REVIEW OF COMPARATIVE LAW
VOLUME XXV
YEAR 2016

# CROSS-BORDER COOPERATION OF POLISH SELF-GOVERNMENT ADMINISTRATION IN THE LIGHT OF THE RELATION BETWEEN ADMINISTRATIVE AND INTERNATIONAL LAW

*Dominik Tyrawa**

ABSTRACT

The purpose of the article is to indicate relations which appear between administrative law and international law, then, to discuss the specificity of international cooperation of local/regional authorities with particular attention paid to the essence of cross-border cooperation. Instead of a conclusion, the author decided to conduct an in-depth analysis of cross-border cooperation of local/regional authorities and refer this cooperation to the relation between administrative law and international law.

**Key words:** territorial self-government, administrative law, international law, cross-border cooperation, international cooperation

## INTRODUCTION

Functions and tasks of contemporary local authorities are constantly evolving. This tendency may result from various reasons. It is sufficient to indicate relevant social changes which should be reflected by the changes of law (in the area of politics, finance and procedures), new economic

* Ph. D., Chair of Public Law, Off-Campus Faculty of Law and Social Sciences in Stalowa Wola, The John Paul Catholic University of Lublin, dtyrawa@kul.pl.

and social problems or others, e.g., climatic, demographic or migration changes.

Within the framework of the territorial self-government we can distinguish the sphere of internal and external activities. In case of internal activities it seems appropriate to indicate such problems as the administrative staff of the self-government or the problems of political system (e.g., the relations between executive and legislative bodies). External activities of the self-government administration include, e.g., the relations between the self-government administration and the claimant, relations between self-government and governmental administration, and actions of self-government administration in the external sphere of operations of the state authority, i.e., in the area of public international law.

The aim of this article is to discuss the following problems of the correlation between the public international law and the administrative law (i.e., also the self-government law), the forms of international cooperation of the territorial self-government with special attention paid to cross-border cooperation and, finally, the evaluation of cross-border cooperation in the light of relations between the administrative law and the international law.

## INTERNATIONAL LAW AND ADMINISTRATIVE LAW

Clarifying the relations between international law and administrative law is highly complicated, although not impossible. The most frequent description of these relations is made by the concept of international administrative law. This concept may be defined both from the point of view of public international law as well as from the point of view of administrative law.

In the first case, there may be relations in the area of diplomatic law (e.g., positions of diplomats or consuls, forms of international agreements as problems of the international law, or the issues connected with foreign

service as problems of the administrative law)[1] or the concept of public service (also provided by international organisations)[2].

In the second case, we also refer to the diplomatic law since the entire diplomatic and consular personnel consists of administrative bodies and it is possible to include within the administrative law those provisions which have been issued to administer foreign affairs and are a component of the internal order of the state[3]. Moreover, we must point to the issues which are between the international public law and the administrative law. These are the issues connected with border traffic (the question of visas), art and culture, education and higher education, environmental protection (and, in particular, nature protection, water law and waste management), taxation and customs, the question of rescue and prevention of natural disasters, widely understood transport law (railway, road transport and traffic, inland waterway) or the status of foreigners[4].

The international administrative law may be understood as a specific platform within which standards are set with the participation of two or more states[5], and the identification of this concept happens as a result of the growing development of economic relations[6]. This concept may also be understood as a part of the legal order, within the framework of which we deal the regulation in the area of administrative law, and it is directly and permanently binding in, at least, two countries and causes responsi-

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[1] It seems that it is impossible to indicate clearly whether they are the problems in the field of administrative law or international law, in this case we deal with the border between those two branches of law, see: Ludwik Ehrlich, *Prawo międzynarodowe*, Warszawa: Wydawnictwa Prawnicze, 1958, p. 94.

[2] An example of such service may be the International Labour Organisation.

[3] Jerzy Stefan Langrod, *Instytucje prawa administracyjnego. Zarys części ogólnej*. Reprint, Kraków: Zakamycze, 2003, p. 77.

