POLITICS AND POLICY

ADMINISTRATIVE POLICE IN THE PUBLIC ECONOMIC LAW – THEORETICAL PERSPECTIVE IN THE POLISH LAW DOCTRINE

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Abstract

The subject of the study was the interpretation of the term "administrative police" in the Polish legal doctrine. The research had to acquire a new knowledge about the broader possibilities of understanding this term in the context of the comparative studies. Making this term more comprehensible, precise, with an emphasis on the position in the security system, genesis of the legal institutions, reception of law and cultural diffusion was the research task. The research problem was related to the group with the following questions: how the term "police" was understood? What meanings were given to it? Whether it concerned the object of the activities of the police authorities or the subject, i.e. only the authorities?
Keywords: *administrative police; public economic law; legal culture.*

Introduction – public economic law in the Polish legal culture

In Polish law, as in other countries from the post-Soviet area, or – more broadly – in the continental legal European culture, in the legal language there is the term "economic law", but we can't identify it with the definition of the commercial law (mercantile law, trade law). In Polish law this term is identical with the German *Wirtschaftsrecht* and the Polish *publiczne prawo gospodarcze* is the same as *öffentliches Wirtschaftsrecht*. In Bulgarian it is *публично търговско право*. In this depiction Polish *prawo handlowe* (German *Handelsrecht*, Bulgarian *частно търговско право*) is the part of the commercial law. In Poland is in force Polish Commercial Companies Code (*Kodeks spółek handlowych*), but it has a narrower range than the Bulgarian *Търговски Закон*. Bulgarian commercial code is more like the pre-war Polish Commercial Code from 1934. Polish Commercial Companies Code includes the regulations for the partnership and capital companies, merging, division and transformation of companies and penal rules. In Poland the regulations – for example – for procuration (*прокурист*) and firm (*фирма*) are in Civil Code – articles 109^1 (procuration) and 43^2 (firm). Analogous to Чл. 2 *ТЗ* is – for a change – the article 6 of Entrepreneurs Law from 2018 (*Prawo przedsiębiorców*).

Why so different? Because commercial law and civil law in Poland were formed in the different ways, and in different times. The Commercial Companies Code was created after the transition to the capitalist world of the 90's. Civil Law was the "kind" of the codification works after the second World War in the 60's. Polish Entrepreneurs Law is its successor after the many legal acts, which followed: Law for Freedom of Business Activity from 2004 (*Ustawa o swobodzie działalności gospodarczej*), Law of Business Activity from 1999 (*Prawo działalności gospodarczej*) and Law of Business Activity from 1988 (*Ustawa o działalności gospodarczej*).

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This law from 1988 was one of the most important legal acts for economic transformation for Poland after the fall of communism. This short, simple, clear, and without any excessive bureaucracy, act passed into the legend of the Polish legislation. It was named "Lex Wilczek" after the Minister of Industry Mieczyslaw Wilczek. The model came from the pre-war Industrial Law from 1927 (*Prawo przemysłowe*), which was publicized for the unification of the law system on the Polish territory after the epoch of the Partitions of Poland. The 1927 Law was based on the model of German and Austrian *Gewerbeordnungen* from 1859 and 1869. The formation of the Polish commercial law is so conditioned by history.

But what of public economic law? It is a very wide sphere of law and to attempt to codify it would be impossible, and surely irrational. Each change would cause a cascading effect in the other acts and a never ending avalanche (Novikov, L., 2017, p. 213). The times of the voluminous "Allgemeines Landrecht für die Königlich Preussischen Staaten" are gone. In the opinion of Polish lawyers, the subject of the public economic law is public government activity which is in the scope of the state interventional competences in the free business transactions sphere (Blicharz, Grabowski, 2018: 22). It can include the sphere of the legal relations between state and entrepreneurs, which is regulated by the administrative means (Kruk, 2018: 42). The public economic law sphere concerns i.a.: definition of entrepreneur and economic activity, business environment institutions, regulations (concessions, licenses), registry, control and supervision of the entrepreneurs, activity of the foreign entrepreneurs and State Treasury (state-owned enterprises, state legal persons, state companies, agencies, foundations), public-private partnership, municipal management, administration of the public goods and public property, commercialization and privatization, enterprises in the special sectors (energy, telecommunication, rail, post office, water management), services of general economic interest, providing of the public services, competition law, state aid, economic planning, economic support, financial supervision (Blicharz, 2017; Dijlidjov, 2015; Kosikowski, 2010; Kowalski, 2007; Marinov, 2011; Olszewski, 2015; Snażyk, Szarfański, 2018; Valeriva, 2013; Zdyb, 2003).

