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## LEGAL DEREIFICATION OF ANIMALS – THE POLISH EXPERIENCE

### **Summary**

*The aim of the paper is to present the concept of normative dereification of animals. Since 1997 Poland has been one of the countries which decided to build their animal protection system on the foundation of distinction of animals from objects. As stated in article 1 paragraph 1 of the Polish Animal Protection Act 1997 the animal as a living being, capable of suffering is not a thing. The author analyses the meaning of the regulation, its actual impact over the years and discusses related interpretative difficulties. In the author's view most importantly dereification provision should be seen as source of a specific interpretative directive. Thus, significant part of the paper has been devoted to the analysis of available court rulings addressing dereification and recognising existence of dereification-based directive of interpretation which has to be applied in cases involving animals.*

**Key words:** *dereification, animal protection, interpretative directives*

### **Introduction**

In recent years one can observe ever growing awareness and concern for animal suffering and animal protection, it is manifested through ongoing relevant legislative efforts at international and national level. At the same time also in academic circles we are witnessing “an animal turn in the social sciences and the humanities”<sup>1</sup>, an increasing scholarly interest in animals, in the relationships between humans and animals, and in the role and status of animals in society. In particular the legal status of animals is currently one of the most discussed topics on the borders of law and morality. Because of this and other factors, many European countries at the end of the last century started to recognise the increasing

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<sup>1</sup>See: H. Ritwo, *On the Animal Turn*, Daedalus 136, 2007, pp. 118-122.

need for strengthening the position of animals, their better protection and for promotion of standards on the welfare of animals. Changes in the social awareness were soon accompanied by often difficult legal changes<sup>2</sup>. Many countries decided to secure animal welfare at abstract level through introduction of foundational principles such as constitutionally recognised dignity of animals. A few decided to take one step further, towards finding a workable balance between the owner's property rights and animals' interest through change of their legal status. As a result, today animals represent a distinct legal category of entities, separate from objects, for example in Germany, Austria, Czech Republic, Slovak Republic<sup>3</sup> and Poland<sup>4</sup>.

## **1. Normative dereification of animals**

Private law traditionally distinguishes between subjects and objects of law. As stated by Gaius in Book I of Justinian Institutes “whole of the law observed by us relates either to persons or to things or to actions”<sup>5</sup> (without any special room for animals, one might add). As regards the above issue of reification of animals in law, the lack of acknowledgement of their nature different from unanimated objects was recognized already in 1960s as the first legal problem that has to be faced if one desires to build a meaningful system of animal protection. It is so because as it is often said perception shapes reality. In the end, a human being is both the creator and the addressee of the animal law provisions, which contain norms of humans towards animals. Thus, how animals will be “treated” in certain legal system, what “rights” will be given to them or in other words in what ways the creator and addressee of the norms will decide to

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<sup>2</sup>K. Sławik, *Traktowanie i ochrona prawna zwierząt w Polsce*, Ius Novum nr 4/11, Warszawa 2011, p. 10.

<sup>3</sup>T. Hajdúková, M. Sabo, *Viacrozmerná štatistická analýza jednotlivých druhov zločinu v Európe*, [in:] *Policajná teória a prax*. Bratislava, pub. Akadémia policajného zboru, no 1/2012, pp. 63-69.

<sup>4</sup>It is worth mentioning that the legal protection of animals in Poland has its roots as far back as in the early 20th century with the first anticruelty provisions. Values similar to the ones expressed in the *Universal Declaration of Animal Rights of 1978*, can be found already in the Ordinance of the President of Poland regarding animals protection from 22<sup>nd</sup> March 1928.

<sup>5</sup>The Tripartite Gaian– Justinian Division of the law into Persons, Things, and Actions - *Omne autem ius quo utimur vel ad personas vel ad res vel ad actions*.

limit himself in regard to animals, depends greatly on his perception of their nature and status<sup>6</sup>.