[4] Joanna Człowiekowska, *Prawo międzynarodowe jako źródło prawa administracyjnego*, [in:] Źródła prawa administracyjnego. *Conference on the hundredth birth anniversary of Professor Jerzy Stefan Langrod*, (ed.) Jan Zimmermann, Piotr Dobosz, Kraków: Zakamycze, 2005, pp. 90-92.

[5] Jerzy Starościak, *Źródła prawa administracyjnego*, [in:] *System prawa administracyjnego*, (ed.) Jerzy Starościak, Wrocław-Warszawa: Wydawnictwo PAN, 1977, p. 151.

[6] Jerzy Starościak, *Studia z teorii prawa administracyjnego*, Wrocław-Warszawa-Kraków: Wydawnictwo PAN, 1967, p. 161.

bility and enforcement to be realised in the same way, by separate or joint bodies[7].

The most important sources of international law are international agreements which refer to nature protection, border traffic, transport, telecommunication or taxation, and the specific role of United Nations Organisation, whose operation is an example of how international administrative law works[8].

Marek Zieliński rightly notices that the difference in discussing this concept results from various specialities of the authors. This concept is described and defined differently at the level of the international public law and differently at the level of the administrative law. The discrepancies in definitions may also result from the fact that different concepts are incorrectly named in the same way[9].

The view of Tadeusz Wasilewski may be indicated as concluding in clarifying the notion of the international administrative law. He makes a precise definition of levels where international and administrative laws pervade each other by distinguishing three basic concepts. They are: the international administrative law, which he divides into international administrative law and administrative international law[10]. According to the cited author the international administrative law includes the principles of the international public law of administrative character and international origin, while the administrative international law is the set of norms of national administrative laws of various states which regulate detailed problems in the area of law of foreign countries.

The concepts indicated as close to the international administrative law are the concept of the European administrative law or the concept of

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[7] Jan Boć, *Prawo administracyjne*, [in:] *Prawo administracyjne*, (ed.) Jan Boć, Wrocław: Kolonia Limited, 2001, p. 54, see also Jan Zimmermann, *Prawo administracyjne*, Kraków: Zakamycze, 2005, pp. 47-48.

[8] Michał Możdżeń-Marcinkowski, *Wstęp do prawa administracyjnego ogólnego*, Kraków: Zakamycze, 2006, p. 39.

[9] Marek Zieliński, *O pojęciu międzynarodowego prawa administracyjnego*, Państwo i Prawo 9(2008), pp. 16-17.

[10] Tadeusz Wasilewski, *Stosunek wzajemny: porządek międzynarodowy, prawo międzynarodowe, europejskie prawo wspólnotowe, prawo krajowe*, Toruń: TNOiK Dom Organizatora, 2004, pp. 94-95.

the global administrative law. The former should be understood as norms and principles of law which are created by European organisations, which allows us to distinguish, e.g., the European administrative law of the European Union or the European administrative law of the Council of Europe. The latter can be defined as a collection of mechanisms, principles, practices and social agreements which influence the responsibility of global administrative bodies[11], guarantee that these entities will function transparently and justify their decisions and their legality. In addition, they assure effective control of norms and decisions they take[12].

The relations indicated above between the international public law and the administrative law are not the only ones, but they are sufficient to be defined in a proper way. It must also be indicated that international public law is superior to the national administrative law. This statement means that norms and principles included in the sources of international law are binding in the administrative law. Also any sources of international public law will be the sources in the administrative law.

## FORMS OF INTERNATIONAL COOPERATION OF THE TERRITORIAL SELF-GOVERNMENT

The units of territorial self-government place more and more emphasis on international contacts. The causes of such actions are, among others, the globalisation of law or the growing political integration. Foreign contacts of local governments also express the willingness of efficient management of the self-government unit[13]. International cooperation of self-governments may serve as the basis for: the exchange of knowledge between the cooperating units, promoting the self-government in the international arena, increasing investment, economic or commercial attractiveness or

[11] John Ferejohn, *Accountability in a Global Context*, IILJ Working Paper 5(2007), p. 1.

[12] Benedict Kingsbury, Nico Krisch, Richard B. Stewart, *The Emergence of Global Administrative Law*, Law and Contemporary Problems 68(2005), p. 16.

