regulation such animals are treated as a separate category. However, it seems that the animal training rules set out in those provisions should

[23] The Nature Conservation Act of 16 April 2004…

[24] For more about the essence of such restrictions, see E. Niemiec, M. Nowakowska, *Hodowla rasowych psów i kotów a ochrona zwierząt – analiza polskich rozwiązań prawnych*, „Przegląd Prawa i Administracji" 2017, Vol. 108, pp. 91–93.

apply in all cases where an animal is undergoing training, including the training of pets. In particular, what should apply in each such case is the requirement in Art. 15(1) of APA that conditions of performances, training and exercises should not endanger the life and health of the animals or cause them suffering. The same is true about the prohibition in Art. 17(4) of APA on forcing animals to perform activities which cause pain or are incompatible with their nature.

Art. 3(2) of the Convention prohibits abandoning a pet animal. In this respect, it should be pointed out that, in accordance with Art. 6(2)(11) of APA, abandoning an animal is to be regarded as abuse and penalised on the basis of Art. 35(1a) of APA. Moreover, the doctrine takes the view that under the current state of law the possibility to dispose of the ownership of an animal by abandoning it with the intention of losing the property rights is excluded, as such an act would be sanctioned by absolute nullity as being contrary to the Act.[25] This means that by abandoning an animal one cannot release oneself from liability.

Art. 11 of the Convention specifies the circumstances in which it is admissible to kill a pet animal, stipulating that it is admissible when the suffering of the animal cannot be rapidly interrupted by a veterinarian or other competent person, or in any other emergency situation defined by the laws of a state which is a party to the Convention. In accordance with the provisions of the Convention, an animal may only be killed by a veterinarian or other competent person, and it should be done in a manner which minimises the physical and mental suffering of the animal. As provided for in Art. 11(1) of the Convention, except in emergencies, it is necessary to use methods which cause immediate loss of consciousness and death; starting with deep anaesthesia, followed by step which will ultimately and certainly cause death of the animal, and the person responsible for killing the animal should ensure that the animal is dead before its body is disposed of. At the same time, Art. 11(2) of the Convention prohibits methods of killing which consist in drowning and suffocation, unless they begin with deep anaesthesia or ultimately and certainly cause death of the animal. It also prohibits the use of any poisonous substance or drug, the dose and application of which do not cause immediate loss of consciousness and death or do not allow deep anaesthesia, followed by a step which will ultimately and certainly cause death. In addition, Art. 11(2) of the Convention prohibits electrocution, unless it causes immediate loss of consciousness. Art. 6(1) of APA introduces a general ban on the killing of animals, allowing an animal to be killed only in enumerated cases. At the same time, Art. 33(1) stipulates that an animal may only be killed in a humanitarian manner by inflicting a minimum of physical and psychological suffering. As regards the methods of killing animals, Art. 33(4)(1) of APA provides that, where killing is necessary without delay, it shall be carried out by administering an anaesthetic by a veterinarian. Art. 33(4)

[25] M. Nazar, *Normatywna dereifikacja zwierząt – aspekty cywilnoprawne*, [in:] *Prawna ochrona zwierząt*, red. M. Mozgawa, Lublin 2002, p. 136.

(1) of APA also allows an animal to be shot by a person authorised to use a firearm, but this possibility applies only to free-living (wild) animals. This regulation should be considered to be in compliance with the provisions of the Convention.

Art. 12 of the Convention allows the taking legislative and/or administrative measures aimed at the reduction of the number of stray animals when a country which is a party to the Convention considers the number of such animals a problem. Such measures must be applied in a such a way so as not to cause avoidable pain, suffering or distress. If animals are to be captured, it should be done with the minimum of physical and mental suffering; if the captured animals are to be kept or killed, it must be done in accordance with the requirements of the Convention with regard to keeping and killing of animals. A regulation concerning handling of stray animals was included in Art. 11–11a of APA and in the Regulation of the Minister of Internal Affairs and Administration of 26 August 1998 on the principles and conditions of capturing stray animals.[26] These regulations include the prevention of animal homelessness in the own tasks of *gmina* districts and impose on them an obligation to establish, by 31 March each year, a programme of care for stray animals and prevention of animal homelessness, including in particular: providing stray animals with a place in an animal shelter; care of free-living cats, including their feeding; capturing stray animals; obligatory neutering or castration of animals in shelters; searching for owners for stray animals; euthanising blind litters; indicating a farm to provide space for farm animals; providing round-the-clock veterinary care in cases of road events involving animals. According to para. 7 of the aforementioned Regulation, devices and measures used to capture stray animals must not pose a threat to their life and health or cause them suffering. Despite the transfer of the powers to determine the principles of care for stray animals and prevention of homelessness of animals to the level of *gmina* districts, the regulation in question should be considered to be in line with the requirements arising from the Convention and it should be assumed that in the event of its ratification no more far-reaching changes would be needed in this respect.

Art. 12(b) of the Convention requires the states which are parties to the Convention to consider the introduction of a system of clear identification of dogs by means causing little or no enduring pain, suffering or distress, such as tattooing as well as recording the numbers in a register together with the names and addresses of their owners; a system of reducing the unplanned breeding of dogs and cats by promoting the neutering of these animals and encouraging finders of stray dogs and cats to report the fact that an animal has been found to the competent authorities. Under the current state of Polish law there is no obligation to mark pet animals. Art. 11a(3) only stipulates that the programs for care of stray animals and prevention of homelessness of animals adopted annually by *gmina* councils may include a plan for

[26] The Regulation of the Minster for Internal Affairs and Administration of 26 August 1998 on the principles and conditions of capturing stray animals (Journal of Laws of 1998, No. 116, item 753).

marking animals in a given *gmina* district. In practice, such plans are rarely developed. The following are indicated as the reasons for not undertaking such activities: the lack of justification for only some *gmina* districts to engage in them; the fact that it is not obligatory to introduce them, the lack of sufficient financial resources and the lack of legal basis for *gmina* districts to co-finance activities with regard to animals which have owners.[27] At the same time, the necessity to introduce a statutory obligation to mark and register animals in a uniform registration system operating in the whole country has been pointed out for many years.[28]

Art. 8 of the Convention introduces the requirement that any entity which is engaged in trading, commercial breeding or operating an animal sanctuary is obliged to declare this to the competent authority, specifying: the species of animals involved; the person responsible and his or her knowledge; a description of the premises and equipment used. Under this provision, such activities may be carried out only if the person responsible has the knowledge and abilities required for the activity either as a result of professional training or of sufficient experience with pet animals and if the premises and the equipment used for the activity comply with the requirements set out in Art. 4. According to Art. 8(4) of the Convention, the competent authority, on the basis of the declaration made by the applicant, should determine whether or not these conditions have been fulfilled. If these conditions are not met, the competent authority should have the possibility to recommend appropriate changes and, if necessary for the welfare of the animals, it should prohibit the commencement or continuation of the activity. The authority in question should supervise whether or not the above-mentioned conditions are met. The current provisions of Polish law do not subject the activity of selling animals to any form of economic restrictions, they only prohibit the operation of markets and fairs where pets are sold, the marketing and purchase of pets at markets and fairs, and the marketing and purchase of dogs and cats outside the places where they are raised or bred. Taking into account the requirements arising from Art. 8 of the Convention and the principles of the regulation of business activity set out in the provisions of the Law of Entrepreneurs of 6 March 2018,[29] it seems reasonable to propose that economic activity is subject to the obligation to obtain a permit or at least to obtain an entry in the register of regulated activity.

Art. 14 of the Convention imposes on the states which are parties to the Convention the obligation to support information and education programmes promoting awareness and knowledge concerned with the keeping, breeding, trading and training of pet animals in accordance with the requirements of the Convention among organisations

[27] The Supreme Audit Office, Regional Branch in Białystok, *Zapobieganie bezdomności zwierząt. Informacja o wynikach kontroli*, LBI.430.004.00.2016, Ref. No.9/2016/P/16/058/LBI, p. 8.

[28] *Ibidem*, p. 13; The Supreme Audit Office, Regional Branch in Białystok, *Wykonywanie zadań gmin dotyczących ochrony zwierząt*, LBI-4101-13-00/2012 Ref. No.46/2013/P12/193/LBI, p. 9.

[29] The Law of Entrepreneurs of 6 March 2018 (consolidated text, Journal of Laws of 2019, item 1292, as amended).

and individuals, with attention drawn in particular to the following subjects: the need for training of pet animals for any commercial or competitive purpose to be carried out only by persons with adequate knowledge and ability; the need to discourage gifts of pet animals to persons under the age of 16 without the express consent of their parents or other persons exercising parental responsibilities; giving pet animals as prizes, awards or bonuses and unplanned breeding of such animals; the possible negative consequences for the health and well-being of wild animals if they were to be acquired or introduced as pet animals and the risks of irresponsible acquisition of pet animals leading to an increase in the number of unwanted and abandoned animals. Within the scope indicated above, Art. 8(2) of APA obliges the minister in charge of education and the school system to include the issue of animal protection in the core curriculum, while Art. 8(3) of APA obliges the voivodeship governments to prepare and ensure the implementation of programmes promoting knowledge of the provisions of APA among farmers by voivodeship agricultural advisory centres. These solutions may be considered to meet the requirements arising from the Convention, provided, however, that they will not constitute an obstacle to undertaking educational activities in the field of animal protection also in other forms. It seems that meeting this condition would require appropriate legislative changes, as the current wording of the provisions of Art. 8 of APA is the basis for the adoption of the view in judicial practice, according to which the inclusion, in the appendix to the resolution of a *gmina* council defining the program of care for stray animals and prevention of animal homelessness, of a task related to the education of the inhabitants of the *gmina* district in the field of correct attitudes and behaviours of humans towards animals and in the field of obligations of the owners of animals as part of the program of care for stray animals and prevention of homelessness among animals in the territory of the *gmina* exceeds the scope of the statutory authorisation contained in the above-mentioned Art. 11a of APA, as the provisions of APA entrust this task to the minister in charge of education and school system and the voivodeship government.[30]

Taking into account the above, it should be concluded that, despite the lack of ratification of the Convention, the provisions of APA are, in principle, in line with its provisions, ensuring a level of protection of pets similar to that resulting from the Convention. What is more, by specifying the obligations involved in keeping pets and by specifying the actions which are prohibited with regard to pets, the provisions of APA in many cases turn out to be more precise and seem to ensure a higher level of protection for animals than would result from the standards set by the Convention.

The furthest-reaching differences between the regulation contained in the Convention and the provisions of APA concern the rules set out in Art. 8 of the Convention on the trade and breeding of pets and, to some extent, the running of animal shelters.

[30] Judgement of the Administrative Court in Kraków of 13 February 2018, II SA/Kr 1574/17, LEX No. 2450473.

At this level, legislative changes would undoubtedly be necessary, consisting in including the activities in the field of trade and breeding of pets in the economic control regulation system. However, what should be considered to be erroneous is the view that, prior to ratification of the Convention, a universal system for the identification and registration of dogs should be introduced, which should reduce the problem of homelessness of animals in the future and make it possible to deal with issues relating to the excessive growth of their population.[31] This is because the presented Art. 12(b) of the Convention only requires the states which are parties to the Convention to consider the need to implement such a system, but this does not oblige them to do so.

Contrary to the concerns that have been expressed,[32] the ratification of the Convention will also not force the need to adapt to its provisions the regulation contained in APA in a way that would result in a reduction of the current level of animal protection. The necessary guarantee in this respect is provided by Art. 2(3) of the Convention, according to which none of the provisions of the Convention limits the possibility for the states which are parties to it to apply more restrictive solutions for the care of pets or to apply the conditions set out in the Convention to categories of animals which are not covered by its regulation.

References

Goettel M., *Sytuacja zwierzęcia w prawie cywilnym*, Warszawa 2013.

Kuszlewicz K., *Prawa zwierząt. Praktyczny przewodnik*, Warszawa 2019.

Nazar M., *Normatywna dereifikacja zwierząt – aspekty cywilnoprawne*, [in:] *Prawna ochrona zwierząt*, red. M. Mozgawa, Lublin 2002.

Niemiec E., Nowakowska M., *Hodowla rasowych psów i kotów a ochrona zwierząt – analiza polskich rozwiązań prawnych*, „Przegląd Prawa i Administracji" 2017, Vol. 108.

Radecki W., *Ustawa o ochronie zwierząt. Komentarz*, Wrocław 2003.

Radecki W., *Ustawy o ochronie zwierząt, o doświadczeniach na zwierzętach – z komentarzem*, Warszawa 2007.

Smaga Ł., *Ochrona humanitarna zwierząt*, Białystok 2010.

[31] The letter of the Minister of Agriculture and Rural Development of 21 October 2016, Ref. No. DS-PiO.WI.4810.436.2016, with a reply to parliamantery question No. 6834 of 20 October 2016 on the ratification of the European Convention for the Protection of Pet Animals.

[32] *Ibidem*.

Abstract: The article discusses issues related to the ratification by the Republic of Poland of the European Convention for the Protection of Pet Animals adopted at the Council of Europe Forum. The Convention was signed on 13 November 1987 in Strasbourg and entered into force on 1 May 1992. Its aim is to ensure the welfare of pets kept by humans for pleasure and company. To date, 24 of the 47 Member States of the Council of Europe have ratified the Convention. Poland has not signed it. As the reason for this, it has been pointed out is that the Polish regulation contained in the Animal Protection Act of 21 August 1997 is in some cases more stringent than the provisions of the Convention, as well as the fact that the possible binding by the provisions of the Convention will result in the need to introduce changes to the Polish regulation, including, *inter alia*, a universal system of dog identification and registration. It has also been emphasised that there is a need to assess the impact of the ratification and conduct broad consultations which will allow to determine the scope of necessary changes in the current regulations in force and to indicate sources of financing new tasks resulting from the Convention for the state authorities. The discussion in the article aims at verifying this position by analysing the compliance of the regulation contained in the Animal Protection Act with the provisions of the Convention.

Keywords: European Convention for the Protection of Pet Animals; Animal Protection Act of 21 August 1997; ratification; pet animals; humanitarian protection of animals

LESIA DANYLIUK

Vasyl Stefanyk Precarpathian National University,
Department of Labour, Environmental and Agricultural Law
https://orcid.org/0000-0003-3201-8881
lesiadanyliuk@ukr.net

Measures for the Protection and Restoration of Game Animals and Their Natural Habitat in Ukrainian Legislation

Introduction

One of the main objectives of modern environmental policy is to ensure sustainable natural resource management. Balanced natural resource management in any country is ensured by its sustainable socio-economic development, i.e. the proper functioning of its entire economic complex, including the hunting industry.

The hunting industry is primarily aimed at a sustainable use of biodiversity, specifically, natural resources for hunting. Such use of game animals and their habitat is achieved by means of sustainable natural resource management. The "chain" of a balanced use of natural resources is as follows: protection – sustainable use – restoration. Measures for protection and restoration play a major role in the system of measures for ensuring a sustainable use of game animals and their habitat. It determines the current relevance and importance of the article chosen for research.

The fundamentals of international, European and Ukrainian legislation on measures for the protection and restoration of game animals and their natural habitat

First and foremost, it should be noted that measures for the protection and restoration of game animals and their natural habitat under Ukrainian legislation have to be studied in the context of the corresponding international and European legislation, including the European Convention for the Protection of Animals during International Transport (1968); Convention on Wetlands of International Importance especially as Waterfowl Habitat (1971); Convention on International Trade in Endangered Species of Wild Fauna and Flora (1973); Convention on the Conservation of Migratory Species of Wild Animals (1979); Convention on the Conservation of European Wildlife and Natural Habitats (1979); Convention on Biological Diversity (1992); Agreement on the Conservation of African-Eurasian Migratory Waterbirds (1995); Pan-European Biological and Landscape Diversity Strategy (1995); Framework Convention on the Protection and Sustainable Development of the Carpathians (2003); Directive 2009/147/EC on the Conservation of Wild Birds; Council Directive 92/43/EEC on the Conservation of Natural Habitats and of Wild Fauna and Flora; Guidance Document on Hunting under the "Birds Directive"; European Charter on Hunting and Biodiversity.

In order to analyse the legal nature of measures for the protection and restoration of game animals and their natural habitat, the legislative understanding of the terms "protection", "conservation", and "restoration" should be discussed. For instance, it can be concluded from Art. 1 of the Convention on Biological Diversity that measures for protection are somewhat broader, since they are not limited to measures for conservation, and measures for restoration (breeding) are only briefly mentioned in Art. 9 of the Convention on the Conservation of European Wildlife and Natural Habitats and in Art. III of the Convention on the Conservation of Migratory Species of Wild Animals.

It deems necessary to study the provisions of the Law of Ukraine on Fauna, the Law of Ukraine on Hunting Industry and Hunting and other related legislation. Pursuant to Art. 36 (para. 1, 2) of the Law of Ukraine on Fauna, the protection of fauna includes a system of legal, organisational, economic, logistic, educational and other measures aimed at fauna conservation, restoration and use. The protection of fauna requires a comprehensive approach to studying its current state, designing and implementing measures for the conservation and amelioration of ecosystems, fauna being a constituent part of them. As can be seen, the legislative definition of fauna protection also includes measures for fauna restoration. Nevertheless, "fauna restoration" is not introduced into the Law as a separate term.

The Law of Ukraine on Hunting Industry and Hunting contains a separate article on measures both for the protection and restoration of game animals (Art. 27 on Protection and Breeding of Game Animals). Pursuant to Art. 27 (para. 2) of the Law, users of hunting grounds implement a set of biotechnical and other measures to insure the

protection and restoration of game animals, conservation and amelioration of their natural habitat. Art. 1 of the Law defines biotechnical measures as a series of general labor activities aimed at ameliorating the living conditions, breeding and increasing the number of wild animals. The identical definition of biotechnical measures is proposed in Chapter 2 of the Procedure for Maintenance of Hunting Grounds.

Scientific approaches to understanding the nature of measures for the protection and restoration of game animals and their habitat

According to Vladyslav V. Petrov, legal measures for fauna protection have to be classified into those that define the procedure for: 1) protecting natural habitats; 2) conserving the gene pool of animal communities; 3) organising a sustainable use of fauna, regulating the number of animals and their breeding.[1]

As regards the first group of measures, Valentyn I. Knysh says that fauna protection is impossible without the protection of natural habitats; therefore, any activity affecting fauna as a result of damage to natural habitats, violation of breeding conditions and disruption to animal migration routes has to be conducted in compliance with fauna protection requirements.[2] Accordingly, any activity related to the protection, sustainable use and restoration of natural habitats contributes to the protection, sustainable use and restoration of animals. Since hunting grounds are the natural habitat of game animals, activities aimed at ensuring the protection, sustainable use and restoration (management) of hunting grounds are also aimed at ensuring the protection, sustainable use and restoration of game animals.

The second group of legal measures for fauna protection requires the imposition of restrictions and prohibitions on the use of certain animals on a certain territory within a certain time limit.[3] This group can include the following measures: a) the formation of the environmental network, establishment of state reserves, *zakaznyks* (protected areas in Ukraine that meet IUCN category IV–VI criteria) and designation of other natural sites and objects subject to special protection; b) the introduction of a special protection regime for the endangered species of the Red List of Ukraine (known as the Red Data Book of Ukraine) and for the species subject to special protection on the

[1] V. Petrov, *Pravovaya ohrana prirodyi v SSSR* [Legal Protection of Nature in the USSR], Moskva 1984, p. 270.

[2] V. Knysh, *Administratyvno-pravova okhorona tvarynnoho svitu ta rol militsii u yii zdiisneni* (rukopys kandydatskoi dysertatsii) [The Legal Administrative Protection of Fauna and the Role of the Police in its Provision (manuscript of dissertation for the degree of the Candidate of Sciences)], Kafedra administratyvnoho prava ta protsesu, Kharkivskyi natsionalnyi universytet vnutrishnikh sprav, Kharkiv 2007, p. 40.

[3] V. Petrov, *Prirodnoresursovoe pravo i pravovaya ohrana okruzhayuschey sredyi* [Natural Resources Law and Legal Protection of Environment], Moskva 1988, p. 17.

territories of the Autonomous Republic of the Crimea, oblasts (administrative units in Ukraine), the cities of Kyiv and Sevastopol; c) the development and implementation of programmes (action plans) on the conservation of endangered animal species; d) the breeding of rare and endangered animal species in captivity; e) the creation of gene banks, etc.[4] Furthermore, some scholars say that animal protection is possible only in nature reserves, but they accommodate only a small part of fauna – rare and endangered animals needed to be protected due to their scientific, historical or other importance. These animals are not used for economic purposes. The majority of fauna is subject to hunting and fishing and used by the state as a source of food provision, industrial, technical, medical raw material and other material valuables. Therefore, it is necessary to introduce regulations on the sustainable use of fauna and its restoration.[5]

The third group of measures consists of legislative acts that define: a) the procedure for hunting game animals, b) the use of living organisms, including animals, as a source of food provision, c) the use of fauna for scientific, educational, cultural and aesthetic purposes. For instance, such measures are aimed at introducing: a) rules and scientifically grounded regulations on the protection, sustainable use and restoration of fauna; b) proscriptions and restrictions on their use; c) scientifically grounded normative guidelines and limits on the use of objects of fauna and requirements for hunting them; d) control over the protection, use and restoration of fauna, etc.[6]

As regards the meaning of the term "fauna protection", it has to be mentioned that in legal science, legal or any other (economic, technical, etc.) protection always includes measures aimed at resolving three, relatively independent, tasks: 1) to conserve fauna; 2) to ensure its sustainable use; and 3) to contribute to its restoration.[7]

Concerning the restoration of natural resources, Oleg V. Basai defines it as a natural (regulated and non-regulated) or artificial process of increasing stocks of natural resources, renewing their quality.[8] Liubov D. Nechyporuk says that "restoration" is a characteristic typical of the legal regulation of the sustainable use of fauna. When animals are uncontrollably driven to extinction, the restoration of certain species might be impossible due to disruption to their living conditions. Some species can be lost for-

[4] L. Leiba, *Problemy y osoblyvosti pravovoho zabezpechennia okhorony tvarynnoho svitu* [Problems and Specifics of Enforceability of Fauna Protection], "Problems of Legality" 2011, Vyp. 113, p. 51.

[5] R. Gizzatullin, *Pravovaya ohrana zhivotnogo mira zakonodatelstvom Respubliki Bashkortostan* (rukopis kandidatskoy dissertatsii) [Legal Protection of Fauna in Legislation of the Republic of Bashkortostan (manuscript of dissertation for the degree of the Candidate of Sciences)], Kafedra hozyaystvennogo i finansovogo prava, Bashkirskiy gosudarstvennyiy universitet, Ufa 1998, p. 59.

[6] L. Leiba, *op. cit*., pp. 51–52.

[7] V. Knysh, *Shchodo poniattia pravovoi okhorony obiektiv tvarynnoho svitu* [On Legal Protection of Fauna], "Law Forum" 2010, No. 1, p. 155.

[8] O. Basai, *Poniattia vidtvorennia pryrodnykh roslynnykh resursiv* [The Notion of Restoration of Plant Resources], "Current Problems of State and Law" 2011, Vyp. 61, p. 652.

ever.[9] In order to ensure fauna restoration, the introduction of (compliance with) certain conditions, directly concerned with the protection of animals and their natural habitat, is necessary. The extermination of animals and disruption to their living conditions lead to the extinction of animals and impossibility of their restoration. On the other hand, human activity aimed at fauna protection and restoration contributes to increasing the number of certain animal species.[10]

To conclude, the protection of game animals and their natural habitat is a system of legal, economic and organisational measures aimed at the protection, conservation, sustainable use and restoration of game animals and their natural habitat in order to ensure a natural balance in fauna and in the environment in general and to preserve the possibility of their further use.

In this paper, the restoration of game animals and their natural habitat is viewed as one of the measures for their protection aimed at increasing the number and improving the quality of game animals and their natural habitat in order to ensure a natural balance in fauna and the environment in general and to preserve the possibility of their further use. For instance, Knysh, studying the concept of the legal protection of fauna and the related activities of the state authorities and non-government bodies, also refers to them as measures for protection.[11]

Measures for the protection and restoration of game animals have common goals: 1) ensuring a natural balance in fauna and the environment in general; 2) preserving the possibility of the further use of game animals and their natural habitat and their beneficial characteristics. Evidently, these measures are inextricably linked and mutually complementary. This opinion can be substantiated by illustrating the measures for regulating the number of game animals that can also be aimed at the protection of game animals and their restoration. It also concerns breeding grounds that users are required to designate within hunting grounds. Pursuant to Art. 27 (para. 2) of the Law of Ukraine on Hunting Industry and Hunting, item 1.3 of the Procedure for Designating Territories for Protection and Restoration of Game Animals (Breeding Grounds), these measures are taken with the aim of protecting and restoring game animals; and pursuant to Chapter 6 of the Procedure for Maintenance of Hunting Grounds, they belong to the measures for the economic and technical division of hunting grounds, i.e. to the measures for the protection and restoration of hunting grounds. In the meantime, considering that hunting grounds are the natural habitat of game animals, it has to be noted that any measures to protect and restore hunting

[9] L. Nechyporuk, *Ekoloho-pravove rehuliuvannia ratsionalnoho vykorystannia obiektiv tvarynnoho svitu* (rukopys kandydatskoi dysertatsii) [Legal Environmental Regulation of Sustainable Use of Fauna (manuscript of dissertation for the Candidate of Sciences)], Viddil problem ahrarnoho, zemelnoho ta ekolohichnoho prava, Instytut derzhavy i prava im. V.M. Koretskoho NAN Ukrainy, Kyiv 2009, p. 57.

[10] V. Kormilitsyin, *Osnovyi ekologii* [Fundamentals of Ecology], Moskva 1997, p. 25.

[11] V. Knysh, *Shchodo…*, p. 155.

grounds will naturally contribute to protecting and restoring game animals, which is once again substantiated by para. 2. of Art. 27 and Art. 1 of the Law as well as Chapter 1 of the Procedure for Maintenance of Hunting Grounds.

The system of measures for the protection and restoration of game animals and their habitat

It deems necessary to discuss and analyse the system of the measures for the protection and restoration of game animals and their natural habitat in more detail.

1. The maintenance of hunting grounds.

Pursuant to Art. 1 of the Law of Ukraine on Hunting Industry and Hunting and Chapter 1 of the Procedure for Maintenance of Hunting Grounds, the maintenance of hunting grounds is defined as a scientifically grounded assessment and inventory of types of hunting grounds, the species composition, the number and quality of game animals of a certain area or region, the development (with regard to environmental and economic conditions) of the procedure for managing hunting farms and measures for the protection, sustainable use and restoration of game animals, conservation of game animals and improvement of the state of hunting grounds.

The actual procedure for taking the corresponding measures is regulated by Art. 28 of the Law and by the Procedure for Maintenance of Hunting Grounds. Art. 28 of the Law contains provisions regulating the procedure for maintaining hunting grounds. Nevertheless, they are of general character. For instance, para. 1 of Art. 28 states that users are obligated to ensure the maintenance of hunting grounds over the course of two years since the day they had obtained a hunting permit. Pursuant to para. 2 of the Art., the procedure for maintaining hunting grounds is defined by the central executive authority on the forestry and hunting industry (the State Agency of Forest Resources of Ukraine) with the approval of the central executive authority on environmental protection (the Ministry of Ecology and Natural Resources of Ukraine). Para. 3–4 of Art. 28 concern projects on the management and development of the hunting industry. Para. 3 of the Art. stipulates that these projects are approved by the central executive authority on the forestry and hunting industry, the central executive authority of the Autonomous Republic of the Crimea on environmental protection, the central executive authority of the Autonomous Republic of the Crimea on the forestry and hunting industry and local state administrations in oblasts, in Kyiv and Sevastopol. Para. 4 of the Art. states that such projects, developed in accordance with the existing requirements at the time of their implementation, are considered valid until their expiry, provided that the land area and boundaries of hunting grounds had not changed.

The Procedure for Maintainance of Hunting Grounds stipulates the main regulatory standards required for a scientifically grounded assessment and inventory of types of

hunting grounds, the species composition, number and quality of game animals, the development (in accordance with environmental and economic conditions) of the action plan for managing hunting grounds and measures for the protection, sustainable use and restoration of game animals, conservation and improvement of hunting grounds. Analysis of the provisions of the Procedure allowed to outline the following measures: 1) the introduction of the categories of the complexity of maintenance work on hunting grounds – of which there are four (I, II, III, IV) – depending on the level of the hunting industry management and a quality assessment of hunting hrounds (Chapter 4 of the Procedure); 2) forestry and hunting zoning – Ukraine's hunting grounds are situated within Ukraine's 5 terrestrial ecosystems (Chapter 5 of the Procedure); 3) the economic and technical division of hunting grounds – the provider together with the user of hunting grounds devise a schematic plan of the territory, designate the boundaries of breeding grounds, gamekeeper's rounds, places for installing notices, signposts, tracks, hairpin turns (for mountainous areas), access roads, bridges, quays, log roads, huts, towers for observation and selective culls, base camps, hunter's huts, enclosures, watering places, etc. (Chapter 6 of the Procedure); 4) the definition of the optimal density of game animals (Chapter 11 of the Procedure); 5) the assessment of the influence of various factors on the state of the population of game animals (Chapter 12 of the Procedure); 6) the calculation of an annual increase in the number of game animals (Chapter 13 of the Procedure); 7) the implementation of guidelines for hunting game animals (Chapter 14 of the Procedure).

The Procedure for Maintenance of Hunting Grounds stipulates that it is to be done once in 15 years, but during this period hunting grounds might undergo significant changes influencing the average productivity of every species of game fauna, calculated during a period of the maintenance of hunting grounds, especially in the forest. Therefore, environmental conditions require maintenance periods to be more frequent. As Volodymyr V. Ovdiienko rightly said, there is a need to return to the practice of the obligatory maintenance of hunting grounds every 10 years, and for the first maintenance work – setting a 1 year limit.[12]

2. The designation of breeding grounds within hunting grounds.

Para. 1 of Art. 27 of the Law of Ukraine on Hunting Industry and Hunting stipulates that in order to ensure the protection and restoration of game animals, users within the boundaries of their hunting grounds allot no less than 20% of no-hunting territory. The procedure for designating this territory is adopted by the central executive authority on the forestry and hunting industry. Pursuant to item 1.3 of the Procedure

[12] V. Ovdiienko, *Pravove rehuliuvannia myslyvstva v Ukraini* (rukopys kandydatskoi dysertatsii) [Legal Regulation of Hunting in Ukraine (manuscript of dissertation for the degree of the Candidate of Sciences)], Kafedra ekolohichnoho prava, Natsionalnyi universytet «Iurydychna akademiia Ukrainy imeni Yaroslava Mudroho», Kharkiv 2013, pp. 100–101.

for Designating Territories for the Protection and Restoration of Game Animals (Breeding Grounds), breeding grounds are parts of hunting grounds, designated by the user with the aim of protecting and restoring game animals.

Based on the provisions of Chapter 2 of the Procedure, breeding grounds can be marked by one or several contours (massifs, plots of land, water bodies, etc.) with the total area of no less than 20% within specified hunting grounds. Users of hunting grounds are to take into account migratory behaviours of game animals in order to create breeding grounds shared by two or more hunting farms (item 2.1). Depending on a type of game animals living on hunting grounds, breeding grounds can be designated for one species or a group of species of game animals (item 2.2). Only grounds that are the most conducive to the protection and restoration of one species or a group of species of game animals and have good feeding and protective properties according to the Classification of Hunting Grounds by value categories (forest appraisal index classes), stated by item 7 of the Procedure for Maintenance of Hunting Grounds (item 2.3), are designated as breeding grounds for the period of no less than 3 years. Hunting on the territory of a breeding ground is forbidden. Culling and trapping of predatory animals and vermin are performed in accordance with the provisions of Art. 33 of the Law of Ukraine on Hunting Industry and Hunting (item 2.4). Forestry work or any other type of work performed by owners or users of land plots on the territory of breeding grounds is agreed with the user of breeding grounds (item 2.5). Chapter 3 of the Procedure stipulates that the designation of breeding grounds is agreed with the owner or user of a land plot and finalised by the order of the user of hunting grounds that contains the information about the area of the grounds with a list of zones, landmarks, water bodies, etc. and a detailed description of their boundaries, species or a group of species of game animals for whom they are intended; it defines the policy on the protection of game animals on this territory (item 3.1). The territories of breeding grounds are demarcated by warning signs (item 3.2).

Khrystyna I. Chopko says that the designation within hunting areas of territories where hunting is forbidden as a means of restoring game animals is rather ineffective. For instance, the area of the ground allotted to the restoration of game fauna (breeding grounds) amounts to less than 20% and is sufficient for a natural breeding of partridges, pheasants, mallards but is too small for a normal breeding of such animals as deer, roe deer, wild boars, etc.[13] According to Anatoliy M. Volokh, this practice is not always effective because territories for breeding are often small, and their protection, considering the distance from hunter's quarters and the poor financial standing of the

[13] Kh. Chopko, *Ekoloho-pravovi zakhody zi zberezhennia vydovoi ta populiatsiinoi chyselnosti dykykh tvaryn* [Legal Environmental Measures for Conservation of Species and Populations of Wild Animals], "Law and Society" 2013, No. 6-2, p. 181.

hunting sector, is formal. In many countries up to 50% of land is allotted for breeding grounds for a more intensive restoration of hunting resources.[14]

3. The establishment of the hunting capacity of hunting grounds.

As stated in the provisions of para. 3 of Art. 27 of the Law of Ukraine on Hunting Industry and Hunting, users of hunting grounds establish the hunting capacity of hunting grounds upon the approval of the central executive authority on the forestry and hunting industry and the local state authorities of the oblasts and the cities of Kyiv and Sevastopol. Furthermore, it has to be noted that the current edition of Art. 1 of the Law does not contain the definition of the hunting capacity of hunting grounds, since it was excluded by the Law of Ukraine of 21 January 2010 No. 1827-VI on Amendments to Certain Laws of Ukraine on Hunting Industry, Hunting and Fishing, Protection, Use and Restoration of Fauna. Before the amendments were introduced, Art. 1 of the Law had defined the hunting capacity as the highest possible number of hunters who can hunt on one day in a certain area of hunting grounds (with regard to the number of game animals and the necessity to take workplace safety measures).

4. The creation of the hunting service.

Pursuant to Art. 29 of the Law of Ukraine on Hunting Industry and Hunting, with the aim of protection, users of hunting grounds establish a hunting service with one professional hunter per 5,000 ha of woodland or 10,000 ha of field or wetland hunting grounds. As regards such regulations, Chopko rightly states that a big area of hunting grounds leads to its formal protection; therefore, scientifically grounded calculations should be made to define the optimal size of hunting grounds for one professional hunter.[15] In the meantime, as Oleg R. Protsiv says, lack of efficient professional protection is one of the reasons for ineffective management of the hunting industry.[16]

According to the director of Ivano-Frankivsk Regional Office of Forestry and Hunting Industry, the formation of an efficient hunting service and a guarantee of proper protection of hunting grounds is one of the obligations of every user. Among the causes of a bad organisation of professional security is the unprofitability of the hunting industry that does not allow to attract investments and properly maintain

[14] A. Volokh, *Problemy upravlinnia resursamy myslyvskykh tvaryn v Ukraini* [Problems of Game Animals Management], [in:] *Zbirnyk materialiv II-ho Vseukrainskoho zizdu ekolohiv z mizhnarodnoiu uchastiu* [Book of Abstracts of the II All-Ukrainian Environmental Conference with International Participation], http://eco.com.ua/sites/eco.com.ua/files/lib1/konf/2vze/zb_m/0057_zb_m_2VZE.pdf [access: 31.07.2019], pp. 2–3.

[15] Kh. Chopko, *op. cit*., p. 181.

[16] O. Protsiv, *Analiz zakonodavchoi bazy myslyvskoho hospodarstva krainy ta rozrobka pokrashchenykh propozytsii. Zakliuchnyi zvit v ramkakh vykonannia prohramy ENPI Fleh-II* [Analysis of Ukrainian Legislation on Hunting Industry and Development of Improved Amendments. The Final Report on ENPI FLEG II Programme], Lviv 2014, p. 28.

the hunting service. Therefore, there is a heavy workload for one professional hunter, a low salary, legal insecurity, lack of material incentives paired with a poor technical support of the hunting service (first of all, transport, weapons, communication equipment) that has a negative impact on the protection of the state hunting fund and the prevention of poaching.[17]

5. The regulation of the number of game animals.

Pursuant to para. 1 of Art. 32 of the Law of Ukraine on Fauna, in order to ensure public health and safety, to prevent diseases of farm animals and other domestic animals, to avert environmental damage and damage to economic and other types of activities, measures aimed at regulating the number of certain species of wild animals are taken. The regulation of the number of predatory animals and vermin within the procedure for managing the hunting and fishing industry is conducted according to the Law of Ukraine on Hunting Industry and Hunting, other statutory and regulatory acts (para. 4 of Art. 32 of the Law of Ukraine on Fauna).

Pursuant to Art. 1 of the Law of Ukraine on Hunting Industry and Hunting, the regulation of the number of wild animals – the elimination (culls and trapping) of animals who live in the wild, provided that their number in a certain area poses a threat to the lives and health of people and domestic animals, inflicts significant damage on the agricultural, forestry and hunting sectors, disrupts a natural balance of species, endangers the existence of other species of animals. The regulation of the number of animals is conducted on the basis of Art. 33 of the specified Law.

6. Selective and diagnostic culls of game animals for veterinary and sanitary examination.

Art. 32 of the Law of Ukraine on Hunting Industry and Hunting stipulates the procedure for selective and diagnostic culls of game animals for veterinary and sanitary examination that, pursuant to para. 1 of this Art., are performed on hunting grounds irrespective of hunting seasons by employees authorised to provide the protection of hunting grounds by permission of the central executive authority on the forestry and hunting industry upon a written application of the user of hunting grounds.

Based on Art. 1 of the Law of Ukraine on Veterinary Medicine, veterinary and sanitary examination is a series of the required laboratory and specialised tests (virologic, bacteriologic, chemical and toxicological, pathoanatomic, histological, parasitological, radiological) that are conducted by specialists of the State Service of Veterinary Medicine or by commissioned doctors of veterinary medicine on the safety of animal products and plant-based products, on agrofood markets, reproductive material, biological products, veterinary medication, substances, feed additives, premixes and

[17] *Ibidem*, p. 29.

fodder, including analysis of manufacturing technology and equipment for their compliance with veterinary and sanitary regulations.

Pursuant to item 2.1 of the Guidelines on Selective Culls of Game Animals, animals subject to selective culls are sick, injured animals, old animals with clear signs of degradation, two-year-old immature young animals, animals with atypical colouring and animals with undeveloped horns (as regards culls of stags, elks, fallow deer, roe deer). Pursuant to item 2.1 of the Guidelines on Selective Diagnostic Culls of Game Animals for the State Veterinary and Sanitary Examination, diagnostic culls are performed in order to assess an epizootic situation among game animals.

Pursuant to para. 2–4 of Art. 32 of the Law of Ukraine on Hunting Industry and Hunting, culls of game animals in, designated by the animal health office, sites of rabies and other dangerous diseases are performed in accordance with the legislation on veterinary medicine. Selective and diagnostic culls of game animals for veterinary and sanitary examination are conducted with regard to the hunting limits. Animals hunted during a hunting season are considered hunted within the limit of this hunting season, and animals hunted between seasons – as hunted within the limit of the next hunting season.

7. The establishment of limits and proscriptions on hunting.

It stipulates the necessity of rigid compliance by legal persons with the use of hunting resources, hunting seasons (Art. 19 of the Law of Ukraine on Hunting Industry and Hunting), proscriptions on hunting (Art. 20 of the Law).

8. Imposition of limits on the use of game animals.

These limits are defined by Art. 16 of the Law of Ukraine on Hunting Industry and Hunting, the Guidelines for Applying the Procedure for Imposing Limits on the Use of Game Animals Belonging to Natural Resources of National Significance, the Limits on the Use of Game Animals of the State Hunting Fund during a Hunting Season (ratified every hunting season), the Limits on Culls of Other Game Animals of the State Hunting Fund by One Hunter a Day during a Hunting Season (ratified every hunting season).

9. Giving certain hunting grounds the status of hunting grounds of the state hunting reserve.

Based on Art. 1 of the Law of Ukraine on Hunting Industry and Hunting, the hunting grounds of the state hunting reserve include non-private hunting grounds or ones that are no longer private because the right of use was revoked. Nevertheless, measures for their protection and restoration as well as measures for the protection and restoration of game animals living on these hunting grounds continue to be taken by the central executive authority on hunting.

10. The work of the state authorities on hunting (first and foremost – the State Agency of Forest Resources of Ukraine and the State Forest Protection Center) that execute their powers stated in the corresponding provisions (including those connected with the protection and restoration of game animals and their natural habitat) directly or through their local authorities.

11. The establishment of a permit- and contract-based procedure for acquiring the right of the use of game animals and their natural habitat.

12. The mechanism for applying sanctions for violating the legislation on the use of game animals.

13. The introduction of other measures defined by Chapter IV of the Law of Ukraine on Fauna (The Protection of Fauna) and other statutory and regulatory acts, aimed at the protection and restoration of game animals and their natural habitat.

The measures for the protection and restoration of game animals and their natural habitat are a responsibility of the state authorities on hunting and users of hunting grounds. Nevertheless, neither of the parties is interested in performing them. For instance, the hunting policies in Germany are aimed at conserving flora and fauna, economically stimulating the development of hunting with regard to national hunting traditions, taking biotechnical measures in order to eliminate the negative impact of game animals on the agricultural, forestry and fishing sectors, protecting and ameliorating their living conditions. For the most part, the protection of game animals, preparation and laying out of feed are managed by hunters. They systematically monitor the state of hunting grounds that allows to obtain timely information on the population of game animals. In Finland, local hunting clubs are united into hunting associations whose objectives are monitoring game animals, economically stimulating the hunting sector and hunting, consulting and providing legal services for hunters. Local hunting clubs are responsible for managing the hunting sector, taking biotechnical measures, combating poaching, etc. In Sweden and Finland, money from annual fees paid by hunters are allotted to the development of the hunting sector, the protection, sustainable restoration and use of game animals.[18]

[18] *Analiz zakonodavchoi bazy i praktyky vedennia myslyvskoho hospodarstva deiakykh krain Yevropeiskoho Soiuzu. Publikatsiia v ramkakh prohramy FLEG II* [Analysis of the Legislation and Practice of Managing the Hunting Industry of Some of the EU Countries. Publication as Part of FLEG II Programme], red. M. Myronenko, A.-T. Bashta, R. Novikov ta inshi, Kyiv 2015, pp. 50–51.

The practice of bringing to justice violators of the legislation on the protection and restoration of game animals and their habitat

Legal liability for violations of the legislation in this field provides for the possibility of imposing on the offender: 1) criminal; 2) administrative; 3) disciplinary; 4) civil sanctions.

Concerning the practice of criminal and administrative liability, according to the data published by the Ministry of Ecology and Natural Resources of Ukraine on its official website in the National Report on the State of the Environment in Ukraine in 2012, about 11,000 violators of hunting rules are detained by the police every year. Up to 400,000 game animals are killed annually in Ukraine, causing damage of UAH 50 million. On average, for one hunter, there are five violations of hunting rules per year. For one officially killed roe deer, there are eight of them killed by poachers.

According to the information on the official website of the State Agency of Forest Resources of Ukraine, poaching is one of the most pressing problems faced by Ukraine's hunting industry. In 2015, 3,237 violation reports were filed, of which UAH 589,000 were charged as fines, and UAH 167,000 – as restitution. Administrative action was taken against 3,237 violators of hunting rules, criminal action – against 4 violators.

Analysis of the Unified State Register of Court Rulings in the section on illegal hunting showed that in Ukraine (as of 1 May 2016), there were 32 sentencing rulings regarding this category of cases, 20 of which entered into force. Among the verdicts that entered into force, 11 were issued for violations of hunting rules that caused significant harm (3 of them were also qualified under para. 2 of Art. 248 of the Criminal Code of Ukraine), and 9 concerned illegal hunting in reserves or on other territories of the nature reserve fund.

Pursuant to the corresponding rulings, the following criminal penalties were imposed on the perpetrators: fines (in 13 rulings), community service (in 3 rulings), imprisonment (in 3 rulings), the amount and duration of which were determined by the sanctions in para. 1 and para. 2 of Art. 248 of the Criminal Code of Ukraine. In the meantime, in cases of imprisonment, the court placed the defendants on probation under para. 1 of Art. 75 of the Criminal Code of Ukraine. On 24 December 2010, the Lebedinsky District Court of the Sumy Oblast issued a ruling on Case 1-277/10 to release the offender from criminal liability under Art. 45 of the Criminal Code of Ukraine for active repentance, and the criminal proceedings against him were discontinued under para. 1 of Art. 248 of the Criminal Code of Ukraine. In all the cases investigated, the defendants paid restitution (voluntarily, by a court verdict or by a civil procedure).

In cases of administrative offenses, under Art. 85 of the Code of Administrative Offenses (Violations of the Rules of the Use of Wildlife) in the Ivano-Frankivsk Oblast, 55 court rulings were found in the Unified State Register of Court Rulings, 45 of which entered into force. Para. 2 of Art. 85 of the Code of Administrative Offences was not

violated in any case, i.e. no ruling was found in this category of cases. Cases under para. 1 of Art. 85 of the Code on violations of hunting and game management rules and regulations are considered by the central body of executive power that implements the state policy in the field of hunting (para. 1 of Art. 242 of the Code), the central body of the executive power that implements the state policy on state supervision in the field of environmental protection, sustainable use, restoration and conservation of natural resources (para. 1 of Art. 242-1 of the Code). Accordingly, it is more difficult to study the practice of applying administrative liability measures under para. 1 of Art. 85 of the Code.

The Ivano-Frankivsk Regional Forestry and Hunting Office on its official website provides the following information on the identification of poaching: in 2012 – 183 cases, in 2013 – 195 cases, in 2014 – 160 cases. In 2015, 174 reports were filed in the oblast for violations of hunting rules, 91 of them (52%) – by state forest service officers. Violators were fined UAH 34,200, and UAH 76,000 of damages were calculated. UAH 30,000 were charged as fines, and UAH 16,000 – as restitution. As of 1 June 2016, 30 violation reports were filed against poachers in the oblast, UAH 9,373 were imposed as fines, and fines of UAH 7,996 were collected.

Conclusions

Consequently, there is a necessity to develop a system of incentives for taking measures for the protection and restoration of game animals and their natural habitat in Ukraine, e.g.: 1) to modify the system of identifiying and prosecuting violators of regulations on hunting by providing economic incentives (entities and persons involved in the hunting sector have to be the most interested in the protection of game fauna). On the other hand, the size of lawsuits for the damage caused to the hunting sector by illegally hunting game animals and fines for illegal hunting ought to be several times higher (three times higher at a minimum) than the market value of legal hunting;[19] 2) to provide material incentives for workers and users of the hunting sector and local residents who detect violations of hunting regulations; 3) to hold the state-funded contest for the best hunting farm (best professional hunter) in combating poaching, with material incentives for winners;[20] 4) to develop a system of implementing and increasing material incentives for employees authorised for the protection of hunting grounds by means of fines and money acquired from selling

[19] *Ibidem*, p. 101.