For that very reason, although the Polish Animal Protection Act of 1997 contains many provisions which deserve to be considered fundamental, such as Article 5 which states that every animal requires humane treatment or Article 6 which deals in detail with forms of inhumane treatment, the core of the Act and of the system of animal protection in Poland as a whole is Article 1 which states that *the animal as a living creature, capable of suffering, is not a thing*. Entry into force of this provision marks the point when normative dereification of animals became part of the Polish national legal system<sup>7</sup>.

Dereification concept is one of several approaches or solutions developed over the years on the issue of animals legal reification. The term refers to the legal detachment of animals from the category of things. As a result, animals have become in a given legal system a new separate legal category, being neither objects nor subjects of the law<sup>8</sup>. Due to its less controversial nature dereification gained significant popularity among other concepts, with probably the most controversial and most discussed one concept of personification. That said, it has to be noted that the overall spectrum of legal concepts relating to the legal status of animals is very broad, however its detail presentation remains outside of the scope of this paper. Just as an example one can name the equitable self-ownership of property concept postulated by David Favre<sup>9</sup>, which is a legal construct under which the author resituates legal ontology to classify animals as living property. The concept recognizes that animals have interests and desire to assert rights to protect those interests and based on that proposes a split of legal and equitable title to an owned animal<sup>10</sup>.

## 2. Results of the normative dereification of animals

Introduction of dereification not in the form of a postulate but as a legal provision was without a doubt an important step itself as it results

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<sup>6</sup>See: A. Elżanowski, T. Pietrzykowski, *Zwierzęta jako nieosobowe podmioty prawa*.

<sup>7</sup>The Polish Animal Protection Act (1997), English version at <http://www.eswacares.org/laws/poland-animal-protection-act-1997-en.pdf>.

<sup>8</sup>See: T. Pietrzykowski, *Law, Personhood and the discontents of juridical humanism*.

<sup>9</sup>D. Favre, *Equitable Self-Ownership for Animals*, 50 *Duke Law Journal* 473-502 (2000).

<sup>10</sup>See: P. MacCormack, *The Animal Catalyst: Towards Ahuman Theory*, 2014.

in normative “exclusion” of animals from the realm of objects<sup>11</sup>. The achievement of this legislative goal was not an easy task, since although as mentioned in comparison to personification concept, dereification seems to be an optimal and less controversial solution, it also had and has its own opponents. Even during the legislative process it was not certain if dereification provision was to remain a part of the final version of the Animal Protection Act 1997 as removal of the provision from the project was proposed and discussed at various stages. Also in Polish legal doctrine, there are various opinions regarding the path chosen by the legislator<sup>12</sup>. Some authors approve of the choice made, considering it more realistic and possible in implementation choice on which one can build a system of animal protection, especially next to the personification concept which is often said to be surrealistic or abstract<sup>13</sup>. Others argue that normative dereification has in reality only a symbolic value and does not influence the application of law in any meaningful way.

Aside from the symbolic aspect however, the dereification provision does imply significant legal changes as it rises the immediate question of applicability of the regulations for objects to animals when trade and other activities involving animals remain a part of daily practice. This problem is usually solved by the legislator through introduction of additional explanatory provision. In the Polish Animal Protection Act we find it in the second paragraph of Article 1 which states that in all matters involving animals not regulated by the Act regulations applicable to things shall be applied accordingly<sup>14</sup>. In light of that one might ask what dereification provision really changes with respect to animals’ situation within the legal system since despite not being a thing it is still being treated as one. First of all the change of the normative status of animals helps, without a doubt, to a certain degree to shape aforementioned social perception of animals and to achieve a sharper focus on animal issues<sup>15</sup>. Secondly, the presence of the dereification provision puts a certain

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<sup>11</sup>G. Rejman, *Ochrona Prawna Zwierząt*, Studia Iuridica XLVI, Warszawa 2006, p. 256.

<sup>12</sup>J. Dworzecki, R. Kochańczyk, *Współczesne zagrożenia*, GWSP, Gliwice 2010, pp. 172-219.

<sup>13</sup>Op cit, p.256.

<sup>14</sup>Similar dereification provisions can be found also in German BGB § 90a and Austrian § 285a of ABGB and Article 641 of the Swiss Civil Code.

