

REFLECTIONS ON THE NATURE OF AN ENERGY COMPANY: INSPIRATIONS FROM STANISŁAW KASZNICA

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ABSTRACT

In his manual *Polish Administrative Law* Stanisław Kasznica dedicates a section to public institutions, which can be categorised into public establishments (e.g. public schools) and public undertakings (e.g. state-owned banks) based on their purpose and the governing law. The author explores how Kasznica's insights can aid in understanding the nature of a public undertaking, as regulated by contemporary law and discussed in case law and doctrine. He concludes that it is worth considering whether the legal definition of an energy company should reflect its fundamental role in the economy and society, given the universal good it provides in the market. Furthermore, he suggests that defining public undertakings legally would be valuable.

KEYWORDS

energy law; energy company; public utility; public undertaking; public enterprise

1. INTRODUCTION

It is widely acknowledged among administrators that Stanisław Kasznica's magnum opus is the book *Polish Administrative Law*. The fact that it was written during the occupation, coupled with the author's advanced age at the time (approximately 70 years old), suggest that he aimed to document only the most pertinent information for future officials. This information was drawn from his extensive experience, knowledge and wisdom, without delving into controversies regarding the concepts he discussed. Indeed, in the preface, Kasznica states that he "restricts himself to presenting, in each case, only one solution that he has reached or that, among the existing ones, he considers most pertinent."¹ The content of the handbook confirms the author's intent and exemplifies clarity of communication, devoid of any trivialisation of the issues being presented. In this respect alone, Kasznica serves as an inspiration.

1 S Kasznica, *Polskie prawo administracyjne: pojęcia i instytucje zasadnicze* [Polish Administrative Law: Basic Concepts and Institutions] (Wydawnictwo Prawnicze 1946) 5. Whenever quoting the handbook, I refer to the second edition, i.e. the one published just after the Second World War, mainly due to the lack of access to the first edition, which was published under a pseudonym and during the occupation.

When I first encountered his handbook as a doctoral student, I was struck by the directness with which he addressed the issues at hand. This approach was particularly striking given that such a style was not commonly practiced in the teaching of administrative law at least 20 years ago. However, rather than dwelling further on the commendable form, I wish to focus on aspects of Kasznica's work that may be particularly inspiring for a lawyer specialising in energy law. Although Kasznica did not specifically address energy issues, his observations on public institutions – including public enterprises – may still be relevant today. To this end, I employ the following approach. First, I summarise Kasznica's views on public institutions, particularly as they pertain to the concept of an energy enterprise. Next, I outline the current state of law and legal scholarship concerning energy enterprises as of 2022. Finally, I draw conclusions from the juxtaposition of Kasznica's thought with contemporary perspectives, with the hope that this comparison will yield valuable scientific insights.

2. PUBLIC INSTITUTIONS IN KASZNICA'S HANDBOOK

Chapter III – *Public Administration Authorities of the handbook Polish Administrative Law* includes paragraph 10, titled *Public Establishments and Enterprises (Public Institutions)*. According to the author, a public institution is defined as “a group of persons and material resources, established by the state or another public-law entity, forming an organisational and technical unit, intended to serve a specific, well-defined purpose on a permanent basis.”² A public institution is established by a public association, most often by the state or municipalities on the basis of a “constitutional act”. Public institutions are divided as follows:

- (1) non-self-reliant – when they do not have legal personality, e.g. power plants and gasworks;
- (2) self-contained – when they have legal personality, e.g. state railways.

Another criterion for the division of public institutions is their purpose and the law by which they are governed. According to this criterion, the division is as follows:

- (1) public establishments – governed by public law and meeting some well-defined public need;
- (2) public enterprises – subject to private law and pursuing a commercial purpose, although, as the author notes, “there are undoubtedly state enterprises which serve more than just fiscal purposes. And, on the other hand, there are establishments which, thanks to their exemplary organisation and the successful selection of their personnel, make in some countries even very serious profits”³.

Further on, the author splits the consideration into two parts, describing separately public establishments and public enterprises. He characterises public establishments as institutions in which “creative activity, i.e. the production of certain goods or the provision of certain services, comes to the fore”.⁴ The relationship between the users (destinators) and the establishment is determined by public law, including the establishment regulations. Thus, regardless of whether the use of the establishment's services is compulsory (e.g. a public school) or voluntary (e.g. a museum or a library), the legal relationship between the user and the establishment does not arise from a contract, but is created on the basis of an administrative act allowing the use of the establishment. In doing so, Kasznica emphasises that the consequence of an administrative legal relationship is that the destinators must be treated equally: It is immediately apparent how advan-

