Magyar Rendészet 2014/3. 109–120.

Comparison on the content of policing and public administration

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Policing is a part of public administration. Both are influenced by the political and economic characteristics of the society. The general task of public administration is the realization of public interest and the carrying out of different public duties. Policing ensures public safety by exercising public authority through legitimate means. Policing is carried out mainly by administrative bodies and to a lesser extent by local governmental and non-governmental bodies, but a policing model has appeared in the organization of the legislative power.

The law in force created a fragmented institutional setup on all aspects of social relations and well-separated and shared the competence sub-systems in the government control. One of these is the policing structure which was discussed in a remarkable aspect by the researches on police in recent years.[1]

Policing is sometimes equal to police in the view of ordinary people and sometimes also in the view of experts on administrative law. This was the case from the beginning for a long period. Since bans exist, they have been breached and actions have been taken against offenders. If the ban was related to a certain degree to the people's safety, the guards of security took action against the ones who committed the breach.[2] The ones taking care of security can be called police.

The purpose of this treatise is not the exploration of the history of policing and police, but for the sake of the topic it should be ascertained that policing in today's meaning as regime functioning within the constitutional limits can be dated from the revolutionary period of 1848–49, although it is undeniable that policing institutes had existed even in feudalism. During the period of the revolution and at the beginning of the 1850s vigorous attempts were made to create an integrated national police, but that could not be established due to the fall of the revolution, and the initiative didn't affect the future developments. But from a public law point of view attention has to be paid to the justification in which Szemere Bertalan (the Minister of Interior of the Batthyány-government) casts light on the main function of the police: "plan has to be made… about the systematization of the crime police in the country. Ensure that torturing is strictly prohibited. If this will be, criminals cannot be brightened without the criminal police."[3]

1 See for example: Hautzinger (2011) 22–35.
2 More about in: Ernyes (1994) 17.
3 In: Fábiánné Kiss (1973) 189.

Policing or law enforcement

A somewhat undignified confusion emerged not in terms of content but in terms of format due to the fact that the name "policing" has been mixed absolutely inconsistently with the term "law enforcement" in both literature and the legal language since 1990–91. It should be emphasised that it is not a question of scientific content and origin. 1. § (2) point h) of the Act 43 of 2010 about the central state administration bodies, as well as members of the government and the status of Secretaries of State says "law enforcement bodies" but 1. § (2) of the Act 34 of 1994 uses the term "policing". Justifications of the laws "of course" ignore the explanation. This cannot be attributed to legislators because these terms are used as synonyms in literature as well. For our part, we are forced to accept "law enforcement" and "policing" as analogue terms but we take "policing" as scientifically well-founded – because we have to pay attention to the legal language in use. It is a fact that law enforcement as an expression is devoid of any substantive distinguishing features which could professionally distinguish or disconnect it from for example "policing" – the term coming from Szamel Lajos.

The topic of policing came to light for the first time in the fall of 1989 at the Police Academy, the predecessor of the Faculty of Law Enforcement at the National University of Public Service. It was suggested by one of the great professors largely on the grounds that if there is national defence, there should be law enforcement too. And believe it or not, the term has been introduced in this way to scientific discourse and to the official language with the quiet reception of today's representative of law enforcement. The first institutionalized form of this is the Szemere Bertalan Hungarian Order of Protection – Science History Society, formed in 1990. In the introductory essay it is written that the author does not wish to strictly define the meaning of law enforcement but under the term every kind of armed forces is understood. Furthermore the following factors are to be included in this term: the structures of armed forces, their dislocation, their tasks, their operation, their legal determination, their equipment and by the same token the educational, social, economic and moral position of human resources.[4] It is obvious from the essay that the term law enforcement comes from the president of the society and the organization is planning to use it systematically.