[20] *Proekt modeli reformuvannia i rozvytku myslyvskoho hospodarstva Ukrainy. Publikatsiia v ramkakh prohramy FLEG II* [The Draft Model of Reformation and Development of the Hunting Industry of Ukraine. Publication as Part of FLEG II Programme], red. M. Myronenko, I. Sheremet, O. Protsiv ta inshi, Kyiv 2015, p. 33.

confiscated products and tools of illegal hunting; and to send all other finances to the user based on the site of poaching,[21] etc.

References

Analiz zakonodavchoi bazy i praktyky vedennia myslyvskoho hospodarstva deiakykh krain Yevropeiskoho Soiuzu. Publikatsiia v ramkakh prohramy FLEG II [Analysis of the Legislation and Practice of Managing the Hunting Industry of Some of the EU Countries. Publication as Part of FLEG II Programme], red. M. Myronenko, A.-T. Bashta, R. Novikov ta inshi, Kyiv 2015.

Basai V., *Poniattia vidtvorennia pryrodnykh roslynnykh resursiv* [The Notion of Restoration of Plant Resources], "Current Problems of State and Law" 2011, Vyp. 61.

Chopko Kh., *Ekoloho-pravovi zakhody zi zberezhennia vydovoi ta populiatsiinoi chyselnosti dykykh tvaryn* [Legal Environmental Measures for Conservation of Species and Populations of Wild Animals], "Law and Society" 2013, No. 6-2.

Gizzatullin R., *Pravovaya ohrana zhivotnogo mira zakonodatelstvom Respubliki Bashkortostan* (rukopis kandidatskoy dissertatsii) [Legal Protection of Fauna in Legislation of the Republic of Bashkortostan (manuscript of dissertation for the degree of the Candidate of Sciences)], Kafedra hozyaystvennogo i finansovogo prava, Bashkirskiy gosudarstvennyiy universitet, Ufa 1998.

Knysh V., *Administratyvno-pravova okhorona tvarynnoho svitu ta rol militsii u yii zdiisneni* (rukopys kandydatskoi dysertatsii) [The Legal Administrative Protection of Fauna and the Role of the Police in its Provision (manuscript of dissertation for the degree of the Candidate of Sciences)], Kafedra administratyvnoho prava ta protsesu, Kharkivskyi natsionalnyi universytet vnutrishnikh sprav, Kharkiv 2007.

Knysh V., *Shchodo poniattia pravovoi okhorony obiektiv tvarynnoho svitu* [On Legal Protection of Fauna], "Law Forum" 2010, No. 1.

Kormilitsyin V., *Osnovyi ekologii* [Fundamentals of Ecology], Moskva 1997.

Leiba L., *Problemy y osoblyvosti pravovoho zabezpechennia okhorony tvarynnoho svitu* [Problems and Specifics of Enforceability of Fauna Protection], "Problems of Legality" 2011, Vyp. 113.

Nechyporuk L., *Ekoloho-pravove rehuliuvannia ratsionalnoho vykorystannia obiektiv tvarynnoho svitu* (rukopys kandydatskoi dysertatsii) [Legal Environmental Regulation of Sustainable Use of Fauna (manuscript of dissertation for the Candidate of Sciences)], Viddil problem ahrarnoho, zemelnoho ta ekolohichnoho prava, Instytut derzhavy i prava im. V.M. Koretskoho NAN Ukrainy, Kyiv 2009.

Ovdiienko V., *Pravove rehuliuvannia myslyvstva v Ukraini* (rukopys kandydatskoi dysertatsii) [Legal Regulation of Hunting in Ukraine (manuscript of dissertation for the degree of the Candidate of Sciences)], Kafedra ekolohichnoho prava, Natsionalnyi universytet «Iurydychna akademiia Ukrainy imeni Yaroslava Mudroho», Kharkiv 2013.

Petrov V., *Pravovaya ohrana prirodyi v SSSR* [Legal Protection of Nature in the USSR], Moskva 1984.

[21] *Ibidem*, p. 213.

Petrov V., *Prirodnoresursovoe pravo i pravovaya ohrana okruzhayuschey sredyi* [Natural Resources Law and Legal Protection of Environment], Moskva 1988.

Proekt modeli reformuvannia i rozvytku myslyvskoho hospodarstva Ukrainy. Publikatsiia v ramkakh prohramy FLEG II [The Draft Model of Reformation and Development of the Hunting Industry of Ukraine. Publication as Part of FLEG II Programme], red. M. Myronenko, I. Sheremet, O. Protsiv ta inshi, Kyiv 2015.

Protsiv O., *Analiz zakonodavchoi bazy myslyvskoho hospodarstva krainy ta rozrobka pokrashchenykh propozytsii. Zakliuchnyi zvit v ramkakh vykonannia prohramy ENPI Fleh-II* [Analysis of Ukrainian Legislation on Hunting Industry and Development of Improved Amendments. The Final Report on ENPI FLEG II Programme], Lviv 2014.

Volokh A., *Problemy upravlinnia resursamy myslyvskykh tvaryn v Ukraini* [Problems of Game Animals Management], [in:] *Zbirnyk materialiv II-ho Vseukrainskoho zizdu ekolohiv z mizhnarodnoiu uchastiu* [Book of Abstracts of the II All-Ukrainian Environmental Conference with International Participation], http://eco.com.ua/sites/eco.com.ua/files/lib1/konf/2vze/zb_m/0057_zb_m_2VZE.pdf [access: 31.07.2019].

Abstract: The article investigates the legal nature of measures for the protection and restoration of game animals and their natural habitat. The author studies the system of such measures and analyses their content. Based on the analysis, the definition of the protection and restoration of game animals and their natural habitat is suggested. The author discusses the correlation between these measures as well as their role in a sustainable use of game animals and their natural habitat.

Keywords: game animals; hunting grounds; protection; restoration

NADIIA KOBETSKA

Vasyl Stefanyk Precarpathian National University,
Department of Labour, Environmental and Agricultural Law
https://orcid.org/0000-0001-9058-7615
nadiia.kobetska@pnu.edu.ua

The Use of Animals for Entertainment Purposes: The Requirements of Ukrainian Legislation and the Practice of Their Implementation

Features of the development and amendment of the legal provisions on the protection of animals from brutal treatment in Ukraine

A humane attitude to animals is one of the key markers of today's civilized society. The international and European community stated their willingness to protect animals from abuse. With this end in view, a number of basic laws and regulations were developed and adopted, among them the Convention on International Trade in Endangered Species of Wild Fauna and Flora (1973), the European Convention for the Protection of Animals during International Transport (1968), the European Convention for the Protection of Vertebrate Animals used for Experimental and other Scientific Purposes (1986), the European Convention for the Protection of Pet Animals (1987), etc. A strong tendency to develop comprehensive legislation on animal protection is characteristic of almost all European states. As regards Ukraine, the last decade is marked by some progress in this direction. It includes the recognition of this problem as one of the objectives of the state policy, adoption of legislative acts, scientific research, organization of public demonstrations. The starting point in this process was the adoption in 2006 of the Law of Ukraine on the Protection of Animals

from Brutal Treatment[1] that combined the main provisions of international documents on the humane treatment of animals.

Nevertheless, despite being progressive, it is only the first stage in the transition from a complete lack of regulations on animal welfare to the approximation of Ukrainian legislation to European standards. For the present, the reality of humane animal treatment in Ukraine is far from being perfect. Academic papers cite both subjective and objective reasons for such a situation. Here belong, for instance, deficiencies in legal mechanisms, people's mentality, a low cultural level, including that of legal culture, insufficient experience of law enforcement agencies in enforcing legal liability, insufficient funding, etc.[2] Furthermore, there is a lack of serious theoretical underpinnings and systematic academic research to be used as a basis for developing corresponding legislation.

As stated by the Law, it is aimed at protecting animals from suffering and death due to cruel treatment, protecting their natural rights and consolidating social morality and humanity. The Law of Ukraine on the Protection of Animals from Brutal Treatment encompasses all animals: farm, domestic and wild. In fact, it laid the foundations for separate legislation on animal protection and welfare. Nevertheless, there arises a question about branch affiliation. According to Ukrainian academic literature, it is part of environmental law.[3] The problem is that Ukrainian environmental law protects only wild animals. Environmental law in Ukraine is grounded in the Law of Ukraine on Fauna aimed at regulating the use of wild animals, conservation and restoration of their populations (in the context of biodiversity preservation). The philosophy of this law is based on Soviet approaches to the regulation and protection of fauna as part of nature. Currently, Ukrainian environmental law does not contain provisions on animal welfare and their protection from cruel treatment which is confirmed by the analysis of textbooks and other academic sources as well as by lack of relevant academic research in the field of environmental law. The provisions of the legislation

[1] Law of Ukraine of 21 February 2006 on the Protection of Animals from Brutal Treatment, VVR, 2006, No. 27, p. 990, as amended.

[2] T. Korotkij, *Organizacionno-pravovye aspekty zashchity zhivotnyh ot zhestokogo obrashcheniya v Ukraine* [The Legal-Organizational Aspects of the Protection of Animals from Cruel Treatment in Ukraine], [in:] *Reshenie problemy bezdomnyh zhivotnyh v Ukraine gumannym sposobom – vazhnejshaya sostavlyayushchaya razvitiya evropejskogo goroda i blagopoluchiya ego zhitelej* (tezisy mezhdunar. konf) [A Humane Solution to the Problem of Stray Animals in Ukraine is an Important Constituent of the Development of European Cities and their Citizens (proceedings of the international conference)], Simferopol 2011, p. 16 (in Ukrainian).

[3] T. Korotkij, *Organizacionno-pravovye voprosy zashchity zhivotnyh v Ukraine: rol yuristov v institucionalizacii dvizheniya po zashchite zhivotnyh* [The Legal-Organizational Aspects of Animal Protection in Ukraine: the Role of Lawyers in Institutionalizing the Movement for Animal Protection], "Ukrainian Journal of International Law. International Legal Standards for the Treatment and Protection of Animals and the Practice of Ukraine" 2013, p. 36 (in Ukrainian).

on animal protection from cruel treatment are partly analyzed by scholars of administrative and criminal international law.

The understanding of basic approaches to animal treatment has likewise to be discussed. The conception of animal welfare is the most acceptable to the international, European and national law of European states. For instance, the European Convention for the Protection of Pet Animals of 1987 defines the principles of animal welfare: nobody shall cause a pet animal pain or suffering, nobody shall abandon a pet animal, any person who keeps a pet animal shall be responsible for its health and welfare and provide accommodation, care and attention with regard to its ethological needs, etc.[4] Soviet states commonly rephrase "animal welfare" as "the protection of animals from cruel treatment". According to Ukrainian scholars, it can be explained by the fact that Soviet legislation on animal management is of prohibitive nature and that Ukrainian law generally leans towards the protection of human moral interests rather than the protection of animals from cruelty[5]. For instance, pursuant to item 1.1 of the Regulations on the Use of Animals for Entertainment Purposes, they are aimed, first and foremost, "at ensuring human life and health" and then "at protecting animals from suffering and death due to cruel treatment and protecting their natural rights".[6] The secondary importance of animal welfare and their protection from cruel treatment is one of the features of Soviet legal and social systems. The only provision governing the protection of animals from cruel treatment in the Soviet period was included in the Criminal Code of the Ukrainian SSR and introduced only in 1988. For the present, Ukrainian law, including environmental law, requires changes to the conception of animal protection prioritizing not the value of animals for humans and ecosystems but the idea of animals having consciousness and feeling emotions.

Legislative regulation of the use of animals for entertainment purposes in Ukraine

Arts. 7–9 of the European Convention for the Protection of Pet Animals (1987) contain provisions on the conditions of animal training, commercial breeding and trade, establishment of animal shelters, use of pet animals for advertising, entertainment and other similar events. The Law of Ukraine on the Protection of Animals from Brutal Treatment defines more specifically and distinctly the conditions of animal

[4] The European Convention for the Protection of Pet Animals of 13 November 1987, ETS No. 125.

[5] N. Zubchenko, *Mizhnarodno-pravove spivrobitnytstvo derzhav u sferi zabezpechennia dobrobutu tvaryn ta yikh zakhystu vid zhorstokoho povodzhennia* [International Legal Collaboration between States on Animal Welfare and the Protection of Animals from Cruel Treatment], Odesa 2016, pp. 60–61 (in Ukrainian).

[6] The Order of the Ministry of Agrarian Policy of Ukraine of 13 October 2010 on Adoption of the Regulations on the Use of Animals for Entertainment Purposes, OV, 2010, No. 100, p. 102.

management with regard not only to the above-mentioned requirements but also contains provisions on veterinary care, transportation, etc. (Arts. 10, 11 of the Law). The conditions of the use of animals for entertainment and other activities are stated by Art. 25 of the Law. These provisions are analogous to those of the Convention. Art. 25 of the Law includes the following bans and obligations: "Showings of animals at exhibits, in zoos shall be allowed on condition that hygienic, veterinary and sanitary rules and regulations are observed. Animals shall be protected from injury, pain, mutilation, death at sporting and entertainment events, video and photo shoots. Animal training shall be conducted on condition that: animals are protected from beatings, intimidation, removal of canine teeth, claws, etc.; animals are not forced to perform traumatic actions. Animals that cannot adapt to captivity, enclosed areas and training shall not be used for entertainment, sporting events, other leisure activities. Any person who keeps an animal unfit for circus, sports and other entertainment purposes shall observe all the conditions of animal management as required by the Law. Blood sports, sporting and entertainment events that involve harassment, killings, observation of the death agony of animals, use of animals for killing other animals shall be prohibited".

To further specify the general provisions of the Law, the following subordinate regulations were adopted: the Regulations on the Use of Animals for Entertainment Purposes (2010), the Procedure for Management and Breeding of Wild Animals in Captive or Semi-Captive Settings (2010), the Regulations on Transportation of Animals (2011), the Rules and Regulations on Keeping Dolphins in Captive Settings (2012). For instance, pursuant to item. 2.8 of the Regulations on the Use of Animals for Entertainment Purposes, any person who uses an animal at entertainment events shall be obliged: to ensure the necessary conditions to satisfy its biological and individual needs, as required by the Law of Ukraine on the Protection of Animals from Brutal Treatment; to provide care, humane treatment, attention, sufficient nutrition and constant access to water for this animal; to observe the sanitation and hygiene standards at the place where the animal is kept (a place of a permanent stay) and the standards of cohabitation; to clean its excrement; to ensure a timely provision of veterinary services for the animal (medical examination, treatment, vaccination, etc.); to have veterinary documents; to immediately inform a veterinary institution of any disease of the animal.

The signing of the Ukrainian-EU Association Agreement in 2014 prompted further steps in approximating Ukrainian legislation to the EU legislation. It involves a gradual introduction and adoption of laws and regulations in compliance with the EU law. The Association Agreement also provides for the approximation of Ukrainian legislation to the EU standards. As stated in item 4 of Chapter 4 "Sanitary and phytosanitary measures", the Agreement is aimed at reaching a mutual understanding concerning the standards of animal keeping and management. The standards of animal keeping and management provide the foundation for animal protection, developed and applied by the Parties in proper compliance with the standards of the World Organization

for Animal Health and come within the purview of the Agreement.[7] Since 2015, the Law of Ukraine on the Protection of Animals from Brutal Treatment has included the ban on the creation and operation of mobile menageries, mobile zoos and mobile exhibits of wild animals as well as dolphinariums without natural seawater. In 2017, amendments were made to this Law, to the Criminal Code and the Code on Administrative Offences for Improper Introduction of the Conditions of Humane Treatment of Animals, including greater administrative and criminal liability for cruel treatment of animals. The amendment of significant importance was made to Art. 1 of the Law of Ukraine on the Protection of Animals from Brutal Treatment to include a specific official definition of "mobile menageries" as specially equipped temporary buildings, vehicles, mobile cages, enclosures, other mobile constructions used by cultural institutions, circuses, mobile zoos, touring centers and other persons or organizations for keeping and transporting wild animals in order to use them for entertainment purposes (of public and private character) and for non-scientific public showings and exhibits.

Although significant progress has been made in the legal regulation of the protection of animals from cruel treatment, it has to be noted that the existing legal mechanisms are not absolutely effective. Academic publications have a considerable number of suggestions about amendments to certain mechanisms of regulating animal management.[8] Furthermore, over the last few years, due to the deregulation of Ukraine's economy and certain economic relations, many permit documents have been cancelled. For instance, Ukrainian legislation provided for a permit-issuing procedure for organizing events involving animals, but in 2016, such a permit was cancelled. The issue of control and imposing sanctions for violating the corresponding bans is problematic. Pursuant to Chapter 4 of the Regulations on the Use of Animals for Entertainment Purposes, dedicated to ensuring the observance of the above-mentioned regulations, public organizations that clearly do not have administrative powers to terminate violations and impose sanctions are responsible for exercising this type of control. The chapter does not provide information on the state authorities as regulatory bodies. The list of such regulatory authorities and their powers are included in Chapter 5 of the Law of Ukraine on the Protection of Animals from Brutal Treatment.

---

[7] Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, OJ, 2014, L 161/3.

[8] D. Kalmykov, *Perspektyvy vdoskonalennia rehuliatyvnoho zakonodavstva v chastyni zakhystu tvaryn vid zhorstokoho povodzhennia* [The Prospects for Amending the Regulatory Legislation on the Protection of Animals from Cruel Treatment], "Law Forum" 2013, No. 1, pp. 367–378, http://archive.nbuv.gov.ua/e-journals/FP/2013-1/13kdovgp.pdf [access: 01.10.2019] (in Ukrainian); M. Berehelia, *Administratyvno-pravove rehuliuvannia zakhystu tvaryn vid zhorstokoho povodzhennia, yaki vykorystovuie liudyna pid chas provedennia zakhodiv* [The Legal-Administrative Regulation of the Protection of Animals from Cruel Treatment at Entertainment Events], "Actual Problems of Native Jurisprudence" 2017, No. 3, pp. 88–90 (in Ukrainian).

Actual problems of the practice of humane treatment of animals in entertainment purposes

As of today, another issue that poses a problem not only for Ukraine in the context of ensuring animal welfare and their protection from cruel treatment is the regulation of circuses, including mobile circuses featuring animals. In mobile circuses, as a rule, animals are devoid of the possibility to show their typical behaviour and interact with other representatives of their species; they are kept in confined spaces, transported for long periods, demonstrated to public without proper security measures. The basis for the regulation of this issue is Art. 9 of the European Convention for the Protection of Pet Animals (1987), but it can be applied only indirectly to the participation of wild animals in circus acts. In Ukraine, it is authorized for stationary zoos to use wild animals, but they have to comply with the rules and standards of keeping animals in captivity. Despite the fact that the use of animals by mobile circuses is not directly prohibited by law, they are not allowed to transport animals, since all mobile constructions for transporting or keeping wild animals for further use in performances are considered mobile menageries whose operation is prohibited, as mentioned above. The problem is, a lack of proper control and a statutory ban on this type of activity leads to the existence and touring of mobile circuses featuring animals. There are currently more than 20 stationary zoos and no less than 8 mobile zoos that keep and feature wild animals in their performances.[9]

It is becoming more common for city councils to ban the operation of mobile circuses in their cities. Such bans are approved and currently in effect on the territory of Kyiv, Lviv, Lutsk, Chernihiv, Rivne, Kryvyi Rih and dozens of other cities. The legitimacy of these resolutions has been repeatedly approved by courts. One of the recent examples of positive court rulings is the ruling of the Eighth Administrative Court of Appeal (Lviv) that upheld the resolution of the Rivne City Council on the prohibition of mobile circuses using animals. On 6 February 2019, a panel of judges heard an appeal of the Rivne City Council against the ruling of the Rivne Regional Administrative Court of 8 October 2018 on the lawsuit filed by the private enterprise "The Production Centre »Tours in Ukraine«" to the Rivne City Council against the unlawful Resolution on the Ban on Mobile Circuses with Animals in the City of Rivne. The Court of Appeal upheld the appeal of the Rivne City Council, having ruled that the appealed resolution was adopted within the powers granted to the local authorities by Ukrainian legislation and does not infringe, by any means, on the rights and legal interests of "The Production Centre »Tours in Ukraine«". According to the Court of Appeal, a mobile menagerie is a constituent part of a mobile zoo, used for keeping and transporting wild animals in order to use them for circus performances. Based

[9] *Analytical Note. The Use of Wild Animals in Circuses*, http://epl.org.ua/announces/analitychna-zapyska-vykorystannya-dykyh-tvaryn-v-tsyrkah/ [access: 01.10.2019].

on a comprehensive analysis of the contents of the legal provisions, the regulation of the protection of animals from cruel treatment also belongs to the competence of local authorities. Therefore, the ban on mobile zoos with animals and menageries in the city of Rivne is within the powers of the local government in protecting animals from cruel treatment, based on Parts 2 and 3 of Art. 28 of the Law of Ukraine on the Protection of Animals from Brutal Treatment.[10]

In general, local governments play an important role in the system of the legal regulation of animal protection. For instance, The Support Programme for Affected Wild and Exotic Animals and Birds in Lviv for the Years 2019–2023 was approved by the Resolution of the Lviv City Council of 8 November 2018.[11] Pursuant to item 2.2, the priorities of the Programme are as follows: creating conditions for the operation of municipal and private shelters for affected wild and exotic animals and birds; providing guaranteed professional veterinary care for affected wild and exotic animals and birds; rehabilitation of affected wild and exotic animals; ensuring a return of wild animals to their natural habitat; doing public awareness-raising work, etc. In the majority of cities, the Regulations on Animal Keeping and Management are approved and in effect.

The driving force for dealing with specific cases related to the cruel treatment of animals and the introduction of measures for their protection is the public, represented by public organizations and movements. It can be illustrated by several examples. For instance, on 15 September 2019, the All-Ukrainian March for Animals[12] took place in Kyiv, uniting like-minded people from 24 cities. It is the third year this march takes place upon the initiative of the humanist movement UAnimals; people from all over the country participate in it. Among the requirements of activists are statutory bans on the use of animals in circuses and dolphinariums, on the exploitation of animals for begging and photo shooting. This event represents public readiness for change and great public demand for resolving issues of the protection of animals from cruel treatment. With the help of a famous Ukrainian actress's open letter and wide public support, in February 2019, the police expropriated two Red List birds that had been used for taking photos with tourists for years and handed them over to the national park.[13]

---

[10] *The Court Upheld the Ruling on Banning Mobile Circuses with Animals*, http://yur-gazeta.com/golovna/sud-viznav-zakonnim-rishennya-pro-zaboronu-peresuvnih-cirkiv-z-tvarinami.html [access: 01.10.2019].

[11] The Resolution of the Lviv City Council of 8 November 2018 on Adoption of the Support Programme for Affected Wild and Exotic Animals and Birds in Lviv for the Years 2019–2023, https://www8.city-adm.lviv.ua/inteam/uhvaly.nsf/(SearchForWeb)/3579266D21FFDD4FC225834B00336AC9?OpenDocument [access: 01.10.2019].

[12] *The All-Ukrainian March for Animals – 2019*, https://www.facebook.com/events/киев-парк-шевченко/всеукраїнський-марш-за-тварин-2019/760066621054797/ [access: 01.10.2019].

[13] *The Red List Birds Have Been Saved: Wild Birds that Had Been Used for Business Activities for Years in Yaremche Have Been Freed*, https://mi100.info/2019/03/01/chervonoknyzhnyh-ptahiv-vryatuvaly-v-yaremche-zvilnyly-dykyh-ptahiv-yakyh-rokamy-vykorystovuvaly-dlya-biznesu/ [access: 01.10.2019].

Another problem of current importance is the operation of dolphinariums. Currently, there are about 15 dolphinariums in Ukraine. Each of them keeps from three to six common bottlenose dolphins. For instance, the Kharkiv Dolphinarium "Nemo" has four dolphins, the Berdiansk Dolphinarium – 33, the Truskavets Dolphinarium "Oscar" – 64. Unofficial sources say that no less than 40 to 60 common bottlenose dolphins are held in captivity in Ukraine. Due to the fact that an official record is not kept, exact figures are unknown; the same goes for the replacement of dolphins.[14] As mentioned above, the Rules and Regulations on Keeping Dolphins in Captive Settings are currently in effect in Ukraine. They contain detailed requirements for swimming pools and enclosures, requirements for water quality, standards for feeding and transporting mammals. For instance, according to the Rules and Regulations, a swimming pool for a dolphin is required to have the following measurements: the minimum depth of swimming pools as well as the average depths of enclosures in a natural sea area with a natural incline of the seabed – 3.5 m; the minimum surface area for a shoal of one to five dolphins – 275 m^2; the minimum extra surface area for every new dolphin – 75 m^2; the minimum length of a swimming pool (enclosure) – 7.3 m; the minimum total water volume for a shoal of one to five dolphins – 1,000 m^3. By law, dolphinariums are obliged to use natural seawater. In the meantime, such ideally formulated precepts remain only on paper due to a lack of proper government control. In such cases, public environmental organizations are at the forefront again. At the end of 2018, the ruling of the Supreme Court of Ukraine on the case of "the protection of dolphins" received much publicity. More specifically, it concerned the dissolution of the dolphinariums that violated the conditions of keeping dolphins. The case is unusual because the lawsuit was filed by a public environmental charity organization, whose right to file this type of lawsuit was confirmed by the Supreme Court of Ukraine. Furthermore, the Court recognized that the state authorities provide insufficient protection for animals used for entertainment purposes.[15]

Conclusions

I would like to conclude by saying the following:

1. Ukrainian legislation on the humane treatment of animals and their protection was developed in the last decade and is being amended to implement the requirements of the corresponding international and European law.

[14] *The Number of Dolphins Kept in Captivity in Ukraine*, http://epl.org.ua/announces/skilky-delfiniv-utrymuyut-v-nevoli-v-ukrayini/ [access: 01.10.2019].

[15] The Ruling of the Supreme Court of 11 December 2010, Case 910/8122/17, https://verdictum.ligazakon.net/document/78977479 [access: 01.10.2019].

2. The laws and regulations governing the conditions of using animals for entertainment purposes are represented by the provisions of the Law of Ukraine on the Protection of Animals from Brutal Treatment and several subordinate regulations. Nevertheless, a number of important legal requirements related, for instance, to a permit-issuing procedure for these activities are currently cancelled or are not specified enough.

3. Resolutions of local governments and court rulings are of considerable importance in introducing a statutory ban on the use of animals for entertainment.

4. An important role in increasing the level of animal protection is played by animal rights organizations that raise the problem of the improper treatment of animals by owners in mobile menageries, dolphinariums, for other commercial purposes; do extensive awareness-raising work; contribute to the development of public world view and conscience; exert pressure on the state and local governments.

References

Analytical Note. The Use of Wild Animals in Circuses, http://epl.org.ua/announces/analitychna-zapyska-vykorystannya-dykyh-tvaryn-v-tsyrkah/ [access: 01.10.2019].

Berehelia M., *Administratyvno-pravove rehuliuvannia zakhystu tvaryn vid zhorstokoho povodzhennia, yaki vykorystovuie liudyna pid chas provedennia zakhodiv* [The Legal-Administrative Regulation of the Protection of Animals from Cruel Treatment at Entertainment Events], "Actual Problems of Native Jurisprudence" 2017, No. 3 (in Ukrainian).

Kalmykov D., *Perspektyvy vdoskonalennia rehuliatyvnoho zakonodavstva v chastyni zakhystu tvaryn vid zhorstokoho povodzhennia* [The Prospects for Amending the Regulatory Legislation on the Protection of Animals from Cruel Treatment], "Law Forum" 2013, No. 1, http://archive.nbuv.gov.ua/e-journals/FP/2013-1/13kdovgp.pdf [access: 01.10.2019] (in Ukrainian).

Korotkij T., *Organizacionno-pravovye aspekty zashchity zhivotnyh ot zhestokogo obrashcheniya v Ukraine* [The Legal-Organizational Aspects of the Protection of Animals from Cruel Treatment in Ukraine], [in:] *Reshenie problemy bezdomnyh zhivotnyh v Ukraine gumannym sposobom – vazhnejshaya sostavlyayushchaya razvitiya evropejskogo goroda i blagopoluchiya ego zhitelej* (tezisy mezhdunar. konf) [A Humane Solution to the Problem of Stray Animals in Ukraine is an Important Constituent of the Development of European Cities and their Citizens (proceedings of the international conference)], Simferopol 2011 (in Ukrainian).

Korotkij T., *Organizacionno-pravovye voprosy zashchity zhivotnyh v Ukraine: rol yuristov v institucionalizacii dvizheniya po zashchite zhivotnyh* [The Legal-Organizational Aspects of Animal Protection in Ukraine: the Role of Lawyers in Institutionalizing the Movement for Animal Protection], "Ukrainian Journal of International Law. International Legal Standards for the Treatment and Protection of Animals and the Practice of Ukraine" 2013 (in Ukrainian).

The All-Ukrainian March for Animals – 2019, https://www.facebook.com/events/киев-парк-шевченко/всеукраїнський-марш-за-тварин-2019/760066621054797/ [access: 01.10.2019].

The Court Upheld the Ruling on Banning Mobile Circuses with Animals, http://yur-gazeta.com/golovna/sud-viznav-zakonnim-rishennya-pro-zaboronu-peresuvnih-cirkiv-z-tvarinami.html [access: 01.10.2019].

The Number of Dolphins Kept in Captivity in Ukraine, http://epl.org.ua/announces/skilky-delfiniv-utrymuyut-v-nevoli-v-ukrayini/ [access: 01.10.2019].

The Red List Birds Have Been Saved: Wild Birds that Had Been Used for Business Activities for Years in Yaremche Have Been Freed, https://mi100.info/2019/03/01/chervonoknyzhnyh-ptahiv-vryatuvaly-v-yaremche-zvilnyly-dykyh-ptahiv-yakyh-rokamy-vykorystovuvaly-dlya-biznesu/ [access: 01.10.2019].

Zubchenko N., *Mizhnarodno-pravove spivrobitnytstvo derzhav u sferi zabezpechennia dobrobutu tvaryn ta yikh zakhystu vid zhorstokoho povodzhennia* [International Legal Collaboration between States on Animal Welfare and the Protection of Animals from Cruel Treatment], Odesa 2016 (in Ukrainian).

Abstract: The present study is aimed at analysing the legal mechanism for the regulation of the use of animals for entertainment purposes under Ukrainian legislation. The analysis encompasses the legislation on the protection of animals from cruelty and ensuring their humane treatment. The specific features of the development and amendment of the legal provisions on the prevention of animal abuse in Ukraine are studied. The main requirements of the Law of Ukraine on the Protection of Animals from Brutal Treatment related to the use of animals for entertainment and their specification in subordinate legislation (the Regulations on the Use of Animals for Entertainment Purposes; the Rules and Regulations on Keeping Dolphins in Captive Settings) are interpreted. The conclusion is made with regard to the development of the corresponding system of legal regulation in Ukraine in the last decade and the introduction of international and European requirements. The study provides examples of the violation of the legislation on the operation of mobile circuses or dolphinariums. The positive experience of adopting bans and regulating animal keeping and management during entertainment events in cities by local governments and courts is analyzed. The importance of public influence and attention to this issue in the context of specific examples of public involvement and the participation of public environmental organizations in animal protection activities (including in courts of law) is emphasized.

Keywords: protection of animals; cruel treatment of animals; the Law of Ukraine on the Protection of Animals from Brutal Treatment; use of animals for entertainment purposes

LUCYNA STANISZEWSKA

Adam Mickiewicz University in Poznań, Faculty of Law and Administration, Institute of Law
https://orcid.org/0000-0003-3457-0901
lucynast@amu.edu.pl

Legal Protection of Homeless Animals and Prevention of Homelessness of Animals as a Mandatory Own Task for the Commune Self-Government

Introduction

The subject of this study is the analysis of the commune's task within the scope of care for homeless animals and prevention of homelessness of animals, as well as legal instruments for its performance. It should be pointed out that it was not until 1997, the year in which the Animal Protection Act entered into force, when the animals were dereified.[1] The legislator granted animals the status of objects for which a special legal regime is in force, resulting from the obligations of a human, as well as public administration bodies towards them in terms of respect and care. Special care should be given to homeless animals and, because of the scale of the phenomenon, it has become a mandatory own task for communes.

On the one hand, it can be indicated that in the Polish law there are legal instruments for the proper performance of the task in the form of care for homeless animals

[1] A. Nałęcz, *Ochrona zwierząt a postęp cywilizacyjny*, [in:] *Wpływ przemian cywilizacyjnych na prawo administracyjne i administrację publiczną*, red. P. Suwaj, J. Zimmermann, Warszawa 2013, p. 674; J. Białocerkiewicz, *Status prawny zwierząt. Prawa zwierząt czy prawna ochrona zwierząt*, Toruń 2005, p. 56.

and prevention of homelessness of animals, while on the other hand, communes in Poland still are not able to cope with the problem of homelessness of animals. Therefore, it should be considered whether legal regulations have been correctly shaped, or whether the problems related to homelessness of animals result from financial aspects and lack of social responsibility for the protection of animal rights and prevention of their homelessness.

The problem of homelessness of animals has usually been pushed to the margins of public discussion. Meanwhile, the problem in question is still alive. In Europe, we can distinguish countries that have successfully managed the issue of homelessness of animals (e.g. the Netherlands, Norway, or Sweden) and those that are still struggling with the problem of overcrowded shelters, like Bulgaria, Greece, Italy, Romania, or Poland.[2] What is more, shelters often do not meet the minimum standards, and therefore they can be called a certain kind of dying facilities.[3] This makes it necessary to analyse legal regulations defining the obligations of communes regarding care for homeless animals and prevention of their homelessness.

A programme of care for homeless animals and prevention of homelessness of animals as a form of performance of the commune's task within the scope of care for animals

The obligation to provide care and protection for homeless animals is the own task of a commune. It was imposed on the commune pursuant to Art. 7 clause 2 of the Act of 8 March 1990 on Commune Self-Government (hereinafter referred to as CSA)[4] and Art. 11 clause 1 of the Act of 21 August 1997 on Animal Protection (hereinafter referred to as APA).[5] Pursuant to Art. 7 clause 2 of CSA, the issue of assigning a specific own task to a group of mandatory or voluntary tasks of a commune is resolved on the basis of substantive law. The ground-breaking change in the law for the issue of care for homeless animals took place on 1 January 2012, when the provision of Art. 11a of APA came into force in a new wording, which was given to it by Art. 1 point 9 of the Act of 16 September 2011, amending the Animal Protection Act and the Tidiness and Order Act.[6] In the provision of Art. 11a, the legislator indicated *expressis verbis* the obligation of the commune council to determine, by way of a resolution (annually by March 31), programmes of care for homeless animals and prevention of homelessness

[2] K. Fiszdon, A. Boruta, *Problem bezdomności zwierząt*, „Przegląd Hodowlany" 2014, Nr 82, p. 34.

[3] Annual report on auditing shelters for 2017, https://www.wetgiw.gov.pl/nadzorweterynaryjny/schroniska-dla-bezdomnych-zwierzat [access: 25.09.2019].

[4] Act of 8 March 1990 on Commune Self-Government (consolidated text, Journal of Laws of 2019, item 506).

[5] Act of 21 August 1997 on Animal Protection (consolidated text, Journal of Laws of 2019, item 122).

[6] Journal of Laws of 2011, No. 230, item 1373.

of animals, and also it indicated an open catalogue of elements of such a programme. This task was of a different nature according to the regulations in force until the end of 2011, when the activities undertaken by the commune in order to ensure protection of homeless animals were the commune's own task, but not its obligation.[7]

By introducing the amendment of 2011, the legislator aimed to enforce the obligations of the commune in order to care for and catch homeless animals. This task is inextricably linked to the duty of communes to ensure tidiness and order in their areas and to create the conditions necessary for maintaining them.[8] The performance of this obligation was not supported by the low effectiveness of preventing homelessness of animals, absence of catching them or leaving sick individuals without help on the streets. The justification for the amending bill showed that the legislator's objective was to prevent the extermination of sick animals that were caught too late, to improve the quality of conditions in shelters, and to strengthen the self-government's responsibility for generating homelessness of animals by the inhabitants.[9] After more than 7 years from the entry into force of the amendment, it is worth analysing the functioning of legal regulations, especially in terms of their effectiveness and efficiency, the reduction of the population of homeless dogs and cats, as well as improving the living conditions of homeless animals in shelters. It is also necessary to evaluate the social and organizational activities carried out in the form of tutoring and education of inhabitants in the field of popularization and expanding knowledge about humane way of treating animals.

The provision of Art. 11a of APA was initially an enumerative indication of the objective elements of the resolution constituting the programme. Then, the legislator, under the Act of 6 January 2017,[10] changed the nature of the enumeration included in Art. 11a clause 2 of APA to a non-exhaustive list while maintaining mandatory elements so as to give some flexibility to communes depending on the needs of a given self-government unit and its financial capabilities. Moreover, the amendment – under Art. 11 clause 3a of APA – made it possible to finance by the self-government the tasks consisting in sterilisation or castration of animals having owners. This competence, expressed *expressis verbis* in the provision, enables the lawful distribution of public funds by the self-government unit. This is an important element of protection against excessive reproduction of animals being *de facto* without care.

---

[7] Also judicature: the decision of the Supreme Administrative Court of 13 March 2012, II OSK 564/12, LEX No. 1138204; the decision of the Provincial Administrative Court in Warsaw of 27 December 2011, IV SA/Wa 1703/11, LEX No. 1160578, and the doctrine: K. Wlaźlak, *Funkcja planowania gminy na przykładzie programu opieki nad zwierzętami bezdomnymi oraz zapobiegania bezdomności zwierząt*, „Przegląd Prawa Publicznego" 2015, Nr 4, p. 36.

[8] Art. 3 clause 2 point 14 of the Act of 13 September 1996 on Tidiness and Order (consolidated text, Journal of Laws of 2018, item 1454).

[9] Justification for the parliamentary bill amending the Animal Protection Act and the Tidiness and Order Act (Sejm paper No. 4257), Warsaw, 12 May 2011, www.sejm.gov.pl [access: 25.09.2019], pp. 8–9.

[10] Act of 15 November 2016 amending the Animal Protection Act (Journal of Laws of 2016, item 2102).

An unquestionable shortcoming of the regulation, however, is the lack of definition of the legal consequences of failure to adopt the programme by a commune's legislative body. Failure to adopt the programme in a given year is significant in terms of its impact, and causes substantial difficulties in the performance of these animal protection tasks, and some of them may even prove impossible to attain, particularly catching homeless animals.

Before the amendment of 2011, the problem of homeless animals was dealt with in general by about 61% of communes, and even less, 25% of communes, passed resolutions in this respect.[11] The Supreme Audit Office report for 2016 shows that although communes generally adopt programmes, they are not very effective as they do not contain many necessary provisions. The most important measures preventing homelessness of animals include their permanent marking and registration as well as castration or sterilisation, however, the majority of communes did not include such measures in the programmes of care for homeless animals and prevention of their homelessness. As many as 9 out of 11 audited communes did not take advantage of the possibility to introduce a plan of marking all animals in the commune. As a result, in case of loss of an animal, and even more so in case of abandoning it, it was difficult to find the current owner, and such an animal became homeless. Only when animals are marked, it is possible to effectively care for and distinguish homeless cats, i.e. cats that have escaped, strayed or been abandoned by people from free-living cats, a concept not defined by law, by commune services and city guards.[12]

According to Art. 11a clause 3a of APA, the programme may or may not include a plan for sterilisation or castration of animals in a commune, or a plan for their marking. It is therefore up to the commune to decide whether such a plan will be implemented at all. In addition, it is free to shape its provisions, to develop the terms and conditions according to which the above-mentioned actions will be carried out.[13]

It should therefore be noted that the inclusion of programme elements such as: a plan for marking animals in the commune and a plan for sterilisation or castration of animals in the commune, as optional raises doubts. These elements concern preventive measures, however, they are essential for the proper protection of animals and prevention of homelessness. However, one should agree with the freedom of shaping the procedures related thereto by the commune. This view is also reinforced by the standpoint of the Supreme Audit Office contained in the audit report, which indicates

[11] Statistics for 2007 quoted in the justification for the parliamentary bill amending the Animal Protection Act and the Tidiness and Order Act (Sejm paper No. 4257), Warsaw, 12 May 2011, www.sejm.gov.pl [access: 25.09.2019], pp. 8–9.

[12] M. Rudy, *Program opieki nad zwierzętami bezdomnymi oraz zapobiegania bezdomności zwierząt*, www.prawoweterynaryjne.pl/artykuly/program-opieki-nad-zwierzetami-bezdomnymi-oraz-zapobiegania-bezdomnosci-zwierzat/ [access: 25.09.2019], p. 2.

[13] See judgment of the Provincial Administrative Court in Bydgoszcz of 20 March 2019, II SA/Bd 1351/18, LEX No. 2696736.

as a basic recommendation for executive bodies of self-governments the introduction of effective and comprehensive prevention limiting uncontrolled breeding of animals and promoting adoption.[14] Therefore, only the implementation of the animal marking plans and sterilisation or castration plans, indicated as optional in Art. 11a clause 3 and 3a of APA, may affect the effectiveness of commune's actions. What is more, the Supreme Audit Office report shows that communes did not carry out any information campaigns for animal owners or any real incentives to castrate or sterilize animals.[15]

However, on the website of the General Veterinary Inspectorate we can read statistics related to shelter audits. The latest published report from 2017 shows that in 2017, the number of dogs in shelters fell by 2.45% and the number of cats increased by 8.86% in comparison with 2016. The number of animals admitted to shelters was higher than in the previous reference period. In 2017, 74,765 dogs were admitted, as compared to 73,314 in 2016, and 27,205 cats were admitted in 2017 as compared to 25,367 in 2016. Data on the number of animals in shelters show that this number remains high all the time. It is worrying that despite measures taken to combat animal homelessness, the number of dogs staying in shelters in 2017 was comparable to previous years, and the number of cats in shelters increased significantly.[16]

In view of the above, it should be pointed out that legal regulations allowing for financing the castration of animals staying in shelters in accordance with Art. 11a of the Animal Protection Act, and promotion of such procedures among animal owners, also at the expense of the commune, are used ineffectively.

Audits of animal shelters have also been carried out. During the audits conducted in 545 animal shelters by district veterinarians, in 68 of them irregularities have been revealed, such as: deficiencies ininfrastructure, inconvenient living conditions for animals, deficiencies in medical and veterinary care.[17] The still unsatisfactory condition of shelters in communes is a consequence of communes' mistakes in establishing rules and determining the precise amount of financial resources spent on entities responsible for providing care to homeless animals and cats living freely in the commune, including in the area of medical and veterinary services.[18] Pursuant to Art. 11a clause 5 of APA, the indication of the manner of spending financial resources allocated to the implementation of particular elements of the programme constitutes its mandatory element. Its omission or misapplication renders the local law absolutely

[14] The Supreme Audit Office report for 2016, https://www.nik.gov.pl/aktualnosci/nik-o-zapobieganiu-bezdomnosci-zwierzat.html [access: 25.09.2019].

[15] *Ibidem*.

[16] Annual report of the Chief Veterinary Officer on the audits of animal shelters in 2017, https://www.wetgiw.gov.pl/nadzor-weterynaryjny/schroniska-dla-bezdomnych-zwierzat [access: 25.09.2019].

[17] *Ibidem*.

[18] Judgment of the Provincial Administrative Court in Cracow of 3 December 2013, II SA/Kr 852/13, LEX No. 1493112.

invalid.[19] By determining the means of spending, the provision of Art. 11a clause 5 of APA constitutes an obligation to indicate specific forms of using them, but also to point out the manner of acting in respect of their allocation aimed at achieving the objectives of the programme.[20] Only by linking the adopted amount of financial resources allocated to the implementation of the programme to a specific way of spending it, can one assume that it is not a fiction and it enables the actual performance of particular tasks, which are numerous, in accordance with the priorities adopted in the resolution. Moreover, expenditures related to the programme should be foreseen already at the stage of adopting the annual budget of the commune.

The performance of this task must, however, be connected with the possession of sufficient financial resources by communes. However, the proposed solution completely ignores the financial aspect of the implementation of new mandatory tasks by communes related to the care for homeless animals and prevention of their homelessness. Measures such as the actions in the Żukowice commune, where the programme ensures that a person who adopts a dog caught in the commune area will receive one-off reimbursement amounting to partial costs of its upkeep, meet with the approval.[21] Such incentives are intended to *de facto* reduce, over a longer period of time, the expenditure of communes on upkeep of animals in shelters.

Performance of the obligation to provide care for homeless animals must take into account the budgetary possibilities of the commune. The doctrine even allowed for the possibility of killing caught homeless animals if the commune is not able to provide proper care and it does not have a social organization that would undertake to run a shelter.[22] However, even serious financial problems of the commune cannot lead to passing the obligation to provide care for homeless animals in the commune onto its inhabitants.

Programme of care for homeless animals and prevention of homelessness of animals as a legal form of administration actions

The basic forms of public administration action include: administrative acts and normative acts. In the doctrine, the subject of the legal nature of the programme of care for homeless animals and prevention of homelessness of animals is discussed quite

[19] Judgment of the Provincial Administrative Court in Warsaw of 8 May 2019, VIII SA/Wa 10/19, LEX No. 2681624.

[20] Judgments of the Provincial Administrative Court in Warsaw of: 13 March 2019, VIII SA/Wa 7/19, LEX No. 2641285, 14 March 2019, VIII SA/Wa 86/19, LEX No. 2639390.

[21] Resolution No. IV/43/2019 of Żukowice Commune Council of 1 March 2019, on the adoption of a programme of care for homeless animals and prevention of homelessness of animals in the Żukowice commune in 2019, http://bip.zukowice.pl/uchwala-nr-iv-43-2019 [access: 25.09.2019].

[22] W. Radecki, *Obowiązki gminy w zakresie ochrony zwierząt*, „Nowe Zeszyty Samorządowe" 2000, Nr 6, p. 34; K. Wlaźlak, *op. cit.*, p. 43.

often.[23] Pursuant to Art. 87 clause 2 of the Constitution of the Republic of Poland,[24] local laws are the sources of universally binding law of the Republic of Poland within the area of operation of the bodies that established them.

Art. 94 of the Constitution of the Republic of Poland states, in turn, that local self-government bodies and local government administration bodies, on the basis of and within the limits of authorisations contained in the statute, shall establish local laws binding in the area of operations of these bodies. The terms and procedure for issuing local laws have been defined in the statute. The above-mentioned constitutional principle has been reflected in Art. 40 clause 1 of CSA, according to which – on the basis of statutory authorizations – the commune has the right to issue local laws. The commune has the power to adopt local laws regulating specific areas of life of the local community within the subject which boundaries are strictly defined by law. The matter regulated by a normative act issued by a body is to result from a statutory authorisation and cannot exceed the scope thereof. This is confirmed by the content of para. 143 in connection with para. 115 of the Principles of Legislative Technique,[25] which states that the local law shall contain only provisions regulating the matters to be submitted for regulation in the authorising provision (statutory authorisation).

In order to assess whether an act has a character of local law, it needs to be examined. It is necessary to verify who the addressee of the norm of conduct is and what the basis for the adoption of the act was. The character of a legal act is determined by the legal basis and the matter regulated therein. At the same time, the act of local law must be abstract and have general characteristics. However, such an act does not have to be addressed to all residents. The point is that it should be addressed at least to a specific group of addressees.

