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ACTIONS BY ADMINISTRATIVE AUTHORITIES JUSTIFIED BY A STATE OF HIGHER NECESSITY

Abstract

This article deals with the actions of the administrative proceeding authorities justified by a state of higher necessity. In Poland, the state of higher necessity does not constitute a title for the encroachment of public administration bodies on the rights and obligations of persons without a legal basis. In terms of its essence, the state of force majeure under the Administrative Procedure Code is not uniformly understood. It may be treated narrowly or broadly. However, regardless of its treatment, it conditions the application of special and very often inherently exceptional solutions. This includes issuing decisions with the application of special regulations in matters of peace, security and public order, and sometimes in situations dictated by an even differently understood state of higher necessity.

This article deals with the actions of the administrative proceeding authorities justified by a state of higher necessity. In Poland, the state of higher necessity does not constitute a title for the encroachment of public administration bodies on the rights and obligations of persons without a legal basis. In terms of its essence, the state of force majeure under the Administrative Procedure Code is not uniformly understood. It may be treated narrowly or broadly. However, regardless of its treatment, it conditions the application of special and very often inherently exceptional solutions. This includes issuing decisions with the application of special regulations in matters of peace, security and public order, and sometimes in situations dictated by an even differently understood state of higher necessity.

Keywords: *public administration, administrative procedure, state of urgency, exceptions, legal regulations*

Introduction

Unquestionably, one of the fundamental functions of administrative proceedings is to adhere to the rule of law in handling individual cases. In their assumptions, procedural norms are expected not only to regulate a relatively orderly sequence of actions taken by public administration bodies with the aim of issuing an administrative decision while enabling the parties and other participants to exercise their procedural guarantees, but also to secure to the same extent the possibility of exercising at any stage of the proceedings an individual's interest right and the public (social) interest needs, which the public administration bodies must take into consideration in every case. The legal security of the parties to administrative proceedings is one of the chief factors ensuring that the rule of law should be respected, although it does not have an

absolute character. The Polish legal system regarding administrative procedures envisages certain legal institutions having an extraordinary nature which are put into motion depending on circumstances related to a state of necessity.

In all fields in which public administration bodies operate other than administrative proceedings, it is possible to uphold the concept of the so-called self-defence of administration (Zimmermann, 1956, p. 408; Jendrośka, 1963, p. 81) or an unwritten law of necessity (Smaga, 2000, p. 153 n.; Smaga, 2004, p. 160 n.); however, unlike states of necessity occurring in judicial law (civil or criminal law), these are not situations unregulated by the legal order (Zoll, 1984, p. 179 n.; Jaroszyński, 1985, p. 85 n.; Sobków, 1985, p. 16 n.; Przybysz, 1986, p. 69; Agopszowicz, 1986, p. 85 n), and special hypotheses and dispositions of the law on administrative proceedings that introduce solutions different from the model ones, implemented as *lex specialis* or even as *ultima ratio* (cf. Łaszczyca, 2007, p. 55 n; Sawuła 2021, passim).

The purpose of this article is to discuss the legal basis and the content of activities pursued by public administration bodies during administrative proceedings initiated by a state of necessity. It is also interesting to observe how a state of necessity is defined in the light of the currently binding provisions of administrative law. Although these questions, put forth in a similar manner, have been previously discussed in the literature dealing with judicial-administrative law, the ongoing development of legal regulations calls for a new look at these issues. Because of the limited framework of this article, our analysis will be constrained to the provisions of general administrative proceedings. Thus, any considerations regarding legal solutions applicable to special administrative proceedings will remain outside the scope of this paper.

The above objective will be accomplished by conducting a study supported by the classic legal dogmatic method. It is irrelevant here to refer to conclusions drawn from comparative legal research. Suffice to mention that in all the countries which have adopted a model of codification of administrative proceedings there are certain 'safety valves', the use of which is justified by a state of necessity. This is also observable in the Council of Europe's legal space, in which the recommended good administration standards – while defining the principle of legal certainty – allow public authorities to take measures which may infringe on acquired rights and legally binding situations if it is

absolutely necessary in the public interest (Dobkowski, 2010, p. 142). The applicability of legal empirical research would also prove to be dubious in our case because by their nature these institutions remain 'dormant' and are activated very rarely, hence large discrepancies are possible in administrative practice and judicial decisions.

