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The legality of acts of local law restricting the possibility of pursuing circus activity with the use of animals in Poland*

Introduction

The study aims to analyse the admissibility of the solutions applied by local authorities in Poland to limit the possibility of circus activities involving animals in the context of the statutory provisions set out the rules for the exercise of this activity, as well as the provisions of the Constitution of the Republic of Poland of 2 April 1997¹, which express the principle of economic freedom and the provisions of the Act of 6 March 2018 Entrepreneurs' Law² under which the undertaking, exercise and termination of economic activity is free for everyone, on an equal footing, and the entrepreneur may take all actions, except those prohibited by law and may be obliged to a certain behaviour only under the law.

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¹ Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws of 1997, No. 78, item 483), hereinafter referred to as the Polish Constitution. The English translation of the Constitution may be found at: <https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm>.

² Act of 6 March 2018, Law of Entrepreneurs (consolidated text: Journal of Laws of 2021, item 162).

Conditions for the limitation of the use of animals in circus activity

Animals have been used for economic purposes for such a long time and in such a widespread manner that this activity is generally considered an obvious part of modern civilisation. The possibility of slaughtering animals for meat or leather, obtaining products such as eggs or milk, using animals as a means of transport, as traction power or for entertainment purposes is in principle beyond doubt, provided that such activities must not cause unnecessary suffering to the animal. The technological growth over the last few decades has made it possible to reduce almost completely the use of animals as traction power or means of transport and, to a certain extent, also the demand for animal products.

How animals are treated, especially about humanitarian protection, i.e. based on ethical (non-economic) considerations, is regarded as one of the measures of civilisational development³. Following the economic and social changes, there are also calls to reduce the use of animals in all sectors of the economy where it is not necessary. This postulate is referred especially to the use of animals for entertainment purposes, including circus activities.

Animals have been used for entertainment since the beginning of history⁴. For many centuries, animal acts were treated as an inherent part of circus art. Animal training handbooks allowing the use of force to compel animals to be obedient were still published in the 20th century⁵. Even today, animal taming is classified as one of three basic branches of circus art, in addition to acrobatics and clowning⁶. An increasing number of people thinks that entertainment purposes are not important enough to justify the suffering and reprehensible conditions in which such animals are kept⁷, and emphasis is placed on the inhumane treatment of animals in circus operations⁸, and on the fact that the idea of animal training for entertainment excludes the possibility of

³ Cf. E. Kruk, *Polskie i estońskie uregulowania prawne dotyczące zwierząt bezdomnych (bezzańskich)*, "Studia Iuridica Lublinesia" 2021, Vol. XXXI, No. 1, p. 145.

⁴ More on the issue in, i.a., A. Jastrzębska, A. Gugolek, J. Strychalski, *Zwierzęta w sporcie, rekreacji i rozrywce. Cz. I*, "Wiadomości Zootechniczne [Zootechnical News]" 2017, Vol. LV(2), pp. 87–93 and A. Jastrzębska, A. Gugolek, J. Strychalski, *Zwierzęta w sporcie, rekreacji i rozrywce. Cz. II*, "Wiadomości Zootechniczne" 2017, Vol. LV(2), pp. 173–182.

⁵ For example: F.C. Bostock, *The training of wild animals*, New York 1903; A. Court, *Wild Circus Animals*, London 1954.

⁶ A. Serena, *Storia del circo*, Milan 2008, pp. XIII–XIV.

⁷ D. DeGrazia, *Prawa zwierząt. Bardzo krótkie wprowadzenie*, Kraków 2014, p. 128 et seq.

⁸ M. Januszcyk, *Niehumanitarność przepisów w zakresie działalności cyrkowej z udziałem zwierząt jako argument za nowelizacją ustawy o ochronie zwierząt i aktów pochodnych*, "Studia Iuridica" 2020, No. 86, p. 74 et seq.

treating animals as equal to humans⁹. It is noted that performances in the circus arena may negatively affect the well-being of animals, for example, due to the increased stress levels, as the animals are exposed to music playing in the background, the lights illuminating the arena, and the presence of an audience spontaneously reacting to individual acts of the circus show¹⁰, and that in the locations where circuses camp it is impossible to create conditions resembling the ones the animals would experience in their natural habitats¹¹. As a consequence, there is a call for a prohibition of using animals in circuses¹².