There were no disputes related to the legal nature of the programme which was considered as the planning act[26] under the Animal Protection Act in the wording in force before 1 January 2012. It is a forecast, a plan; but it did not create obligations and rights of citizens, however, after the amendment of 2011, a dilemma arose which was not ended by the amendment of 2016.

Doctrine, as well as judicature is not uniform with regard to the classification of programmes for the care of homeless animals and the prevention of homelessness of animals. It should be borne in mind that this act has a differentiated normative character as it contains norms of a mixed nature, i.e. abstract and concrete. On the one

[23] K. Wlaźlak, *op. cit.*, pp. 36–38; E. Kruk, *Ewolucja i charakter prawny gminnych programów opieki nad zwierzętami bezdomnymi oraz zapobiegania bezdomności zwierząt*, „Studia Prawnicze i Administracyjne" 2018, Vol. 25(3), p. 43.

[24] The Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws of 1997, No. 78, item 483).

[25] The Ordinance of the Prime Minister of 20 June 2002 on "Principles of Legislative Technique" (consolidated text, Journal of Laws of 2016, item 283).

[26] K. Wlaźlak, *op. cit.*, p. 37.

hand, such a resolution as a programme must be classified for planning acts, which means that its nature, as a universally binding act, may be debatable. On the other hand, such a programme may impose rights and obligations for the inhabitants of the commune who own animals, e.g. with regard to the procedure of declaring sterilization and co-financing of its costs with the commune.

Some administrative courts, especially before the amendment of Art. 11a of APA of 2016, indicated that resolutions adopted by commune councils on the basis of Art. 11a clause 1 of APA do not constitute acts of local law within the meaning of Art. 87 clause 2 of the Constitution of the Republic of Poland and Art. 40 of CSA.[27]

Currently, more and more often opposite judgements are being issued, recognising the programmes as acts of local law. A clear view on the inclusion of resolutions on the adoption of the programme to the acts of local law means that they must be published in the provincial official journal and *vacatio legis* must be also observed. The Supreme Administrative Court – pointing out that the programme is of great informative importance for the inhabitants, who can find out from it who – in a commune – runs a shelter, a farm, or is an entity obliged to provide 24-hour veterinary care in case of road accidents involving animals – stated that it is an act of local law.[28]

In its most recent judgement of 30 July 2019, the Supreme Administrative Court indicated that the resolution of the commune council – the programme of care for homeless animals and prevention of homelessness of animals – is an act of local law. The programme first of all concretizes the methods of operation of the commune in order to properly fulfil its obligations resulting from the Animal Protection Act. The contents of the programme therefore constitute plans, forecasts and rules of conduct in specific situations, the implementation of which constitutes own tasks of the commune. However, the important feature of the programme is that apart from individual and concrete provisions, it contains general and abstract regulations. The fact that the programme of care for homeless animals and prevention of homelessness of animals adopted by the commune council contains individual and specific provisions does not deprive it of legal force of universally binding law.[29]

The standpoint of the doctrine is also divided. Katarzyna Wlaźlak points out that it is difficult to derive at least one norm characterizing local law (general and abstract)

---

[27] Judgment of the Provincial Administrative Court in Lublin of 7 August 2012, III SA/Lu 463/12, LEX No. 1227904; judgment of the Provincial Administrative Court in Wrocław of 12 November 2014, II SA/Wr 603/14, CBOSA; judgment of the Provincial Administrative Court in Poznań of 12 September 2014, II SA/Po 593/14.

[28] This standpoint is also presented, among others, in the following judgments of the Supreme Administrative Court: of 13 March 2013, case ref. II OSK 37/13, ONSAiWSA 2014, No. 6, item 100; of 2 February 2016, case ref. II OSK 3051/15, LEX No. 2037496; of 30 March 2016, case ref. II OSK 221/16, LEX No. 2066405; of 12 October 2016, case ref. II OSK 3245/14, LEX No. 2199460; of 24 May 2017, case ref. II OSK 725/17, LEX No. 2334602; or of 17 October 2017, case ref. II OSK 268/16, LEX No. 2406444.

[29] Judgment of the Supreme Administrative Court of 30 July 2019, II OSK 1754/18, LEX No. 2706464.

from the content of Art. 11a of APA. Despite the undoubtedly existing similarity of the programme to the sources of generally applicable law, the resolution on this matter does not meet the characteristics of local law. It does not directly determine the rights and obligations of entities remaining outside the structure of commune self-government, thus it does not shape and change their legal situation.[30] On the other hand, Michał Rudy emphasizes that since the resolutions adopting programmes of care for homeless animals and prevention of homelessness of animals contain abstract and general norms, and including the fact that the resolutions should be addressed to an unspecified group of addressees performing tasks related to the care for animals and prevention of homelessness of animals, thus, they have effects beyond the internal sphere of self-government administration in a commune, and one should support the standpoint recognising such resolutions as acts of local law.[31]

Emil Kruk presented a new approach and pointed out that due to the fact that in the current legal status, and more specifically after adding clause 3a to Art. 11a of APA which enables financing of tasks consisting in sterilisation or castration of animals having owners, programmes may contain abstract and general norms addressed to entities outside the organisational structure of commune authorities, it is a condition for including them in acts of local law.[32] Due to the fact that this is an element of the programme designated as an optional plan, only selected programmes will be the acts of local law.

Undoubtedly, the classification of a given act as a universally applicable law requires, on a case-by-case basis, the establishment of the norms contained therein. Many programmes contain norms addressed to the inhabitants of the commune, then they should be the acts of local law. In the jurisprudence of administrative courts, the standpoint is consolidated that it is sufficient for at least one norm of a resolution to have a general and abstract character, so that the whole act has the status of an act of local law. Taking into account the subject matter of the programme, addressed to an unspecified circle of recipients performing tasks related to the care for homeless animals, also to the inhabitants of the commune, such a resolution constitutes an act of local law because it determines *erga omnes* about the rights and obligations of entities forming a self-government community. Undoubtedly, if the programme constitutes norms addressed to the inhabitants of the self-government community, it would be correct to qualify it as an act of local law. Depending on the assumption whether a particular act is a local law or an internal law, this has numerous consequences for the addressees. Depending on the classification of the act in question, different rules shall apply in order to appeal against them to the administrative courts, regarding the

[30] K. Wlaźlak, *op. cit.*, p. 38.

[31] M. Rudy, *Program opieki nad zwierzętami bezdomnymi oraz zapobiegania bezdomności zwierząt jako podstawowa forma realizacji zadania gminy z zakresu opieki nad zwierzętami*, „Samorząd Terytorialny" 2018, Nr 9, p. 33.

[32] E. Kruk, *op. cit*., p. 43.

manner of publication and entry into force, the possibility of supervision measures and the possibility of suspending their enforcement if appealed.[33] Therefore, it should be postulated to the legislator to directly decide that the programme is an act of local law.

Procedure for establishing the programme

The legislative procedure is initiated by the development of a draft programme by the executive body of the commune. By February 1 at the latest, the commune head (mayor, president of the city) shall submit the draft programme for opinion to the competent district veterinarian, to social organizations operating in the commune's area whose statutory objective is to protect animals, and lessees or managers of hunting districts operating in the commune's area (Art. 11a clause 7 of APA). The requirement of cooperation of public administration bodies should be assessed positively with reference to the establishment of the programme of care for homeless animals and prevention of homelessness of animals in order to protect animal rights better. Such broad cooperation, also with non-governmental organizations, is aimed at improving the flow of information and creating opportunities to undertake the fullest and best, with regard to the needs of the commune area, programme for the protection of homeless animals. However, the opinion is not binding for the addressee. The executive body of the commune should familiarise itself with the content of the opinion and take it into account in further activities, however, it is not obliged to implement it. In practice, consultations are conducted in order to learn about the opinions of non-governmental organisations and entities listed in Art. 3 clause 3 of the Act of 24 April 2003 on Public Benefit Activity and Volunteerism. Undoubtedly, more comprehensive idea of cooperation is agreeing because it seeks to reach a common standpoint, thus being binding for the addressee. It must take into consideration the standpoint of the cooperating entity.[34] Therefore, for cooperation in the establishment of the programme with the entities listed in Art. 11a clause 7 of APA it is also necessary to postulate the adoption in a form of agreeing. On the other hand, the use of the institution of tacit cooperation should be assessed positively. Art. 11a clause 8 of APA indicates that the cooperating entities shall issue their opinion within 21 days of receipt of the draft programme, whereas failure to give their opinion within this time limit shall be considered as acceptance of the submitted programme.[35]

[33] K. Ziemski, *Granice prawa miejscowego*, [in:] *Prawo administracyjne dziś i jutro*, red. J. Jagielski, M. Wierzbowski, Warszawa 2018, p. 597.

[34] S. Biernat, *Działania wspólne w administracji państwowej*, Warszawa 1979, p. 34.

[35] S. Pawłowski, L. Staniszewska, *Konstrukcja milczącego współdziałania między organami administracji publicznej w świetle przepisów prawa materialnego*, [in:] *Milczące załatwienie sprawy przez organ administracji publicznej*, red. Z. Kmieciak, M. Gajda-Durlik, Warszawa 2018, p. 374.

Subsequently, the draft programme is submitted to the commune council, which is responsible for the adoption of a resolution on the matter in question by March 31 each year. The determination of the deadline for the adoption of this resolution may be treated by the legislator as disciplinary measuresfor the commune authorities in order to start works on the creation of the programme. In view of these intentions of the legislator, it should be postulated that in justified cases of failure to adopt the programme within the statutory deadline one should be allowed by the law to adopt the programme at a later date.[36] The purpose of the regulation is to take over by the communes the absolute obligation to provide care for the homeless animals and to catch them. In the absence of a programme, such an obligation to maintain homeless dogs or cats would have to be passed onto residents or non-governmental organizations, which contradicts the assumptions of the legislator. The date of adopting the programme should therefore be understood as an instructional date, so that its subsequent adoption would be effective and the objectives of the law would not be illusory. Failure to meet the deadline for undertaking the programme constitutes a breach of the law, however, it cannot lead to the abandonment of the performance of a mandatory task by the communes.

Conclusions

To sum up, it should be pointed out that the current regulation of Art. 11a of APA raises numerous doubts, causing the legal nature of the programme of care for homeless animals and prevention of homelessness of animals to be unclear. Currently, the legislator does not express any opinion on the legal essence of the programme. There is also no statutory requirement to publish it in the provincial official journal.

There are also problems with the lack of inclusion of optional elements of the programme such as animal marking plans, sterilisation or castration. This is often due to a lack of sufficient financial resources by the communes. Without sufficient money for this purpose, even the best programme can only prove to be a postulate on paper. Unfortunately, the legislator has forgotten about it, imposing these important but very expensive tasks on communes, not fully realizing that many communes in Poland do not have sufficient funds for their implementation. Therefore, a well-planned budget is an extremely important element of the programme, which should take into account the needs and capabilities of the local self-government unit. Also, the very procedure of developing the plan is questionable, and thus it should be advocated in favour of its sensible development. In addition, the programme should be monitored and controlled on an ongoing basis during its implementation and, if necessary, adapted to local conditions and possibilities. Moreover, it is very important to implement social

[36] See K. Wlaźlak, *op. cit*., p. 40.

and organizational activities among the inhabitants of the communes, especially information campaigns and those encouraging the adoption of homeless animals.

References

Białocerkiewicz J., *Status prawny zwierząt. Prawa zwierząt czy prawna ochrona zwierząt*, Toruń 2005.

Biernat S., *Działania wspólne w administracji państwowej*, Warszawa 1979.

Fiszdon K., Boruta A., *Problem bezdomności zwierząt*, „Przegląd Hodowlany" 2014, Nr 82.

Kruk E., *Ewolucja i charakter prawny gminnych programów opieki nad zwierzętami bezdomnymi oraz zapobiegania bezdomności zwierząt*, „Studia Prawnicze i Administracyjne" 2018, Vol. 25(3).

Nałęcz A., *Ochrona zwierząt a postęp cywilizacyjny*, [in:] *Wpływ przemian cywilizacyjnych na prawo administracyjne i administrację publiczną*, red. P. Suwaj, J. Zimmermann, Warszawa 2013.

Pawłowski S., Staniszewska L., *Konstrukcja milczącego współdziałania między organami administracji publicznej w świetle przepisów prawa materialnego*, [in:] *Milczące załatwienie sprawy przez organ administracji publicznej*, red. Z. Kmieciak, M. Gajda-Durlik, Warszawa 2018.

Radecki W., *Obowiązki gminy w zakresie ochrony zwierząt*, „Nowe Zeszyty Samorządowe" 2000, Nr 6.

Rudy M., *Program opieki nad zwierzętami bezdomnymi oraz zapobiegania bezdomności zwierząt*, www.prawoweterynaryjne.pl/artykuly/program-opieki-nad-zwierzetami-bezdomnymi-oraz-zapobiegania-bezdomnosci-zwierzat/ [access: 25.09.2019].

Rudy M., *Program opieki nad zwierzętami bezdomnymi oraz zapobiegania bezdomności zwierząt jako podstawowa forma realizacji zadania gminy z zakresu opieki nad zwierzętami*, „Samorząd Terytorialny" 2018, Nr 9.

Wlaźlak K., *Funkcja planowania gminy na przykładzie programu opieki nad zwierzętami bezdomnymi oraz zapobiegania bezdomności zwierząt*, „Przegląd Prawa Publicznego" 2015, Nr 4.

Ziemski K., *Granice prawa miejscowego*, [in:] *Prawo administracyjne dziś i jutro*, red. J. Jagielski, M. Wierzbowski, Warszawa 2018.

Abstract: The legislator imposed on the communes a mandatory own task in the form of an obligation to provide homeless animals with adequate care and protection. A legal instrument for this purpose are programmes of care for homeless animals and prevention of homelessness of animals. However, the provisions constituting this legal instrument raise doubts as to the nature of these acts, moreover, there are numerous problems with the practice of their application and especially with the financing of this task by communes. All this shows that Poland is one of the EU Member States which still lacks effective means of combating animal homelessness.

Keywords: care for homeless animals; prevention of homelessness; own tasks of the commune; planning acts; local law

ANNA OSTROWSKA

Maria Curie-Skłodowska University in Lublin, Faculty of Law and Administration
The Provincial Administrative Court in Lublin
https://orcid.org/0000-0003-0058-5814
ostrowska@poczta.umcs.lublin.pl

Location of Animal Shelters in the Local Spatial Development Plan in Poland

Introduction

The local spatial development plan is the basic and at the same time the most effective instrument for shaping spatial order in Poland. This act, issued by the commune council in a complicated, multi-stage procedure with public consultation, having the force of an act of universally binding law, determines the purpose and manner of management and development of the area in which it applies.[1] When shaping the local plan, the administration bodies must take into account a number of values that make up the idea of spatial order and sustainable development, such as landscape values, environmental protection requirements, including water management and protection of agricultural and forest land, health and safety requirements for people and property, economic values of space, as well as property rights.

Although the legislature did not distinguish animals as a separate asset requiring protection at the level of spatial planning, it is undoubtedly a value that is within all of the above-mentioned values. Animal protection may be implemented in the local plan in various ways, e.g. by preserving and maintaining in proper condition the existing habitats of plant and animal species for which the Natura 2000 area was designated, introducing restrictions or even prohibitions of development of areas where pro-

[1] The procedure for adopting the local spatial development plan and the elements of its content are specified in the Act of 27 March 2003 on Spatial Planning and Development (Journal of Laws of 2018, item 1945, as amended).

tected animal species occur, or introducing restrictions or prohibitions of economic activity. The protection of animals in the local plan does not include only species protected under separate regulations. It also applies to animals not subject to species protection but intended for breeding. The role of the local plan, as an instrument for spatial planning, is to establish appropriate spatial standards for animal husbandry, so as to ensure the welfare of farm animals and, in addition, to eliminate or minimize the negative aspects of animal husbandry, such as odour and noise. Another, no less important aspect of animal protection in the local spatial development plan, is the location of shelters for homeless animals.

Limitations on the planning authority of the commune on the location of shelters for homeless animals in the local spatial development plan

In the current legal status, in view of the unambiguous wording of Art. 11 para. 1 of the Animal Protection Act of 21 August 1997 (hereinafter referred to as APA)[2] and Art. 3 of the Act of 13 September 1996 on Maintaining Cleanliness and Order in Communes,[3] there is no doubt that the burden of providing care to homeless animals, trapping of homeless animals and protection against them is borne by communes,[4] constituting their obligatory own task. Trapping of homeless animals takes place exclusively on the basis of a resolution of the commune council defining annually until 31 March the programme of care for homeless animals and prevention of homelessness of animals, including, *inter alia*, providing a place for homeless animals in a shelter for animals (Art. 11 para. 3 of APA in conjunction with Art. 11a para. 1 and 2 point 1 of APA). The obligation to trap animals is, in principle, possible only if there is sufficient room for animals in the shelter, unless they pose a serious threat to people or other animals (Art. 11 para. 3 of APA).

Pursuant to Art. 4 point 25 of APA, an animal shelter is a place intended for the care of domestic animals which meets the conditions laid down in the Act of 11 March 2004 on the Protection of Animal Health and the Fight against Infectious Diseases of Animals[5] (i.e. veterinary requirements: location, health, hygiene, sanitary, organizational, technical or technological, protecting against epizootic and epidemic risks).

[2] Journal of Laws of 2019, item 122, as amended.

[3] Journal of Laws of 2018, item 1454, as amended.

[4] In accordance with the definition provided in Art. 4 para. 16 of APA, the term "homeless animals" shall be understood as domestic or farm animals which have escaped, strayed or been abandoned by a human being, and it is not possible to determine their owner or another person under whose care they have been permanently cared for so far. It follows from the definition that homelessness may concern only those animal species which are traditionally under the care of a human being (utility or domestic animals).

[5] Journal of Laws of 2018, item 1967, as amended.

Location of this facility in the commune may take place with the alternative use of one of two legal instruments: a resolution of the commune council on the local spatial development plan, being an act of local law, or a decision on determining the conditions of development and land use, issued by the executive body of the commune in the area for which the local plan was not adopted. The animal shelter has now been classified as a public purpose project[6] and consequently the investor, when submitting an application for determining its location, no longer has to meet the conditions set out in Art. 61, at the forefront of the so-called condition of good neighborliness, which does not apply to the public purpose project. The widest scope of planning freedom is available to the municipal council when it adopts the local plan. Of course, this is not an unlimited freedom, as the public authorities in a democratic state governed by the rule of law do not have such a freedom.

The limits of this freedom are determined by constitutional principles, including the principles of social justice and proportionality, as well as the values and interests to be taken into account in defining the purpose for which the area is to be developed and the manner in which it is to be used. When adopting local plans, municipal authorities are bound not only by the Constitution and statutes, but also by regulations contained in secondary legislation as higher-level acts in the hierarchy of sources of law. The existence of such restrictions is particularly important in the case of locating in the local plan those projects whose functioning is generally considered burdensome for the environment. Such projects include shelters for homeless animals.

Society demands that public authorities establish an effective system of care for homeless animals, expecting that this system will provide a decent standard of living for animals and protect people from attacks from them and from the spread of zoonoses. On the other hand, however, municipal residents are generally opposed to animal shelters being located close to where they live. It would seem that a simple solution to this problem is to locate shelters away from human settlements, where the inconveniences associated with the operation of the shelter would be imperceptible to the residents. However, the problem is much more complex, because when locating a shelter, it is necessary to ensure convenient and easy access for volunteers and animals willing to adopt animals. This problem will probably not be solved by locating the shelter in distant, inaccessible wastelands.

The importance of the issue of locating shelters in the area of communes is evidenced by the intensity of social protests and comments made in the procedure of adopting the local plan, whenever the commune authorities intend to include the localization of the shelter in the local plan. The functioning of the animal shelter is

[6] In Art. 6 of the Act of 21 August 1997 on Real Estate Management (Journal of Laws of 2018, item 2204, as amended), point 9c was added, which refers to the performance of equipment or structures for preventing or combating infectious diseases of animals, which is a very capacious category.

perceived as a source of atmospheric pollution, possible contamination of water and soil, a source of noise and odour, as well as a source of exposure of people to zoonotic infectious diseases and animal attacks. All these factors reduce the market attractiveness and thus the value of properties located in the vicinity of animal shelters.

Therefore, there is a typical conflict of interest in the sphere of spatial planning: the public interest, and – specifically – the interest of the commune, which has a statutory obligation to provide care for homeless animals, protection against homeless animals and the interest of property owners located in the vicinity of the planned location of the shelter, who – although as members of the community – are thus also protected against homeless animals, but are interested in maintaining the *status quo* on their properties. This is a typical example of the attitude of real estate owners towards public projects implemented in their neighborhood, which in the Anglo-Saxon spatial planning system was called NIMBY ("not in my backyard").

As far as legal regulations "imposing" restrictions on municipal authorities regarding the location of animal shelters in the plans of local animal shelters are concerned, they are in fact residual. The most important limitation, aimed at preventing or at least minimizing threats related to the location of a shelter for animals, is contained in para. 1 section 1 of the Regulation of the Minister of Agriculture and Rural Development of 23 June 2004 on Detailed Veterinary Requirements for Running Animal Shelters,[7] according to which, the animal shelter should be located in a place at least 150 m away from human settlements, public utility facilities, plants belonging to entities conducting business activity in the field of production of animal products, plants belonging to entrepreneurs conducting business activity in the field of production of animal nutrition, plants conducting business activity in the field of collection, storage, operation, processing, use or disposal of animal by-products, slaughterhouses, fairs, shoots, zoological gardens and other places of animal collection.

On the other hand, pursuant to Art. 2–5 of that regulation, in view of the need to ensure appropriate living conditions for the animals, the plan should provide for a sufficiently large area for the location of the shelter to allow for the separation of the necessary premises and boxes for the animals, to ensure their free movement, bedding and constant access to drinking water, as well as an open-air enclosure for the animals to behave in a manner appropriate to particular species.

When locating a shelter whose operation may generate noise not only from animals but also from motor vehicles, the municipal authorities are also required to include in the local plan the permissible noise levels laid down by the noise indicators LDWN, LN, LAeq D and LAeq N in the Annex to the Order of the Minister for the Environment of 14 June 2007 on permissible environmental noise levels[8] for the following

[7] Journal of Laws No. 158, item 1657, as amended.

[8] Art. 113 para. 2 point 1 of the Act of 27 April 2001 on Environmental Protection Law (Journal of Laws of 2019, item 1396).

types of land actually developed: a) for housing, b) for hospitals and social welfare homes, c) for buildings designed for permanent or temporary stay of children and young people, d) for spa purposes, e) for recreational purposes. The applied solution to the problem of acoustic nuisances is, e.g. locating shelters in the lowering of the area between embankments or other hills, which are natural acoustic screens.

Polish law has not yet introduced norms regulating the permissible level of unpleasant odour emission.[9] The methodology of odour measurement has not been developed, therefore, it is not possible to carry out inspection in the scope of determining odour nuisances, including emission control measurements or odour air quality.[10] The Code of Counteracting Odour Nuisance prepared in 2016 in the Air and Climate Protection Department of the Ministry of Environment is not a legally binding act, but only a collection of comments and recommendations of unquestionable educational and information value. There is no doubt that odours reduce the comfort of life, cause intensification of such adverse psychosomatic symptoms as: irritation, headaches, nausea, difficulties with concentration, loss of appetite, difficulties with falling asleep.[11] Moreover, they reduce the tourist attractiveness of areas exposed to their impact and also lower the market value of properties located therein (their unfavourable impact is therefore similar to the impact of noise).[12]

Therefore, odour nuisances can only be prevented indirectly by applying appropriate legal regulations concerning the location of specific projects emitting odours, assessment of their impact on the environment and legal regulations on construction. It is not true that since there are no anti-odour regulations at the central level, they cannot be introduced by local lawmakers. On the contrary, the lack of such regulations means that it is the local legislature who bears the burden of preventing social conflicts related to the emission of nuisance odours.

---

[9] Authorisation for the Minister of the Environment under Art. 222(5) of the Act of 27 April 2001 – The right to environmental protection to issue a regulation establishing reference values for fragrance substances in the air and methods of assessing the fragrance quality of air has not been implemented. Admittedly, on 26 January 2010, The Minister of the Environment issued a regulation on reference values for certain substances in the air, but it does not concern the permissible levels of odoriferous substances.

[10] The Ombudsman's statement to the Minister of the Environment on the lack of regulations concerning odour nuisances (odour imissions), https://www.rpo.gov.pl/sites/default/files/Do%20M%C5%9A%20w%20sprawie%20braku%20przepis%C3%B3w%20dotycz%C4%85cych%20uci%C4%85%C5%BCliwo%C5%9Bci%20zapachowych%20powodowanych%20przez%20zak%C5%82ady%20przemys%C5%82owe.pdf [access: 21.09.2019], p. 6.

[11] B. Krajewska, J. Kośmider, *Standardy zapachowej jakości powietrza*, „Ochrona Powietrza i Problemy Odpadów" 2005, Nr 6, pp. 181–191.

[12] *Kodeks przeciwdziałania uciążliwości zapachowej*, Departament Ochrony Powietrza i Klimatu Ministerstwa Środowiska, Warszawa 2016, https://www.gov.pl/web/srodowisko/uciazliwosc-zapachowa [access: 21.09.2019]. See also the Polish Ombudsman's letter of 27 October 2016, ref. No. V.7203.5.2014.PM, https://www.rpo.gov.pl [access: 21.09.2019].

One of the most effective legal instruments available to the commune body in this area is the local spatial development plan. Since this act determines the purpose and manner of management of the real estate covered by it, it may thus prevent or limit the conduct of activities involving the emission of odours in a given area. The findings of this act are related to the administrative bodies at further stages of the investment and construction process, including the stage of issuing decisions on environmental conditions, water and legal permits and decisions on building permits. The question remains how the commune council should formulate the provisions of the plan to prevent social conflicts caused by odour nuisances resulting from the operation of specific projects, including animal shelters.

In countries where odour emission standards have been introduced, legal solutions are based on several different models,[13] which can also be applied jointly, i.e. the model of maximum impact standard; minimum distance between installations and other facilities or areas (separation distance standard); maximum emission standard; or the number of complaints received by authorities or the level of irritation confirmed by surveys conducted among the local community (maximum annoyance standard). The Polish local legislatures usually use a model based on the definition of minimum distances in which projects that are sources of odour from specific objects or areas may be located. This method is most frequently used in the case of the so-called assessment of odour nuisance of fugitive emission facilities, which include facilities related to animal husbandry.[14]

Therefore, the municipal council may introduce a ban on locating such projects in a given area in the local plan, or – by allowing such localization – limit it, e.g. by determining the permissible size of the project or introducing minimum distances between the project and specific areas and objects.[15] In the case of a shelter for homeless animals, the commune council is bound by the minimum distance resulting from the aforementioned regulation of the Minister of Agriculture and Rural Development (150 m). However, the planning authority has the power to extend that distance

[13] E. Jachnik, *Prawne aspekty ochrony zapachowej jakości powietrza*, „Przegląd Prawa Rolnego" 2017, Vol. 1(20), pp. 149–163.

[14] For plants with organised emissions, the approach based on the criterion of permissible airborne odour concentration (imission standard) expressed in units of odour concentration OU/m^3 shall prevail, for which the maximum annual exceedance frequency shall also be reported. K. Kapusta, *Ochrona zapachowej jakości powietrza. Doświadczenia światowe w świetle potrzeby unormowań prawnych w Polsce*, „Prace Naukowe GIG – Górnictwo i Środowisko" 2007, Nr 4, p. 49; L. Woźniak, *Regulacje prawne dotyczące przeciwdziałania uciążliwościom zapachowym (odorom) w wybranych krajach Unii Europejskiej*, Warszawa 2014, p. 19ff.

[15] G. Rząsa, *Miejscowy plan zagospodarowania przestrzennego jako prawny środek ochrony przed uciążliwościami odorowymi – wybrane zagadnienia*, „Zeszyty Naukowe Sądownictwa Administracyjnego" 2019, Vol. 1(82), p. 51. See also judgment of the Supreme Administrative Court of 14 March 2018, II OSK 1281/16; judgment of the Regional Administrative Court in Warsaw of 2 December 2016, IV SA/Wa 751/16, CBOSA.

from areas intended for human habitation if, e.g. an eco-physiographic study or an environmental impact assessment show that due to the expected number of animals in the shelter or equipping the shelter with furnaces for burning animal corpses, the nuisances related to its functioning will cover a larger area. At the same time, it is important to observe the requirements of proportionality and balancing the interests.[16] In particular, the current development of the area, including the presence of installations emitting odours in the area (or in the areas adjacent to the area covered by the local plan), is important. The higher the "saturation" of such installations in a given area, the stricter restrictions may be introduced in the local plan (in terms of future accumulation of odour impacts).[17]

The requirement to locate a shelter at least 150 m from human settlements was introduced mainly in order to minimize epidemiological risks, epizootic hazards and odour and noise nuisances. The introduction of this distance standard also has the unintended and socially undesirable effect that it is in fact a barrier to the establishment of small shelters in communes with between 10 and 20 animals. If one considers that a shelter must include a number of rooms and runs for animals and its own infrastructure, a plot of several hectares must be allocated for its location, taking into account the distance requirement. A minimum 150 m buffer zone should therefore be established around the shelter to ensure that no human settlements are established closer to the shelter as a premise for the closure of such a shelter.

The average number of homeless dogs (these animals are considered to be the source of the greatest threats) in the Polish community is 40 per year, while 73% of the communities declare that they catch 10 homeless dogs per year.[18] Therefore, activists of animal protection associations claim – not without reason – that such a number of homeless animals could be provided with good care in a small building with several boxes located, e.g. in the back of a municipal animal clinic or in a farm, i.e. close to human settlements, without putting anyone at risk of inconvenience or danger.

The homeless animal shelters vision adopted by the legislature, which results in the introduction of a distance standard applicable to all shelters, regardless of their size, applies to establishments of mass isolation and possible elimination of animals in the event of an epidemic of infectious diseases, e.g. rabies. Such a way of thinking about shelters does not give a chance to create an effective system of animal care. It may also be added that the anachronism of the distance standard is confirmed by the fact that over half of shelters in Poland, including the largest Polish shelter "Na Paluchu" in Warsaw, do not meet this standard. Another problem is that the provisions of the regulation do not specify how to measure the distance of 150 m – whether from the

[16] J. Chmielewski, *Problematyka prawna uciążliwości zapachowych w planowaniu i zagospodarowaniu przestrzennym na obszarze gminy*, „Samorząd Terytorialny" 2019, Nr 3, pp. 52–64.

[17] G. Rząsa, *op. cit.*, p. 60.

[18] *Wymagania weterynaryjne z kosmosu*, http://www.boz.org.pl/iw/150/150_metrow.htm [access: 04.10.2019].

borders of land plots or from the edges of buildings intended for human habitation. The legislature also failed to define what should be understood by the term "human settlement", which may raise significant doubts, e.g. when assessing whether the human settlement is a built-up plot of land with a holiday house used only seasonally. Finally, it should be added that the legislature is inconsistent in introducing distance standards for shelters for homeless animals, whereas it did not provide for such standards either for zoos or for animal hotels.

The role of "informal" public consultation in the procedure of locating a shelter in the local spatial development plan

The disadvantage of the statutory regulation concerning participation in spatial planning is its late "launch". This is because it occurs only when the planning procedure is officially initiated and the basic form of participation, i.e. remarks, is updated when the draft planning act is ready and the spatial conflicts are aggravated. Entities with a key influence on the planning procedure, from the legislature to the municipal authorities, attach too little importance to the preliminary (preparatory, informal) activities that take place at an early conceptual stage, even before a resolution is passed on the commencement of the preparation of the planning act. The lack of due diligence on the part of the commune authorities in carrying out preliminary analyses aimed at determining the actual need to adopt a local plan in a given area, or in changing the planning act, as well as in determining the factual and legal status of the properties covered by the future act, cannot be justified only by a residual, laconic statutory regulation in this respect. A rational local legislator should be aware that the adoption of such a complex, multi-layered and inherently conflicting act requires comprehensive spatial, social, political, legal and economic analyses in a given area. Considering such a broad research area, it should make public consultation an element of the preparatory process.

Confronting various values, interests and expectations at the stage of conceptual works may become a source of valuable information for the commune authorities concerning preferences in the area's designation and development, and it will also allow them to identify the parties to potential disputes in the process of adopting a spatial planning act.[19] Lack of participation at the stage of shaping the planning assumptions generates uncertainty of the legal situation of the commune, making its participation at further stages of the procedure of adopting the planning act and – as a consequence – influence on the final decisions taken illusory. Since legal regulations are the basic reference framework for all activities of public administration, there is no doubt that

[19] A. Gójska, P. Kuczyński, B. Lewenstein, I. Pogoda, E. Zielińska, *Konsultacje społeczne w przestrzeni wielkomiejskiej. Ochocki Model Dialogu Obywatelskiego*, Warszawa 2012, p. 19.

they are also the most important factor in socializing spatial planning, indicating the directions and scenarios of activities of the participants in the planning process.[20] However, the tools of participation in the procedures of adopting municipal spatial planning acts and the accompanying procedures of strategic environmental assessment,[21] are insufficient and launched too late, as indicated above. Tomasz Kaczmarek and Michał Wójcicki summarized the views in this respect and created a catalogue of defects in participation in spatial planning, including: a) lack of statutory possibilities of community involvement in the process of preparing assumptions for draft plans and studies, b) limitation of community involvement in the planning process only to the possibility of submitting applications, comments and participating in public discussion, c) low effectiveness of legal instruments such as conclusions and comments on draft plans due to the possibility of not taking them into account by the executive body, d) lack of definition of public discussion on the plan and study presentation, which allows for the use of all possible methods that may be questioned at a later stage, e) limited possibility of translating the results of public discussion into planning decisions, f) lack of regulations concerning the publication of draft plans in the media, including broadcasting of the public discussion.[22]

These drawbacks cannot be negated, but it is worth looking at the legislation regulating the spatial planning process from a different perspective – as it does not create

[20] H. Izdebski, *Samorząd terytorialny. Podstawy ustroju i działalności*, Warszawa 2011, cited in: T. Kaczmarek, M. Wójcicki, *Uspołecznienie procesu planowania przestrzennego na przykładzie miasta Poznania*, „Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2015, Vol. 1, p. 221.

[21] The procedure of strategic environmental impact assessment is regulated in the Act of 3 October 2008 on Access to Information on the Environment and its Protection, Public Participation in Environmental Protection and Environmental Impact Assessments (Journal of Laws of 2018, item 2081, as amended). It follows from Art. 46 paragraph 1 of the aforementioned act, that, as a rule, it is obligatory to carry out a strategic environmental impact assessment for a local plan (the abandonment of the assessment in the case of draft spatial planning acts may concern only drafts constituting minor modifications to already adopted acts). Strategic assessment is carried out in order to determine the impact of the planned document (plan, programme) on the environment. The findings made as part of the assessment are subject to opinions of the authorities competent for environmental protection and public discussion with the participation of the public. Strategic assessment is also required in the procedure of amending the resolution on the study and the local plan. The key element around which the strategic assessment procedure focuses is the environmental impact assessment, which is attached to the municipal projects of general spatial planning acts. In the system of spatial planning, the forecast is, as a rule, non-normative, forecasting and informational, not binding on either the authorities or the public. Its role is to ensure that environmental protection aspects are treated equally to social, economic and other aspects that the authority has to take into account in the planning process. Notwithstanding the above, the forecast is the central link around which the strategic assessment procedure takes place, determining the next steps of the procedure – the cooperation of authorities and public participation. It is a document that is presented for public review together with a draft study/local plan and is the subject of public discussion. Its findings may constitute a basis for comments on the draft of these acts.

[22] *Ibidem*, p. 226.

any obstacles for the local legislature to develop forms of community participation in this process. The legal basis for additional consultation in spatial planning is the provision of Art. 5a of Act of 8 March 1990 on Municipal Self-Government.[23]

A factor potentially increasing the effectiveness of such early consultation is the place and form in which it takes place. They do not take place at the commune office building, where individuals feel like petitioners, but in public places, such as common rooms, schools, kindergartens, community centers. The second such factor is involvement in the organization and course of consultations, apart from the employees of the commune office and planners, also members of housing estate councils or village councils.[24] The third one is a form of such consultations, which can be a free discussion, during which anyone can speak, including the submission of an informal proposal. At this stage, when the draft act is not yet ready, consulted and agreed, there is a real chance to present their positions to individuals who are not organized in the so-called urban movements, or not affiliated with non-governmental organizations, which often "take over" the obligatory public discussion held after the opinion and agreement on the draft act of planning. What is important, the consultation process is recorded in an audio form and made available to interested parties. An effective form of informal consultation can also be the submission of a draft study or local plan to the district councils, housing estate councils or village meetings, i.e. to the resolution bodies of the auxiliary units of the municipalities, for their opinion.[25]

Such informal social consultation took place in Sopot, where after almost a decade of disputes and social protests, the "Sopotkowo" animal shelter was opened in 2016. Although this shelter was located on the basis of a decision to determine the location of a public purpose project, the consultation method applied there may also be used when the location of the shelter is based on a local plan. Before the formal initiation of the locating procedure, the Sopot authorities proposed three alternative locations for the shelter to the residents and set a deadline for them to choose from any of the options in electronic form via the Internet or in traditional form – by throwing a filled-in paper questionnaire available in various public places into the ballot box

[23] Journal of Laws of 2019, item 506, as amended. J.H. Szlachetko, *Konsultacyjne formy udziału społeczeństwa w planowaniu przestrzennym*, „Metropolitan. Przegląd Naukowy" 2016, Nr 3, p. 35.

[24] Magdalena Kalisiak-Mędelska draws attention to the untapped potential of the commune's auxiliary units, which are predisposed to create conditions to counteract the alienation of power from the real problems of local communities, or may become a "breeding ground" for local leaders who will promote the idea of participation at further levels of the local government career. Unfortunately, as the author emphasizes, in the present legal form and manner of operation, they are rather a relic from the beginning of building a democratic state due to the lack of independence, both organizational and financial (they operate within the legal entity of the commune and the commune budget or the rural community fund – *Partycypacja społeczna na poziomie lokalnym jako wymiar decentralizacji administracji publicznej w Polsce*, Łódź 2015, p. 273, 310).

[25] http://www.poznan.pl/mim/konsultujemy/ [access: 23.04.2019]; T. Kaczmarek, M. Wójcicki, *op. cit.*, pp. 226–229.

(people aged 16 and over could vote). Residents were also given the opportunity to submit their own proposals for the location of the shelter, which met the criteria of distance from buildings, land development, proximity to public transport or surface area. In the period preceding the vote, the Sopot city council organized a number of information meetings with the residents. As a result, one of the locations proposed by the city authorities was chosen.

The main benefits of introducing informal tools of participation in the planning procedure, especially where the location of the project entails a social protest, are, above all, increasing the spectrum of possibilities for stakeholders to obtain information on the conditions and directions of spatial planning in a given area, making individuals aware of their rights and obligations in the planning procedure, a chance to build a forum for agreement between officials and inhabitants of the commune, and thus, a chance to reduce the scale of spatial conflicts, and shortening the official, formal procedure of adopting a spatial planning act.

Conclusions

The establishment of animal shelters is now the best-known solution for the care of homeless animals. The problem of homeless animals may be reduced by introducing a general obligation of the microchipping of animals, which will allow for quick identification of their owners. However, this is a costly undertaking, requiring the introduction of appropriate technical and IT solutions, which, however, at the current state of technology, is realistic.[26] Until an effective system to prevent the abandonment of animals is established, it is necessary to review the views on the essence and basic, overarching objective of establishing shelters, which is not to prevent infectious diseases, but to ensure that animals are cared for. The change of the current approach of the legislature, and consequently, the change of an excessively strict, anachronistic standard defining the minimum distance between a shelter and human settlements, could result in the creation of many small communal shelters for a few or a dozen or so animals. This would allow communities to fulfil their statutory tasks and save money spent every year on sending homeless animals to distant shelters located in other communities.

[26] Microchipping is the most durable way to mark animals. Actions of free dog microchipping have been carried out in the Lublin region for at least 6 years, but they have been poorly received by the public. The owners do not enjoy this privilege because – allegedly – they do not want to be listed in pet owners' databases.

References

Chmielewski J., *Problematyka prawna uciążliwości zapachowych w planowaniu i zagospodarowaniu przestrzennym na obszarze gminy*, „Samorząd Terytorialny" 2019, Nr 3.

Gójska A., Kuczyński P., Lewenstein B., Pogoda I., Zielińska E., *Konsultacje społeczne w przestrzeni wielkomiejskiej. Ochocki Model Dialogu Obywatelskiego*, Warszawa 2012.

http://www.poznan.pl/mim/konsultujemy/ [access: 23.04.2019].

Izdebski H., *Samorząd terytorialny. Podstawy ustroju i działalności*, Warszawa 2011.

Jachnik E., *Prawne aspekty ochrony zapachowej jakości powietrza*, „Przegląd Prawa Rolnego" 2017, Vol. 1(20).

Kaczmarek T., Wójcicki M., *Uspołecznienie procesu planowania przestrzennego na przykładzie miasta Poznania*, „Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2015, Vol. 1.

Kalisiak-Mędelska M., *Partycypacja społeczna na poziomie lokalnym jako wymiar decentralizacji administracji publicznej w Polsce*, Łódź 2015.

Kapusta K., *Ochrona zapachowej jakości powietrza. Doświadczenia światowe w świetle potrzeby unormowań prawnych w Polsce*, „Prace Naukowe GIG – Górnictwo i Środowisko" 2007, Nr 4.

Krajewska B., Kośmider J., *Standardy zapachowej jakości powietrza*, „Ochrona Powietrza i Problemy Odpadów" 2005, Nr 6.

Rząsa G., *Miejscowy plan zagospodarowania przestrzennego jako prawny środek ochrony przed uciążliwościami odorowymi – wybrane zagadnienia*, „Zeszyty Naukowe Sądownictwa Administracyjnego" 2019, Vol. 1(82).

Szlachetko J.H., *Konsultacyjne formy udziału społeczeństwa w planowaniu przestrzennym*, „Metropolitan. Przegląd Naukowy" 2016, Nr 3.

Woźniak L., *Regulacje prawne dotyczące przeciwdziałania uciążliwościom zapachowym (odorom) w wybranych krajach Unii Europejskiej*, Warszawa 2014.

Wymagania weterynaryjne z kosmosu, http://www.boz.org.pl/iw/150/150_metrow.htm [access: 04.10.2019].

Abstract: The local spatial development plan is the basic and, at the same time, the most effective instrument for shaping spatial order in Poland. This act, issued by the commune council in a complicated, multi-stage procedure with public consultation, having the force of an act of universally binding law, determines the purpose and manner of management and development of the area in which it applies. When shaping the local plan, the administration bodies must take into account a number of values that make up the idea of spatial order and sustainable development. Although the legislature did not distinguish animals as a separate asset requiring protection at the level of spatial planning, it is undoubtedly a value that is within all of the above-mentioned values. Animal protection may be implemented in the local plan in various ways. One of the most important is the location of shelters for homeless animals. The article discusses the problem of locating animal shelters in the local spatial development plan in the context of social conflicts connected with it.

Keywords: animal protection; animal shelter; local spatial development plan; conflict of interest; noise and odour nuisances; public consultation

ANZHELA SLEPCHENKO

Taras Shevchenko National University of Kyiv
Institute of Law
https://orcid.org/0000-0002-4050-3310
anhelika2003@ukr.net

Hunting Organizations vs the Ministry of Ecology and Natural Resources of Ukraine towards the Issue of Enlisting of the European Elk in the Red Data Book of Ukraine

Introduction

The wildlife is an integral component of environmental and biological diversity on the Earth. It is a renewable and protected natural resource that requires rational use. The Preamble to the Law of Ukraine on Wildlife of 13 December 2001, states that the fauna is a national wealth of Ukraine. In the interests of the present and future generations, measures are taken on protection, scientifically grounded and inexhaustible use and reproduction of wildlife in Ukraine.[1] According to Art. 1 of this Law, one of the tasks of the Ukrainian legislation on wildlife is to ensure conditions for the conservation of all species and population diversity of animals.

Conservation of wildlife, conservation of biological diversity, and conservation work is one of the main priorities of state policy in the field of environmental protection and rational use of natural resources in Ukraine. Thus, the Basic State Policy Directions of Ukraine in the Field of Environmental Protection, Natural Resources Use and Provision of Environmental Safety, approved by the Decree of the Verkhovna

[1] Law of Ukraine of 13 December 2001 on Wildlife (Official Bulletin of Ukraine of 2002, No. 2, item 47, as amended).

Rada of 5 March 1998, provide, in particular, development and implementation of state, regional and interstate programs on protection, use and reproduction of fauna and flora species that are threatened with extinction due to the negative impact of business activity (para. 31).[2]

According to the Law of Ukraine on the Fundamental Principles (Strategy) of the State Environmental Policy of Ukraine for the Period until 2030, one of the tasks in course of ensuring sustainable development of the natural resource potential of Ukraine is reduction of the loss of biological diversity, conservation and restoration of natural fauna species, animals habitats, rare and endangered fauna species to be protected (section III).[3]

The Concept of the National Program for Conservation of Biodiversity 2005–2025[4] states that biodiversity is the Ukrainian national wealth, and its conservation and sustainable use is one of the priorities of the state policy in the field of use of nature, environmental safety and protection, as well as an indispensable condition for its improvement and environmentally balanced socio-economic development. The current state of biodiversity in Ukraine is a subject of great concern for specialists and requires drastic action. In Europe, Ukraine is second only to France in terms of biodiversity and it entails its high responsibility on conservation of such biodiversity. Conservation of biodiversity is one of the decisive conditions for preserving the identity of a nation and may become a factor that will determine near future of the state.

At the same time, the loss of a particular species of plant, animal and mycobiota in one country is a loss for the entire biosphere as a global ecosystem. Therefore, the problem of biodiversity conservation is becoming of global biosphere importance nowadays as it concerns further evolution of the entire organic world. The protection of flora, fauna and mycobiota diversity is the key to normal functioning of natural ecosystems and the sustainable use of renewable natural resources, which will contribute to the sustainable development of society.

Nowadays humankind has fundamentally changed ecosystems, while the animal world is very sensitive to any changes of natural factors and serves as an indicator of the anthropogenic impact on the environment in modern technogenic world. Any abrupt changes are unfavorable for animals that have adapted to certain conditions

---

[2] The Basic State Policy Directions of Ukraine in the Field of Environmental Protection, Natural Resources Use and Provision of Environmental Safety: Decree of the Verkhovna Rada of Ukraine of 5 March 1998, No. 188/98-VR (Bulletin of the Verkhovna Rada of Ukraine of 1998, No. 38, item 248).

[3] Law of Ukraine of 28 February 2019 on the Fundamental Principles (Strategy) of the State Environmental Policy of Ukraine for the Period until 2030 (Official Bulletin of Ukraine of 2019, No. 28, item 980).

[4] On Approval of the Concept of the National Program for Conservation of Biodiversity for 2005–2025: Order of the Cabinet of Ministers of Ukraine of 22 September 2004, No. 675-p (Official Bulletin of Ukraine of 2004, No. 38, item 2524).

over the millennia, and they either disappear completely or become rare and extinct. In particular, the fact that the total number of ungulates and fur game animals in Ukraine continues to decline, was noted in the Fifth National Report of Ukraine on the Convention on Biological Diversity of Ukraine issued by the Ministry of Ecology and Natural Resources in 2015.