With all due respect for the purpose and scientific endeavours of the Society we can state that the founder of the term still owes a) a convincing or at least thoughtful explanation of law enforcement coming to the place of policing b) the scientific analysis and c) justification why the term "law enforcement" is to be used. Taking the above into consideration we regret to say that the legislators started to use the term during codification – typically in Act 110 of 1993 about national defence. With no little inconsistency. A good example for this phenomenon, in addition to the above mentioned laws about central state administration bodies and police, is Act 120 of 2012 which con-

4 "Law Enforcement" – History Books Special Issue 2006.

tains the term "policing tasks" as opposed to the Government decision no. 2073/2004. (IV. 15.) which uses "law enforcement" (as seen in part III. 3.1.).[5]

We take the strict attitude that the term "law enforcement" should be stamped out from policing literature and legislating process. Its unfounded use is untenable for those who read the works of Concha Győző, Tomcsányi Móricz, Kmety Károly, Magyary Zoltán, Szamel Lajos, Berényi Sándor, Lőrincz Lajos, Katona Gézá, Szikinger István, Finszter Géza throughout the cultivating the science of policing. (Similar opinion of Finszter Géza: The theory of policing — Kerszöv: 2003. page 61.)

Comparison of the content of public administration and policing

The essence of policing can be deducted from the concept of public administration as a whole-part relation, where policing administration (and its subsystems, including national security administration and corrections, etc.) is a part of public administration as a whole. Fábián Adrián investigates the concept of public administration through the concept of administration, underlining that it is not the only positive definition of public administration.[6] Rozsnyai Krisztina uses a description which combines the elements of the positive and the negative definition and at the same time it separates the different activities of the state (jurisdiction and legislation) from public administration but also describes its main content elements.[7] Patyi András and Varga Zs. András also have an integrated approach when, using complex conceptual elements, they detach public administration from the other branches of power. Then they enumerate these elements and highlight the subordinate position of public administration to law and its diverse and comprehensive administrative, public service character.[8]

We cannot give a definition of public administration that is based on professional consensus. Therefore, perhaps it is more appropriate *to collect the (generally) approved content items*. If this approach is acceptable, public administration, in our opinion, can be *described using its six criteria as follows:*

1. Room for manoeuvre for public administration at the macro level is often influenced by political and economic factors. This statement is supported by facts which say that the post-election programme of the government is defined by the programme of the winning political party; the strengthening or liberal philosophy of the policies behind the government determines the movement of public administration in the central or the opposite direction; it is always the winning political factor that gives the leaders of central and regional administrative organs. The influence of economy is shown by the fact that the setting up and feasibility of the various social and public duties are fundamentally defined by the country's economic potential.

5 About inconsistent use of terms policing and law enforcement see more in: Dunavölgyi (2011)
6 Fábián (2011) 22.
7 Rozsnyai (2011) 3.
8 Patyi–Varga (2009) 56.

2. Public administration always focuses on realizing a public purpose, duty or service. These are typically defined by the legislative power, for which the framework is provided by the function of state. Experts have various opinions of the functions of the state and their content. One of the most widely accepted views is that we can classify them as internal and external functions. Internal functions are mainly economic, medical, educational, cultural, environmental and policing while external functions are mainly defined as exercising the function related to cooperation in international defence.[9]
3. According to its external motivation, public administration performs a range of basic activities to fulfil its public duties. We should mainly consider the preparation of legislative and other decisions as well as executive, mandatory, organizing and controlling activities.[10] It should be emphasized that since the functions of public administration can be examined in several ways, as they reinforce rather than exclude each other; the activities can be classified and assessed according to other systems, too. For example, in terms of who is concerned, whose life is influenced by the given activity; or whether or not it involves public authority. A distinction can also be made between the types of activities, according to those backing the people affected by the given activity or in terms of the relationship between the administrative body performing the activity and those subjected to the administration.[11] When analysing the activities of public administration, the research done by Verebélyi Imre, setting up theses using a system theory approach, cannot be ignored. The professor calls it the "MERCEDES" model and states that when categorizing the system of public administration, whose elements are related in many ways, we can establish 24 main structure-defining requirements and they are in complete harmony with the types of a certain activity.[12]
4. In most cases, public administration fulfils its social role by enforcing its public powers. Public authority always serves the public interest; this makes it possible to fulfil its role, often when there is a conflict between the interests of the entity and of the majority, i. e. state power.[13] The issue of contracts concluded by authorities, established in recent years is a special part of this. It involves the administrative organs, which are parts of the state and have public authority, concluding civil law contracts.[14] One device for enforcing public power is the legitimate use of administrative force, which, in extreme cases, could mean taking a human life. "The state is a public body established to exercise force. It is above us and it enforces its interest, affects its will, even by suppressing people's contrary wishes and behaviour if necessary."[15] Of course, this does not mean that public