1. Legal basis and content of actions pursued by public administration bodies in administrative proceedings justified by a state of necessity *sensu stricto*

In the strict sense, the definition of 'a state of necessity' based on the Act of 14 June 1960 Code of Administrative Procedure in Poland (consolidated text: Journal of Laws of 2024, item. 572) (Kpa) refers to a state that poses a threat to life or health, and which is one of the premises for the expropriation of a right acquired by virtue of an administrative decision under the so-called subsidiary right of appeal (Agopszowicz, 1986, p. 85; Sawuła, 2021, passim; cf. Matan, 2009, p. 14 n; Dobkowski, 2019, p. 12 n.).

Pursuant to Article 161 of the Kpa, the minister can reverse or amend as necessary any final decision if there is no other way to avert a situation that threatens human life or health. Such power in relation to decisions issued by local government bodies in cases relating to the government administration's duties is also vested in voivodes (regional governors).

This institution serves the attainment of specific purposes, which include especially the protection of threatened human life or health. However, a question arises if these threats are to be real or potential. Such threats tend to appear unexpectedly and are characterised by high intensity and an unpredictable course. For these reasons, cases of reversing the consequences of a final decision by its repeal or amendment by the competent public administration body *ex officio* cannot be dependent on the consent of parties or other entitled persons even if the said decision endowed them with certain rights or was actually beneficial to them. Such cases per se should be treated as urgent or sometimes as an emergency. The urgency of a threat, however,

should not be the sole premise. Nevertheless, Article 161 § 1 of the Kpa may also be employed at the request of a party or parties, as they can have a real interest in it, especially when there is a threat to human life and health. It also needs to be mentioned that the competent organs are ministers and possibly voivodes. Previously, they were the supreme public administration bodies, which were understood more narrowly. Changes in this regard were made when Poland was undergoing the political reform of the state in 1999, one of the aims of which was to strengthen institutionally the entire system of the protection of public security and order. It is also worth noting that although the provisions of Article 161 § 1-2 of the Kpa implicate discretion by phrasing the rule as 'the minister can', the said right of appeal is not entirely elective. It is difficult to imagine that under the circumstances of a real threat to people's lives and health, the minister would decline to use his powers. In reality, the minister or a voivode are obligated to exercise this right. Considering the subsidiary character of the institution, Article 161 of the Kpa can be seen as a last resort, by creating a possibility to abolish or limit the binding force of a final decision. However, the administration bodies should act 'as necessary', which means that they should be guided by the deliberate need to reverse the currently binding decision and either reverse or amend it in its entirety or in part, taking into account the mitigation of the consequences resulting from the cassation decision or reformatory decision due to the fact that the power of the above decision will expropriate the right lawfully acquired by virtue of the previous decision. Although in administrative practice decisions are rarely repealed or amended pursuant to Article 161 of the Kpa (which is evidenced by the small number of such cases lodged with administrative courts), this provision is a relatively stable institution in the legal system.

2. Legal basis and content of actions pursued by public administration bodies in administrative proceedings justified by a state of necessity *sensu largo*

In a broader understanding, a state of necessity also encompasses such legal situations where procedural guarantees of parties are sacrificed for the protection of human life and health exposed to danger. This corresponds to the violation of personal safety in a slightly milder form. Putting human life or health at a risk of losing it is always a danger, but not every dangerous situation of this type raises (causes) a state of threat. Although the border is fluid, in the case of a threat we deal with the direct impact of a factor causing harm to man, while in the case of a danger people are only and as much as at a risk of being exposed to the impact of a harmful factor. The term 'danger' is broader than the term 'threat'. Thus, a person can be exposed to the impact or at a risk of the impact.

A state of necessity in *sensu largo* entails the application of such procedural regulations as:

1. Article 10 § 2 of the Kpa, allowing for a derogation from the principle of active participation of a party in administrative proceedings, with particular emphasis on the party's possibility to comment on the evidence proved under Article 81 of the Kpa;
2. The provision of Article 100 § 2 of the Kpa allowing for the resolution of the preliminary issue by the public administration body conducting the proceedings in its own area;
3. Article 102 of the Kpa allowing for a public administration body conducting the proceedings to take any necessary steps during the suspension of the proceedings;
4. Article 145 § 2 of the Kpa allowing the recommencement of the proceedings by order of court or another body before falseness of the evidence substantiating a decision or a criminal act involved in issuing a decision have been confirmed if the falseness of the evidence or the criminality are evident.