The explanatory memorandum to the parliamentary bill amending the Animal Protection Act and certain other acts of 11 September 2020, which provides for a prohibition of the organisation and performance of circus shows and similar shows involving the use of animals for entertainment purposes points out that circuses are unable to provide animals with conditions appropriate to their needs, including contact with their herd, the possibility of isolation when they need it, full-size enclosures, mental and motor stimulation, a sense of security, the possibility for wild animals to find their food themselves and adapt their diet to their individual needs¹³. It has also been stressed that animals in circuses, both wild and domesticated, suffer from a range of medical conditions from mental disorders to injuries and diseases associated with training and adopting unnatural postures, and that learning tricks that are unnatural for wild animals often requires brutal methods of training which can seriously endanger the health and sometimes even lives of the animals¹⁴.

Normative bases for the running of circus activity involving animals

The arguments presented above have not been reflected in the general ban on performing circus activities with the use of animals. At the same time, the provisions of generally applicable law, essentially directly indicate that this type of activity is permissible in the territory of the Republic of Poland. Importantly, such a possibility is even provided for by provisions that are intended to protect animals, in particular the provisions of the Act of 21 August

⁹ Z. Snelawska-Stempień, *Bestia na arenie cyrkowej – zjawisko „Nowego Cyrku” jako przykład zmian w relacjach pomiędzy człowiekiem a zwierzęciem*, „Edukacja Humanistyczna” 2013, Issue 2(29), p. 252.

¹⁰ T. Franc, *Kilka uwag o ochronie zwierząt wykorzystywanych w cyrkach*, „Przegląd Prawno-Ekonomiczny” 2019, No. 46 (1), p. 261.

¹¹ Ibidem, p. 262.

¹² Ibidem, p. 269.

¹³ Poselski projekt ustawy o zmianie ustawy o ochronie zwierząt oraz niektórych innych ustaw z dnia 11 września 2020 r., druk nr 597, Sejm Rzeczypospolitej Polskiej IX kadencja.

¹⁴ Ibidem.

1997 on the protection of animals¹⁵. Such provisions include, inter alia, Article 18 (1) APA which, while allowing the use of animals for entertainment, shows, films, sports and special purposes, stipulates that such animals may be kept, bred and presented only in stud farms, circuses or circus bases and in places intended for animals used for special purposes, under the supervision of the Veterinary Inspectorate. Thus, this provision explicitly mentions circuses as one of the permitted forms of using animals for entertainment purposes. The possibility of using animals in the activities of circuses is also confirmed by Article 17 (1)–(4) APA, which define the rules of training and showing animals for entertainment purposes, provided that only animals born and raised in captivity may be used for such activities and only those that can be provided with living conditions appropriate to the needs of a given species, prohibiting training in a way that causes them suffering, training only to increase the aggressiveness of the animals and forcing the animals to perform activities that cause pain or are contrary to their nature. Another regulation that directly points to the possibility of using animals for circus activities is Articles 24i and 24j of the Act of 11 March 2004 on the protection of animal health and combating infectious animal diseases¹⁶, which define the powers of the Chief Veterinary Officer and District Veterinary Officers with respect of performing tasks under the provisions of Commission Regulation (EC) No. 1739/2005 of 21 October 2005 laying down animal health requirements for the movement of circus animals between the Member States¹⁷. The provisions of this regulation define a circus as a travelling exhibition or fair that includes one or more animals and set out the rules for the movement of circuses between the Member States of the European Union, thus confirming the legality of such activity.

The Act of 11 August 2021 on alien species¹⁸, which came into force on 21 December 2021, through the amendment of Article 73 (2) of the Act of 16 April 2004 on nature protection¹⁹, has excluded the possibility to hold and import for circus purposes animals of species which are dangerous to the life and health of people. According to the statement of reasons for the proposed Alien Species Act, the prohibition was introduced because the activities related to circus operations pose a significant threat to the health and lives of

¹⁵ Act of 21 August 1997 on animal protection (consolidated text Journal of Laws of 2020, item 638).

¹⁶ Act of 11 March 2004 on the protection of animal health and combating infectious animal diseases (consolidated text Journal of Laws of 2020, item 1421).

¹⁷ Commission Regulation (EC) No. 1739/2005 of 21 October 2005 laying down animal health requirements for the movement of circus animals between Member States (Official Journal L 279 of 22.10.2005, p. 47).

¹⁸ Act of 11 August 2021 on alien species (Journal of Laws of 2021, item 1718).

¹⁹ The Act of 16 April 2004 on nature protection (consolidated text Journal of Laws of 2021, item 1098, as amended).

people, resulting in the need to introduce changes that would eliminate dangers caused by such types of entities²⁰. Consequently, this prohibition cannot be extended to animals that do not belong to dangerous species within the meaning of Article 73 of the Nature Protection Act.

