

# PRZEGLĄD PRAWA ADMINISTRACYJNEGO

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## The Scope of the Subject Matter of the Polish Act on the Protection of Animals

*Zakres przedmiotowy polskiej ustawy o ochronie zwierząt*

### Introduction

The basic Polish legal act which regulates the issue of humane protection of animals is the Act of 21 August 1997 on the protection of animals<sup>1</sup> (hereinafter: APA). Its material scope is defined in Article 2(1), which states that the Act regulates the treatment of vertebrate animals, including vertebrate animals used for scientific or educational purposes to the extent not regulated in the Act of 15 January 2015 on the protection of animals used for scientific or educational purposes<sup>2</sup> (hereinafter: APASEP). Regretfully, the current wording of this provision raises interpretative doubts, which makes it difficult to precisely determine the material scope of the APASEP. The main source of these doubts are the terminological ambiguity of certain legal concepts and the lack of internal

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<sup>1</sup> Consolidated text, Journal of Laws 2023, item 1580.

<sup>2</sup> Consolidated text, Journal of Laws 2023, item 465.

consistency of this act. To be more precise, this refers in particular to the lack of a statutory definition of “animal” and the normative context in the form of: Article 1(1) APA, which introduced the principle of dereification of animals into the Polish legal order; Article 5 APA, according to which, “every animal requires humane treatment”; as well as the provisions of the APASEP, the scope protection of which include cephalopods. In this situation, it will be necessary to analyse the historical development of the provision of Article 2 APA and to interpret it taking into account the rules of linguistic, systemic and teleological interpretation, which will make it possible to clarify the subject scope of the Act in question. The findings made in this respect will be important not only for the further development of legal science, but above all for the unification of the practice of law application and actual animal protection.

### Development of the regulation of Article 2 of the Animal Protection Act

Originally, Article 2 APA defined the scope of the Act by stating that it regulates the treatment of the following animals: 1) pets, 2) farm animals, 3) animals used for entertainment, show, film, sports and special purposes, 4) animals used for experiments, 5) animals kept in zoos, 6) free living (wild) animals, 7) species that are alien to native fauna. The legislature did not define the term “animal” (and it is currently still the case) and, of course, the classification itself had nothing to do with the biological taxonomy. It merely showed the division of animals, which in essence referred to their traditional intended purpose and was not a universal (clearly disjunctive) division. Moreover, the list was enumerative, which significantly narrowed the scope of application of the Act. In this situation, the application of the APA provisions was problematic. The doubts concerned, among others, possible concurrence of provisions in the case of animals of different categories (e.g. alien-species animals kept in farm conditions) or the possibility of granting legal protection to animals which could not be included in any of them (e.g. animals kept in animal shelters).<sup>3</sup> That latter doubt arose primarily in connection with the above-mentioned provision of Article 5 APA, according to which “every animal requires humane treatment”.

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<sup>3</sup> For more detail on this topic, see: W. Radecki, *Ustawy o ochronie zwierząt. Komentarz*, Warszawa 2015, p. 56.

So far, Article 2 APA was amended five times (in 2002,<sup>4</sup> 2005,<sup>5</sup> 2009,<sup>6</sup> 2012<sup>7</sup> and 2015<sup>8</sup>). The changes made to the text can be divided into two groups. The first concerns animals which were referred to in the original text of the APA as “animals used for experiments” and subsequently as “animals used in experimental procedures” (amendment of 2002). For this category of animals, subsequent changes in the wording of Article 2 of the Act involved: 1) striking the category of animals used in experimental procedures off the list animals to which the APA was to apply (amendment of 2005); 2) exclusion of the possibility of applying the provisions of the APA to procedures constituting an experiment within the meaning of Article 2(6) of the Act of 21 January 2005 on experiments on animals<sup>9</sup> (amendment of 2012); 3) allowing the possibility of applying the provisions of the APA to vertebrate animals used for scientific or educational purposes to the extent not regulated in the Act of 15 January 2015 on the protection of animals used for scientific or educational purposes (change from 2015). The second group includes changes of a general nature, consisting in: 1) making the material scope of the regulation more specific by stipulating that the APA regulates the treatment of “vertebrate” animals and at the same time changing the nature of listing the categories of animals covered by the APA, from enumerative to exemplification (amendment of 2009); 2) deletion of the above-mentioned listing, which, due to the described change in its nature, lost any normative meaning (amendment of 2012).

### Definition of the statutory term “animal”

The determination of the material scope of the APA is significantly impeded by the fact that this Act does not contain a definition of the term “animal”. This situation prompts to performing a linguistic interpretation by establishing what meaning this term has in common language. Dictionary studies will be helpful

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<sup>4</sup> Article 2(4) APA amended by Article 1(1) of the Act of 6 June 2002 amending the Act on the protection of animals (Journal of Laws No. 135, item 1141) as of 28 September 2002.

<sup>5</sup> Article 2(4) APA repealed by Article 48(1) of the Act of 21 January 2005 on experiments on animals (Journal of Laws No. 33, item 289) as of 27 March 2005.

<sup>6</sup> Article 2 APA initial sentence amended by Article 1(2) of the Act of 24 April 2009 amending the act on the protection of animals (Journal of Laws No. 79, item 668) as of 12 June 2009.

<sup>7</sup> Article 2 APA amended by Article 1(1) of the Act of 16 September 2011 amending the Act on the protection of animals and the Act on maintaining cleanliness and order in communes (Journal of Laws No. 230, item 1373) as of 1 January 2012.

<sup>8</sup> Article 2(1) APA amended and Article 2(2) APA repealed respectively by Article 73(1) (a) and (b) of the Act of 15 January 2015 Act on the protection of animals used for scientific or educational purposes (Journal of Laws item 266) as of 27 May 2015.