<sup>15</sup>See: A. F. Goetschel, *The Animal Voice: Ensuring Interests Through Law*, 2013 Lecture Series Keynote Presentation.

pressure on various parties and public authorities when it comes to animals related decisions.

### **3. Article 1 par. 1 as an interpretative directive**

Finally, the influence of the normative dereification should be seen as interpretative mindset shaping one. In the author's view dereification provision with its axiological weight has predominantly an interpretative value and function. The provision embodies an obligation for the practitioners, including authorities and courts, to engage into dereification-based interpretation in any case involving animals<sup>16</sup>. In fact the provision was attributed such a role already during the legislative process<sup>17</sup>. Thus, the greatest influence of dereification comes from putting additional standards and responsibilities on practitioners of law who have obligation to or are at least expected to engage in humanitarian interpretation. The presence of the dereification provision within the legal system translates into a specific dereification-based directive of interpretation which embodies a certain level of care which has to be maintained when law is being applied to animals and places certain obligation on all legal interpreters<sup>18</sup>. Courts in particular should recognise the existence of such a directive and apply it as a part of the process of interpretation in cases involving animals. As a result, examination and application of values of the Animals Protection Act becomes an integral part of law interpretation process.

### **4. Dereification directive in court rulings**

When it comes to evaluation of the suggested judiciary input into the process of clarification of normative dereification importance and recognition of new interpretative obligations, it has to be stressed that despite the fact that it has been almost twenty years since the Polish Animal Protection Act 1997 came into force, the existing pool of court decisions addressing dereification provisions, even indirectly, is still very limited. Furthermore, among those decisions in which courts had to, in

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<sup>16</sup> See: Ruling of the Supreme Administrative Court in Warsaw, case number II OSK 1628/11W.

<sup>17</sup> Report of the Environment Protection Commission, print nr 392, Parliament session 5 March 1997.

<sup>18</sup> See also: M. Goettel, *Sytuacja zwierzęcia w prawie cywilnym*, Wolters Kluwer, Warszawa 2013.

accordance with Article 1 paragraph 2, apply to animals regulations applicable to things, courts often limited their explanation to a firm statement of appropriateness of relevant provision, focusing on similarity of the case at hand with ones which would involve an object not an animal, without acknowledgement of the dereification directive itself. Nevertheless, the few court rulings that exist have significant value in terms of dereification directive's clarification and establishment of its application, perhaps the most important one of them being the Ruling of the Supreme Administrative Court from 3<sup>rd</sup> November 2011. In this ruling the court states directly that the dereification provisions found in Animal Protection Act 1997 create certain interpretative obligation. Namely, in any case in which relevant provisions applicable to things are being applied to an animal, one applying the provisions or interpreting them is obliged to consider whether the provision should not be reinterpreted appropriately given that subject of the regulated activity is a living animal being under protection of the Act. The court stressed that the established by the legislator in Article 1 paragraph 2 “appropriate application” of provisions designed for things to animals is inherently linked with the normative dereification of animals established in paragraph 1 and should be carried out with dereification directive in mind. As explained in the judicial decision of the Supreme Court of the Republic of Poland from 15<sup>th</sup> February 2008, appropriate application of relevant provision can either mean direct application, application with appropriate changes or lack of application (due to lack of appropriateness)<sup>19</sup>. With that in mind, the Supreme Administrative Court further clarified that in this case appropriate application has to satisfy not only the letter of law but also axiology of the Animal Protection Act, in other words it must be carried out in the spirit of legislation. The issue which was the subject of appeal was application to animals of Article 180 (regarding abandonment – *an owner may relinquish the ownership of a movable thing by abandoning it with such intention*) and Article 181 (regarding gaining ownership through owner-like possession – *the ownership of an ownerless movable is acquired by the movable being taken in owner-like possession*) of the Polish Civil Code in light of problems arising often in relation to adoption or sterilization of animals in animal shelters which, if not abandoned, remain according to civil provisions the property of their owners. Addressing the problem the

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<sup>19</sup>Case number III CZP 56/06, OSNC 2007, nr 3.