1. Research process

The subject of the study was the interpretation of the term "administrative police" in the Polish legal doctrine. The research had to acquire a new knowledge about the broader possibilities of understanding this term in the context of the comparative studies. Making this term more comprehensible, precise, with an emphasis on the position in the security system, genesis of the legal institutions, reception of law and cultural diffusion was the research task. The research problem was related to the group with the following questions: how the term "police" was understood? What meanings were given to it? Whether it concerned the object of the activities of the police authorities or the subject, i.e. only the authorities? Whether the thinking processes of the police were coherent, without differences in definitions or internal contradiction (tips: Petkova, 2017), maybe overlap? How we can simplify them to make them easier to understand for readers? What the genesis and journey of ideas looked like? Where do the contradictions come from? Whether the pre-war terminological classifications are appropriate? It can be important because of the modelling influences on the understanding of the administrative system structures. In this system appears the relationship between governance and security.

The occasion for the considerations inspired the interesting book "Policja gospodarcza w prawie gospodarczym. Ujęcie teoretyczne" ("Economic Police in the Economic Law. Theoretical Depiction") published in 2019 by Polish lawyer Witold Małecki. It's a very good guidebook for anyone who wants to learn something about the theoretical aspects of the administrative police theory in the Polish legal doctrine. In this situation the research methods were clear: analysis of the primary (statutory law) and secondary sources (scientific literature). This text therefore has the style of a commentary on the sections of that book. The hypothesis assumes that the models of the administrative police are unclear. They should be simplified in the way of implementation of the

dualistic understanding of the police in the subjective and the objective sense; next we need the differentiation between the administrative and security police. The legal terms are strongly conditioned by the genesis of legal ideas and historical evolution of the legal norms. The reflections can be important in time of the legal systems convergence, because legal cultures are different and some institutions cannot be directly adopted.

2. Theory of the administrative police in the Polish law doctrine

As I tried to show, the Polish legal culture is strongly connected with the German, but with the French too (especially in the area of the civil law). A lot of the legal institutions were adopted from these cultures. They evolved and are still developing. Between policy and administration is situated the administrative police – from the German: *Verwaltungspolizei*, Polish: *policja administracyjna*.

The administrative police should be discussed against the background of the general idea of the police. The genesis of the police idea was described in the literature and we can focus our attention on the police definition (from Polish literature for example: Smyk 2019a, Smyk 2019b). According to Małecki the understanding of the police term in the Polish doctrine should be referred to by the tripartite classification, that is used in the German science, with the distinction of the three definitions of the police: institutional, formal and material (Małecki, 2019: 75). Some of the authors distinguish the institutional definition in two ways: monistic and pluralistic. In the monistic definition, the administrative police is a system of the entities whose sole or main task is to perform the police function (but this is the definition *idem per idem*, because we didn't know, what the "police function" is). In the pluralistic definition we should use the administrative police term in the plural. Both meanings are however inexact.

In the terms of names, the famous Polish theoretician of the administration Zbigniew Leoński (1929–2006) pointed to the distinction of the police in the material and formal sense. In the material sense, the police is each authority (institution, organ of state) which deals with the protection of public order, public security, social order, health and safety protection, action in an emergency (e.g. natural disaster) regardless of the name. In the formal sense, the police is only such an authority, which was so named by the legislator. In sequence we can mark out: 1) police formations that were organized on a military pattern and civil authorities; 2) state, local and private formations; 3) authorities with the general competences (for which the security is not the basic task) and special authorities (founded exclusively or above all for the security protection, e.g. sanitary) (Janik, 2012). In Polish literature there is a joint name: „inspekcje, służby, straże" (inspections, services, guards), e.g. work inspection, state protection service, border guards (Małecki, 2019: 75-80). The formal sense of the police in Leoński's proposal shows the models of the police formations and the material – subject side of the police, thus the group of the entities (authorities, institutions, organs of state etc.).

Formal and material sense merge with each other and additionally, in the opinion of some representatives of the doctrine, the first is all of the competences and tasks of the police authorities and the second – public administration function focussed on the prevention of threats and stopping damage. In addition, the formal and material sense in the literature are distinguished in another reality sphere. The formal sense should be concerned with the conventional reality and in the area of conventional reality – normative reality, but the material sense should be concerned with objective reality. In my opinion this model is unclear, because these sets are disjointed.