<sup>9</sup> The Act was repealed on 27 May 2015.

in this regard. For example, according to the Polish dictionary *Słownik języka polskiego PWN*, animal (Polish: *zwierzę*) is “every living creature except man”.<sup>10</sup> On the other hand, *Wielki słownik języka polskiego* points out that, in the colloquial sense, animal is “a living creature that is neither a plant, man, bird nor insect”.<sup>11</sup> This understanding raises a number of doubts though. They concern its compliance (or lack thereof) with the current state of scientific knowledge. In modern animal science (zoology), the term “animal” is used to define heterotrophic, multi-cellular organisms with eukaryotic cells (the genetic material is contained in an organised cell nucleus), enclosed in a thin cell membrane. Moreover, all animals respond to stimuli from the external environment, and most of them have the ability of locomotion.<sup>12</sup> Thus, from a scientific point of view, there is no reason to exclude insects, birds or even humans from the animal world, as is often the case in the linguistic level.<sup>13</sup>

That is why the above-mentioned dictionary explanations cannot be seen as sufficient for the purposes of the interpretation herein. As in any such case, it is necessary to refer to teleological arguments. This is so because the question arises whether the legislature also uses the term “animal” to denote any living creature except man? It seems that such a thesis would be unreasonable. This is shown mainly by the current wording of Article 2(1) APA, according to which, the law in question regulates the handling of vertebrate animals. The objective scope of the APA was only limited on 12 June 2009 by adding a reference to vertebrate animals. Originally, the provision of Article 2 APA contained only a list of individual categories of animals to which the act was to be applied (pets, livestock, animals used for entertainment, shows, film, sports and special purposes, animals used for experiments, kept in zoos, free-living animals – wild, alien to native fauna). The aforementioned list, however, lacked any major normative significance, which was mainly due to the fact that its individual elements were not disjunctive, and the enumeration itself was not complete.<sup>14</sup>

In contrast, the legal definition of the term “animal” was contained in the decree of the President of the Republic of Poland of 22 March 1928 on the protection

<sup>10</sup> *Słownik języka polskiego PWN*, <https://sjp.pwn.pl/sjp/zwierze;2547682.html> (access: 16.09.2023).

<sup>11</sup> *Wielki słownik języka polskiego PAN*, [https://wsjp.pl/index.php?id\\_hasla=12128&id\\_znaczenia=4610116&l=26](https://wsjp.pl/index.php?id_hasla=12128&id_znaczenia=4610116&l=26) (access: 16.09.2023).

<sup>12</sup> *Encyklopedia PWN*, <https://encyklopedia.pwn.pl/haslo/zwierze;4002515.html> (access: 16.09.2023). Cf. J. Dzik, *Zoologia. Różnorodność i pokrewieństwa zwierząt*, Warszawa 2015, p. 10 et seq.

<sup>13</sup> On linguistic perception and recognition of the animals world, see: M. Walczak, *Czy owad to zwierzę?*, „Zoophilologica. Polish Journal of Animal Studies” 2015, nr 1, pp. 265–271; R. Tokarski, *Konceptualizacja zwierząt w potocznej świadomości językowej*, [in:] *Prawna ochrona zwierząt*, red. M. Mozgawa, Lublin 2002, pp. 11–17.

<sup>14</sup> For more detail on this topic, see: W. Radecki, *op. cit.*, p. 55 et seq.

of animals.<sup>15</sup> It is worth noting, as a side note, that this was the first Polish legal act governing the humanitarian protection of animals. According to Article 1 of this decree (in its original wording), the abuse of animals is “forbidden” and the term “animal” should be understood as “all domestic and domesticated animals and birds and captured animals and wildfowl, as well as fish, amphibians, insects etc.”. It was only under Article 1(1) of the Act of 25 February 1932 on the amendment of the Decree of the President of the Republic of 22 March 1928 on the protection of animals,<sup>16</sup> which entered into force on 22 April 1932, when the concept of “animal” was extended to cover all wild animals and birds, and not only those “captured”, as previously. Taking aside the distinction in the above-mentioned definition between “animals” and “birds”, as is not justified, it should be noted that the lawmakers did not limit the objective scope of the concept in question, and therefore also the scope of the legal protection, to vertebrates, but covered all animals, in the common sense of the word, therefore, excluding humans. Such meaning was valid until the entry into force of the APA.

### Clarification of the biological term “vertebrates”

Pursuant to Article 2(1) APA, the Act regulates the treatment of “vertebrate animals”. Thus, in the wording of this provision, the legislature refers to the criterion of the biological affiliation of animals to a specific unit of systematics. This requires an explanation of the biological concept of “vertebrates”.

Vertebrates (*Vertebrata*) are the largest group within the phylum *Chordata*; they usually are given the rank of subphylum. They occupy the highest position in the organizational and systematic hierarchy of the living world. The top position in this hierarchy is given to man (*Homo sapiens*). Vertebrates are divided into two superclasses: 1) *Agnatha*, which includes one class (*Cyclostomata*); 2) *Gnathostomata*, comprising all classes of proper vertebrates: fish (*Pisces*), amphibians (*Amphibia*), reptiles (*Reptilia*), birds (*Aves*) and mammals (*Mammalia*).

This group is very diverse in morphological terms. Vertebrates have a connective tissue skeleton (cartilage or bone skeleton) which include: axial skeleton, skull and skeleton of fins (odd and even) or limbs. The axial skeleton in the form of dorsal strand occurs in all vertebrate embryos and for the entire lifetime only in lower members of this subphylum. In higher-developed forms, the axial skeleton is represented by the vertebral column, gradually displacing the dorsal string. The skull is composed of the neurocranium (brain case) and facial skeleton. The neurocranium

<sup>15</sup> Consolidated text, Journal of Laws 1932, No. 42, item 417.

