

Crossing the line: Dealing with cross-border communities

EDITED BY
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Foreword

ONE OF THE CHALLENGES FACING MODERN DAY FEDERATIONS IS THE PROVISION of services to communities that are split by a provincial boundary. Residential patterns are not constrained by the demarcation of provinces and it is not uncommon for local communities to straddle provincial boundaries. Geographically, socially and economically such 'split' communities are usually a single entity, but politically they are split between two provinces and as a consequence receive services from different provincial and local governments.

In this publication various prominent international scholars in federalism, under the guidance of Bertus de Villiers, discuss how their respective federations deal with the challenges posed by cross-border communities. The experiences make fascinating reading and the Konrad-Adenauer-Stiftung (KAS) trusts that the publication will contribute to the South African debate where service delivery to cross-border communities has given rise to serious challenges in recent years.

The South African Department of Provincial Affairs and Local Government announced in 2008 a review of the functioning of the provinces and local governments. The current system has been in place since the 1993 interim Constitution and it therefore seemed opportune to evaluate and assess the progress that has been made.

KAS has already made a substantial contribution to the review of the powers and functions of provinces as well as to the demarcation of provincial boundaries and has published two reports dealing with this subject, namely De Villiers B, *The Future of the South African Provinces – the Debate Continues* (2007) and De Villiers B (ed), *Review of Provinces and Local Governments in South Africa: Constitutional Foundations In Practice*

(2008). This, the third publication on the review of the provinces, considers the challenges presented by cross-border communities in federations.

An area of challenge since the introduction of the Constitution is that where the population of a town or city straddles a provincial or even a national boundary, and the way in which local governments in the adjacent provinces discharge their functions to those residing in their jurisdiction. Within the South African debate on federalism, a perception has frequently emerged that it may be 'better' for a community to reside in one province rather than another. Typical examples are those of Bushbuckridge, Moetse, Khutsong/Merafong and Matatiele.

The perception that it may be better to live on one side of a provincial border rather than on another has led to demands for provincial boundary adjustments. In a recent instance, the community of Khutsong/Merafong became so aggravated about their inclusion in North West Province that the boundary was eventually re-amended following public unrest and even violent clashes by sections of the community. The status of some other communities that would prefer to be in one province rather than another remain under review.

South Africa is, however, by no means unique in this regard: there are many other examples around the world where cross-border issues have arisen and have had to be dealt with. In Europe, for example, some local communities straddle an international border, especially in the Euregio along the German–Dutch border. Other examples of cross-border cooperation can be found in the United States, Switzerland, Australia, Austria, Mexico, Nigeria and Brazil. Although the jurisdiction of local governments is limited to the province or the country in which they are situated, community settlement patterns are not inhibited by such factors and therefore have to be taken into account.

The splitting of a town or city by a provincial or international boundary means that institutions will need to be developed and policies devised to facilitate sound intergovernmental relations and cooperation between the respective governments.

This publication shows how, at a comparative level, federal-type dispensations through local governments deal with the challenges of servicing communities that are affected by provincial boundaries. It shows how, among others, local governments coordinate service delivery, how they can engage in joint programmes and how they consult on policy objectives.

In South Africa, KAS was engaged in the research and consulting that led to the drafting of the 1996 Constitution, which is a federal-type dispensation. Cross-border cooperation is an essential element of the functioning of a federal system – not only in a young federal system like South Africa, but in any part of the world.

The authors featured in this publication each look at their regions in detail and point out possible problems vis-à-vis cross-border coordination, and how these can affect the equity and effectiveness of service delivery. We at KAS hope that with this publication, examples can be provided of how such problems can be addressed and eventually overcome.

A handwritten signature in black ink, appearing to read 'W. Böhler', with a stylized flourish at the end.

*Dr Werner Böhler
KAS Resident Representative
Johannesburg*

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Abbreviations and translations

μ SAs	Micropolitan statistical areas
ACT	Australian Capital Territory
AEBR	Association of European Border Regions
ANC	African National Congress
<i>Bundesrat</i>	Federal Council
B-VG	Austrian Federal Constitution
COG	Councils of government
EGTC	European Grouping of Territorial Cooperation
EU	European Union
FCT	Federal Capital Territory
GCCC	Gold Coast City Council
<i>Grundgesetz</i>	German Basic Law
IDR	Integrated development region
KAS	Konrad-Adenauer-Stiftung
<i>Land/Länder</i>	Federal state/states
LBRL	(State) Basic Local Government Act 1985
LGC	Local government council
MARC	Mid-America Regional Council
MoU	Memorandum of understanding
MPO	Metropolitan planning organisation
MSA	Metropolitan statistical area
NSW	New South Wales
PAZ	<i>Plattform Aargau Zürich</i>
QCC	Queanbeyan City Council
RIDE	Integrated Development Region of the Federal District
RMAFC	Revenue Mobilisation Allocation and Fiscal Commission
SFC	Swiss Federal Constitution
TEB	<i>Trinationale Eurodistrict Basel</i>
TIP	Transportation Improvement Programme
UN	United Nations
US	United States
VAS	<i>Verein Agglomeration Schaffhausen</i>

Introduction

BERTUS DE VILLIERS

BACKGROUND

From the outset of negotiations in the early 1990s, the South African constitution drafters were confronted with the problem posed by communities that live across provincial boundaries or which are so close to a provincial boundary that they prefer to be included in a neighbouring province. It was recognised at the time that regardless of how carefully demarcation of provincial boundaries occurred, it was quite likely that over time some communities would expand to straddle provincial boundaries. The challenge presented by communities that live across or in close proximity to a provincial boundary has not dissipated.

In the absence of historically acceptable provinces that could form the basis of the South African federation, the negotiators had to appoint a committee of experts in the early 1990s to give advice on where the provincial boundaries should be drawn. In most of the rural areas the drawing of provincial boundaries was relatively uncontroversial, but in a number of instances it soon became apparent that some communities or parts thereof would prefer to be included in one province rather than another. Typical examples were the communities of Bushbuckridge, Moutse, Khutsong/Merafong and Matatiele and Umzimkulu. The preference to be in one provinces rather than another may be motivated by various reasons.

The demarcation of the provinces was finalised in the 1993 interim constitution but with an undertaking that specific problem areas would be

further investigated. These problem areas have not disappeared. In fact, in some instances such as Khutsong/Merafong, dissatisfaction has led to violent resistance and unrest, and, ultimately, a recent reversal of a decision that resulted in the community being included in the North West Province against their wishes.

There are many reasons why a community, or part of a community, may wish to be included in one rather than another province. The reasons may be ethnic, language or cultural cohesion, geographical factors, availability of infrastructure and services, respect for traditional authorities, proximity to one provincial capital compared to another, and an expectation that one provincial government may be better able to address social and economic issues than another.

CROSS-BORDER COMMUNITIES

South Africa is not unique in this sense. Many federations, both old and young, have had to deal with the wishes and aspirations of communities that lie close to or straddle provincial boundaries. South Africa may be able to benefit from the experiences of other federations, particularly in the way in which local and provincial governments cooperate to address the needs and aspirations of such border communities. These international experiences may in due course offer valuable insight not only for South Africa, but also for Southern Africa where international borders are increasingly under pressure because of communities living adjacent thereto.

International experience has shown that the constant adjustment of provincial boundaries does not provide sustainable solutions since it often encourages more demands for boundary changes. The best way forward is arguably for institutional and policy arrangements to be implemented to address the concerns of local communities. In doing so, adjustment of provincial boundaries could be kept to an absolute minimum.

This publication, which has been made possible by the contributions of eminent international scholars in federalism and constitutionalism, reflects on how local governments within federations work together to ensure effective delivery of services to communities that live in neighbouring provinces. As editor I am acutely aware that the constitutional, political and legal arrangements of each country are unique and that comparative research potentially suffers serious limitations. I am, however, also aware of

the incredible source of information that is available to South Africans and how in the years 1990 to 1996 we all benefitted from international expertise in the drafting of our constitution. I trust that the experiences discussed in this publication assist South Africans in their endeavours to improve the functioning of our constitution.

THE PUBLICATION

The Konrad-Adenauer-Stiftung, which supported the research, and I are greatly honoured to have so many experts contribute to this report at relatively short notice. They were all keen to make a constructive contribution to South Africa's constitutional and political developments.

The following case studies are included in this report – South Africa, United States, Switzerland, Germany, Austria, Spain, the European Community, Brazil, Mexico, Nigeria and Australia.

The contributors were requested to discuss by way of introduction the general legal and institutional arrangements of their federation and in particular local government, and then to focus on ways in which issues arising from border communities are dealt with, the way in which local governments cooperate and any other related issues.

In Chapter 1 **Bertus de Villiers** provides an overview of the demarcation process in South Africa that gave rise to the provinces as we know them today. He discusses the way in which public consultation occurred, the proposed demarcation and the potential problem areas that were highlighted at the time.

In Chapter 2 **Rama Naidu** and **Sagie Narsiah** discuss the contemporary issues that arise from two demarcation problem areas, namely Khutsong and Matatiele. The authors reflect on how communities have been frustrated by attempts at a political level to address their concerns but without proper consultation and respect for local realities. They also discuss the concept of 'cooperative governance' and how it has crystallised in regard to local government.

In Chapter 3 **John Kincaid** discusses the rich experiences of the United States (US) local governments. He observes that although inter-local cooperation is common in the US, interstate inter-local cooperation is less common. Counties and municipalities are not divided by state lines, nor are state lines perceived to have divided historically coherent communities that

yearn to reunite across a state line. There are, however, many examples of formal and informal cooperation between local authorities. Kincaid also discusses some peculiar outcomes of a number of school districts which are located in two separate states.

In Chapter 4 **AJ Brown** and **Mark Bruerton** discuss the Australian experiences. They provide a useful overview of local government in Australia and then reflect on the experiences of three cross-border local government arrangements. Overall, these cross-border communities have engaged in cooperative efforts between the local authorities which govern each community. These areas focus largely on planning, economic development and tourism.

In Chapter 5 **Heinrich Hoffschulte** discusses the experiences of the Euregio between Germany and the Netherlands. This is one of the first European regions where local communities cooperate across international borders in the fields of infrastructure, economic activity, culture, leisure and other social activities. Hoffschulte concludes that the Euregio has become a model for a number of other cross-border (or transfrontier) regions, not only within the European Union but also at its external frontiers. These border regions are a kind of laboratory for the whole of Europe (and possibly other parts of the world.)

In Chapter 6 **Peter Bussjäger** discusses the role of local governments in Austria. The chapter begins with an overview of the Austrian federal arrangements and the place of local governments within the overall system. Bussjäger then comments on what he calls the unitary elements of Austrian federalism and the powers of local governments – original powers and assigned powers. There are multiple formal and informal mechanisms through which municipalities work to improve services to their members. Municipalities may decide to cooperate for various reasons. Municipalities may cooperate within *Länder* and also between *Länder* – especially when they are situated on different sides of a *Land* boundary but in close proximity to each other. The most important reasons for cooperation are cost optimisation, organisational reasons for the effective realisation of a project, exchange of experience or a legal obligation for the establishment of associations. It is noticeable that cooperation usually occurs among small and medium size municipalities only.

In Chapter 7 **Kai Schadtle** discusses the federal arrangements in Germany and the status of local government vis-à-vis the *Länder* and the

federal government. The powers and functions of local governments are derived from the *Länder* constitutions and also from delegation by *Länder* and federal governments.

Schadtle reflects on the various forms of cooperation that exist between local governments within the same *Land* and also between local governments in different *Länder*. In some instances a local government may transfer a function or the totality of its functions to another local government. There are also several examples of inter-*Länder* cooperation, for example Metropolregion Rhein-Neckar which is located at the intersection of three *Länder* (Baden-Württemberg, Hesse and Rhineland-Palatinate) and extends into the territory of 15 districts or district-free cities. Schadtle observes: 'It is evident that especially such regions are interested in equal and concerted regional development and therefore need political-administrative coordination'.

In Chapter 8 **Eva Marian Belser** discusses how intermunicipal cooperation in Switzerland is increasing due to various factors such as increased mobility, growing cities and demands for integrated planning in many spheres including transport, education and environmental protection. Some local authorities have been experimenting with cross-cantonal agreements but no commune has been established with cross cantonal boundaries. Belser stresses that Swiss cantons and communes as a rule would not change cantonal boundaries for the sake of improved cooperation. Cooperation can occur through various formal and informal mechanisms. Since 2001 more than 30 agreements affecting communes in neighbouring cantons have been concluded. She discusses some of these to illustrate how such cooperation works in practice.

In Chapter 9 **Silvia Díez Sastre** and **Francisco Velasco Caballero** provide an overview of the status of local governments within the constitutional and policy arrangements of Spain. Although Spain is not formally a 'federation' (similar to South Africa) it is regarded as part of the international family of federal states. In some instances its sub-national regions and communities have even greater powers and autonomy than many of the traditional federations.

Many local governments in Spain share an international border with either Portugal or France. Such local authorities are empowered to enter into agreements with the local authorities of a neighbouring state on matters of common concern. Local governments can also form associations

with each other for purposes of improved cooperation. To date, 49 such conventions on cross-border cooperation have been concluded.

In Chapter 10 **Heinrich Hoffschulte** gives an overview of the supra-national arrangements that have been concluded in the European Union to facilitate and encourage cooperation between local governments across international boundaries. He refers to what is generally known as ‘Europe of the regions’ to illustrate how important local and regional cooperation has become. Hoffschulte concludes that since the end of the Second World War, local communities and their representatives have endeavoured to make the traditional boundaries disappear and lose their significance. In their eyes, they are doing their part to establish a new order of peace in a Europe in which frontiers will no longer be the painful scars of the past, but purely and simply the boundaries of administrative areas.

In Chapter 11 **Wladimir Antônio Ribeiro** and **José Mário Brasiliense Carneiro** discuss the federation of Brazil and the practical processes that have been implemented to encourage cooperation between local authorities. The local authorities are ‘federated’ authorities in the sense that their status as a third tier and powers are protected in the Constitution. The autonomy of local governments has not been without problems and some of these are discussed by the authors. The principle of subsidiarity guides the allocation and discharge of powers and functions. In many instances members of the public would opt to use the facilities provided by one municipality rather than that of another. In this way voters drift with their feet to where they believe they will receive the best service. Local governments often engage in the formation of public consortiums whereby bulk services in areas such as health, water and education are provided. The authors conclude with a useful discussion on practical examples of cooperation between local authorities in three different states.

In Chapter 12 **José M Serna** provides an overview of intergovernmental cooperation in the federation of Mexico. Very little information is available in South Africa on the functioning of the Federation of Mexico and these examples should make interesting reading for the South Africa audience. Serna discusses how there is an obligation on urban centres that fall within different states to cooperate with one another if they form a ‘demographic continuum’. An example is that of Mexico City and the various agreements that have been entered into to service the sprawling metropolis. A metropolitan commission is responsible to oversee certain functional areas

such as the provision of water, waste management and other bulk services. Local governments are also encouraged to enter into associations across state boundaries to improve service deliver to their people. Local governments may also delegate functions to the states or receive functions from the states.

In Chapter 13 **Isawa Elaigwu** discusses the many challenges that Nigeria faces in dealing with populations that live across state and international boundaries. He points to several examples in Nigeria where populations have grown to exceed state boundaries and explains how such situations present serious challenges to all three levels of government. Elaigwu also refers to many examples where local populations are spread across international borders, with 21 of the Nigerian states having at least one border with a foreign nation. He then discusses some of the practical arrangements that have been made to cater for cross-state populations in cities such as Lagos, Jos, Abuja and Ibadan. Elaigwu concludes as follows:

While the geographical boundaries of state and local governments are clear, the socio-economic and security boundaries of state and local governments of split populations in relation to bordering states and local governments are very fluid. As an illustration, while some workers live in one state or local government with their families, they spend most of their working hours in Abuja. For some, they only come back home at night to sleep and then leave again very early in the morning. To ignore these people, though resident in neighbouring states, is to ignore crucial challenges of split populations as these workers essentially put pressure on water, electricity, sewage, security and other infrastructure and services of the area in which they work.

CHAPTER 1

Demarcation of the South African provinces – A brief overview

BERTUS DE VILLIERS

INTRODUCTION

In contrast to many other federal-type dispensations, South Africa did not have widely accepted historic provinces upon which the new constitutional dispensation of 1996 could be built. The then provinces and homelands did not have political, democratic, legal or moral credibility and a new way had to be found to demarcate acceptable provincial boundaries. The only way forward was therefore to ‘create’ provinces from scratch. For this purpose, a Demarcation Commission was appointed in 1993 with the task of making recommendations to the negotiators for the demarcation of provinces.

The Commission for the Demarcation and Delimitation of Provinces was established to conduct the task and report to the main negotiators, the Negotiating Forum. The Commission commenced its work in April 1993 and submitted its final report¹ and recommendations in August 1993.² The Commission’s recommendations were accepted with minor adaptations by the main negotiating parties and continue to form the basis of demarcation of the current provinces.

The process of demarcation did not occur in a vacuum: the Commission was instructed to take into account a wide range of criteria before making recommendations. The public was also invited to motivate their submissions by using the criteria as a point of departure.