9 See in: Kalas (2007) 27–28.
10 Similar classification can be found in Kalas (2007) 52–58.
11 Szalai (2011) 14–17.
12 Verebélyi (2010) 463–474.
13 Rivero (1990) 12. Detailed analysis in: Temesi (2008)
14 See more: Schubauerné Hargitai (2013)
15 Kmethy (1907)

authority is present in every single move made by public administration. From preparing international contracts through education, health and other administrative sectors to organizing elections, in many cases, because of its nature, the manifestation of public power (having an enforcement character) is absolutely or almost completely excluded from certain activities.

5. An essential element of the definition of public administration is its being subject to legal constraints. This means that the acts of the administrative organs are subject to the Fundamental Law on the one hand, and to European Union legislation on the other. A specific administrative act may be absolutely blocked from the possibility of discretion (legally binding) or based on the discretion given by a hypothesis or a sanction (disposition). In both cases the content of the act is specified by legislation. In this system, discretional power is usually excluded, i.e. the freedom for any administrative body to decide in its sole discretion, without legislative authorization. The only possible exception is in the area of policing and here, too, only in very rare cases. (We will discuss this later.) Being subject to legal constraints, in the majority of cases, means discretion of substance or of evidence. "Most of the individual decisions in official activities are discretionary acts."[16] A special manifestation of discretion is fairness when the decision-maker, considering the positive elements available, brings a decision more favourable for the legal entity as compared to decisions based on general discretion. The realisation of being subject to legal constraints is demonstrated in all the areas of procedures carried out by authorities. Of course, contra legem decisions can also be made in the area of administrative law. However, in this case the opportunity for reparation is always opened as a warranty rule, which always requires the right legislative technique.[17]
6. The sixth criterion of defining public administration can be appraised in its specific institutions and its personnel. Every administrative task has an adequate organization which forms a special system. The three subsystems are as follows:
   - state administration
   - local administration
   - and other public administrations (paraadministration,[18] quasi state administrative organisations, certain legal and natural persons).[19]

Certain administrative tasks can be fulfilled at the same time and in any subsystem with similar action manoeuvres, while others can be fulfilled in only one way.

16 Discussing the issue, it is important to mention the works of Madarász Tibor and Molnár Miklós, among other authors.

17 See more in: Szilvásy (2011) 458–463.

18 Lőrincz Lajos was among the first ones who researched the term "paraadministration". Lőrincz (2010) 246–254.

19 According to entities performing public administration tasks, see: Fazekas (2008); Fazekas János: *State governing organisations with autonomous status.*

The central elements of the concept of policing

1. Policing activities are connected to security, emergency prevention and the mitigation and elimination of risk. In this conceptual element, we witness the social purpose of public administration such as fulfilling public tasks, public purposes and public needs. Namely, the social function of policing, its public task is to provide security. This security is regulated by the law; the safety of the community is the statutory social security. Consequently, policing protects the law-protected safety from all factors acting against it. Public safety can be approximated from a subjective and an objective viewpoint. From the subjective viewpoint, it means the inviolability of the lives of the natural person entities, their health, their freedom and their financial circumstances, while from the objective viewpoint, it means the inviolability of the legally protected functioning of the state, its institutions and the protection of all these subjects from crimes and any harassment. Public safety is protected by many branches of the law and the violation of any of these rules means the violation of public safety. Therefore, the protection of public safety equals the legal subject protected by the given legal standard. These legal standards can be found mostly in constitutional laws, administrative laws, criminal laws and partly in financial and labour laws.[20]
2. The following conceptual element of policing is public administration, and by this, it is connected to the law constraint of policing. It was described above which branches of the law record the legal interest protected by policing. From these, the constitutional laws and the Constitution shall be emphasized as they ensure the democratic order of the society as a whole. Article 46 of the Constitution regulates the protection of public safety in normal legal situations while articles 48–50 regulate this in special legal situations. The Constitution does not provide regulations for policing actions and for other subject matters in legal situations and it does not use the term "policing". But it's true that in article 51 (3) about extraordinary situations, we find the term "law enforcement": "After initiating the declaration of a state of preventive defence, the Government may, by means of decrees, introduce measures derogating from the Acts regulating the operation of public administration, the Hungarian Defence Forces and law enforcement organs…" Unfortunately, the Fundamental Law does not comment on the interpretation of the criticized term. (So the incorrect artificial word is materialized as a virus in the Fundamental Law.) The Fundamental Law assigns the police for the protection of public safety and public order but it does not say that other law enforcement agencies cannot be formed. It also points out that the Government controls the police. The actual content regulation of policing is given by administrative laws, criminal laws and misdemeanour laws. Administrative laws define the tasks, spheres of action, system, connections, guarantees of action and provisions of policing coming from the Fundamental law. Further-