According to scholars in ecology, poaching, predators, climate change and other factors influence the process of reducing the elk population, but hunting is the main reason for the elk extinction.[5] Meat and elk horns are objects of commercial interest and, therefore, the population of elk may be significantly reduced if the state does not control hunting.

One of the traditional species of the European forest zone is the European elk. It inhabits the forest-steppe and north of the steppe zone. The elk protection in most countries is provided via management and control tools, in particular, by setting hunting limits. In Ukraine, since 1991, there has been a sharp decrease in the elk population: officially, there were 14,796 elk in 1991, and only 4,396 in 2006. Thus, the elk disappeared completely in the Zaporozhye, Nikolaev, Kherson, Ivano-Frankivsk, Transcarpathian, Chernivtsi regions and the Crimea. As ecologists suggest, poaching, predators, climate change and other factors influence the process of reducing the elk population, but hunting is the main reason for its extinction.[6] Meat and horns of the European elk are objects of commercial interest and, therefore, the elk population may be significantly reduced if the state does not control hunting.

The circumstances of the case

According to the Institute of Zoology of the Academy of Sciences of Ukraine, the European elk population in Ukraine is now less than 2,000 head. As a result, on 6 December 2016, one National Deputy of Ukraine submitted a statement to the Minister of Ecology and Natural Resources of Ukraine[7] on taking urgent measures to protect the European elk by imposing a ban on the elk hunting for a period of 25 years .

On 3 February 2017, the Ministry of Ecology and Natural Resources of Ukraine (hereinafter referred to as the Ministry of Ecology) issued an order No. 41 on the Prohibition of Hunting the European Elk, which established a ban on hunting the European elk (*Alces alces*) in the territory of Ukraine for a period of 25 years in order

[5] I. Parnikoza, *Zaboronyty polyuvannya na losya v Ukrayini!* [Prohibit the Elk Hunting in Ukraine!], https://h.ua/story/434280/ [access: 04.11.2019].

[6] *Ibidem*.

[7] The Address of the People's Deputy of Ukraine I.V. Lutsenko of 6 December 2016, Public Association "Ukrainian Hunting Union", https://gsvms.org.ua/files/elk/LystLuc_compressed.pdf [access: 04.11.2019].

to ensure the conservation and restoration of its population. The basis for this decision was scientific evidence that the elk population in Ukraine had been rapidly declining.

In addition, when deciding whether to issue a moratorium on hunting, the Ministry of Ecology took into account Poland's experience in imposing a lengthy ban on the elk hunting,[8] which has become the truly effective mean of increasing its population. Thus, in Poland, by introducing over the 8 years of the hunting moratorium, the number of elk has more than tripledand stands at over 30,000 head now. The decision of the Ministry of Ecology was met with sharp rejection and active resistance of the hunters who started an active public campaign aimed at its abolition.

Subsequently, on 19 December 2017, despite the active resistance of the hunting lobby, as a result of the submission of the National Commission for the Red Data Book of Ukraine, the Ministry of Ecology introduced the elk to the Red Data Book of Ukraine by issuing an order on Amendments to the List of Species of Animals Listed in the Red Data Book of Ukraine (Fauna).[9] The European elk has been classified as "vulnerable" one.

Hunting organizations continued to campaign against the efforts of environmentalists to save the European elk from total extinction. Hunters argued that the findings on the number of elk are not documented and inaccurate, and that the elk population is much larger in fact. The Association of Hunting Area Users has applied to the police for a scientist who is the author of expert opinion for the Institute of Zoology of the Academy of Sciences, accusing him of "official forgery". As a result, the orders to ban hunting and bring elk to the Red Data Book of Ukraine were challenged by the hunters in the administrative court as unlawful ones.

During this period, hunters have filed several lawsuits, but the primary one was the administrative lawsuit of one individual hunter, concerning the recognition of illegal orders of the Ministry of Ecology regarding the ban on elk hunting and enlisting the European elk in the Red Data Book of Ukraine. Such a case was decided in the courts of Ukraine for the first time. During the hearing of this case in the Kyiv District Administrative Court, there were public demonstrations of environmental activists and hunters near the court, which turned into fights with injuries to the participants. Hunting associations led a dirty information campaign, called the elk protection "ecopsychosis", and well-known activists were described as "eco-terrorists".[10] For two years, the Ukrainian society has been concerned to note the results of administrative court proceedings on hunters' appeal against the orders of the Ministry of Ecology

[8] The Decree of the Minister for the Environment of 10 April 2001 (Journal of Laws of 2001, No. 43, item 488, pp. 3049–3050).

[9] On Amendments to the List of Species of Animals to be Listed in the Red Data Book of Ukraine (Fauna): Order No. 481 of the Ministry of Ecology and Natural Resources of 19 December 2017 (Official Journal of Ukraine of 2018, No. 5, item 216).

[10] S. Androsyuk, T. Telichko, *Ekopsykhoz* [Ecopsychosis], "Forest and Hunting Journal", https://ekoinform.com.ua/?p=3462 [access: 04.11.2019] (in Ukrainian).

and Natural Resources of Ukraine on imposing a ban on European elk hunting and entering this animal into the Red Data Book of Ukraine.

On 27 November 2018, the hunters' claim was upheld by the Kyiv District Administrative Court.[11] This court decision appeared on the front pages of most information sources. The Minister of Ecology of Ukraine of that time, Ostap Semerak, said in an interview that he was "surprised by the aggression of some Ukrainian citizens who are trying to win the right to kill animals through the courts".[12] The Ministry has filed an appeal to which activists and environmental NGOs have joined. The case was also considered in cassation by the Supreme Court of Ukraine. On 8 April 2019, the Administrative Court of Appeal cancelled the decision of the first instance. On 2 October 2019,[13] the Supreme Court of Ukraine finally finished the case and upheld the position of the Ministry of Energy and Environmental Protection of Ukraine,[14] regarding the need to ban European elk hunting and to include it in the Red Data Book of Ukraine, and supported the decision of the Administrative Court of Appeal of 8 April 2019.[15]

The main argument of the lawsuit and, accordingly, the decision of the court of first instance, which was not further supported by the courts of appeal and cassation, was that the submission of the National Commission on the Red Data Book of Ukraine had not provided a scientific justification for the need to include the European elk in the Red Data Book of Ukraine, as there was no clear data on amount and dynamics of the population. The submission had contained only general links to population decline, indication of significant chances of its disappearance and references to some scientific publications by certain scholars published in 2010–2013.[16]

The Administrative Court of Appeal referred to the term "scientific result", enshrined in Art. 1(22) of the Law of Ukraine on Scientific and Technical Activities of

[11] The Kyiv District Administrative Court Judgment of 27 November 2018, case No. 826/9432/17. The Unified State Register of Judgments, https://www.reyestr.court.gov.ua/Review/387945 [access: 04.11.2019].

[12] *Sud rozhlyane apelyatsiyu Minekolohiyi na skasuvannya zaborony polyuvannya na losya 18 bereznya* [The Court Will Consider the Appeal of the Ministry of Ecology to Lift the Ban on the Elk Hunting on March 18], Interfax Ukraine News Agency, https://ua.interfax.com.ua/news/general/572681.html [access: 04.11.2019].

[13] The Decision of the Sixth Administrative Court of Appeal of 8 April 2019, case No. 826/9432/17 proceeding No. A/855/838/19. The Unified State Register of Judgments, http://reyestr.court.gov.ua/Review/81430545 [access: 04.11.2019].

[14] The Decree of the Cabinet of Ministers of Ukraine No. 829 of 2 September 2019 – Some Issues of Optimization of the System of Executive Central Bodies – renamed the Ministry of Environment and Natural Resources of Ukraine into the Ministry of Energy and Environmental Protection of Ukraine.

[15] The Decision of the Supreme Court of Ukraine by the Board of Judges of the Administrative Court of Cassation of 2 October 2019, case No. 826/9432/17, proceeding No. K/9901/14908/19. The Unified State Register of Judgments, http://reyestr.court.gov.ua/Review/84806004 [access: 04.11.2019].

[16] The Kyiv District…

26 November 2015,[17] i.e. new scientific knowledge obtained in the process of fundamental or applied scientific research and recorded on a data storage item. Based on this definition, the Court of Appeal pointed to the error of the court of first instance that the submission of the National Commission on the Red Data Book of Ukraine did not provide adequate scientific justification for reduction of the European elk population in Ukraine.

In this regard, the Supreme Court of Ukraine, composed of the Administrative Court of Cassation panel of judges, stated that the failure to carry out special studies to determine real populations of the European elk "(…) does not indicate the inaccuracy of scientific data taken into account by the National Commission on the Red Data Book of Ukraine", and that "(…) it has been proven beyond reasonable doubt that the elk is currently a »vulnerable« animal and in the near future such species may be classified as endangered if the factors that adversely affect the status of their populations stay active".[18]

In general, we agree with the findings of the Court of Appeal and the Supreme Courts of Ukraine, but, at the same time, we deem it necessary to pay attention to other environmental-legal aspects of this case that, unfortunately, have not been the subject of thorough analysis by the courts. In particular, such issues are the necessity to outline and substantiate those rights, freedoms and legitimate interests of the plaintiff, defense of which justified his claims for hunting prohibition and including the European elk in the Red Data Book of Ukraine, as well as an indication of the legal relations regulated by orders of the Ministry of Ecology, which have been appealed against, to which the plaintiff should become a party.

Such a necessity is required by the law, because in accordance with Art. 5 – Right to Apply to Court and Methods of Judicial Protection of the Code of Administrative Judiciary of Ukraine (hereinafter referred to as CAJ) of 15 December 2017[19] – "(...) a person may appeal to the administrative court such a decision, action or inaction of the authority that violates his rights, freedoms or legitimate interests". In addition, in accordance with Art. 264 CAJ of Ukraine (Peculiarities of Proceedings in Cases of Appeal against Regulations of Executive Bodies, the Verkhovna Rada of the Autonomous Republic of Crimea, Local Self-Government Bodies and Other Authorities), "(…) the right to appeal against a normative legal act is available to the persons that are subject to its application and, consequently, are subjects of legal relations in which this act will be applied". Thus, the court decision by which the claim was satisfied should have specified which particular legal rights, freedoms and interests of the plaintiff

[17] Law of Ukraine of 26 November 2015 on Scientific and Technical Activities (Official Bulletin of Ukraine of 2016, No. 2, item 4, as amended).

[18] The Decision of the Supreme Court…

[19] Law of Ukraine of 15 December 2017 – Code of Administrative Judiciary of Ukraine (Official Bulletin of Ukraine of 2005, No. 32, item 1918, as amended).

are violated, and party of which specific legal relationship he or she was or should have become, or explain the way in which the orders of the Ministry of Ecology are applicable to the plaintiff.

However, such an argument is absent in both of decisions of the Kyiv District Administrative Court of 27 November 2018, and the Sixth Administrative Court of Appeal of 8 April 2019, respectively. The court stated only that "(…) the rights and interests for which the plaintiff appealed to the court were partially violated" and that "(…) necessary element of violation of any personal right is a change in the state of his subjective rights and obligations, i.e. termination or impossibility of exercising its rights and/or the occurrence of an additional duty". In addition, the court stated in the definition of such legal relations that "(...) the plaintiff has obtained the ID of hunter NUMBER_1 and is engaged in hunting. Thus, since after adding the European elk to the List of Animal Species included in the Red Data Book of Ukraine (fauna), hunting is prohibited for him, the plaintiff as a hunter is a party to the legal relations to which the order of the defendant [Ministry of Ecology – A.S.] dated 19 December 2017 No. 481 was applied".

Hunters' rights in Ukrainian environmental law doctrine

In order to determine the rights the claimant has when it comes to elk hunting, it is necessary to refer to the legislation of Ukraine on wildlife, which provides the rights of subjects regarding the use of wildlife. One of these rights is hunting as a special use of wild animals. Their content and implementation are governed by the Law of Ukraine on Wildlife of 13 December 2001[20] and the Law of Ukraine on Hunting Economy and Hunting of 22 February 2000,[21] which enshrine the rights of subjects in the field of fauna use, where hunting is one of the special kinds of wildlife use.

The wildlife is an integral part of the environment and an independent object of legal protection under Ukrainian law at the same time.[22] The Law of Ukraine on Wildlife is the main legislative act that regulates relations in the field of protection, use and reproduction of wildlife objects, preservation and improvement of the habitat of wild animals, ensuring conditions for conservation of all species and population diversity of animals.

According to the Law of Ukraine on Wildlife, hunting is defined as a type of special use of fauna, which is carried out by catching of wild animals and birds, which are

[20] Law of Ukraine of 13 December 2001 on Wildlife (Official Bulletin of Ukraine of 2002, No. 2, item 47, as amended).

[21] Law of Ukraine of 22 February 2000 on Hunting Economy and Hunting (Official Bulletin of Ukraine of 2000, No. 12, item 442, as amended).

[22] L.V. Leiba, *Tvarynnyy svit yak ob'yekt pravovoyi okhorony* [The Animal World as an Object of Legal Protection], "Problems of Legality" 2010, No. 112, p. 78 (in Ukrainian).

free in nature or kept in semi-free conditions within the hunting grounds and may be objects of hunting (Art. 21). The right to hunt within the limits of the designated hunting grounds is granted to citizens of Ukraine who have reached the age of 18 and received appropriate documents certifying the right to hunt (Art. 22). Required documents include a hunting license, an annual hunting game check card including violations of hunting rules with a stamp of state duty payment, hunting permits (license, shooting card, etc.), weapon documents, etc. (Art. 23).

The Law of Ukraine on Hunting stipulates that "wild game" means wild animals that may be hunted, and "hunting" is a human activity aimed at tracing, pursuing or killing (hunting) wild animals, which are free in nature or kept in semi-free conditions (Art. 1) under a special license or shooting card. In our opinion, the analysis of these acts does not imply the conclusion that content of subjective right to hunt is related to specific species of animals. The object of hunting in the doctrine of environmental law is defined as a state hunting fund, which refers to animals that are free in nature or are kept in semi-free conditions or in captivity within the area of state hunting farms.[23]

The object of this right is all game animals, as the unspecified range of all wild animals species, which are currently classified as such by the state in course of respective procedure. Game animals that are free in nature, and are kept in semi-free conditions or in captivity within the area of state hunting farms, constitute a state hunting fund. The law does not guarantee hunters the right or freedom to obtain specific species of animals (including elk), the right to obtain licenses for a particular wild animal, or the right to request the approval of a certain amount of limits each year, etc.

Another aspect that has been left out of the courts' attention is the issue of the Ukrainian people's ownership to wildlife in the whole, proclaimed by the Constitution of Ukraine. Hunters are not the owners of game animals, because according to the Constitution of Ukraine and the Laws of Ukraine, all wild animals, including game animals that are in free in nature on the territory of Ukraine, are objects of property of the Ukrainian people. In accordance with the Constitution and the Law of Ukraine on Hunting, rights of the owner are exercised by state authorities and local self-government on behalf of the Ukrainian people. In other words, the owner of animals is still the Ukrainian people, and its rights are exercised by state authorities and local self-government bodies within the limits defined by the Constitution of Ukraine (Art. 3 of the Law of Ukraine on Hunting). Therefore, the Ministry of Ecology, while inserting the European elk into the Red Data Book of Ukraine for the purpose of its preservation, acted as a representative of the owner of these animals, i.e. the Ukrainian people. It should be noted that the current legislation of Ukraine, while enshrining the

[23] *Ekolohichne pravo Ukrayiny. Akademichnyy kurs* [Environmental Law of Ukraine. Academic Course], red. Yu.S. Shemshuchenko, Kyiv 2005, p. 592 (in Ukrainian); *Ekolohichne pravo* [Environmental Law], red. A.P. Hetman, Kharkiv 2014, p. 277 (in Ukrainian).

powers of state bodies in the field of ecology, does not distinguish specific authority for management (administration) of the Ukrainian people's exercise of property rights regarding natural resources, including wild animals.

In our opinion, the position of the District Administrative Court of Kyiv (courts of the first instance) is not substantiated as well in another aspect. In particular, the court stated that after adding the European elk to the Red Data Book of Ukraine, the plaintiff as a hunter had become a party to the legal relations established by the order of the defendant dated 19 December 2017 No. 481[3]. Such a conclusion contradicts the Law of Ukraine on the Red Book of Ukraine, according to which, special use of objects of the Red Data Book of Ukraine may be carried out in exceptional cases for scientific and breeding purposes only. After adding an animal to the Red Data Book of Ukraine, hunters may not be members of this relationship, accordingly they have no right to file a claim.

Certain additional responsibilities with regard to such animals may be imposed on users of hunting grounds who are obliged to comply with the regime of protection of species of animals included in the Red Book of Ukraine within the boundaries of the assigned territory in accordance with Art. 34 of the Law of Ukraine on the Red Book of Ukraine. Meanwhile, the court decision does not provide information on whether the plaintiff is a user of hunting lands in which the European elk are located. Therefore, it is difficult to agree with this conclusion of the court. However, the higher courts did not consider these circumstances at all. In our opinion, the exclusion of certain species of animals from the state hunting fund may not either deprive the interested persons of their legal right to hunt or limit its scope.

Having supported the position of the Ministry of Ecology regarding the need for legal protection of the European elk, the Supreme Court of Ukraine stated, with regard to the issue of infringement of the plaintiff's legal rights, that the right to hunt is not absolute and may be restricted, and the ban on elk hunting due to its inclusion in the Red Book is in conformity with the law and does not violate the plaintiff's hunting rights. Such findings of the Supreme Court of Ukraine need some clarification, in particular, as to whether the inclusion of a game animal in the Red Data Book of Ukraine may be linked to restrictions on hunting rights.

In accordance with the aforementioned Laws of Ukraine on the use of wildlife, some restrictions may be imposed. For example, the rights of owners of wildlife objects may be restricted in the interests of protecting these objects, the environment and protecting the rights of citizens in the manner prescribed by law (Art. 7 of the Law on Wildlife). Article 28 of this Law provides for the possibility of restricting the use of wildlife objects for scientific, cultural, educational, educational and aesthetic purposes. One should also take into account the provisions of Art. 37 of this Law (Protection of Wildlife), according to which, the establishment of prohibitions and restrictions on the use of wildlife objects is one of the means of their legal protection. Similarly, the legal protection of animals in this Article includes the establishment

of a special regime for the protection of species of animals listed in the Red Data Book of Ukraine.[24]

In this regard, we would like to point out that the issue of limitation of personal rights in the field of natural resources use, including the right to hunt, has not been sufficiently developed in the Ukrainian environmental law doctrine. In this case, it is an issue whether there are any grounds for stating that the inclusion of the species of fauna or flora in the Red Data Book might be a limitation of subjective rights. The restriction of the right should be distinguished from its violation. In the first case, it is about narrowing the scope of human rights that may be established at the legislative level to ensure more important interests, while the second one is about unlawful infliction of harm to rights, freedoms and legitimate interests.

The legal basis for the restriction of human and citizen rights in Ukraine is established by the Constitution of Ukraine. Pursuant to Art. 64, the constitutional rights and freedoms of a person and citizen shall not be restricted, except in cases stipulated by the Constitution of Ukraine, in particular, in conditions of martial law or state of emergency. The Ukrainian legislation on the use of wildlife provides for the possibility of introducing some restrictions in this area. Thus, the introduction of a wild animal into the Red Book shall not be considered as a restriction on the use of the animal world, since both the first and second ones are independent and legally provided animal protection means.

Conclusions

To summarize, the introduction of wild animals into the Red Book shall not be considered as a violation or restriction of personal right to hunt, since the content of this right does not include the authority to obtain a specific species of wild animals. The object of the right to hunt is the state hunting fund. It should be acknowledged that the issue of determining the subjective right to hunt specific animals, as well as the existence of the relevant freedom or legitimate interest and their legal nature, is debatable and needs further research. In any case, the fact that there is no proper justification of these aspects in the court decision, which satisfied the relevant claim, as well as the decisions of the appellate and cassation courts also lack such justification. Consequently, it does not exclude the possibility of filing similar claims in the future by persons dissatisfied with granting of specific environmental protection to some natural objects, and the grounds for consideration and satisfaction of such claims by the courts.

[24] G. Levina, *Pravova pryroda Chervonoyi knyhy Ukrayiny (v konteksti okhorony ridkisnykh vydiv dykykh tvaryn)* [The Legal Nature of the Red Book of Ukraine (in the Context of the Protection of Rare Species of wild Animals)], "Constitutional State" 2016, No. 27, pp. 581–582.

References

Androsyuk S., Telichko T., *Ekopsykhoz* [Ecopsychosis], "Forest and Hunting Journal", https://ekoinform.com.ua/?p=3462 [access: 04.11.2019].

Ekolohichne pravo [Environmental Law], red. A.P. Hetman, Kharkiv 2014 (in Ukrainian).

Ekolohichne pravo Ukrayiny. Akademichnyy kurs [Environmental Law of Ukraine. Academic Course], ed. Yu.S. Shemshuchenko, Kyiv 2005 (in Ukrainian).

Leiba L.V., *Tvarynnyy svit yak ob'yekt pravovoyi okhorony* [The Animal World as an Object of Legal Protection], "Problems of Legality" 2010, No. 112 (in Ukrainian).

Levina G., *Pravova pryroda Chervonoyi knyhy Ukrayiny (v konteksti okhorony ridkisnykh vydiv dykykh tvaryn)* [The Legal Nature of the Red Book of Ukraine (in the Context of the Protection of Rare Species of Wild Animals)], "Constitutional State" 2016, No. 27.

Parnikoza I., *Zaboronyty polyuvannya na losya v Ukrayini!* [Prohibit the Elk Hunting in Ukraine!], https://h.ua/story/434280/ [access: 04.11.2019].

Sud rozhlyane apelyatsiyu Minekolohiyi na skasuvannya zaborony polyuvannya na losya 18 bereznya [The Court Will Consider the Appeal of the Ministry of Ecology to Lift the Ban on the Elk Hunting on March 18], Interfax Ukraine News Agency, https://ua.interfax.com.ua/news/general/572681.html [access: 04.11.2019].

Abstract: The author reviewed the court decisions regarding hunters appealing against the decisions of the Ukrainian authorities concerning the ban on European elk hunting and the entry of this species in the Red Data Book of Ukraine, which were considered by the Ukrainian courts in 2017–2019. The author emphasizes the problems of application of the environmental legislation of Ukraine, including faunistic one, which contains the principles of protection and conservation of wild fauna, by the administrative courts of Ukraine in proceedings of the respective administrative cases. In particular, the court of first instance, which upheld the claim for unlawfulness of the decision to include the animal in the Red Data Book of Ukraine, had not analyzed the provisions of environmental legislation regarding the content of right to hunt, the ownership to wild animals by the Ukrainian people, the peculiarities of legal relationship where the hunter is a party. The resulting decision was subsequently overturned by the higher courts. The main issue addressed by the author is the subject of hunting rights in Ukraine. Legislation and doctrine do not refer to specific species of wild animals but to all game animals, which constitute the state hunting fund. Therefore, the author concludes that hunters do not have the right to a particular species of wild animals (in this case, the elk), that, accordingly, does not give grounds for claiming the court protection of their right, freedom or legitimate interest via challenging acts of public authorities (in this case, the Ministry of Ecology and Natural Resources of Ukraine).

Keywords: the Red Data Book of Ukraine; legal protection of wildlife; court jurisprudence; faunistic law; European elk; right to hunt

TETIANA SHARAIEVSKA

Taras Shevchenko National University of Kyiv
Institute of Law
https://orcid.org/0000-0003-0099-938X
tetiana_sharaievska@ukr.net

Who Will Be Responsible for the Massive Loss of the European Bison in Ukraine?

Introduction

The European bison is a great and powerful animal. It was widely distributed in the wild in ancient times all over the forests of Europe, and disappeared from Ukraine around the 17th century. Due to its size, the European bison was a very easy and profitable target for hunters, so in the late 19th – early 20th centuries, only two natural populations survived in the Belovezhskaya Pushcha and the North Caucasus. In February 1919, the last free European bison was killed that lived in Belovezhskaya Pushcha. As a result of the civil war, bison protection in the Caucasus ceased as well. In 1923, the International Society for the European Bison Protection emerged.[1] As of 2014, there were approximately 5,046 European bison in the world, including 3,403 species in the wild in free or semi-free flocks.

Today, the problem of the European bison decrease in Ukraine is nationwide. So, there is a need to preserve and restore their population. The European bison has already been listed in the International Red Book, European Red List, Red Book of Ukraine, and also included in the Red Book and Red Lists of other neighboring countries, namely Poland, Belarus, Lithuania. It is protected by the Berne Convention. Thus, the European bison protection is an honorable duty of every state in which this animal is located.

[1] *Balance Lost: On Extinct Animals That Have Disappeared from the Territory of Ukraine Due to Human Activities*, Zik News, https://www.google.com/amp/zik.ua/amp/news/2018/11/13/vtrachenyy_balans_pro_tvaryn_yaki_znykly_i_znykayut_z_terytorii_ukrainy_1446881 [access: 30.11.2019].

It seemed that the people and the state would have to draw serious conclusions from the recent tragic event and take all necessary measures to protect them. In Ukraine, in 2016, there were 300 European bison in total, 100 of which occupied the Vinnytsia region. The large herd of the European bison here had been carefully restored for the last ten years.

The circumstances of the case

The European bison were brought to the hunting grounds of Vinnytsia region in Ukraine in 1979 (4 females and 2 males) from Volhynia. As of early 2016, there were approximately 300 species in Ukraine, while in 1991, there were more than 664. What happened to the rest of the animals? The incident in Vinnytsia gives the comprehensive answer to this question.

An unprecedented case of a large number of red-book animals death shocked all Ukraine in January 2016. In the territory of Vinnytsia region, almost one tenth of all the European bison of Ukraine died in tragic and unexplained circumstences.[2] According to official data, the herd of European bison huddled on the frozen pond, but the ice cracked and some of the animals dropped into the water.[3] There were 80 bison, 20 of which drowned. Thus, the total loss of the Vinnytsa European bison population amounted to more than 20%, which constitutes the largest loss of the biggest wild animals in Ukraine. That is the price of poaching.

In order to hide the scale of the tragedy, the most absurdous versions of its reasons were put forward. According to one version, the cause of death was psychosis among the herd caused by the number of animals. Another reason was suicide.[4] It was also claimed that they were afraid of something and entered the ice. However, foresters have evidence that this was not an accident or some incomprehensible biological phenomenon. They claim that a herd of the European bison would never go on the ice voluntarily. This is unnatural for them. Animals, weighing almost one ton, are defenseless there.[5]

---

[2] *Is the Matter Delayed? Almost a Year Ago, No One Was Responsible for the Massive Loss of the European Bison*, 20 Minutes News, https://www.google.com/amp/s/vn.20minut.ua/Kryminal/amp/spravu-zatyaguyut-za-zagibel-zubriv-mayzhe-rik-tomu-dosi-nihto-ne-vidp-10571439.html [access: 30.11.2019].

[3] *Who killed the European Bison in Vinnytsia Region?*, BBC News Ukraine, https://www.bbc.com/ukrainian/society/2016/02/160215_bisons_tragedy_vinnytsya_vc [access: 30.11.2019].

[4] *Mass Suicide of the European Bison in Vinnytsia Region*, Open Forest, https://www.openforest.org.ua/27486 [access: 30.11.2019].

[5] *Bloody Mlynok, or Trebukhiv Tragedy*, Eko Inform, https://ekoinform.com.ua/?p=1162 [access: 30.11.2019].

Criminal liability for improper use of specially protected wildlife species

Legal responsibility is usually defined as the obligation of a person that violated law to take respective administrative, criminal, civil, and disciplinary measures that are applied to him. According to the scheme of the Ukrainian environmental legislation, the elements of basic violations in this area are provided in the Law of Ukraine on Environmental Protection[6] and specified in the primary environmental laws, while sanctions for them are established and applied in accordance with the labor legal acts, laws on administrative offenses, criminal and civil law. In particular, it is provided in the Laws of Ukraine on Wildlife,[7] on Hunting,[8] on the Red Book of Ukraine,[9] the Criminal Code of Ukraine,[10] the Code of Ukraine on Administrative Offenses,[11] the Civil Code of Ukraine[12] and others.

Environmental offenses are characterized by infliction or risk of possible infliction of harm to the environment (e.g. extinction, mass extermination or serious diseases of wildlife species, inability to reproduce for a long time certain wildlife species, particularly large-scale material damage, etc.). Qualifying signs of environmental crimes also include certain methods of encroaching on legal order of environmental protection and use of natural resources, tools and means of committing a crime (e.g. violations of hunting rules committed by an official using official position, or by previous consent of few persons, or via mass extermination of animals, birds or other wildlife species, or using vehicles, etc.).[13]

In order to ensure proper and uniform legal practice regarding application of faunistic legislation in criminal proceedings, the Plenum of the Supreme Court of Ukraine adopted the Resolution on Judicial Practice in Cases of Environmental Crimes and Other Offenses No. 17 of 10 December 2014. According to the Resolution, characteristics of environmental criminal liability are determined by the following: 1) it

---

6 Law of Ukraine of 25 June 1991 on Environmental Protection (Bulletin of the Verkhovna Rada of Ukraine of 1991, No. 41, item 546, as amended).

7 Law of Ukraine of 13 December 2001 on Wildlife (Official Bulletin of Ukraine of 2002, No. 2, item 47, as amended).

8 Law of Ukraine of 22 February 2000 on Hunting (Official Bulletin of Ukraine of 2000, No. 12, item 442, as amended).

9 Law of Ukraine of 7 February 2002 on the Red Book of Ukraine (Official Bulletin of Ukraine of 2002, No. 10, item 462, as amended).

10 Criminal Code of Ukraine of 5 April 2001 (Official Bulletin of Ukraine of 2001, No. 21, item 920, as amended).

11 Code of Ukraine on Administrative Offenses of 7 December 1984 (as amended) (Verkhovna Rada of Ukraine), https://zakon.rada.gov.ua/laws/main/80731-10 [access: 30.11.2019].

12 Civil Code of Ukraine of 16 January 2003 (Official Bulletin of Ukraine of 2003, No. 11, item 461, as amended).

13 N.R. Malysheva, M.I. Yerofyeyev, *Scientific and Practical Commentary to the Law of Ukraine on Environmental Protection*, Kharkiv 2017, p. 391.

is a type of retrospective legal liability; 2) it is based on a socially dangerous crime, the object of which is the violation of relations in the field of protection, use and reproduction of wildlife species; 3) it is applied to those socially dangerous acts, that are provided in the Criminal Code of Ukraine, and only upon the court's judgment; 4) prosecution of the guilty persons does not exempt them from compensation for the damage caused to the fauna; 5) specific body of the crime in this sphere shall be established with reference to the legislation on wildlife.[14]

Concerning criminal liability in this case, criminal proceedings were initiated regarding this incident under Art. 248 (illegal hunting) and Art. 364 (abuse of power or authority) of the Criminal Code of Ukraine. Subsequently, the criminal proceedings were initiated under Art. 249 of the Criminal Code of Ukraine (responsibility for illegal fishing, animals or other aquatic mining). The maximum punishment that is possible for poachers (apart from the fine, of course) is 5 years imprisonment.

According to Art. 248(1) of the Criminal Code of Ukraine, illegal hunting is such hunting that is conducted in violation of established rules (if it caused significant harm); as well as of animals, birds or other species of fauna listed in the Red Book of Ukraine, etc. Criminal violation of hunting rules is complete from the moment of causing significant harm. When deciding whether the harm is significant, the quantity, cost and environmental value of the extinct animals and birds, the environmental harm calculated at special fees shall be considered. For example, the destruction of at least one bison shall be recognized as a significant harm. Illegal hunting of wildlife species included in the Red Book of Ukraine is a formal crime and is considered to have been completed since start of the hunt, regardless of whether the relevant game animals were actually obtained.

Therefore, in the course of the objective aspect of crime, the crime constitutes: 1) violation of the hunting rules, if it caused significant harm; 2) illegal hunting in wildlife sanctuaries or in other nature reserve fund territories and objects; 3) hunting of animals, birds or other species of fauna listed in the Red Book of Ukraine. In case of illegal hunting in wildlife sanctuaries or other nature reserve fund territories and objects of animals, birds or other species of fauna listed in the Red Book of Ukraine, criminal liability arises regardless of whether any harm inflicted there.

However, the investigation into this outstanding case took a long time. Up to the last moment, there was hope that poachers would be found and punished. In June 2017, the case was formally closed due to "the absence of a crime". Investigators claim they heard a few hundred testimonies of witnesses and conducted a series of expert reports. As a result, they came to the conclusion that there was no evidence that

[14] G.I. Baliuk, O.O. Pogribnyy, Yu.S. Shemshuchenko, *Wildlife of Ukraine: Legal Protection, Use and Reproduction*, Kyiv 2010, p. 273.

someone intentionally forced the herd to enter the ice.[15] At the same time, no poacher was suspected of the crime.

According to the statistics, up to 30 European bison are killed every year by poachers in Ukraine, while about 20 animals are born and reach breeding age. The rapid decline in the European bison population in Ukraine was caused not only by poaching but it also introduced the possibility of legal commercial hunting for them. The profit from this commercial hunting was to be allocated to the opening of the European bison protection fund, but it was not created, and such hunting led to the extermination of the species. It was a particularly sophisticated form of poaching. At the request of public environmental organizations, such practices were put to an end.

Based on the above analysis of the institute of legal responsibility for environmental offenses, there can be drawn the conclusion with regard to at least three important issues that hinder its effective application: environmental legal nihilism, the unwillingness of individual officials to apply sanctions to violators, and the weakness and inefficiency of these sanctions.[16] The risk of harm to the natural objects of the analyzed group (especially protected or especially valuable natural objects) should already be a sufficient reason to criminalize such offenses regardless of other circumstances. The mere fact of extinction or destruction of such natural objects indicates rather high seriousness of the act due to their special value.[17]

In this regard, we agree that it is appropriate to broaden the scope for liability for encroachment on specially protected natural objects and species in separate articles or their sub-articles. In order to ensure a uniform understanding of such objects and species and more accurate application of the criminal law, it is also advisable to include the Note into the Criminal Code of Ukraine with an approximate list of especially protected natural objects and species as objects of criminal protection. This will not only bring criminal law in line with environmental law in general, but also unify and make it more effective.[18]

In addition, analysis of the relevant norms revealed their lack of "environmental nature". As a rule, they do not take into account the environmentally hazardous consequences, which complicates the application of criminal law and does not allow to interpret such norms correctly. Therefore, it would be advisable to point specific environmental consequences in criminal law, along with the overall grave consequences.

[15] *Opened Loudly, Closed Quietly*, Silski Visti, http://silskivisti.kiev.ua/19502/index.php?n=36233 [access: 30.11.2019].

[16] V. Kostyts'kyy, *Ten Issues on Legal Liability for Environmental Offenses*, [in:] *Public Liability Law: Monograph*, red. I. Bezklubyy, Kyiv 2014, p. 411.

[17] S.B. Gavrysh, *Criminal Legal Protection of the Environment in Ukraine*, Kyiv 2002, p. 95.

[18] *Ibidem*, pp. 101–102.

Compensation of environmental harm for violations of the requirements of faunistic law

According to the current environmental legislation of Ukraine, the application of disciplinary, administrative or criminal liability measures does not release the violators from compensation for the damage caused by the irrational use of natural resources, their destruction, including those that are subject to special protection. Issues of compensation of harm are regulated by the legal provisions on civil liability, which is proposed to be recognized as an environmental liability due to exclusive compensatory, restorative, material and financial nature of the legal relationship in which it is implemented.

Environmental harm is a necessary element of an environmental offense or the result of illegitimate actions defined in the law, the object at risk of which is natural resource belonging to the owner or user, the environment as a system of life conditions, and life and health of the person in such environment.[19]

From the point of view on a scientific approach regarding differentiation of environmental legal liability as of a separate one, it is interesting to refer to its division depending on the ways of influencing the offender: compensatory, aimed at covering damages, and repressive, which is realized through the use of punishment. Compensatory liability includes, in particular, the obligation to cover the damage according to the rules of civil and commercial law. Administrative, criminal and disciplinary responsibility are regarded as repressive types.[20] Thus, harm and requirement for its compensation are the main attributes of responsibility.

The Resolution of the Cabinet of Ministers of Ukraine No. 1030 of 7 November 2012 established the amount of compensation for the illegal extraction, destruction or damage of fauna and flora species listed in the Red Book of Ukraine, as well as for the destruction or deterioration of their habitat (growth). According to this Resolution, the compensation for one illegally killed bison is equal to UAH 130,000.

The State Environmental Inspectorate reported damages of more than UAH 2 million and sent the materials to the Main Directorate of the National Police in Vinnytsia Oblast to determine the causes of the European bison's massive loss.[21] Such an amount of the fine will have to be paid to those found guilty of poaching. However, the offenders have not been brought to responsibility yet. The only recent thing the state

[19] M.V. Krasnova, *Compensation for Damage under the Environmental Legislation of Ukraine (Theoretical and Legal Aspects). Monograph*, Kyiv 2008, p. 69.

[20] M. Krasnova, *Current Issues of Definition of the Concept of "Environmental Responsibility" in the Modern Law of Ukraine*, [in:] *Public*…, p. 427.

[21] *The Perpetrators of the Massive Loss of 17 European Bison Enlisted in the Red Book Have Not Been Punished Yet*, Censor Net, https://www.google.com/amp/s/amp.censor.net.ua/ua/news/395122/politsiya_zatyaguye_rozsliduvannya_zagybeli_17_zubriv_na_vinnychchyni_ekolog_andriyi_plyga_dokument [access: 30.11.2019].

has done in the area of animal protection is an introduction of new fees for damages caused to forestry during illegal wildlife poaching.

Therefore, proprietary environmental harm is linked to the certain economic value of the objects of the material world and shall be regarded as property losses, i.e. reduction of value of damaged object within the meaning of natural resources, property complexes managed by the respective persons, including both owners and users, reduction or loss of income derived from the opportunities to use such resources and complexes for their intended purpose, the need for new costs to restore their useful properties, etc. Such damage is always associated with the corresponding loss and reduction of material benefits (including natural resources and objects) protected by law. The primary forms of compensation are natural and monetary ones, which, depending on the actual circumstances, may have the following features.[22]

The material criterion of environmental harm includes the assessment of an environmental value, personal and qualitative characteristics. The material criterion enables to take maximum account of the damage and should play a decisive role in the qualification of the offence in cases of destruction of unique, endangered, rare or other particularly valuable environmental elements, for example, in a given region. A qualitative criterion characterizes environmental harm in terms of its scale, the magnitude of the overall harm to nature and people, which makes it possible to distinguish environmental crimes from wrongdoings and qualify the severity of environmental crimes themselves.[23]

The consequences of environmental crime determine the concept and content of environmental harm. It is based on various types of harm including biological (harm to the natural environment in a narrow sense), personal (harm to life and health) and economic (damage to the material sphere) ones. The most complex environmental harm to be assessed in the course of criminal qualification is economic damage, which causes not only direct losses (actual costs), but also losses in the form of economic losses (costs for environmental restoration) and lost profits (reasonably planned profits).[24] Thus, the issue of guilt for environmental harm remains open to debate. If general rules on tort liability are based on guilt, then absolute liability, if defined as such by special laws on liability for environmental damage, is based on the absence of guilt.[25] In such a case, since the investigation bodies did not find people that are guilty of the mass destruction of the bison in Ukraine, then the compensation for environmental damage was financed by the state budget with the loss equal to UAH 3 million.[26]

---

[22] M.V. Krasnova, *Compensation...*, pp. 76–77.

[23] S.B. Gavrysh, *op. cit.*, p. 295.

[24] *Ibidem*, p. 537.

[25] M.V. Krasnova, *Compensation...*, p. 425.

[26] *The Vinnytsia Authorities Will Have to Pay Three Million Hryvnias for the Destroyed European Bison*, Vlasno Info, http://vlasno.info:8080/spetsproekti/2/ecology/item/14906-vinnytsku-vladu-zmusiat-zaplatyty-try-miliony-hryven-za-znyshchenykh-zubriv [access: 30.11.2019].

Conclusions

1. As far as the key problems of the case in question are concerned, it should be noted that this is an irreparable loss not only for the Vinnitsa region but for the whole of Ukraine. The European bison is a national asset of the Ukrainian people and is subject to special protection. However, as we see, due to the current procedural legislation, it is difficult to hold somebody responsible for environmental crimes, since the environmental legal aspect is not taken into account in the course of procedural regulation. Despite the international legal protection of specific wildlife objects, its protection on the national level is a failure. Procedural legislation does not take into account the peculiarities of the pre-trial and judicial procedure for consideration of environmental disputes.

Consequently, we consider that proposals of some scholars regarding the need to distinguish environmental procedural sub-branch of law are relevant. It shall be defined as a set of legal norms established or authorized by the state, regulating uniform procedural relations in the environmental field arising from spatial-territorial ordering of natural objects, including natural resources, planning, forecasting, observation and information in the field of environmental protection, distribution of natural resources, environmental control and environmental dispute resolution.[27] It corresponds to the Law of Ukraine on the Fundamental Principles (Strategy) of State Environmental Policy to Ukraine for the Period till 2030,[28] according to which one of the root causes of Ukraine's environmental problems is unsatisfactory control over the observance of environmental legislation, failure to ensure the inevitability of responsibility for its violation. In this regard, we may conclude that the issues that still remain unsolved to this day are: Who will be responsible for that environmental crime and who will compensate the environmental damage caused to the state?

2. If we talk about specific ways of solving this case, we support proposals of scholars and practitioners to create a special Hunting Area Protection Service, that is armed and well-equipped with the latest surveillance equipment, provided with appropriate vehicles and powers, such as those in Poland or Belarus. In order to support and strengthen the conservation regime of the area as a habitat for rare red-book animals, it is also proposed to create the Zubry Podillya National Nature Park.[29] Accordingly,

[27] A.P. Het'man, *Introduction to the Theory of Environmental Procedural Law of Ukraine: Textbook*, Kharkiv 1998, p. 12.

[28] Law of Ukraine of 28 February 2019 on the Fundamental Principles (Strategy) of the State Environmental Policy of Ukraine for the Period until 2030 (Official Bulletin of Ukraine of 2019, No. 28, item 980).

[29] *The Forests of Three Districts in Vinnytsia Region Are Proposed to Be Integrated into a National Park*, Vlasno Info, http://vlasno.info/spetsproekti/2/ecology/item/15929-lisy-trokh-raioniv-na-vinnychchyni-proponuiut-ob-iednaty-v-natsionalnyi-park [access: 30.11.2019].

there will be no hunting areas, hunting of any kind of animals will be prohibited. This way the European bison population may be preserved and restored.

In addition, this practice is already common in Ukraine. In particular, on 18 August 2000, the General Zoological Reserve "Zubr" was established in the area of 4,050 ha, which stores the only European bison population in the Volyn region. In 1965, 15 European bison were brought to this area from the Belovezhskaya Pushcha. They became the symbol of this primeval forest in which they lived until the 17th century.[30] It corresponds with the provisions of the Law of Ukraine on the Red Book of Ukraine, according to which the protection of species enlisted in the Red Book of Ukraine is ensured through the rapid establishment of wildlife sanctuaries, other nature reserve fund territories and objects, as well as the environmental network in the territories where species of the Red Data Book of Ukraine are located (growing); and along the ways of migration for rare and endangered fauna species.

3. The protection of European bison in Ukraine should be subject to more stringent regulation as in Belarus,[31] in particular, via adopting the special regulatory act on additional measures for the protection of this animal in Ukraine.

To sum up, there is a certain contradiction/inconsistency between the use of environmental resources and its protection. Finding the right approach to this issue will have its influence on the future environmental situation,[32] including the conservation of rare and endangered wildlife species. In this regard, it is important to focus attention of society and public authorities on the negative trends in terms of environmental crime. Emphasizing the environmental, legal and moral aspects of dealing with such cases is an urgent issue.

References

Balance Lost: On Extinct Animals That Have Disappeared from the Territory of Ukraine Due to Human Activities, Zik News, https://www.google.com/amp/zik.ua/amp/news/2018/11/13/vtrachenyy_balans_pro_tvaryn_yaki_znykly_i_znykayut_z_terytorii_ukrainy_1446881 [access: 30.11.2019].

Baliuk G.I., Pogribnyy O.O., Shemshuchenko Yu.S., *Wildlife of Ukraine: Legal Protection, Use and Reproduction*, Kyiv 2010.

[30] V. Het'man, O. Mazurenko, *Tsuman Pushcha: A Journey to the World of Bison and Orchids*, "Ecological Bulletin" 2019, p. 17.

[31] P.M. Yermolinskiy, *On the Issue of the Ratio between the Protection and Rational Use of the European Bison Legal Institutes in the Republic of Belarus*, [in:] *Actual Problems of Reforming Land, Environmental, Agricultural and Economic Relationship: Collection of Abstracts of the International Scientific and Practical Conference*, Khmelnytskyi 2013, p. 25.

[32] *Ibidem*, p. 27.

Bloody Mlynok, or Trebukhiv Tragedy, Eko Inform, https://ekoinform.com.ua/?p=1162 [access: 30.11.2019].

Gavrysh S.B., *Criminal Legal Protection of the Environment in Ukraine*, Kyiv 2002.

Het'man A.P., *Introduction to the Theory of Environmental Procedural Law of Ukraine: Textbook*, Kharkiv 1998.

Het'man V., Mazurenko O., *Tsuman Pushcha: A Journey to the World of Bison and Orchids*, "Ecological Bulletin" 2019.

Is the Matter Delayed? Almost a Year Ago, No One Was Responsible for the Massive Loss of the European Bison, 20 Minutes News, https://www.google.com/amp/s/vn.20minut.ua/Kryminal/amp/spravu-zatyaguyut-za-zagibel-zubriv-mayzhe-rik-tomu-dosi-nihto-ne-vidp-10571439.html [access: 30.11.2019].

Kostyts'kyy V., *Ten Issues on Legal Liability for Environmental Offenses*, [in:] *Public Liability Law: Monograph*, red. I. Bezklubyy, Kyiv 2014.

Krasnova M., *Current Issues of Definition of the Concept of "Environmental Responsibility" in the Modern Law of Ukraine*, [in:] *Public Liability Law: Monograph*, red. I. Bezklubyy, Kyiv 2014.

Krasnova M.V., *Compensation for Damage under the Environmental Legislation of Ukraine (Theoretical and Legal Aspects). Monograph*, Kyiv 2008.

Malysheva N.R., Yerofyeyev M.I., *Scientific and Practical Commentary to the Law of Ukraine on Environmental Protection*, Kharkiv 2017.

Mass Suicide of the European Bison in Vinnytsia Region, Open Forest, https://www.openforest.org.ua/27486 [access: 30.11.2019].

Opened Loudly, Closed Quietly, Silski Visti, http://silskivisti.kiev.ua/19502/index.php?n=36233 [access: 30.11.2019].

The Forests of Three Districts in Vinnytsia Region Are Proposed to Be Integrated into a National Park, Vlasno Info, http://vlasno.info/spetsproekti/2/ecology/item/15929-lisy-trokh-raionivna-vinnychchyni-proponuiut-ob-iednaty-v-natsionalnyi-park [access: 30.11.2019].