The Negotiating Forum set out ten criteria according to which the Commission had to make its recommendations for demarcation, namely:

- historical boundaries, such as the existing four provinces, homelands, local governments and development regions;
- administrative considerations, including nodal points for the delivery of services to ensure that each province would be properly served;
- rationalisation of existing structures such as homelands, provinces and regional governments;
- limit financial costs as far as possible;
- minimise inconvenience to people as much as possible;
- minimise the dislocation of services;
- demographic considerations;
- development potential and possible economic growth points; and
- cultural and language realities.

The Commission was required to take all these criteria into account and to assess the proposals submitted by the public on the basis of the criteria.

It is clear from these criteria that the negotiators required a well-balanced, considered and, if possible, a politically unbiased report from the Commission. Although the demarcation of provinces is inevitably a highly political exercise, the negotiators were adamant to defuse political controversy that could derail or discredit the demarcation process. The parties were generally also at pains not to abuse the process of demarcation for political gain.

The author of this chapter – who was a member of the technical support team to the Commission – can testify from his own experience that the process of consultation and demarcation was, within the time constraints, open and largely free from political interference. The outcome – which is open to criticism as with any demarcation process – was technically defensible and was widely considered at the time as the most balanced application of all the criteria.

The enquiry of the Commission was extensive and it had public hearings in various parts of the country. It received more than 300 written submissions and more than 80 oral presentations were heard. After publication of its recommendations, the Commission received a further 400 submissions in response to the draft report. The Commission took oral submissions in various parts of the country and, after publication of its draft report, visited potential problem areas to hear further submissions.

The workings of the Commission were regarded as one of the most transparent and accessible processes undertaken in public consultation involving the interim constitution in comparison to the other committees that had responsibility for various aspects of that constitution. Many of the other committees that played a role in the negotiating process had little, if any, public participation.

It must, however, be acknowledged that during the demarcation phase there were no democratically elected institutions in South Africa and the negotiating process was conducted between political parties and movements whose electoral support had not been tested. De Coning nevertheless concludes that 'the invitation for submissions, the inclusiveness of the process, the response of the public, and the nature of submissions played an important role in the demarcation process'.³

The Commission recommended the creation of nine provinces, and those ultimately became the provinces as we know them today. Many observers were surprised that such a complicated and politically risky process could culminate in general consensus between the main political parties. If provincial demarcation were to be undertaken today, the results may be different from those arrived at in 1993. On the other hand, it must be acknowledged that the general public's acceptance of provincial boundaries since 1993 is indicative that the Commission was close to the mark in its recommendations.

Concerns were, however, expressed at the time that the demarcation process was too hasty, not sufficiently transparent and lacked in-depth consultation with people on the ground. For example, in a minority report Ann Bernstein criticised the general public participatory process. Her concern was that:

to try and actually produce the regional map of the country in such a short time and think that this will resolve the differences that exist

between all the many interests on this matter is ... totally unrealistic and dangerous.⁴

David Welsh also foreshadowed after the demarcation that one area where future disputes may arise is in the Eastern Cape. He observed that:

neither [the African National Congress or National Party] originally proposed a consolidated Eastern Cape province, and the inference may reasonably be drawn that behind-the-scenes bargaining took place. As this account will show, the issue of the proposed Eastern Cape province is not yet over.⁵

SENSITIVE AREAS

The Commission through its own deliberations identified certain 'sensitive areas' where wide-ranging submissions had indicated that diverse opinions may be held as to where the provincial boundaries should go. Some of the sensitive areas were as follows:

- *Gauteng*: Several proposals were made for the Gauteng Province, of which two problem areas remain: the status of Moutse and whether it should be in Gauteng, Mpumalanga or Limpopo; and Merafong and whether it should be in Gauteng or the North West.
- *Eastern Transvaal (now Mpumalanga)*: Submissions were received for the inclusion of Pretoria as part of the Eastern Transvaal and for Pongola to be included in the Eastern Transvaal province. The Commission did not support either proposal and believed that the previous PWV area (now Gauteng) constituted an integrated economic entity and that it should not be split up. The area of Bushbuckridge was identified as problematic since some sections of the community wanted to be included in Mpumalanga and others in Limpopo.
- *Free State*: Submissions were received to integrate the province with what is now known as the North West Province. The Commission did not support the proposal and believed instead that the balance of criteria supported the creation of two separate provinces. There were

suggestions that an area such as Sasolburg should form part of Gauteng due to its proximity to Vanderbijlpark/Vereeniging, but the Commission did not support it.

- *KwaZulu-Natal*: The most well known problem areas are Matatiele and Umzimkulu and whether it should be part of KwaZulu-Natal or Eastern Cape.
- *Larger Cape Province*: Several proposals were received with regard to the old Cape Province.
 - A first category proposed the demarcation of a single Cape Province on the basis of the 1961 Republican Constitution. This option did not receive wide support in public submissions. The previous National Party government had already made suggestions before the normalisation of South African politics in 1990 for the Cape Province to be divided into three administrative provinces due to its size and diverse interests. The whites-only provincial government at the time had commented on the size of the province, the difficulty in delivering services to regional areas and the diverse interests of persons from Upington to East London.
 - A second category proposed the creation of two provinces: Transkei/Eastern Cape/Western Cape as a single province; and the Northern Cape as a separate province. There were also proposals for some form of *volkstaat* in the Northern Cape area. The *volkstaat* proposal was discounted since it could not satisfy the balanced application of all the demarcation criteria.
 - A third category also proposed two provinces: Northern Cape/Western Cape; and Transkei/Eastern Cape.

After lengthy deliberations, the Commission came to the conclusion that if all the demarcation criteria were applied consistently the preferred option would be for three provinces to be created, namely Eastern Cape, Western Cape and Northern Cape. This remains, arguably, the most contentious of the Commission's recommendations. The Commission was convinced that

a single Cape Province would be too big for effective management, that the interests of its inhabitants would be too diverse, and that the interests of the urban areas would be emphasised to the detriment of the rural areas.

The Commission believed if it appeared that the Eastern Cape was lagging behind other provinces in terms of financial and human resources, the necessary support programmes could be instituted to ensure that the residents of the province had access to adequate facilities, rather than to amalgamate the area into the Western Cape. The Commission further believed that the interests of people in the Eastern Cape may be better served if they had a specific province rather than to be amalgamated with the Western Cape and its diverse interests.

EQUALISATION

The Commission acknowledged at the time that some of the proposed provinces would be less well-off than others in economic terms and skilled human resources. This was particularly the case with the proposed Eastern Cape Province and Northern Province (now Limpopo). The Commission realised that these provinces might suffer a lack of resources and skilled administrators in comparison with some of the other provinces.

The Commission repeatedly used the term 'soft' boundaries to indicate that provinces would have an obligation to support and assist one another. By using this concept, the Commission acknowledged the importance of constitutional guarantees to ensure the free flow of persons, goods and services across the entire nation.

All federal-type dispensations have various forms of interprovincial support programmes to ensure that lesser developed provinces are assisted, for example: fiscal and financial arrangements; industrial development subsidies; the training of civil servants; the secondment of staff from other provinces and the national government; exchange of expertise; special development grants and so forth.

Most, if not all, federal- or regional-type dispensations require some form of fiscal equalisation to support lesser developed provinces. The Commission envisaged that similar programmes would be instituted to assist the lesser developed provinces of South Africa.

It was also acknowledged by the Commission that further adjustments to the proposed provincial boundaries may be required in the future. De

Coning made the following recommendations regarding the future adjustment of boundaries:⁶

- Extensive public consultation and debate should occur prior to demarcation.
- The mandate and terms of reference of a demarcation commission must be clearly spelt out to ensure submissions are considered on the basis of the same criteria, and any adjustments are technically and politically justifiable.
- A demarcation commission should, as far as is practicable, focus on technical issues rather than political gerrymandering.
- Adequate time should be allowed to receive public submissions and for the public to comment on a draft report/recommendations.
- Development considerations must play a key role in adjustments, if any, of provincial boundaries.

CRITICISM

The demarcation of the South African provinces in 1993 is not beyond criticism. A job had to be done in order to keep the momentum of negotiations going, and the Commission did this to the best of its ability within a very limited time-frame. The public consultation was conducted over a short period and during the early days of constitutional negotiations.

Due to the history of South Africa, many submissions were from white-dominated interest groups. Many of the submissions were to some extent based on the nine so-called development regions which had previously been used by the Development Bank of Southern Africa for the purpose of regional economic development initiatives and grants.

The level of participation by local communities, especially those from disadvantaged backgrounds, was relatively low. Although many public submissions were received, a similar exercise conducted properly in 2009 would probably see the participation of far more local communities and black interest groups.

CONCLUSION

In contrast to federal states such as the United States, Switzerland and Germany where historic provinces are accepted as a given, South Africans have had to get used to the idea of artificially ‘created’ provinces. It is nevertheless surprising to note how well the provincial demarcation has been received by the public.

In general, provincial identities have been developing over the past 14 years and there is no widespread public outcry for the demarcation of provinces to be undone or completely redone. There may be criticism against the quality of governance in some provinces but the actual provincial boundaries have, in general, not been subject to popular challenge. With the exception of a few local problem areas, one could contend that the general demarcation outcome has been legitimised through wide acceptance by the public.

The general acceptance of the provincial boundaries does not mean that alterations to boundaries should not be considered. It is quite possible, as has been experienced in other federal-type dispensations, that changes to boundaries may be required from time to time. At the same time, however, this does not mean that provincial boundaries should be changed on a whim. If alterations to provincial boundaries are abused for political gain, the system would suffer credibility problems and demands for more changes to boundaries would grow.

ENDNOTES

- 1 *Report of the Commission on the Demarcation/Delimitation of SPRs*, Multi-party Negotiation Process, Word Trade Centre, Kempton Park, 1993.
- 2 For an excellent and unique overview of the working of the Commission refer to De Coning C, *The territorial imperative: Towards an evaluation of the provincial demarcation process*. In De Villiers B (ed), *Birth of a Constitution*. Cape Town: Juta, 1994, pp 189-229.
- 3 *Ibid*, p 205.
- 4 *Report of the Commission on the Demarcation/Delimitation of SPRs*, op cit, p 88.
- 5 D Welsh, *The provincial boundary demarcation process*. In De Villiers, op cit, p 227.
- 6 De Coning, op cit, pp 219-220.

CHAPTER 2

Cooperative governance in South Africa: The experience of cross-boundary municipalities

RAMA NAIDU AND SAGIE NARSIAH

INTRODUCTION

The notion of cross-border municipalities and the challenges associated with them is not unique to South Africa. The recent violent uprising in Khutsong and widespread community anger in Matatiele, Moutse and Bushbuckridge should tell us that the process of demarcating provinces in South Africa, as far as those communities are concerned, had some significant shortcomings. Issues of public participation, intergovernmental relations as well as the exercising of undue political influence as opposed to the will of the people were three of the major challenges encountered in the South African context. This chapter sets out to examine briefly the background to the system of government in South Africa, particularly the notion of cooperative governance and intergovernmental relations, and then to analyse two case studies of cross-boundary municipalities and the issues surrounding them.

SPHERES OF GOVERNANCE

South Africa comes from a divided past – political, economic, social, racial and geographic. The Union of South Africa which was constituted in 1910 comprised four ‘republics’, namely, the Cape, Orange Free State, Natal and Transvaal: these constituted the provinces of South Africa when it was proclaimed as a republic in 1961. The spatial arrangement also included the ‘bantustans’ or independent territories – the Transkei, Venda, Boputhats-

wana and Ciskei (the so-called TVBC states) – a curious invention of the apartheid state. These areas were recognised as sovereign states by the apartheid state only and had no international standing. Also, there were the so-called self-governing territories – fragmented bits and pieces of land which were used as containers for black people. Among the self-governing territories were KwaZulu, Gazankulu, Lebowa and Qwa-Qwa.

South Africa was ruled from the centre as a unitary state. Although the provinces had nominal white-only elected bodies, these were abolished in the later years of the apartheid state and substituted with administrators appointed by the national government.

When a new dispensation was being forged in the early 1990s, the bantustans – independent and self-governing territories – were disbanded and incorporated within South Africa. The spatial integrity of South Africa and a common citizenship were recognised. In order to realise this, a new constitution was written and a new spatial dispensation created.

The four province configuration made way for a nine region arrangement in 1994. The nine regions as they exist today are KwaZulu-Natal, Free State, Eastern Cape, Western Cape, Northern Cape, Gauteng, North West, Mpumalanga and Limpopo. The nine provinces – a product of the recommendations of a committee for the demarcation of provinces – were based on the magisterial districts which had informed the geography of apartheid.¹ Later on in 1998, a Municipal Demarcation Board was established to demarcate municipalities. A tri-strata governance structure was thus created – national, provincial and municipal.

The Constitution of South Africa was the instrument which gave effect to this configuration, asserting that: ‘In the Republic, government is constituted as national, provincial and local spheres of government which are distinctive, interdependent and interrelated’.² Provinces have the power to enact and promulgate legislation within their own spheres of competence. Furthermore, the Constitution sketches out the exclusive and concurrent powers of provinces. Moreover, the autonomy of provinces is given credence by the Constitution, which states in section 125(5): ‘[T]he implementation of provincial legislation in a province is an exclusive provincial executive power.’ While this could be and has been interpreted as evidence that South Africa is a federal state, the dominance of the African National Congress (ANC) has meant that the federal principles have not been tested robustly.³

The national state, however, has the power to override the provincial sphere when it comes to concurrent powers. Furthermore, the national state has the power to impose its will on the provinces. Section 100(1) states: ‘When a province cannot or does not fulfil an executive obligation in terms of legislation or the Constitution, the national executive may intervene by taking any appropriate steps to ensure fulfilment of that obligation.’

The third sphere of governance is the local municipality. The Constitution furnishes the provinces with the competence of establishing municipalities. The exclusive competence of the provinces and that of local government is set out in Schedule 5 of the Constitution. Moreover, due cognisance ought to be taken of the transformational role of local government in addressing the exclusion of black people during the apartheid era.

Specifically section 152(1) states that municipalities are ‘to provide democratic and accountable government for local communities ... to encourage the involvement of communities and community organisations in the matters of local government’.

The Constitution does, however, empower the provincial and national governments to intervene in the functioning of municipalities, but this is under certain circumstances. The model of governance that is privileged, and indeed given content, is one based on cooperative governance.

COOPERATIVE GOVERNANCE

The Constitution of South Africa places importance on a governance system that seeks to avoid conflict. In this regard the different components of government are urged to work together rather than against each other. The use of language in the Constitution is significant when it comes to the competence of national, provincial and local government. For example, ‘spheres of government’ are referred to rather than ‘tiers’, which would suggest a hierarchical arrangement.

The importance of cooperative government is of signal importance. This is evidenced by an entire chapter (Chapter 3) dedicated to cooperative government in the Constitution of South Africa. Although this chapter in the Constitution is fairly short and while it emphasises the three spheres working together, it is also very clear on what is expected from each sphere. For example section 41(1e-g) of the Constitution states that each must:

respect the constitutional status, institutions, powers and functions of government in the other spheres; not assume any power or function except those conferred on them in terms of the Constitution; exercise their powers and perform their functions in a manner that does not encroach on the geographical, functional or institutional integrity of government in another sphere.

The Constitution also makes provision for the settlement of disputes and urges one sphere of governance to resolve conflicts without recourse to the courts.

The Constitution further allows for the delegation of responsibilities between the different spheres of government – national to provincial, provincial to local and even local to local. These provisions have not worked well in reality but have the potential to impact positively on intergovernmental relations and service delivery.

A useful example in this regard is the phenomenon of cross-boundary municipalities. The Local Government: Cross-boundary Municipalities Act 2000 was the product of an amendment to the South African Constitution. The amendment in question became known as the Constitution Second Amendment Act. Specifically, the Act sought:

to amend the Constitution of the Republic of South Africa, 1996, so as to provide that, where a municipal boundary is determined across a provincial boundary, national legislation must make provision for establishing a municipality of a type agreed to by the provincial governments concerned and for the exercising of executive authority over that municipality; and to provide for matters connected therewith.⁴

The amendment also set out various criteria for cross-boundary municipalities, specifically, the concurrence of the provinces concerned – that is, the provinces concerned had to consent to the change.

This example of cooperative governance was not unproblematic; in fact this attempt at cooperative governance was a failure. This will be examined in greater detail later on in the chapter. However, before we do this it is expedient to examine briefly the background which gave rise to this specific incidence of cooperative governance.

BOUNDARY DEMARCATION

When South Africa entered the post-apartheid era in 1990, one of the issues which had to be resolved was the creation and status of provinces. On 23 May 1993 the Multi-party Negotiating Council briefed a Commission for the Delimitation/Demarcation of States/Provinces/Regions to create a new map for South Africa by addressing the internal boundary configuration. The Commission proposed a configuration which comprised nine regions (at that stage there was no agreement as to what the regions would be called); however, there were some dissenting opinions.

The Commission was given additional time for further consultation and returned its proposals in November 1993 with the nine-region proposal intact.