The content of these provisions allows for the formulation of the rule according to which, while complying with the legal requirements to ensure animal welfare, domesticated and wild animals can be used in circus activities in the territory of Poland, including their training and movement. It should be assumed that this possibility is not restricted by the wording of Article 17 5 APA, which prohibits the operation of travelling menageries. In the literature, it is assumed that this is an absolute prohibition, which is an exception to the principle of economic freedom²¹. By art. 4 (4) APA, activities of such menageries consist in the organization of touring animal exhibitions. The doctrine notes that the difference between a circus and a travelling menagerie is relatively small, especially when it comes to the situation of animals used as a kind of attraction and the 'itinerant' nature of these activities²². It is also pointed out that circuses often carry also animals that are treated as exhibits and can be viewed by viewers for an extra fee, for example, during breaks in the show²³. However, these two activities cannot be considered identical. Following the content of Article 17(5) and Article 18 (1) APA, circus and travelling menagerie activities should be considered as separate entertainment activities. Consequently, having regard to the interpretation rule according to which any restriction or prohibition must be interpreted strictly, it must be presumed that the prohibition laid down in Article 17 (5) APA only concerns the organization of travelling exhibitions, and it seems to be crucial for delimiting the scope of this prohibition to state that these activities usually employ untrained animals²⁴. Apart from the teleological aspect and advisability of such a solution given the impact of both activities on the welfare of animals used for these purposes and the fact that it appears that the circus activity which is associated with the use of training is more bothersome for the animal, it should be assumed that the current ban on the activities of travelling menageries in Poland does not exclude the use of animals in circus activities.

²⁰ Rządowy projekt ustawy o gatunkach obcych z dnia 12 maja 2021 r., druk nr 1187, Sejm Rzeczypospolitej Polskiej IX kadencja.

²¹ W. Radecki, *Ustawy o ochronie zwierząt*, Warszawa 2015, s. 134; idem, *Ustawa o ochronie zwierząt*, Wrocław 2003, s. 76.

²² K. Kuszlewicz, *Ustawa o ochronie zwierząt. Komentarz*, Warszawa 2021, p. 223.

²³ Report "Cyrki ze zwierzętami w Polsce", Fundacja Międzynarodowy Ruch Na Rzecz Zwierząt Viva, 2016, <https://www.cyrkbezzwierzat.pl/wp-content/uploads/2016/04/raport-cyrki.pdf>.

²⁴ Cf. M. Rudy, M. Hejduk, *Stanowisko w sprawie „menażerii objazdowych”*, <http://www.prawoweterynaryjne.pl/artykuly/stanowisko-w-sprawie-menazerii-objazdowych/>.

Actions of local government bodies for the limitation of the possibility to pursue circus activity involving animals

The lack of a nationwide prohibition of the use of animals in circuses and at the same time high social expectations to restrict the possibility to perform such activities resulted in attempts to introduce such restrictions at the local level. These actions take different forms. In most cases, they consist in introducing, using an executive order of municipal executive body (village mayor, town mayor, city president), restrictions on making the areas owned or managed by local government unit available for purposes related to carrying out circus activities involving animals as well as a ban on distributing tickets for circus shows with the participation of animals in local government organisational units and a ban on promoting such events using local government unit's property²⁵. Another type of action is specifying in the ordinance on the lease of municipal land for commercial activities higher rates of rent for non-tender rental of communal property for circuses with animals²⁶. Other forms of action taken include: appeals to property owners not to allow access to the property to organise shows involving the training of wild animals²⁷, or resolutions of local authorities on taking action to prevent the location of travelling perfor-