2 Ibid., 80.

3 Ibid., 81–82.

4 Ibid., 82.

tageous such a state of affairs is for the general public: the factory authorities cannot make any differences between applicants, favouring some and pushing others away, guided by incidental considerations or perceptions. And after all, this is sometimes about essential needs!⁵ Another consequence of such a legally formed relationship is that “the claim for admission to a public establishment often – but not always – has the character of a subjective right”.⁶

Public enterprises, on the other hand, are governed by private law and their purpose is profit, although not exclusively. Indeed, Kasznica divides such enterprises into two sub-types: public enterprises with fiscal purposes (e.g. salt, tobacco, lottery or alcohol monopolies) and public utility enterprises, whose “main purpose is to perform a special public service”.⁷ The latter include state-owned banks. The purpose of the enterprise is therefore somewhat “fuzzy”. It is therefore not so much the fiscal purpose of the enterprises in each case, since there are some among them that pursue a public utility purpose. What certainly characterises all of them, on the other hand, is economic self-sufficiency.

The legal consequences of the circumstances of public enterprises being subject to private law are as follows: “there is no compulsion to use the company’s services – nor do private individuals have a legal claim to be allowed to use the services – the relationship between the company’s bodies and its users is based on the principle of equivalence – the fees, paid for the company’s services, are by nature private fees and are collected through judicial enforcement – the company’s liability is carried out through private law”⁸. This clear distinction between what is private and what is public is engaging and is reminiscent of the “grumblings” of professors from my university years about the mixing of the public and the private in law. For Kasznica, apparently “seeing me” when choosing a contractor was possible in private law, whereas in public law it was out of the question.

Finally, the last relevant section of the Handbook’s consideration of public institutions was devoted to concessionary enterprises. These are private enterprises that have been given a public utility character, including a number of administrative and legal powers. Such an enterprise is most often a public limited company. “The act by which an enterprise is given the character of a public utility – the concession act, the concession – is an administrative act”, he said: “On the basis of this act, the enterprise – the concessionaire – is granted the public subjective right to establish and operate the enterprise. This granting is at the discretion of the authority”⁹. Why does the state not independently carry out such an activity by establishing a public institution? Kasznica answers: “The state, however, considers it more expedient in certain cases not to carry out this monopolised activity with the help of its own bodies, creating state establishments, but to contract it out precisely to a private enterprise, hoping that it will manage more economically”¹⁰. Examples of such activities were the telephone concession companies (in Kasznica’s time it was the famous PASTa – this example also comes from him), radio broadcasting, aviation, railways etc. Importantly, the powers enjoyed by concessionaries are analogous to those enjoyed by public establishments. A concessionary undertaking could not cease to operate: “Once started, an undertaking cannot be abandoned”¹¹.

5 Ibid., 83.

6 Ibid., 84.

7 Ibid., 86.

8 Ibid., 85.

9 Ibid., 86.

10 Ibid., 86.

11 Ibid., 87.

The summary of Kasznica's views on public institutions presented above will hopefully give us a better understanding of the nature of energy companies.

3. ENERGY COMPANIES IN POLISH LAW

The legal definition of an energy company is contained in Article 3(12) of the Energy Law,¹² being consistent with the requirements of Directives 2009/73¹³ and 2019/944.¹⁴ According to it, an energy company is an entity which carries out economic activity in generating, processing, storing, transmitting, distributing or trading fuels or energy, as well as transmitting carbon dioxide or handling liquid fuels. This definition draws attention to the need to perform energy-related activities and to conduct them in a manner that fulfils the characteristics of economic activity. Thus, when it comes to the first element of the definition, let us call it subject matter, it is explained in the Energy Law itself. This is where the definitions relating to concepts such as transmission, distribution, fuels and energy are contained. In short, an energy company is one whose objective is to carry out various activities related to fuels, energy and carbon dioxide.

In contrast, the second element of the definition, the functional one, refers to the concept of economic activity without defining it. According to a practice that has already been established for years, in such cases where a public law does not explain the concept of economic activity, the definition contained in the basic law for economic law is used. Currently, this is the Business Law.¹⁵ In Article 3 of this Act, a business activity is an organised profit-making activity performed on its own behalf and in a continuous manner. Thus, an energy company is such an entity that conducts organised, profit-making, continuous activity on its own behalf. The absence of these characteristics means that an entity producing energy or fuels, e.g. for its own use, will not be considered an energy enterprise.¹⁶

The prominence of an energy undertaking's objective and commercial nature within the definition has some obvious consequences. An energy company by its legally defined nature is engaged in economic activity, and therefore its purpose is profit. The social purpose is not included in the definition at all. It is therefore not surprising that the representatives of the doctrine, when writing about the energy company, do not mention its role as an entity providing services that are universally available¹⁷ or essential for human life. In addition, the fact that a large group of energy companies are organised into joint stock companies whose shares are listed on the public stock market – which in turn gathers investors whose aim is to multiply their capital – further emphasises the commercial nature of the activities of these entities.