There were a number of areas which the Commission declared 'disputed' and referred back to the Negotiating Council for its decision. Among the affected areas were Umzimkulu and Matatiele (which formed part of the Mount Currie area), Moutse and Bushbuckridge.⁵

The Negotiating Council did not make a decision on the affected areas, instead including them in Part 2, Schedule 1 of the Interim Constitution of 1993. The Interim Constitution made provision for a referendum to be held to determine the will of the people living in the affected areas. Specific timeframes were specified in section 124 of the Constitution.

A petition had to be lodged with the Secretary of Parliament within a period of six months of the commencement of the Constitution, meaning by 27 October 1994. High-ranking government officials who had been part of the liberation struggle made promises to communities such as Bushbuckridge and Matatiele that their wishes would be honoured. However, no referendums were held in these areas, the provision lapsed and the situation in the affected areas was left unresolved.

The response of the government was to classify these areas as cross-boundary municipalities and implement an elaborate and cumbersome system of service agreements between the provinces. But it was clear that the system of cooperative governance was not working and by 2005 new legislation was introduced to abolish cross-boundary municipalities.

For the purpose of this chapter the experience of two such cross-boundary municipalities, Matatiele and Merafong, will be discussed. The disputes involving Moutse and Bushbuckridge will not be considered here.

THE MATATIELE CASE

The town of Matatiele is situated on the border of the KwaZulu-Natal and Eastern Cape provinces. For the 1999 national and provincial and December 2000 local government elections Matatiele remained part of KwaZulu-Natal and Umzimkulu was part of the Eastern Cape. For the December 2000 local government election, Matatiele was included in the Sisonke District Municipality, while Maluti was placed in the Umzimvubu local municipality: Umzimkulu was thus a cross-boundary municipality while Matatiele was not. The Matatiele local municipality consisted of the town of Matatiele, Cedarville and a group of about nine farms to the west.

For the 2006 local government election, the government was intent on dispensing with cross-boundary municipalities, which were beset with administrative and logistical difficulty. The Department of Provincial and Local Government reported that eight of the 16 cross-boundary municipalities were operating at a sub-optimal level when it came to service provision and were thus placed in the department's 'Project Consolidate' programme. This was clearly an untenable situation.

The government made the decision to dispense with cross-boundary municipalities in 2002 and instructed the Municipal Demarcation Board as such. The Board published its recommendations on 18 August 2005. These recommendations had to be underpinned by the legislative process, that is, the promulgation of particular laws. This entailed a constitutional amendment and the repeal of existing legislation on cross-boundary municipalities. Both the Constitution Twelfth Amendment Act of 2005 and the Cross-boundary Municipalities Laws Repeal and Related Matters Act were signed into law on 23 October 2005. Interestingly, the Twelfth Amendment Bill barely managed to obtain the two-thirds majority in the National Assembly – the deputy speaker cast the deciding vote.

Matatiele, which was included as part of Sisonke District Municipality for the December 2000 local government election, was now included as part of the Alfred Nzo District Municipality as part of the Eastern Cape. On 25 August 2005 the Matatiele Local Municipality was asked to consent to the new demarcation but the municipality's administration refused to comply with the request. The Municipal Demarcation Board was then obliged to conduct public hearings.

The public hearings process elicited an overwhelming response from the people of Matatiele and Maluti (Maluti was now re-demarcated as part of

Matatiele local municipality). There were 3,248 individual representations and a petition of over 10,000 signatures in favour of the retention of Matatiele (including Maluti) in KwaZulu-Natal. Additionally, a delegation from Matatiele met with the Provincial and Local Government Portfolio Committee on 18 October 2005. The Municipal Demarcation Board eventually deferred to the wishes of the people of Matatiele/Maluti and re-demarcated boundaries including the area on Sisonke District Municipality and effectively proposing the disestablishment of the Alfred Nzo District Municipality. This proposal was gazetted in the Eastern Cape Province on 20 October 2005. This demarcation received widespread support from people in Matatiele – 19,348 people signed a petition in support of the Municipal Demarcation Board's revised proposal.

Yet, the Constitution Twelfth Amendment Bill and the Cross-boundary Municipalities Laws Repeal and Related Matters Bill which appeared before cabinet did not contain the Municipal Demarcation Board's revised proposals. Cabinet approved these bills, as did parliament and the two provincial legislatures. The Board's revised proposals had been rejected and the wishes of the people of Matatiele/Maluti had been ignored. The Matatiele local municipality explored several options, among them petitioning parliament through its various organs. On exhausting these avenues, they decided to appeal to the highest court in the land – the Constitutional Court – for relief. A resolution was passed on 12 December 2005 at a Matatiele Local Municipality Council meeting to bring an application against the government's decision to change the boundaries of the municipality.

The Matatiele Municipality together with various other local interest groups from in and around the area formed the Matatiele/Maluti Mass Action Committee and brought an urgent application before the South African Constitutional Court arguing that the wishes of the community had been ignored. Furthermore, it alleged that the president and cabinet minister in charge of local government had exerted undue pressure on the Municipal Demarcation Board to change boundaries, noting that the Board had initially located Matatiele in KwaZulu-Natal. When the Constitutional Court ruled in February 2006, it concluded that there was nothing remiss with the actions of the president and the minister. It was a narrow technical judgement based on procedure and a particular reading of the separation of powers. However, the Constitutional Court asked further questions

regarding public participation and heard arguments in March that year. In August the Court ruled for the community of Matatiele, concluding that the KwaZulu-Natal provincial government had not consulted the people of Matatiele. They were given 18 months to rectify the situation. While at first sight this looks like a questionable decision, the chapter on cooperative government in the Constitution makes provision for such action.

Both the community and government accepted that cross-boundary municipalities militated against effective governance and service delivery. The argument was not purely about service delivery, even though the public record shows that the Eastern Cape is one of the most poorly administered provinces and KwaZulu-Natal one of the better run provinces. Service agreements between provinces were an administrative and logistical nightmare. Apart from service delivery, other issues such as economic relationships and social and cultural links need consideration. Matatiele 'looks' north into KwaZulu-Natal with regard to economic linkages. Culturally, Matatiele has closer links to KwaZulu-Natal than the Eastern Cape. Notwithstanding the Constitutional Court judgement, the transfer of Matatiele to the Eastern Cape began in earnest in 2007.

THE MERAFONG CASE

Merafong was established as a cross-boundary municipality in October 2000, straddling the Gauteng and North West provinces. It is important to note at this juncture that the major part of Merafong, geographically speaking, lay in Gauteng. Merafong formed part of the West Rand District Municipality. The population of Merafong is approximately 300,000 with almost three-quarters residing in Gauteng, in the Khutsong and Carletonville areas. The remaining approximately 80,000 people live in the Wedela and Fochville areas of the Southern District Municipality of the North West Province. It is therefore reasonable to conclude that the majority of the residents of Merafong draw their provincial identity from Gauteng. Furthermore, economically, the Carletonville area is associated with mining activity and the Fochville and Wedela areas with agriculture. Therefore most of the residents of Merafong are reliant on the mining sector for their livelihood.

When it became clear that the cross-boundary arrangement which had distinguished the existence of Merafong since 2000 was to be abolished, the

people of Merafong made their choice of province clear. It became evident at the public hearings held by the respective provincial legislatures and the Municipal Demarcation Board that the residents of Merafong wanted the municipality to be re-demarcated in its entirety in Gauteng, given that the majority were living in and receiving services from that province. Furthermore, the Gauteng Provincial Legislature mandated its representatives at the National Council of Provinces to support the inclusion of Merafong, in its entirety, in the West Rand District Municipality. Similarly the Municipal Demarcation Board produced a map which re-demarcated Merafong as part of the West Rand District Municipality of Gauteng Province.

However, when the Constitution Twelfth Amendment Bill and the Repeals Bill were published, Merafong had been included in the Southern District Municipality of North West Province. This triggered protest within the Merafong community. It deserves mention that the protest was not characterised by a disaffected faction within the community but was supported by a range of civil society formations such as the South African Communist Party, the Congress of South African Trade Unions, local businesses and churches. A number of protest marches were held under the banner of the Merafong Demarcation Forum.

The nature of the protest, unlike in Matatiele where demonstrations were mainly peaceful, were violent and required police intervention. During this period the police shot at residents with rubber bullets. Resistance was most fierce in Khutsong, with large-scale damage to property and scenes reminiscent of the apartheid era shown in the media on a regular basis. There were also reports of community leaders being intimidated, and at least one report of a community leader's house being fire-bombed. Furthermore, service delivery came to a standstill. The education sector was most seriously affected, with schools shut down and educators refusing to teach because of the volatile situation. It was evident that residents were demanding that their constitutionally entrenched right to live where they choose in South Africa be recognised.

A number of political manoeuvres were evident during the period leading up to the vote on the Bill in the national parliament in mid-November. The first of these related to the Municipal Demarcation Board, which after meeting with the residents of Merafong re-demarcated the area to reflect the community's wishes. The residents even held a celebratory

march. Yet shortly thereafter the minister requested the Board to change the boundaries, placing Merafong within North West Province. Furthermore, the Gauteng provincial legislature decided to withdraw its support for the inclusion of Merafong in that province. Notwithstanding the outpouring of community protest, the national assembly passed the Bill on 15 November 2005. It was then that the situation spiralled out of control, particularly in Khutsong.

The community of Merafong had clearly acknowledged that the cross-boundary dispensation was untenable and had to be resolved, and that Merafong was a singular geographical unit and had to be maintained as such. The community wanted to be included in Gauteng Province. Residents believed that service delivery would be adversely affected should they be included in North West Province.

Legislation was passed in February 2009 to provide for the reintegration of Merafong into Gauteng Province.

CONCLUSION

It is evident that the unresolved issues emanating from the demarcation process that took place in the early to mid-1990s impacted on and indeed informed the struggles over boundaries in the Matatiele and Merafong municipalities. What was evident during that period, particularly in the case of Matatiele, was that a political solution was preferred over one where the wishes of the people were adhered to.

The phenomenon of cross-boundary municipalities was created to address the issue. However, it was evident that cross-boundary municipalities could at best be an interim arrangement. The Matatiele Constitutional Court judgement found as follows:

The problems associated with the administration of the cross-boundary municipalities led to huge financial burdens and costs and often undermined service delivery. According to the government, eight of the 16 cross-boundary municipalities 'experience service delivery challenges necessitating national support intervention.' Various reports that were commissioned on the cross-boundary municipalities recommended that the concept of cross-boundary municipalities should be abolished. As a consequence of these

recommendations, the government took a decision as early as November 2002 to do away with cross-boundary municipalities and to review provincial boundaries so as to ensure that all municipalities fall in one province or the other.⁶

The fact that cross-boundary municipalities were posing enormous difficulties in terms of governance and simple public administration is borne out by the government's own internal investigations. In a memorandum to the President's Coordinating Council meeting held on 1 November 2002 entitled 'Administration of Cross-Boundary Municipalities', the following was noted:

It should be stressed that the joint exercise of executive authority only applies to the MECs [members of the executive council] for local government and not to other provincial MECs and functionaries. If provinces affected by a cross-boundary municipality opt for this system, the other functionaries of these provinces would have to continue exercising their statutory powers in the areas under their jurisdiction. The result would be that legislation that is the responsibility of the local government MECs, would be jointly administered in the cross-border area whilst other provincial legislation would have to be administered in the area by the two provinces separately. The legislation of the different provinces would still apply to the separate provincial segments of the cross-boundary area. The joint administration model therefore requires consensus and uniformity between the MECs, as far as local government matters are concerned.⁷

The areas affected, in this case Matatiele and Merafong, did not contest the abolition of cross-boundary municipalities. They did, however, contest their ostensible exclusion from the decision-making process in the determination of their geographical fate. Public participation in such issues needs the realisation of the principles of a participative democracy rather than one based purely on representative democracy. It is clear in the Matatiele and Merafong instances that a higher tier of governance – in this case national government – had over-determined practice at the provincial and local scales. Furthermore, it is clear that the provinces were unwilling

to exercise their constitutional mandate to veto legislation, instead deferring to national government.

The changes in the power structures of the ruling ANC has had an unintended positive impact on the cross-boundary issue, particularly for the communities of Matatiele, Merafong and Moutse. The ANC's recalling of Thabo Mbeki as president of South Africa and the subsequent cabinet reshuffle resulted in a political head of the ministry of local government.

One of the first issues that the minister sought to resolve were the boundary issues affecting the Matatiele, Merafong and Moutse communities. These communities were given the assurance that their wishes would be honoured by the government – that is, that Matatiele would be part of KwaZulu-Natal and Merafong would be part of Gauteng. While the reasons for this change in government position lie beyond the scope of this paper, it does give credence to the thesis that higher spheres of governance in South Africa over-determine lower spheres. While the Constitution of South Africa allows for this, it does, however, ostensibly violate the spirit of cooperative governance.

In effect the cross-boundary experience has suggested that South Africa has a *de facto* three-tier governance structure and a *de jure* three-sphere system. Using the phenomenon of cross-boundary municipalities as an example of cooperative governance, it is evident that the wishes of the central state over-determined that of the provincial and local spheres to the extent that civil society formations had to take up the cudgels of struggle and engage the state in costly court battles.

A key issue raised was public participation in the process of governance. Cooperative governance would assume the realisation of participatory democracy; but it was clear in the case of cross-boundary municipalities that participatory democracy was sacrificed on the altar of representative democracy. If cooperative governance is to be realised then these issues need to be addressed.

ENDNOTES

- 1 For an excellent and unique overview of the working of the Commission refer to De Coning C, *The territorial imperative: Towards an evaluation of the provincial demarcation process*. In De Villiers B (ed), *The Birth of a Constitution*. Cape Town: Juta, 1994, pp 189-229.
- 2 RSA, Constitution of the Republic of South Africa, Act 108. Pretoria: Government Printer, 1996, p 25.
- 3 For a discussion of the functioning of the provinces refer to De Villiers B (ed), *Review of Provinces and Local Governments in South Africa: Constitutional Foundations and Practice*. KAS Occasional Paper, Johannesburg, November 2008.
- 4 RSA, Constitution 2nd Amendment Act. Pretoria: Government Printer, 1998, p 2.
- 5 I Narsiah, 'The Regional Question in South Africa'. Unpublished MA dissertation. University of Durban Westville, 1996.
- 6 Constitutional Court, *Matatiele Municipality and Others vs President of the Republic of South Africa and Others*. CCT 73/05. Johannesburg: Constitutional Court of South Africa Constitutional Court, 2006, p 11.
- 7 *Ibid*, p 12.

CHAPTER 3

Interlocal cooperation in the United States

JOHN KINCAID

OVERVIEW: INTERJURISDICTIONAL COOPERATION

Interlocal cooperation is common in the United States (US) and occurs in many policy areas, including, among others, animal control, arts and culture, bond banks, building inspections, community and economic development, contractor licensing, cooperative purchasing, disaster response planning and assistance, education at all levels, election administration, emergency medical services, environmental protection and natural resources, financial management and accounting, fire-fighting rescue and prevention, fleet sharing and maintenance, grant writing and administration, health services, hospitals and public health, homeland security, housing, human resources and payroll administration, information technology, insurance and investment pools, land-use planning and administration, legal services, library services, parks, trails, recreation and zoos, pension plans and retiree services, police services and training, public facilities, public works, senior citizen services, snow removal, tax assessment and collection, tourism, traffic control, transportation (e.g., airports, bridges, roads, streets and public transit), waste collection, disposal and recycling, water and sewer services, metering and billing, watershed management, workforce development, and 211 (community health and human resources), 311 (non-emergency government services) and 911 (emergency services) telephone services. There are also a few cases of interlocal tax-base sharing and revenue sharing, but these are intrastate not interstate arrangements.¹

Interlocal cooperation may be established by informal agreements between public officials, formal service contracts (e.g., one locality providing services to other localities), joint operating agreements (e.g., localities jointly providing services), functional consolidation of specific agencies to form joint agencies having their own governing boards, and special district governments created to carry out certain functions.² Various regional associations, such as councils of governments and metropolitan planning organisations, also facilitate interlocal cooperation.

Intertstate cooperation is also common and occurs in such fields as adoption and placement of children, agriculture, airports, child support payment enforcement, commercial vehicle safety regulations, cooperative purchasing, criminal justice, disaster assistance and mutual aid, education, energy, environmental protection and natural resources, fire protection, fisheries, flood control, forest-fire management, housing and treatment of mentally ill people, housing of prisoners out of state, interstate rendition, libraries, lotteries, low-level radioactive waste and nuclear power plant safety, motor vehicle violations, oil and gas conservation, pest control, ports, public safety, reciprocal recognition of professional accreditations, river basin and watershed management, solid waste disposal, supervision of parolees and probationers, taxation, transportation and water allocation. Interstate cooperation occurs through informal agreements, formal agreements and contracts, and interstate compacts (which are permitted by the US Constitution).

There are more than 200 interstate compacts, of which 22 are national and about 30 are regional (i.e., eight or more member states). The average state belongs to 25 compacts.³ About five compacts include the US government as a partner.⁴ Some 76 compacts (38% of the total) deal with environment and natural resource matters involving two to 30 states per compact (with an average of four states per compact).⁵ Many compacts establish a multistate commission to carry out the compact's functions;⁶ the other compacts are administered jointly by cooperating agencies in the member states. However, because compacts are legally binding instruments approved by the US Congress, states cooperate more frequently through informal mechanisms and through bilateral and multilateral agreements and contracts. State officials also cooperate through many national and regional voluntary associations.