Competences, tasks and functions are mental constructs, not material artifacts. Additionally, when we distinguish a conventional reality, we can speak about conventionality (acts, contracts, customs). In the objective reality we have objective truth, the artifacts and people's behaviour also something that we can identify by oneself, check, test and finally say, that is falsifiable. In this way, abstract and general legal norms – about which W. Małecki wrote – will be a part of the conventional reality, but concrete and individual norms will be a part of the

conventional reality too. Abstract and general legal norms are constructs, being the product of the legislator. Concrete and individual legal norms are acts of the application of law. Both abstract, legal, concrete and individual norms are in the normative reality, because they build the law, together with the behaviour of the authorities and people. The legislators use the norms for the change of the reality, in the way of social engineering. Naturally we can say that abstract and general legal norms are applied in the form of the concrete and individual norms and realized by behaviour.

For example: alcohol licensing is a part of the public economic law. The Polish Act on Upbringing in Sobriety and Counteracting Alcoholism include abstract and general legal norms, creating the competences of the local government that realize the public administration function in the sphere of alcoholism prevention. It's all in the normativity. The application for a personal licence to sell alcohol and the administrative decision are conventional, but the decision includes concrete and individual norms. The consent can be objectively assessed, in the objective reality. In objective reality we can verify if the activity of the entrepreneur complies with the regulations (abstract and general) and decision (concrete and individual). But this, what we do with our evaluation is conventionality: we can do nothing or something. Our actual decision will be able to be objectively assessed. We can't precisely distinguish the senses and spheres. In my opinion the local authorities will be the administrative police in the subject sense, and their activities (decisions issuing) – object sense.

The problem increases in the confrontation with the dichotomy "is" (*Sein*) and "ought" (*Sollen*). Security is however a value, which is protected by the police and administration. We can speak about the dichotomy (*дихотомия*) between reality and value (Christov, 2016: 65). Theoretical reason teaches what is, and practical reason dictates what should be (Szyszkowska, 1972: 138). The addressee learns the regulations published by the legislator, knows how they are applicable in practice, and his reason dictates the duty of their application.

In the conventional acts are both normative acts, as signs of the social contract, and acts being the sign of the persons usual activity, not always fully legal. For example, in Poland, the Police usually do not issue a fine for exceeding the speed limit by 10 km/h but so issue fines for exceeding the speed limit by 30 km/h. The behaviour of the Police is also the expression of a conventionality but also the sign of the objective fact. Objectively the Police should issue a fine for each driver exceeding the speed limit – as the normative reality provides. The conventional reality corrects the normative reality. This is life in two dimensions. The discrepancy between conventional and normative reality works on the principle "the fewer the better": then the instrumentalization of the law decreases, the application of the law by the authority and the law-abiding by the citizens is higher. In this way the law does not break away from life.

If we stick to proposed model: formal and material sense and coupled with the conventional, normative and objective reality, we should distinguish functions, competences and tasks, but some of which would remain only in the sphere of the material existence and others only in the sphere of the formal duty, but it would be wrong. We should therefore correct the separation of the police in the formal, material and institutional sense. We just need to use the term of police in the subject and object sense. As I showed, the police in the subject sense is the whole of the entity, which protects public order and public security. In the object sense – a sphere of the security management.

The administrative police term came to Polish literature from the German science. What is important: it is not a normative term and not all lawyers use it. It is not interpreted uniformly. It is so because after WW2 it was not was not used, it experienced a relative renaissance after 1989, but it did not fully pass into the Polish administrative culture. What is interesting, in Bulgarian publications this term was presented mainly before 1939 (*административна полиция*). This term concern i.e. separated police structure activating under Ministry of the Internal Affairs and Public Health (*Министерство на вътрешните работи и народното здраве*) (Българските държавни институции, 1987; Daskalov, 2005; Ivanov, 2004; Milkova 1976; Nachev, 2002).

For the German security and legal culture is characteristic the distinction between security police (*Sicherheitspolizei*) and administrative police (*Verwaltungspolizei*) – both in the subject and object sense. *Sicherheitspolizei* means both the police formation and a sphere of security management. *Verwaltungspolizei* is a sphere of the security management too, but also a common name for the authorities, which perform tasks from the sphere of the administrative police, e.g. construction supervision. Then we must know what is included within this sphere. Therefore the administrative police divides into specific police groups such as building police, sanitary police etc., that can be the departmental police formations (*Fachpolizeien*), e.g. forest guard, which can be subordinated to the Ministry of Forestry.