However, the picture of an energy company would be incomplete, and thus untrue, were it not for two necessary additions. Firstly, a huge part of the regulation of energy law is the series of obligations

12 Ustawa z dnia 10 kwietnia 1997 r. – Prawo energetyczne [Act of 10 April 1997 – Energy Law] [2022] JoL 1385.

13 Directive (EU) 2019/944 of the European Parliament and of the Council of 5 June 2019 on common rules for the internal market in electricity and amending Directive 2012/27/EU [2019] OJ L 158, 125. The provision of Article 2(57) of Directive 2019/944 indicates the definition of an energy undertaking.

14 Ibid.

15 Ustawa z dnia 6 marca 2018 r. – Prawo przedsiębiorców [Act of 6 March 2018 – Entrepreneurs' Law] [2021] JoL 162 as amended.

16 M Stoczkiewicz, *Pomoc państwa dla przedsiębiorstw energetycznych w prawie Unii Europejskiej* [State Aid for Energy Companies in European Union Law] (Wolters Kluwer 2011) 75.

17 Cf M Swora in M Swora, Z Muras (eds), *Prawo energetyczne. Komentarz* [Energy Law. Comment] (Wolters Kluwer 2016) 304; M Kraśniewski, B Pikiewicz, M Ziarkowski in M Czarnecka, T Ogiński (eds), *Prawo energetyczne. Komentarz* [Energy Law. Comment] (CH Beck 2020) 36.

imposed on energy companies in order to subject it to its social mission, which is to provide basic goods and services to the public. There are arguably few entities on the market that are subject to such far-reaching regulation as energy companies. This is recognised in both the literature on the subject and case law. The most emblematic ruling, partly due to its being extensively cited in the literature, is the judgment of the Polish Constitutional Tribunal,¹⁸ in which it ruled on the obligation to purchase electricity from unconventional and renewable sources.

It is worth quoting at this point the longer passages from this judgment and the relevant literature: “The Energy Law introduces, in the field of energy management, numerous restrictions of an administrative nature, characteristic of a regulated market, consisting in the fact that »the state encroaches in a sovereign way on the economic activity of energy enterprises, regulating this activity by granting concessions, approving tariffs, multi-faceted control of enterprises and imposing fines«, although the legal relations linking an energy enterprise with other energy market participants »are primarily civil law relations linking this enterprise with the recipient of services«”¹⁹. Legal scholars expressed the conviction that energy enterprises are not *de jure*, but *de facto* public utility enterprises and as such should be subject to more far-reaching rationing than other entrepreneurs²⁰. Furthermore, the Polish Constitutional Tribunal stated that energy law as a part of public economic law is not detached from the axiology of economic activity: “it is not free from assessments in general categories of social justice, it serves not only as an instrument for controlling economic processes, but also for securing social interests, coextensively with setting permissible limits restricting the basic values of the market economy in the public interest”²¹.

Thus, the role of the law in the implementation of social justice by means of obligations imposed on energy companies is not questioned, and at the same time they are referred to as *de facto* public utilities, despite the fact that the law does not explicitly call them such and the very attribute of a public utility is currently applied essentially to local government units and their subsidiaries. However, it is argued in the literature that municipal entities are governed by the rules of private law when performing municipal management, and when providing public utility services.²²

Secondly, it is important to acknowledge, albeit not as a principle established by law, that the largest entities in the energy market today are state-owned enterprises (joint stock companies with majority ownership by the Treasury or under its decisive influence). These entities are public entrepreneurs not by legal designation, but because the Treasury’s shareholding enables it to significantly influence their activities through private law mechanisms. This factor has a considerable impact on their operations, decision-making processes and associated risks. Consequently, the public’s expectations of these entities are elevated, particularly concerning the quality of services, pricing and accessibility.

18 Judgment of the Polish Constitutional Tribunal of 25 July 2006, P24/05 (2006) OTK-A 87.

19 So H Palarz, *Prawo energetyczne z komentarzem* [Energy Law with Commentary] (Ośrodek Doradztwa i Doskonalenia Kadr 2004) 18.

20 A Walaszek-Pyziół, ‘Kształtowanie i realizacja polityki energetycznej państwa na gruncie ustawy Prawo energetyczne (podmioty, instrumenty)’ [Shaping and Implementing the State Energy Policy under the Energy Law (Entities, Instruments)] (1999) *Acta Universitatis Vratislaviensis. Prawo* vol. 266, 419.