Interstate interlocal cooperation is less prevalent because local

governments are legal creatures of their states. Such cooperation is often a by-product of interstate cooperation via compacts or other agreements (e.g., Palisades Interstate Park Commission involving New Jersey and New York); however, states generally authorise local governments to negotiate cross-border assistance and service arrangements so long as they comply with state law, do not exceed the powers granted them by their state and, when necessary, comply with an interstate compact.

LOCAL GOVERNMENTS: CREATURES OF THE STATES

There are 89,527 local governments in the US: 3,033 counties, 19,492 municipalities, 16,519 townships, 13,051 independent school districts and 37,381 special districts. There are very few cases, however, of local governments divided by a state line (i.e., boundary) because local governments are created and regulated by the states. Each local government therefore falls within the boundaries of a state. Local governments are not mentioned in the US Constitution. States have the predominant legislative authority over local governments; consequently, local governments that straddle state lines have been very rare.

It is possible that during the development of the US some local communities were divided when final boundary lines were drawn to demarcate states entering the union, but such cases were too infrequent and unremarkable to attract historical notice and would have been resolved by the separated communities establishing themselves under their respective state's municipal charter laws. Virtually all state boundary lines were established when populations were small and sparsely distributed across rural landscapes. Furthermore, communities divided by state lines would not have been ancient or longstanding communities inhabited by residents having primordial ties to each other and to the land (except for Indian communities), but rather relatively new communities established by migrants on the frontier. Hence, cases of communities divided by state lines would not have been culturally or socio-economically traumatic.

GENERAL PURPOSE LOCAL GOVERNMENTS

No county governments cross state lines because counties are, in part, arms of state government established in the 48 states to provide decentralised

state and federal state services, especially social services, to local communities. For example, Texas has 254 counties. Pursuant to state law (and federal law when applicable), counties: register voters; conduct federal, state and local elections; record births, marriages, divorces and deaths; manage divorce, child custody and child support cases; handle criminal prosecutions; operate jails and state courts of first instance; register property deeds and other real estate transactions; inspect business weights and measures; provide health and welfare services such as Medicaid (i.e., health care for the poor), welfare and food stamps (discount coupons for the poor to buy food); and perform other functions.

Counties also are local self-governments. They have their own locally elected officials who exercise such substantial powers as taxation, borrowing, eminent domain, policing and law enforcement. In this capacity counties, among other things: build, maintain and plough some roads and bridges; operate public transportation, airports, hospitals, old-age homes, coroner services, parks and recreation programmes; handle consumer protection, environmental protection, economic development and land-use planning; and provide municipal services to unincorporated communities.

Cooperation among counties occurs mostly between counties within the same state where all are subject to the same state laws. Counties cooperate on matters of transportation (e.g., support for a regional airport and coordination of surface transportation), emergency services, law enforcement, and some health services and services for children and senior citizens, among others.

Cooperation between counties located on opposite sides of a state line is less prevalent because the counties are governed by different state regimes. However, there is frequently informal cooperation, especially for emergency services and law enforcement, and more formalised cooperation on transportation matters through a metropolitan planning organisation. Since 2001, the federal government has variously encouraged and required counties and other local governments to cooperate regionally for homeland security purposes (e.g., regional coordination for responding to terrorist incidents and other disasters).

No municipalities or townships (which exist in 20 northeastern and midwestern states) cross state lines. Except for some midwestern townships that provide only limited services (usually roads and policing), municipalities and townships are general purpose local governments

chartered by their states to perform a wide range of functions, such as: police and fire protection; emergency response; water and sewer systems; streets, roads, traffic signs and signals and parking meters; public transportation; various public works; trash and garbage collection and recycling; public health and sanitation; public housing; port facilities; cemeteries; tree cutting and planting; zoning; eminent domain; economic development; fire and building code inspections; restaurant inspections; convention centres; and sports stadiums.

A few big cities (e.g., New York City, Philadelphia and San Francisco) are both a municipality and a county, but this combination is rare. Most cities are located in a county, such as Chicago in Cook County, Illinois.

Cooperation among municipalities and townships is widespread and involves a wide range of services and functions, although, again, cooperation is most prevalent between municipalities and townships within the same state.

SCHOOL DISTRICTS

Independent school districts are single purpose local governments, coequal to cities and counties, established to provide government-funded K-12 education. They exercise such important powers as taxation, borrowing and eminent domain. A school district's legislative body – usually called a school board – is ordinarily elected by a direct vote of the residents of the district. The board hires a superintendent who performs the district's executive functions. Cooperation between school districts is overwhelmingly intrastate rather than interstate. However, at least three school districts do cross state lines.

The Union County College Corner Joint School District serves students in Union County and the city of West College Corner, Indiana, and in the city of College Corner and Preble and Butler counties (whose boundaries divide College Corner), Ohio.⁷ Residents constructed a school on the state line in 1893. In 1926, pursuant to an interstate agreement, the district opened a new school building that served grades K-12 until 1972. The state line bisects the building, which now hosts only grades K-5. The building's keystone and bell straddle the state line. The US flag is flown on the state line in front of the centre of the school. The Ohio flag is flown on the right (Ohio) side of the US flag and the Indiana flag on the left side. Both sides

of the building are identical and symmetrical, with an arched entry for students on the Ohio side and on the Indiana side. The state line bisects the school's gymnasium such that when Indiana did not switch to summer daylight saving time, a basketball player who threw the ball from the Ohio side of the gymnasium to the hoop on the Indiana side saw his ball go through the hoop (or miss the hoop) an hour before he threw it.

In 1972, grades 9-12 were moved to Union County High School 15 miles away in Liberty, Indiana. During the 1980s, there were disputes between the two states over the school district, especially with Ohio seeking to terminate the district. On one occasion Union County, Indiana withheld half of the school superintendent's salary.⁸ Local Ohio and Indiana residents, however, fought to maintain the district. In 1995, a federal magistrate ordered reorganisation of the district. It now operates under Indiana law, although the school board includes members from both states. The school building bisected by the state line has an Ohio address but an Indiana telephone exchange number. Ohio serves as landlord for the building and pays tuition for Ohio students to attend the schools in the joint district. (After the fifth grade, Ohio students attend the Union County Middle School and Union County High School in Indiana.)

The Dresden School District operates K-12 schools in Hanover, New Hampshire and an elementary school in Norwich, Vermont. The Hanover high school also serves students from other towns, including Cornish, Lyme and Piermont, New Hampshire, and Hartland and Strafford, Vermont. The district was authorised by the New Hampshire and Vermont legislatures in 1961 and established under an interstate compact approved by the US Congress in 1963 and signed by President John F. Kennedy a few days before his assassination. The district, as well as each elementary school, has a school board. The district now operates under the 1969 New Hampshire-Vermont Interstate School Compact, which was enacted by Congress to foster education opportunities and administrative efficiencies through interstate school districts. The Rivendell Interstate School District, established by local voters in 1998 under the same compact, united financial and human school resources from the towns of Fairlee, Vershire and West Fairlee, Vermont, and Orford, New Hampshire. There have been periodic disputes over various matters, especially funding. Congress amended the interstate compact in 1978 to require a more equitable allocation of resources from each state to the interstate districts and to clarify procedures

for approving amendments to the articles of agreement among interstate school district members.⁹

There also is a Maine-New Hampshire School District Compact that authorises interstate school districts between those two states and allows consolidation of elementary and secondary schools; however, congressional consent is required to do so. Apparently, no interstate districts have yet been created under the compact. About 35 states have approved the Interstate Library Compact, but apparently no interstate library districts have come into being although there are various forms of cooperation among libraries across state lines. In 1989, a solid waste disposal district in New Hampshire and a counterpart district in Vermont – both districts encompassing 28 towns in the two neighbouring states – signed a bi-state Solid Waste Project Cooperative Agreement. However, dissatisfaction with the operation of the disposal programme prompted all but one town in the two states to withdraw from the compact in 2006.¹⁰

SPECIAL DISTRICTS

Special districts are ordinarily single-purpose local governments established under state laws to provide a specific service such as natural resource management, environmental protection, irrigation, fire protection, housing and community development, water and sewer services, transportation and cemeteries. The number of special districts increased by 203% from 12,340 in 1952 to 37,381 in 2007. A number of special district governments cross state lines, thereby involving interstate interlocal cooperation.

The leading example is the Port Authority of New York and New Jersey, established in 1921 by an interstate compact enacted by Congress. In terms of budget size (\$6.7 billion in 2009), it is one of the largest local governments in the US, even though it possesses no tax powers and receives no tax money from other governments. It relies instead on tolls, fees and rents as well as borrowed funds. Defined as a 3,900 km² circle with a 40 km radius centred on the Statue of Liberty, the authority administers the New York–New Jersey seaport, the region's four major airports (e.g., JFK and Newark Liberty), the PATH rail transit system, six tunnels and bridges between the two states, the Port Authority Bus Terminal in Manhattan and the World Trade Center site destroyed by terrorists in 2001. The authority has four subsidiaries: the New York and New Jersey Railroad Corporation;

Newark Legal and Communications Center Urban Renewal Corporation; Port Authority Trans-Hudson Corporation Transitcenter Inc.; and WTC Retail LLC.

Even so, this bi-state authority's authority is not thoroughgoing because New York City independently operates the Staten Island Ferry and many of the city's bridges. The Triborough Bridge and Tunnel Authority manages still other bridges and tunnels. Subways, commuter trains and buses are operated by the New York City Transit Authority, which is controlled by the Metropolitan Transit Authority. It provides public transportation in 12 southeastern New York counties plus two counties in southwestern Connecticut under a contract with that state's Department of Transportation. New Jersey Transit independently operates buses and trains in the region in New Jersey.

This case illustrates the usually limited nature of interstate interlocal cooperation arising from the desire of neighbouring states and localities to retain as much authority and independence as possible. Even though New York state shares borders with Pennsylvania, New Jersey, Connecticut, Massachusetts and Vermont, the port authority is New York's only interstate compact authority (although the state is a partner in two bi-national authorities that operate bridges with the Canadian province of Ontario). However, the state does engage in considerable cooperation with its neighbours through some other compacts and compact agencies (e.g., the Delaware River Basin Commission whose members are Delaware, New Jersey, New York, Pennsylvania and the US government) as well as through informal agreements and formal agreements and contracts that do not rise to the level of compacts. For example, New York has many contracts with neighbouring states to build, maintain and coordinate surface transportation.

Other interstate agencies that include interstate interlocal cooperation as by-products are the Bi-State Development Agency (Illinois and Missouri), Delaware River Port Authority (New Jersey and Pennsylvania), Delaware River Joint Toll Bridge Commission (New Jersey and Pennsylvania), Susquehanna River Basin Commission (Maryland, New York and Pennsylvania), Tahoe Regional Planning Agency (California and Nevada) established in 1969 as the nation's first bi-state environmental planning agency, and Washington Metropolitan Area Transportation Authority (Maryland, Virginia, and Washington, DC).

METROPOLITAN AREAS AND VOLUNTARY ASSOCIATIONS OF LOCAL GOVERNMENTS

The US also has 363 metropolitan statistical areas (MSAs),¹¹ which altogether encompass 83% of the US population. Of these MSAs, one (Philadelphia) includes portions of four states; Washington, DC includes portions of Maryland, Virginia and West Virginia; six (e.g., New York City and Chicago) include portions of three states; and 41 include portions of two states. In short, 13.5% of MSAs include portions of more than one state. There are also 577 micropolitan statistical areas (μ SAs),¹² which account for 10% of the US population. Of these, only 16 (or 2.7%) include portions of two states (e.g., Natchez, which includes portions of Louisiana and Mississippi).

Metropolitan areas, however, are not government jurisdictions; they are merely areas aggregated by the Office of Management and Budget of the White House for statistical purposes and, in a few cases, for allocating federal grants-in-aid. For example, in 1962 the federal government required metropolitan areas to organise metropolitan planning organisations (MPOs). An MPO, which consists of representatives of area local governments and transportation authorities, is responsible for continuing, cooperative and comprehensive (3-C) planning for surface transportation in its metropolitan area so as to ensure interlocal cooperation and coordination. The Safe, Accountable, Flexible, Efficient Transportation Equity Act: A Legacy for Users of 2005 (SAFETEA-LU) requires each MPO in the US to create a Transportation Improvement Programme (TIP) for its metropolitan region. An MPO is not a government, but it does have effective control over transportation improvements in its area because local projects must be a part of the MPO's TIP in order to receive federal funding. An MPO's TIP must also 'mirror' its state's Statewide Transportation Improvement Programme. Thus, federal funding for surface transportation is tied to the MPO planning process.

Most metropolitan areas have one or more regional councils of governments (COGs), which are voluntary associations of local governments. Most COGs are intrastate entities, and most COGs also function as MPOs. Examples of COGs that cross state lines, however, include: the Bi-State MPO in the Fort Smith metropolitan area (Arkansas and Oklahoma localities); Texarkana Metropolitan Planning Organization (Arkansas and Texas); WILMAPCO (Castle County, Delaware, and Cecil County, Maryland); Bi-State Regional Commission encompassing five

counties and 43 municipalities in Illinois and Iowa; East-West Gateway COG in the St. Louis metropolitan area (Illinois and Missouri); State Line Area Transportation Study (Illinois and Wisconsin); Siouxland Interstate Metropolitan Planning Council, located in Sioux City, Iowa, and including Nebraska and South Dakota localities; St. Joseph Area Transportation Study Organization (Kansas and Missouri); Duluth-Superior Metropolitan Interstate Council (Michigan and Minnesota); Delaware Valley Regional Planning Commission (created by interstate compact in 1965), which includes Burlington, Camden, Gloucester and Mercer counties in New Jersey and Bucks, Chester, Delaware and Montgomery counties, plus the City of Philadelphia in Pennsylvania; Ohio-Kentucky-Indiana Regional COG (OKI); Toledo Metropolitan Area COG (Ohio and Michigan); Belomar Regional Council (Ohio and West Virginia but not Pennsylvania); Brook-Hancock-Jefferson MPO (Ohio and West Virginia); Wood-Washington-Wirt Interstate Planning Commission (Ohio and West Virginia); and Metropolitan Washington COG (which includes Washington, DC and 21 county and municipal governments in Maryland and Virginia, plus area members of the Maryland and Virginia legislatures, the US Senate and the US House of Representatives). There are also some interstate airport arrangements. The Chicago/Gary Airport Compact was signed by the cities of Chicago, Illinois and Gary, Indiana in 1995 to establish a new administration for the Gary/Chicago International Airport near the state line in Indiana.

Most of these organisations (i.e., COGs) function primarily as MPOs; they have very limited governance authority and capacity, and no power to levy taxes. They are funded mostly by contributions from the member governments, fees and charges for services provided to members, and some federal funds. COGs can provide a wide range of accounting, administrative, budgeting, coordinating, engineering, grant writing, information, legal counsel, networking, planning, research, satellite broadcasting, training and technical assistance services for their member jurisdictions. Their principal areas of focus (mostly for planning) are usually transportation, community and regional economic development, environmental protection, criminal justice, homeland security and emergency preparedness.

The most studied region of interlocal cooperation is the Kansas City metropolitan area, which is served by the Mid-America Regional Council

(MARC), which covers nine counties and 120 municipalities encompassing 1,850,644 people in Kansas and Missouri. Research in this area suggests that interlocal agreements are not motivated mainly by desires to provide services more economically and effectively (although these are important) but rather by a ‘norm of reciprocity’ embedded in socio-political networking in the metropolitan region. Networking is facilitated by network brokers, especially MARC, and by policy leaders in the network.¹³

Another study of this region examined 16 system maintenance services (i.e., airport, border streets, contractor licensing, emergency preparedness, fire, jails, police, police academy, purchasing, sanitary sewer, solid waste collection and disposal, storm water, traffic control, water and 911) and 12 lifestyle services (i.e., affordable housing, ambulance, child care, economic development, land use, parks and trails, public health, public transit, recreation, senior citizen programmes, tourism and zoo). The study identified 1,848 intergovernmental arrangements, which accounted for 72% of all the delivery arrangements for the 28 services examined in the region – for ‘an average of 40 intergovernmental service delivery arrangements per city’.¹⁴ Some 57% of the arrangements were for system maintenance services, while 43% were for lifestyle services. The services involving the most intergovernmental arrangements were ambulance, emergency preparedness, police, fire and public health. Kansas City, Missouri itself has developed alliances with 37 other cities, 15 of which are in Kansas. The study found no statistical differences in the propensity of central cities, suburban cities, poor cities and wealthy cities to enter intergovernmental service arrangements.

City administrators in the area reported high levels of satisfaction with the intergovernmental arrangements and little or no fear that the arrangements limited the autonomy of their jurisdictions. One city administrator in Missouri and one in Kansas were found to be key contact persons for interjurisdictional networking in the area. MARC was found to be important for facilitating intergovernmental agreement-making and reducing transaction costs.