<sup>16</sup> Journal of Laws No. 29, item 287.

protects the brain and key sensory organs, while the facial skeleton protects the anterior part of the digestive tract. The fin skeleton consists of cartilage or bone rays. The transformation of even fins resulted in the development of limbs in terrestrial vertebrates. The skin consists of two layers: the outer layer (the epidermis is made up of a multi-layer epithelium) and the inner layer (the dermis is made up of connective tissue). The skin of vertebrates has great creative potential. The nervous system is characterized by a high degree of development. The anterior part of the neural tube develops into the brain with five distinct parts: telencephalon, diencephalon, midbrain, hindbrain (cerebellum) and medulla oblongata. The sensory organs are also very well developed. The circulatory system is a closed system. It is characterized by the presence of a highly differentiated heart, which drives blood flow in the vessels. The respiratory system occurs as gills in primarily aquatic vertebrates or lungs in terrestrial and secondarily aquatic vertebrates. The digestive system of vertebrates forms a set of organs for the collection, disintegration, transport, digestion and absorption of food. It is a tract with secretory ducts of salivary glands, liver and pancreas. The gastrointestinal tract of vertebrates is composed of mouth, throat, esophagus, stomach, small intestine and large intestine. In many forms, the large intestine has a diverticulum called the blind intestine. The last section of the digestive tract is the rectum intestine. Outside the intestine opens with the anus. In some fish, as well as in amphibians, reptiles, birds and monotremes, the urinary and sexual ducts enter the final segment of the rectum. It then forms a cloaca. The excretory system consists of urine producing organs (kidneys) and excretory pathways (ureters). According to the degree of development and the principles of functioning, three types of kidneys are distinguished: pronephros, mesonephros and metanephros. Reproduction in vertebrates is quite diverse – in individual classes there is internal or external fertilization. External fertilization occurs in fish and amphibians. Development in amphibians is complex, there is a larval stage (in the form of tadpoles). Internal fertilization occurs in reptiles, which are mostly oviparous (some species are oviparous and viviparous); in birds, which are oviparous; and in mammals, which are viviparous. Both reptiles, birds and mammals are characterised by simple development process. Vertebrates are mostly gonochoric – their reproductive organs are made up of female and male glands.<sup>17</sup>

Vertebrates are found on all continents and inhabit almost all environments (aquatic and terrestrial), and some are capable of active flight. A significant proportion of vertebrates are classified as so-called synanthropic species, i.e.

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<sup>17</sup> E. Podsiadło, *Podtyp: kręgowce – vertebrata*, [in:] *Zoologia dla uczelni rolniczych*, red. J. Hempel-Zawitkowska, Warszawa 2008, pp. 275–276; H. Szarski (red.), *Anatomia porównawcza kręgowców. Część pierwsza*, Warszawa 1987, passim; idem (red.), *Anatomia porównawcza kręgowców. Część druga*, Warszawa 1987, passim.

adapted to live in an environment heavily transformed by humans, associated with human habitation or human activities. Approximately 58,000 vertebrate species have been described to date, representing approximately 5% of described animal species in total.<sup>18</sup> Their share in the national fauna is even smaller and does not exceed 1.5%. “This group of animals, relatively small compared to the number of species, has a disproportionately great ecological role and social importance. Humans derive the most benefits from these animals, vertebrates have the greatest impact on the human way of life and culture”.<sup>19</sup> This is done, unfortunately, with an enormous detriment to the natural environment. It is estimated that more than 14,500 vertebrate species are exploited by humans worldwide. These animals are killed for food, killed for entertainment, used in medical research, kept in zoos or, for example, bred as pets (for companionship or decoration). Almost 40% of them are threatened with extinction due to overexploitation.<sup>20</sup>

### Legal protection of cephalopods

According to the literal wording of Article 2(1) APA, the Act governs the treatment of vertebrate animals, which means that cephalopods remain outside the scope of its protection. On the other hand, this group of animals is protected under EU law and national rules governing the treatment of animals used for experimental purposes. Given that there is scientific evidence of their ability to experience pain, suffering, distress and lasting harm (recital 8), the EU legislature has included cephalopods in 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.<sup>21</sup> The Directive lays down measures for the protection of animals used for scientific or educational purposes and applies to live vertebrate animals except humans, including independently feeding larval forms and foetal forms of mammals as from the last third of their normal development, and to live cephalopods. Consequently, cephalopods are also included in the Polish national law implementing that directive, under which the term “animals” can be under-

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<sup>18</sup> J.E.M. Baillie, C. Hilton-Taylor, S.N. Stuart (eds.), *2004 IUCN Red List of Threatened Species. A Global Species Assessment*, Cambridge 2004, p. 7, <https://portals.iucn.org/library/sites/library/files/documents/RL-2004-001.pdf> (access: 14.08.2023).

<sup>19</sup> Z. Głowaciński, *Vertebrata kręgowce*, [in:] *Czerwona lista zwierząt ginących i zagrożonych w Polsce*, red. Z. Głowaciński, Kraków 2002, p. 13.

<sup>20</sup> Ch.T. Darimont, R. Cooke, M.L. Bourbonnais et al., *Humanity's diverse predatory niche and its ecological consequences*, “Communications Biology” 2023, No. 6, p. 10.

<sup>21</sup> OJ L 276/33, 20.10.2010.

stood not only as live vertebrate animals but also live cephalopods (Article 2(1) (1)). This definition covers all animals to which the Directive applies.

The literature points to the serious practical implications of the incoherence between the Act on the protection of animals and the Act on the protection of animals used for scientific or educational purposes in this area. As Michał Janowski explains this in a simple way: “Whoever inflicts unnecessary pain on a pig or octopus in the course of scientific or educational activity, will bear the responsibility provided for in the criminal provisions of the APASEP. However, inflicting similar pain in the course of any activity (e.g. industrial or culinary) other than the two mentioned above in relation to a pig will be penalized under the Act, while in relation to an octopus will remain unpunished.”<sup>22</sup> In this situation, taking into account the high level of development of the neural structures of some invertebrates as well as the need to ensure the coherence of the legal system, some authors postulate changes in the content of Article 2 of the Act, so that this provision covers in an unambiguous way all animals capable of suffering.<sup>23</sup>

### Dereification of animals

The date when the APA became effective, i.e. the day of 24 October 1997, is a turning point in terms of legal situation of animals in Poland. Until then, animals kept under human control (regardless of the type of this control) were treated as movable property, the subject of ownership and other rights in rem.<sup>24</sup> This also applied to free-living (wild) animals taken into autonomous possession.<sup>25</sup> It should

<sup>22</sup> M. Janowski, *Status prawny zwierząt a ich kategoryzacja biologiczna*, „Archiwum Filozofii Prawa i Filozofii Społecznej” 2020, nr 4, p. 32.