20 This theory was discussed in my PhD dissertation based on Szamel (1992); Balla (2012) 14.

more, administrative laws regulate the magisterial using of policing, it can specify different kinds of obligations for the clients and during the enforcement, it may apply sanctions and coercive actions. It fixes the statutory rights of clients and the enforcement of these rights is supported by guarantees. Criminal laws and misdemeanour laws are free from rules for defining tasks, directing powers, detailing the organizational issues and anything else dealing with the relation between administrative laws and policing. It is natural as these two branches of law contain the regulation system of the state's demand for punishment so that policing with the use of these two law fields becomes mobilized for the purpose of preparing for criminal justice. The criminal and misdemeanour policing procedures are about to end the illegal circumstances being active against a protected legal subject, meanwhile it claims the suspected person to authority.

If the content of the public action is official, then it is always based on a strictly defined regulation both in a substantive law and a procedural law approach. In criminal and misdemeanour laws, the given policing action is always bound which means discretion is only possible when determining the disposition. In another aspect, we can see that the hypothesis and the disposition of the exact legal regulation do not give an option for interpretation as regards starting and carrying out the procedure, it is an obligation of policing to comply with the only one kind of legal order. This contrasts with the administrative regulation of policing in the field of official jurisdiction which in turn often and typically prevails in the decision-making autonomy. This is often written in the given administrative regulation with the modal "may" (…may give the authorization to…) and with conjunctions "from" or "to" (the penalty can range from 1,000 HUF to 10,000 HUF) or it can operate with a non-univocal interpretation of legal terms entitling somebody to do something which testifies that it is positioned for the discretion of the policing official decision ("the license shall be revoked if there is an offensive threat of public safety or national security, or public health or public morality interest").[21]

The question remains if it is a must that every policing action should be tied to the law. "The act shall comply in all respects with the substantive legal provisions which are the basis for the issuance." Unless, the action will be void.[22] This finding cannot be debated in constitutional states with a constitutional system. However, exception in policing official jurisdiction can be found. We need to highlight that it is rare. It may occur that in order to protect safety the policing organ makes an atypically discretionary decision, maybe even against the law. But such decision can only be made in accordance with the principles of democracy, and their protection, always meeting the general values of society.

3. The third conceptual element of policing is: its activity is mainly administrative and within this public authority, a rather administrative manifestation where legitimate coercion may be applied or secret tools can be used. The primary area of policing shall be searched in the public administration system. We cannot overlook

21 Patyi–Varga (2009) 231. The university handbook discusses the tied-to-law position of public administration.

22 As before, page 241: The book quotes Madarász Tibor, who discusses the void cases of actions in the university handbook — Hungarian State Administration — on page 343.

that these are listed in Act 43 of 2010 which specifies the examined type of institution among the central state administration bodies. Accordingly, this includes:
– the police
– the Prison Service
– the professional body for disaster management
– and the civil security services.

However, policing profiled agencies can be found not only in the central state administration. Such agencies work in local government administration, moreover – if we take into consideration that the fundamental purpose of policing is the surveillance of safety, this being the core element of the concept, then – beyond public administration they are also to be found in the legislature and in the private/civil sphere. It needs to be highlighted that in this logic the only determinant element is the purpose. Based on the surveillance of safety and the responsibilities assigned to this destination, we distinguish the following authorities to be maintained in the organization of policing:
– primary policing body
– secondary policing body
– other administrative bodies performing policing duties
– non-administrative related policing organs.