Although the study included interstate interlocal agreements, it did not examine these agreements separately. Consequently, it is not known whether the interstate arrangements differ significantly in number or policy focus from the intrastate arrangements in this metropolitan area. An indirect indicator of the likelihood that the policy foci of the interstate

agreements differ from those of the intrastate agreements is that MARC has a Department of Aging Services, but it serves only the five counties on the Missouri side of the metropolitan area, probably because social welfare policies of this nature are fairly uniform across counties within a state but differ from one state to another in terms of citizen eligibility rules, types of benefits for recipients, funding levels and administration.

CONCLUSION

Although interlocal cooperation is common in the US, interstate interlocal cooperation is less common. Counties and municipalities are not divided by state lines,¹⁵ nor are state lines perceived to have divided historically coherent communities that yearn to reunite across a state line.¹⁶ Similarly, few if any communities desire to be incorporated into a neighbouring state, in part because they would not necessarily be better off in a neighbouring state. Although there are economic disparities between the states, those disparities have regional manifestations; consequently, disparities between adjacent states are usually less remarkable than those between states in different regions of the country.

In addition, all US states, comparatively speaking, are relatively well off. Furthermore, patterns of representation and policy-making in state governments today do not produce long-term systematic biases against particular communities for reasons of political party allegiance, language, religion, ethnicity or race. Therefore, a predominantly Democratic locality in a state dominated by the Republican Party would not likely agitate to be incorporated into an adjacent state that is Democratic.

Apparently only three of the country's 13,051 school districts straddle a state line, mainly because there can be substantial differences between the education systems in adjacent states. Interstate special district authorities established by interstate compacts to perform particular functions are slightly more common, though small in number relative to the number of metropolitan areas, watersheds and other regionally relevant factors that cross state lines. More common are interlocal agreements and contracts forged across state lines that do not rise to the level of compacts, as well as informal cross-border agreements, but the number, scope and significance of such agreements are unknown because no US government agency or state government agency monitors them, and no one has conducted systematic

research on them. In turn, even though 41 MSAs and 16 μ SAs cross state lines, less than 20 COGs or MPOs cross state lines.

Given the substantial sovereignty retained by the 50 states and their legal authority over all local governments, interlocal cooperation across state lines is difficult to achieve in policy fields that go beyond reciprocity, episodic mutual aid, merely coordinating activities on both sides of a border, and providing certain services via contracts. In particular, the vast array of social welfare programmes in the US is state-based and therefore variable, and federal funding for these programmes goes to states and local governments, not to interstate entities.

For example, Medicaid (i.e., health care for the poor) is the single largest federal state grant-in-aid programme funded by the federal government at rates of 50–79% depending on a state's per capita income. Although the federal money comes with a plethora of rules, each state operates its own Medicaid programme under which it determines citizen eligibility for benefits, the level and types of benefits, and so on. Consequently, even if a wealthy community wished to assist a poor neighbouring community across a state line, it would have difficulty finding a way to do so, at least governmentally.

There are, however, two important mitigating factors. First, poor people can migrate across state lines freely, and many do so. Furthermore, pursuant to the US Supreme Court's interpretation of the US Constitution, no state can deny a person any social welfare benefits¹⁷ or voting rights for more than 30 days after he or she moves into the state. Second, private money can be sent across state lines freely. This is important because private and religious non-governmental provisions of social welfare are prevalent in the US, and federal and state income tax laws encourage charitable giving. Hence, citizens of the wealthy community can freely contribute to the welfare of their poor neighbours across the state line even if their local governments cannot do so.

Finally, unlike most federal countries, the US has no formal fiscal equalisation programme nationwide for the states or for localities.¹⁸ States engage in some fiscal equalisation activities for their school districts but not ordinarily for their counties, municipalities and other special districts. Instead, the US places an emphasis on redistributing wealth directly to persons (e.g., through cash welfare payments, tax credits and refunds, and direct services) rather than to places. This policy enhances individual choice and mobility, thus rendering state borders more porous than solid.

ENDNOTES

- 1 Knapp JL & Grossman PJ, Voluntary tax sharing: A Virginia case study, *National Civic Review* 70, July 1981, pp 347-352; Richman RS & Wilkinson MH, Interlocal revenue sharing: Practice and potential, *Issues & Options* I(1), 1993, entire issue; Plammer WJ Jr & Dustin JL, Fostering economic development through county tax sharing, *State and Local Government Review* 25, Winter 1993, pp 57-71; Zelio J, Local tax sharing, *NCSL Legisbrief* 7, October 1999, pp 1-2.
- 2 Bureau of Governmental Research, *Interlocal Service Agreements and Contracts*. Columbia: University of South Carolina, 1980; Honadle BW, Providing community services: The cooperation factor, *National Civic Review* 70, July 1981, pp 353-355, 360; Honadle BW, Interlocal cooperation, *National Civic Review* 71, July-August 1982, pp 362-364; New Jersey Department of Community Affairs, *Interlocal Services: Working Together – Interlocal Service Agreements, Sample Language for Selected Activities*, September 1992; and New Jersey Department of Community Affairs, *Interlocal Services: Working Together – A Guide to Joint Service Feasibility Studies and Interlocal Agreements*, December 1992.
- 3 National Center for Interstate Compacts, Council of State Governments: <http://www.csg.org/programs/ncic/resources.aspx> [accessed 30 January 2009]. Compacts originated during the colonial era primarily to settle boundary disputes. Compacts are authorised, with congressional approval, in Article I, section 10 of the US Constitution. From 1789 to 1920, boundary dispute resolution continued to be the major motivator of compacts.
- 4 Zimmerman JF, *Interstate Cooperation: Compacts and Administrative Agreements*. Westport, CT: Praeger, 2002, p 88.
- 5 US General Accountability Office, *Interstate Compacts: An Overview of the Structure and Governance of Environment and Natural Resource Compacts*, GAO-07-519. Washington, DC: US Government Printing Office, April 2007.
- 6 See Leach RH, Interstate authorities in the United States, *Law and Contemporary Problems* 26, Autumn 1961, pp 666-681.
- 7 I wish to thank Michael A. Pagano, University of Illinois at Chicago, for bringing this school district to my attention.
- 8 Wheeler L, College Corner Journal: Singular loyalty for divided school, *New York Times*, 23 August 1988.
- 9 For more on these districts, see Zimmerman, *Interstate Cooperation*, op cit, pp 84-88.
- 10 Zimmerman JF, Dissolution of the New Hampshire-Vermont Solid Waste Compact, *Connections*, Spring 2008, pp 4-5. Available at <http://www.csg.org/programs/ncic/resources.aspx> [accessed 4 February 2009].
- 11 The US government defines an MSA as a central city or twin cities having a population of at least 50,000 people plus contiguous counties or county equivalents that have a high level of socio-economic integration with the centre, as measured by interjurisdictional commuting.

- 12 These urban areas have a central city or cities having 10,000 to 49,999 people, plus surrounding integrated areas. This designation was created in 2003.
- 13 Thurmaier K & Wood C, Interlocal agreements as overlapping social networks: Picket-fence regionalism in Metropolitan Kansas City, *Public Administration Review* 62, September/October 2002, pp 585-598.
- 14 Wood C, Scope and patterns of metropolitan governance in urban America: Probing the complexities in the Kansas City Region, *American Review of Public Administration* 36, September 2006, p 342.
- 15 Within states, however, there are many cases of municipalities that straddle county lines and school districts and other special districts that cross municipal and county lines.
- 16 Indian communities are a partial exception to this generalisation; however, the fact that some of the country's 310 reservations straddle state lines (e.g., the Navajo nation – the largest reservation – overlaps portions of four states) is not problematic because reservations fall directly under the authority of the US government, not the states, and they have self-governing powers that transcend state lines.
- 17 States are required to provide a number of social welfare benefits (e.g., health care and education) to illegal aliens as well.
- 18 Kenyon DA & Kincaid J, Fiscal federalism in the United States: The reluctance to equalize jurisdictions. In Pommerehne WW & Ress G (eds), *Finanzverfassung in Spannungsfeld zwischen Zentralstaat und Gliedstaaten*. Baden-Baden: Nomos Verlagsgesellschaft, 1996, pp 34-56.

Overcoming state borders in Australian cross-border communities: Select examples

A J BROWN AND MARK BRUERTON¹

INTRODUCTION

This chapter addresses two basic questions:

- Are there significant problems of cross-border coordination affecting the equity and effectiveness of government service delivery and regulation in particular communities in Australia?
- To what extent, and how, are such problems being addressed and overcome?

Australia is a federation of six states (New South Wales [NSW], Tasmania, South Australia, Victoria, Queensland and Western Australia) forged under the Constitution of the Commonwealth of Australia in 1901. Since federation the federal or Commonwealth Government has also accepted responsibility for, or created, two mainland territories (Northern Territory and Australian Capital Territory [ACT]).

The Australian federation was established to create a national government and a basis for more independence from Britain, and in large part to overcome the perceived disadvantages to the Australian community of the continent's subdivision into six colonies. With respect to internal trade and commerce – and increasingly in matters of economic and business regulation generally – the transfer of state autonomy to more uniform national control

has been largely successful in addressing the issues as perceived in 1901. However, in a range of policy and service areas, many not anticipated at federation, questions of cross-border equity and coordination continue to arise. These issues can be divided roughly into two types:

- Issues where cross-border difficulties or inconsistencies suggest a need for greater national uniformity or national control over policy. This debate is occurring in Australia over a wide range of issues, such as natural resource and environmental management (e.g. rivers that run through and between different states), and the need for greater national involvement in the administration of the public health system (e.g. different state-run public hospital services having poorer outcomes than others). This chapter will not review these larger debates over the redistribution of federal, state and local roles and responsibilities in detail – other than to note, as discussed in the next section, that these debates help explain who is currently responsible for what, and therefore the types of remedies that have so far been found for basic issues of cross-border equity and coordination.
- Issues where local and/or state services are reasonably similar on either side of a state border and simply need to be coordinated in order to: serve communities properly; address the needs of a particular region; or address potential disadvantage to a community, or part of a community, lying across a state border from another community.

Most of the chapter focuses on how the resolution of these issues is currently approached in Australia, with the latter parts of the chapter providing some examples *vis-à-vis* particular cross-border regions.

In practice, most Australian state borders travel through rural or remote areas of the country, with low population densities. Communities in these regions tend to address localised cross-border issues in informal ways, usually without formal agreements and with or without recourse to (or approval from) state governments. However, issues of equity and coordination become most obvious in the country's three most populous cross-border regions, namely:

- Gold Coast (Queensland)–Tweed Shire (NSW);

- Albury (NSW)–Wodonga (Victoria); and
- Canberra (ACT)–Queanbeyan (NSW).

There are approximately 600 local government authorities across Australia, including city, shire and regional councils. These are created and regulated under state legislation. Consequently there are no formal local government areas that traverse a state boundary. In only one instance (Albury–Wodonga) has such a cross-border local government area been proposed, as will be discussed, but the proposal was abandoned.

Nevertheless, there are a range of informal governance arrangements that span state borders. These are sometimes the creatures of federal, state or local government, or a mixture; sometimes these arrangements are intended to address specific localised policy or service issues.

In many cases they reflect the fact that the border artificially divides a reasonably ‘natural’ economic or demographic region, which is largely true for each of the more populous areas listed. It should be noted, however, that similar informal ‘regional governance’ arrangements also exist for many regions lying purely within one state, as all Australian states but for Tasmania (and a lesser extent Victoria) are very large units in either a geographic or population sense (or both).

This makes the question of regional governance an important issue for the future of effective and equitable public policy and service delivery in all parts of Australia. It is also an important part of the backdrop to the question of what options exist for ensuring effectiveness and equity in the particular ‘cross-border’ regions where this is more likely to be an issue.

The first part of the chapter provides further detail on the constitutional and political context for current options and solutions. It provides some departure points for understanding the different ways these issues have been approached to date. In particular it highlights that the capacity of local government authorities to collaborate to best serve cross-border communities is severely constrained, both by limitations on the policy and service functions for which they are responsible and by limitations on the resources to which they have access. Nevertheless this is a field of considerable innovation and one that is under-studied in Australia.

The second part of the chapter examines some of the responses to cross-border governance issues developed by local government authorities in the three regions listed above. Despite their constraints, local authorities remain

the closest level of government to the community and in areas such as planning and tourism, it has fallen to these local government authorities to overcome capacity constraints to deliver for the cross-border communities as a whole. These responses have not been the same, however, since some communities favour direct bi-lateral cooperative programmes, some favour incorporating new organisations to govern cross-border issues, and some have taken a more regional approach incorporating many different combinations of direct and indirect cooperation.

The third part of the chapter examines some examples of state government responses to cross-border issues. It does not address issues where one state government takes a different policy approach (better or worse) to another, which may be the principal cause for localised feelings that it is better to live, or use services, on one side of a state border than another. For example, the educational policies and level of resourcing in state high schools on one side of a border may be perceived to be better than on the other. The resourcing and management of state-owned public hospitals may raise similar issues.

These issues are not addressed because, as discussed earlier, the conventional responses to such policy divergences in Australia are: political pressure on the state government to change its policies; political pressure for the Commonwealth government to take over or force greater uniformity in that policy area; or both.

Supporters of the federal system tend to consider these to be perfectly appropriate responses in any federal system and tend not to see these kinds of cross-border issues as raising major governance problems. Critics of the federal system do tend to consider these policy divergences to represent a major governance problem, but tend to propose that power should pass to the Commonwealth to take over these policy areas or impose uniform national standards. In some areas, Commonwealth leverage to do this is much stronger than in others. For example the Commonwealth government currently has only limited roles in state secondary education, other than through control of funding. However, it currently has a much stronger role in ensuring the availability and equity of health services throughout the country because it directly administers the national health insurance scheme through which most doctors source a significant proportion of their income, in addition to collecting most of the revenue which funds the state hospital services.

The third part of the chapter on state services therefore focuses on an area of basic cross-border coordination in policy areas that are in little or no dispute: emergency services and community policing. In areas such as ambulance, fire and police, it falls to the state-based institutions to cooperate together to deliver an adequate service in these cross-border regions. Some examples of the way in which this cooperation is pursued between the Queensland, NSW, Victoria and ACT governments are described.

Together, a range of local and state-based responses have been used to address service delivery issues in cross-border communities. A common characteristic of these responses is their level of informality. There is healthy debate in Australia over more structural, constitutional or legislative improvements to the federal system as a whole that would make policy and services more responsive in all regions, including cross-border regions, in ways that may alleviate issues of perceived inequity. There is also a valid question as to whether more formal approaches to policy and service coordination in cross-border regions, as in other regions, might well be a wise investment and might help ensure that solutions to cross-border issues are less temporary and not left to chance.

THE CONSTITUTIONAL POSITION OF AUSTRALIAN LOCAL GOVERNMENT

Since cross-border communities essentially coexist as one community regardless of the state border dividing them, local government is the level of government most appropriate to deal with cross-border divisions. However, local government in Australia is not an equal partner within the federal structure. It has no recognition in the federal constitution and has a significantly smaller role than comparable democracies around the world. This section examines the limitations placed on local government as a result of the legal and financial structures which prevail in Australia.

In the legal area, federal constitutional ambivalence has led to a precarious position for local government as a subservient and dependent sphere of government to the states. In the financial area, limited discretionary funds and the limited ability of the federal government to assist local government directly has further impeded local government's ability to cope with an ever increasing list of responsibilities. Efforts to improve the situation of local government have also met with limited

success due to a negative community attitude to expanding the role of local government and a perceived lack of necessity for federal constitutional recognition from federal government reviews. Overall, this lack of legal standing as compared to the state and commonwealth levels of government has informed and required the informal mechanisms employed by local government to shore-up cross-border community services.

THE LEGAL POSITION

Classical federal constitutions have been largely agreements between sovereign or semi-sovereign entities to form a common union by surrendering authority in some areas to an overarching central government.² The Australian Constitution is no exception. The primary role of the document is to provide some certainty over the extent to which state sovereignty is sacrificed to the Commonwealth. As such, local government had neither a place nor a role in the negotiations leading to the formation of constitutions. Therefore, while the states and the Commonwealth are recognised within the federal constitution,³ local government is not mentioned. Furthermore, any references made to local government during the federation conventions were in reference to a proposed role of the states in the new federation rather than an acknowledgement of local government's status as members of the federation in their own right.⁴ As such, since local government is denied independent status under the federal constitution, local government has remained subservient to and dependent on the states.

Most states have acknowledged local governments in their own constitutions. Victoria (1979), Western Australia (1979), South Australia (1980) and NSW (1986) have all made provision for essentially plenary local government powers to provide for 'peace, order and good government' or 'better government' in their respective jurisdictions.⁵ Queensland, Tasmania and the Northern Territory have not yet recognised local government in their own constitutions. Each state has, however, adopted a local government act which sets out the powers and responsibilities for local government in each state.

These responsibilities, however, are not necessarily uniform across the states. This creates a problematic legal position for local governments since they are hindered by inconsistent powers in different states, compounded

by inconsistent constitutional recognition of status. Furthermore, their power and responsibility remain in place only at the discretion of the states, hindering local government's ability to act independently.