Although Article 108 § 1 of the Kpa stipulates that immediate enforceability can be granted to a decision if it is necessary for the protection of human health or life or for the protection of the national economy from major losses or because of any other social interest or exceptionally vital interest of a party to the proceedings, and – despite the fact that in the sphere of administrative police we do not deal with qualified protection of human life or health – considering the nature of the entire legal institution, it should be concluded that such protection falls within the scope of 'a state of necessity' *sensu largo* (cf. Borkowski, 2012, p. 444).

3. Legal basis and content of actions pursued by the public administration bodies in administrative proceedings justified by a state of necessity *sensu largissimo*

In a yet broader understanding, 'a state of necessity' covers also a state of emergency, that is the actions of bodies engaged in administrative proceedings bodies undertaken in urgent situations (Łaszczyca, 2007, p. 55, cf. Tarkowski, 2010, p. 27-28).

In such cases, too, the procedural guarantees of the parties can be limited.

'A state of necessity' *sensu largissimo* entails the employment of such procedural regulations as:

1. Article 10 § 2 of the Kpa, allowing a derogation from the rule of active participation of a party in administrative proceedings, with particular emphasis on the possibility for the party to comment on the evidence proved under Article 81 of the Kpa, but not only in the presence of a threat to human life and health, but also in the face of a threat of irretrievable material damage;
2. Article 23 of the Kpa setting the limits on actions carried out by a public administration body on whose territory a given matter arose until a jurisdictional dispute is resolved;
3. provisions in Articles 24 § 4 and 25 § 2 of the Kpa, indicating the scope of activities which can be carried out by an employee or a public administration body excluded from proceedings;

4. Article 34 § 2 of the Kpa delegating to a public administration body involved in proceedings the task of appointing a representative of an absentee;
5. Article 55 of the Kpa allowing the so-called urgent summons – by telephone or other means of communication.

4. An attempt to determine the essence of a state of necessity in administrative proceedings

Following the German doctrine, from the standpoint of administrative proceedings, the notion of 'a state of necessity' refers to a set of legal norms which envisage certain separate proceedings of an extraordinary nature due to particular circumstances dictated by the existence of some abnormal state. Such events would therefore be regulated separately, other than normal cases. They are aggregated into a certain conceptual entirety according to their purpose, which is the adaptation of law to some demands which arise unexpectedly and require specific adjustments of proceedings to these abnormal circumstances. Thus, this is extraordinary law to which the bodies engaged in administrative proceedings are entitled, which means that the implementation of such regulations occurs at the expense of procedural guarantees of parties to the proceedings (vide: Zimmermann, 1933, p. 113).

Essentially the same viewpoint in the postwar literature was expressed by A. Jaroszyński, who asserted that a state of necessity was 'a synthetic approach to all situations identified in law which justify a deviation from the normal course of procedures followed by the authority or cause a change in the previously established administrative relationship.' (Jaroszyński, 1985, p. 86).

A slightly different opinion was worded more contemporaneously by G. Łaszczyca, who maintains that a state of necessity is a state justifying the sacrifice of a certain value (guarantee) for the protection of another threatened legal interest (Łaszczyca, 2007, p. 58).

Also, R. Sawuła claims that a state of necessity refers to an event where one legal interest is sacrificed to save another one (Sawuła, 2021, p. 13).

All these opinions clearly refer to a state of necessity defined in the context of judicial law (civil and criminal law). However narrowly or broadly one can comprehend a state of necessity, in the Code of Administrative Procedure in Poland (Kpa) this is related to a legal institution rather than the sphere of facts. It is not about a derogation from the legal order dictated by the necessity to save certain protected goods, but about a specific action of a body involved in administrative proceedings which must remain within the legally established framework. Its competences must be regulated by norms as *ius strictum*, and the norms themselves, by being exceptional, should be interpreted more narrowly rather than broadly. The concept of 'a state of necessity', although regulated by law, does not function as a policy clause in the Kpa. It is not an independent title to act, but rather it constitutes one of the elements which will be considered in the entirety of the legal protection of public safety and order, including the application of procedural and enforcement provisions.