Primary policing body is the police itself (without National Defence Service and Terror Prevention Centre). Act 34 of 1994 about national police provides twenty-one opportunities of action and twelve kinds of coercive measures for the police to ensure public safety (law and order) and limit order. There is no other law enforcement agency with such a broad regulatory power and this is what makes national police a primary policing body. This status is also confirmed by the number of nearly forty-four thousand members they count which cannot be compared to any other number they have in the policing sector (in this context we do not count the civil body guards with a number of over one-hundred thousand as a policing body).

Secondary policing bodies include:
– the civil security service
– the Prison Service
– the National Tax and Customs Administration – which is classified in the central state administration organs' subsystem of government offices –
– the National Guard.

Two comments are immediately offered to the above categorization. First, secondary policing bodies do not include the professional body for disaster management. It is because the organization's activities are concentrated around security (industrial safety, fire safety, etc.) but it does not have the direct power to enforce it, thus in the absence of one of the two pillars of the specific differences it cannot be considered as an essential policing agency. The second observation relates to the parliamentary guards. It definitely poses an interesting problem. For about a hun-

dred years there was no example in the history of Hungarian policing for the legislature or the judiciary to have public safety-protective function beyond public administration. And this is right if our first base is the classical principle of the power branches which lists the implementation of state functions which are outside of the legislation and judiciary to the enforcement branch. In this train of thought the Parliament or the Curia has no military force for defensive purposes, school system for education, etc. About the legislative power it can be stated that it accomplished its job well when they created their own rules about their own guard[23] with Act 36 of 2012 about Parliament. The act does not consider it as a policing body ("The Parliamentary Guard is an armed force under the leadership of the House Speaker"[24]). In this context the comment made to 125 § saying the House Speaker has policing tasks in which he helps the Parliamentary Guard to perform its essential task, seems inexplicable. But if we take a closer look at these tasks (defence of the Parliament, ensuring its independence, body guard, maintenance of the order of negotiations) and the tools they can use to fulfil those tasks ("physical force, handcuffs, chemical means, electronic devices, roadblock, firearm use"[25]) we can clearly see that the Parliamentary Guard is a policing and a secondary policing organ.[26]

To perform their policing tasks, Prison Service and civil security service are allowed to use physical coercion, chemical tools, handcuffs, firearms, and secret operational tools (like taping, secret surveillance) on the basis of the national security act. So, all secondary policing bodies can operate strong and multi-use coercive means conferred by the act on them to ensure safety and they have the right to use secret methods.

Policing related other administrative agencies and personnel performing policing tasks are:

- the professional body for disaster management
- public space surveillance
- armed security guard
- rangers, mountain guard, hunter, forest personnel, fisheries patrol, field inspector (municipal utility supervisor).

The organs of policing bodies of this category are distinguished from the police and secondary policing bodies by the fact that all their tasks are related to public space surveillance. Their policing tools are adequate to the forced measures they have to take. Which is actually an understatement, and it is understandable because as far as the disaster management sector's tasks are concerned they cannot be performed by policing coercive measures (in emergencies due to threats like natural disasters, industrial disasters or others), they can be performed for example by saving the population. But in case, for example, of a backup order to

23 Act 66 of 1812 established the Parliamentary Guard for the first time.
24 Act 36 of 2012 127. § (1)
25 In the act under 125. § (1), (2) e) and 133. § (3)
26 There was an interesting conference in this topi con May 15th 2013, held at National Public Service University Public Administration faculty led by Tóth Zoltán. Several speakers emphasized the very special status of the Guard.

take action against those who resist rescue work, the disaster management can only solve this by police intervention. So, physical force or similar action can only be used indirectly. In this regard, we can see that other administrative persons performing policing tasks have wider range of tools to apply. Physical force or chemical means may be applied by rangers, mountain guards, hunters, forest personnel and forestry personnel performing law enforcement tasks against a person caught in the act of illegal acts, violation, committing crime and for safeguarding purposes. They have the right to search the clothing, the person and the vehicle, the right to restrict freedom of movement of a person caught in the act. What is more, the supervisors of public area, the field inspectors, the rangers, the fish guards and the members of security services are allowed to use handcuffs. The legislature gives permission to bear arms for self-defence reasons to the members of forest protection service, forest management staff performing law enforcement duties and wardens.[27]