The Perpetrators of the Massive Loss of 17 European Bison Enlisted in the Red Book Have Not Been Punished Yet, Censor Net, https://www.google.com/amp/s/amp.censor.net.ua/ua/news/395122/politsiya_zatyaguye_rozsliduvannya_zagybeli_17_zubriv_na_vinnychchyni_ekolog_andriyi_plyga_dokument [access: 30.11.2019].

The Vinnytsia Authorities Will Have to Pay Three Million Hryvnias for the Destroyed European Bison, Vlasno Info, http://vlasno.info:8080/spetsproekti/2/ecology/item/14906-vinnytskuvladu-zmusiat-zaplatyty-try-miliony-hryven-za-znyshchenykh-zubriv [access: 30.11.2019].

Who Killed the European Bison in Vinnytsia Region?, BBC News Ukraine, https://www.bbc.com/ukrainian/society/2016/02/160215_bisons_tragedy_vinnytsya_vc [access: 30.11.2019].

Yermolinskiy P.M., *On the Issue of the Ratio between the Protection and Rational Use of the European Bison Legal Institutes in the Republic of Belarus*, [in:] *Actual Problems of Reforming Land, Environmental, Agricultural and Economic Relationship: Collection of Abstracts of the International Scientific and Practical Conference*, Khmelnytskyi 2013.

Abstract: The article is devoted to research of legal responsibility for violation of the legislation in the field of protection and use of rare and endangered fauna species. Special attention is paid to the issues of criminal liability in the sphere of the use of protected wildlife species. It is concluded that it is necessary to strengthen the criminal liability for encroachment on especially protected species in separate articles or respective sub-articles of the Criminal Code of Ukraine. The author considered the issue of compensation for environmental harm for violation of the requirements of faunistic legislation. It is proved that harm and requirement on its compensation are the primary feature of responsibility. In this regard, it is suggested that the application of measures of adverse material impact on violators of environmental legislation should be defined as environmental responsibility. The above-mentioned issues were considered with reference to the example of unprecedented destruction of large number of red-listed European bison in January 2016 in Ukraine. The article describes the potential ways of resolving this case to prevent such situations from occurring in the future. In particular, the author proposes to strengthen the conservation regime of this territory, as a habitat for rare red-listed species, as well as to establish the National Natural Park for preservation of the European bison population in the Vinnytsia region.

Keywords: environmental responsibility; environmental harm; criminal liability; the Red Book of Ukraine; European bison; legal protection of wildlife; faunistic law

OLENA HAFUROVA

National University of Life and Environmental Sciences of Ukraine, Faculty of Law
https://orcid.org/0000-0002-1986-826X
gafurova.olena@gmail.com

OLHA KUKHAR

National University of Life and Environmental Sciences of Ukraine, Faculty of Law
https://orcid.org/0000-0001-5858-6356
olgkukhar@gmail.com

Problems of Ensuring the Protection of Bees in the Management of Plant Protection Products in Ukraine and the EU: Comparative Legal Aspects

If the bee disappears from the surface of the earth,
man would have no more than four years to live.
Albert Einstein

Favorable climatic conditions, large areas of honey fields, millennial traditions of keeping bees have provided Ukraine with a leading position on the global honey market. Today the country is on the first place in honey production among European countries and on the fourth in the world after China, India and Argentina.[1] An important economic indicator of the industry is the production of additional bee products – propolis, pollen, royal jelly, bee venom, etc., which are the basis for manufacturing of a number of valuable medicines and food.[2] Beekeeping plays one of the leading roles not only in

[1] Explanatory Note to the Draft Law of Ukraine on Amendments to Certain Legislative Acts of Ukraine on Beekeeping Protection, No. 10052 of 14 February 2019, http://w1.c1.rada.gov.ua [access: 15.10.2019].

[2] *Agrarian Law of Ukraine*, red. V.M. Yermolenko, Kyiv 2010, p. 361.

the economic development of the country, but also performs environmental and social functions. It is important in natural ecosystems, since bees provide pollination of about 80% of the total volume of honey plants. This is the only way to increase the harvest of these crops without disturbing the ecological balance.[3] The social function of the industry is to help solve the problem of unemployment in rural areas, providing opportunities for rural population to obtain an additional source of income by creating a small apiary.

However, in recent years, numerous deaths of bees have been increasingly reported in the media. Thus, in 2017, Rivne, Zhytomyr, Cherkasy, Sumy regions, suffered, where hundreds of bee colonies were killed and people were poisoned.[4] In 2018, about 45,000 bee colonies across Ukraine were killed.[5] The mass death of bees was also reported in 2019.[6] According to the official data of the State Service of Ukraine on Food Safety and Consumer Protection (hereinafter referred to as the State Consumer Service), 1,066 bee families were affected in 2017; in 2018, there were 1,408 apiaries in which 12,800 bee families were killed.[7] There is no official data for 2019, although according to preliminary information from the Union of Beekeepers of Ukraine, the number of bee deaths this year is much lower. The reason for this was the poisoning of bees with pesticides – chemical toxicosis. Moreover, in 95% of cases, the chemical toxicity of insect pollinators is caused by insecticides,[8] in 4% – herbicides, and 1% accounts for other poisonous chemicals, provided during the flowering of plants without informing beekeepers.[9] Unfortunately, the problems of legal protection of bees in the process of plant protection products implementation have not received enough attention in the native agrarian legal literature.

In addition, Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, ratified by the Law of Ukraine of 16 September 2014 (hereinafter referred to as the Association Agreement) stipulates Ukraine's obligation to approximate its legislation on animal health and phytosanitary measures to EU legislation (Art. 64, para. 1).[10] Given the above, focusing on these issues is particularly relevant.

---

[3] T.O. Kovalenko, S.I. Marchenko, *Legal Regulation of Economic Activity in the Agro-Industrial Complex of Ukraine*, Kyiv 2015, p. 296.

[4] *Pesticides: Great Harm, Little Benefit*, http://epl.org.ua/environment/pestytsydy-velyka-shkoda-mala-koryst [access: 10.10.2019].

[5] Explanatory Note…

[6] *Warning! In the Stavishchensk and Volodarsky Districts of Kyiv Region There Have Been Registered Cases of Mass Death of Bees*, http://oblvet.org.ua/novini/uvaga!-u-stavischenskomu-ta-volodarskomu-rayonah-kivschini-zareestrovano-vipadki-masovo-zagibeli-bdjil/ [access: 10.10.2019].

[7] *The Main Cause of Death of Bees in Ukraine Is Established*, https://www.bbc.com/ukrainian/news-44826366 [access: 23.10.2020].

[8] "Insecticides" – a chemical substance made and used for killing insects, especially those that eat plants, https://dictionary.cambridge.org/dictionary/english/insecticide [access: 07.10.2019].

[9] Explanatory Note…

[10] Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, ratified by the Law of Ukraine of 16 September 2014, No. 1678-VII, No. 40, p. 2021.

Some aspects of legal protection of bees, including when using pesticides, are raised in the works of such Ukrainian specialists in the field of agrarian, land and environmental law, as: S. Bugera, V. Yermolenko, S. Marchenko, K. Sakadzhi, Yu. Superson, V. Urkevich and others. The purpose of this article is to undertake a systematic theoretical and legal analysis of bee protection legislation in the application of plant protection products. Particular attention is paid to addressing issues related to the adaptation of Ukrainian legislation in this field to the EU law.

First of all, it should be noted that the legal regulation of beekeeping is an important sub-institution that is part of the institute of legal regulation of animal husbandry within the framework of agrarian law.[11] It consists not only of agrarian norms, but also of other branches of law, such as environmental, land, civil, administrative, financial, etc., in other words, it is complex. Accordingly, the legislation in the field of bee protection is characterized by complexity. The main document which regulates the relations on breeding, use and protection of bees is the Law of Ukraine of 22 February 2000 on Beekeeping.[12] Considering the protection of bees in the process of using plant protection products, the provisions of the Law of Ukraine of 2 March 1995 on Pesticides and Agrochemicals should be taken into account.[13]

Returning directly to the consideration of the issue related to the protection of bees, it should be noted that the Law of Ukraine on Beekeeping contains Section VI, devoted to these issues. One of the measures to provide the protection of bees is the process of plant protection products implementation in agriculture and forestry, using pesticides and agrochemicals included in the list established in accordance with the procedure of the Ministry of Agrarian Policy and Food of Ukraine (hereinafter referred to as the Ministry of Agrarian Policy) (Art. 31). Interestingly, the Law of Ukraine on Pesticides and Agrochemicals provides that such lists are approved by the Ministry of Ecology and Natural Resources of Ukraine (hereinafter referred to as Ministry of Environment), and agrees with the State Sanitary and Epidemiological Service (Art. 12). In practice, the list of pesticides and agrochemicals allowed for use in Ukraine is being developed by the Ministry of Environment and approved by the Ministry of Health of Ukraine (hereinafter referred to as the Ministry of Health) and the Ministry of Agrarian Policy.[14] Unfortunately, the State Register of Pesticides and Agrochemicals permitted for use in

[11] A.M. Stativka, *Legal Regulation of Agricultural Production*, Kharkiv 2015, p. 178; Y.V. Superson, *Legal Regulation of Beekeeping in Ukraine*, Kyiv 2013, p. 6.

[12] Law of Ukraine No. 1492-III of 22 February 2000 on Beekeeping (Bulletin of the Verkhovna Rada of Ukraine of 2000, No. 21, p. 157).

[13] Law of Ukraine No. 86/95-BP of 2 March 1995 on Pesticides and Agrochemicals (Bulletin of the Verkhovna Rada of Ukraine of 1995, No. 14, p. 91).

[14] The Ministry of Environment is now renamed "the Ministry of Energy and Environmental Protection of Ukraine"; The Ministry of Agrarian Policy was reorganized by joining the Ministry of Economic Development, Trade and Agriculture of Ukraine, based on the resolution of the Cabinet of Ministers of Ukraine No. 829 of 2 September 2019 "Some Issues of Optimization of the System of Central Executive Bodies", http://zakon1.rada.gov.ua [access: 16.10.2019].

Ukraine (updated regularly, last updated on 2 April 2019), which is available on the official website of the Ministry of Environment,[15] contains active substances that are toxic to bees and banned in the EU. These are insecticides such as neonicotinoids (also known as neonics) and fipronil.[16]

According to the European Food Safety Authority (EFSA), neonics such as clothianidin, thiamethoxam and imidacloprid are particularly harmful to bees.[17] A temporary ban on their use was introduced from 1 December 2013 by Commission Implementing Regulation (EU) No. 485/2013 of 24 May 2013 amending Implementing Regulation (EU) No. 540/2011, as regards the conditions of approval of the active substances clothianidin, thiamethoxam and imidacloprid, and prohibiting the use and sale of seeds treated with plant protection products containing those active substances (hereinafter referred to as Commission Implementing Regulation (EU) No. 485/2013).[18] This document provided that seeds of crops treated with plant protection products containing these substances should not be used or placed on the market, except for seeds used in greenhouses (Art. 2). A similar ban was also imposed on the use of fipronil by Commission Implementing Regulation (EU) No. 781/2013 of 14 August 2013 amending Implementing Regulation (EU) No. 540/2011, as regards the conditions of approval of the active substance fipronil, and prohibiting the use and sale of seeds treated with plant protection products containing this active substance.[19]

The definitive ban on the use of these outdoor substances (only possible to be used in permanent greenhouses) is linked in particular to the adoption in 2018 of the following Commission Implementing Regulations (EU): 1) No. 783 of 29 May 2018 amending Implementing Regulation (EU) No. 540/2011 as regards the conditions of approval of the active substance imidacloprid;[20] 2) No. 784 of 29 May 2018 amending Implementing Regulation (EU) No. 540/2011 as regards the conditions of approval of the active substance clothianidin;[21] 3) No. 785 of 29 May 2018 amending Implementing Regulation (EU) No. 540/2011 as regards the conditions of approval of the active substance thiamethoxam.[22]

Interestingly, the aforementioned active substances continued to be applied in agricultural practice under temporary bans. This took place due to the possibility of obtain-

[15] State Register of Pesticides and Agrochemicals permitted for use in Ukraine, https://menr.gov.ua/content/derzhavniy-reestr-pesticidiv-i-agrohimikativ-dozvolenih-do-vikoristannya-v-ukraini-dopovnennya-z-01012017-zgidno-vimog-postanovi-kabinetu-ministriv-ukraini-vid-21112007--1328.html [access: 16.10.2019].

[16] *Pesticides and Bees*, https://ec.europa.eu/food/animals/live_animals/bees/pesticides_en [access: 16.10.2019].

[17] *Neonicotinoids*, https://ec.europa.eu/food/plant/pesticides/approval_active_substances/approval_renewal/neonicotinoids_en [access: 16.10.2019].

[18] https://eur-lex.europa.eu/eli/reg_impl/2013/485/oj [access: 16.10.2019].

[19] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32013R0781 [access: 16.10.2019].

[20] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32018R0783 [access: 16.10.2019].

[21] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32018R0784 [access: 16.10.2019].

[22] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32018R0785 [access: 16.10.2019].

ing special emergency permits for their use by individual EU Member States. According to the report of the Institute of Agrarian Economics on the implementation of research on the "Assessment of Potential Losses of the Domestic Agricultural Sector in the Case of Prohibition of the Use of Neonicotinoids",[23] since 2013, 1,812 such permits were granted in the EU. Their annual number exceeds 300 units for 28 EU countries (Fig. 1).

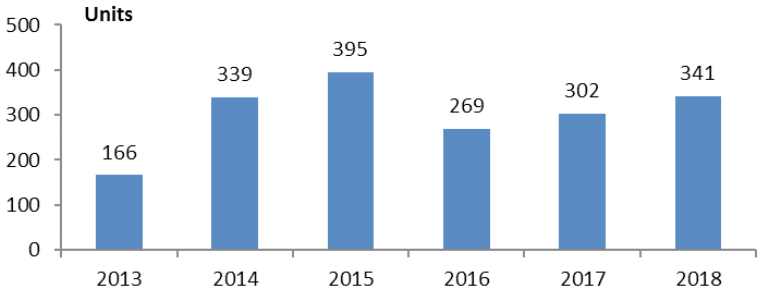


Fig. 1. Emergency (special) authorizations for the use of provisionally banned insecticides in the EU (2013–2018)

Source: The report of the Institute of Agrarian Economics on the "Assessment of Potential Losses of the Domestic Agricultural Sector in the Case of Prohibition of the Use of Neonicotinoids".

As can be seen in Fig. 2, Spain (405), France (287), Portugal (256) and Greece (225), are the leaders in obtaining such permits despite the existing ban in the EU.

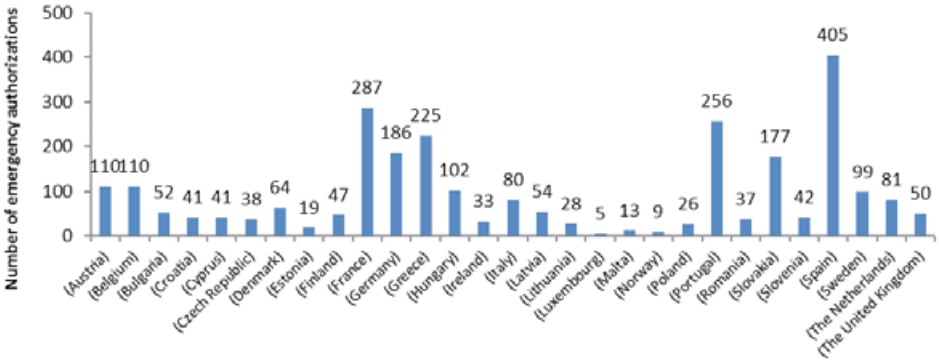


Fig. 2. Emergency (special) authorizations for EU Member States to apply temporarily banned insecticides (2008–2018)

Source: See Fig. 1.

[23] http://uacouncil.org/uk/post/za-visnovkami-ekspertiv-neonikotinoidi-odni-z-najbils-bezpecnih-pesticidiv [access: 16.10.2019].

Given the experience of the EU, and the fact that bee deaths in Ukraine are largely attributable to the use of this pesticide group, the question of the need to introduce a similar ban in our country and strengthening control over compliance with plant protection products regulations is quite acute. But, for this, according to experts, the methods of testing plant protection products should be unified in terms of implementation of the principles of good laboratory practice in research institutions with the aim of mutual recognition of data and uniformity in assessing the level of danger to human health and the environment.[24] It should be noted that the implementation of Commission Implementing Regulation (EU) No. 485/2013 (action 69) had to be done in 2018, as set out in the Comprehensive Strategy for the Implementation of Chapter IV (Sanitary and Phytosanitary Measures) of Annex IV "Trade and Trade Issues" Association Agreement between the European Union and its Member States, of the one part, and Ukraine, of the other part, ratified by the Law of Ukraine on 16 September 2014, adopted by the Government on 24 February 2016 (hereinafter referred to as the Comprehensive Strategy for the Implementation). That is, the imposition of a temporary ban on the use of the aforementioned neonicotinoids. Unfortunately, this action has not been completed so far.

Additionally, with the Comprehensive Strategy for the Implementation, Commission Implementing Regulation (EU) No. 540/2011 of 25 May 2011 implementing Regulation (EC) No. 1107/2009 of the European Parliament and of the Council as regards the list of approved active substances should be implemented by 2020[25] (hereinafter referred to as Commission Implementing Regulation (EU) No. 540/2011) (para. 67). This is particularly important as this document contains an official list of pesticides authorized in the EU. The necessity of its obligatory use in Ukraine was drawn by Katerina Sakadzhi. In her opinion, this will allow to restrict and, to some extent, stop the penetration into Ukraine of untested or banned plant protection products in the EU.[26]

The use of pesticides in the EU gives priority to ensuring a high level of safety. The registration of plant protection products is based on the precautionary principle, which ensures that the active substances or products placed on the market (pesticides) do not adversely affect the health of humans, animals or the environment. This principle may be applied by Member States where there is scientific uncertainty as to the risks posed by humans, animals and the environment to the plant protection products allowed in their territories (Art. 4(1) of Regulation (EC) No. 1107/2009 of the European

[24] M.G. Prodanchuk, I.V. Lepeshkin, O.P. Kravchuk, A.P. Grinko, M.V. Velychko, M.V. Babyak, M.I. Leposhkina, *Statutory Regulation of Pesticide Studies under Conditions of World Economy Globalization: The International Experience*, http://protox.medved.kiev.ua/index.php/ua/categories/emergency-situation-toxicology/item/562-statutory-regulation-of-pesticide-studies-under-conditions-of-world-economy-globalization-the-international-experience [access: 16.10.2019].

[25] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32011R0540 [access: 16.10.2019].

[26] K. Sakadzhi, *Legal Regulation of the Application of Agricultural Plant Protection Products*, Kharkiv 2012, p. 4.

Parliament and of the Council of 21 October 2009 concerning the placing of plant protection products on the market and repealing Council Directives 79/117/EEC and 91/414/EEC,[27] [hereinafter referred to as Regulation (EC) No. 1107/2009]). By the way, this document should also be implemented in 2020 (para. 67 of the Comprehensive Strategy for the Implementation).

The consolidation of this principle eliminates the adverse effects of pesticides not only on humans but also on animals. Unfortunately, there is no such principle among the basic principles of state policy in the sphere of activities related to pesticides and agrochemicals, which are stipulated in the Law of Ukraine on Pesticides and Agrochemicals (Art. 3). EU legislation provides for the need to take into account the effects of pesticides on certain species of animals, including bees. Thus, the active substance may be approved for use only following an appropriate risk assessment on the basis of Community or internationally agreed test guidelines, that the use under the proposed conditions of use of plant protection products containing this substance: will result in a negligible exposure of honeybees (3.5% to 7% magnitude; reduction in colony size),[28] or has no unacceptable acute or chronic effect on colony survival and development taking into account the effects on honeybee larvae and their behavior (para. 3.8.3. of Annex II "Procedure and Criteria for the Approval of Active Substances, Antidotes and Synergists" in accordance with Chapter II).

In our view, given the effects that plant protection products may have on animals, the experience of legal regulation of the above relations in the EU should be taken into account. Let us consider how legal regulation of bee protection in the process of chemical treatment of agricultural land is carried out in Ukraine. First of all, it should be noted that the obligation to ensure the protection of bees relies on legal entities and individuals who carry out activities that affect or may affect their condition. For example, legal entities and individuals who use plant protection products are obliged to adhere to the current normative legal acts providing protection of bees from poisoning (Art. 30 of the Ukrainian Law on Beekeeping). If these persons use plant protection products for the treatment of melliferous plants, they must, not later than 3 days before the beginning of the treatment, through the media, warn the beekeepers, whose apiaries are within 10 km of the cultivated areas. The date of cultivation, the name of the pesticide, the degree and duration of its toxicity (Art. 37) are reported. These provisions are stipulated in the by-laws. However, it should be noted that in some cases, they are contrary to this Law. For example, the Instruction on the Prevention and Elimination of Bee Diseases and Poisoning, approved by the order of the Chief State Inspector of Veterinary Medicine of Ukraine of 30 January

[27] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32009R1107 [access: 16.10.2019].

[28] A. Rortais, G. Arnold, J.L. Dorne, S.J. More, G. Sperandio, F. Streissl, C. Szentes, F. Verdonck, *Risk Assessment of Pesticides and Other Stressors in Bees: Principles, Data Gaps and Perspectives from the European Food Safety Authority*, https://www.sciencedirect.com/science/article/pii/S0048969716320587 [access: 16.10.2019].

2001 No. 9 (hereinafter referred to as the Instruction),[29] reduced the distance of apiaries, holders of which must be warned, to 7 km (subpara. 7.1.2, para. 7.1), and State Sanitary Standards 8.8.1.2.-001-98 "Transport, Storage and Use of Pesticides in the National Economy", approved by the Order of the Ministry of Health of 3 August 1998 No. 1 (hereinafter referred to as SSS8.8.1.2.-001-98),[30] allow the possibility of warning beekeepers at least 2 days before the start of each chemical treatment (subpara. 6.1.7, para. 6.1). Thus, the risk is increased by harming bees in the process of carrying out appropriate agricultural work. Of course, such a state of affairs is unacceptable, and the mentioned normative legal acts must be brought into compliance with the provisions of the Law of Ukraine on Beekeeping.

According to the Instruction, chemical treatments are carried out during the absence of bee flight in the morning or evening. In addition, it is not allowed to treat the flowering bee plants during the mass bee flight (para. 7.1). SSS 8.8.1.2.001-98 states that all work with pesticides and agrochemicals must be carried out in the morning (up to 10) and in the evening (18–22) hours with minimal rising air flows. As an exception, it is possible to treat trees during daylight hours in cloudy and cool days with ambient temperatures below +10°C. During the period of such operations within the radius of 200 m from the boundaries of the treated areas, warning signs must be installed (para. 6.1). But in practice, all these conditions are often not provided. As a rule, the perpetrators cannot be held liable or the fine is a minimum amount. So, the Law of Ukraine on Beekeeping provides disciplinary, administrative, civil or criminal responsibility for failure to notify (concealment), the provision of false information about a rising of the threat to bees in process of using of plant protection products (Art. 38). How are these rules implemented?

The Code of Administrative Offenses[31] does not mention this offense. It is possible to bring to administrative responsibility for: 1) breaking the rules relating to the use of pesticides and agrochemicals (the amount of the fine for citizens is from 3 to 7 non-taxable minimum income and for officials from 7 to 10 non-taxable minimum) (Art. 83); 2) breaking the plant protection legislation, in particular, failure to comply with the requirements of legal acts in the sphere of plant protection, which led to environmental pollution (a warning may be applied or a fine may be imposed, its amount for citizens is from 5 up to 10 non-taxable minimum and for officials from 10 to 18 non-taxable minimum) (Art. 83-1). It should be noted that the size of the non-taxable minimum is UAH 17 (63 euro cents) (para. 5 subsection 1 section XX of the Tax Code of Ukraine).[32] So, the amount of fines is about from UAH 51 (nearly EUR 2) to UAH

[29] https://zakon.rada.gov.ua/laws/show/z0131-01#Text [access: 16.10.2019].

[30] https://zakon0.rada.gov.ua/rada/show/v0001282-98#Text [access: 16.10.2019].

[31] Code of Administrative Offenses of 7 December 1984, No. 8073-X (Bulletin of the Verkhovna Rada of the Ukrainian SSR of 1984, p. 1122).

[32] Tax Code of Ukraine of 2 December 2010, No. 2755-VI (Bulletin of the Verkhovna Rada of the Ukraine of 2011, No. 13–17. p. 112).

306 (EUR 12). Such sanctions are insignificant for any business entities. In order to resolve this issue, it is proposed in the scientific literature to supplement the Code of Administrative Offenses in the following wording: "Article 83[2]: Hiding or providing false information about the threat to bees when applying plant protection products. Failure to report (conceal) or provide false information about the threat to bees when applying plant protection products will result in a fine of fifty to one hundred non-taxable minimum and of two hundred to five hundred non-taxable minimum".[33]

As for criminal responsibility, the Criminal Code of Ukraine[34] (hereinafter referred to as Criminal Code) also lacks an article that would provide responsibility for breaking of beekeeping legislation. Given the massive cases of bee deaths and impunity of guilty persons, the Draft Law of 14 February 2019 "on Amendments to Certain Legislative Acts of Ukraine on Beekeeping Protection"[35] proposes to supplement the Criminal Code with Art. 247-1 – Bee Poisoning. According to it, criminal responsibility comes for:

1. Failure to notify (conceal) or provide false information to individuals or legal persons engaged in beekeeping and to the local self-government authority about the threat to bees in the process of using of plant protection products or agrochemicals, if this has led to the poisoning (death) of bee colonies and caused substantial damage.[36] Such an offence is punishable by a fine of UAH 51–85 thousand non-taxable minimum or custodial restraint for a term of up to 2 years, with deprivation of the right to occupy certain positions or engage in certain activities for a term of up to 2 years or without such.

2. Breaking of plant protection products or agrochemicals using regulations by a business entity or an individual, if this has caused the poisoning (death) of bee colonies and caused significant damage.[37] Punishable by a fine from 5 thousand to 10 thousand non-taxable min. or custodial restraint for a term of up to 3 years, or imprisonment for the same term, with deprivation of the right to occupy certain positions or engage in certain activities for a term of up to 3 years.

In our opinion, the amendments to the Code of Administrative Offenses and the Criminal Code are, first of all, aimed at implementing the final provisions of the Beekeeping Law, which stipulate that the Cabinet of Ministers of Ukraine must

---

[33] S. Bugera, *Problems of Legislative Support for the Beekeeping Industry. Land, Environmental, Agrarian Law: Environmental Impact Assessment: Proceedings of the All-Ukrainian Round Table*, Kyiv 2018, pp. 40–42.

[34] Criminal Code of Ukraine of 5 April 2001, No. 2341-III (Bulletin of the Verkhovna Rada of the Ukraine of 2001, No. 25–26, p. 131).

[35] Draft Law on Amendments to Certain Legislative Acts of Ukraine on Beekeeping Protection No. 10052 of 14 February 2019, http://w1.c1.rada.gov.ua/pls/zweb2/webproc4_1?pf3511=65508 [access: 16.10.2019].

[36] "Substantial damage" – material damage caused to the beekeeper, 5 times more than non-taxable minimum.

[37] "Significant damage" – material damage caused to the beekeeper, 50 times more than non-taxable minimum.

submit proposals to the Verkhovna Rada of Ukraine within 6 months from the day this Law enters into force on bringing Ukrainian legislation into line with it (para. 3). Second, the establishment of responsibility for offenses in the beekeeping sector will force economic operators to use plant protection products, given their impact on the activity of bees.

With regard to property responsibility, there are examples in the case law where the court compensated for the damage caused by the death of bees as a result of breaking of the legal requirements when using plant protection products. For example, on 13 February 2019, the Romany City Court of Sumy region made a decision,[38] according to which the lawsuit for damages was partially satisfied. The Court drew attention to the need to comply with the provisions of the Law of Ukraine on Beekeeping, according to which apiaries are subject to mandatory registration at the place of residence of the individual or at the location of the legal entity engaged in beekeeping, in local state administrations or village, settlement, city councils (Art. 13). So, during litigation the petitioner was unable to prove that he owned the claimed amount of bee families.

Works related to aerial application of pesticides are particularly dangerous for bees since, as a rule, the insects get into the spraying zone. It should be noted that Directive 2009/128/EC of the European Parliament and of the Council of 21 October 2009, which sets limits for Union action to achieve a sustainable use of pesticides[39] (hereinafter referred to as Directive 2009/128/EC), with a view to minimize the environmental impact of pesticides, establishes a requirement for Member States to ban spraying of pesticides from an aircraft or a helicopter (Art. 3). These measures were taken in 2014 by France. Spain, by banning aerial spraying of pesticides in 2012, has allowed exceptions, in particular in cases where it is not possible to do so by land or to control pests of particular importance.[40] In Ukraine, the aforementioned Directive was to be implemented in 2018 (para. 67 of the Comprehensive Strategy for the Implementation). However, this question still remains unresolved.

It should be noted that EU legislation provides for exceptions only in special cases where pesticides cannot be applied by any other means for technical or economic reasons. Moreover, Member States should designate the authorities empowered to identify such causes, examine requests for the use of aerial spraying of pesticides and publish information on crops, areas, circumstances and specific requirements for their application, including weather conditions when aerial spraying may be permitted. The latter can only be done subject to a number of conditions: 1) there must be no viable alternatives, or there must be clear advantages in terms of reduced impacts on human health and the environment as compared with land-based application of

[38] The decision of the Romensky District Court of the Sumy region, No. 79818394 of 13 February 2019, https://youcontrol.com.ua/ru/catalog/court-document/80138990/ [access: 16.10.2019].

[39] https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32009L0128 [access: 16.10.2019].

[40] *France Bans Aerial Spraying of Pesticides*, https://www.freshplaza.com/article/121830/France-bans-aerial-spraying-of-pesticides/ [access: 16.10.2019].

pesticides; 2) the pesticides used must be explicitly approved for aerial spraying by the Member State following a specific assessment addressing risks from aerial spraying; 3) the operator carrying out the aerial spraying must hold a certificate as referred to in Art. 5. During the transitional period where certification systems are not yet in place, Member States may accept other evidence of sufficient knowledge; 4) the enterprise responsible for providing aerial spray applications shall be certified by a competent authority for authorizing the equipment and aircraft for aerial application of pesticides; 5) if the area to be sprayed is in close proximity to areas open to the public, specific risk management measures to ensure that there are no adverse effects on the health of bystanders shall be included in the approval. The area to be sprayed shall not be in close proximity to residential areas; 6) from 2013, the aircraft shall be equipped with accessories that constitute the best available technology to reduce spray drift (Art. 9).

Particularly promising for the conservation of honey bees is the gradual restoration of entomophile crops and the implementation of organic farming. In the process, such activities ensure a high level of animal welfare, including bees. Moreover, the Association Agreement provides for cooperation between the parties, which includes, *inter alia*, promoting modern and sustainable agricultural production, taking into account the need to protect the environment and animals, in particular by promoting the use of organic production methods and the use of biotechnology, *inter alia*, through the implementation of best practices in these fields (Art. 404).

Annex XXXVII to the Association Agreement, Council Regulation (EC) No. 834/2007 of 28 June 2007 on organic production and labeling of organic products repealing Regulation (EEC) No. 2092/91[41] (hereinafter referred to as Council Regulation (EC) No. 834/2007) and Commission Regulation (EC) No. 889/2008 of 5 September 2008, laying down detailed rules for the implementation of Council Regulation (EC) No. 834/2007 on organic production and labeling of organic products with regard to organic production, labeling and control[42] (hereinafter referred to as Commission Regulation (EC) No. 889/2008), are recognized as part of the legal standards considered by the Ukrainian side in the gradual approximation of sector or product legislation. Accordingly, the requirements contained in these beekeeping documents should be maximally reproduced in national law. According to Council Regulation (EC) No. 834/2007, apiaries should be kept at a sufficient distance from sources which may cause contamination of bee products or deterioration of bee health (Art. 14). This provision is specified in Commission Regulation (EC) No. 889/2008, which requires that the apiaries be placed so that, within a radius of 3 km from the apiary, nectar and pollen sources consist mainly of organically grown crops and/or wild animals, and/or crops to which low environmental impact methods are applied (Art. 13, para. 1). In addition, this document approved the list of pesticides that may be used in the

[41] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32007R0834 [access: 16.10.2019].

[42] https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32008R0889 [access: 16.10.2019].

organic production process (Annex II). In Ukrainian law, these provisions are partially reproduced. Only the Law of Ukraine of 10 July 2018 on Basic Principles and Requirements for Organic Production, Treatment and Labeling of Organic Products was adopted,[43] which in this part complies with Council Regulation (EC) No. 834/2007. As for the requirements laid down in Commission Regulation (EC) No. 889/2008, they are enshrined in the resolution of the Cabinet of Ministers of Ukraine of 19 April 2019 on Approval of the Procedure (Detailed Rules) for Organic Production and Circulation of Organic Products (para. 103 and Annex 3).[44] Accordingly, no mechanism has been put in place to implement the provisions of the law. This situation makes it practically impossible to carry out activities in the field of production and circulation of organic bee products.

Conclusions

The agrarian legislation of Ukraine, which regulates relations on the management of plant protection products, is in the process of gradual transformation. It is due, *inter alia*, to the need to take into account EU standards for the safety of animals, in particular bees, when administering these preparations. According to the Comprehensive Implementation Strategy, the implementation of the following legal acts is envisaged: Commission Implementing Regulation (EU) No. 485/2013 (para. 69), Commission Implementing Regulation No. 540/2011 implementing Regulation (EC) No. 1107/2009 and Directive 2009/128/EC (para. 67). Moreover, the implementation of the first and last documents was to take place in 2018. As a result, using of insecticides of the neonicotinoid group (clotianidin, thiamethoxam and imidacloprid) as well as aerial spraying of pesticides should be prohibited at the legislative level. Unfortunately, these measures have not yet been implemented. This demonstrates Ukraine's non-compliance with its obligation to approximate its legislation on animal health and phytosanitary measures to EU legislation. In order to ensure a high level of safety in the use of pesticides, it is considered appropriate to enshrine in the Law of Ukraine on Pesticides and Agrochemicals the principle of precaution, which helps to eliminate the negative impact of active substances on the health of humans, animals or the environment.

Amendments to the Code of Administrative Offenses and the Criminal Code of Ukraine to establish administrative and criminal responsibility for violation of bee-

[43] Law of Ukraine No. 2496-VIII of 10 July 2018 on Basic Principles and Requirements for Organic Production, Treatment and Labeling of Organic Products (Bulletin of the Verkhovna Rada of Ukraine of 2018, No. 36, p. 275).

[44] The Resolution of the Cabinet of Ministers of Ukraine on Approval of the Procedure (detailed rules) for Organic Production and Circulation of Organic Products of 23 October 2019, https://zakon.rada.gov.ua/laws/show/970-2019-%D0%BF [access: 23.10.2019].

keeping legislation will encourage business entities to comply with regulations on the use of plant protection products. Organic farming ensures a minimum level of chemical use and therefore minimizes their negative impact on the activity of bees. Unfortunately, due to the lack of a mechanism for implementing the provisions of the Law of Ukraine on Basic Principles and Requirements for Organic Production, Management and Labeling of Organic Products, it is impossible to conduct activities in the field of organic beekeeping.

References

Agrarian Law of Ukraine, red. V.M. Yermolenko, Kyiv 2010.

Bugera S., *Problems of Legislative Support for the Beekeeping Industry. Land, Environmental, Agrarian Law: Environmental Impact Assessment: Proceedings of the All-Ukrainian Round Table*, Kyiv 2018.

France Bans Aerial Spraying of Pesticides, https://www.freshplaza.com/article/121830/France-bans-aerial-spraying-of-pesticides/ [access: 16.10.2019].

Kovalenko T.O., Marchenko S.I., *Legal Regulation of Economic Activity in the Agro-Industrial Complex of Ukraine*, Kyiv 2015.

Neonicotinoids, https://ec.europa.eu/food/plant/pesticides/approval_active_substances/approval_renewal/neonicotinoids_en [access: 16.10.2019].

Pesticides and Bees, https://ec.europa.eu/food/animals/live_animals/bees/pesticides_en [access: 16.10.2019].

Pesticides: Great Harm, Little Benefit, http://epl.org.ua/environment/pestytsydy-velyka-shkoda-mala-koryst [access: 10.10.2019].

Prodanchuk M.G., Lepeshkin I.V., Kravchuk O.P., Grinko A.P., Velychko M.V., Babyak M.V., Leposhkina M.I., *Statutory Regulation of Pesticide Studies under Conditions of World Economy Globalization: The International Experience*, http://protox.medved.kiev.ua/index.php/ua/categories/emergency-situation-toxicology/item/562-statutory-regulation-of-pesticide-studies-under-conditions-of-world-economy-globalization-the-international-experience [access: 16.10.2019].

Report of the Institute of Agrarian Economics on the "Assessment of Potential Losses of the Domestic Agricultural Sector in the Case of Prohibition of the Use of Neonicotinoids", http://uacouncil.org/uk/post/za-visnovkami-ekspertiv-neonikotinoidi-odni-z-najbils-bezpecnih-pesticidiv [access: 16.10.2019].

Rortais A., Arnold G., Dorne J.-L., More J.S., Sperandio G., Streissl F., Szentes C., Verdonck F., *Risk Assessment of Pesticides and Other Stressors in Bees: Principles, Data Gaps and Perspectives from the European Food Safety Authority*, https://www.sciencedirect.com/science/article/pii/S0048969716320587 [access: 16.10.2019].

Sakadzhi K., *Legal Regulation of the Application of Agricultural Plant Protection Products*, Kharkiv 2011.

Stativka A.M., *Legal Regulation of Agricultural Production*, Kharkiv 2015

Superson Y.V., *Legal Regulation of Beekeeping in Ukraine*, Kyiv 2013.

The Main Cause of Death of Bees in Ukraine Is Established, https://www.bbc.com/ukrainian/news-44826366 [access: 16.10.2019].

Warning! In the Stavishchensk and Volodarsky Districts of Kyiv Region There Have Been Registered Cases of Mass Death of Bees, http://oblvet.org.ua/novini/uvaga!-u-stavischenskomu-ta-volodarskomu-rayonah-kivschini-zareestrovano-vipadki-masovo-zagibeli-bdjil/ [access: 10.10.2019].

Abstract: The article researches the issue of implementation of legal regulation of bee protection in the process of agricultural land cultivation by plant protection products in Ukraine, and a possible link of responsibility, both administrative and criminal, for violation of the beekeeping legislation and pesticides and agrochemicals, which will encourage agrarians to comply with the agrarian regulations and inform the beekeepers of the field. Thus, Ukrainian legislation must take into account EU standards for the safety of animals, including bees, when using plant protection products. The author also studies the level of implementation of the Ukrainian legislation in accordance with the obligations to the European Union in accordance with the Association Agreement between Ukraine and the European Union, which establishes the obligation of Ukraine to approximate its legislation on sanitary and phytosanitary measures for the protection of animals and regulation of the circulation of plant protection products in Ukraine to EU legislation. This includes the ban on the use of toxic pesticides to bees in the open air and the ban on air spraying of pesticides. In addition, the article examines the European experience of using the principle of reservation in the registration of plant protection products. The purpose is to ensure a high level of safety when using pesticides and to eliminate the adverse effects of the active substances on the health of humans, animals or the environment. Also particularly promising for bee conservation is the gradual restoration of entomophile crops and organic farming in Ukraine. Thus, the process of such activities ensures a high level of animal welfare, including bees and environmental protection.

Keywords: bees; pesticides and agrochemicals; plant protection products; precautionary principle; administrative responsibility; criminal responsibility; beekeepers; organic farming

MONIKA A. KRÓL

University of Lodz, Faculty of Law and Administration
https://orcid.org/0000-0001-9689-2266
mkrol@wpia.uni.lodz.pl

Prevention Instruments against African Swine Fever and Legal Protection of Wild Game in Poland

1. African swine fever

African swine fever (ASF) is a viral disease caused by a complex DNA virus that affects only porcine species of all breeds and ages. Contagious viral swine disease is highly resistant and has affected domestic and wild boars. European susceptible species are domestic pigs and European wild boars in all age categories (no age dependency) and without gender predilection. It does not affect humans or other animal species.[1]

ASF was reported for the first time in 1909 in Kenya (genotype I)[2] and spread all over Africa. Genetic characterization of all the ASF virus isolates known so far has demonstrated 23 geographically related genotypes with numerous subgroups.[3] The first ASF incursion outside Africa was made in the second half of the 20th century in Europe. ASF was introduced into Portugal from West Africa in 1957. After eradication of this incursion, ASF virus of genotype I reappeared in the country in 1960, and then spread across Europe (Italy – 1967, Spain – 1969, France – 1977, Malta – 1978, Sardinia – 1978,

[1] D. Beltrán-Alcrudo, M. Arias, C. Gallardo, S. A. Kramer, M. L. Penrith, *African Swine Fever: Detection and Diagnosis*, Food and Agriculture Organization of the United Nations, Rome 2017, No. 19, p. 1.

[2] *Ibidem*, p. 7. The first outbreak was described by: R.E. Montgomery, *A Form of Swine Fever Occurring in British East Africa (Kenya Colony)*, "Journal of Comparative Pathology" 1921, No. 34, pp. 159–191 and E. Olsevskis, M. Masiulis, *Better Training for Safer Food. Introduction to African Swine Fever*, Belgrade 2018.

[3] D. Beltrán-Alcrudo, M. Arias, C. Gallardo, S.A. Kramer, M.L. Penrith, *op. cit.*, p. 6.

Belgium – 1985, and the Netherlands – 1986).[4] It also hit the Caribbean (Cuba – 1971 and 1980, the Dominican Republic – 1978, and Haiti – 1979) and Brazil (1978).[5]

All Western European countries successfully controlled the outbreaks after brief periods except for Spain and Portugal, where the struggle with the disease lasted several decades until the 1990s, and Italy's Mediterranean island of Sardinia, where ASF has been endemic since its introduction in 1978, circulating mainly in free-range settings and wild boar.[6]

In 2007, ASF of genotype II,[7] came from Mozambique, Madagascar and Zambia to Georgia. It was most likely introduced via ship waste that was either turned into swill or was disposed of in an area accessible to scavenging pigs.[8] The disease spread quickly throughout the Caucasus (Armenia in 2007 and Azerbaijan in 2008) and into the Russian Federation (2007). In 2018, a very serious situation occurred throughout China[9] and North Korea. In the past few years, the disease has progressively spread westwards, entering Ukraine (2012), Belarus (2013), the European Union (Lithuania, Poland, Latvia and Estonia, 2014), and Moldova (2016).[10] In Poland, the first outbreak was found in 2014. At the end of 2018, the virus was already present in Romania, Moldova, the Czech Republic and Hungary.

---

[4] *Ibidem*, p. 10; M. Frączyk, G. Woźniakowski, A. Kowalczyk, Ł. Bocian, E. Kozak, K. Niemczuk, Z. Pejsak, *Evolution of African Swine Fever Virus Genes Related to Evasion of Host Immune Response*, "Veterinary Microbiology" 2016, Vol. 193, pp. 133–144; *ASF and the Legislative Framework: The Management of Disease Eradication Through Awareness and Cooperation*, Ministerial Conference on the "Eradication of African Swine Fever in the EU and the Long-Term Management of Wild Boar Populations", 12 December 2018, Brussels, https://ec.europa.eu/food/sites/food/files/animals/docs/ad_control-measures_asf_conf-20181219_pres-03.pdf [access: 19.05.2020].

[5] D. Beltrán-Alcrudo, M. Arias, C. Gallardo, S.A. Kramer, M.L. Penrith, *op. cit*, p. 10; C. Gallardo, A. de la Torre Reoyo, J. Fernández-Pinero, I. Iglesias, J. Muñoz, M.L. Arias, *African Swine Fever: A Global View of the Current Challenge*, "Porcine Health Management" 2015, Vol. 1, p. 21.

[6] D. Beltrán-Alcrudo, M. Arias, C. Gallardo, S.A. Kramer, M.L. Penrith, *op. cit*., p. 10. In 2018, in Belgium there were 128 ADNS notifications of ASF cases in wild boar but only in the infected area (South Wallonia). No outbreaks in domestic pigs were reported, *African Swine Fever in Wild Boar. Belgian Case*, Ministerial Conference, 19 December 2018, Brussels, https://ec.europa.eu/food/sites/food/files/animals/docs/ad_control-measures_asf_conf-20181219_pres-06.pdf [access: 19.05.2020].

[7] E. Chenais, K. Depner, V. Guberti, K. Dietze, A. Viltrop, K. Ståhl, *Epidemiological Considerations on African Swine Fever in Europe 2014–2018*, "Porcine Health Management" 2019, Vol. 5, p. 6.

[8] M. Szewczak, *Współpraca jednostek samorządu terytorialnego z Polskim Związkiem Łowieckim w zakresie zwalczania Afrykańskiego Pomoru Świń*, Narodowy Instytut Samorządu Terytorialnego, „Ekspertyzy i opracowania" 2018, Nr 42, p. 1, www.nist.gov.pl [access: 19.05.2020].

[9] With China relying heavily on the pork industry and owning almost half of the world's domestic pigs, an ASF epidemic would have a catastrophic impact on trade and pig production, with serious implications for global food security, see: D. Beltrán-Alcrudo, M. Arias, C. Gallardo, S.A. Kramer, M.L. Penrith, *op. cit*., p. 6.

[10] See a scientific report of the European Food Safety Authority EFSA: *Epidemiological Analyses on African Swine Fever in the Baltic Countries and Poland*, "Journal EFSA" 2017, Vol. 15(11), p. 5068, https://efsa.onlinelibrary.wiley.com/doi/epdf/10.2903/j.efsa.2017.5068 [access: 19.05.2020].

The main source and reservoir of ASF are wild boars carcasses remaining in the environment, as well as infected wild boars migrating to Poland from Belarus and Ukraine. Nowadays three stages of ASF spread have been recognized in Poland. During the first stage ASF spreads exclusively within wild boar population. During the second stage, the virus is transferred from wild boars to domestic pigs in backyard holdings. Currently, the third stage is observed, during which the ASF virus spreads from swine carcasses to wild boars.[11]

No commercial vaccine exists currently to prevent and control ASF and in fact, an effective commercial vaccine against ASF has never been successfully developed.[12] For over 40 years, various strategies have been employed in the search for an effective vaccine against this disease. European countries are fighting ASF and trying to prevent the virus's spread. However, few effective results have been obtained so far and the disease continues to spread into neighbouring countries, mainly along wild boar corridors, and other ways of virus transmission could occur at any time.[13]

The current problem directly related to one of the protected by law game species, the wild boar, is the threat posed by the ASF virus and refers to the issue of sanitary hunting. ASF epidemic that has been ongoing in Europe for several years, despite legal protective instruments implementation, is systematically expanding its range.[14] The aim of this research is to identify and evaluate legal regulations made in terms of ASF. The research also focuses on assessing the adopted instruments of ASF prevention.