[13] Paweł Swaniewicz, *Kontakty międzynarodowe samorządów*, Samorząd Terytorialny 10(2005), p. 7.

realising joint projects. International cooperation is treated as prestigious, particularly with reference to small units of self-governments, particularly rural or rural-urban communes (Polish: *gmina*).

The legal grounds for the international cooperation of territorial self-government unit must be sought at various levels. The starting point is the Constitution[14], as well as the constitutional principle of supporting international law and integration signalled in the preamble and indicated in Article 9 of the Constitution of the Republic of Poland. However, it must be emphasised that this principle is general, which may have and has an impact on the interpretation of this principle. The concept of "international law' includes the multitude of legal sources, of various effectiveness and of various origins. In order to interpret it properly, we must make the critical analysis of the doctrine[15] or review the case law in this area[16].

The constitutional regulation is interpreted at the statutory level. Here we must indicate: Article 84a of the Local Commune Self-Government Act of 8 March 1990[17], Article 75a of the Local Poviat Self-Government Act of 5 June 1998[18] or Article 76 (3) of the Local Voivodship Self-Government Act of 5 June 1998[19]. A special act which the above mentioned principles refer to is the Act of 15 September 2000 on the principles of territorial self-government units' access to international associations of local or

[14] Article 172(2) of the Constitution of the Republic of Poland of 2 April 1997 (Journal of Laws of 1997, no 78, item 483 as amended), pursuant to which units of territorial self-government can join international associations of local and regional communities as well as cooperate with local and regional communities of other states.

[15] See., e.g., Krzysztof Skubiszewski, *Przyszła konstytucja RP a miejsce prawa międzynarodowego w krajowym porządku prawnym*, Państwo i Prawo 3(1994), p. 11, Małgorzata Masternak-Kubiak, *Przestrzeganie prawa międzynarodowego w świetle Konstytucji Rzeczypospolitej Polskiej*, Kraków: Zakamycze, 2003, pp. 182-183 or also Andrzej Wasilkowski, *Przestrzeganie prawa międzynarodowego (art. 9 Konstytucji RP)*, [in:] *Otwarcie Konstytucji RP na prawo międzynarodowe i procesy integracyjne,* (ed.) Krzysztof Wójtowicz, Warszawa: Wydawnictwa Sejmowe, 2006, 9.

[16] E.g., Judgement of Constitutional Tribunal of 11 May 2005, Ref. No K 18/04, LEX no 155502 or Judgement of the Supreme Administrative Court of 26 August 1999, Ref. No V SA 708/99, LEX no 41452.

[17] Uniform text, Journal of Laws of 2016, item 446.

[18] Uniform text, Journal of Laws of 2015, item 1445, as amended.

[19] Uniform text, Journal of Laws of 2016, item 486.

regional communities[20]. According to the above act the units of territorial self-government may join the associations and participate within the limits of their tasks and competencies, acting pursuant to the Polish internal law, the state's foreign policy and its international commitments. In addition, the ground for such associations for the provinces is the document "Priorities of province's international cooperation". Here the key question is the problem of tasks of the unit of territorial self-government and the question of taking resolutions with respect to these tasks. The example of such a regulation may be Article 7 (1) 20 of the Commune self-government, which indicates, as one of its own tasks, the cooperation with local and regional communities of other countries and Article 18(2)12a of the Act pursuant to which we deal with the exclusive responsibility of the Commune Council, specified by the possibility of taking relevant resolutions in this respect.

Taking up the cooperation is an exclusive right of the units of territorial self-government. It means that, e.g., commune's auxiliary units[21] or organisational units are excluded in this area. It should not be surprising that the problem of foreign cooperation of the units of territorial self-government was so extensively regulated in the Act on Voivodship self-government. It results from territorial, personal and financial, potential of provinces and is also in compliance with the concept "Europe of Regions".

