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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]

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[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.

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[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]

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[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.

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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