This distinction is not used in the Polish public administration, because we use different terminology and we have different administrative structures. In Poland the public administration works in a different way, it is divided into government (*rządowa*) and self-government administration (*samorządowa*); government administration – general and special; general – central and territorial, special – combined (*zespolona*) and non-combined (*niezespolona*). General administration is subordinate to the Ministry of the Interior and Administration and special – to different ministries or central offices (bureaus), e.g. The Central Statistical Office. The combining of administrations creates structures that are responsible for some policy to the general administration, so educational administration (superintendent of education – *kurator oświaty*) serves voivode, to realize the Ministry of National Education's tasks. The non-combined administration creates its own territorial structures, e.g. National Revenue Administration (*Krajowa Administracja Skarbowa*), which is subordinated to the Ministry of Finance. The distinction of two types of police is not adequate for Polish law and security culture (Kostrubiec, 2019: 45; Żywicka, 2017: 205).

It may be one of the reasons for attempts – described by Małecki – to adapt the often chaotic police classifications, that we can find in the German literature, to the Polish administrative system. The legal doctrine says that security police take a shape of the general and basic function of maintaining public order and administrative police concern the specialized spheres of social activity (trade, transport, health protection etc.). Security police should work *ad hoc*, directly with concentration on enforcement actions whereas administrative police concern the conventional reality. The various authors try to distinguish political police from the administrative police, but the tasks within both spheres are really different and these two types do not cover all categories of police (Małecki, 2019: 80). When we try to distinguish the administrative police from the police as a force, our efforts cannot always be correct. As a result we forget that the police as a force work so that the entrepreneurs comply with the administrative law. Furthermore, with the security management in the public administration sphere or more in the sphere of the public interest deal not only with state-owned entities, but. organizations from the third sector (eg. education for security, social campaigns etc.). These organizations do not apply directly the legal regulations in social life, do not issue the administrative decisions, but they can realize the delegated tasks.

The combination of the administrative police with the creation of the general and abstract legal norms that protect the public goods recognizing as the police goods – as W. Małecki rightly noted – is not acceptable in the democratic state. The law-making activity of the state administration was exposed when in the public space there was no administrative judiciary and the administration creates the law and settles disputes, as at the beginning of the 19th century. Besides – as W. Małecki argued – general and abstract legal norms protecting the police goods are present in the substantive criminal law, not only in the substantive administrative law.

Therefore we should clearly separate the security police and administrative police, because there are two different spheres of the security management. I prefer a model, in which the administrative police is a sphere of the security management in the branches of public administration. It concerns the management of the public affairs by the public entities (including special administration), imposing administrative penalties (often fines), in the administrative

punitive proceedings, in accordance with the regulations from the substantive administrative law and extra-code penal law, in the form of administrative decision, that can be appealed to the administrative court. The security police – in my opinion – is a sphere of the security management, that concern the activities of police formations in the criminal matters, prosecution of offences, jurisdiction of the ordinary criminal courts, criminal code and criminal procedure, higher or more severe penalties (restriction of liberty, deprivation of liberty), in the form of the criminal judgement, that can be appealed to the higher court. Naturally this is only a model, which should be developed, e.g. to departmental and territorial police formations (federal, state, local) and tangent points between administration and security. The Police issue a fine for the administrative infractions (violations), so for example the lack of the house number plate. The petty offences law is derived from hard police crimes from the 18th Century (*schwere Polizei-Übertretungen*) and sanctions prohibited acts, which violate the administrative sphere.

W. Małecki wrote successively about the levels of police concept qualification: subjective, teleological and instrumental qualification. By the subjective qualification he identified the police with the activity of the public entities (Małecki, 2019: 91). It is hard to agree with this idea, because the activity refers to the objective side. The subjective qualification refers to the subject (entity, institution, organ of state, organization etc.). The police in the subjective qualification can be the group of the entities, which protect the public order and security (as I suggested above). The subject definition of public administration is formulated similarly. The administrative police is connected with the public administration system and security police with the justice.

The teleological qualification is placed on the aim. The aim of police activity is – in the Polish doctrine – the protection of especially important goods (Małecki, 2018: 95). In English we can use the common concept "good" for describing different names, e.g. public order, biodiversity, landscape (without landscape dominant elements), clean air, drinking water, forest, information, property, money, cryptocurrency, livestock etc.