As we can see, the organizations engaged in policing activities – being public administrative, central state administrative, self-governing or other organisations of the legislative branch of the administration – have got their social purposes to protect safety and when using their powers – coercive action or covert activities – they might limit human freedom. This statement can only be taken with reservations about the disaster management body, which brings up the idea that it should be wiser to leave this organisation out of the specification of policing bodies of the Act 43 of 2010.

The bodies of the last organizational grouping could be called 'para policing' or 'quasi policing' agencies (under the latter name we do not mean the overused 'so' but it refers to 'almost'). Apart from the term it can be declared that we do not mean the public administration (and legislative) organisations here but the bodies belonging to the security sphere, all of them part of the civil sphere. Their number one representatives are the security guard companies.

In the case of public (legislative) policing, the content of the legal relationship is always defined by public law, while in the case of civil security the legal relationship is always defined by civil law. In the first case, security tasks must be performed by the state and in the second case it is a profit-oriented activity. The first one ensures public safety while the second one ensures the safety of the private sphere. In the first case we find strict official coercion and covert means and in the second case these are strictly excluded (apart from self-defence). In the view of these facts, the purpose of 'improving public policy, public safety, and enhancing the effectiveness of crime prevention' declared in the Preamble of the Act 133 of 2005 about the protection of persons, property, the private detective activity raises serious problems of interpretation. We cannot say that private security activity has no effect on public safety but it is not the primary objective of this sphere; first and foremost they want to obtain profit. Numerous

27 Act 120 of 2012 1. § and 15. § (1), (2) and 11. §, 20–21.

such companies appeared after 1989 and their numbers are two or three times higher than the number of police officers. Among them there are persons who are excellent and highly qualified, ex-officers who often served in senior positions at the national security or at the police, people who have good connections and their personnel and material knowledge can gain benefit for the primary policing bodies and to the Constitutional Protection Office.[28] And for that reason it is a difficult safety question, (too).

When discussing policing we cannot omit the auxiliary police, which are organizations aiming to improve the public's sense of security. They were established as associations with court registration. Act 165 of 2011 declares that auxiliaries can give the opportunity to citizens who feel responsible for the safety of their housing environment to take part in maintaining public safety. Its basic task is to co-operate with the local police in crime prevention, voluntary assistance in disaster management, accident prevention, victim protection, performing tasks in traffic safety, searching for wanted persons and objects. The statutory provision that prohibits other civil associations to perform such tasks is remarkable. The legally regulated exclusivity and the vigilante activity determine the usefulness and importance of this civil organization and by doing so, it provides those criteria by which the Civil Guard Association and its vigilante activity can clearly be separated from other activities and merger varieties.[29]

Of course, auxiliaries do not have regulatory powers and a license to action. What really differentiates this socially useful and highly acclaimed organization from other civil groups is that it is formed with a non-profit purpose by public self-assembly and its operation is characterized by self-governing elements. Auxiliaries can be found in several towns in the country and the government aims to support the central organisation, the National Civil Guard Association with one billion Hungarian forints in 2014.

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28 See more in: Szikinger (1998) 42–44.

29 Explanation given to the Act 165 of 2011 3. §

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SUMMARY

A rendészet és a közigazgatás tartalmi összehasonlítása

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A rendészet a közigazgatás része. Mindkettőt befolyásolják a társadalom politikai és gazdasági sajátosságai. A közigazgatás általános feladata a közérdek realizálása, különböző közfeladatok tejesítése, a rendészet ezen belül a közbiztonságot biztosítja. Jellemző a közhatalom érvényesítése annak összes legitim eszközével együtt. A rendészet feladatait főként államigazgatási, kisebb mértékben önkormányzati és civilszervek látják el, de megjelent a törvényhozói hatalom szervezetében funkcionáló rendészeti modell is.

30 Detailed analysis: Temesi (2008)