<sup>23</sup> *Ibidem*, pp. 40–41.

<sup>24</sup> Within the meaning of Article 45 of the Act of 23 April 1964 Civil Code (consolidated text, Journal of Laws 2023, item 1610), “things include only tangible objects”. Therefore, pursuant to that definition under civil law, things are material parts of nature in their original or processed state, distinct (naturally or artificially) to the extent that they can be regarded as an inherent good in socio-economic relations. See: E. Skowrońska-Bocian, M. Warciński, *Komentarz do art. 45*, [in:] *Kodeks cywilny*, t. 1: *Komentarz. Art. 1–449*<sup>10</sup>, red. K. Pietrzykowski, Legalis 2020; P. Nazaruk, [in:] *Kodeks cywilny. Komentarz aktualizowany*, red. J. Ciszewski, LEX/el. 2023, art. 45.

<sup>25</sup> There is a view established in the case law that wild animals which are not things but material objects not owned by anyone become things and objects of ownership by capturing them and taking possession of them. Once the APA became effective, this view has generally remained valid, except that since capturing a wild animal, the animal becomes the object of ownership but it does not become a thing. This does not change the fact that in matters not regulated in the APA, the provisions on things should be applied *mutatis mutandis* to such animals. See: Ruling of the Supreme Court of 9 March 1973, I CR 58/73, NP 1974, No. 9, item 1211, LEX No. 2711470; resolution of the Supreme Court of 12 April 1988, III CZP 22/88, OSNC 1989, No. 9, item 136, LEX No. 3474.



be noted at this point that as early as at that time scholars in the field used to express their doubts about the legal status of animals resulting from their biological nature. Due to their locomotory and sensory abilities (especially feeling pain and fear), animals were perceived as “*sui generis* objects of civil-law relations”. There were also postulates formulated that there was a need to protect animals “within reasonable limits”<sup>26</sup> and postulates of their dereification.<sup>27</sup> These postulates were implemented in the APA provisions, namely Article 1(1) which states that “an animal, as a living being capable of suffering, is not a thing”. In view of the above, this legal classification of animals is supported primarily by humane (emotional) reasons, nonetheless, the very phrase that points to the ability to feel suffering does not have a normative character, and its usefulness in determining the objective scope of dereification is limited. This is so because it would be difficult to assume that the lawmakers simply concluded that all animals have such an ability. It is also difficult, even taking current scientific knowledge into account, to conclusively state which of them do not possess such a feature.<sup>28</sup> This issue is also made more complex by the current wording of Article 2 APA which sets its objective scope, indicating that the Act governs the treatment of vertebrate animals.<sup>29</sup>

As regards establishing the normative scope of the principle of dereification, it should be noted that Article 1(1) APA refers to the entire legal system of law, as confirmed by the content of Article 1(2), according to which, for matters that are not regulated in the APA the provisions concerning things shall apply *mutatis mutandis* to animals. This means the need, when interpreting any provisions referring to animals, to take into account the fact that animals are live beings capable of suffering and humans owe them respect, protection and care. However, the provisions on things contained in such legislation can only be still applied *mutatis mutandis*. Therefore, the dereification of animals must be regarded as a principle of the whole legal system and not merely a principle of a particular

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<sup>26</sup> M. Pazdan, § 64. *Pozycja prawna zwierząt*, [in:] *System Prawa Prywatnego*, t. 1: *Prawo cywilne – część ogólna*, red. M. Safjan, Legalis 2012 and the literature referred to therein. Another view is presented by Jan Białocerkiewicz, who holds that the duality consisting in an item being and not being a thing at the same time cannot be accepted. As he puts it: “Dereification means that the animal becomes a subject under public and private law with a restriction on the economic sphere. All that remains is to specify this subjectivity as to its nature and scope”. See: J. Białocerkiewicz, *Status prawny zwierząt. Prawa zwierząt czy prawna ochrona zwierząt*, Toruń 2005, p. 107.

<sup>27</sup> E. Łętowska, *Dwa cywilnoprawne aspekty praw zwierząt: dereifikacja i personifikacja*, [in:] *Studia z prawa prywatnego. Księga pamiątkowa ku czci Profesora Biruty Lewaszkiwicz-Petrykowskiej*, red. A. Szpunar et al., Łódź 1997, pp. 71–92.

<sup>28</sup> W. Radecki, *op. cit.*, p. 46.

<sup>29</sup> Cf. remarks by Mieczysław Goettel, who argues that regardless of the current wording of Article 2 APA, the legislature does not limit the “dereification mechanism” to vertebrates only. M. Goettel, *Sytuacja zwierzęcia w prawie cywilnym*, Warszawa 2013, p. 46.

branch of law.<sup>30</sup> This is about a principle of a guiding nature that has a real impact on both the processes of law making and law application. This is so because it defines the directions for legislation and constitutes an important guideline for interpretation. It is worth noting that dereification includes all animals, both domesticated and free-living. It is also irrelevant in this case how the animal is used by humans (its purpose). Nonetheless, the scope and forms of legal protection of animals in the Polish legal system are diverse.

Referring to this issue, the Polish Supreme Court noted: “The law in question [APA – E.K.] provides for in paragraph 2 of Article 1 that »in matters not regulated« in that legal act »the provisions relating to things shall apply *mutatis mutandis* to animals«. Therefore, dereification indeed covers all animals, but in fact only to the extent governed by that law. Thus, another law governing another sphere of social or economic life, which also concerns the handling of animals by humans, but not from the perspective of protection and proper treatment of those animals as living beings, but other goods, may provide for the forfeiture of an animal, treating it as an object and such a solution therefore complies with the Act on the protection of animals, pursuant to Article 1(2)<sup>31</sup> thereof”. An example of this may be the Act of 10 December 2020 on the organisation of livestock breeding and reproduction,<sup>32</sup> which, in Article 39(2), when providing for the possibility of a criminal measure in the form of forfeiture for several infractions referred to in paragraph 1 of that provision, expressly states that this is the “forfeiture of a thing that is an object of the infraction”. However, it should be emphasized that as far as vertebrate animals are concerned, such forfeiture can only apply to poultry chicks, for the infraction of placing them on the market in the territory of the Republic of Poland despite failure to comply with the requirement of origin from poultry herds entered in breeding books or registers. At the same time, it is essential that such an animal is clearly regarded, when regulating its forfeiture, as a “thing”.