While many local authorities operate at the community level some act at a regional level, and again the status of regional authorities differs across jurisdictions. Different states have pursued different programmes of either amalgamating councils into larger 'regional' entities or creating regional organisations of councils, or both. In three states (Queensland, NSW and Western Australia) there are both 'local' councils and 'regional' councils, recognised as such either by formal legislative status or by name, or both. But all of these are also creatures of statute and do not enhance the legal standing of local authorities.

THE FINANCIAL POSITION

In addition to the problematic legal position of local government, Australian local government also faces a problem of capacity. Compared to other federations around the world, Australian local government suffers from a disproportionately small share of revenue. Between 1973 and 1998, local government's revenue share compared to the state and federal share of revenue has been fairly consistently between six and seven percent.⁶ This is compared to around 40% for the state governments and just over 50% for the federal government.⁷

This is also a disproportionately small share of funding when compared to local government funding in other comparable federations. Local government in the United State (US) draws 24.6% of revenue, in Canada it draws 18.1%, in Germany it draws 14.3% and in Brazil it draws 12.4%.⁸ In addition, responsibilities within the jurisdiction of local government have only increased. Both state and federal governments have continued to rely more heavily on local government for service delivery, creating a situation where local government struggles to support these services on a limited revenue share.⁹

Regional organisations of local government and other regional bodies operate with an even smaller and less reliable share of federal and/or state funding. This is of particular relevance to cross-border regions where the management of cross-border issues can be reliant on one or more of these types of less formal, regional organisations.

THE POLICY POSITION

Attempts to create an improved regional institutional programme in Australia have been met with limited success. Early attempts between the 1940s and 1970s have been criticised for their top-down approach and their failure to understand the needs of the communities in the regions that the new bodies were supposed to be serving.¹⁰ However, more recent 'bottom-up' community-based programmes of regionalisation (either by expanding local authorities to create regional councils or councils banding together in regional organisations of councils, usually with only strategic government assistance) have also failed to produce meaningful change due to their limited legal and financial capacity.¹¹ Such failures have created a multiplicity of regional bodies which have, in and of themselves, been unable to force institutional responses to the concerns of regional and, by extension, cross-border communities.

THE POLITICAL POSITION

Attempts to address the problem of local governments' legal capacity constraints have been a policy objective of successive governments; however, no meaningful changes have been made. Federal constitutional recognition of local government has been seen as an important way to begin improving the situation of local government through legal harmonisation and improved funding from the federal government.¹² But such an attempt to improve the position of local government has so far met with limited success.

In both 1974 and 1988 the federal government placed a constitutional referendum before the people to recognise local government in the federal constitution. This would see local government become a more direct partner in the federal system and allow for, in particular, more direct cooperation between the federal government and local government, thereby bypassing the often conflicted situation of dealing with the states.¹³ The 1974 referendum was defeated in all but one state and failed to achieve a popular majority, while the 1988 referendum was defeated in all states and also failed to achieve a popular majority.¹⁴

Probable causes of these failures originate in a preference in the political establishment for state rather than federal constitutional recognition, and the public's desire to avoid the expansion of local government power. Two

federal reviews stand as testament to the public's preference for local government recognition in state constitutions over the federal constitution. For example, the Fraser Federal Government's Advisory Council for Intergovernmental Relations saw the democratic nature of local government as a partner tier of government rather than a subservient one and argued in favour of state constitutional recognition, yet stopped short of federal constitutional recognition.¹⁵ It stated:

[T]he fact that [local government] is also a democratically elected organisation ... implies that it is a partner to the State in government, much as the adult son working the family farm with his father is a partner in the family enterprise, rather than a hired hand bound to do the employer's bidding.¹⁶

This highlights the continued political opinion that local government is a creature of the states rather than a necessary federal partner.

Further to this perceived lack of necessity for federal constitutional recognition is an attitude in the community which sees local government as the least effective tier of government in Australia. In a 2008 Newspoll, respondents in five out of the eight states and territories nominated local government as the least effective tier of government in Australia.¹⁷ This indicates a resistance within the community to expand the role and powers of local government. In combination with a perceived lack of necessity to constitutionally recognise local government, this provides for a situation where an expansion of local government capacity is difficult.

In 2008, however, there was renewed interest in both constitutional recognition and other mechanisms for increasing the capacity of local government. In November 2008 the federal government established a new Australian Council for Local Government to assist with these issues, and in December 2008 the Australian Local Government Association held a special constitutional summit which resolved to again pursue constitutional recognition.¹⁸ These debates are therefore ongoing.

There is also ongoing debate within Australia about whether the effectiveness and efficiency of public policy and services would not be enhanced by stronger forms of regional governance. Historically this debate led to the inclusion of constitutional provisions for new states and has periodically played out in terms of the use of these provisions to further

subdivide the existing states in a manner that would render regions at the current periphery of their states more autonomous. Alternative ideas include abolition of the states and their replacement with regional governments.¹⁹

In either case, there is periodic debate about adjusting state boundaries so that artificial divisions such as those which divide Gold Coast–Tweed Shire are removed. At the same time it is widely recognised that the territorial divide would simply have to be relocated elsewhere. The question is where. Notwithstanding their complexity, these debates – while not usually regarded as a mainstream political issue – are perennial ones confirming significant unresolved issues of political identity and policy effectiveness within current governance arrangements.

SUMMARY

Due to a lack of recognition in the federal constitution, local government has remained a dependant and subservient level of government to the states. The states therefore dominate the nature of local government within their own jurisdictions, leading to a situation of differing nature, powers and legal standing across the various states and territories. This legal impediment has been compounded by a lack of capacity and ineffective regionalisation programmes.

Compared to the other levels of government in Australia and local governments around the world, Australia's local governments receive a disproportionately low share of revenue with an ever increasing list of responsibilities. Attempts to change this disempowered status have met with limited success due to a negative public and political view of local government and a preference from federal government reviews for state, not federal, constitutional recognition.

However, since local government remains the closest level of government to the community, it has largely fallen to local government to deal with the problems of communities which straddle state borders. Local governments have therefore had to employ non-institutional means to overcome the legal constraints placed on governing a cross-border community. But there are still some problems related to the aforementioned legal and capacity restraints that have necessitated assistance from the states.

LOCAL GOVERNMENT RESPONSE

As discussed above, local government has only a limited role in the overall system. In many cases it is therefore unable to deal with those cross-border issues considered most important by communities because these may be state issues. Nevertheless local government does provide the current best model of liaison and cooperation.

Local authorities have engaged in extensive consultations with one another to remove cross-border barriers to services and development on a bilateral basis, through specially created independent bodies or through a regional approach which brings together both new organisations and bilateral cooperation across the region. Each authority has adopted its own strategy to deal with the issues and scenarios its region faces. Therefore, while approaches to regional cooperation have not been exactly the same, they have all been tailored towards cross-border links to avoid governing inconsistencies in cross-border regions. Below are some examples of local government cooperation in the Gold Coast–Tweed region, the Albury–Wodonga region and the Canberra–Queanbeyan region. Note that these are limited examples of cross-border cooperation and are not the result of a comprehensive survey.

GOLD COAST CITY–TWEED SHIRE

Gold Coast City is in the south-eastern corner of Queensland and Tweed Shire is in the north-eastern corner of NSW. Both these cities share a common urban and suburban area centred on the Queensland–NSW border. To administer this region, the Gold Coast City Council (GCCC) and the Tweed Shire Council have taken measures to ensure a cooperative effort is made in relation to physical and economic development in the cross-border area.

One area of concern has been planning. The GCCC has formulated local area plans to guide development in each nominated region of the city in order to maintain the local identity and environment.²⁰ The local area plan for the Coolangatta region backs onto Tweed Shire and as such bi-monthly consultation is undertaken by strategic regional planning teams for each council to coordinate planning, infrastructure and response to traffic issues for the Coolangatta region and along the border.²¹

Cooperation between the GCCC and Tweed Shire Council has also

extended to economic development. Representatives of the councils have worked together to promote economic development through the formation of a cross-border working party aimed at reducing overlap and inconsistencies between the two councils with regard to business regulation.²² Extensive consultation is also conducted between the councils, the Tweed Economic Development Corporation, the Cross-Border Working Party and representatives of the Queensland and NSW governments to ease irregularities resulting from the cross-jurisdictional nature of the region.²³ Finally, both councils formulated the TweedGold Coast Enterprise Region. This has been a project formulated in partnership between the GCCC and the Tweed Economic Development Corporation to market the Gold Coast and Tweed Shire as one region for investment and development rather than as two distinct units.²⁴

Through these bilateral partnership arrangements to reduce inconsistencies between the jurisdictions, the GCCC and Tweed Shire Council have been able to counter cross-border irregularities in planning, business regulation and marketing which have become apparent in the region.

ALBURY CITY—CITY OF WODONGA

The city of Albury sits on the southern border of NSW and the northern border of Victoria. Just over the Victorian border is the city of Wodonga. In a similar fashion to the Gold Coast City and Tweed Shire, Albury city and the city of Wodonga share a common suburban and commercial area along the Victoria–NSW border. As with the Gold Coast–Tweed, therefore, common development and economic policies have been necessary to ensure service delivery and economic development. However, both Albury and Wodonga are subject to outside planning requirements from their respective states. Wodonga is required to operate under stringent requirements of the Wodonga Planning Scheme,²⁵ while Albury is required to adhere to the more general requirements of the NSW State Plan.²⁶

To avoid conflict caused by the requirements of two separate planning documents, the Albury and Wodonga councils have formulated new bodies which can operate across borders. Some of these are the Albury Wodonga Corporation, Destination Albury Wodonga and Parklands Albury Wodonga. These have been jointly created by the Albury City Council and

the Wodonga City Council to allow Albury–Wodonga to operate and be marketed as a joint investment and development destination²⁷ while still maintaining the required planning independence to meet their respective requirements. Furthermore, the Albury and Wodonga city councils cooperate on tourism (through jointly sponsoring tourism marketing) and transport between the two cities.²⁸ The favouring of issue-related cross-border organisations reflects a different approach to that of the Gold Coast City and Tweed Shire due to the differing planning requirements in the region, but still allows for a degree of cross-border cooperation where required.

The Albury–Wodonga region has been the site of several experiments in regional cross-border administration. Albury–Wodonga was designated a ‘growth centre’ by the Whitlam Federal Government²⁹ and as such had a cross-border development organisation, the Albury–Wodonga Development Corporation.³⁰ It has also been the site of one of the few cross-border area consultative committees established under the Howard federal government,³¹ and was the site for an experimental cross-border local authority.

However, each measure has either failed to achieve greater regional institutional backbone or collapsed: the Albury–Wodonga development organisation (merged into the Albury Wodonga Corporation) has essentially become a holding company providing a joint land vendor in both Albury and Wodonga;³² the cross-border Area Consultative Committee has been dissolved;³³ and the council merger was rejected by the local community.³⁴ The Alliance of Councils and Shires of the Upper Murray has been the only organisation to endure. It brings together councils from both sides of the border in the Albury–Wodonga region to discuss policy coordination between the councils.³⁵ However, since this is an informal body, cross-border cooperation in Albury–Wodonga has been limited to informal agreements largely using cross-border organisations.

CANBERRA/QUEANBEYAN

The situation faced by Canberra and Queanbeyan is unique in Australia since Queanbeyan is administered by the Queanbeyan City Council (QCC) within the borders of NSW, while the city of Canberra is directly administered by the government of the Australian Capital Territory (ACT).

In some ways this has made cooperation easier due to the increased legal standing and financial capacity of the ACT; however, in others it has been more difficult because of uncertainty about whether appropriate cooperation in a situation should be undertaken directly with the QCC or the NSW government.

Cooperative efforts between the ACT and QCC have nonetheless been relatively successful. In the area of planning and development, the ACT Planning and Land Agency's senior executive and the QCC's senior executive meet regularly to coordinate planning and development. Furthermore, notifications between the Agency and the QCC vis-à-vis development and environmental plans are undertaken to assist in the coordination of planning.³⁶ There is, however, at least one notable failure in the coordination, namely the QCC's approval of substantial housing developments directly under the flightpath of Canberra airport, located immediately across the border.

In addition to direct consultations between the ACT government and the QCC, the ACT government and the NSW government negotiate and consult to ease cross-border irregularities. The chief minister of the ACT and the premier of NSW have agreed to a regional planning framework to govern planning across the region, and the NSW and ACT governments have signed a memorandum of understanding to set out which agency administers different parts of the framework.³⁷

ACT is also an active member of the Regional Leaders' Forum for the ACT region, which incorporates local government areas around the ACT, including the QCC, to coordinate region-wide policies for economic growth and environmental management throughout the region.³⁸ The unique status of the Canberra–Queanbeyan relationship has required a combination of regional, state and local coordination to ensure that the necessary cooperation is undertaken.

SUMMARY

Each cross-border community has engaged in cooperative efforts between the local authorities that govern the relevant communities. These areas focus largely on planning, economic development and tourism. The Gold Coast City and Tweed Shire have favoured a more direct bilateral approach to cooperation, while Canberra and Queanbeyan have looked to a more

local, state and regional focus, notifying each other and coordinating efforts where appropriate.

Albury and Wodonga have favoured an approach whereby separate organisations govern cross-border enterprises, although direct, issue-related cooperation still exists. Local authorities are not, however, the sole providers of services within these communities. Many services are still provided directly by the states, and as such direct state to state cooperation has also been necessary to ensure adequate service delivery in these cross-border regions.

STATE-BASED RESPONSES

As a result of the constitutional status quo in Australia, the limited power of local government and the limited successes of regionalisation projects, many critical areas of service delivery in cross-border communities remain with state governments. While local authorities can cooperate through informal means to coordinate planning, tourism and economic development, these state services are the most commonly accused of featuring overlaps, gaps or inconsistencies in service delivery where cross-border communities are served by different service providers, each governed from their respective state capital.

State governments are nevertheless under considerable institutional and political pressure to ensure that effective and equitable services are delivered on each side of their common borders. Increasingly this is as a result of conditions placed on state governments in order to receive Commonwealth funding. Federal evaluation agencies such as the Productivity Commission and Audit Offices also evaluate relative performance in order to identify inefficiencies, inequities or poor performance by different governments in different areas, creating pressure for coordination and alignment.

State governments also coordinate directly in relation to practical matters raised across borders. Although there are many areas that could be examined, the examples provided here are limited to emergency services (ambulance, police and fire services). While institutional coordination to administer services in these areas is lacking, state agencies have been active in coordinating efforts between their activities in cross-border areas. This has been largely through coordination of communication and creating

provisions for the closest emergency service unit to cross the border to expedite service delivery where necessary.

FIRE SERVICES

Each state operates its own fire and rescue services usually tailored to the type of natural disaster or region they service. For example in NSW there is the NSW Rural Fire Service which deals with fire emergencies in regional and rural NSW, the NSW Fire Brigade which deals with urban/metropolitan-based fire emergencies and the State Emergency Service (SES) which deals with floods and storms across the state.³⁹

Each organisation has concluded a memorandum of understanding (MoU) with its corresponding service in other states to deal with cross-border communities. For example, in Queensland the NSW Rural Fire Service which deals with fires in regions bordering Queensland has MoUs with the corresponding Queensland agency, the Queensland Fire and Rescue Service.⁴⁰ This allows, for example, an NSW Rural Fire Service vehicle to respond to a fire emergency in Queensland if it is the closest and best equipped unit to respond, and vice versa.

AMBULANCE SERVICES

Like fire services, each state operates a distinct ambulance service which operates across its state and is centrally coordinated from the state capital. Therefore, once again, to deal with service delivery in cross-border regions, these state-based ambulance services have MoUs indicating that an ambulance unit from one jurisdiction can cross a border and respond to a call in another jurisdiction.⁴¹ In practice this means that the telecommunications provider in, for example, the ACT automatically diverts a call from the regional areas in and around the ACT to either the ACT Ambulance Service or the NSW Ambulance Service depending on which has a unit closer. Once a call has been responded to, the unit can take the patient to either an NSW or ACT hospital, once again depending on convenience. While agreement is required from, for example, the ACT-based hospital to receive a patient from NSW, this is in practice a formality and is rarely, if ever, not granted.⁴² Arrangements like this allow for a streamlined ambulance service for cross-border communities.

POLICE SERVICES

Policing is a service which operates across borders in cross-border communities. The state-based police services are often called upon to pursue suspects across state borders, and in many cases apprehend such suspects outside their home state.

In strict legal terms, however, the state-based police services have no authority to pursue suspects or apprehend suspects outside their own jurisdictions. To deal with this, like the other aforementioned agencies, the police services have engaged in extensive cooperation and have drafted MoUs.

The result, for example, along the NSW–Victoria border is that each police officer is appointed a special constable in the counterpart jurisdiction. This in practice allows for a Victoria police officer to pursue a suspect into NSW, apprehend them and either return them to Victoria or process the arrest in an NSW police station⁴³ and vice versa. Overall this has allowed a seamless police service to operate in cross-border communities and closes a potential legal loophole in law enforcement.

SUMMARY

As with the jurisdictions of local authorities, jurisdictions for emergency service agencies stop at state borders and create legal difficulties for adequate service delivery in these areas. This has led the state-based emergency services (fire, ambulance and police) to formulate arrangements between themselves to deal with these problems. State-based fire services issue MoUs to allow fire rescue units to respond to emergencies in counterpart jurisdictions.