Besides the regulation indicated above, i.e., the currently effective Act of Constitution, political acts of territorial self-government units and the special act, the grounds for international cooperation of territorial self-government units must be sought in the acts of international law. Here we must specify the acts in the legal system of the Council of Europe and in the legal system of the European Union, also emphasising the limited nature of their effectiveness, i.e., limited to the member-states of these international organisations. However, we must not overlook the fact that, although these regulations are effective in a limited number of states, they impact also third states which model their internal regulations on those systems.

[20] Journal of Laws of 2000, No 91, item 1009, as amended.

[21] Compare: Judgement of the Provincial Administrative Court in Kraków of 11 May 2004, Ref. No III SA/Kr 61/04, LEX no 138349.

In the legal system of the Council of Europe there are two acts of law of fundamental importance: the European Outline Convention on Trans-frontier Co-operation between Territorial Communities or Authorities of 21 May 1980[22], launched in Madrid, and the European Charter of Local Self-Government of 15 October 1985[23], prepared in Strasbourg. The former act, in its preamble, indicates its main aim. It says that the aim of the Council of Europe is "to achieve a greater unity between its members and to promote co-operation between them" and "this aim will be pursued in particular by agreements in the administrative field". This cooperation was to refer to such fields as "regional, urban and rural development, environmental protection, the improvement of public facilities and services and mutual assistance in emergencies" and the cooperation between local and regional authorities in this area was to facilitate the effective realisation of these aims. The latter act, being the source of legal standards[24] of international co-operation, points to this form within the framework of the right of local communities to associate. Parties of this international agreement are entitled to join an international association of local communities which will be recognised in every country, i.e., also in the states which are not parties of this agreement, on the basis of bilateral international agreements.

With reference to the EU sources, the international co-operation of territorial self-government units is ruled by several acts, often only indirectly connected with the problems discussed. The key ones are: the Communications from the European Commissions (like the Communication from the Commission of 1 June 2003 – Paving the way for a new neigh-

[22] Journal of Laws of 1993, no 61, item 287.

[23] Journal of Laws of 1994, no 124, item 607.

[24] Legal standard may be defined as a certain model of action, which is an instruction specified in legal acts established within the legal system, which in its content indicates a certain mode of action or failure to act, and its role is limited to the improvement of the quality of solutions, both legal as well as factual ones, see: Dominik Tyrawa, *Standaryzacja zewnętrzna prawa administracyjnego i działania administracji publicznej w Polsce jako przykład globalizacji*, [in:] *Ewolucja prawa polskiego w dobie globalizacji*, (ed.) Dominik Tyrawa, Lublin, Wydawnictwo KUL, 2013, p. 219.

bourhood instrument[25]), the no longer binding Regulation No 1638/2005 of the European Parliament and of the Council of 24 October 2006 laying down general provisions establishing European Neighbourhood and Partnership Instrument[26], Regulation No 1082/2003 of the European Parliament and of the Council of 5 June 2006 on European Grouping of Territorial Co-operation (EGTC)[27], Commission Regulation No 951/2007 of 9 August 2007 laying down implementing rules for cross-border cooperation programmes financed under Regulation (EC) No 1638/2006 of the European Parliament and of the Council laying down general provisions establishing a European Neighbourhood and Partnership Instrument (ENPI)[28] or the Regulation of the European Parliament and of the Council No 1303/2013 of 17 December 2013 laying down common provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund, the European Agricultural Fund for Rural Development and the European Maritime and Fisheries Fund and laying down general provisions on the European Regional Development Fund, the European Social Fund, the Cohesion Fund and the European Maritime and Fisheries Fund and repealing Council Regulation (EC) No 1083/2006[29]. This system of general sources, coming from the EU system, is supplemented by the act of national law, the Act of 7 November 2008 on European Grouping of Territorial Co-operation[30].

The Union legislation distinguishes cross-border cooperation, transnational cooperation and interregional cooperation[31]. The most developed form of co-operation seems to be the European Grouping of Territorial Co-operation (EGTC). Its aim is to facilitate and support territorial

[25] Document unpublished in official publication, quoted after: Sylwia Dołzbłasz, Andrzej Raczyk, *Współpraca transgraniczna w Polsce po akcesji do UE*, Warszawa, Wolters & Kluwer, 2009. The list of legal acts of the EU included there is also helpful in this field.