Court stated that one has to consider inter alia the humanitarian issue involved. The court explained that interpretation of Article 181 with use of dereification directive results in that gain of ownership of an animal can occur by taking it in owner-like possession and providing care for it without the need for statutory period of time requirement to be met if the animal's well-being is at stake. The court's approach and interpretation illustrates well how, in practice, the dereification directive should be applied, modifying or excluding in necessary non-humanitarian aspects of direct application of relevant provision. Similar approach to the dereification directive was offered by the Administrative Court in Poznan in ruling from 6<sup>th</sup> June 2013. As stated by the court all actions, taken by person and regulated by law, involving an animal should be carried out with the animal's well-being in mind. The court stressed that the dereification directive puts an obligation on the person applying regulation not only to fulfil requirements which apply to things but also to an act in a certain respectful and acceptable humanitarian fashion. Therefore, both rulings mentioned above establish and describe important interpretative approach. Unfortunately to the best of the author's knowledge, the above are currently the only rulings so directly addressing application of the dereification directive.

##### **5. Limits of dereification's applicability, impact of the dereification directive on other areas of the legal system**

As explained earlier, legal dereification of animals in order to have an effect requires proper understanding and recognition as an interpretative directive which should be applied in all situations in which animals and their welfare are involved. However, at the same time, without a doubt, clear limits of this application are of equal importance. In light of the abovementioned interpretive difficulties arising from incorporation of the normative dereification into the legal system, it is crucial for doctrine and judicature to set interpretative boundaries of dereification directive application so that it doesn't cause unnecessary complications in areas which are not related to animal welfare and well-being and thus do not require dereification based approach.

In absence of such boundaries, significant legal changes in one area such as introduction of the concept of normative dereification can lead to problems in other distant legal concepts which are heavily based on definitions from other branches such as the area of taxation. While in

general, the interpretation of legislators' intention is often a challenge, it is especially difficult to ascertain when it comes to tax legislation, where complex legal concepts are used in order to achieve economic ends<sup>20</sup>. Complexity and artificiality of the tax system and its use for a wide spectrum of objectives make interpretation a very difficult task<sup>21</sup>. Not surprisingly therefore, introduction of normative dereification of animals has also caused new problems in this area. Namely, it led to taxpayers' doubts with regard to the taxation of transactions involving animals. The central question being whether one should or should not pay the income tax on earnings from sale of animals or civil law activities tax if animals are not considered goods or objects. The analysis of the approach taken by the tax authorities and courts in this situation illustrates well the process of establishment of interpretative boundary limiting the scope of dereification directive. Today available materials show existence of a clear and uniform interpretive line in this regard. Correct interpretation of relevant tax provisions in light of dereification directive is described well in Individual Tax Interpretation<sup>22</sup> of the Director of the Tax Chamber in Katowice from 2012, issued as a result of a taxpayer's request for clarification regarding taxation on the sale of dogs. The interpretation states that the Polish Animal Protection Act does not regulate transactions involving animals, including sale transactions and does not prohibit such transactions with consequence of lack of such prohibition being owners right to sell an animal in which case parties involved are obliged to apply all relevant regulations including tax provisions. The interpretation stresses that since the legislator established in article 1 paragraph 2 of the Animal Protection Act that all matters not regulated by the Act are governed by the regulations applicable to things, it is clear that this includes tax matters not regulated by the Act. Thus, the Director concludes that sale of an animal or other transaction should be treated for tax purposes in the same way as sale or other transaction involving things and is subject to income tax or civil law activities tax.<sup>23</sup>

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<sup>20</sup>J. Freedman, *Interpreting tax statutes: Tax Avoidance and the intention of Parliament*, 2007.

<sup>21</sup>Op. cit.

<sup>22</sup>In Polish legal system tax interpretations and judicial decisions do not constitute a source of universally binding law, but they have an impact on how the law is applied. Two types of tax interpretations are general interpretations, issued by the Minister of Finance and individual interpretations, issued upon application.

<sup>23</sup>See: Individual Tax Interpretation of the Director of the Tax Chamber in Katowice from 6<sup>th</sup> June 2012 regarding taxation of sale of dogs, BPBII/1/415-178/12/MZ.