State-based ambulance services have issued MoUs allowing ambulance services to cross borders to respond to a call and take a patient to any hospital in the region.

Finally the police services have allowed for a situation where state police officers in a cross-border region can become special constables in the other state, allowing them to enforce the law across the border.

This closes the potential legal gap for state-based service delivery and complements the efforts undertaken by local authorities to ensure that cross-border communities are not adversely affected purely on the basis of geography.

CONCLUSION

Cross-border communities are in a precarious position as a result of constitutional relationships that exist in Australia. As a federal nation consisting of a Commonwealth government, six semi-sovereign states and two mainland territories, political power is centralised. This means that communities that live on the borders of states or territories can be faced with uncertainty in terms of critical service delivery.

The most obvious solution is to allow for greater local government empowerment to deliver these services at either a community or regional level. Yet local government has been disempowered by the nature of the federal system in Australia, while attempts to strengthen governance at a regional level either through the creation of regional governments or regional organisations of councils which could exist across borders have met with limited success.

This leaves a situation where institutional coordination is difficult and outcomes remain challenging. As such, coordination of cross-border service delivery has fallen largely to informal measures undertaken first at the local level for services like planning, tourism and economic development, and at a state level to ensure that a range of essential services operate adequately in cross-border communities.

Local government has been able to develop unique, region-specific measures to ensure a streamlined approach is taken to planning, economic development and tourism. Some, like the Gold Coast City and Tweed Shire whose common suburban area stretches across the NSW–Queensland border, have favoured bilateral partnership approaches to cross-border cooperation. In contrast, Albury City and the city of Wodonga which stretches across the NSW–Victoria border have favoured the creation of separate organisations to govern cross-border cooperation due to the stringent and different planning requirements imposed upon them from their respective states. Furthermore, the city of Canberra and the city of Queanbeyan, stretching across the border of NSW and the ACT have had to take a unique combination of state, local and regional cooperation measures due to the nature of governance in the ACT as the direct administrator for Canberra.

The constitutional divisions between states make cross-border service delivery more difficult in the areas of fire, ambulance and police response. Owing to the fact that each state operates separate fire, ambulance and

police services, when responding to an emergency or pursuing a suspect across a state border, questions as to their legal standing in their counterpart jurisdiction are raised. This has led the state government agencies to issue various MoUs to deal with these issues.

In the area of fire, fire services from either state can easily respond to an emergency in the opposite state or territory on request from the opposite state's service. Ambulance calls are automatically transferred to the closest response unit regardless of borders, and that ambulance service can easily obtain permission to take their patient to the closest hospital in a separate jurisdiction if necessary. The police in cross-border areas are automatically commissioned as special constables in their counterpart jurisdiction to allow them to operate in that jurisdiction when necessary.

Overall these measures – in conjunction with cooperative efforts at the local level – provide services which, under the constitutional arrangements that prevail in Australia, have the history of greatest complication in cross-border communities. These measures are, however, informal in nature.

While clearly better than nothing, in many respects these cooperative efforts provide a short-term solution to the problem of service delivery in cross-border communities and do not necessarily relieve the need for consideration of more substantial institutional change to bring local and regional responsibilities under greater control from the communities concerned (including the option of boundary change). Even without such changes, greater institutional support for cross-border collaboration is desirable as a means of placing this collaboration on a more permanent and sustainable basis.

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Local and regional transborder cooperation in Europe: Lessons learned in the German–Dutch Euregio¹

HEINRICH HOFFSCHULTE

INTRODUCTION

In the history of European nations, borders have been barriers. They were lines of demarcation, the aim of which was to separate economic and political units, peoples and nations by means of appropriate control, and to make the crossing of borders subject to special authorisation. Border regions consequently often found themselves cut off from economic life on the other side of the frontier and, even worse, marginalised by their own nation, always more or less left outside the economic development of the country.

This situation was felt all the more clearly and painfully in Europe after the Second World War when certain frontiers were modified at the end of the hostilities, once more cutting off and separating population groups.

The Treaty of Rome in 1956 and the institution of the big, single market of the European Union (EU) from 1993 have led to the gradual removal of internal borders. The new external frontiers of the EU have also changed in nature due to the growing single market and the ending of passport or border controls.

This has resulted in a challenge for the new border regions, especially in terms of their relations with Central and Eastern European countries. Here, as with all external frontiers, it is a matter of establishing new social, political and economic contacts with neighbours who often are cut away by the change of character of these borders, although many of them prepare to become members of the EU as well.

Transfrontier cooperation is very attractive in border regions from the perspective of furthering European cooperation. It may be more or less intense and may take various forms. It is now common knowledge that border regions play a special role in the 'Europe of the regions'.

One of the most practical examples of cross-border cooperation at a local level between municipalities is that of the first and oldest German–Dutch transborder region, also referred to as a Euregio.

DEVELOPMENT OF THE GERMAN–DUTCH EUREGIO

Owing to its proximity to the Netherlands, the German *Land* (federal state) Westfalian Münsterland had long been able to experience and appreciate the advantages of transfrontier cooperation. After the Second World War, citizens on both sides of the international border established contact in the desire to eradicate the after effects of the war. These efforts undertaken by Euregio are now held up by the EU and the Brussels Commission as an example for many transfrontier regions existing today within the EU and on its external frontiers.

The name 'Euregio' signifies both an objective and a geographical area: Euregio = EUropean REGION. It is located in the middle of the German–Dutch border area, bounded approximately by the Rhine, Ems and Ijssel rivers. The German part is constituted mainly by the Westmünsterland (part of the North Rhine-Westfalian *Land*) and the county of Bentheim (part of Lower Saxony *Land*), while the Dutch side comprises Twente and

Achterhoek. Euregio is thus at the geographic centre of the main economic area of Northwest Europe, with the Rhine-Ruhr region, Randstadt Holland and the north German ports within 100–250 km.

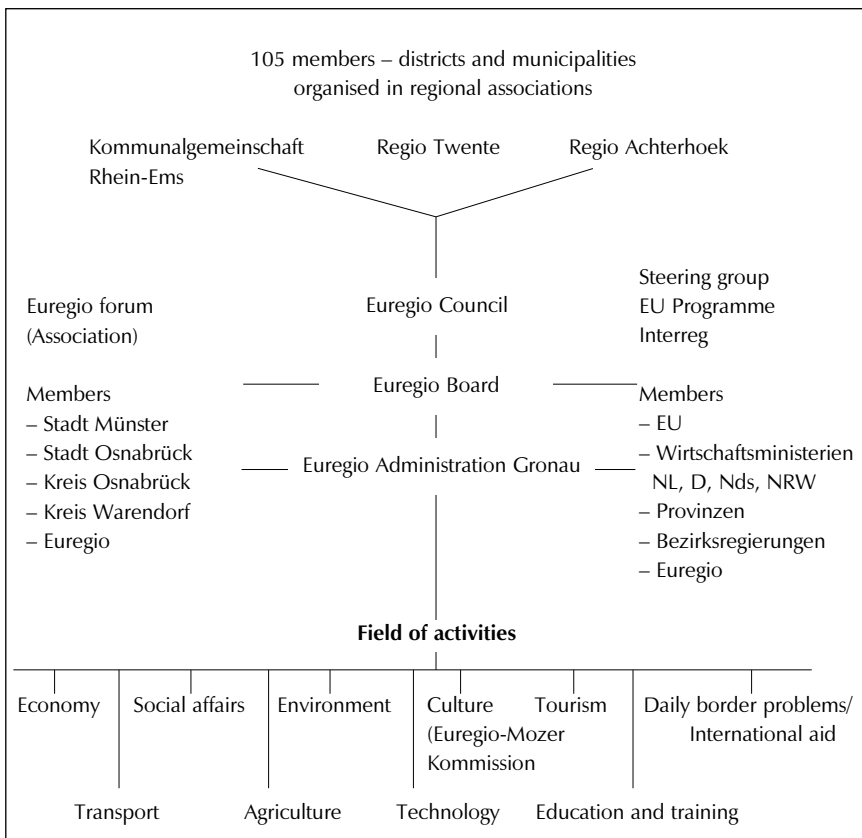
However, the advantages of such a central location can only be fully exploited if



cooperation is established within this transborder region. Looked at individually, the regional components of Euregio in both Germany and the Netherlands are characterised by their peculiar and rather peripheral national (or *Land*) situation. The consequences of this are common to virtually all border regions, though to differing degrees.

Thus the peculiar national situation leads to relative isolation vis-à-vis the respective national centres where political opinions are formed and economic and infrastructural decisions are taken. Economic activities and trade flows are generally based on the national or *Land* centres, and the same is true of the road networks. Infrastructure in border regions is not as

Euregio organisational schematic



well developed compared to the well-equipped central regions of the respective states.

In contrast, the Euregio region – despite its belonging to two different national states – constitutes a relatively homogeneous region from an ethnic, geographical, cultural, architectural, economic and linguistic perspective. (The German dialect spoken in the countryside near the border is similar to the official Dutch language, so people feel ‘at home’ on both sides of the border.)

Today Euregio covers the areas of activity of three ‘communities of localities’ (*Kommunalgemeinschaften*), bringing together some 130 local authorities, towns and self-governed *Kreise* (counties, departments) with an overall population of about 3.2 million inhabitants. On the Dutch side, it is the *Samenwerkingsverband* (cooperation association) *Oost-Gelderland* and *Samenwerkingsverband Twente*; in Germany it is the *Kommunalgemeinschaft Rhein-Ems*, an association created as early as 1954 in Kreis Steinfurt.

The statute of Euregio sets as an objective ‘the promotion of transfrontier development in the fields of infrastructure, economic activity, culture, leisure and other social activities’. The extent of these fields made it necessary to set up several committees of experts in the different sectors. There are committees on transport, social affairs, agriculture and the environment. One of the most important fields is covered by the Economic Activity and Labour Committee.

The administration of Euregio is headed by the two secretaries general of the Euregio office (Secretariat). Its headquarters, manned by some 30 bilingual German- and Dutch-speaking staff, have been in Gronau since 1985 – 50 m from the German–Dutch frontier. This Euregio office was the first, and for a long time the only, one of its kind in Europe until the EU made it a model and financed the spreading of its ideas to other cross-border regions.

RECENT ENLARGEMENTS OF EUREGIO

This transfrontier cooperation caused much interest in neighbouring cities and regions, with the result that the three biggest towns – Enschede-Hengelo in the Netherlands and Münster (population 280,000) and Osnabrück (population 168,000) in Germany – formed a ‘triangle of towns’ (*Städtedreieck*). They aspired to achieve closer cooperation as well as the

exchange of experiences and services. In addition, they wished to participate in regional development within Euregio in order to better defend their interests vis-à-vis the EU. By all accounts they also wished to be full members of Euregio. Similarly, neighbouring *Kreise* (counties) on the German side (Osnabrück and Warendorf) and adjacent Dutch regions also wished to join in the cooperation and finally did so.

Thus a Euregio-*Städtedreieck* working group was set up in accordance with Euregio procedures to test and consolidate the options for cooperation. It already appears that regional development is becoming a priority concern of the region thus constituted. On 1 January 1999 the towns in the Triangle achieved their aim. After a period of ‘apprenticeship’, they are now constituent members of Euregio.

INTERNAL INTEGRATION

Focal points in Euregio’s work are not only economic growth but also internal integration of the region. In order to achieve these aims the ministries for economic affairs of the North Rhine-Westphalia and Lower Saxony *Länder*, the German federal economics ministry and that of the Netherlands drew up a transfrontier action programme for Euregio (agreement of 11 May 1984). Based on an analysis of the strengths and weaknesses of the region, the programme does not stop at outlining global strategies for future development but includes concrete projects and actions.

Many projects have already been implemented with the aid of coordinated five-year plans or programmes, the so-called Interreg I and Interreg II and III programmes. Others are in the planning stage for continuity, in action now with Interreg IV.² The basic work for the action programme is done in specialised committees, including the Committee for Economic Activities and Labour. The transfrontier action programme is constantly monitored and updated. Four working groups have been established to serve as the engine rooms for cooperation, namely: training and labour market; community-based projects; countryside and rural areas; and environment and waste management.

THE EUREGIO MOZER COMMISSION

The Euregio Mozer Commission – established in 1972 and named after one

of the most famous personalities engaged in the post-war cross-border activities of Euregio – is a special platform for all social-cultural cooperation and disposes over an own budget. This commission has eight German and eight Dutch members, based on a regional accord and not on the population figures on either side of the border. Additional consultant members of the commission represent the granting corporation (EU, states, regions) as well as Euregio member authorities.

The commission assists Euregio local authority members when working together for the citizens, associations, independent honorary actors, institutions and organisations that wish to pursue cross-border activities, and features a respectable list of annual activities, contacts and partnerships, including the twinning of municipalities and cities. Today the most requested items and activities of the Euregio Mozer Commission are in the fields of arts and culture, sports, youth and schools.

Although the commission's budget is only some 140,000 euros, effective networking has made it well known by a growing number of partners, donors and sponsors. Its activities, however, provide the greatest publicity. The commission can initiate and organise about 260 activities a year that are seen by some 90,000 people.

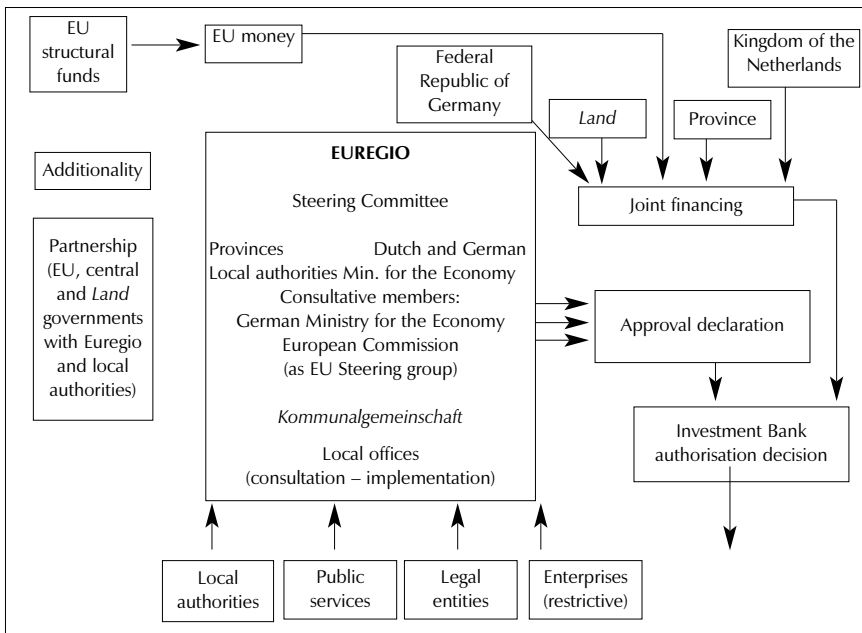
THE STEERING COMMITTEE (*LENKUNGSAUSSCHUß*) FOR TRANSBORDER DEVELOPMENT

A steering committee (*Lenkungsausschuß*) links the region, supra-regional and national competent authorities (the Bundestag, Netherlands, North Rhine-Westphalia and Lower Saxony), the Dutch (border) provinces, *Regierungspräsidenten* (general administrators appointed by the *Land*) and *Kreise* (counties, districts, departments) on the German side as well as the EU. The *Lenkungsausschuß* is made up of representatives of these different bodies, on nomination by Euregio. The member bodies have a consultative role and cannot be bound by majority decisions.

This steering committee works on the basis of provisions set up by the EU, the German–Dutch State Treaty of 1991 and the Outline Convention on Transfrontier Cooperation of 1980. It also takes into consideration the EU funding programmes, i.e. it takes the form of an EU steering group.

Lastly, the recommendations of this steering committee decide the region's priorities. So it is one decision for all, and not separate grant decrees or decisions.

Project reporting. EU support and funds from the German and Dutch sides



The joint steering committee illustrates the opportunities and possibilities of decentralised local (and regional) self-government in cooperation with partners at the level of the *Land*, the central national governments and even the EU, and all this very much in the spirit of subsidiarity.

EUREGIO AS A MODEL FOR COOPERATION

Euregio has become a model for a number of other cross-border (or transfrontier) regions, not only within the EU but beyond its external frontiers. These border regions are a kind of laboratory for the whole of Europe: they apply the principle that only problems which cannot find a solution within the region should be handled by Brussels. At the same time this bars the way to any form of centralism.

In this regard it is particularly significant that the principle of subsidiarity was integrated in the Treaty of Maastricht (EU Treaty from 1992). This means that competence and capacities for resolving important

problems should not immediately be passed to the highest level of government but should first be entrusted to the nations with their localities, regions and transfrontier regions. This principle is strengthened by the draft Constitutional Treaty for the European Union, under ratification in the revised form of the Treaty of Lisbon.³

This constitutes a great opportunity for well-established border regions which, thanks to tried and tested cooperation over the years, have already been able to adapt to meet future developments.

NEW TASKS AND CHALLENGES

Former German chancellor Helmut Kohl often said that Europe should not stop at the Oder River. Central Europe includes the Baltic states (Estonia, Latvia and Lithuania), Poland, the Czech Republic, Hungary and Slovakia, Slovenia as well as the peoples of the free and democratic parts of the former Yugoslavia which became independent states – now mostly members of the Council of Europe themselves. Here again, it is necessary that cooperation across old as well as new frontiers should banish disagreements, conflicts and war.