[26] Official Journal of the European Union L 2006, 310, 1.

[27] Official Journal of the European Union L 2006, 210, 19.

[28] Official Journal of the European Union L 2007, 210, 10.

[29] Official Journal of the European Union L 2013, 347, 320.

[30] Journal of Laws of 2008, no 218, item 1390, as amended.

[31] Łukasz Buczkowski, Lech Żukowski, *Formy współpracy międzynarodowej lokalnych jednostek samorządu terytorialnego,* [in:] *10 lat doświadczeń polskiego samorządu terytorialnego w Unii Europejskiej*, (ed.) Elżbieta Feret, Przemysław Niemczuk, Rzeszów-Przemyśl, Wyższa Szkoła Prawa i Administracji, 2014, p. 35.

co-operation between its members. Its member may be: a member state or national authorities, regional authorities, local authorities, public entities (within the meaning of the EU provisions), entities awarded contracts for public services provided in the general economic interest pursuant to the national or EU law, as well as national, regional and local authorities or entities equivalent to those specified above, from third countries. EGTC allows entities coming from outside the EU structure to join. However, in this respect the EU legislator introduced some limitations, according to which EGTC may include members located on the territory of at least two member states and at least one third state which borders with at least one member state on condition that these states implement together programs supported by the EU or operate in the area of territorial co-operation. There are some exceptions to this rule, according to which it is allowed that EGTC included members situated on the territory of only one member state and at least one third state bordering with a member state on condition that the EU member state will acknowledge such a grouping as compliant with the scope of its territorial co-operation in the area of cross-border co-operation, transnational co-operation or bilateral relations with this third state, and, according to which EGTC can include members of only one state included in the EU and at least one state or Overseas Countries and Territories (OCTs), with or without the participation of third states. Establishing EGTC is voluntary and initiated by entities which are to create its structure[32].

## CROSS-BORDER CO-OPERATION OF THE TERRITORIAL SELF-GOVERNMENT

Cross-border co-operation is a special form of international co-operation. In order to describe the phenomenon, a commune, a self-government unit, was selected.

[32] More on EGTC, see: Łukasz Buczkowski, Lech Żukowski, *Formy współpracy* …, p. 38-49.

In the concept of "cross-border" of key importance is the concept of border (both the border of the state and the border of the competence of the entity performing the task). Within this concept, the cross-border activities cross the borders of independent states which results in the necessity to break various barriers. It is possible to distinguish specific features of this concept. Firstly, the primary aim of cooperation is not the partner's origin in another state, but a concrete task, in this case the partner's origin is of secondary importance, and crossing the border results from the decision to perform the task together. Secondly, the cross-border cooperation has a spatially limited applicability. It means the proximity of co-operating partners and the proximity of the border. In this case the proximity is not a clear term, as it does not imply the necessity of having a common border[33].

In order to describe the arisen relations, it seems the best to use these concepts of cooperation, collaboration or coaction interchangeably. Undoubtedly, these forms are voluntary, so it is possible, but not obligatory, to join these legal forms. The territorial self-government unit decides to cooperate. The scope of the cooperation is set by the tasks to be performed by the unit, i.e., the unit's own tasks.

In cross-border cooperation it is possible to distinguish: the cooperation through international associations of local and regional communities, twin-town agreements, international municipal initiatives, cooperation for development (ad hoc cooperation dedicated to the entity at a lower level of development and affected by, e.g., a natural disaster) and cross-border cooperation as a manifestation of cooperation crossing the state borders[34].

Communes are neither primary nor secondary entities of international law. This statement results from the fact that, in case of Poland, communes are the entities of internal law, despite their relative leeway (freedom of action). Communes are basic units of territorial self-government, the only units which have their direct empowerment in the constitution. They are equipped with the attribute of independence, which means that they take

[33] Renata Kusiak-Winter, *Współpraca transgraniczna gmin Polski i Niemiec. Studium administracyjnoprawne*, Wrocław: Prawnicza i Ekonomiczna Biblioteka Cyfrowa, 2011, pp. 32-33.