²⁵ Examples include: ordinance No. 51/2016 of the President of the Capital City of Warsaw of 19 January 2016 on the prohibition of organizing travelling circus performances with the participation of animals in the areas owned by the Capital City of Warsaw, ordinance No. 664/KST/2016 of the President of the City of Kędzierzyn-Koźle of 22 January 2016 on the lack of consent to make available the property owned by the Municipality of Kędzierzyn-Koźle for the purposes of organizing shows including training of wild animals; Ordinance No. 49/2016 of the President of the City of Bydgoszcz of 27 January 2016 on the prohibition of organizing travelling circus shows with the participation of animals; Ordinance No. 110/2016 of the President of the City of Wałbrzych of 10 February 2016 on the prohibition of organizing travelling circus shows with the participation of animals in the areas belonging to the Municipality of Wałbrzych; Ordinance No. 507/2016 of the President of the City of Elk of 28 January 2016 on the prohibition of organizing travelling circus shows with the participation of animals in the areas owned by the Municipality of Elk; Ordinance No. 131/2016 /P of the President of the City of Poznań of 16 February 2016 on the prohibition of organising travelling circus shows with the participation of animals in the areas owned by the City of Poznań; Ordinance No. 93/2016 of 23 March 2016 on the prohibition of entering into lease agreements for municipal land of the City of Suwałki and land under the management of the City of Suwałki, for the purposes related to the organisation of circus shows with the participation of animals; Ordinance No. 83/2016 of the Mayor of Aleksandrów Łódzki of 28 April 2016 on the prohibition of making available the land owned by the Municipality of Aleksandrów Łódzki and the State Treasury for the purposes related to organizing travelling circus shows with the participation of animals.

²⁶ An example may be: ordinance No. 296/2018 of the Mayor of Tomaszów Mazowiecki of 14 August 2018 on the lease of land for the purpose of conducting commercial activities.

²⁷ An example may be: the appeal of the President of the City of Kędzierzyn-Koźle of 1 February 2016, No. Or.033.6.2.2016 regarding not making property available for the purposes of organizing shows involving training of wild animals.

mances, shows and exhibitions for entertainment and shows involving the training of animals on land owned by local government²⁸.

Actions involving appeals or resolutions aimed at limiting the possibility of organizing circus shows with the use of animals on local government-owned properties do not raise much doubt, however, it is noted that the calls for restricting circus animal acts may affect final decisions taken under specified factual circumstances about applying for the lease of commune grounds²⁹. The case-law of the administrative courts processing complaints against such acts generally states that such acts are not binding and can only be considered as acts of an informative nature presenting a specific view (opinion) of the authority on a specific matter which does not have a direct effect in the area of the rights of individuals³⁰. It is noted that such acts are issued without any legal basis in the form of substantive law provisions³¹ and that they do not contain conclusive decisions, but only calls, information, instructions or other content, not imposing any obligation or conferring any power, in particular in the relationship between the body and a third-party entity³². In the opinion of administrative courts, such acts shall not be public administrative matters within the meaning of Article 101 of the Act on municipal government³³. Attributing to such acts the nature of only a postulate, we must consider them an acceptable form of action by public authorities, which, according to the case law, is merely an external expression of the expectations of the authority concerned³⁴.

While the action of formulating appeals or adopting resolutions aimed at limiting the possibility of organising circus shows with animals on land owned by the local government does not raise any major doubts, the assessment of the legality of ordinances issued by those bodies, containing prohibitions on providing land to organise circus shows involving animals, the distribution

²⁸ Examples include: Resolution XVI/355/15 of the City Council of Łódź of 16 September 2015 the statement – appeal to prevent the location of travelling performances and shows with the participation of animals in areas owned by the city of Łódź; Statement No. XX / 5/16 of the Wrocław City Council of 21 January 2016 on taking measures to prevent the location of touring performances, shows and shows for entertainment purposes with the use of animal training in areas owned by the City of Wrocław.

²⁹ M. Januszczyk, *op. cit.*, pp. 85–86.

³⁰ Cf. decision of the Regional Administrative Court in Opole of 7 November 2016, II SA/Op 429/16, *Legalis*; decision of the Regional Administrative Court in Wrocław of 25 October 2016, II SA/Wr 466/16, *Legalis*.

³¹ Decision of the Regional Administrative Court in Wrocław of 25 October 2016, II SA/Wr 466/16, *Legalis*.

³² Decision of the Supreme Administrative Court of 5 April 2017, I OSK 172/17, *Legalis*.

³³ Decision of the Supreme Administrative Court of 11 July 2017, I OSK 275/17, *Legalis*; decision of the Regional Administrative Court in Wrocław of 25 October 2016, II SA/Wr 466/16, *Legalis*; decision of the Regional Administrative Court in Opole, 7 November 2016, II SA/Op 429/16, *Legalis*.

³⁴ Decision of the Supreme Administrative Court of 11 July 2017, I OSK 275/17, *Legalis*.

of tickets for such circus shows with animals in organisational units and the promotion of such events using the assets of the local government unit is subject to numerous problems.