2. Legal instruments against African swine fever in the European Union

In the EU, this issue is regulated in Council Directive 2002/60/EC laying down specific provisions for the control of African swine fever (hereinafter referred to as Directive 2002/60/EC)[15] and the Commission Implementing Decision 2003/422/EC,

[11] Z. Pejsak, G. Woźniakowski, K. Śmietanka, A. Ziętek-Barszcz, Ł. Bocian, M. Frant, K. Niemczuk, *Przewidywany rozwój sytuacji epizootycznej w zakresie afrykańskiego pomoru świń w Polsce*, „Życie Weterynaryjne" 2017, z. 4, p. 255.

[12] C. Gallardo, A. de la Torre Reoyo, J. Fernández-Pinero, I. Iglesias, J. Muñoz, M.L. Arias, *op. cit*., p. 23.

[13] *African Swine Fever*, Gap Analysis Report, The Global African Swine Fever Research Alliance (GARA), November 2018, p. 6, https://go.usa.gov/xPfWr [access: 19.05.2020] or J. Alvarez, D. Bicout, A. Boklund et al., Research Gap Analysis on African Swine Fever, Scientific Report, "EFSA Journal "2019, Vol. 17(8), pp. 2–3.

[14] *African Swine Fever in Wild Boar in the Czech Republic. Development and Current Situation* (ASF – Measures in Infected Areas), Ministerial Conference, 19 December 2018, Brussels, https://ec.europa.eu/food/sites/food/files/animals/docs/ad_control-measures_asf_conf-20181219_pres-01.pdf [access: 19.05.2020].

[15] Council Directive 2002/60/EC of 27 June 2002 laying down specific provisions for the control of African swine fever and amending Directive 92/119/EEC as regards Cieszyn disease and African swine fever, Official Journal of the EU L 192 from 20.07.2002, p. 27.

issued on this basis, of 26 May 2003 approving the African swine fever diagnostic manual.[16] On this basis, the European Commission, by implementing decision of 9 October 2014 concerning animal health control measures relating to ASF in certain Member States and repealing Implementing Decision 2014/178/EU[17] has established a number of animal health control measures, including the ban on sending pigs and pork from endangered areas.

The current state of the threat occurrence within the EU was determined by Commission Decision 2020/662 of 15 May 2020 amending Implementing Decision 2014/709/EU concerning animal health control measures relating to ASF in certain Member States.[18] This act confirmed the occurrence of the virus in large part of eastern and central Poland, and even in western part of the country, to which bans will be applied.

Member States must ensure that any suspicion of disease is immediately reported to the authorities of the country concerned and, if confirmed, the results of the investigation must be submitted to the European Commission. Member States were required to draw up and submit to the Commission the plan of the measures taken to eradicate the disease (Art. 16) and report progress on its implementation every six months. In the area of disease occurrence:

1. Agricultural holdings must be placed under supervision, and animals and pig products, materials or wastes that could be moved by ASF, cannot leave the farm area.

2. Restrictions may also apply to the movement of people or vehicles.

3. Determining the occurrence of disease on the farm, with a few exceptions, requires the slaughter of all pigs and the destruction of infected meat or other waste.

4. Similar rules apply to the detection of disease in a slaughterhouse or means of transport.

5. Rooms, vehicles and equipment that may be contaminated must be cleaned and disinfected.

6. An order was also made to create an "infected area" with a radius of at least 3 km and a "vulnerable area" with a radius of 10 km around the outbreak.

If it is suspected that wild boars may have been infected, Member States must notify the pig owners and hunters as well as carry out a study of all shot or dead boars. It is obligatory to designate the infected area together with farms under surveillance, as well as it is possible to issue a hunting ban. Since 2013, grants for a total amount of 95 million EUR have been awarded for programmes and emergency measures implemented by Member States in the combat against ASF.[19]

[16] Official Journal of the EU L 143 from 11.06.2003, p. 35; Official Journal of the EU, Polish special edition, Ch. 3, Vol. 39, p. 59.

[17] Official Journal of the EU L 295 from 11.10.2014, p. 63.

[18] Official Journal of the EU L 155 from 18.05.2020, p. 27.

[19] *ASF and the Legislative…*, p. 40.

3. Legal instruments against African swine fever in Poland

Legal actions that were introduced in Poland aimed at:

1) preventing ASF,

2) providing special solutions related to ASF occurrence on the territory of the Republic of Poland.

3.1. Preventing both infectious diseases of animals and threat to people is an element of veterinary protection of animals governed by the provisions of the Act of 11 March 2004 on the Protection of Animal Health and Control of Infectious Animal Diseases (hereinafter referred to as PAH)[20] and the Act of 23 September 2016 amending certain other acts to facilitate the control of infectious animal diseases.[21] Regulation in this area is also settled in the Hunting Law Act of 13 October 1995 (hereinafter referred to as HLA).[22]

We can recognize three groups of legal instruments:

1) mandatory signalling the virus incursion,

2) control measures include administrative and legal instruments of a mandatory and regulatory nature,

3) programming.

The first of the duties laid down consists of implementing an obligation to signal the virus incursion. The provision of Art. 42 of PAH in the event of a suspected disease imposes on the animal keeper an immediate notification of the veterinary inspection, veterinarian or the executive body of the commune. In addition, the obligation to notify the indicated bodies or the nearest institution of a clinic for animals with evident signs of diseases of free-living animals rests, pursuant to Art. 14 of HLA, on the lessee and manager of the hunting district and owners and land managers. Due to the nature of the ASF spread outside the country, in the event of an outbreak, veterinary authorities provide information on protected, threatened or other areas established in connection with the eradication of disease outside the Republic of Poland, competent authorities of EU Member States or third countries in order to cooperate in the eradication of contagious animal disease (Art. 48 of PAH). Regulation of the Ministry of Agriculture and Rural Development of 6 May 2015 on controlling African swine fever[23] determines the manner and procedure of suspicion or confirmation of ASF, the manner and conditions for the identification of infected, threatened and contaminated areas, measures to control the disease, the manner of cleaning and disinfection and the re-placement of animals on the farm.

[20] Consolidated text from 2018, Journal of Laws, p. 1967, as amended.

[21] Journal of Laws of 2016, pos. 1605.

[22] Consolidated text from 2018, Journal of Laws, p. 2033, as amended.

[23] Journal of Laws of 2015, p. 754, as amended.

The second group of ASF control measures includes administrative and legal instruments of a mandatory and regulatory nature. The Minister of Agriculture may introduce:

1) the division of the country into restricted and disease-free zones, and may also require universal testing, examinations and other treatments on animals of susceptible species, with a view to preventing uncontrolled spreading of the disease infectious animals,

2) temporary bans for leaving the disease outbreak and temporary restrictions on movement of people or vehicles, with a view to preventing the uncontrolled spread of infectious animal diseases and minimizing the nuisance of the introduced restrictions (Art. 47 of PAH).

In addition, pursuant to Arts. 44–46 of PAH, bans may be introduced, established by the district veterinarian either by a regulation (local law act) or by an administrative decision or by way of a voivode's decree. In this form, an order may be issued to hunt game animals (wild boars), imposed on leaseholders or managers of hunting districts.[24] It is also possible to provide sanitary hunting even in areas covered by legal forms of nature protection, which, pursuant to Art. 47a of PAH, is carried out by a hunter from the Polish Hunting Association for a fee.

The owner of animals killed or slaughtered by order of the Veterinary Inspection bodies, or that died as a result of the procedures imposed by these organs in the control of infectious animal diseases, is entitled (pursuant to Art. 49 of PAH) to compensation if he complies with all obligations imposed with regard to ASF. Detailed issues are regulated by the Regulation of the Ministry of Agriculture and Rural Development of 6 May 2015 on measures taken in connection with combating African swine fever,[25] on the basis of which prohibitions and orders for farms were established from the areas of occurrence and danger of the disease.

The creation of a protective system functioning in a coherent way across the EU did not protect against all health security problems. Hence, Member States, based on the provisions of Directive 2002/60/EC, develop contingency plans taking into account local factors such as the density of pig farms that may contribute to the spread of African swine fever virus.[26]

[24] This is provided for in the provisions of the Regulation of the Ministry of Agriculture and Rural Development of 19 February 2016 on the regulation of wild boar hunting (Journal of Laws of 2016, item 229), ordering wild boar hunting to reach the density of wild boar at the level of at most 0.5 person/km^2 in the areas specified in the annex to the regulation, excluding national parks and nature reserves.

[25] Consolidated text, Journal of Laws of 2018, pos. 280, as amended.

[26] The strategy of combating ASF for the eastern part of the European Union is mentioned in the document SANTE/7113/2015-Rev7, which contains guidelines for the surveillance and eradication of African swine fever among boars.

In Poland, an updated ASF control program is prepared annually, adopted pursuant to the Ministry of Agriculture and Rural Development regulation (executive order). The provisions of the Regulation the Ministry of Agriculture and Rural Development of 20 March 2019 on the introduction in 2019 on the territory of the Republic of Poland of a "Program aimed at early detection and control of African swine fever virus infections in Poland",[27] provide for the application of measures aimed at strengthening the protection of the territory of the Republic of Poland against ASF. The program provides for:

1) reduction in the population of wild boars carried out both by hunting and sanitary hunting; from 2020, according to EU regulations, compensation and selective hunting would not be eligible in the programmes,

2) increasing the share of female boars in reducing the population of this animal species,

3) prohibiting the feeding of wild boars.

The 2020 programme maintains these measures.[28]

It should also be emphasized that based on para. 1 point 3 of the Decree of the Minister of the Environment of 1 August 2017 amending the regulation on hunting periods for game animals,[29] it is allowed to hunt wild boars for a whole year, and therefore also during the breeding period. These regulations met with a negative response from public opinion, and did not receive full support from the Polish Hunting Association.[30]

3.2. The Act of 5 September 2016[31] also introduces specific solutions related to the occurrence of African swine fever regarding the supply of pork from farms located in the areas covered by regulatory measures established in connection with the occurrence of the virus. The regulations introduce procedural simplifications for the sale of pork to producers in the areas where the virus is present, provided that it meets veterinary requirements.

---

[27] Journal of Laws of 2019, pos. 598.

[28] Regulation of the Minister of Agriculture and Rural Development of 12 February 2020 on the introduction in 2020 on the territory of the Republic of Poland of a "Programme for the early detection and control of African swine fever virus infections in Poland" (Journal of Laws of 2020, pos. 290).

[29] Journal of Laws of 2017, pos. 1487.

[30] The Polish Hunting Association declaration from 10 January 2019 – *Myśliwi przeciwni strzelaniu do ciężarnych loch*, https://wiadomosci.onet.pl/kraj/mysliwi-przeciwni-strzelaniu-do-ciezarnych-loch-oswiadczenie-pzl-i-nrl/0sn4dpb [access: 19.05.2020].

[31] Act of 5 September 2016 on specific solutions related to the occurrence of African swine fever on the territory of the Republic of Poland (consolidated text, Journal of Laws of 2019, p. 988) together with executive order to the act.

4. Conclusions

The applicable regulations turn out to be insufficient and the virus is systematically spreading. It is influenced by many factors, including the level of awareness with regard to the principles of biosecurity among farmers and hunters. Wild boar management rules (cooperation with agricultural and environmental sectors, biosecurity during hunting, hunting management, ban on feeding) are of great significance.

In addition to the above, hunters have to change their perspective. The situation was not improved by the reduced wild boar population, which is the result of sanitary hunting since 2014. In 2015, 310,000 wild boars were shot, whereas in 2019 – 185,000.[32] The similar situation happened in Lithuania[33] and Estonia.[34] Hence the proposals to combat the epidemic by building, like in Luxembourg, fences along the eastern border of Poland, or shooting all boars living within its territory, and then reintroducing them.[35]

To sum up, even the best legal regulation does not protect against the spread of ASF virus. It can be colloquially said that the virus is resistant to it. Effective implementation of law can be ensured only by farmers-hunters who will strictly follow the established biosecurity procedures.

References

African Swine Fever, Gap Analysis Report, The Global African Swine Fever Research Alliance (GARA), November 2018, p. 6, https://go.usa.gov/xPfWr [access: 19.05.2020].

African Swine Fever in Wild Boar. Belgian Case, Ministerial Conference, 19 December 2018, Brussels, https://ec.europa.eu/food/sites/food/files/animals/docs/ad_control-measures_asf_conf-20181219_pres-06.pdf [access: 19.05.2020].

African Swine Fever in Wild Boar in the Czech Republic. Development and Current Situation (ASF – Measures in Infected Areas), Ministerial Conference, 19 December 2018, Brussels, https://ec.europa.eu/food/sites/food/files/animals/docs/ad_control-measures_asf_conf-20181219_pres-01.pdf [access: 19.05.2020].

Alvarez J., Bicout D., Boklund A. et al., *Research Gap Analysis on African Swine Fever*, Scientific Report, "EFSA Journal" 2019, Vol. 17(8).

[32] Data on the hunting season: 2014/2015 – 260,000 wild boars; 2015/2016 – 310,000; 2016/2017 – 282,000; 2017/2018 – 308,000; 2018/2019 – 185,000 (*Myśliwi…*).

[33] Data on the hunting season: 2013/2014 – 48,420 wild boars, 2014/2015 – 44,940; 2015/2016 – 41,222; 2016/2017 – 24,962; *ASF and the Legislative*…, p. 53.

[34] Data on the hunting season: 2013/2014 – 24,909 wild boars; 2014/2015 – 32,580; 2015/2016 – 17,610; 2016/2017 – 7,690; *ASF and the Legislative* …, p. 55.

[35] *Ardanowski: W walce z ASF konieczne jest wybicie dzików*, Gazeta Prawna, 27 lipiec 2018, https://www.gazetaprawna.pl/artykuly/1193103,w-walce-z-asf-koniecznejest-wybicie-dzikow-ardanowski.html [access: 19.05.2020].

Ardanowski: W walce z ASF konieczne jest wybicie dzików, Gazeta Prawna, 27 lipiec 2018, https://www.gazetaprawna.pl/artykuly/1193103,w-walce-z-asf-koniecznejest-wybicie-dzikow-ardanowski.html [access: 19.05.2020].

ASF and the Legislative Framework: The Management of Disease Eradication Through Awareness and Cooperation, Ministerial Conference on the "Eradication of African Swine Fever in the EU and the Long-Term Management of Wild Boar Populations", 12 December 2018, Brussels, https://ec.europa.eu/food/sites/food/files/animals/docs/ad_control-measures_asf_conf-20181219_pres-03.pdf [access: 19.05.2020].

Beltrán-Alcrudo D., Arias M., Gallardo C., Kramer S.A., Penrith M.L., *African Swine Fever: Detection and Diagnosis*, Food and Agriculture Organization of the United Nations, Rome 2017, No. 19.

Chenais E., Depner K., Guberti V., Dietze K., Viltrop A., Ståhl K., *Epidemiological Considerations on African Swine Fever in Europe 2014–2018*, "Porcine Health Management" 2019, Vol. 5.

Frączyk M., Woźniakowski G., Kowalczyk A., Bocian Ł., Kozak E., Niemczuk K., Pejsak Z., *Evolution of African Swine Fever Virus Genes Related to Evasion of Host Immune Response*, "Veterinary Microbiology" 2016, Vol. 193.

Gallardo C., de la Torre Reoyo A., Fernández-Pinero J., Iglesias I., Muñoz J., Arias M.L., *African Swine Fever: A Global View of the Current Challenge*, "Porcine Health Management" 2015, Vol. 1.

Montgomery R.E., *A Form of Swine Fever Occurring in British East Africa (Kenya Colony)*, "Journal of Comparative Pathology" 1921, No. 34.

Myśliwi przeciwni strzelaniu do ciężarnych loch, https://wiadomosci.onet.pl/kraj/mysliwi-przeciwni-strzelaniu-do-ciezarnych-loch-oswiadczenie-pzl-i-nrl/0sn4dpb [access: 19.05.2020].

Olsevskis E., Masiulis M., *Better Training for Safer Food. Introduction to African Swine Fever*, Belgrade 2018.

Pejsak Z., Woźniakowski G., Śmietanka K., Ziętek-Barszcz A., Bocian Ł., Frant M., Niemczuk K., *Przewidywany rozwój sytuacji epizootycznej w zakresie afrykańskiego pomoru świń w Polsce*, „Życie Weterynaryjne" 2017, z. 4.

Report of the European Food Safety Authority EFSA "Epidemiological Analyses on African Swine Fever in the Baltic Countries and Poland", "Journal EFSA" 2017, Vol. 15(11), https://efsa.onlinelibrary.wiley.com/doi/epdf/10.2903/j.efsa.2017.5068 [access: 19.05.2020].

Szewczak M., *Współpraca jednostek samorządu terytorialnego z Polskim Związkiem Łowieckim w zakresie zwalczania Afrykańskiego Pomoru Świń*, Narodowy Instytut Samorządu Terytorialnego, „Ekspertyzy i opracowania" 2018, Nr 42, www.nist.gov.pl [access: 19.05.2020].

Abstract: Contagious viral swine disease which is highly resistant has affected domestic and wild boars and pigs. The main source and reservoir of African swine fever virus (ASF) are wild boars carcasses remaining in the environment, as well as infected wild boars migrating to Poland from Belarus and Ukraine. ASF epidemic that has been ongoing in Europe for several years, despite protective instruments implementation, is systematically expanding its range. The aim of this research is to identify and evaluate legal regulations made in terms of ASF. The research also focuses on assessing the adopted instruments of ASF prevention.

Keywords: African swine fever; wild game protection; infection zones

KRZYSZTOF GÓRSKI

Siedlce University of Natural Sciences and Humanities
Faculty of Agrobioengineering and Animal Husbandry
https://orcid.org/0000-0002-9165-504X
krzysztof.gorski@uph.edu.pl

Welfare of Cattle and Pigs in Terms of Meat Inspection Data

1.

The issues concerning protection of farm animal welfare are governed by a number of legal acts based on the Declaration of Animal Rights adopted under the auspices of UNESCO on 15 October 1978. This document was followed by conventions (6/11/2003,[1] 10/5/1979,[2] 10/3/1976[3]), directives of the Council of Europe (98/58/EC,[4] 2008/119/EC,[5] 1999/74/EC,[6] 2007/43[7]), acts on the protection of animals, as well as regulations and implementing regulations, which set out the minimum requirements for the rearing of particular animal species. The basic principles of farm animal wel-

[1] European Convention for the Protection of Animals during International Transport (Revised), 6/11/2003.

[2] European Convention for the Protection of Animals for Slaughter, 10/5/1979.

[3] European Convention for the Protection of Animals Kept for Farming Purposes, 10/3/1976.

[4] Council Directive 98/58/EC of 20 July 1998 concerning the protection of animals kept for farming purposes, 8.8.1998.

[5] Council Directive 2008/119/EC of 18 December 2008 laying down minimum standards for the protection of calves (codified version), 15.1.2009.

[6] Council Directive 1999/74/EC of 19 July 1999 laying down minimum standards for the protection of laying hens, 3.8.1999.

[7] Council Directive 2007/43/EC of 28 June 2007 laying down minimum rules for the protection of chickens kept for meat production, 12.7.2007.

fare were developed by the Farm Animal Welfare Council[8] and are contained in the so-called Code for the Welfare of Livestock. Intensive farming systems have caused serious problems.

The World Organization for Animal Health (OIE) is increasingly playing an important role in ensuring animal welfare standards and, in the face of rapidly growing and modernizing animal production and increasing international trade in animals, is influencing countries that are less committed to the welfare issue. The OIE issued recommendations on personnel training, ethology, animal care, stunning and slaughtering methods to ensure welfare during slaughter of animals for human consumption. The definition of "animal welfare" adopted in May 2008 by the OIE International Committee reads as follows: "Animal welfare means the extent to which an animal copes with the conditions offered by the breeder". Animal welfare is defined as appropriate if (according to scientific criteria) the animal is healthy, satisfied, well nourished, safe, able to express innate behavior and does not suffer from unpleasant conditions such as pain, fear or dissatisfaction expressed by anxiety.[9]

Existing national legal regulations (laws, regulations of the Minister of Agriculture and Rural Development, guidelines of the Chief Veterinary Officer) relating to welfare concern: keeping animals on the farm, transporting animals and slaughtering animals. The most important legal acts of the Polish legislation in the field of animal welfare include the Animal Protection Act of 21 August 1997[10] (Journal of Laws of 1997, No. 11, pos. 724, as amended), the Act of 15 January 2015 on the Protection of Animals Used for Scientific or Educational Purposes, and a number of executive regulations to this Act. The principles of animal welfare protection are particularly emphasized in the Animal Protection Act, which contains significant, frequently quoted words: "The animal as a living being, capable of suffering, is not a thing, and man owes it respect, protection and care". Since 2013, receiving direct payments by holdings in the European Union has been linked with the management of holdings in accordance with requirements concerning animal welfare conditions. These requirements were called cross-compliance (1307/2013[11]). In the literature on the subject, the division of welfare indicators into physiological, behavioral, health and production indicators is now predominant.

---

[8] Farm Animal Welfare Council (FAWC). Five Freedoms, http://www.fawc.org.uk/freedoms.htm [access: 20.02.2020].

[9] OIE 76th General Session World Assembly, World Organization for Animal Health, Paris, 25–30 May 2008.

[10] Animal Protection Act of 21 August 1997 (consolidated text, Journal of Laws of 2003, consolidated text 2013, item 856, as amended).

[11] Regulation (EU) No. 1307/2013 of the European Parliament and of the Council of 17 December 2013 establishing rules for direct payments to farmers under support schemes within the framework of the common agricultural policy and repealing Council Regulation (EC) No. 637/2008 and Council Regulation (EC) No. 73/2009.

In the European Union, all animals that are slaughtered for meat are subjected to a meat inspection (MI) process, with the primary aim of ensuring that meat is fit for human consumption. The frequency of disease conditions and lesions, as well as quality deviations found during the sanitary and veterinary examination of slaughter animals before and after slaughter is a measurable indicator of the health and hygienic condition of slaughter animals.[12] Meat inspection plays an important role in detection of certain welfare condition. The quality of carcasses and meat depends on the technology of rearing and on the conditions of transport and pre-slaughter handling of animals. Animal transport, even under the best conditions, may lead to significant weight loss, injuries or even death of animals.[13] The transportation of animals to the slaughterhouse must be carried out by drivers that hold a certificate of competence in vehicles previously approved by the national veterinary authority for animal transportation.[14] Similar reservations may be made in respect of live-storage facilities, where animals are kept before slaughter and are often subjected to additional stress.[15] Qualitative deviations in the form of emaciation, watery muscles or incomplete loss of blood, which have been observed for years, may be symptoms of certain diseases or inappropriate treatment during breeding or on the way from the farm to the slaughterhouse.

Changes or symptoms observed before and after the slaughter of animals shall provide information on the health status and welfare of the animals.[16] Slaughterhouse animal examination and meat testing are tools to reduce or even exclude risks to consumer safety and health.[17] In recent years, a number of reports have been published

[12] A. Cleveland-Nielsen, G. Christensen, A.K. Ersbøll, *Prevalence of Welfare-Related Lesions at Post-Mortem Meat Inspection in Danish Sows*, "Preventive Veterinary Medicine" 2004, No. 64, pp. 123–131; P. Sánchez, F.J. Pallarés, M.A. Gómez, A. Bernabé, S. Gómez, J. Seva, *Importance of the Knowledge of Pathological Processes For Risk-Based Inspection in Pig Slaughterhouses (Study of 2002 to 2016)*, "Asian-Australasian Journal of Animal Sciences" 2018, No. 31, pp. 1818–1827.

[13] K. Górski, *Transport zwierząt gospodarskich a ich dobrostan*, „Przegląd Hodowlany" 2000, Nr 2, pp. 24–26.

[14] Regulation (EC) No. 1/2005 of 22 December 2004 on the protection of animals during transport and related operations and amending Directives 64/432/EEC and 93/119/EC and Regulation (EC) No. 1255/97.

[15] S. Wajda, E. Burczyk, *Zasady postępowania z bydłem w czasie obrotu przedubojowego*, „Gospodarka Mięsna" 2017, Nr 68, pp. 12–14.

[16] S. Harley, L.A. Boyle, N.E. O'Connell, S.J. More, D.L. Teixeira, A. Hanlon, *Docking the Value of Pigmeat? Prevalence and Financial Implications of Welfare Lesions in Irish Slaughter Pigs*, "Animal Welfare" 2014, No. 23, pp. 275–285; N. Staaveren, B. Doyle, E.G. Manzanilla, J.A.C. Diaz, A. Hanlon, L.A. Boyle, *Validation of Carcass Lesions as Indicators for On-Farm Health and Welfare Pigs*, "Journal of Animal Science" 2017, No. 95, pp. 1528–1536.

[17] A. Dalmau, E. Fabrega, X. Manteca, A. Velarde, *Health and Welfare Management of Pigs Based on Slaughter Line Records*, "Journal of Dairy, Veterinary & Animal Research" 2014, No. 1, pp. 73–78.

concerning the evaluation of slaughter and free-living animals in Poland.[18] The results of these tests show a significant number of animals for slaughter, especially cattle and pigs with symptoms or lesions.

The aim of this study is to analyze the frequency of pathological conditions and lesions in slaughter animals in Poland in 2018 in the context of animal welfare. Data relating to the evaluation of the results of the health and veterinary examination were derived from the official documentation of the Veterinary Inspection from all places where animals were slaughtered under veterinary supervision.

2.

The analyzed data included those taken from the sanitary and veterinary examination in the reports prepared by the Veterinary Inspection.[19] The analysis of changes in the frequency of pathological conditions and pathological changes in slaughter animals was carried out for 2018. Post-slaughter examination involved visual examination of carcasses and organs including palpation and incision of tissues or organs. Tuberculosis, erysipeloid, septicemia and abscess, emaciation and watery muscles, icterus, salmonellosis, neoplasm, leukemia, putrefaction, immaturity, incomplete loss of blood, parasites, foci of pus, contamination, organoleptic anomalies and other changes were included in the assessment of the causes of disease changes and unfitness for consumption. The analysis of the results included the number of animals tested, the number of carcasses found to be diseased and the number of carcasses declared unfit for consumption. Post-mortem examination of slaughtered healthy animals was made according to the Regulation (EC) No. 854/2004.[20]

[18] M. Radkowski, J. Siemionek, B. Zdrodowska, *Neoplastic Lesions in Slaughter Animals in Warmińsko-Mazurskie Voivodeship (Poland) Area during the Years 2001–2007*, "Polish Journal of Veterinary Science" 2010, No. 13, pp. 669–672; K. Szkucik, Z. Bełkot, M. Gondek, *Występowanie zmian chorobowych i odchyleń jakościowych w tuszach zwierząt łownych w Polsce w latach 2000–2011*, „Medycyna Weterynaryjna" 2012, Nr 68, pp. 755–761; H. Lis, K. Górski, *Ocena wyników badania sanitarno-weterynaryjnego bydła rzeźnego w Polsce w 2016* r., „Życie Weterynaryjne" 2017, Nr 92, pp. 831–833; K. Górski, S. Kondracki, *Analysis and Comparison of the Frequency of Pathological Conditions and Lesions in Slaughtered Animals in Poland in 2009 and 2017*, "Folia Pomeranae Universitatis Technologiae Stetinensis Agricultura, Alimentaria, Piscaria et Zootechnica" 2019, No. 350, pp. 15–24.

[19] *RRW-6. Sprawozdania z wyników urzędowego badania zwierząt rzeźnych i mięsa za 2018 rok*, Główny Inspektorat Weterynarii, Warszawa 2018.

[20] Regulation (EC) No. 854/2004 of the European Parliament and of the Council of 29 April 2004 laying down specific rules for the organization of official controls on products of animal origin intended for human consumption.

3.

Table 1 shows that in 2018, more than 24.7 million slaughtered animals, including more than 1.98 million cattle and more than 22.7 million pigs, were under veterinary supervision.

Table 1. Pathological condition and lesion frequency in animals slaughtered in Poland in 2018

Species	Number of examined animals	Number and percentage of animals with lesions or pathological symptoms	Number and percentage of carcasses unfit for consumption
Cattle	1,988,338	429,183 (21.59)	4,893 (0.25)
Pigs	22,724,461	7,409,394 (32.61)	34,627 (0.16)
Total	24,712,799	7,838,577 (31.72)	39,520 (0.16)

Source: *RRW-6. Sprawozdania z wyników urzędowego badania zwierząt rzeźnych i mięsa za 2018 rok*, Główny Inspektorat Weterynarii, Warszawa 2018.

As can be seen in Table 1, in 2018, 31.72% of examined animals were diagnosed with a pre-slaughter and post-slaughter disease in the form of symptoms or lesions. Among cattle, there were 21.59% of animals with symptoms or lesions. In case of pigs, the percentage of individuals showing lesions exceeded 32.6%. In 2017, there was 20.68% of cattle and 35.45% of pigs with symptoms or lesions.[21] In 2018, 39,520 carcasses were declared unfit. The percentage of carcasses unfit for consumption in cattle was 0.25%, while in pigs it was 0.16%, and in 2018, it was slightly higher than in 2017.

Table 2 presents data showing the frequency of disease-related changes in particular species of animals for slaughter in 2018, according to the type of changes.

Table 2. Frequency of disease lesions and qualitative changes in 2018 according to the type of changes

Type of lesions	Cattle	Pigs
	Number and percentage	
Tuberculosis	27 (0.0010)	321 (0.0020)
Erysipeloid	-	1,778 (0.0080)
Actinomycosis and sepsis	1,260 (0.0600)	9,205 (0.0400)
Salmonellosis	0 (0.0000)	9 (0.0001)
Neoplasms	6 (0.0003)	4 (0,0001)
Leukemia	0 (0.0000)	3 (0.0001)
Emaciation and watery muscles	242 (0.0120)	1,939 (0.0090)
Icterus	126 (0.0060)	1,728 (0.0080)
Putrefaction	33 (0.0020)	7 (0.0001)
Immature	6 (0.0003)	1 (0.0000)

[21] K. Górski, S. Kondracki, *op. cit*., pp. 15–24.

Type of lesions	Cattle	Pigs
	Number and percentage	
Organoleptic anomalies	1,036 (0.0500)	2,558 (0.0100)
Incomplete loss of blood, natural death, the slaugthering in agony	393 (0.0200)	2,506 (0.0100)
Chemical poisonings	20 (0.0010)	0 (0.0000)
Foci of pus, contaminations and congestions	252,531 (12.7000)	5,488,413 (24.1500)
Cysticercosis	569 (0.0300)	1 (0.0000)
Echinococcosis	0 (0.0000)	19,709 (0.0900)
Fasciolosis	133,103 (6.6900)	-
Trichinellosis	-	40 (0.0002)
Sarcocystosis	-	31 (0.0002)
Other parasites	6,362 (0.3200)	448,908 (1.9800)
Other contagious diseases	3 (0.0002)	1 (0.0000)
Other changes	33,466 (1.6800)	1,432,232 (6.3000)
Total	429,183 (21.6000)	7,409,394 (32.6100)

(-) absent

Source: See Table 1.

The data shows that among both cattle and pigs there were cases of tuberculosis, septicemia and abscesses, as well as icterus, neoplasms, emaciation or watery muscles, putrefaction, immaturity, as well as incomplete loss of blood, natural death and slaughtering in agony found by sanitary and veterinary examination. In the carcasses of all these species there were foci of pus and contaminations or congestion, cysticercosis and other parasites. Cases of erysipeloid, salmonellosis, trichinellosis, echinococcosis and sarcocystosis have been reported in pigs, and cases of fasciolosis have been reported in cattle. According to data from Table 2, the most numerous group included animals with foci of pus, contaminations and congestions – 12.7% in cattle and 24.15% in pigs, respectively. Changes as such may be due to inappropriate handling of slaughter animals during transport and before slaughter.[22] A large number of contaminations and congestions may indicate poor hygienic quality during cutting and processing of carcasses. When comparing the frequency of disease lesions defined as foci of pus, contamination and congestion with data from 2017, it can be concluded that there has been an increase in the percentage of cattle with these lesions from 10.2% to 12.7%. In case of pigs, there was a decrease in the percentage of animals with changes recorded as foci of pus, contamination and congestion (from 28.07% to 24.15%). Liver fluke infections in cattle (6.69%) and other changes in pigs (6.30%) were the second most frequent. A large percentage of lesions was also caused by the presence of other parasites. This is particularly true for pigs in which parasites were found in more than

[22] V. Vecerek, M. Malena, M. Malena Jr., E. Voslarova, P. Chloupek, *The Impact of the Transport Distance and Season on Losses of Fattened Pigs During Transport to the Slaughterhouse in the Czech Republic in the Period from 1997 to 2004*, "Veterinární Medicina" 2006, No. 51, pp. 21–28.

2% of the examined carcasses. For comparison, it can be said that the incidence of fasciolosis in cattle in Poland in 2017 was about 8.6%,[23] i.e. at a level by 2% higher than in 2018. In Western Europe, the prevalence of liver fluke in cattle estimates of 25%, 50% and 61% are reported in Northern Ireland, Germany, and Spain, respectively.[24] Other pathological lesions occurred at a much lower frequency. Tuberculosis-related changes occurred in 0.001% of the examined cattle and in 0.002% of the examined pigs, emaciation or watery muscles were present in 0.01% of cattle and 0.009% of pigs, incomplete loss of blood, natural death or slaughter in agony occurred in 0.02% of cattle and 0.01% of pigs. Other diseases or quality deviations of cattle and pig carcasses ranged from 0.0001 to 0.0003%. The increasing number of cases of trichinellosis in pig meat – 40 cases in 2018 – is alarming. In 2017, only 5 cases of trichinellosis[25] were identified nationwide. The decreasing percentage of pigs with echinococcosis is to be considered as satisfactory. In 2018, the disease was found in 0.09% of pigs. This result differs significantly from the national average of 2017, when the extensiveness of echinococcosis in pigs was 0.16%.[26] However, our findings are different compared to Slovakia (0.13–0.29%)[27] and Romania (4%).[28]

Changes or symptoms of disease found before and after the slaughter of animals are not only the basis for the evaluation of breeding technology, the evaluation of transport conditions or the storage of animals. They also provide information on animal health status and their welfare. Having considered the foregoing, research in this area should be carried out systematically and significantly expanded. In conclusion, from an animal welfare point of view, the high number of animals with symptoms or lesions related to disease is a cause for concern. A large number of purulent foci, contamination and congestions indicates low care for the conditions of pre-slaughter marketing of slaughtered animals, as well as hygiene and conditions of slaughter, carcass cutting and processing. Congestion may also be the result of improper handling

[23] K. Górski, S. Kondracki, *op. cit*., pp. 15–24.

[24] M. Mezo, M. Gonzáles-Warleta, J.A. Castro-Hermida, F.M. Ubeira, *Evaluation of the Flukicide Treatment Policy for Dairy Cattle in Galicia (NW Spain)*, "Veterinary Parasitology" 2008, No. 157, pp. 235–243; B. Kuerpick, T. Schnider, C. Strube, *Seasonal Pattern of Fasciola hepatica Antibodies in Dairy Herds in Northern Germany*, "Parasitology Research" 2012, No. 111, pp. 1085–1092; A.W. Byrne, S. McBride, A. Lahuerta-Marin, M. Guelbenzu, J. McNair, R.A. Skuce, S.W.J. McDowell, *Liver Fluke (Fasciola hepatica) Infection in Cattle in Northern Ireland: A Large-Scale Epidemiological Investigation Utilizing Surveillance Data*, "Parasites & Vectors" 2016, No. 9, pp. 209–223.

[25] K. Górski, S. Kondracki, *op. cit*., pp. 15–24.

[26] *Ibidem*.

[27] A.H. Kedra, Z. Swiderski, V.V. Tkach, P. Dubinský, Z. Pawlowski, J. Stefaniak, J. Pawlowski, *Genetic Analysis of Echinococcus granulosus from Humans and Pigs in Poland, Slovakia and Ukraine. A Multicenter Study*, "Acta Parasitologica" 1999, No. 44, pp. 248–254.

[28] J.M. Bart, S. Morariu, J. Knapp, M.S. Ilie, M. Pitulescu, A. Anghel, I. Cosoroaba, R. Piarroux, *Genetic Typing of Echinococcus granulosus in Romania*, "Parasitology Research" 2006, No. 98, pp. 130–137.

of animals during transport. The presence of quality-related deviations in the form of emaciation, watery muscles or incomplete loss of blood of slaughtered animals also indicate errors made during breeding or transport of animals for slaughter. Parasitic diseases, mainly liver fluke in cattle and echinococcosis in pigs, require greater interest and more effective actions to reduce their incidence.

References

Bart J.M., Morariu S., Knapp J., Ilie M.S., Pitulescu M., Anghel A., Cosoroaba I., Piarroux R., *Genetic Typing of Echinococcus granulosus in Romania*, "Parasitology Research" 2006, No. 98.

Byrne A.W., McBride S., Lahuerta-Marin A., Guelbenzu M., McNair J., Skuce R.A., McDowell S.W.J., *Liver Fluke (Fasciola hepatica) Infection in Cattle in Northern Ireland: A Large-Scale Epidemiological Investigation Utilizing Surveillance Data*, "Parasites & Vectors" 2016, No. 9.

Cleveland-Nielsen A., Christensen G., Ersbøll A.K., *Prevalence of Welfare-Related Lesions at Post-Mortem Meat Inspection in Danish Sows*, "Preventive Veterinary Medicine" 2004, No. 64.

Dalmau A., Fabrega E., Manteca X., Velarde A., *Health and Welfare Management of Pigs Based on Slaughter Line Records*, "Journal of Dairy, Veterinary & Animal Research" 2014, No. 1.

Górski K., Kondracki S., *Analysis and Comparison of the Frequency of Pathological Conditions and Lesions in Slaughtered Animals in Poland in 2009 and 2017*, "Folia Pomeranae Universitatis Technologiae Stetinensis Agricultura, Alimentaria, Piscaria et Zootechnica" 2019, No. 350.

Górski K., *Transport zwierząt gospodarskich a ich dobrostan*, „Przegląd Hodowlany" 2000, Nr 2.

Harley S., Boyle L.A., O'Connell N.E., More S.J., Teixeira D.L., Hanlon A., *Docking the Value of Pigmeat? Prevalence and Financial Implications of Welfare Lesions in Irish Slaughter Pigs*, "Animal Welfare" 2014, No. 23.

Kedra A.H., Swiderski Z., Tkach V.V., Dubinský P., Pawlowski Z., Stefaniak J., Pawlowski J., *Genetic Analysis of Echinococcus granulosus from Humans and Pigs in Poland, Slovakia and Ukraine. A Multicenter Study*, "Acta Parasitologica" 1999, No. 44.

Kuerpick B., Schnider T., Strube C., *Seasonal Pattern of Fasciola hepatica Antibodies in Dairy Herds in Northern Germany*, "Parasitology Research" 2012, No. 111.

Lis H., Górski K., Ocena wyników badania sanitarno-weterynaryjnego bydła rzeźnego w Polsce w 2016 r., „Życie Weterynaryjne" 2017, Nr 92.

Mezo M., Gonzáles-Warleta M., Castro-Hermida J.A., Ubeira F.M., *Evaluation of the Flukicide Treatment Policy for Dairy Cattle in Galicia (NW Spain)*, "Veterinary Parasitology" 2008, No. 157.

Radkowski M., Siemionek J., Zdrodowska B., *Neoplastic Lesions in Slaughter Animals in Warmińsko-Mazurskie Voivodeship (Poland) Area during the Years 2001–2007*, "Polish Journal of Veterinary Science" 2010, No. 13.

RRW-6. Sprawozdania z wyników urzędowego badania zwierząt rzeźnych i mięsa za 2018 rok, Główny Inspektorat Weterynarii, Warszawa 2018

Sánchez P., Pallarés F.J., Gómez M.A., Bernabé A., Gómez S., Seva J., *Importance of the Knowledge of Pathological Processes for Risk-Based Inspection in Pig Slaughterhouses (Study of 2002 to 2016)*, "Asian-Australasian Journal of Animal Sciences" 2018, No. 31.

Szkucik K., Bełkot Z., Gondek M., *Występowanie zmian chorobowych i odchyleń jakościowych w tuszach zwierząt łownych w Polsce w latach 2000–2011*, „Medycyna Weterynaryjna" 2012, Nr 68.

Staaveren N., Doyle B., Manzanilla E.G., Diaz J.A.C., Hanlon A., Boyle L.A., *Validation of Carcass Lesions as Indicators for On-Farm Health and Welfare Pigs*, "Journal of Animal Science" 2017, No. 95.

Vecerek V., Malena M., Malena Jr M., Voslarova E., Chloupek P., *The Impact of the Transport Distance and Season on Losses of Fattened Pigs During Transport to the Slaughterhouse in the Czech Republic in the Period from 1997 to 2004*, "Veterinární Medicina" 2006, No. 51.

Wajda S., Burczyk E., *Zasady postępowania z bydłem w czasie obrotu przedubojowego*, „Gospodarka Mięsna" 2017, Nr 68.

Abstract: The article deals with the analysis of the frequency of pathological conditions and lesions in the context of animal welfare. The article shows that from an animal welfare point of view, the high number of animals with pathological conditions and lesions is a cause for concern. It was concluded that a large number of contamination and congestions indicates low care for the conditions of pre-slaughter marketing of slaughtered animals, as well as hygiene and conditions of slaughter, carcass cutting and processing. It has been found that congestion may also be the result of improper handling of slaughter animals during transport.

Keywords: animals for slaughter; post-mortem inspection; lesions; animal welfare

MONIKA KAPUSTA

University of Lodz, Faculty of Law and Administration
https://orcid.org/0000-0002-7632-244X
mkapusta@wpia.uni.lodz.pl

Standards for the Use of Service Animals in the Polish Police

The issue of using animal help by formations serving society has a centuries-old tradition. Literature shows that especially the role of dogs has been enormous. Dog domestication was one of the most important processes in human history. The partnership between dogs and humans was based on a human need for help with hunting or protecting. The dog stayed with man permanently not for its beauty, fur or meat, but because it was necessary, it recognized its leader in a human. It stayed because, cooperation of these two species benefited both parties.[1] It can be said that since the dawn of time people have subordinated some animals and used them, in particular for purposes related to the protection of various human societies (it is assumed, among others, that the ancient Egyptians began to use dogs for police tasks, primarily related to guarding property).[2] These animals have a particular role, because they are used in the work of many formations, which are responsible for ensuring public order and security.

The importance of those animals is different, depending on their functions. On the wall paintings that were created 4,000 years ago, we can see an Egyptian warrior holding a dog (on a leash) which attacks the enemy.[3] It allows us to say that dogs were first used in wars. Nowadays, dogs serve together with people in various formations, such as: army, police, border guards, fire brigade, mountain and water rescue. There is no doubt that the nature and role of the Polish Police makes that the animals working for this formation are highly valued.

[1] Z. Mierzwińska, *Bierz się do pracy z psem*, „Pies" 2002, Nr 2, p. 42.
[2] B. Hołyst, *Policja na świecie*, Warszawa 2011, p. 43.
[3] G. Wiorowski, K. Lubryczyński, *Kynologia policyjna*, red. K. Jałoszczyński, Szczytno 2011, p. 11.

Dogs are not the only animals, which are used by the Police. Horses are the second group of animals which help the Police in their work. These animals' role in ensuring public order and security is simply invaluable. For this reason, these animals should be provided an extensive protection and special living conditions. Therefore, the rules on protection of police animals[4] should be looked at in more detail.

In Poland, standards for the use of police animals can be found in the various legislative instruments. In the legal provisions of Art. 12 para. 1 items 9 and 10 of the Act of 24 May 2013 on Direct Coercion Measures and Firearms (hereinafter referred to as ADCMF),[5] the service dog and the service horse were mentioned as types of means of direct coercion. Arts. 21 and 22 of the above-mentioned act specify the cases and rules on the use of these animals. Hence, there have been introduced certain rules for officers of various formations who have the right to use these "specific means of direct coercion".

In Art. 21 of the ADCMF, the legislator indicated that a service dog may be used (only against a person) in cases of:

- repelling a direct, unlawful attempt on the life, health or freedom of the entitled person or another person,
- counteracting a direct attack on areas, objects or equipment protected by an entitled person,
- protection of the order or safety in areas or objects protected by an entitled person,
- counteracting the attack on the inviolability of the state border within the scope specified in Art. 1 of the Act of 12 October 1990 on the State Border Protection,[6]
- ensuring of safe escorting or submission,
- apprehending a person, preventing him/her from running away or chasing such a person,
- detaining a person, thwarting his/her escape or chasing such a person,
- overcoming active resistance.

The rule is that the service dog should wear a muzzle during the performance of its official duties. A service dog does not need to be muzzled when:

1) it was trained to act without a muzzle, or
2) such a dog is used for:
   a) repelling an attempt on the life or health of the entitled person or another person,

[4] In the article, police dogs and police horses are also called "service dogs" and "service horses".

[5] Consolidated text, Journal of Laws of 2018, pos. 1834, as amended.

[6] Consolidated text, Journal of Laws of 2018, pos. 1869, as amended. In the indicated Art. 1 of the Act, the state border was defined as: a vertical surface passing through the border line separating the territory of the Polish state from the territories of other states and from the high seas. The state border also separates air space, water and the interior of the earth.

b) performing official duties towards persons in relation to whom the use of firearms is allowed in cases of:

- the need to repel a direct, unlawful attack on:
  a) the life, health or freedom of the entitled person or another person or the need to counteract activities aimed directly at such an attack,
  b) important objects, devices or areas or the need to counteract activities aimed directly at such an attack,
  c) property which at the same time poses a direct threat to the life, health or freedom of the entitled person or another person, or the need to counteract activities aimed directly at such an attack,
- the need to oppose a person:
  a) not complying with the call for immediate abandonment of arms, explosives or other dangerous tools, the use of which may threaten the life, health or freedom of the entitled person or another person,
  b) who attempts to unlawfully take away a firearm from an authorized or another person authorized to possess it,
- a direct pursuit of a person against whom:
  a) the use of firearms was allowed in the cases specified in item 1 letter a–d and item 2,
  b) there is a reasonable suspicion that he/she has committed the offense referred to in Art. 115 para. 20 (terrorist offense), Art. 148 (murder), Art. 156 para. 1 (grievous bodily injury), Arts. 163–165 (causing a commonly hazardous event, causing immediate danger of the incident, causing states commonly dangerous to life or health), Art. 197 (rape and extortion of sexual activity), Art. 252 (taking hostage) and Arts. 280–282 (robbery) of the Act of 6 June 1997 – Penal Code.[7] In the provisions of the ADCMF, no other issues related to work with the service dogs were settled. In Art. 22 of the ADCMF, it was indicated that the service horse is used for:
     – repelling a direct, unlawful attempt on the life, health or freedom of the entitled person or another person,
     – preventing public order or safety violations,
     – counteracting the attack on the inviolability of the state border within the scope specified in Art. 1 of the Act of 12 October 1990 on the State Border Protection,
     – preventing property damage,
     – overcoming passive resistance,
     – overcoming active resistance.