The findings presented above are also supported by another passage in the Supreme Court’s ruling cited above, which has stated: “The Act on the protection of animals, by recognising that: »an animal, as a living being capable of suffering, is not a thing« (Article 1(1)), has admittedly dereified, de-objectified animals, and this applies to all animals and not only to vertebrate animals, and then it regulates the treatment of them (Article 2(1)), but this still does not mean their legal personification, although it is also not a mere legal-technical distinction of them from the group of things. For it is a question of assuming that an animal is not

<sup>30</sup> M. Goettel, *op. cit.*, p. 48 et seq.

<sup>31</sup> Resolution of the Supreme Court of 20 June 2012, I KZP 4/12, OSNKW 2012, No. 7, item 72, LEX No. 1166848.

<sup>32</sup> Journal of Laws 2021, item 36.

a material object at all, but a living being, capable of feeling suffering, and as such is excluded from the class of material objects, and thus it is about creating a system of legal protection for animals, with requiring man to treat them in a certain way, taking into account the precepts and prohibitions indicated in this law<sup>33</sup>

### Principle of humane treatment of animals

Pursuant to Article 5 APA, every animal needs to be treated humanely,<sup>34</sup> which, in accordance with Article 4(2) of the same Act, should be understood as treatment that takes into account the animal's needs and ensures care and protection.<sup>35</sup> Thus, it is not only a question of guaranteeing animals to be free from fear or ill-treatment, but also of providing it with appropriate living conditions, i.e. ensuring that the animal can live in accordance with the needs of the species, breed, sex and age (Article 4(15) APA).<sup>36</sup> In the case of animals held by humans, this is about, in particular, obtaining and maintaining in the animal a physical and mental state in which it can best withstand the conditions of existence imposed by man (Article 4(9) APA). Under the currently applicable legislation, the requirement to treat animals humanely is subject to a number of restrictions, the extent of which is determined by the intended use of the animal. The best example of this is the legally allowed<sup>37</sup> possibility of performing procedures and experiments on animals, because regardless of the purpose they are to serve and the measures aimed at minimising the suffering accompanying them, this way of treating animals, by

<sup>33</sup> See: Resolution of the Supreme Court of 20 June 2012, I KZP 4/12, OSNKW 2012, No. 7, item 72, LEX No. 1166848.

<sup>34</sup> Cf. the remarks on Article 2 regarding the objective scope of regulation of the APA.

<sup>35</sup> This refers to the natural needs of a given species, and the needs related to the individual situation of the animal, including its physical and mental condition. See: judgment of the Supreme Court of 16 November 2009, V KK 187/09, LEX No. 553896; judgment of the Supreme Court of 13 December 2016, II KK 281/16, LEX No. 2237277; judgment of the District Court in Krosno of 10 August 2016, II Ka 231/16, LEX No. 2093993; judgment of the Supreme Administrative Court of 23 January 2013, II OSK 1743/11, LEX No. 1361605; judgment of the Supreme Administrative Court of 12 March 2019, II OSK 1066/17, LEX No. 2657280; judgment of the Regional Administrative Court in Wrocław of 30 May 2023, II SA/Wr 107/23, LEX No. 3575229.

<sup>36</sup> Cf. E. Łętowska, *op. cit.*, p. 78; Ł. Smaga, *Ochrona humanitarna zwierząt*, Białystok 2010, p. 125; E. Kruk, *Administracyjnoprawne standardy humanitarnej ochrony zwierząt*, [in:] *Standardy współczesnej administracji i prawa administracyjnego – aktualne wyzwania*, red. Z. Duniewska, M. Stahl, A. Rąbiega-Przyłęcka, Warszawa–Łódź 2019, pp. 607–617.

<sup>37</sup> The rules and conditions for the protection of animals used for scientific or educational purposes are set out in the Act of 15 January 2015 on the protection of animals used for scientific or educational purposes (consolidated text, Journal of Laws 2023, item 465). To the extent not regulated by this Act, the provisions of the APA apply to the protection of this group of animals.

its very nature, is inhumane. For the sake of clarity, it is also worth pointing out that the requirement to treat animals humanely also applies to free-living (wild) animals, which must be provided with conditions for their development and free existence (Article 21 APA). However, this does not apply to animals that pose an extraordinary threat to human life, health or economy, including hunting. In such cases, the legislature allows measures to be taken to reduce the population of these animals (Article 33a(1) APA), which should also be done in a way that spares the avoidable pain, distress and suffering of the animals in the process.

This issue is present in court case-law, where it is emphasized that “the ownership of an animal primarily obliges, and the scope and content of rights to the animal is modified by the necessity of its humane treatment. Human beings should conduct towards animals as living beings capable of certain sensations (e.g. suffering) and not as objects”<sup>38</sup> With this in mind, it should be clarified that the addressee of the norm under Article 5 APA is any person whose conduct is associated with a specific behaviour towards an animal.<sup>39</sup> Those having a title to or who actually exercises care of an animal<sup>40</sup> shall treat the animal in a manner that takes into account its species-related and individual needs. In some cases, failure to do so may meet the criteria of animal maltreatment (Article 6(2) APA). In principle, this type of behaviour is qualified as a criminal offence which in its basic type is punishable by imprisonment for up to 3 years (Article 35(1a) APA). Only certain forms of inhumane treatment of animals have been subject to infraction (petty offence) responsibility system (Articles 37, 37a, 37b, 37d and

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<sup>38</sup> Judgment of the Supreme Administrative Court of 28 January 2020, II OSK 659/18, LEX No. 3043554.