5. Actions taken by public administration bodies during administrative proceedings dictated by a state of necessity versus the handling of matters related to public peace, order and public safety in conditions of necessity

In the context of actions pursued by bodies engaged in administrative proceedings dictated by a state of necessity, however understood, a question can be asked, namely whether the provisions of the Code of Administrative Procedure can be applied in matters of public peace, order and safety, that is in actions carried out by the public administration in the administrative police sphere, which has own legal specifics and dynamics but nevertheless relates to permanent situations. Wherever the necessity of an action does not have a qualifiable character, special regulations of the administrative proceedings that are not used in daily administrative practice are applied.

In this type of matters, specific legal means are employed, and the competent bodies act more on the principle of opportunity rather than legalism, and the reaction time and effectiveness of actions matter more. It is not only about issuing administrative decisions in the form of declaratory police permits and constitutive police ordinances, which is done according to the general norms, but here the focus is on measures taken in order to ensure (maintain, protect) public peace, order and safety through the ongoing supervision and constant surveillance.

The situation had been clear for years because the following assumptions used to be approved in general:

1. in the event of violating the provisions containing directly enforceable statutory orders and prohibitions serving the protection of these values, administrative decisions are issued entirely as exceptions;
2. as regards warrants, these are governed by the Act of 17 June 1966 on Enforcement Proceedings in Administration (consolidated text: Journal of Laws of 2023, item. 2505), which concerns the use of compulsory measures as part of the enforcement of non-monetary obligations;
3. as regards prohibitions, there are penal-administrative provisions, that is the current system of the law on minor offences, which combines the shared disposition of a prohibition in terms of the material and legal aspect with the powers of an officer of the competent inspection, service or guard in terms of the procedural aspect, where the said officer not only monitors that these prohibitions are respected, but also has a right to issue fee notices and the power to act as a public prosecutor in court, and sometimes has other competences, for example in the field of investigations;
4. The Act on Enforcement Proceedings in Administration also contains the institution of direct coercion, acting as a linchpin, which gives the right to officers of some uniformed services to use physical force, either independently or assisting other enforcers.

The above solutions were based on the assumption that any identification of the breach of statutory obligations and prohibitions should be finalised by applying these legal means, or possibly by resorting to the principle of whistleblowing and notifying the competent state authorities of the findings made.

Thus, it was assumed that in principle the Kpa should have no connection with the matters related to the protection of public peace, order and safety, and that these were the issues submitted to authoritative actions by the administration, which however are not performed under administrative jurisdiction.

Obviously, there are reasons pertaining to the protection of human life and health, which are one of the prerequisites for making a decision immediately enforceable or justifying why the public administration bodies must take into account the need to protect human life or health as a circumstance co-occurring with an act of violation of the law when making a decision about an administrative penalty fee. One can leave aside considerations regarding the protection of classified information and the deprivation of a party of the right to inspect the files of proceedings containing classified information and designated as 'strictly confidential', which is to ensure internal security.

However, it is justifiable to claim that the authors of the Code of Administrative Procedure (Kpa) in Poland were aware that its provisions would also be applied in cases related to the protection of public peace, order and safety. It should be clearly underlined that this is an untapped potential of the mentioned act.

For several years, control procedures have been developed separately and actually every inspectorate, service or guard has a different control procedure, some being more and others less complex. And it is possible that:

1. a control procedure will be in the form of administrative proceedings;
2. will begin by the authority's employee presenting his or her official ID and the authorisation of the competent authority to handle a given type of cases, and by serving the notice of initiation of the proceedings to the party at the registered office or place of residence;
3. next, an on-site investigation will be conducted in the form of inspection or perlustration;
4. afterwards, the findings will be written down in a protocol signed by the party to the protocol;
5. finally, an administrative decision supported by the protocol's contents will be announced:
    a. a decision to discontinue the proceedings in the absence of significant violations;

b. deciding on the essence of the matter if any violations are found, thus setting a deadline for rectifying the irregularities, imposing an additional obligation, limiting or suspending the exercise of the right;
c. with the order of immediate enforceability or immediate execution by virtue of the law.

The authors of the Kpa assumed that the code's provisions would also be applied in situations where negative influences on public peace, order and safety appeared in everyday situations.