In the content of these ordinances, the following provisions are usually considered the basis for introducing the limitations specified therein: Article 7 (1) item 1, Article 30 (2) item 3 and Article 33 (5) of the Act of 8 March 1990 on municipal government³⁵, and Article 25 (1) of the Act of 21 August 1997 on real estate management³⁶, and in the case of municipalities with poviats rights also Article 23 (1) of the Act on real estate management and Article 92 (1) item 2 of the Act of 5 June 1998 on poviats (district) government³⁷. These regulations include as municipality's tasks the matters of spatial development, real estate management, environmental and nature protection and water management, and entrust the municipal executive body with the management of municipal property, indicating that the municipal real estate resources are managed by the village mayor, town mayor or city president, and also define the powers responsibilities of the poviats head (*starosta*) in the field of management of the real estate of the State Treasury, pointing out that in cities with poviats rights, the functions of the poviats authority are exercised by the city president. Article 33 (5) of the Act on municipal government entrusts the executive body of the municipality, as the head of the municipal office, with the exercise of the powers of the official superior about the employees of the office and heads of municipal organisational units. The analysis of those provisions leads to the conclusion that the measures taken by the municipal authorities to limit the possibility of operation by animal circuses are based entirely on powers of those authorities in the area of management of municipal property and, to the extent entrusted to them, also the property of the State Treasury. In this context a doubt appears whether, as part of these powers, municipal authorities may refuse certain groups of entrepreneurs the possibility of pursuit of economic activity on the premises of real estate managed by these authorities in a situation where the provisions of generally applicable law do not prohibit such activity, do not make the possibility of its performance conditional upon the fulfilment of any specific requirements, resulting in e.g. from subjecting this activity to restrictions, and do not provide for the exclusion of the possibility of its performance in a specific area. Doubts may also arise from the fact that such restrictions are introduced in the form of internal acts. This circumstance raises questions, on the one hand, about the effectiveness of such acts

³⁵ Act of 8 March 1990 on municipal government (consolidated text Journal of Laws of 2021, item 1372, as amended).

³⁶ Act of 21 August 1997 on real estate management (consolidated text Journal of Laws of 2021, item 1899, as amended).

³⁷ Act of 5 June 1998 on poviats government (consolidated text: Journal of Laws of 2020, item 920, as amended).

and, on the other hand, about the protection of the rights of entrepreneurs affected by the provisions of these acts.

Based on numerous cases concerning the admissibility of the adoption by local authorities of acts aimed at limiting the possibility of operation of animal circuses on their territory, two different groups of views have developed in the case-law of the administrative courts deciding those cases. Some administrative courts allow such acts to be adopted, while on the other hand a view is presented which excludes such a possibility.

The first view is based on the assumption that acts of local government units introducing restrictions on making the real property available for such activities, distribution of tickets or promotion of circus shows with animals are of internal nature and, as a consequence, do not limit the free operation of circuses using animals³⁸. Such position is presented, *inter alia*, by the Supreme Administrative Court in the decision of 21 April 2017, I OSK 161/17, pointing out that the ordinances issued by bodies of local government units should be attributed the character of externally non-binding declarations as to how they will behave in the future, and their issuance does not exclude the possibility of concluding a civil contract under which it would be possible to obtain the right to use the property by third-party entities³⁹. According to the standpoint presented by the Supreme Administrative Court, in this case, there is no option of a civil claim for granting the right to lease or rent and the violation of the legal interest of the applicants for the conclusion of such agreement cannot be derived from the constitutional provisions of Article 20 and Article 22 of the Constitution of the Republic of Poland, which establishes the principle of freedom of economic activity, because these provisions do not create, on the part of the economic operator, a right consisting in a claim for the conclusion of a contract of lease, tenancy or lending of local government's or state treasury's property to conduct this activity on such property⁴⁰. A similar view was presented by the Supreme Administrative Court in the decision of 5 April 2017, I OSK 27/17⁴¹, indicating that the right to carry out circus performances on municipal property, including with the participation of animals, does not stem from any provision of the law in force, and economic operators do not have a claim to rent the property, while the municipality, being an equal participant in civil law transactions, is free to choose contractors and form legal relations with them based on freedom of contract, as well as to determine the principles of making the property available, including its purpose, allocation, period and conditions⁴². As a consequence, it is assumed that it is not possible

³⁸ Cf. decision of the Supreme Administrative Court of 21 April 2017, I OSK 161/17, *Legalis*.

³⁹ *Ibidem*.

⁴⁰ *Ibidem*.

⁴¹ Decision of the Supreme Administrative Court of 5 April 2017, I OSK 27/17, *Legalis*.