<sup>39</sup> A similar view is presented by Karolina Kuszlewicz who holds that the principle of humane treatment of an animal “does not need to be combined with other specific human obligations towards the animal, in particular there is no need for formal relationships concerning »ownership« or the possession of the animal or other grounds requiring protection or care of the animal (resulting, for example, from practising as a veterinarian)”. See: K. Kuszlewicz, *Ustawa o ochronie zwierząt. Komentarz*, Warszawa 2021, p. 99.

<sup>40</sup> Under the provisions of the APA, the legislature uses both the term “owner” and “guardian” without defining the latter. It is assumed in the case law that in this situation it is possible to attribute to this term the meaning commonly used in colloquial language (“guardianship” is caring for someone or something, while “guardian” is one who takes care of someone or something). Moreover, administrative courts take the view that it is legally irrelevant that someone becomes the guardian of an animal “gratuitously”. Such a person has the same obligations as the owner in terms of providing the animal with proper care. This also applies if the guardian intends to resign. In such a case, they should secure the animal’s livelihood by employing all legal and factual possibilities that lawfully exist in this respect. See: judgment of the Regional Administrative Court in Kraków of 20 November 2014, II SA/Kr 1230/14, LEX No. 1601396; judgment of the Regional Administrative Court in Poznań of 21 March 2012, II SA/Po 1215/11, LEX No. 1138746. Cf. M. Goettel, *op. cit.*, pp. 263, 266–267.

37e).<sup>41</sup> For other persons, who are not subject to the legal obligation to care for the animal, the requirement of humane treatment of animals, resulting from the content of Article 5 APA, is primarily limited to refraining from behaviour that could lead to a deterioration in animal welfare.<sup>42</sup>

It is also worth noting that both in the doctrine and in the practice of applying the law, the principle of humane treatment of animals expressed in the content of the provision at issue, is used as a kind of directive for the interpretation of the provisions defining the legal status of animals and the scope of their protection. For example, it is worth quoting a fragment of the substantiation for the judgment of the Supreme Court, which stated that: “In order to properly determine how to understand »appropriate living conditions«, it is necessary to refer to the content of Article 5 of the Act, which sets out a general rule covering all animals by the requirement of »humane treatment«.”<sup>43</sup>

### Legal protection of experimental animals

According to the literal wording of the provision in Article 2(1) APA, the Act governs the handling of all vertebrate animals, provided however that in the case of vertebrate animals used for scientific or educational purposes, its scope of application is limited to matters not regulated in the APASEP, where a similar reference is made in Article 4, as if to confirm the legislator’s intention.

In view of the above, it is necessary to determine the material scope of the APASEP. Pursuant to Article 1(1) of this Act, it lays down the rules and conditions for the protection of animals used for scientific or educational purposes, including: the rules for carrying out procedures and experiments; the conduct of

<sup>41</sup> This issue is discussed in more detail by Tomasz Pietrzykowski, who points to a loophole in the current legal regulation. In his opinion: “The inhumane treatment of an animal, also committed unintentionally, should constitute a penalised act. Animal maltreatment, on the other hand, should be an aggravated form of such an act – requiring intent on the part of the perpetrator (at least as *dolus eventualis*) and subject to appropriately more severe criminal sanctions”. See: T. Pietrzykowski, *Prawo ochrony zwierząt. Pojęcia, zasady, dylematy*, Warszawa 2022, pp. 201–203 and the literature referred to therein. Similarly: E. Kruk, *Industrial breeding of animals: Legal and ethical issues*, „Białostockie Studia Prawnicze” 2021, vol. 26(3), pp. 192–194.

<sup>42</sup> Cf. W. Radecki, *op. cit.*, p. 66.

<sup>43</sup> Judgment of the Polish Supreme Court of 7 July 2020, II KK 222/19, OSNKW 2020, No. 9–10, item 40. The case law approaches in a similar way Article 1(1) APA, which introduces normative dereification of the animal. See: e.g. judgment of the Regional Administrative Court in Poznań of 24 August 2022, II SA/Po 198/22, LEX No. 3405836, judgment of the Regional Administrative Court in Gdańsk of 23 March 2022, II SA/Gd 663/21, LEX No. 3327417, judgment of the Regional Administrative Court in Warsaw of 18 November 2021, IV SA/Wa 999/21, LEX No. 3320140.

the activities of breeders, suppliers and users; the rules for carrying out inspections of breeders, suppliers and users; the conditions for keeping animals used for scientific or educational purposes and the way in which they are treated; the responsibilities and powers of ethics committees for animal experiments. The provisions of the APASEP also define the duties of the minister responsible for higher education and science in the field of the protection of animals used for scientific or educational purposes, which should be fulfilled in cooperation with the European Commission and bodies of EU member states other than the Republic of Poland. Moreover, in order to ensure the effectiveness of the solutions provided for in this Act, it includes provisions penalising the non-fulfilment of statutory obligations, as well as provisions providing for the possibility of imposing administrative fines for failure to comply with administrative obligations. Having all this in mind, it can be assumed that in the remaining scope, unless the provisions of other special laws provide otherwise, to the protection of animals used for scientific or educational purposes the APASEP should be applied.<sup>44</sup>

Leaving aside, at this point, all doubts about the real usefulness of this form of animal exploitation (especially as regards the possible translation of the results of animal tests to humans), and the accompanying ethical dilemmas, it should be pointed out that the legislature allows, under the conditions set out in the law, the possibility of performing procedures that may inflict pain, suffering, distress or permanent damage upon the animal, to an extent equal to or greater than needle stab, as well as activities aimed at or likely to cause the birth or hatching of the animal or the creation and maintenance of a genetically modified animal line under conditions of pain, suffering, distress or permanent damage to the body, to an extent equal to a needle stab or more severe injuries (Article 2(1) point 6 APA). However, the primary objective of the APASEP is the implementation of the standards set out in 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.<sup>45</sup> This directive, and thus also the APASEP transposing its provisions, refers in their content to the so-called 3R principle, which defines the ethical