In addition, in Art. 22, para. 2 of the ADCMF, it was specified that a service horse is used (using its weight) to control the movement of a group of people. These provi-

[7] Consolidated text, Journal of Laws of 2018, pos. 1600, as amended.

sions are laconic and insufficient, in particular in terms of ensuring the protection of service animals. This regulation is limited to listing the cases in which these animals can be used. Many issues related to working with service animals are regulated in implementing regulations or internal regulations. It should be emphasized that the legislator did not ensure the uniformity of these provisions and therefore they can differ significantly in particular protective formations. In the Police, the legal regulation of working with service animals allows to determine standards for the use of these animals and thus defines the scope of protection for these animals. Currently, these issues are regulated by internal provisions:

– Regulation No. 296 of the Police General Commandant of 20 March 2008 regarding methods and forms of performing tasks using service dogs, detailed rules for their training and food standards (hereinafter referred to as Regulation No. 296),[8]

– Regulation No. 884 of the Police General Commandant of 21 July 2009 regarding methods and forms of performing tasks by police officers using service horses, detailed training rules and food standards (hereinafter referred to as Regulation No. 884).[9]

Due to the fact that among the indicated service animals in the Police, the dog is the one whose scope of tasks is more extensive and varied, I will begin the further part of the analysis by characterizing the standards for the use of service dogs in the Police.

Regulation No. 296 specifies:

1) organization and methods of using and maintaining service dogs, including the performance of tasks by police dog handlers,
2) organization of training, improvement and testing of police dogs' utility,
3) nutrition, including food standards, prevention and ensuring proper living conditions for police dogs,
4) selection, purchase, retraining, transfer and withdrawal of police dogs from active duty,
5) supervising the implementation of the tasks in the field of police cynology.

Regulation No. 884 regulates:

1) methods and forms of tasks performed by police officers with the use of police horses, including tasks performed by mounted police officers,
2) organization and methods of using and maintaining police horses, including detailed rules for training and testing the performance of service horses,
3) nutrition, including food standards, prevention and ensuring proper living conditions for police horses,
4) acquisition, allocation, transfer to service and withdrawal of police horses from active duty,
5) supervising the implementation of tasks related to police horses.

[8] Consolidated text, Journal of Laws KGP of 2019, pos. 11.

[9] Consolidated text, Journal of Laws KGP of 2018, pos. 125.

These two Regulations serve to systematize all issues – not only those related to working with these animals, but also the ones referring to their entire life "in service" from their selection/acquisition to withdrawal from service.

Referring to Regulation No. 296, which regards police dogs, it should be noted that it did not explicitly set limits to the protection of these animals, but specified living and working conditions that contribute to the protection of these animals.

It is significant that police dogs can be used for various purposes. In para. 3 item 6 of the Regulation there was provided a classification of police dogs. According to this classification, the dogs are used to serve in the following sections: 1) preventive service: a) patrol, b) tracking, c) patrol and tracking, d) combat operations, e) to search for explosives, f) to search for drugs, g) to search for human corpses, h) water rescue and detecting human bodies; 2) criminal service – for osmological examinations.

All over the world, the Police use both thoroughbred and non-thoroughbred dogs for their purposes. The main factors determining the admission of a dog as a police dog are its predispositions to work. Depending on the intended use of a particular dog in policing, they have to meet certain expectations and requirements and these might be different depending on the sector in which the dog is used. For example, in the case of patrol and tracking dogs, these requirements are extended by trainability, size, body composition, resistance to adverse weather conditions, the possibility of being in the pen in the open air all year round. In addition, a patrol and tracking dog must have an appropriate appearance and body structure, i.e. it must impress. However, the dog cannot arouse excessive interest among bystanders, as it can be an excuse for provocation or offensive comments, hinder the police work and provoke unnecessary tensions with other people.[10]

Years of experience have led to the identification of breeds which are most often chosen to assist the Police. For example, the breeds which are most often used for training-patrolling and tracking include: German Shepherd, Belgian Shepherd Malinois, Giant Schnauzer, Rottweiler, Black Russian Terrier, Doberman, Bouvier des Flanders. There are different reasons for choosing each of these breeds. For example, the German Shepherd is the most commonly used breed of dogs due to its popularity among breeders and therefore high availability. In addition, these dogs are characterized by: intelligence, fortitude, ease of adaptation to new conditions, high olfactory ability, high trainability, willingness to carry out all commands.[11] Belgian Shepherds (more popular in Western Europe than in Poland) are energetic, versatile, strong, they love to work long and hard, they are very involved in exercises, they have a great deal of stamina, and the sharp sense of observation allows them to act in advance if a similar situation has occurred in the past.[12] The Giant Schnauzer is a strong dog

[10] G. Wiorowski, K. Lubryczyński, *op. cit*., p. 65.

[11] B. Wilcox, Ch. Walkowicz, *Atlas ras psów świata*, Warszawa 1997, p. 423.

[12] L. Smyczyński, *Psy. Rasy i wychowanie*. Warszawa 1957, p. 335.

with a lively disposition, brave, calm, cautious, loyal to his master. This breed has very well developed sense organs, it is also resistant to weather changes and diseases, however, due to its vitality and great need for movement, it is not a dog suitable for everyone.[13] Rottweilers, which are hardly available in Poland, are not very popular in the Polish Police. Their short hair makes that they very badly tolerate low temperatures in boxes located in the open air, which shortens the period of their service. It also generates additional costs related to the need to train new dogs. What is more, despite the fact that they are alert, reliable, skilful and persistent, breeders warn that they can be aggressive towards other dogs and may question human dominance.[14] Other dog breeds listed above appear extremely rarely in the Polish Police. Mainly due to their small population.

Every police dog (owned by the Police)[15] must have a certificate, i.e. a document confirming its ability to perform the tasks for which it was trained.[16] The dog obtains such a certificate after the completion of the training, which takes the form of a course, or at the request of the provincial police commander and with the consent of the school commander – individual training.[17] Successful completion of the training results in a dog's certificate. This document is issued for a specified period (depending on the dog's age), and obtaining subsequent certificates involves verification of the dog's functional fitness (i.e. the ability to perform the tasks for which it was trained).[18] To enhance the functional fitness of police dogs means to ensure the proper work of these animals. It is the job of police dog handlers and it has the form of cyclic training carried out individually or collectively (together with other handlers).[19] In order to improve functional fitness of the dogs, the training must take place at a certain frequency. The handler must be provided with one day per two weeks for improving functional fitness of the dogs (regardless of the number of dogs allocated) but sometimes (e.g. in justified cases) one day per a week.[20]

Service dogs can be trained for: patrol service; tracking marks; combat operations; searching the terrain, rooms, vehicles, inland waterway, sea and air vessels or parcels and luggage in order to: a) find people or objects, b) search for traces left by people, c) search for explosives, d) search for drugs, e) search for human corpses; osmological tests; ambushes and blockades; rescuing drowning people; taking action in cases specified in the provisions on means of direct coercion and firearms.[21] In para. 18 of

[13] L.J. Dobroruka, *Psy*, Warszawa 1992, p. 50.
[14] B. Wilcox, Ch. Walkowicz, *op. cit.*, p. 721.
[15] Section 3 item 1 of Regulation No. 296.
[16] Section 2 item 4 of Regulation No. 296.
[17] Section 29 items 1 and 3 of Regulation No. 296.
[18] Section 30 of Regulation No. 296.
[19] Section 31 para. 2 of Regulation No. 296.
[20] Section 31 para. 3–5 of Regulation No. 296.
[21] Section 18 of Regulation No. 296.

Regulation No. 296 it is stated that police dogs can be treated not only as means of direct coercion, but they are also used in the implementation of many other tasks entrusted to the Police. Under certain circumstances it is possible to retrain the dog, but this must be done under a special procedure.[22]

In para. 21 of Regulation No. 296 there is a rule that a dog may only be used in service for tasks corresponding to the category in which it was trained. In addition, the dog must be kept on a leash and in a muzzle, except for dogs trained for service without a muzzle and in situations justified by the tactics and aim of using the dog, which include in particular: tracking of traces, searching for missing persons, combat operations, osmological tests, saving drowning people, searching for drugs, explosives and human corpses.[23]

Regardless of the type of activities performed by the dog, it should not be directed to new activities not earlier than at least three hours after leaving the previous service.[24] The dog must also be given daily care, so when planning the service of a handler, during working or duty hours, he/she should be provided with one hour for this purpose.[25] To ensure the welfare of the dog, it is necessary to take into account weather conditions during the process of organizing the work of a handler with his dog.[26] Section 24 para. 9 of Regulation No. 296 indicates that in adverse weather conditions, the handler's superior may: 1) not direct the dog for service; 2) shorten the service time with a dog; 3) introduce additional rest for the dog.

Regulation No. 296 also introduced certain standards for feeding police dogs. First of all, it is recommended that the dog must be fed high-quality, complete, dry food, intended for working dogs, depending on the dog's age and veterinary health status. In addition, para. 33 of Regulation No. 296 indicates that dogs are fed once a day in summer and twice a day in winter. Dogs must have constant access to water throughout the year.

In Section 37 para. 1 of Regulation No. 296 there is an obligation to submit service dogs to: 1) compulsory vaccination against rabies; 2) other preventive vaccinations; 3) periodic veterinary examinations – at least twice a year; 4) quarter deworming; 5) other preventive procedures – according to the veterinarian's instructions. Police dogs must also stay in certain places, i.e. on the premises of the police organizational unit, at the handler's place – if he/she has the relevant conditions or in another area designated by the head of the police organizational unit (cell). Enclosures for dogs should also meet the standards contained in the provisions on the conditions of keeping individual species of animals used for special purposes, and they should also be constantly kept

[22] Specified in Section 40 of Regulation No. 296.
[23] Section 22 para. 1 of Regulation No. 296.
[24] Section 23 para. 5 of Regulation No. 296.
[25] Section 24 para. 1 of Regulation No. 296.
[26] Section 24 para. 8 of Regulation No. 296.

clean, disinfection and deratization should be carried out at appropriate intervals.[27] Police dogs should be provided with the welfare, in accordance with the needs of a given race and gender. Regulation No. 296 also concerns the issue of acquisition, transfer and withdrawal of dogs from service. These provisions not only guarantee that animals will be able to work efficiently for the Police, but they also provide protection for such animals in situations where, for example, they permanently lose their functional fitness or suffer from disease with little chance of recovery.

The issue of responsibility for dogs in the Police is also regulated. In para. 2 of Regulation No. 296, there were indicated certain categories of persons entrusted with specific functions to the extent necessary to perform tasks using police dogs. These persons are: the coordinator, police dog handler, candidate for a police dog handler, dog guardian, service dog training instructor, civilian instructor, helper and veterinarian. Each of these groups of people was assigned different tasks. A key role, with regard to direct work with a service dog, is played by a dog handler, i.e. a policeman who has undergone proper training at the police school, in which specialized courses for dog handlers and training of these animals are conducted. A guide of a dog used for osmological examination may also be a police employee.[28]

The allocation of the right number of dogs to one handler is important for the correct implementation of their tasks. Pursuant to Section 4 para. 3, a handler in preventive service can be assigned at the same time no more than two dogs.[29] In criminal service, a guide can be assigned a maximum of three dogs for osmological examinations, including dogs under individual training.[30]

In a similarly way – although taking into account the diversity of species – there were formulated regulations concerning police horses in the above-mentioned Regulation No. 884. This regulation was issued in 2009, so it was modeled (in terms of the scope of regulation) on the basis of the regulation on police dogs. It is not surprising, therefore, that these solutions are analogous, especially with regard to the police horse's work cycle (from starting service, through assignment, to withdrawal from service).

Each police horse, like a police dog, must have a properly trained person assigned. In the case of horses, this person is called a "mounted police officer" and similarly to police dogs, he is responsible for all the duties related to the functioning of the horse in the Police, i.e. 1) performing horse service and documenting these activities in accordance with the provisions on the forms and methods of performing tasks by police officers in terms of patrol service and coordination of preventive activities, as well as with the provisions on recording, filling and storing service notebooks; 2) carrying out exercises; 3) taking care of: a) the welfare and physical condition of horses, includ-

[27] Section 38 para. 5 and 6 of Regulation No. 296.

[28] Section 2 item 2 of Regulation No. 296.

[29] Exceptions to this rule were specified in Section 4 item 4 and Section 4 item 5 of Regulation No. 296.

[30] Section 4 item 6 of Regulation No. 296.

ing subjecting them to preventive measures, vaccinations, veterinary examinations, treatment and shoeing; b) stables, which include sets of rooms consisting of boxes for horses, feeds, saddles, duty rooms and social rooms for policemen and employees, as well as the area adjacent to them – by using them properly and keeping them clean; 4) improving skills in tactics and techniques of using horses in service; 5) performing other works related to maintaining horses.[31]

The list of tasks entrusted to police horses is much shorter than in the case of police dogs, which results from the specificity of these animals. In Section 14 para. 1 of Regulation No. 884, there was formulated an open catalog in which it was indicated that the horses are used in particular for: 1) patrol service; 2) activities related to ensuring and restoring violated public order during mass events or assemblies.

The Regulation indicates acceptable norms of the working time of mounted police officers. Under normal conditions this kind of service can last for no more than 6 hours a day, during which a 30-minute break must be provided for the horse (time of service also includes the time of transporting the horse from the stable to the service area). In justified cases, the time of service may be extended to max. 12 hours a day. If the service period is extended to 8 hours, the horse must have two rest periods – 30 minutes each, and in the case of duty extended to 12 hours – 3 rest periods, 30 minutes each[32].

In Section 15 of Regulation No. 884, the organization of service with the use of police horses was made dependent on prevailing weather conditions – the rules are similar as in the case of police dogs. When planning the mounted police officer's service, it is also necessary to take into account the time devoted to the daily care of the horse (as a rule, 2 hours a day, unless the policeman has been assigned 2 horses, in that case the time is extended by 1 hour) and the time for carrying out the exercises, and for necessary movement to keep the animal in the proper condition.[33] Police horses – similarly to police dogs – must be properly prepared for service and thus they must participate in training completed by obtaining appropriate certificates.[34]

Regarding the issue of feeding, while in the case of dogs (and more precisely the purchase of food and proper feeding of a dog), the handler is paid a monetary equivalent for each day of the month, set at the level of the specific feeding rate of the policeman (hereinafter referred to as SZ [*szkolna stawka żywieniowa policjanta*]), in the case of police horses the daily monetary rate was set at PLN 16.18. Despite the fact that the prices of products increase year by year, this rate has not changed for years. However, the provincial police commanders were allowed to increase the rate indicated. However, in case of illness, convalescence or other justified cases, the food

[31] Section 7 of Regulation No. 884.

[32] Section 14 para. 3–5 of Regulation No. 884.

[33] Section 17–19 of Regulation No. 884.

[34] In Section 21–26 of Regulation No. 884, there was regulated the procedure of these trainings.

dose is adjusted according to the individual needs. Moreover, in Annex 6 to Regulation No. 884, the material dimension of the basic feeding standards for the service horse is specified (daily in grams). The list includes items such as: wheat bran (2,000 g), linseed (100 g), carrot (1,500 g), salt lick (30 g), oats (8,000 g), hay (7,000 g), straw (8,000 g), complete mixtures (500 g) and feed additives (as needed). Annex 6 to Regulation No. 296 contains a table of feeding rates for a dog, in which the division of dogs – into those weighing over 20 kg and those up to 20 kg – was made, and in which summer and winter feeding standards were also specified. The summer standard for a dog over 20 kg (0.7 SZ rate) is the basic standard, the winter standard for such a dog is 0.9 SZ rate, while for a dog below 20 kg the summer standard is 0.5 SZ rate, and winter standard – 0.7 SZ rates.

In the case of police horses, prevention is extremely important. For this reason, horses are subjected to: 1) mandatory deworming and vaccination against rabies, influenza, tetanus, fungal infections and diseases caused by herpes viruses; 2) periodic veterinary examinations – at least twice a year; 3) other preventive procedures as instructed by the veterinarian; 4) cleaning and forging hooves every 6 to 8 weeks or more often if necessary.[35] For the benefit of police horses, buildings intended for them are subject to periodic disinfection, disinfestation and deratisation. They must also meet certain technical and sanitary requirements.[36]

Regulation No. 884 also determines the issue of acquisition, transfer and withdrawal of horses from service in the Police. Bearing in mind that the function of police horses is specific, it is extremely important that their efficiency guarantees the proper performance of the activities for which they are used. For this reason, Regulation No. 884 specifies the grounds for mandatory and optional withdrawal of horses from service. There are cases in which the animal cannot serve in the Police. These are *inter alia*: permanent loss of usefulness; little chance of improvement; vices; the lack of progress in training, which is necessary to achieve the level of training required to issue a first degree certificate.[37]

Each of the activities related to the use of service animals in the Police must be properly documented. To facilitate this, the Police General Commandant introduced annexes to each of Regulations, including protocols for performing specific activities using police animals. These protocols allow the collection and systematization of information about individual police animals, so that their life and service in the Police can be verified at any time. There is no doubt, that the Police General Commandant, when issuing both of these Regulations, had a difficult task, consisting not only in providing persons responsible for police animals with appropriate conditions to per-

[35] Section 33 para. 1 of Regulation No. 884.
[36] Section 34 and 35 para. 2 of Regulation No. 884.
[37] Section 40 of Regulation No. 884

form their duties, but also in guaranteeing police animals optimal working and living conditions in the Police.

The provisions of both Regulations were formulated in such a way that a lot of attention was devoted to various procedures related to the selection, training or withdrawal of animals from active duty, as well as to persons entrusted with the care of these animals. This solution is intended – as indicated explicitly in both Regulations – to ensure the welfare of these animals. Therefore, we can ask: What is animal welfare in fact? In the literature on the subject, this concept is defined heterogeneously. As a rule, when describing this concept, we can refer to terms such as "stress", "tolerance", "adaptation", "fitness", and "homeostasis" – which may indicate that this concept is associated with the body as a whole.[38] For example, Barry Hughes defined welfare as a state of physical and mental health achieved in conditions of full harmony of the system in its environment.[39] According to Donald M. Broom, the term "welfare" is a state of the system in which the animal can cope with circumstances occurring in the environment,[40] whereas David Sainsbury claims that welfare is a set of conditions covering the biological and behavioral needs of the organism, which allows revealing the fullness of its genetic capabilities.[41] In the Farm Animal Welfare Code, written by English specialists from the Farm Animals Welfare Council, the concept of animal welfare boils down to the following points: freedom from hunger and thirst, freedom from discomfort, freedom from pain, injury and disease, freedom from fear and stress, and the ability to express normal behavior. In order for these conditions to be met, the animals must be provided with fresh water, adequate feed, secured rest area, shelter, optimal environmental conditions, veterinary care, elimination of stressors and adequate living space and social composition in the group.[42]

The above definitions show that animal welfare is a very broad concept. When defining the concept of the welfare of police animals, it is necessary to take into account their specificity, and therefore to assume that it is a state of physical and mental health achieved in optimal conditions that can be guaranteed by ensuring that these animals meet their needs while not overloading them with work excessively in relation to their possibilities. So, we can ask the second question: Is it possible to achieve it in the case of police animals, which in principle are used for work under special conditions?

Undoubtedly, the provisions of the regulations are formulated in such a way as to provide animals with the greatest comfort of work and life. In addition, it should be taken into account that sometimes what constitutes work for a human is only fun for

[38] R. Kołacz, E. Bodak, *Dobrostan zwierząt i kryteria jego oceny*, „Medycyna Weterynaryjna" 1999, Nr 3, p. 147.

[39] B.O. Hughes, *Welfare of Intensively Housed Animals*, "Veterinary Research" 1988, No. 33, p. 123.

[40] D.M. Broom, *The Veterinary Relevance of Farm Animal Ethology*, "Veterinary Record" 1987, No. 17, p. 400.

[41] D.W.B. Sainsbury, *Pig Housing and Welfare*, "Pig News and Information" 1984, No. 4, p. 337.

[42] R. Kołacz, E. Bodak, *op. cit*., p. 147.

the animal, e.g. walks with a patrolling policeman, is even necessary to maintain the physical and mental condition of the animal. Therefore, the people responsible for these animals have to devote a certain amount of time to dealing with them every day. These animals must meet certain health requirements at the time of admission to the service, and during performing their duty must be guaranteed proper care, periodic examinations and preventive measures so that their health does not deteriorate. The tasks entrusted to these animals must be adapted to their abilities and certificates. In addition, by issuing both Regulations, the Police General Commandant introduced the concept of adverse weather conditions in which the working time of police animals could be reduced.

Nevertheless, the work performed by these animals is stressful, sometimes performed under time pressure, requiring concentration and attention, and therefore may cause some discomfort and disrupt the welfare of these animals. Therefore, constant and proper care for them at every stage of their work in the Police and later is of crucial importance. Officers should show particular diligence in their work with police animals.

It should be noted that in the performance of certain tasks, service animals are simply irreplaceable. It should be assumed that the role of service horses over the years was limited. The reasons are in particular: technological progress and the possibilities offered by other means of transport, as well as the threats that may currently be associated with the use of these large animals as means of direct coercion. But it should not be forgotten, that there were periods of Polish history when these animals were of key significance.

The situation is completely different in the case of dogs. These animals are still necessary in some areas of police work. Although technological progress allows the creation of means and mechanisms which are more effective than police dogs, the limited budget makes that the work of police dogs is still crucial for the implementation of a number of activities related to the detection of specific odors or substances. Many activities targeted at police dogs are human-oriented. For this reason, it should be evaluated whether this could lead to a restriction on the use of constitutional freedoms and human rights and whether it would not be better to introduce these regulations into a legal act.

Based on the above considerations, service animals should be provided with maximum work comfort and protection which is crucial for their welfare and therefore ensures high quality of their work.

References

Broom D.M., The *Veterinary Relevance of Farm Animal Ethology*, "Veterinary Record" 1987, No. 17.
Dobroruka L.J., *Psy*, Warszawa 1992.
Hołyst B., *Policja na świecie*, Warszawa 2011.
Hughes B.O., *Welfare of Intensively Housed Animals*, "Veterinary Research" 1988, No. 33.
Kołacz R., Bodak E., *Dobrostan zwierząt i kryteria jego oceny*, „Medycyna Weterynaryjna" 1999, Nr 3.
Mierzwińska Z., *Bierz się do pracy z psem*, „Pies" 2002, Nr 2.
Sainsbury D.W.B., *Pig Housing and Welfare*, "Pig News and Information" 1984, No. 4.
Smyczyński L., *Psy. Rasy i wychowanie*, Warszawa 1957.
Wilcox B., Walkowicz Ch., *Atlas ras psów świata*, Warszawa 1997.
Wiorowski G., Lubryczyński K., *Kynologia policyjna*, red. K. Jałoszyński, Szczytno 2011.

Abstract: The issue of using animal help by formations serving man has a centuries-old tradition. It can even be said that since the dawn of time people have subordinated certain animals and used them, in particular for purposes related to the protection of various human societies. The notion of service animals in the Police, included in the law and legal literature, includes dogs and horses, whose role in ensuring safety and public order is almost invaluable. Therefore, these animals should be given adequate protection and guaranteed special living conditions. Pertinent regulations referring to the use of service animals can be found in legal acts. In the provisions of Art. 12 para. 1 point 9 and 10 of the Act of 24 May 2013 on Direct Coercion Measures and Firearms, a service dog and service horse are listed, including these animals as means of direct coercion. In Arts. 21 and 22 of this Act, there are specified the cases and rules for the use of these animals. Therefore, certain principles were introduced for officers of all formations authorized to use these "specific means". However, these provisions are laconic and insufficient. Many issues related to the use of service animals shall be governed by regulations or applied internally. It should be emphasized, however, that the legislator did not ensure the uniformity of these provisions, as a result of which they may differ significantly in individual protective formations. The article discusses the legal regulations regarding service dogs and service horses (including methods of their use and maintenance; ensuring proper living conditions; selection, transfer and withdrawal from service). The analysis of legal solutions applicable in this field was used to assess standards for the use of service animals in the Polish Police.

Keywords: police animals; police (service) dogs; police (service) horses; protection of police animals; work with police animals; police animals' welfare

KONRAD RYDEL

University of Warsaw, Faculty of Law and Administration
https://orcid.org/0000-0003-3905-8317
k.rydel@wpia.uw.edu.pl

Legal Subjectivity of Chimps, or "Monkey Verdicts" in the United States

An eminent Ancient Roman jurist and public servant Aurelius Hermogenianus pointed to one of the most important features of legal systems: "Therefore, since all law is established for men's sake, we shall speak first of the status of persons and afterward about the rest".[1] Contemporary legal systems, based on the concept of human dignity, very clearly point out the differences between things and subjects of law. The issue of legal subjectivity can be simplified to the statement that the entities of civil law relations are natural persons and legal persons.[2] The law provides these entities with privileges, obligations and the ability to perform legal acts.[3] Hans Kelsen said it is necessary to "(…) bring physical and legal persons (…) on the common denominator, on the denominator of law".[4]

All animals, without any exception, are deprived of both legal capacity and personality. Animals do not enjoy constitutional freedoms and rights. Contemporary Western legal systems reserve all freedoms and rights for man.[5] The provisions relating

[1] *The Digest of Justinian*, translation edited by A. Watson, Pennsylvania 1998, p. 15.

[2] Under the Polish law there also exist unincorporated entities with legal capacity. Those units do not have legal personality, but they have legal capacity, i.e. the ability to be the subject of rights and obligations.

[3] T. Pietrzykowski, *Podmiotowość prawna – ujęcie teoretyczne*, [in:] *O czym mówią prawnicy, mówiąc o podmiotowości*, red. A. Bielska-Brodziak, Katowice 2015, pp. 15–30.

[4] S. Kirste, *Human Dignity and the Concept of Person in Law*, [in:] *The Depth of the Human Person: A Multidisciplinary Approach*, ed. M. Welker, Cambridge 2014, p. 290.

[5] O. Horta, *What Is Speciesism?*, "The Journal of Agricultural and Environmental Ethics" 2010, No. 23, pp. 243–266; R.D. Ryder, *Szowinizm gatunkowy, czyli etyka wiwisekcji*, translated by Z. Szawarski, „Etyka" 1980, Nr 18, pp. 39–47.

to things apply to them accordingly. Despite the so-called dereification of animals in most legal systems and a humanization of the law applicable to them, the status of animals, including those closest to *homo sapiens*, is still much closer to things.[6]

The paradigm of recognizing only people and legal entities as entitled to enjoy the freedoms and rights guaranteed by legal systems is beginning to change.[7] A specific confirmation of this thesis are court proceedings brought by non-governmental organizations, as well as legislative decisions granting legal personality for the natural environment (in whole or in part).[8] In the case of animals, it is usually said about the right to life and freedom. The issue of practical implementation of the right to freedom by applying the *habeas corpus* order for animals is the subject of this work.

The *habeas corpus* order has a long tradition in the common law system.[9] It was introduced in England in 1679 during the reign of Charles II and expressed public resistance against the arbitrary behavior of the ruler. The essence of the *habeas corpus* order is the judicial review of the lawfulness of detention, which still exists in the Anglo-Saxon legal system. Within one day, the detainee had the right to demand to be brought before a court to find out about the charges, and he could not be imprisoned for more than three to twenty days, which was dependent on the distance from the place of imprisonment to the seat of the court. The *habeas corpus* order was created to protect the individual against the oppressive ruler, and attempts are now being made to embrace the *habeas corpus* order also for animals.

In most cases, attempts of issuing the *habeas corpus* order on animals are unsuccessful. The article deals with four proceedings initiated by the non-profit organization the Nonhuman Rights Project.[10] The organization was founded in 2007 by the American lawyer Steven M. Wise. Its purpose is to take action to recognize animals as legal entities who are holders of a certain limited catalog of rights. According to its founder, the criterion for obtaining legal personality is related to the ability of certain species of

[6] T. Liszcz, *Zwierzęta w prawie stanowionym*, „Więź" 1997, Nr 7, pp. 46–54; W. Jedlecka, *Z problematyki własności zwierząt*, [in:] *Własność w prawie i gospodarce*, red. U. Kalina-Prasznic, Wrocław 2017, p. 148; M. Nazar, *Normatywna dereifikacja zwierząt – aspekty cywilnoprawne*, [in:] *Prawna ochrona zwierząt*, red. M. Mozgawa, Lublin 2002, p. 139.

[7] T. Pietrzykowski, *Problem podmiotowości prawnej zwierząt z perspektywy filozofii prawa*, „Przegląd Filozoficzny – Nowa Seria" 2014, Nr 2, pp. 247–249.

[8] J.S. Kerr, M. Bernstein, A. Schwoerke, M.D. Strugar, J.S. Goodman, *A Slave by Any Other Name Is Still a Slave: The Tilikum Case and Application of the Thirteenth Amendment to Nonhuman Animals*, "Animal Law" 2013, No. 19, p. 8; S.A. Radcliffe, *Development for a Postneoliberal Era? Sumak kawsay, Living Well and the Limits to Decolonisation in Ecuador*, "Geoforum" 2012, Vol. 43, pp. 240–249; W. Bar, *Nowa dogmatyka Konstytucji Republiki Ekwadoru. Casus praw natury*, „Teka Komisji Prawniczej – OL PAN" 2010, Vol. 3, pp. 33–47; K. Pietari, *Ecuador's Constitutional Rights of Nature: Implementation, Impacts, and Lessons Learned*, "Willamette Environmental Law Journal" 2017, No. 2, pp. 37–94.

[9] Full title: An Act for the better securing the Liberty of the Subject, and for Prevention of Imprisonment beyond the Seas.

[10] See more: https://www.nonhumanrights.org/ [access: 15.10.2019].

animals, such as primates, whales or elephants to self-awareness, the ability to act consciously and the existence of basic interests – the will to live and the ability to feel pain. The author indicates in the book *Rattling the Cage*: "They are »legal things«. Their most basic and fundamental interests – their pains, their lives, their freedoms – are intentionally ignored, often maliciously trampled, and routinely abused. Ancient philosophers claimed that all nonhuman animals had been designed and placed on this earth just for human beings. Ancient jurists declared that law had been created just for human beings. Although philosophy and science have long since recanted, the law has not".[11] In the following cases, the right to freedom as well as freedom from torture is usually raised as closely related to keeping the animal in non-natural conditions. In 2013, the Nonhuman Rights Project spoke on behalf of four detained chimpanzees – Leo, Hercules, Kiko and Tommy – to courts in New York to determine the legality of their imprisonment. According to the animal representative, chimpanzees, like humans, benefit from guarantees of imprisonment control. Although the Nonhuman Rights Project has lost each case, these rulings are an important voice in the discussion about whether there are non-human entities that exercise fundamental rights.

The source of human and citizen rights is human dignity.[12] In other words, human dignity is a foundation of law. It provides an axiological basis for modern legal systems.[13] It is assumed that personal dignity is a certain inherent value of every human being and is also a synonym of humanity. In this sense, human dignity is inalienable, inherent and inviolable.[14] The source of human and citizen rights is human dignity. It provides an axiological basis for modern legal systems.[15] The law does not indicate what human dignity really is, only showing how it works. The emergence of the concept of inherent human dignity after World War II was largely dictated by a political decision. The signatory states of the United Nations Charter were not interested in creating any definition of "legal dignity", which is still a legally undefined term.

The first legal act that more broadly refers to the concept of human dignity is the Universal Declaration of Human Rights,[16] proclaimed by the United Nations General

[11] S.M. Wise, *Rattling the Cage. Toward Legal Rights for Animals*, Cambridge 2014, p. 4.

[12] M. Zubik, *„Wolność" a „prawo" (pięć hipotez o stosowaniu pojęć konstytucyjnych dotyczących praw człowieka)*, „Państwo i Prawo" 2015, Vol. 9, pp. 3–19.

[13] More on problems related to the relationship of dignity and law, see: S. Kirste, *A Legal Concept of Human Dignity as a Foundation of Law*, [in:] *Human Dignity as a Foundation of Law*, eds. W. Brugger, S. Kirste, Stuttgart 2013, pp. 7–13; M. Granat, *Godność człowieka z art. 30 Konstytucji RP jako wartość i jako norma prawna*, „Państwo i Prawo" 2014, Nr 8, p. 6.

[14] L. Bosek, W. Borysiak, *Art. 30*, [in:] *Konstytucja RP*, t. 1: *Komentarz do art. 1–86*, red. L. Bosek, M. Safjan, Warszawa 2016, pp. 723–751.

[15] L. Garlicki, *Rozdział II: Wolności, prawa i obowiązki człowieka i obywatela. Zasady ogólne*, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, t. 3, red. L. Garlicki, Warszawa 2003, pp. 11–12.

[16] The first references to the term appeared in Art. 151 I of the German Weimar Constitution of 1919 and in the Preamble to the Irish Constitution of 1937.

Assembly on 10 December 1948.[17] The Declaration begins with the following words: "Whereas recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family is the foundation of freedom, justice and peace in the world (…)".

Stephan Kirste mentioned earlier states: "From these patterns, a rather systematical conception emerged, holding that it is impossible to define human dignity positively, but only negatively through possible violations of it. The negative approach thereby replaces the question of what human dignity is by the question when and under what conditions it is violated".[18]

The functional rather than the material nature of human dignity is of paramount importance for actions brought by the Non Human Rights Project. This organization referred to those features of humanity that could be related to animals to some extent. Although the word "dignity", understood as "human dignity", is not mentioned in chimp lawsuits. First of all, according to the current state of research presented by the claimant, the chimpanzee is an autonomous entity with very well-developed cognitive abilities. Chimpanzees show self-awareness, agency, abstract thinking ability, and self-criticism. They feel pain and emotions, intentionally plan and take action, and its behavior cannot be qualified as simple instincts. This statement is not made in the texts of the lawsuits, but the plaintiff's representatives show that, in fact, chimpanzees enjoy their rights, at least to a limited extent, just like humans, because they are basically equipped with a set of features very similar to people.

In the case of chimpanzee Kiko,[19] the court refused to issue the *habeas corpus* order because it considered that its issuing was pointless. The chimpanzee was kept on his private property by his owners. The Non Human Rights Project, which intervened on behalf of the chimpanzee, requested the animal to be moved to a sanctuary specially created for this purpose. In a laconic ruling, the court stated that: "It is well settled that a *habeas corpus* proceeding must be dismissed where the subject of the petition is not entitled to immediate release from custody". The court, even without refusing a certain legal personality to the animal, decided that issuing a *habeas corpus* order was unacceptable, because in this case it would not lead to his release. According to the court, a chimp would only be transferred from one prison to another. The court, probably due to the controversy of the issues it had to consider, did not refer in any way to the legitimacy of granting fundamental rights to animals, and in this particular case, the human rights of a chimpanzee.

[17] United Nations General Assembly Resolution 217A.

[18] S. Kirste, *A Legal*…, p. 69.

[19] *Nonhuman Rights Project, Inc., on Behalf of Kiko, Appellant, v Carmen Presti, Individually and as an Officer and Director of the Primate Sanctuary, Inc., et al., Respondents*, 2015 NY Slip Op 00085 [124 AD3d 1334], http://www.courts.state.ny.us [access: 15.10.2019].

In the case of Tommy,[20] the court ruled on the inadmissibility of issuing a *habeas corpus* order, considering that it was impossible to relate the concept of a person to a chimpanzee who was being held in a caravan settlement in New York State. The court took the position that a person within the meaning of the law constitutes the subject of rights and obligations and the guarantees under Art. 70 New York Civil Practice Law and Rules apply only to man. An animal, being unable to bear specific duties or responsibilities, cannot be the subject of freedom and rights as much as a human being. The court noted that case-law had always noticed a correlation of rights with obligations, referring to the traditional understanding of legal personality presented by *Black's Law Dictionary*: "So far as legal theory is concerned, a person is any being whom the law regards as capable of rights and duties. (…) Persons are the substances of which rights and duties are the attributes. It is only in this respect that persons possess juridical significance, and this is the exclusive point of view from which personality receives legal recognition". In its ruling, the court unfortunately did not refer to the most frequently raised arguments, which are opposed to the statements of supporters of not granting animals any legal status.

In the summary of the judgment, the court stated that the human rights paradigm does not deprive the animals themselves of protection. What is more, modern legislation aims to ensure the fullest possible protection for animals. This is confirmed by the prohibitions of torture or unreasonable killing of animals, their transport in a cruel and inhuman way, or the ban on having animals without providing them with food and water. As a solution to the applicant's doubts, the court indicates taking action to further extend the protection of chimpanzees.

In the case of Leo and Hercules,[21] the organization sued New York State University. Both chimpanzees were held for research by Stony Brook University. As in previous cases, the organization referred primarily to the similarity of chimpanzees to people: "They share with humans similarities in brain structure and cognitive development, including a parallel development of communications skills, as shown by their use and understanding of sign language. (...) Chimpanzees also demonstrate self-awareness, recognizing themselves in mirrors and photographs and on television, and have the capacity to reflect on their behavior".

The most significant part of the judgment concerns the legal subjectivity of chimpanzees. As the court rightly points out – legal subjectivity is not closely related to

[20] *The People of the State of New York ex rel. The Nonhuman Rights Project, Inc., on Behalf of Tommy, Appellant, v Patrick C. Lavery, Individually and as an Officer of Circle L Trailer Sales, Inc., et al., Respondents*, 2014 NY Slip Op 08531 [124 AD3d 148], http://www.courts.state.ny.us [access: 15.10.2019].

[21] *The Nonhuman Rights Project, Inc., on behalf of Hercules and Leo, Petitioners, against Samuel L. Stanley, Jr., M.D., as President of State University of New York at Stony State University of New York at Stony Brook aka Stony Brook University*, 2015 NY Slip Op 25257 [49 Misc 3d 746], http://www.courts.state.ny.us [access: 15.10.2019].

being human. The applicant organization considered that the appropriate form of protection was the adoption of legal fiction, as was the case with corporations or local governments. Then the protection of animals is ensured by a political decision and not by science. This is related to the existence of the above-mentioned personality elements of chimpanzees. Granting them freedom and equality characteristic of people is a requirement of justice.

The court did not accept this position. Legal personality cannot be compared with the status of animals, because legal personality was created by people and for people. Legal persons are a form of human activity, they are an expression and reflection of human rights and freedoms. In its ruling, the court rightly notes that the concept of legal personality has evolved throughout history, giving the example of the fate of slaves in the United States and women who were denied full rights, often treated as the property of a husband or other male family members. The court states that: "The past mistreatment of humans, whether slaves, women, indigenous people or others, as property, does not, however, serve as a legal predicate or appropriate analogy for extending to nonhumans the status of legal personhood. Rather, the parameters of legal personhood have long been and will continue to be discussed and debated by legal theorists, commentators, and courts, and will not be focused on semantics or biology, or even philosophy, but on the proper allocation of rights under the law, asking, in effect, who counts under our law".[22] The court also cited the view expressed by the panel in the case of the chimpanzee Tommy, and thus the inadmissibility of extending the guarantee from the *habeas corpus* order to animals. It applies only to people in a narrow sense. In the lawsuit, the plaintiff noted that, in fact, legal personality and rights arising therefrom are not always correlated with the existence of obligations, and such solutions exist in some common law countries. After considering the arguments put forward by the applicant, the court finally refused to issue the *habeas corpus* order, noting however: "The similarities between chimpanzees and humans inspire the empathy felt for a beloved pet. Efforts to extend legal rights to chimpanzees are thus understandable; some day they may even succeed. Courts, however, are slow to embrace change, and occasionally seem reluctant to engage in broader, more inclusive interpretations of the law, if only to the modest extent of affording them greater consideration. As Justice Kennedy aptly observed in *Lawrence v Texas*, albeit in a different context, »times can blind us to certain truths and later generations can see that laws once thought necessary and proper in fact serve only to oppress«".[23]

The Federal Court of Cassation of Argentina came to the opposite conclusion that the Sumatran orangutan was a "non-human person".[24] The proceedings in the case

[22] *Ibidem.*

[23] *Ibidem.*

[24] A. Alvarez-Nakagawa, *Law as Magic. Some Thoughts on Ghosts, Non-Humans, and Shamans*, "German Law Journal" 2017, No. 5, pp. 1264–1267.

of orangutan held at the zoo were initiated on the motion of the Lawyers for Animal Rights. The attorney of the orangutan, Andres Gil Dominguez referred in the lawsuit to the intellectual and cognitive abilities of the orangutan and the fact that the animal's long-term detention at the zoo causes serious damage to the animal's psyche. The court took the view that the orangutan was a "non-human person" and that: "[N]othing impedes that the rights to life and dignity, proper of living beings, and that are consecrated to human persons in the legal system, be extended analogically to Sandra, who is a sentient being".[25] The court also considered that pursuant to Art. 10 of the Civil Code, "the law does not protect abuse of rights", and such should be considered the long-term detention of an orangutan in conditions that do not correspond to its cognitive and intellectual abilities. Noteworthy is the summary of the court's consideration of the animal's subjectivity: "The categorization of Sandra as a »non-human person« and, in consequence, as a subject of rights should not lead to a rushed and decontextualized claim that Sandra is therefore a possessor of the rights of the human persons. This is in no way transposable. On the contrary, as the expert Hector Ferrari says, »putting clothes on a dog is also abuse«".[26]

As the court further observes, the law does not distinguish any intermediate category between "subjects" and "entities" of law, which implies treating sentient beings as things. The dynamic interpretation of the law, according to the court, leads to noticing more legal entities that contradict the classical division into "things" and "persons". The notable exception is basically the French Civil Code, which introduces the legal category of "sentient beings". The court further notes that the relationship between man and animal has been shaped as a relationship of subordination, and the role of the animal is to serve man. In conclusion, the court confirms the recognition of the rights of orangutans and refers to expert opinions according to which the empirical evidence is that orangutans are a thinking, sentient, intelligent species, genetically similar to humans, with similar thoughts, emotions and sensitivities, and with the ability to self-reflect.[27]

---

[25] *Ibidem*, p. 1265.

[26] *La categorización de Sandra como "persona no humana" y en consecuencia como sujeto de derechos no debe llevar a la afirmación apresurada y descontextualizada de que Sandra entonces es titular de los derechos de las personas humanas. Ello de modo alguno es trasladable. Por el contrario, tal como lo señala el experto Héctor Ferrari "ponerle vestido a un perro también es maltratarlo"*, Juzgado Nº 2 en lo Contencioso Administrativo y Tributario de la CABA, A2174-2015/0, "Asociación de funcionarios y abogados por los derechos de los animales y otros contra GCBA s/amparo", translated by S. Gruda, unpublished translation, Warszawa 2020.

[27] The Supreme Court of India and High Courts also issued several interesting judgments regarding the legal status of animals, e.g. *Animal Welfare Board of India v A. Nagaraja & Ors*, (2014) 7 SCC 547; *N. Adithayan v Travancore Devaswom Board and Others*, (2002) 8 SCC 106; *People For Animals v Md Mohazzim & Anr*, CRL. M.C. NO.2051/2015 (The Delhi High Court), https://indiankanoon.org [access: 15.10.2019]. In the case *Animal Welfare Board of India v A. Nagaraja & Ors* the court stated: "All living creatures have inherent dignity and a right to live peacefully and

The court's view that animal rights existis crucial, not the mere recognition of the animal as a new category of legal entities. Recognizing the legal subjectivity of an animal is extremely important given the traditional division into "things" and "persons". However, the court's argument referring to the intellectual value of the orangutan is more important than simple recognition of existence of abstract rights. It seems that the court consciously does not use the term "dignity" understood as "human dignity", speaking only of "living in dignity", because reference to this term would directly cause even greater controversy. Despite this, the court justifies the existence of fundamental rights for the sake of certain orangutan features, which are essentially no different from human traits and although the word "dignity" is not mentioned in relation to them, it is the occurrence of "dignity traits" such as the ability to feel emotions, pain or broadly understood sensitivity, that leads to the approximation of the status of an orangutan to a human. The court's recognition of the special qualities of an orangutan also means that it deserves protection by itself.

The lawsuits initiated by the Nonhuman Rights Project, although ended with the dismissal or rejection of lawsuits by the New York State Courts, should be considered a success, especially from the point of view of animal interest. Firstly, they force discussions about animal rights, their welfare, ethical aspects of their use, etc. Secondly, some court decisions in animal cases, although outside the US, are beneficial to them. An example of such a decision is the above-mentioned judgment of the Argentine's court or a number of judgments issued before the Indian courts. Thirdly, there is a tendency to slowly deviate from the purely anthropocentric perception of law in general not only in terms of environmental law, but also in the scope of granting for animals a certain catalog of rights previously reserved for people.

The issue of legal subjectivity of animals raises a lot of controversy and there is no answer that would satisfy even the majority of people involved in the discussion. However, the law cannot run away from this problem. The best summary for a number of doubts this issue raises should be the statement of judge Fahey who was involved in the Kiko case: "In the interval since we first denied leave to the Nonhuman Rights Project, I have struggled with whether this was the right decision. Although I concur in the Court's decision to deny leave to appeal now, I continue to question whether the Court was right to deny leave in the first instance. The issue whether a nonhuman animal has a fundamental right to liberty protected by the writ of *habeas corpus* is profound and far-reaching. It speaks to our relationship with all the life around us. Ultimately, we will not be able to ignore it. While it may be arguable that a chimpanzee is not a »person« there is no doubt that it is not merely a thing".

right to protect their well-being which encompasses protection from beating, kicking, over-driving, over-loading, tortures, pain and suffering, etc. Human life, we often say, is not like animal existence, a view having anthropocentric bias, forgetting the fact that animals have also got intrinsic worth and value".

On the other hand, it is unjustified to talk about the existence of some universal catalog of animal rights corresponding to human rights, or about their legal subjectivity, even to a limited extent. However, there are isolated cases of giving animals the rights that people have. At the moment, it is difficult to say whether these are only isolated cases or a prelude to extend human rights to animals. We must wait for new legislators' decisions and court rulings.

References

Alvarez-Nakagawa A., *Law as Magic. Some Thoughts on Ghosts, Non-Humans, and Shamans*, "German Law Journal" 2017, No. 5.

Bar W., *Nowa dogmatyka Konstytucji Republiki Ekwadoru. Casus praw natury*, „Teka Komisji Prawniczej – OL PAN" 2010, Vol. 3.

Bosek L., Borysiak W., *Art. 30*, [in:] *Konstytucja RP*, t. 1: *Komentarz do art. 1–86*, red. L. Bosek, M. Safjan, Warszawa 2016.

Garlicki L., *Rozdział II: Wolności, prawa i obowiązki człowieka i obywatela. Zasady ogólne*, [in:] *Konstytucja Rzeczypospolitej Polskiej. Komentarz*, t. 3, red. L. Garlicki, Warszawa 2003.

Granat M., *Godność człowieka z art. 30 Konstytucji RP jako wartość i jako norma prawna*, „Państwo i Prawo" 2014, Nr 8.

Horta O., *What Is Speciesism?*, "The Journal of Agricultural and Environmental Ethics" 2010, No. 23.

Jedlecka W., *Z problematyki własności praw zwierząt*, [in:] *Własność w prawie i gospodarce*, red. U. Kalina-Prasznic, Wrocław 2017.

Kerr J.S., Bernstein M., Schwoerke A., Strugar M.D., Goodman J.S., *A Slave by Any Other Name Is Still a Slave: The Tilikum Case and Application of the Thirteenth Amendment to Nonhuman Animals*, "Animal Law" 2013, No. 19.

Kirste S., *A Legal Concept of Human Dignity as a Foundation of Law*, [in:] *Human Dignity as a Foundation of Law*, eds. W. Brugger, S. Kirste, Stuttgart 2013.

Kirste S, *Human Dignity and the Concept of Person in Law*, [in:] *The Depth of the Human Person: A Multidisciplinary Approach*, ed. M. Welker, Cambridge 2014.

Liszcz T., *Zwierzęta w prawie stanowionym*, „Więź" 1997, Nr 7.

Nazar M., *Normatywna dereifikacja zwierząt – aspekty cywilnoprawne*, [in:] *Prawna ochrona zwierząt*, red. M. Mozgawa, Lublin 2002.