[34] Ibidem, pp. 42-51.

action in their own name and at their own risk. In the Polish law there is a principle of presumption of competence in favour of the commune, as laid down in Article 163 of the Constitution according to which "the commune shall perform all tasks of local government not reserved by the constitution or acts to other units of public authority", while Article 164 indicates the leading role of the commune in this area. The tasks of the commune are listed in Article 7 of the Act on Commune Self-Government and next specified own tasks in specific acts on substantive administrative law or financial law. However, it must be remembered that the necessity to realise the task results from the will of the legislator, and not the commune itself, which means that communes must not create their own tasks for their own development, unless within the limit of their competence. The distinction between own task and delegated task should be made by the case study on the basis of the substantive law[35]. It is right that in the area of cross-border cooperation it is possible to perform only and exclusively own tasks[36], which means that cross-border cooperation can be regarded as commune's own task.

## CONCLUSION

Cross-border cooperation, as one of the possibilities of international cooperation for territorial self-government, may be assessed by the correlations of international law and administrative law in several ways.

The first way, according to which the form of cooperation indicates supplementing the activities of the state in the external sphere by the activities of the units of territorial self-government. In this way we have deeper decentralisation of public administration and also manifestation of the growing globalisation of law which affects territorial self-government units, originally appointed only to perform local or regional tasks, whereas now

[35] Ewa Olejniczak-Szałowska, *Zadania własne i zlecone samorządu terytorialnego*, Samorząd Terytorialny 12(2000), p. 10.

[36] Judgement of the Superior Administrative Court in Łódź of 27 September 1994, Ref. No SA/Łd 1907/94, LEX no 10657.

we can observe the extension of this activity onto other, external forms of cooperation. In this way the territorial self-government unit becomes the entity supplementing the international activity of the state.

The second way to clarify these relations is the fact that cross-border cooperation becomes one of the forms of fulfilling the tasks imposed on territorial self-government units. It means that this form of cooperation supplements other de facto activities and in some cases, assessed individually, it may improve the efficiency of the unit. Thus, hidden under this form of cooperation, there is a thoroughly defined aim which must be connected with other tasks of the territorial self-government. This form of cooperation should be implemented after other forms of internal activity have been used and the aim should be to perform other tasks and not, e.g., the cooperation itself. We can also assume that international cooperation of territorial self-government should be launched if the self-government unit performs other tasks correctly and efficiently. The self-government unit should not be priority-oriented at international cooperation, as this form of activity should be only one of many spheres of its activity. International cooperation, including transnational cooperation, is aimed at meeting the collective needs of the local community, and entering into it may increase the opportunity or even make the investment feasible, lower its cost, offer more possibilities of external financing or facilitate the exchange of know-how in the management and operations of the unit.

The third way indicates that cross-border cooperation is possible only if legal systems of both states allow this form of cooperation. Here, we have the idea of international administrative law realised in practice. The convergence of laws of various states is inspired by the system of international law (in this case, by the system of the Council of Europe and the European Union), which results in building the European administrative space and is the return to the sources of the administrative law.

The fourth way may be connected with the Regulation included in Article 3 of the Act on the rules concerning accession of self-government units to international associations of local and regional communities. Pursuant to this provision, the access to the association must not be connected with transferring the execution of public tasks, its real estate assets and proprietary right to intangible assets belonging to the unit on behalf of the association or on any of the members associated in it. This provision

is two-fold. On the one hand, it protects the self-government unit from hasty disposing of the property which guarantees its proper functioning; on the other hand, this provision confirms the importance of entities in international relations where the self-government unit supplements and not replaces functioning of the state.

Concluding, external operations of self-government units, including cross-border cooperation in particular, can be evaluated in various ways. One of the ways is the evaluation in relation to the administrative law and the international law. Such assessment allows us to clarify new grounds or reasons for these concepts and, simultaneously, supplements the definition and description of the phenomenon in question. Now, with the growing significance of these forms of activity, through the phenomenon of international cooperation of territorial self-government units, it is also possible to define the research and de facto interdependence of the international law and the administrative law pervading each other, which is also an example confirming the ongoing globalisation of law.

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