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<sup>44</sup> It is pointed out in the literature the possibility of applying to animals used for scientific or educational purposes the institution of temporary removal of the animal from its owner or keeper, as provided for in the APA (Article 7), or the possibility of a cumulative application of the provision of Article 66 APA with the provisions of Article 35(1), (1a) or (2) APA, which, in general terms, penalise behaviours that constitute non-fulfilment of statutory obligations and which exposes animals to unnecessary pain or leads to their death. See: G. Manjura-Niśkiewicz, *Ustawa o ochronie zwierząt. Komentarz*, Warszawa 2022, p. 33; M. Mozgawa, [in:] *Komentarz do niektórych przepisów ustawy o ochronie zwierząt wykorzystywanych do celów naukowych lub edukacyjnych (art. 66, art. 67, art. 68)*, red. M. Mozgawa, [in:] *Pozakodeksowe przestępstwa przeciwko zasobom przyrody i środowisku. Komentarz*, WKP 2017.

<sup>45</sup> OJL 276/33, 20.10.2010.

framework for the admissibility of animal tests. According to this principle: 1) Wherever possible, live animal experiments should be replaced by alternative methods to achieve the intended objective of the test (replacement); 2) the number of animals used in the experiment must not exceed the absolute necessity (reduction); 3) methods to minimise animal suffering must be used (refinement). The regulations of the APASEP, referring in essence to the 3R principle described above, introduce a number of requirements and prohibitions that must be taken into account in the process of planning and implementing animal experiments. An example may be the provision of Article 5(2) APASEP, according to which it is unacceptable to perform a procedure if it involves severe pain, suffering or distress, which may be long-lasting and cannot be alleviated. The performance of such a procedure is therefore prohibited by law, irrespective of any scientific, economic or social advantages which might provide reasons for it.

These findings lead to the conclusion that the standards of protection of the life and welfare of animals used in experimental procedures set out in the APASEP differ considerably from those adopted in the APA, for example, for domestic animals. For example, it may be pointed out that laboratory animals are bred and can then be killed only in order to use their organs or tissues for the purposes specified in Article 3 APASEP. The legislature does not provide for any specific restrictions in this regard, except that the animal should be killed by an appropriately qualified person and using a method that would minimise its pain, suffering and distress. As set out in Article 6 APA, the procedures should be designed and carried out in such a way as to avoid and replace, as far as possible, the death of animals by the early and humane completion of those procedures, consisting in the earliest possible killing of the animals when there are symptoms of pain, suffering or distress which cannot be alleviated and the duration of which is not scientifically and ethically justified. It should be added here that the procedure whereby an animal is deprived of consciousness and then is no longer awakened is classified as the least "severe" (Article 10(1) point 1). This is of utmost importance, since in many cases the implementation of these procedures causes pain, suffering, distress or permanent damage to the body of the animal, to such an extent that "outside the experimental context, these procedures would undoubtedly be considered cases of maltreatment with particular cruelty".<sup>46</sup> On the other hand, the literature on the subject points to the high level of welfare requirements for animals used for scientific or educational purposes.<sup>47</sup>

<sup>46</sup> T. Pietrzykowski, *Prawo ochrony zwierząt. Pojęcia...*, p. 271.

<sup>47</sup> S. Mroczkowski, A. Frieske, *Prawna ochrona zwierząt doświadczalnych*, Bydgoszcz 2015, p. 34 et seq.; K. Smykowski, *Eksperymenty medyczne z wykorzystaniem zwierząt. Studium teologicznomoralne*, Lublin 2017, p. 180 et seq.

## Conclusions

In view of the current wording of Article 2(1) APA, it should be definitely stated that this Act provides for the protection of all vertebrate animals (including the most primitive ones), regardless of species and possible ways in which they are utilised by humans. If there is any doubt about this, the doubt concerns the possibility of extending this protection to invertebrates. The main source of this doubt are the provisions of Article 1(1) and Article 5 APA, which refer to animals in general. The first is that the animal, as a living being capable of suffering, is not a thing, and man owes it respect, protection and care, while according to Article 5 APA, as mentioned above, “every animal requires humane treatment”. The principle resulting from these provisions and the obligation contained in it constitute the axiological foundation of the system of animal protection in Poland. However, there are various limitations to this principle. In any case, the scope of humane animal protection, regardless of the underlying noble ideas, is determined by human needs and the need to ensure the effectiveness of the legal regulations that govern it. The above-mentioned restrictions stem from special legislation, but are also introduced by the APA itself. An example is Article 1(2) APA, according to which in matters not regulated by the Act, the provisions on things should be applied *mutatis mutandis* to animals, which means that they can still be an object of civil rights. On the other hand, Article 2(1) expressly states that the APA regulates the treatment of vertebrate animals only, and therefore all invertebrate animals remain outside the scope of its regulation. If the legislature had actually intended to cover all animals by the regulation, it would certainly not have included in the wording of Article 2(1) the stipulation that the APA also regulates the treatment of vertebrate animals used for scientific or educational purposes to an extent not regulated in the Act of 15 January 2015 on the protection of animals used for scientific or educational purposes,<sup>48</sup> which also covers live cephalopods. It should therefore be assumed that the protection under the APA applies exclusively to vertebrate animals.<sup>49</sup> Under the current legal framework, it is not possible to extend this protection to

<sup>48</sup> Consolidated text, Journal of Laws 2023, item 465.

