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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

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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.

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[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.

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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