Pietari K., *Ecuador's Constitutional Rights of Nature: Implementation, Impacts, and Lessons Learned*, "Willamette Environmental Law Journal" 2017, No. 2.

Pietrzykowski T., *Problem podmiotowości prawnej zwierząt z perspektywy filozofii prawa*, „Przegląd Filozoficzny – Nowa Seria" 2014, Nr 2.

Pietrzykowski T., *Podmiotowość prawna: ujęcie teoretyczne*, [in:] *O czym mówią prawnicy, mówiąc o podmiotowości*, red. A. Bielska-Brodziak, Katowice 2015.

Radcliffe S.A., *Development for a Postneoliberal Era? Sumak kawsay, Living Well and the Limits to Decolonisation in Ecuador*, "Geoforum" 2012, No. 43.

Ryder R.D., *Szowinizm gatunkowy, czyli etyka wiwisekcji*, translated by Z. Szawarski, „Etyka" 1980, Nr 18.

The Digest of Justinian, translation edited by A. Watson, Pennsylvania 1998.
Wise S.M., *Rattling the Cage. Toward Legal Rights for Animals*, Cambridge 2014.
Zubik M., *„Wolność" a „prawo" (pięć hipotez o stosowaniu pojęć konstytucyjnych dotyczących praw człowieka)*, „Państwo i Prawo" 2015, Nr 9.

Abstract: Practical implementation of the right to freedom by applying the *habeas corpus* order for animals is the subject of this work. The article deals with four proceedings initiated in the United States by the non-profit organization the Nonhuman Rights Project. The author tries to describe attempts to change the perception of animals only as things within the meaning of the law. Four court cases were presented for this purpose. All cases concerned the issue of a *habeas corpus* order for a chimpanzee. The article describes the most important fragments of court rulings on this subject and indicates the motives that determined the refusal to issue an order. In the following, the author presents the case of an orangutan, which was detained at a zoo in Buenos Aires and basically compares the positions of the courts. Mainly, the text presents key arguments raised by parties – supporters and opponents of issuing *habeas corpus* orders for animals. At the moment, there is no dominant position among lawyers and courts. Cases were precedential and therefore it cannot be determined how they will affect the legal system or the situation of animals.

Keywords: legal subjectivity; animal rights; dereification of animals; freedom; *habeas corpus*

EMILIA KUDASIK-GIL

Jagiellonian University, Faculty of Law and Administration, Kraków
Pablo de Olavide University, Faculty of Law, Seville
https://orcid.org/0000-0001-5935-5904
e.kudasik@gmail.com

Spanish Animal Protection Law – an Overview of Civil, Criminal and Administrative Provisions Concerning Animal Welfare

Introduction

Santiago Muños Machado raises a question: how is it possible that historically law had so little interest in animals, while we have always cohabitated together, using them in so many ways?[1] Law was silent about the human-animal relations for a long time, because animals were not (and they still are not) the subjects of it.[2] First provisions addressing animal issues were established mainly to conserve species for their usefulness to man, and not for the animals – as living beings – themselves.[3] In Spanish law, exceptional lack of concern for the protection of animals against their abuse can be proved through the late incorporation of legal regulations regarding animal welfare.[4] The glaring example is the ratification of the European Convention for the Protection of Pet Animals[5] only 30 years after its promulgation. Moreover, the

[1] *Los animales y el derecho*, ed. S. Muños Machado, Madrid 1999, p. 18.
[2] *Ibidem*, p. 23.
[3] *Ibidem*, p. 24.
[4] S.B. Brage Cendán, *Los delitos de maltrato y abandono de animales. Artículos 337 y 337 bis CP*, Valencia 2017, pp. 20–21.
[5] The European Convention for the Protection of Pet Animals, Strasbourg, 13 October 1987, European Treaty Series, No. 12, https://rm.coe.int/168007a67d [access: 11.10.2019].

Spanish Government made a reservation to exclude puppies of the hunting breeds (such as *galgos españoles*) from the conventional protection.[6]

There were, however, exceptions in relation to maltreatment of animals, such as *Real Decretos* elaborated in the 19th and 20th centuries. Unfortunately, according to Muños Machado, those regulations were hardly ever applicable, because of lack of concern of the authorities.[7] The European Union accession somehow forced Spain to develop provisions concerning animal issues[8] (standards arising from the European Union regulations were implemented automatically into the Spanish legal system), although Spanish national legislator decided not to adopt a particular act concerning only animal welfare issue, and to this day, it has not elaborated a nationwide animal protection act. However, there are provisions, mainly in the Spanish Civil Code, concerning animals in matters as diverse as: ownership, occupation, finding, usufruct, usage, easements, indemnification for defects in sale and purchase, lease, force majeure, games and betting, or tortious liability.[9]

Issue of animals in civil law

Art. 333 of the Spanish Civil Code[10] (hereinafter referred to as CC) stipulates that "all things that are or may be the object of appropriation are considered movable or immovable property".[11] Generally, this division is comprehensive – Art. 334 of CC indicates an enumerative list of assets classified as immovables, and remaining assets should be classified as movable goods. Jacinto Gil Rodríguez defines "things" as all objects "which are not a person and serve men",[12] not excluding animals from this category. Although it is not said directly, the analysis of Art. 346.I of CC set within Art. 335 of CC indicates that in terms of Spanish law, animals are treated as movable

[6] L. Lozano Benito, *Amputación de orejas y rabo en perros de rehala: un escenario de mutilación y maltrato*, "Blog de Derecho de los Animales. Abogacía Española", 11 octubre 2018, https://www.abogacia.es/2018/10/11/amputacion-de-orejas-y-rabo-en-perros-de-rehala-un-escenario-de-mutilacion-y-maltrato/?fbclid=IwAR27Awk-V1iIAEJtjDs_aTruKOfO1LOLOYjTgW5L-Rg2XNN5S1WOveE2B4d4 [access: 11.10.2019].

[7] *Los animales y el…*, pp. 80–82.

[8] At the beginning of the 21st century, it was emphasized that Spanish law concerning animal welfare should be equated with, or at least approximated to more restrictive regulations of EU member states (see G. Doménech Pascual, *Bienestar animal contra derechos fundamentales*, Barcelona 2004, pp. 152–153).

[9] C. Rogel Vide, *Personas, animales y derechos*, Madrid 2018, p. 31.

[10] Spanish Civil Code of 25 July 1889, Spanish Official Journal No. 206 (repealed on 4 August 2018).

[11] All Spanish-English translations were made by the author of the article.

[12] *Código Civil Comentado*, Vol. I, eds. P. de Pablo Contreras, R. Valpuesta Fernández, Navarra 2011, p. 1354.

property, which is also unanimously accepted in the civil law literature.[13] Utter reification is brightly visible in Art. 355 of CC, which emphasizes that an offspring of an animal is legally considered a natural fruit.

Spanish doctrine elaborated the special legal term – *semoviente*[14] – to classify animals[15] as exceptional movables, "living things" capable of reproduction and movement, in contrast within animate things. It follows that *semovientes* are not a third category of things, different from movables and immovables, as Spanish law stands by the classic, Roman dichotomy between objects and subjects of law.[16] Nevertheless, Carlos Rogel Vide, representative of the Spanish civil law doctrine, accentuates that despite the existence of dichotomous terms – subject and object of law – animals do not necessarily have to be classified as things (whether movables or immovables), because the term "object", containing also energy or intangible assets, is much wider than the term "thing".[17] The author subscribes to the thesis that animals "are neither things, nor persons",[18] they are something in between – a "third genre". It is also indicated in the literature that, although provisions concerning animals are part of common civil law regime, in certain cases, being *semoviente* leads to the necessity of applying appropriate, peculiar rules in order to respect the effective separation of animals from things.[19] This conclusion demonstrates that in reality animals enjoy superior status than actual things, however, it does not imply that animals are subjects of law or that they were given any individual rights.[20]

In 2014, the problem of poor animal welfare in Spain was noticed by the World Animal Protection organization while creating the worldwide ranking concerning the commitment to animal protection in 50 countries.[21] The Animal Protection Index assesses the animal welfare policy of each country using 15 different indicators. Spain was ranked with "C" (on the A–G scale), and was last but one (of all EU countries), followed only by Romania. The most highlighted issue in the report is the lack of

[13] Among others: S.B. Brage Cendán, *op. cit.*, pp. 30–31; C. Gil Membrado, *Régimen jurídico civil de los animales de compañía*, Madrid 2014, p. 16; *Los animales y el…*, p. 24, 47; M.P. Sánchez González, *Los animales como agentes y víctimas de daños en el Derecho Civil*, [in:] *Los animales como agentes y víctimas de daños*, ed. J.M. Pérez Monguió, Barcelona 2008, pp. 19–20.

[14] This term can be translated into "livestock", but a rough translation is "a thing moving itself".

[15] Traditionally, it included only farm and labour animals, but nowadays it refers to all animals, as they can move from one place to another by themselves without any help of their owners and sometimes even against their will (see C. Rogel Vide, *Los animales en el Código Civil*, Madrid 2017, pp. 14–15).

[16] Muños Machado indicates that civil law only recognises two categories of legal entities: persons and things. So, if animals are not human beings, they are things (see *Los animales y el…*, p. 47).

[17] C. Rogel Vide, *Personas…*, pp. 33–34.

[18] *Ibidem*, p. 76.

[19] M.P. Sánchez González, *op. cit.*, p. 20.

[20] *Ibidem*, p. 24.

[21] For more information: https://api.worldanimalprotection.org/ [access: 11.10.2019].

formal recognition of animal sentience in nationwide legislation.[22] Neither the Spanish Constitution nor the Civil Code nor any other nationwide regulation identifies animals as "living beings" or explicitly recognises their sentience. At the same time, in view of the fact that Spain is a part of the European Union, it applies in its legal order Art. 13 of the Treaty on the Functioning of the European Union[23] which considers animals as sentient beings.[24] Moreover, the Act on Care for Animals on Farms, during Transport, Slaughter and Experimentation,[25] applicable to vertebrate animals used in production or for scientific experimentation, in several provisions makes references to animal suffering, which can be understood as indirect acknowledgement of the fact that animals are sentient beings, although, unfortunately, in Art. 2.2, the Spanish legislator explicitly excluded wild animals (even in captivity), bulls used in bullfights and pet animals from the scope of the Act application.

It is also worth noting that each Spanish Autonomous Community is entitled to legislate in the field of animal protection. Nowadays it is exactly the autonomous law which mainly regulates those problems in Spain through regional animal protection acts. The Autonomous Community of Catalonia was a pioneer in establishing regulations concerning animal welfare.[26] It is known as the most animal-friendly region in the whole Spain, as evidenced by the text of the current, repeatedly amended Catalan Animal Protection Act, saying that its purpose is to "(…) reach the greatest

[22] *Animal Protection Index, Kingdom of Spain*, p. 1, https://api.worldanimalprotection.org/sites/default/files/api_spain_report_.pdf [access: 11.10.2019].

[23] Consolidated version of the Treaty on the Functioning of the European Union, Official Journal C 326/47, 26/10/2012, pp. 0001–0390, https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:12012E/TXT&from=EN [access: 11.10.2019].

[24] This provision states that: "In formulating and implementing the Union's agriculture, fisheries, transport, internal market, research and technological development and space policies, the Union and the Member States shall, since animals are sentient beings, pay full regard to the welfare requirements of animals, while respecting the legislative or administrative provisions and customs of the Member States relating in particular to religious rites, cultural traditions and regional heritage". It is considered as both the general principle of EU law and legal norm, and therefore EU law and Spanish law must respect animal welfare in the relevant fields, in accordance with the derogation clause. In other case, the European Union Court of Justice has a right to rule annulment of those regulations which are not compliant with Art. 13 TFEU (see E. Alonso, *El artículo 13 del Tratado de Funcionamiento de la Unión Europea: Los animales como seres «sensibles [sentientes]» a la luz de la jurisprudencia del Tribunal de Justicia de la Unión Europea*, [in:] *Animales y Derecho. Animals and the Law*, eds. D. Favre, T. Giménez-Candela, Valencia 2015, p. 18, 25–27, 31; M. Wartenberg, *Art. 13 Lisbon Treaty/TFEU – Historical, Constitutional and Legal Aspects*, [in:] *Animales y…*, pp. 336–337, 345–346).

[25] The Act of 7 November 2007 on Care for Animals on Farms, during Transport, Slaughter and Experimentation, Spanish Official Journal, No. 268, 8 November 2007, pp. 45914–45920.

[26] First Animal Protection Act was elaborated in 1988 and was considered to be very progressive and animal friendly (Animal Protection Act of 4 March1988, Spanish Official Journal, No. 75, 28 March 1988, pp. 9594–9603).

level of animal protection and welfare" (Art. 2.1).[27] Moreover, Art. 2.2 of the Act says that: "(…) animals are living beings endowed with physical and psychic sensibility, as well as a voluntary movement, and should receive the treatment corresponding to their ethological needs, which, additionally, would ensure their well-being". Also, the Catalan Civil Code[28] distinguishes animals from things, indicating in Art. 511.1.3 that "(…) animals, which are not considered things, are under the special protection of law. The rules regarding property are applied only when the nature of animal allows it".

World Animal Protection organization also pointed out "socio-cultural barriers to improving animal welfare",[29] referring mainly to bullfights and hunting. The report also states that improvement of animal welfare is not a priority for the government, however, since 2014, governmental approach to animal welfare issues began to change. As regards the shaping of legislation concerning animal welfare, the recently proposed amendment to the Spanish Civil Code submitted by the parliamentary group *Ciudadanos* in 2016,[30] suggests recognition of a special legal status of animals, distinct from things, and goes even further with suggesting that companion animals should be located outside the person's estate for all legal purposes, so that they are unattachable, absolutely indivisible in situations of co-ownership and non-transferable in the case of onerous contracts. This project has sparked the debate on the nationwide animal welfare law, or more precisely, the lack of it. During the parliamentary discussion about the draft law in 2017, members of Congress noted that nationwide law considering animal protection should be enacted, because of immense differences between different Autonomous Communities' regulations[31] which commonly lead to legal uncertainty.

Additionally, in 2017, the parliamentary group *Popular* proposed another amendment to the Civil Code, Mortgages Act and Civil Procedure Code[32] regarding the legal status of animals. The proposition of revision concerns in particular the issue of nature

[27] Legislative Decree of 15 April 2008, which approves the repealed version of the Catalan Animal Protection Act, Catalan Official Journal, No. 5113, 17 April 2008.

[28] Catalan Civil Code of 10 May 2006, Spanish Official Journal, No. 148, 22 June 2006 (repealed on 22 February 2017).

[29] *Animal Protection Index*…, p. 2.

[30] Official Bulletin of the Cortes Generales – Congress of Deputies XII legislature, series D, No. 8 of 25 October 2016, proposition of law on the modification of the legal regime of pets in the Civil Code, pp. 74–75, http://www.infocoponline.es/pdf/BOCG-12-D-38-C1.pdf. [access: 11.10.2019].

[31] C. Rogel Vide, *Personas*…, pp. 49–51 and the references therein. An example of imbalance between particular laws are the amounts of fines which have to be paid as consequence of committing administrative offences in different autonomous communities (see J.M. Pérez Monguió, *Los animales como agentes y víctimas de daños en el Derecho administrativo* [in:] *Los animales*…, pp. 339–340) or penalization of certain conducts, e.g. the Canary Islands permits traditional cockfighting, forbidden in other Spanish communities (see C. Bécares Mendiola, M. González Lacabex, *Avances y retos del Derecho animal en España*, [in:] *El Derecho de los animales*, ed. B. Baltasar, Madrid 2015, p. 251).

[32] Official Bulletin of the Cortes Generales – Congress of Deputies XII legislature, series B, No. 167-1 of 13 October 2017, propositions of law, http://www.congreso.es/public_oficiales/L12/CONG/BOCG/B/BOCG-12-B-167-1.PDF [access: 11.10.2019].

of animals, naming them "sentient living beings" (no longer things), but still including them in the category of objects.[33] The proposed changes in law affect a lot of provisions of the Civil Code, such as animals' status during and after the divorce[34] or obligations of the owner in relation to animals.[35] Regarding the Mortgages Act,[36] there would be no longer the possibility of burdening farm or recreational animals with a mortgage. Furthermore, it would be forbidden to seize pet animals, according to the new Art. 605.1 of the Spanish Civil Procedure Code.[37] During the parliamentary debate on the amendment,[38] it was emphasized that a state law of animal welfare should be adopted and that the Spanish Parliament should elaborate the regulations concerning the appearance of animals in festivals and other public spectacles, with special reference to those during which bulls are tortured or slaughtered. Moreover, the opinion that bull-involving festivities (especially *corridas de toros*) should be removed from the declaration of cultural assets of national interest was presented.

Both of the above-mentioned amending proposals were very well received by the Congress of Deputies, but neither of them was enacted yet. What is more, the language of new provisions still uses the term "object" in regard to animals, and in reality, treats them as things.[39] That is why, in my opinion, new regulations do not bring any value, but rather constitute an attempt to reach the average European standard in terms of animal protection. Nevertheless, those initiatives are commendable, but their adoption is highly unlikely.

Problem of bullfighting

Bullfighting (*la tauromaquia*) in Spain goes back several centuries. Forbidden in other European countries, it is still admired in the Iberian Peninsula. The "spectacle" is divided into three parts: the aim of the first (*tercio de varas*) and second (*tercio de*

[33] The proposed new Art. 333 bis explicitly says that animals also could be objects of appropriation but with limits established by other legal regulations.

[34] The most important amendment obliges to establish the custody on animals during and after the divorce, taking into consideration their welfare (Art. 90 nueva letra c).

[35] The owner would have to enjoy and dispose of an animal respecting its sentience and guarantee its welfare depending on the species.

[36] Mortgages Act of 8 February 1946, Spanish Official Journal, No. 58, 27 February 1946, pp. 1518–1532 (repealed on 16 March 2019)

[37] Spanish Civil Procedure Code of 7 January 2000, Spanish Official Journal, No. 7, 8 January 2000 (repealed on 15 April 2019).

[38] Cortes Generales, Journal of Sessions of the Congress of Deputies, Plenary and Permanent Deputation, No. 97 of 12 December 2017, p. 6ff, http://www.congreso.es/public_oficiales/L12/CONG/DS/PL/DSCD-12-PL-97.PDF [access: 11.10.2019].

[39] The new Art. 333.3 mentions the "value of the animal", and Art. 357.2 still stands that offspring of animals are natural fruits.

banderillas) stages is to injure and debilitate a bull, while in the third one (*tercio de muerte*), the bull is put to death.[40] Bullfighting is still very popular in Spain, however, according to Juan Madueño,[41] the opinion poll conducted in 2019 shows that more than half of the Spanish people would want to either totally ban bullfights or at least limit them somehow. Responding to the social landscape, three out of seventeen Autonomous Communities elaborated laws referring to this matter. The first Spanish region which banned bullfights was the Canary Islands, in 1991,[42] although it was not done explicitly, since Art. 5 indicates that "the usage of animals in fights, shows, and other activities that lead to their abuse, cruelty or suffering is prohibited". In 2010, Catalonia, as the first region in mainland Spain, passed the laws directly prohibiting this activity.[43] Moreover, the Balearic Islands made an attempt to forbid bullfights in 2017.[44] As in the case of the Canary Islands, the Parliament of the Balearic Islands prohibited bullfighting indirectly, but to effectively make it unviable, it imposed strong restrictions, banning hurting or killing animals in any way during the fight (Art. 9).

Unfortunately, those positive initiatives have been withdrawn by the Constitutional Court (hereinafter referred to as TC), which examined two constitutional motions initiated by 50 Senators (regarding Catalonia) and the President of the Government (regarding the Balearic Islands). Both verdicts were based on the 18/2013 Act,[45] which classified bullfighting as Spanish cultural heritage. In case of the Catalan Act, nine out of twelve TC judges made a decision on the annulment of the legal provision prohibiting bullfighting in Catalonia.[46] According to the reasoning of TC, Catalonia had exceeded its legislative powers in terms of banning bullfights, because the "preservation of common cultural heritage" was the responsibility of the state. In other words, Autonomous Communities have no power to legislate in this scope, therefore, they cannot prohibit bullfighting. Moreover, it is the state which is obliged to preserve and promote bullfighting. Taking the Balearic Islands into consideration, the TC annulled

[40] For more information about *corrida de toros*, see: J. Mosterín, *La tortura como espectáculo*, [in:] *Los derechos de los animales*, ed. M. Tafalla, Barcelona 2004, pp. 240–244.

[41] J. Madueño, *Más de la mitad quiere "limitar o prohibir" los toros y la caza*, "El Español", 12 enero 2019, https://www.elespanol.com/espana/20190112/mitad-quiere-limitar-prohibir-toros-caza/367963207_0.html [access: 11.10.2019]. Moreover, already in the 1990s, opinion polls showed that the majority of Spanish citizens did not like bullfights (see J. Mosterín, *op. cit.*, p. 245).

[42] Animal Protection Act of 30 April 1991, Spanish Official Journal, No. 152, 26 June 1991, pp. 21196–21199.

[43] Act of 3 August 2010, amending Art. 6 of the revised text of the Animal Protection Act, approved by Legislative Decree 2/2008, Spanish Official Journal, No. 205 of 24 August 2010, pp. 73974–73975.

[44] Act of 3 August 2017 for regulating bullfights and animal protection in the Balearic Islands, Spanish Official Journal, No. 223, 15 October 2017, pp. 91030–91038.

[45] Act of 12 November 2013 for regulating bullfighting as cultural heritage, Spanish Official Journal, No. 272, 13 November 2013, pp. 90737–90740.

[46] Judgment of the Constitutional Court 177/2016 of 20 October 2016, Spanish Official Journal, No. 285, 25 November 2016.

the part of regional 2017 Animal Welfare Act regarding prohibition of killing bulls in bullfights.[47] In general, it has been said that without killing a bull, which is the crucial part of a bullfight, the spectacle cannot be named *corrida de toros*, hence the Act, in fact, prohibits bullfighting, which is Spain's cultural heritage. The question relating to the validity of the Canary Islands Law at present time remains open.

Animal abuse in the Spanish Penal Code

Since 1995, the Spanish Penal Code (hereinafter referred to as CP) provides criminal sanctions for animal abuse. However, it was not until 2003, when an amendment introduced a criminal offence of animal cruelty into the Penal Code.[48] Previously, the now non-existent Art. 632 of CP[49] merely provided for animal abuse-related misdemeanour, punishable by fine. The Art. stated that only "cruel mistreatment of pet animals or other animals in unauthorized spectacles" would lead to criminal liability. Unfortunately, the tenor of this provision was unclear. Some of Spanish legal commentators approve the interpretation that it does not matter whether it comes to pets or other animals, it is essential in all cases, that the maltreatment takes place during unauthorized spectacles. In 1998, Audiencia Provincial in Segovia[50] interpreted the provision mentioned above, indicating that two different interpretations are admissible. According to the judge, the grammatical interpretation indicates that cruel mistreatment of pet animals always leads to criminal liability, but in regard to other animals, only if it is conducted in unauthorized spectacles.[51] As stated by the judge, this way of understanding Art. 632 of CP is also correct regarding systematic analysis of law in which pets, as being closer to the humans than other animals, are protected more extensively.[52] However, in spite of favourable interpretation, Audiencia

[47] Judgment of the Constitutional Court 134/2018 of 13 December 2018, Spanish Official Journal, No. 13, 15 January 2019.

[48] Teresa Giménez-Candela mentions that this reform was carried out after the widely known, cruel incident which took place in Tarragona in 2003. Group of people broke into the dogs' kennel and brutally killed fifteen dogs, firstly hanging them on the tree and then cutting off their legs and leaving them to bleed to death. This incident led to the harsh criticism of the then criminal norms among the majority of Spaniards and ended with tightening of provisions concerning animals in the Penal Code (see T. Giménez-Candela, *The Overview of Spanish Animal Law*, [in:] *Animales y Derecho*…, p. 205).

[49] Spanish Penal Code of 23 November 1995, Spanish Official Journal, No. 281, 24 November 1995, pp. 33987–34058 (repealed on 2 March 2019). The whole *Libro III* of Spanish Penal Code, including Art. 632, has been repealed by the amendment in July 2015.

[50] Judgment of a Provincial Court of Segovia, 15 September 1998 (ARP 3755) discussed by Alonso Sánchez Gascón (*Jurisprudencia sobre perros*, Madrid 2002, pp. 253–255).

[51] This way of interpretation is also presented by S.B. Brage Cendán, *op. cit.*, pp. 105–106.

[52] Both interpretations were applied by the Spanish jurisprudence, but it seems like the supporters of the second one are in the minority (see *Código Penal concordado y comentado con jurisprudencia*

Provincial passed the verdict acquitting the owner of an abused horse. The maltreatment did not take place during legally unauthorized spectacle and according to the majority of the doctrine, it is impossible to extend the concept of pet animals so that it includes a horse.[53]

In addition to the above, Chapter IV of Title XVI of Book II of the Spanish Penal Code has been repeatedly amended. At the very beginning, it contained only 6 articles in relation to flora and fauna protection, mostly concerning hunting and fishing. Some changes were made through the amendments in 2003 and 2010, but the most relevant one was the 2015 reform of the Spanish Penal Code. Thenceforth, Art. 337 of CP[54] provides for the crime of unjustified mistreatment of animals which causes injuries, severely damaging their health or which subjects them to sexual exploitation. The term "animals" in the discussed provision refers only to pets, tamed, or generally domesticated animals, the animals which live temporarily or permanently under the human control and to any other animals except those living in the wild. Moreover, Section 3 provides for the aggravated type of the basic crime if the consequence of maltreatment is death of an animal, providing for, at the same time, increased penalties for the perpetrator. Exhaustive enumeration of specific kinds of animals, which are protected under the Spanish penal law differs from modern animal protection regulations in other European countries such as Germany or Poland. German Animal Protection Act[55] covers all vertebrate animals, while Polish Animal Protection Act[56] regulates the proceedings with vertebrate animals (Art. 2.1), at the same time stating that all animals, as living and sentient beings, are not things (Art. 1.1). That legislative technique appears to be more transparent and, as a consequence, ensures greater legal certainty. Also, because of the fact that bullfights are not classified as unjustified mistreatment of a bull, as long as they are authorised, those animals do not enjoy legal protection.[57]

---

y leyes penales especiales y complementarias, ed. L. Rodríguez Ramos, Madrid 2015, p. 1786; S.B. Brage Cendán, *op. cit.*, p. 104 and references therein).

53 In judgment of a Provincial Court of Madrid 16a, 335/2008, of 21 May 2008, it is said that the term "domestic animal" should be understood as an animal which accompanies its owner and cohabitates with them. However, Brage Cendán mentions other interpretation, based on the definition offered by the *Diccionario de la Lengua Española*, according to which, domesticated animals are not only pets, but also those depending on humans for their subsistence, supported by the majority of doctrine and jurisprudence (see S.B. Brage Cendán, *op. cit.*, p. 65 and references therein).

54 Spanish Penal Code of 23 November1995, Spanish Official Journal, No. 281, 24 November 1995 (repealed on 2 March 2019).

55 Animal Welfare Act as published on 18 May 2006 (Federal Law Gazette I p. 1206, 1313), which was last amended by Art. 1 of the Law of 17 December 2018 (Federal Law Gazette I p. 2586), http://www.gesetze-im-internet.de/tierschg/BJNR012770972.html [access: 11.10.2019].

56 Animal Protection Act of 21 August 1997 (consolidated text, Journal of Laws of 2019, item 122, as amended).

57 T. Giménez-Candela, *op. cit.*, pp. 220–221.

Nonetheless, it seems that the major change in penal law was introduced between the lines. In the literature on the subject before 2015, and in the current discussion there is no consensus on what the object of legal protection under Art. 337 of CP is. Most common concepts suggest that the legally protected good is related to human interests. In this scope, legal goods such as animal's owner property, environment, human morality or feelings are mentioned. However, according to Santiago B. Brage Cendán, the 2015 amendment replaced the traditional, anthropocentric character[58] of penal regulations with zoocentric viewpoint.[59] In the author's opinion, since 2015, the animal welfare – more precisely animal's interest in lack of suffering[60] – is considered a legally protected good under Art. 337 of CP. In addition, the author states that its interest should be understood as the animal's right not to suffer unnecessary and unjustified abuse, although noting that it is not a homogenous view.[61] On the other hand, Luis Ruiz Rodríguez considers that the protected good is an abstract relation between man and animal.[62] Nowadays, each of the approaches presented above has its supporters and critics in the Spanish doctrine.

Brage Cendán states that reforms in criminal law provided by the 2015 amendment were introduced on the basis of the increased sensibility of Spanish society concerning animal welfare.[63] That thesis can be supported by the data published in the Annual Report elaborated by the State Attorney General's Office, presenting that 163 sentences for mistreatment of domestic animals were delivered in 2017, which is a 58% increase in convictions compared to the previous year, which can be explained

[58] "Anthropocentric" means believing that humans are more important than anything else. Such an approach means that "animals are creatures serving man, completely dominated by him" (see *Los animals y el…*, p. 43). The author also emphasizes that before the 2003 amendment (the book was published in 1999), all regulations of the Spanish Civil Code were made only with regard to human interest, without paying attention to animal protection as a living being (*Ibidem*, p. 48). The anthropocentric approach is highly visible in the idea that animal protection is indirectly based on constitutional rules, only because the Spanish constitution protects goods such as possession or ownership. In this concept, certain animals' freedom from suffering or death must serve their owners, consumers, biodiversity or environment, etc. The Spanish Constitution does not establish provisions in animals' interest and does not postulate the animal welfare (see G. Doménech Pascual, *op. cit.*, p. 133).

[59] S.B. Brage Cendán, *op. cit.*, pp. 59–60, 69.

[60] This proposition is rarely presented and widely criticized by today's authors, because of the generally supported view that law has an anthropocentric character (see L. Ruiz Rodríguez, *Posición y tratamiento de los animales en el Sistema penal*, [in:] *Los animales*..., pp. 185–186). However, J.M. Pérez Monguió also indicates that the animal itself is a legally protected good in Spain (see J.M. Pérez Monguió, *op. cit.*, p. 244).

[61] *Ibidem*, pp. 47–58. However, the majority of the authors refuse to recognize even basic animal rights, like the right to live or not to suffer, indicating that it is only human legal obligation to take care of animals and provide them with it (see L. Ruiz Rodríguez, *op. cit.*, p. 184).

[62] *Ibidem*, p. 187.

[63] S.B. Brage Cendán, *op. cit.*,p. 69.

by "an increasing awareness of the existence of the natural environment".[64] On the other hand, statistics show that convicting judgements were given only in 17.8% of all 914 conducted judicial procedures, however, the sheer number of proceedings increased by 18% compared to 2016.[65] Also, the jurisprudence line opposing the animal abuse in the name of the tradition has been already initiated in Spain, but as Teresa Giménez-Candela emphasizes, Spain is still far from defending animals' "interests", because it is not grounded in social awareness yet.[66]

The *galgos* case

Spain is known for its strong hunting tradition – approximately 90% of the Spanish land is an area intended for this national sport.[67] Unfortunately, the current Spanish Hunting Act of 1970[68] states in Art. 1 that its main objective is to protect, conserve and promote national hunting wealth, but mentions nothing corresponding to wild animals' welfare. Furthermore, Art. 28 explicitly allows hunting with dogs. One of the hunting dog breeds is *galgo español*. Those dogs are treated more like hunting tools, like things, rather than living beings capable of feeling, and they are commonly abandoned or slaughtered when no longer needed. It is estimated that each and every year in Spain, 50,000 *galgos* are abandoned or killed,[69] particularly in February, when the hunting season ends.[70] Oscar Horta noticed that hunting dogs are the victims of

[64] M.J. Segarra Crespo, *Memoria elevada al Gobierno de S.M. presentada al inicio del año judicial por la Fiscal General del Estado*, Madrid 2018, p. 26, 597–598, https://www.elconfidencialdigital.com/media/elconfidencialdigital/files/2019/06/28/MEMFIS18.pdf [access: 11.10.2019].

[65] *Ibidem*, p. 596.

[66] T. Giménez-Candela, *op. cit.*, p. 223 and the references therein.

[67] J. Santarén, *El negro misterio de los galgos abandonados*, "El País", 14 mayo 2019, https://elpais.com/elpais/2019/05/07/animalesycia/1557216912_339358.html?fbclid=IwAR1dsZO-hN-q6cXeeIWqeahRgUSEnzpLeU2xmwO69UoWE5MTNbkLkSBOf2w [access: 11.10.2019].

[68] Hunting Act of 4 April 1970, Spanish Official Journal, No. 82, 6 April 1970 (updated on 23 December 2009).

[69] Brage Cendán (*op. cit.*, p. 12) refers to the data mentioned by Carmen Requejo Conde in *El delito de maltrato a los animales*, "Diario La Ley" 2007, nº 6690, p. 1. The same number (including abandoned, as well as murdered *galgos*) is mentioned by Jenifer Santarén. The author refers to the data published by the No a la Caza (NAC) platform (see J. Santarén, *El negro misterio-los galgos abandonados*, "El Pais", 14 May 2019, https://elpais.com/elpais/2019/05/07/animalesycia/1557216912_339358.html?fbclid=IwAR1dsZO-hN-q6cXeeIWqeahRgUSEnzpLeU2xmwO69UoWE5MTNbkLkSBOf2w [access: 11.10.2019]). However, since there is no official register of abandoned dogs, numbers change depending on different associations connected with animal protection; L. Villa, *Acaba la temporada de caza, arranca la del abandono de perros*, "Público", 2 febrero 2018, https://www.publico.es/sociedad/maltrato-animal-acaba-temporada-caza-arranca-abandono-perros.html [access: 11.10.2019].

[70] R. Argullo, *La jauría humana*, [in:] *Los derechos*..., p. 155.

hunting equally with killed animals, as they are killed when they get old or they are shot by mistake during the chase.[71]

The above situations happen despite the fact that since 2003, Spain penalizes abandonment – firstly only of pet animals, but after the 2015 amendment – of all animals mentioned in Art. 337 of CP (Art. 337 bis CP). To commit this crime it is, however, required that abandonment is conducted in conditions at least endangering the life or integrity of an animal (abstract or hypothetical risk). Moreover, almost every Autonomous Community in its regulations concerning animal protection refers somehow to abandonment, penalizing it as an administrative offence, and determining the process of catching animals, recollecting them from shelters, and transferring the rights to the animal to its new owners (*cession*). Sadly, only the Catalan Animal Protection Act directly prohibits the rescued animal's slaughter,[72] while other laws provide for conditions under which this action could be conducted.[73] However, it is foreseen as the final option, because the adoption of an animal should be given priority and is generally preferred by the law.[74]

Animal protection in administrative law

Finally, a few words about administrative law. In Spain, it is mainly the public law which regulates the human-animal relations within the scope of animal protection.[75] This legal system is composed almost exclusively of norms elaborated by Autonomous Communities,[76] such as, *inter alia*, the Catalan Animal Protection Act. It was mentioned above that Spain lacks nationwide animal welfare laws, although there exists the Act on Care for Animals on Farms, during Transport, Slaughter and Experimentation, which contains administrative provisions concerning animal protection, implemented in order to fulfil requirements imposed by the European Union.

It has to be emphasized, that before the incorporation into the penal system provisions concerning animal mistreatment (like, e.g. Art. 337 of CP), animal abuse was considered as an administrative offence, recognised by particular regional laws. In accordance with the principle *ne bis in idem*, those regulations, although still legally

[71] O. Horta, *Un paso adelante en defensa de los animales*, Madrid 2017, p. 68.

[72] C. Bécares Mendiola, M. González Lacabex, *op. cit.*, p. 251.

[73] For example, Pets Protection Act of Castilla y León Community of 24 April 1997 in Art. 21.1 states that, in addition to sanitary reasons regulated in the corresponding regulations, animals may be slaughtered by the Public Administrations or their collaborating entities after the reasonably carried out unsuccessful search for the owner, and only if it is impossible to care for them in an animal shelter or other facility.

[74] M. González Lacabex, *La adopción de animales de compañía en el Derecho español*, [in:] *Animales y Derecho*..., pp. 238–239.

[75] J.M. Pérez Monguió, *op. cit.*, p. 212.

[76] *Ibidem*, p. 211.

binding, shall only apply to the conducts which do not comply with conditions included in provisions provided by criminal law (such as killing an animal, but without viciousness, cruelty or injustice), which means that those acts are still punishable under the administrative provisions. The foreseen sanction for an infraction is a fine up to EUR 30,000.[77] But it is not only the animal abuse which is punishable under the public law. Individual, autonomous laws introduce different offences or prohibitions in relation to animal protection, e.g. an offence of mutilation or prohibition of animal fights.

Conclusions

Spain is widely considered as an animal-unfriendly country[78] due to numerous traditions like *sanfermines*, *toro embolado* ("burning of the bulls"), bullfighting or hunting. Recently, activists in Europe recognized the problem of abandoning, abusing and killing Spanish *galgos* by their owners immediately after the hunting season is over. Not only the *galgo* massacre issue shows Spanish citizens' attitude to animals. Every year lots of people cultivate tradition and take part in numerous festivals during which bulls and other animals are abused and murdered.[79] In addition, the Spanish law, which does not favour animals, treats them as things.

Therefore, on the basis of the above it seems surprising that the wide discussion about the status/situation of animals during and after the divorce has been recently raised in Spain. Even in current literature on the subject, it is said that pet animal in majority of cases is "an additional member of the family" and that the relation between humans and pets are similar to those between parents and their children.[80] It is quite common that in the separation or divorce agreements or in last wills, the custody of the animal and visiting schedules are determined.[81] However, according to the Spanish jurisdiction, it is unclear whether those agreements are enforceable

[77] *Ibidem*, p. 248.

[78] Even Spanish academic writers emphasize that, indeed, Spain is considered as an animal-unfriendly country (see O. Horta, *op. cit.*, p. 14). Alfredo Merino, referring to the words of Jesús Mosterín, indicates that Spaniards are one of the most cruel societies in the world as far as the approach towards animals is concerned (see A. Merino, *Los europeos más crueles con los animales*, [in:] *Los derechos*…, p. 237). On the other hand, some authors emphasize that this is important to notice, that not all Spanish people support bullfights, some of them even denounce it and feel ashamed of it (see M. Vincent, *Antitauromaquia*, [in:] *Los derechos*…, p. 252; J. Mosterín, *op. cit.*, p. 248).

[79] For example: running the bulls (Pamplona), fire bulls (Soria), the bull of La Vega in Tordesillas (Valladolid), the Cazalilla turkey (Jaen), but many other cities and villages have their own more or less known festivals (see T. Giménez-Candela, *op. cit.*, p. 219).

[80] C. Gil Membrado, *op. cit.*, p. 59.

[81] Admissibility Decision of a Provincial Court of Barcelona of 5 April 2006 (JUR\2006\171630); Judgment of a Provincial Court of León of 25 November 2011 (JUR\2011\427786).

or unenforceable.[82] It also seems unusual that in the Spanish legal system, in which animals are considered as goods, most autonomous laws incorporate term "adoption" to name the legal action consisting of transfer of all rights to the pet to new owner by the animal shelters.[83]

Those cases show, however, that Spanish people's unfavourable approach to animals has become to change, although it mainly refers to pet animals. The author's intention was to show that in recent years there has been made progress in the Spanish animal protection law. According to the cited statistics, the number of people convicted of animal abuse increases. Likewise, during some *fiestas*, live animals are replaced with plastic models.[84] However, much remains to be done to improve the situation of animals in Spain. The adoption of proposed amendments to Civil Code, presented in the Parliament by two political parties, would be a step towards adjusting the law to the current standards backed by the latest scientific research, indicating that animals are sentient beings. In consequence, this would lead to an improvement of animal welfare. As long as Spanish law treats animals as movables and does not directly recognise animal sentience, its regulations will remain at the lower end of the whole European Union. However, without changing Spaniards' attitude towards animals and without the application of new provisions by the relevant authorities, even the best written laws will remain only symbolic.

References

Alonso E., *El artículo 13 del Tratado de Funcionamiento de la Unión Europea: Los animales como seres «sensibles [sentientes]» a la luz de la jurisprudencia del Tribunal de Justicia de la Unión Europea*, [in:] *Animales y Derecho. Animals and the Law*, eds. D. Favre, T. Giménez-Candela, Valencia 2015.

Argullo R., *La jauría humana*, [in:] *Los derechos de los animales*, ed. M. Tafalla, Barcelona 2004.

Bécares Mendiola C., González Lacabex M., *Avances y retos del Derecho animal en España*, [in:] *El Derecho de los animales*, ed. B. Baltasar, Madrid 2015.

Brage Cendán S.B., *Los delitos de maltrato y abandono de animales. Artículos 337 y 337 bis CP*, Valencia 2017.

Código Civil Comentado, Vol. I, eds. P. de Pablo Contreras, R. Valpuesta Fernández, Navarra 2011.

Código Penal concordado y comentado con jurisprudencia y leyes penales especiales y complementarias, ed. L. Rodríguez Ramos, Madrid 2015.

Doménech Pascual G., *Bienestar animal contra derechos fundamentales*, Barcelona 2004.

Gil Membrado C., *Régimen jurídico civil de los animales de compañía*, Madrid 2014.

Giménez-Candela T., *The Overview of Spanish Animal Law*, [in:] *Animales y Derecho. Animals and the Law*, eds. D. Favre, T. Giménez-Candela, Valencia 2015.

[82] C. Gil Membrado, *op. cit.*, pp. 61–69 and references therein.

[83] M. González Lacabex, *op. cit.*, p. 242.

[84] J.M. Pérez Monguió, *op. cit.*, p. 277 and references therein.

González Lacabex M., *La adopción de animales de compañía en el Derecho español*, [in:] *Animales y Derecho. Animals and the Law*, eds. D. Favre, T. Giménez-Candela, Valencia 2015.

Horta O., *Un paso adelante en defensa de los animales*, Madrid 2017.

Los animales como agentes y víctimas de daños, ed. J.M. Pérez Monguió, Barcelona 2008.

Los animales y el derecho, ed. S. Muños Machado, Madrid 1999.

Lozano Benito L., *Amputación de orejas y rabo en perros de rehala: un escenario de mutilación y maltrato*, "Blog de Derecho de los Animales Abogacía Española", 11 octubre 2018, https://www.abogacia.es/2018/10/11/amputacion-de-orejas-y-rabo-en-perros-de-rehala-un-escenario-de-mutilacion-y-maltrato/?fbclid=IwAR27Awk-V1iIAEJtjDs_aTruKOfO1LOLOY-jTgW5LRg2XNN5S1WOveE2B4d4 [access: 11.10.2019].

Madueño J., *Más de la mitad quiere "limitar o prohibir" los toros y la caza*, "El Español" 12 enero 2019, https://www.elespanol.com/espana/20190112/mitad-quiere-limitar-prohibir-toros-caza/367963207_0.html [access: 11.10.2019].

Merino A., *Los europeos más crueles con los animales*, [in:] *Los derechos de los animales*, eds. M. Tafalla, Barcelona 2004.

Mosterín J., *La tortura como espectáculo*, [in:] *Los derechos de los animales*, ed. M. Tafalla, Barcelona 2004.

Rogel Vide C., *Los animales en el Código Civil*, Madrid 2017.

Rogel Vide C., *Personas, animales y derechos*, Madrid 2018.

Santarén J., *El negro misterio de los galgos abandonados*, "El País", 14 mayo 2019, https://elpais.com/elpais/2019/05/07/animalesycia/1557216912_339358.html?fbclid=IwAR1dsZO-hN-q6cXeeI-WqeahRgUSEnzpLeU2xmwO69UoWE5MTNbkLkSBOf2w [access: 11.10.2019].

Sánchez Gascón A., *Jurisprudencia sobre perros*, Madrid 2002.

Sánchez González M.P., *Los animales como agentes y víctimas de daños en el Derecho Civil*, [in:] *Los animales como agentes y víctimas de daños*, ed. J.M. Pérez Monguió, Barcelona 2008.

Segarra Crespo M.J., *Memoria elevada al Gobierno de S.M. presentada al inicio del año judicial por la Fiscal General*, Madrid 2018, https://www.elconfidencialdigital.com/media/elconfidencialdigital/files/2019/06/28/MEMFIS18.pdf [access: 11.10.2019].

Villa L., *Acaba la temporada de caza, arranca la del abandono de perros*, "Público", 2 febrero 2018, https://www.publico.es/sociedad/maltrato-animal-acaba-temporada-caza-arranca-abandono-perros.html [access: 11.10.2019].

Vincent M., *Antitauromaquia*, [in:] *Los derechos de los animales*, ed. M. Tafalla, Barcelona 2004.

Wartenberg M., *Art. 13 Lisbon Treaty/TFEU – Historical, Constitutional and Legal Aspects*, [in:] *Animales y Derecho. Animals and the Law*, eds. D. Favre, T. Giménez-Candela, Valencia 2015.

Abstract: The article is an analysis of the Spanish law and jurisdiction in the field of animal protection and welfare. Its aim is to present and discuss the most important civil, criminal and administrative provisions, at the same time highlighting the recent changes in regulations concerning animal welfare in both nationwide laws and regional legislation adopted by Autonomous Communities. It is an important issue for the reason that Spanish law is considered as animal hostile and is being widely criticised since it still considers animals as only movable things and not as sentient beings. This attitude towards animals reflected in the law is derived from various firmly rooted national traditions, such as bullfights or hunting. However, the social landscape concerning animal abuse in Spain has changed, although

unfortunately, animal mistreatment is still commonly conducted, particularly towards wild animals. Regarding the development of social sensibility to animal harm, the article presents the problem of attempts to proscribe bullfights in Catalonia, Canary Islands and Balearic Islands, as well as the discussion recently took place in the Parliament about the Civil Code revision in relation to animal sentience and animal legal status. Moreover, the paper addresses more practical issues in the scope of animal protection, i.e. lately resounding problem of killing and abandoning hunting dogs – Spanish *galgos*.

Keywords: Spain; Spanish animal protection law; animal welfare; bullfights; animal abuse; Spanish law

The present publication is the result of research on the state of animal protection legislation, which was presented at the International Scientific Conference "Domestic, European Union and International Standards in Legal Protection of Animals", which took place on 17 October 2019 at the Faculty of Law and Administration of Maria Curie-Skłodowska University (MCSU) in Lublin.

The aim of the conference was to draw attention to the contradiction of some regulations introduced into the national legal framework, including those providing "enhanced" standards of animal protection, with higher-level standards; as well as to their conformity with social conditions, and to the fact that in many cases they are not enforced, therefore, they are of a superficial nature. Moreover, regulations state a different level of protection for domestic animals, homeless animals, livestock, laboratory animals, animals used for specific purposes and, finally, free-living animals. An invitation to participate in the discussion concerning this issue met with great interest of the scientific community, which resulted in various considerations on the current state of regulation setting legal standards for the protection of animals. The scope of these considerations reflects the complexity of issues related to animal protection. They refer to humanitarian protection, species protection as well as animal protection. Some research papers are devoted to the general status of the animal, others focus on detailed solutions and differences in the protection of individual species of animals, or on the differentiation of the principles of animal protection depending on the purpose given to them by humans.

wydawnictwo.umcs.eu

UMCS
WYDAWNICTWO

9 788322 793879