<sup>49</sup> This view is confirmed in the case law of the Supreme Court, which has repeatedly indicated that only vertebrate animals have been covered by the protection under the APA. See: Resolution of the Supreme Court of 20 June 2012, I KZP 4/12, OSNKW 2012/7/72, LEX No. 1166848; judgment of the Supreme Court of 13 December 2016, II KK 281/16, LEX No. 2237277. The literature presents different views on the scope of normative dereification of animals and on the scope of the APA. Cf. M. Goettel, *op. cit.*, p. 46; K. Kuszlewicz, *Prawa zwierząt. Praktyczny przewodnik*, Warszawa 2019, p. 54, 75; T. Pietrzykowski, *Prawo ochrony zwierząt – między praktyką a teorią nowej gałęzi prawa*, „Krytyka Prawa” 2020, nr 2, pp. 218–219; G. Lubeńczuk, *The concept of the normative dereification of an animal in Polish law*, „Studia Iuridica Lublinensia” 2021, vol. 30(5), p. 417.



invertebrates, even if some of them are known to be capable of suffering.<sup>50</sup> This interpretation is also supported by the content of the explanatory memorandum to the draft Act of 24 April 2009 amending the Act on the protection of animals<sup>51</sup> which, under Article 1(2), modified the wording of Article 2 APA by introducing a proviso that the Act regulates the handling of vertebrate animals. Presenting the reasons for the amendment, the draft originator clearly indicated that it aimed at regulating “only vertebrate animals,”<sup>52</sup> while “the protection of invertebrate animals is implemented under the provisions contained in the Act of 16 April 2004 on nature protection (Journal of Laws No. 92, item 880, as amended)”<sup>53</sup> A different view in this matter is presented by Karolina Kuszlewicz, who believes that the current wording of Article 2(1) does not exclude the possibility of covering invertebrates by the protection under the APA, including in particular the application of the general and criminal provisions<sup>54</sup> of this act to them. The author herself, however, sees the “flaws” of such an assumption, recognizing that “it is highly abstract and not yet verified in practice” and in fact difficult to implement.<sup>55</sup>

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<sup>50</sup> This does not mean that invertebrates are not legally protected at all. However, the normative basis of this protection should be seen in other legal acts. An example is Article 125 of the Act on nature conservation of 16 April 2004 (consolidated text, Journal of Laws 2023, item 1336, which prohibits the killing of animals not covered by forms of nature conservation, except in cases specifically listed in that provision. Infringement of that provision constitutes an infraction and is punishable by arrest or a fine (Article 131(13) of the Act on nature conservation).

<sup>51</sup> Journal of Laws No. 79, item 668.

<sup>52</sup> The authors of the amendment do not in any way explain the decision to restrict the protection under the APA only to vertebrate animals. However, it can be assumed that it is based on scientific findings on the properties of the vertebrate nervous system, which reaches a level of development that is unprecedented in any other group of animals. See: M. Janowski, *Status prawny zwierząt a ich kategoryzacja biologiczna*, „Archiwum Filozofii Prawa i Filozofii Społecznej” 2020, nr 4, p. 31.

<sup>53</sup> See: Justification of the government bill amending the Animal Protection Act of 29 December 2008, Form No. 1561, Sejm of the Republic of Poland, 6<sup>th</sup> term, <https://orka.sejm.gov.pl/Druk6ka.nsf/wgdruk/1561> (access: 23.08.2023), p. 7.

<sup>54</sup> Other view is presented by Zuzanna B. Gądzik, who, considering that the APA applies only to vertebrate animals, claims that: “This eliminates, due to the prohibition of using analogy to the detriment of the offender, the possibility of applying Article 35(1) or (1a) APA to invertebrate animals (e.g. molluscs or insects)”. See: Z.B. Gądzik, *Prawnokarna ocena odpierania i zwalczania niebezpieczeństwa ze strony zwierząt*, „Acta Iuridica Resoviensia” 2021, nr 4, pp. 63–64; eadem, *Przestępstwo znęcania się nad zwierzętami wolno żyjącymi (dzikimi)*, „Radca Prawny. Zeszyty Naukowe” 2021, nr 3, p. 127.

<sup>55</sup> K. Kuszlewicz, *Ustawa...*, p. 89.

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**Abstract:** The basic legal act in Poland which regulates the issue of humane animal protection is the Act on animal protection of 21 August 1997. Regretfully, due to its numerous shortcomings, such as lack of terminological accuracy and internal consistency, the practical application of this Act often entails serious difficulties. Such difficulties certainly include interpretative doubts related to the current wording of Article 2(1) defining the objective scope of the Act on animal protection. However, the research carried out made it possible to establish that only vertebrate animals are protected under this Act, irrespective of their species and the possible means of their exploitation by humans. It has also been demonstrated that, under the legislation currently in force, it is not possible to extend this protection to invertebrate animals, even if some of them are known to be capable of feeling suffering. This does not mean that invertebrates are deprived of any legal protection. Nonetheless, the normative basis of this protection should be seen in other legal acts.

**Keywords:** animals; vertebrates; cephalopods; experimental animals; law; act; dereification; humane animal protection

**Abstrakt:** Podstawowym aktem prawnym w Polsce, który reguluje problematykę humanitarnej ochrony zwierząt, jest ustawa z dnia 21 sierpnia 1997 r. o ochronie zwierząt. Niestety, ze względu na jej liczne niedostatki, takie jak brak ścisłości terminologicznej oraz wewnętrznej spójności, praktyczne zastosowanie tej ustawy często wiąże się z poważnymi trudnościami. Do takich trudności z całą pewnością można zaliczyć wątpliwości interpretacyjne związane z aktualnym brzmieniem art. 2 ust. 1, który określa zakres przedmiotowy ustawy o ochronie zwierząt. Przeprowadzone badania pozwoliły jednak ustalić, że ustawa ta obejmuje ochroną wyłącznie zwierzęta kręgowce, niezależnie od gatunku i możliwych sposobów ich eksploatacji przez człowieka. Ponadto wykazano, że w aktualnym stanie prawnym nie ma możliwości rozszerzenia zakresu tej ochrony na zwierzęta bezkręgowce, nawet jeżeli o niektórych z nich wiadomo, że są zdolne do odczuwania cierpienia. Nie oznacza to, że bezkręgowce pozbawione są jakiegokolwiek ochrony prawnej. Jej podstaw normatywnych należy jednak szukać na gruncie innych aktów prawnych.

**Słowa kluczowe:** zwierzęta; kręgowce; głowonogi; zwierzęta doświadczalne; prawo; ustawa; dereifikacja; humanitarna ochrona zwierząt