21 So K Strzyczkowski, *Prawo gospodarcze publiczne* [Public Economic Law] (LexisNexis 2005) 26. Cf C Kosikowski, *Polskie prawo gospodarcze publiczne* [Polish Public Economic Law] (LexisNexis 2003) 245.

22 C Banasiński, K Jaroszyński, *Ustawa o gospodarce komunalnej. Komentarz* [Municipal Economy Act. Comment] (Wolters Kluwer 2017) 39.

To further clarify the nature of an energy company, it is noteworthy that under Article 32 of the Energy Law, economic activity in the energy sector requires a licence. Although the distinction between permits and concessions has become less pronounced than in Kasznica's time, the concession authority, represented by the President of the Energy Regulatory Authority, still wields considerable discretionary power in granting concessions. However, this discretion does not imply that the authority operates as part of a state monopoly.

4. CONCLUSIONS

What would Kasznica say about the modern energy enterprise? It is certainly not a non-autonomous public institution of a municipal nature, as power and gas plants were organised in his time. Perhaps the shift towards distributed energy, with significant participation from municipalities forming energy clusters, represents a return to the origins of energy as a more localised initiative rather than a centralised professional energy system. However, this is only a potential future direction, and it seems unlikely that the energy industry will be organised into entities resembling non-autonomous public institutions.

Kasznica might initially find modern energy law perplexing. The legal landscape he described was simpler, with a clear distinction between public and private law. In public law, obligations to the state and users predominated, and activities were fundamentally orientated towards the public interest. In contrast, private law, even when applied to public enterprises, maintained its inviolability, free from interference by competition law. Concepts such as the essential facilities doctrine or the abuse of a dominant or monopolistic market position were unknown, allowing entrepreneurs significant discretion in choosing their counterparties, setting prices and engaging in differentiated treatment.

Today, however, energy companies involved in distribution, transmission, storage, liquefaction and regasification are obligated to provide equal access to the network, storage or installations. Even energy companies involved in generation and trading face significant restrictions in the private legal sphere, particularly in areas such as tariff formation.

In exploring suitable concepts to describe contemporary reality, Kasznica might attempt to define public enterprises and other entities in the private sector that fulfil a specific social mission. A public enterprise, using Kasznica's terminology, is neither a public establishment nor a public entrepreneur, as it does not assume legal-administrative powers from the state concerning users. However, it remains a special entity because it provides essential services, despite operating in the private sector.

The challenges that emerged with the significant increases in gas and electricity prices in Poland and Europe during 2021 and 2022 underscore the crucial role energy companies play in the economy, individual living conditions and public perception. The quality and pricing of services and goods are often viewed through a political lens rather than as purely private matters. This situation calls for reconsidering the organisational and legal framework of energy companies, their position within the economy and the state and the nature of concessions.

Drawing on Kasznica's approach, which favoured simplicity in describing reality, it would be worth reconsidering the definition of an energy company, potentially incorporating a social component. This would clarify that energy companies are not merely commercial entities pursuing their own or shareholders' objectives. A more comprehensive proposal would involve re-evaluating the general regulation of public entrepreneurs, regardless of their organisational and legal forms.²³

23 Attempts to specify companies – companies with a public mission in Article 9 of the *ustawa z dnia 16 grudnia 2016 r. o zasadach zarządzania mieniem państwowym* [Act of 16 December 2016 on the principles of management of state property] [2021] JoL 1933.

Above all, Kasznica's life and attitude should serve as an inspiration. He was not only a clandestine university instructor during the occupation, but also a dedicated public servant. As a member of the elite, he believed in subordinating his talents to the common good. This was evident not only when he defended Dublany near Lviv in 1918, but also when he helped establish the university in Poznań and taught clandestine classes during the occupation. Kasznica was also a man of deep faith, living a life marked by modesty and commitment. His faith enabled him to find meaning in the immense personal suffering caused by the loss of his wife and two sons – Jan, who perished in the defensive war of 1939 and Stanisław, who was tortured in the Office of Security's prison and executed after a show trial in 1948.

It is particularly noteworthy, especially in a time when faculty councils pass resolutions without significant risk, that when Kasznica was forcibly retired in 1947, his colleagues from the Poznań law faculty honoured him with a letter of gratitude. The letter stated: "You have devoted your knowledge, warm heart and unwavering character to the service of science, youth, the university and your colleagues. [...] Today, as you are retired by the authorities' order, the Council of the Faculty of Law and Economics expresses its deepest respect and gratitude for your dedicated work, offers a heartfelt assurance of our unwavering feelings and requests that you continue to regard us as your trusted and kind friends." Only those familiar with academic life can fully appreciate the significance of such a heartfelt gesture to someone condemned to infamy.

The success of us all, particularly in the fields of academia and legal practice – including energy law – depends on how many choose to embody the values and attitude represented by Kasznica.

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