⁴² Decision of the Supreme Administrative Court of 5 April 2017, I OSK 27/17, *Legalis*.

to recognise that such ordinances may infringe the legal interest or right of entrepreneurs performing circus activities⁴³. Courts that accept the aptness of such standpoint dismiss complaints of entrepreneurs attempting to challenge the legality of such acts, indicating that such acts do not infringe an individual legal interest of entrepreneurs and thus cannot be challenged under Article 101 of the Act on municipal government.

It should be noted that this standpoint is, at least to some extent, also reflected in the literature on the subject, which states that in a situation where the prohibition on the organisation of circus shows with animals only applies to real property owned by the municipality, including the property given in permanent management to municipal organisational units or managed by the municipality itself, and in the case of cities enjoying rights of a poviát also to real property owned by the State Treasury and managed by the president of the city pursuant to Article 23 (1) of the Act on real estate management, there is no breach of statutory delegation to issue ordinances by the executive body of the municipality, nor a breach of constitutional guarantees of ownership and freedom of economic activity, and such actions fall both within the scope of municipal property management referred to in Article 30 (2) item 3 of the Act on municipal government, as well as management of the municipal real property resources referred to in Article 25 (1) of the Act on real estate management⁴⁴. Furthermore, it is pointed out that the prohibition on the organisation of circus shows with animals on municipal real property is an acceptable form of determination of the use of such property and is an activity of ordinary management falling within powers of the municipal executive body and that the municipal executive body, as an entity managing municipal property, has the full right to decide on the use of the municipal real property and thus to indicate which forms of activity are acceptable on their territory and which are not⁴⁵.

The second view is based on the assertion that the ordinances on the prohibition of the provision of municipal land or land owned by the State Treasury to organize travelling circus shows with animals are of a sovereign nature, both in the internal system (the ban is directed to the heads of municipal organisational units), and in the external system (unilateral limitation of the possibility of concluding contracts by a specific group of economic entities), and thus, even though they are internal and aim indirectly at causing civil-law effects, they must be qualified as acts taken in a matter of public administration within the meaning of Article 101 (1) of the Act on municipal govern-

⁴³ Cf. decision of the Supreme Administrative Court of 21 April 2017, I OSK 161/17, *Legalis*.

⁴⁴ M. Karciarz, *Prawne aspekty zakazu organizowania przedstawień cyrkowych z udziałem zwierząt*, <https://prawodlasamorządu.pl/drukuj/6256>.

⁴⁵ *Ibidem*.

ment⁴⁶. According to this position, the prohibition on concluding contracts of the provision of real estate managed by local government units to organise and hold such events is a unilateral interference of a local government body in the sphere of a freedom-related public right due to a limitation of freedom stemming from this right and results in a narrowing of the limits of economic freedom vested in entrepreneurs conducting activities involving the organisation of travelling circus shows with the participation of animals⁴⁷. Consequently, such ordinances constitute an unlawful breach of a legal interest which is directly grounded in the constitutional public right to freedom of economic activity and should be perceived as a breach of Article 20 in conjunction with Article 22 and Article 32 of the Polish Constitution, as well as Article 2 of the Polish Constitution, by violating the principle of a democratic state ruled by law and breaching the principle of proportionality⁴⁸. It is also noted that the protection of animals used for, *inter alia*, entertainment purposes are outside the statutory powers of municipal executive bodies, since, by Article 18 APA, the keeping, breeding and presentation of animals used for entertainment purposes are subject to the supervision of the Veterinary Inspectorate and municipal bodies do not have the authority to adopt normative acts in this respect⁴⁹. From this perspective, the ordinances that prohibit the organisation of circus shows with animals do not fall within the concept of managing municipal real estate and real estate owned by the State Treasury, which means that the issuing authority enters without the appropriate statutory authorization the sphere of constitutionally guaranteed subjective rights of organizers of such shows⁵⁰. It is also argued that such ordinances breach the principle of equal treatment by public authorities contained in Article 32 of the Constitution of the Republic of Poland, which principle is also referred to in Article 2 of the Entrepreneurs' Law, which stipulates that the undertaking, performance and termination of business activity are free for everyone on an equal footing, and which means that it is forbidden to pass discriminatory provisions or clauses in legal acts as regards access to material, capital or personal elements of business activity⁵¹. In line with this position, differentiating the situation

⁴⁶ E.g. judgment of the Regional Administrative Court in Łódź of 17 October 2017, II SA/Ld 506/17, Legalis; judgment of the Regional Administrative Court in Wrocław of 25 October 2016, II SA/Wr 372/16, Legalis; judgment of the Regional Administrative Court in Wrocław of 25 October 2016, II SA/Wr 391/16, Legalis; judgment of the Regional Administrative Court in Warsaw of 14 September 2016, I SA/Wa 604/16, Legalis; judgment of the Regional Administrative Court in Gliwice of 17 November 2016, II SA/Gl 828/16, Legalis.