The above interpretation is in line with another one established in 2011 by the Supreme Administrative Court of Poland according to which *one lacks rational and practical reasons to assume that it could have been legislator's intention to introduce tax law changes with introduction of dereification and to have dereification directive affect all the taxable activities and events involving animals*. Importantly, at the same time the Court stresses that without a doubt from the day when the Animal Protection Act came into force, when animals are no longer things as defined in Article 45 of the Civil Code, thus dereification directive applies in ways such as that trade or other activities involving animals have to be conducted in a manner in line with the standards of humanitarian treatment as stated in the Act<sup>24</sup>. Thus, the court recognising its interpretative role does not only set boundaries of the dereification directive applicability to the area of taxation explaining lack of influence of tax provisions on animals' well-being (and thus lack of need of their reinterpretation based on dereification directive) but also recognises that dereification directive can and should be applied when conducting activities which are being taxed such as the act of sale. Importance of the described above court ruling comes also from the fact that it solidified the uniform interpretation, which in spite of appearances of simplicity of the issue, was not achieved for several years. The examination of tax interpretations from early years of normative dereifications presence in the legal system, shows that numerous opposite interpretations existed not so long ago and tax authorities often accepted opposite interpretation (as compared with the one universally accepted nowadays) as the correct one. For instance, in 2005 the Tax Office for Cracow-Pradnik issued an Individual Interpretation regarding tax on civil law transaction involving animals in which authorities determined that only transactions such as sale or exchange of goods are subject of taxation with animals not being goods or things. Based on that the Director of the Tax Office came to a conclusion that an animal cannot be classified as a thing and consequently tax on civil law transactions such as sales and exchange of things and property rights does not apply to transactions involving animals<sup>25</sup>. Currently in light of the established interpretative line such

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<sup>24</sup>See: Ruling of the Supreme Administrative Court of Poland (NSA) from 31<sup>st</sup> May 2011, case number II FSK 77/10; also Ruling of the Administrative Court in Warsaw (WSA) from 5<sup>th</sup> October 2009, case number III SA/Wa 615/09.

<sup>25</sup>Similar interpretations – Tax Office Poznan-Winogrady - Decision MM- 4360-PCC-6/2005, as well as Individual Interpretation of the Director of the Tax Chamber in

incorrect interpretations are unlikely to occur, nevertheless the above example shows that understanding of the normative dereification and application of dereification directive has proven to be difficult even for bodies specialised in legal interpretations.

## **Conclusion**

In light of all the above findings, one cannot agree with claims that normative dereification of animals had no or little effect on the Polish legal system or law practice. The analysis of available court rulings, tax decisions and other materials shows that without a doubt introduction of the dereification provision gave rise to the dereification-based interpretative directive which is being used actively in cases involving animals. At the same time based on the recent rulings of the Supreme Administrative Court, one can expect that the mandatory application of the directive will be increasingly stressed and enforced in the future.

At the same time it has to be acknowledged that the described interpretative role of the dereification provision is often difficult to notice and understand by an average addressee. Wording of Article 1 § 2 which only states that regulations applicable to things are to be applied accordingly to animals, is not very explicit when it comes to the interpretative obligation embodied within. In the author's view one could postulate *de lege ferenda* amendment of the dereification provision based on section 494 of the Czech Civil Code which explicitly states that provisions regarding objects are to be applied to animals accordingly *only to the extent that does not contravene with the nature of the animal*<sup>26</sup>.

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Olsztyn confirming an interpretation issued by the Director of the Tax Office in Olsztyn from 7<sup>th</sup> November 2003 (No. US.V/436-12/03), who despite citing article 1 paragraph 2 arrived at a conclusion that an animal does not qualify any longer as an object and thus cannot be subject to taxation.

<sup>26</sup>In original „ustanovení o věcech se na živé zvíře použijí obdobně jen v rozsahu, ve kterém to neodporuje jeho povaze.“, in Czech dereification has been introduced just recently when new Civil Code entered into force in 2014.

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