Some of the pre-war Polish authors distinguish the three concepts: *bezpieczeństwo publiczne* (public security), *porządek publiczny* and *spokojność publiczna*. In English there are hard to translate, because the English term"public order" concerns both *porządek publiczny* and *spokój publiczny*. In German it is easier – we can speak about: *öffentliche Sicherheit*, *öffentliche Ordnung* and *öffentliche Ruhe*. *Öffentliche Ruhe* in German and in Polish it may seem archaic, all the more, when in the old Polish books we find the term *spokojność publiczna* – it can be read as *öffentliche Ruhigkeit* (in German it is like a neologism). Sometimes the public order in the sense of Polish *porządek publiczny* refers to ordered social and political system, order of society and state; and *spokojność publiczna* – to common referred public order and public security, e.g. not to riot in front of shops due to lack of food. The Polish name *spokojność publiczna* or *spokój publiczny* in English can literally be read as "public peace". In Bulgarian we precisely distinguish between *обществен ред* and *обществен мир*. "Public peace" will concern the peace between social units.

W. Małecki mentioned Tadeusz Hilarowicz (1887–1958), for whom public order refers to not only "preventing everything what is prohibited under criminal sanction, but also removing everything what goes against the common ethical and social opinions" (Małecki, 2019: 95-109). Nowadays, this approach can be highly controversial, especially in multicultural societies.

W. Małecki spoke about an interesting idea from Władysław Kawka – Kawka was the author of the famous pre-war coursebook "Policja w ujęciu historycznym i współczesnym" (Kawka, 1939). Kawka wrote: "public order is a situation[2], whose disturbance must not exceed the possibilities of a mentally healthy person. In the situation of the public order the distortions of reality cannot be excessive." In other words, the disturbances in the environment must not exceed the adaptability of the average person.

[2] Kawka used the concept „state" in Polish *stan* in meaning of the "situation".

W. Małecki took note of the distinction between police activity in public and private sphere which was presented in the past Polish law doctrine. The police should have acted only in the public sphere, i.e. protected life, health, property; but the protection should have come only when danger threatened from the outside. The dangers from the private sphere were to be "taken out from the police control". W. Małecki aptly pointed out the inadequacy of this approach. He gave an example of an assessment by the construction superviser of a private house project, but also – ahead of the coronavirus pandemic – the threat arising from "the consumption of meat from a sick animal".

The author of the reviewed book was rightly sceptical about the instrumental qualifications. In the intentions of the representatives of the doctrine, instrumental qualification was the "legal possibility of using coercion" (Małecki, 2019: 109). W. Małecki presented apt arguments that in the police activity (as a security management) are both coercive (forced) and non-coercive actions. He gave an example of a situation where the forecasting activities of the weather stations warning against the flood risks overtake the forced actions of the police services during a natural disaster. They all are in the sphere of the security management.

3. Conclusion

The economic police is not a function or task, but in the objective sense – a sphere of public management, which restricts business activity providing public security and public order (Długosz et alt., 2018: 696). It is active in the public interest (common good), includes orders and bans. Małecki's definition of economic policy is very good. He wrote, that economic police is activity of public authorities to protect public goods of an existential nature for society and individuals (i.e. public security, public order, public peace, and within them – in particular: life, health and property) from specific threats that may arise as a result of business activity (Małecki, 2019: 127). For me, in the subjective sense, the economic police is the set of the public entities (institutions, organs of state, services etc.), which applies the legal regulations to entrepreneurs.

The public administrative law regulations act on the status of the social unit directly or indirectly. Directly – when the consequences result simply from the legal norm (general and abstract) at the appearance of the concrete case that is in this norm specified (Długosz et atl., 2018: 697). Rights and obligations have the same content for all persons, that are in the similar legal and factual situation. The norm specifies rights and obligations for the addressee directly and the control of the behaviour of persons is the public administration task. The authorities play the role of the "night-watchman". Their role is limited to checking the compliance of the social units with the legal norms, in our case – compliance of the entrepreneurs with law. After they are implemented the supervisory solutions that are combined with the applying, if necessary, coercive actions (including using force), in order to bring the behaviour of the persons to the lawful situations. These norms need for their execution not so judicial, but enforcement proceedings (Długosz et alt., 2018: 697).

The legal regulations act indirectly when the legal situation of the entrepreneur does not result directly from a general and abstract norm, but is the result of the unilateral law application by the authority. The authority concretizes and individualizes the legal norm in form of the conventional act, i.e. administrative act, that is issued for individual designated addressee. So is this described in the jurisprudence of the Polish administrative courts (Długosz et alt., 2018: 698).

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