⁴⁷ Judgment of the Regional Administrative Court in Łódź of 17 October 2017, II SA/Ld 506/17, Legalis.

⁴⁸ *Ibidem*.

⁴⁹ Judgment of the Regional Administrative Court in Gliwice of 8 October 2019, II SA/Gl 865/19, Legalis.

⁵⁰ *Ibidem*.

⁵¹ *Ibidem*.

of circus operators depending on whether the repertoire includes animal performances would be permissible only if such a differentiating criterion was provided for in the legal system⁵².

Admissibility of the limitation of the use of animals in circus activity by local government bodies

Analysing both of the presented positions, one should support the accuracy of the second one. Leaving aside entirely non-legal aspects of conducting circus activities with animals, including, in particular, the issue of concern for the welfare of animals used in circuses, and thus abandoning the assessment of the reasonableness of the currently binding provisions of generally applicable law, it must be stated that those provisions allow circus activities with animals. Since the legislature explicitly points to the possibility of carrying out such activity, it should be assumed that it is covered by the freedom of economic activity and, consequently, by Article 22 of the Polish Constitution, such possibility could only be limited by way of a statute. Attempts to limit the ability to carry out such activity in any other way should be regarded as inadmissible. As a result, one should consider accurate the view that in a situation where entrepreneurs carry out a legitimate business regularly supervised by the state, and an important condition for the success of this business is the possibility to use municipal real estate, then the prior exclusion of the possibility to conclude contracts allowing for such use and the manifestation of this prohibition in an act of public administration directly affects the legal sphere of these entrepreneurs because of their subjective rights arising from the Constitution of the Republic of Poland and related to their status as entrepreneurs⁵³. There should be no doubt that the *a priori* exclusion of the possibility to provide to entrepreneurs running lawful businesses with land necessary for the performance of business activity should be perceived as a limitation of the constitutionally guaranteed freedom of economic activity. This freedom includes not only the right to undertake and pursue an economic activity but also the possibility of choosing the place where such activity is to be pursued. It is worth concurring with the view that the restrictions of the territorial and temporal framework of given business activity are justifiable from the point of view of the proportionality rule only in a limited number of cases⁵⁴. As a rule, it should be possible to carry out this activity on the entire

⁵² Ibidem.

⁵³ Judgment of the Regional Administrative Court in Wrocław of 25 October 2016, II SA/Wr 372/16, Legalis.

⁵⁴ J. Kołacz, *Swobody cząstkowe a swoboda działalności gospodarczej*, "Ruch Prawniczy, Ekonomiczny i Socjologiczny" 2008, Vol. LXX, Issue 2, p. 89.

territory of the country. In this context, it is worth noting that under Article 44 (1) of the Entrepreneurs' Law, a licence, permit or entry in the register of regulated activity entitles to conduct business activity in the entire territory of Poland unless separate provisions provide otherwise. If the legislature introduced such a rule about activities subject to administrative restrictions, it seems that the rule should apply even more to those activities which are not subject to restrictions, and the possibility of introducing exceptions to this rule should have a clear basis in statutory provisions. It should be regarded as unacceptable to exclude the possibility for a certain group of entrepreneurs and their customers to use certain public property, which, as the Supreme Administrative Court correctly indicated in its case law, should in its essence serve everyone⁵⁵.

It would seem that the condition which could justify a restriction or even an exclusion of the possibility of making available land under the management of a local government unit to operators engaged in circus activities using animals would be, for example, exclusion of certain real estate from the possibility of doing business in the local land development plan. However, where no such restriction is in place, it is not possible to exclude in advance, in general terms, the possibility of making certain properties available to entrepreneurs without taking into account all the circumstances of the particular case. The decision to make the real property available to the entrepreneur should, in any event, be based on the provisions of generally applicable law and in particular, the principle defined in Article 12 of the Act on real estate management that the authorities acting for the State Treasury and the local government are obliged to administer the property in compliance with the rules of economy. By the principle of equality, one should be cautious about the possibility of leasing land on preferential terms to entities that perform circus activities without the participation of animals, which is indicated in the literature⁵⁶.