However, typical police penalties should be equated with sanctions for offences, which are imposed following the principle of opportunism, and furthermore done so in a separate procedure. Even if a case is concluded by issuing educational measures such as an admonition or a penalty notice, the administrative proceedings regulations are still not applicable, although in practice authorised employees of administration bodies are allowed to issue penalty notices by virtue of Article 268a of the Kpa, and obvious mistakes in issued penalty notices are corrected by administrative decisions. However, the Kpa regulates the issuing and imposition of administrative monetary penalties, but even if that measure was intended to be used in situations of direct adverse influences on public peace, order and order, it is a separate subject of administrative proceedings. And this can be rightly seen as a certain limitation.

Administrative proceedings are judicialised, that is developed on the model of court proceedings, but they are not formalised enough to be applicable solely to typical cases. In fact, administrative proceedings are flexible.

Beside classic direct decisions, that is verbal orders by officers, including a call to remove the violation and a simultaneous threat to resort to certain enforcement means, including direct coercion, either used directly or as part of the provided assistance, provisions of the substantive law envisage in particular orders of the person in charge of a rescue operation, for example an order to demolish a nearby barn in order to prevent the spread of a fire. Pursuant to Article 21(2) of the Act of 13 August 1991 on the State Fire Service (consolidated text: Journal of Laws of 2024, item. 127), in circumstances justified by a state of necessity, the firefighter in charge of a rescue operation or any other

rescue task has a right to order necessary complete demolition or certain demolition works. According to § 1 point 2 of the Regulation of the Council of Ministers of 4 July 1992 (Journal of Laws No. 54, item. 259), on the scope and procedure of exercising rights by the person in charge of rescue operations, orders given by the person commanding a rescue operation are the decisions which can be made immediately enforceable, under the provisions of the Kpa.

Leaving aside the need to include the substantive legal definition of a state of necessity in the judicial law (criminal and civil law), from the procedural viewpoint these are decisions made under the Kpa, although in an extremely simplified procedure, which are immediately enforceable and which – in compliance with the aforementioned executive provisions – are announced orally, and where the entire proceedings are documented in a single protocol, or even in an internal report for the superior, and the grounds for the decision are confirmed in writing only at a request of an interested party.

By definition, these decisions could be subject to mandatory execution, even without serving the reminder and enforcement title because, pursuant to Article 20 § 2 of the Act on Enforcement Proceedings in Administration, a fire brigade commanding a rescue operation can act as an enforcement authority for the execution of administrative duties of non-monetary character, although in reality these duties are carried out by the fire protection services themselves in order to achieve the statutory tasks, and not as an act of substitute performance.

The state of necessity as understood above breaches the procedural guarantees of parties, although the right to a court trial is ensured to a minimal necessary extent. Double substantive proceedings of a case in the face of having caused irreversible consequences is illusory.

Quite frequently, it is impossible to reverse the consequences of decisions made for the sake of protecting public peace, safety and order, and even when such decisions are determined to be unlawful or unjustified, the only thing left to do is to mollify the loss caused by the said decision by awarding compensation.

Conclusions

Examples of legal solutions employed in administrative proceedings justify the conclusion that a state of necessity in Poland does not entitle the state to encroach on the legal sphere of an individual person without a legal basis. With respect to its essence, the state of necessity is not understood unequivocally in the light of the Kpa, but whether it is perceived in its narrow or broader sense, it necessitates the use of special solutions, very often extraordinary in character. In addition, some administrative decisions are issued under the special regulations concerning public peace, safety and order, and sometimes in situations dictated by a state of necessity understood yet differently.

However, a prerequisite for accepting the law of higher necessity in administrative proceedings is the proper performance of the competences delegated to public administration bodies respecting the principles of proportionality and strict legalism, and then the legal security of the parties to administrative proceedings should not be affected significantly. This is the source of the legitimacy of administrative proceedings. One cannot scrutinise any legal institution in isolation from the whole system, of which the said institution is just one of the building blocks.

Nonetheless, it is worth noting dissimilarities in the legal construction of a state of necessity in law and in administrative proceedings. To emphasise the specifics of the latter, a special term can be distinguished, such as 'a state of administrative necessity', which is increasingly often used in legal doctrine.

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