Summary and conclusions

The foregoing considerations require that, under the legislation currently in force, the running of circus activities with animals in the territory of the Republic of Poland remains legal and that such operators may enjoy the constitutionally guaranteed freedom of economic activity, including the possibility of doing business throughout the country. In the light of that principle, acts adopted by local authorities, which are intended to prevent or even restrict

⁵⁵ Judgment of the Supreme Administrative Court of 21 June 2018, I OSK 130/18, Legalis.

⁵⁶ G. Manjura-Niśkiewicz, *Ustawa o ochronie zwierząt. Komentarz*, 2022, Legalis.

the possibility of conducting such an activity in a particular area by refusing *a priori* making public land available to economic operators running such businesses must be considered inadmissible. In this situation, given the need to protect and ensure animal welfare, it should be suggested that a total ban on the use of animals in circus activities should be adopted as soon as possible by an appropriate amendment to the Animal Protection Act currently in force. In doing so, it seems appropriate that this prohibition should cover all animal species and not only wild animals. Admittedly, in most countries where similar prohibitions apply only to wild animals, it is difficult to justify a specific restriction of such a prohibition to that category of animals, based on animal welfare and taking into account the specificities of the circus activity. In purely legal terms, the introduction of such a prohibition should not raise much concern. There is currently a total prohibition of the operation of travelling menageries in Poland, which activity, as mentioned above, appears to have less negative effects on animal welfare than the activities involving the use of animals in circuses.

As long as such a prohibition is not introduced, the possibilities for local authorities to take action to protect animals used in circus activities will be very limited and may boil down only to formulating non-binding postulates for the abandonment of the use of animals for circus activities and very limited measures provided for by generally applicable law, such as the possibility, under Article 60 (1) of the Entrepreneurs' Law, allowing the village mayor, town mayor or city president to report irregularities to the competent authorities, including in particular the Veterinary Inspectorate, which, by Article 18 (1) APA, is the authority responsible for supervising the activities relating to the keeping, breeding and presentation of animals in circuses.

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Summary

The legality of acts of local law restricting the possibility of pursuing circus activity with the use of animals in Poland

Keywords: local law, circuses, animals, limitations, economic freedom.

The article is of a scientific-research nature. It aims to assess the admissibility of solutions applied by local authorities in Poland intended to limit the possibility of organising circus shows involving animals in the context of statutory provisions which indicate the possibility of lawful pursuit of such activities, as well as the provisions of the Constitution of the Republic of Poland of 2 April 1997 and the provisions of the Act of 6 March 2018 Entrepreneurs' Law, which express the principle of economic freedom and guarantee the right to undertake and pursue an economic activity on an equal footing. This assessment is based on an analysis of the acts adopted by local government authorities to limit the possibility of organising circus shows involving animals based on the case-law of Polish administrative courts processing complaints lodged by circus operators. This analysis allowed identification of the scope of possible activities of local government authorities and the formulation of conclusions on the need to prohibit the use of animals in circus activities.

Streszczenie

Legalność aktów prawa miejscowego, ograniczających możliwość wykonywania działalności cyrkowej z wykorzystaniem zwierząt

Słowa kluczowe: prawo miejscowe, cyrki, zwierzęta, ograniczenia, wolność gospodarcza.

Artykuł ma charakter naukowo-badawczy. Jego celem jest ocena dopuszczalności stosowanych przez władze lokalne w Polsce rozwiązań, mających na celu ograniczenie możliwości organizowania przedstawień cyrkowych z udziałem zwierząt w kontekście przepisów ustawowych, które jednoznacznie wskazują na możliwość legalnego wykonywania takiej działalności, a także przepisów Konstytucji Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r. i przepisów ustawy z dnia 6 marca 2018 r. Prawo przedsiębiorców, które wyrażają zasadę wolności gospodarczej oraz gwarantują prawo do podejmowania i wykonywania działalności gospodarczej na równych prawach. Podstawą tej oceny jest analiza aktów wydawanych przez organy jednostek samorządu terytorialnego w celu ograniczenia możliwości organizowania przedstawień cyrkowych z udziałem zwierząt w oparciu o dorobek polskich sądów administracyjnych rozpatrujących skargi wnoszone przez przedsiębiorców wykonujących działalność cyrkową. Analiza ta pozwoliła na określenie zakresu możliwych działań organów jednostek samorządu terytorialnego oraz sformułowania wniosków dotyczących potrzeby wprowadzenia zakazu wykorzystywania zwierząt w działalności cyrkowej.