A good way to promote openness to the east is through regional transfrontier cooperation based on the Euregio model. The Association of European Border Regions (AEBR)⁴ is working hard on this task – on the basis of the experience of Euregio and an increasing number of other transfrontier regions. In 2000 the AEBR already listed 183 European border regions, most of them actively involved in the association's exchange work. In recent years the AEBR has developed a number of successful initiatives, especially to the east of the new frontiers of Germany. The EU provides targeted aid to these activities and debates, with AEBR assistance. Thus the AEBR has become what the EU calls an 'observatory of transfrontier cooperation' and has introduced a programme called Linkage, Assistance and Cooperation for the European Border Regions – Technical Assistance and Promotion of Cross-Border Cooperation (LACE-TAP).

Funding from Brussels does not stop at the EU's external frontiers but permits transfrontier cooperation with, for example, Poland, the Czech Republic and Hungary which are poised to become EU members themselves. The EU now comprises 27 nations, compared to the 12 at German reunification in 1990. Since 1992, the EU Commission has

welcomed the enlargement of transfrontier cooperation and enshrined it in the Treaty of Maastricht, thanks to the pressure exerted by, among others, the Consultative Council of the Municipalities and Regions, predecessor of EU's representation of local and regional authorities, the so-called Committee of Regions.

A new Euregio House was officially inaugurated at the end of January 1992 along the Gronau–Westfalen border. The working group on European border regions also occupies premises in this building. The chairman of the organisation justified his choice of site by the fact that this region has reached the highest degree of transfrontier cooperation development and, as such, is a model to others.

The AEBR is supported in its practical work by the EU and the Council of Europe. It also uses its own experiences and resources, thereby implementing the right given to local authorities in the Council of Europe's Charter of Local Autonomy which states in Article 10 that: 'Local authorities shall be entitled, in exercising their powers, to cooperate and, within the framework of the law, to form consortia with other local authorities in order to carry out tasks of common interest.'⁵ The same article stresses that this includes international cooperation and associations. The Charter of Local Autonomy has been ratified by 44 of the 47 member states of the Council of Europe (only the mini-states of Andorra, Monaco and San Marino see no sense in doing so) and is now a powerful endorsement for all transborder cooperation.

The AEBR's priorities in the field of transfrontier activities include:

- environment, agriculture, tourism;
- questions relating to cultural cooperation in border regions;
- technological development in transfrontier regions;
- questions regarding cooperation in terms of public law and the EU programme of transfrontier actions;
- the effects of the single market on the border regions since 1993;
- everyday frontier problems facing citizens and commercial or labour partners; and
- European integration and regional policy for frontier regions.

The developments that followed the political upheavals in Central and Eastern Europe in the recent past soon led to the establishment of

democracies based on the Western model. It is now a matter of stabilising the situation and pushing the reforms further. The Euregio cooperation model may perhaps be applied with great benefits in all border regions.

The Council of Europe has constantly used the broad experience of Euregio and the new Euro-regions all over Europe to foster this work and support the spreading of ideas. Numerous studies and reports have been prepared, discussed and followed by recommendations and resolutions in the Council of Europe's Congress of Local and Regional Authorities and its two specialised chambers, the Chamber of Local Authorities and the Chamber of Regions, formed by locally or regionally elected representatives (mayors or councillors). Some examples are:⁶ a report on the 'State of Transfrontier Cooperation in Europe' (Vallvé report from October 1999); an explanatory memorandum, 'International Cooperation at Regional Level (Vierin report May 2001); explanatory memorandum 'Promoting Transfrontier Cooperation: An Important Factor of Democratic Stability in Europe' (Tschudi report, May 2002, followed by a resolution and concrete recommendations); a report and a recommendation 'The Proposal To Set Up a Centre of the Council of Europe For Inter-regional and Cross-border Cooperation' (May 2006 CG(13)13); explanatory memorandum 'The Institutional Framework of Inter-Municipal Cooperation (Michel Guégan, May 2007 [CPL(14)6REP]).

The Guégan report gives a wide range of examples of intermunicipal cooperation, including:

- drinking water supply;
- waste water treatment;
- sewage treatment;
- public transport;
- fire fighting, fire brigades;
- waste collection and management, including building and operating;
- waste management facilities (in common);
- health;
- welfare support;
- economic and territorial development;
- public amenities;
- supply of machines and materials;
- school facilities;

- road maintenance;
- town and country planning (involving regional planning as well);
- environmental management and protection;
- management of abattoirs and municipal markets; and
- leisure and tourism.

In addition to these ‘classic’ sectors, the report lists developments in some countries with specific areas of intermunicipal cooperation, such as:

- primary education;
- private and public libraries;
- psychological support and dental care services;
- strategic planning;
- use of ‘shared’ bridges;
- civil status register;
- agriculture irrigation projects;
- management of EU structural funds available to municipalities;
- promotion of tourism;
- rescue services; and
- comparative studies on local development.

The Guégan report mentions that although intermunicipal and transborder cooperation is normally voluntary and spontaneous in nature as a reaction to local needs, this does not exclude the establishment of cooperation structures with intervention from ‘higher’ levels of government. In fact, in some countries the central government intervenes either to initiate the procedure for establishing a specific cooperation structure or to ‘approve’ or set up the structure itself.

CONCLUSION

Although Euregio was set up under difficult conditions, it worked; however, we are still learning and trying to improve. The effective opening of frontiers and borders has resulted in the realisation that ‘the devil lies in the detail’. Once the ‘big’ problems are resolved, the frontiers are open and transborder contact is normal, the previously ‘smaller’ problems become more apparent.

A true value of intermunicipal and transborder cooperation is in the peace it brings after so many conflicts and border problems. We must continue our work in Euregio, in Europe and worldwide.

ENDNOTES

- 1 Internet in Dutch: www.euregio.nl; in German: www.euregio.de; e-mails: info@euregio.nl and info@euregio.de.
- 2 Many publications, co-financed by EU Interreg funds, illustrate the daily work of Euregio. 'Euregio: Het Europa in de Praktijk van Alledag', Euregio, Gronau 1995 and others.
- 3 Lisbon Treaty, Art. 5: 'Under the principle of subsidiarity, in areas which do not fall within its exclusive competence, the (European) Union shall act only if and insofar as the objectives of the proposed action cannot be sufficiently achieved by the Member States, *either at central level or at regional and local level*, but can rather, by reason of the scale or effects of the proposed action, be better achieved at Union level.' It should be remembered that the mentioning of 'regional and local level' was not known in the Treaty of Maastricht (1992); steady pressure from the European family of local authorities, the CEMR, Council of European municipalities and regions finally resulted in the express mention of their role in the Draft Treaty establishing a Constitution for Europe (July 2004), now represented as the Lisbon Reform Treaty for the EU (2008), under ratification.
- 4 See <http://www.aebr.net>.
- 5 CLA from 1985/88, <http://conventions.coe.int>.
- 6 See also <http://www.coe.int> and www.coe.int/congress.

Local government cooperation in Austria: Options and benefits for the communities

PETER BUSSJÄGER

INTRODUCTION: THE AUSTRIAN FEDERAL CONSTITUTION

The Austrian Federal Constitution (B-VG) is based on various structural principles (building blocks or *Baugesetze*), namely: the rule of law; the democratic principle; the federal principle; and the republican principle. Austrian scholars have suggested two further principles, namely the separation of power principle and the liberal principle, which are not expressly named in the Constitution. One can, however, consider the latter two principles as implied in the principle of rule of law.

A removal or substantial modification of any of these principles would be considered a total revision of the Constitution, which according to Art. 44 par. 3 B-VG would need an amendment of the Constitution passed in the National Council of the parliament by a two-thirds majority (and as far as the federal principle is concerned also by a two-thirds majority in the Federal Council *Bundesrat*) as well as approval by popular referendum. Moreover, the Federal Council, the second chamber of parliament (members of the Federal Council are elected by the *Landtage* – the parliaments of the states or *Länder*), has veto power¹ if the competence of the *Länder* concerning legislative or executive powers is restricted by constitutional law. According to the Constitutional Court, the federal principle includes three substantive elements, namely:

- distribution of legislative and administrative competencies;

- participation of the *Länder* in federal legislation and administration; and
- constitutional autonomy of the *Länder*.

The following structures are characteristic of Austrian federalism: the Federation and the *Länder* have their own legislative and executive institutions. At federal level these are both chambers of parliament, the National Council and *Bundesrat*, and the Federal Government. At the level of the *Länder*, there are the *Landtage* and the *Land* governments. In terms of legislation, most important powers are assigned to the Federation while the *Länder* are responsible for comparatively few significant economic or political agendas and deal rather with such matters as building law, nature and countryside protection, town and countryside planning and social aid. Judicial power is an exclusive federal task. Civil law and criminal law, for example, is a Federation competency.

A large part of the administrative business of the Federation is executed by the *Land* governor (*Landeshauptmann*) and subordinated authorities of the *Länder* (so called indirect federal administration). This is similar to the constitutional and administrative arrangements in Germany where the *Länder* administer most federal statutes. The tasks of the exclusive federal administration are managed by own authorities of the Federation, located in the *Länder*, or by subordinated authorities of the *Länder*.

The *Länder* gain a stronger position in the administration of federal laws. They also play an important role in providing public services, for example, health care and social services.² The Federation and the *Länder* are entitled to act as holders of civil rights beyond the limits of the spheres of competencies. The executive power of the *Länder* is administered by the *Land* government, which is elected by the *Landtag*.

The *Länder* participate in Federal legislation by way of the Federal Council; however, the council does not play a very important role. Austria is thus a federal state with strong unitary elements. The municipalities play a substantial role in Austrian federalism. Although the municipalities fall under the constitutional arrangements of the respective *Länder*, over the past decades they have freed themselves from the *Länder* both materially and politically. One could therefore speak of ‘three-level federalism’.

One reason for the strong role of municipalities is that the Federal Constitution provides long and detailed regulations concerning the organisation and tasks of municipalities.³

At the federal level, instruments of direct democracy are limited to referenda, public consultation and popular initiative. The Federal Constitution provides that the legislation of the *Länder* is exercised by the *Landtage*. Nevertheless the Federal Constitution leaves it to the *Länder* to create instruments of direct democracy at *Land* and municipal level.

Although the *Länder* are able to provide instruments of direct democracy in the context of their constitutional autonomy, the largest space for the development of democratic instruments is granted to municipalities. *Länder* constitutions may provide that eligible voters of municipality parliaments may participate directly in matters of the own sphere of competencies of municipalities. However, the representative system, which applies at all three levels in Austria, may not be completely eliminated when it comes to the decision-making powers of municipal bodies, in particular the power of municipal parliaments.

LÄNDER CONSTITUTIONS AND ORGANISATION

The Federation and the *Länder* have their own constitutions. The *Länder* constitutions have to be passed by the *Landtage*. The presence of at least half the deputies and a two-thirds majority is necessary for the formation of *Länder* constitution law.

According to Art. 101 par 1 B-VG, the highest administrative bodies of the *Länder* are the *Land* governments, which are formed by the *Land* governor, the required number of deputies and further members, whose number is determined by the respective *Land* constitution. The possibility to introduce a department system, granted in the Federal Constitution, is used by all *Länder*.

The *Land* governor him/herself is a member of the *Land* government and can be head of a department as well. In respect of the indirect federal administration, he/she is bound by instructions of the Federal Government or a minister of the Federal Government. The *Land* governor is responsible for executing the federal laws, which have to be carried out by the subordinated authorities.

The *Land* government is supported by the Office of the *Land* government, which is an auxiliary body that makes recommendations in the form of draft decisions. Many tasks of the *Land* governments and their departments are executed by the district administrative authorities, which

can be either a district authority or a city with own statute. Apart from municipal tasks, cities with own statutes have to cope with the affairs of district administration authorities. The head of the district authority is the district governor.

The scope of tasks of the district authority is quite comprehensive. District authorities carry out *Länder* and federal (delegated) administration, if they are not assigned to other authorities. Their agendas are, for example, water management, forestry, traffic, social aid, nature conservation and matters pertaining to trade and industry.

BOUNDARIES AND ALLOCATION OF MUNICIPALITIES

Art. 3 B-VG determines that the federal territory comprises the territories of the *Länder*. Presently, the entire federal territory comprises the territories of 2,357 municipalities, and each municipality is located within the borders of a single *Land*.⁴ The allocation of a municipality or a part of it to another *Land* would require a modification of the borders of the respective *Länder*, but so far this issue has not been tested.

Nevertheless the Federal Constitution provides regulations concerning modifications to Federation and *Länder* borders.⁵ These provisions stipulate that any interference in the territorial existence of a *Land* needs a federal constitutional law and corresponding constitutional laws of the respective *Länder*, while other modifications of the borders of the *Länder* only need corresponding (simple) laws of the Federation and the *Länder*.

The question to be clarified is whether the reallocation of a municipality means interference in the existence of a *Land* or only causes a change of borders. Interference in the existence of a *Land* would, for example, occur if two *Länder* are merged or a large part of a *Land* territory (e.g. a district) is separated.

In terms of the affiliation of a municipality to another *Land*, this would require corresponding laws of the Federation and the *Länder* concerned. In terms of interference in the existence of the *Länder*, it would require constitutional laws of the affected *Länder*.

One cannot say in general to what extent the separation of a municipality would qualify as interference in the existence of a *Land*. Each case would require individual evaluation based on territorial and economic aspects, as well as the population. However, the Federal Constitution

stipulates that it would be inadmissible for a single municipality to be part of two *Länder*.

There is limited financial motivation for municipalities to change affiliation to another *Land* because of the law of financial equalisation which, among other things, is based on the population size of a municipality. Furthermore, municipalities are protected from discrimination or unfair treatment by the right to sue at the Constitutional Court. In addition, the legal structures of municipalities are relatively uniform since the Federal Constitution mainly determines the establishment of municipalities, tasks and responsibilities. In summary there are few benefits for municipalities to affect a change.

ADMINISTRATION (POLITICAL) DISTRICTS AND DISTRICT COURTS

The districts are institutions of the *Länder*. In Austria there are 99 districts. In addition there are some cities with an own statute, including Eisenstadt, Rust (Burgenland), Graz (Styria), Innsbruck (Tyrol), Klagenfurt, Villach (Carinthia), St. Pölten, Krems/Donau, Waidhofen/Ybbs and Wiener Neustadt (Lower Austria), Linz, Steyr, Wels (Upper Austria), Salzburg (Salzburg) and Vienna.

There is a stipulation in the *Übergangsgesetz* 1920,⁶ a constitutional transitional regulation from the time of the founding of the Federal State, that any modification of the district territories requires the agreement of the Federal Government. In the same way, the affected *Länder* must agree to any modification of the territories of the district courts.

The territories of the district courts do not have to follow the structure of administrative districts; however, the administrative districts and district courts may not coincide themselves. A political district can thus comprise several court districts, but no district court can exceed the territory of a political district. There are 141 district courts; mergers are often discussed but there is no current plan for this. In addition to these district courts there are 20 regional courts in 16 different locations for civil law, criminal law, labour and social matters – and additionally in Vienna for commercial matters. Furthermore, there are four appeal courts located in Graz (for the Federal states Carinthia and Styria), Innsbruck (for Vorarlberg and Tyrol), Linz (for Salzburg and Upper Austria) and Vienna (for Lower Austria, Burgenland and Vienna). In contrast to the district court, the *Länder* do not

have the authority to agree to district modifications of the regional and appeal courts.

Each municipality has to be part of an administrative district of the *Länder*.⁷ The municipalities within the same administrative district need not all share borders and they do not interfere with each other's discharge of functions although they are in the same administrative district.

MUNICIPALITIES

Each *Land* (except Vienna) is divided into municipalities,⁸ which are relatively small. Only some municipalities in Austria have more than a few thousand inhabitants and these small municipalities dominate the landscape.⁹ Municipalities do not only act as simple administrative units – they enjoy a sphere of autonomous self-government. This privilege is protected by the Federal Constitution.

ORGANISATION

Municipal councils – like the *Landtage* – are bodies of representative status and are elected by eligible voters. The mayor is head of a municipality and is directly elected by the municipal council or the citizens of the municipality. The election procedure is determined in the respective *Land* constitution. The municipal office supports the municipalities by making recommendations, preparing draft decisions and administrating auxiliary activities.

PROGRAMMES

The municipality is a legal person in public law and is capable of having rights and obligations. It exercises administrative functions either as a delegated administration on behalf of the Federation or on behalf of the *Länder*; or in cases within the autonomous sphere of competence.

AUTONOMOUS SPHERE OF COMPETENCE

According to the general clause in Art. 118 par 2 B-VG these programmes include all matters that exclusively or predominantly deal with interests of

the local community and are suited for management by the community within its local borders.

Matters of the autonomous sphere of competence correspond with Art. 118 par. 3, for instance: local public security police (Z3); administration of municipal traffic areas and local traffic police (Z 4); and local sanitary police (Z 7).

The municipality is subject to supervision by the Federation and the respective *Land* when dealing with tasks concerning matters of the municipality's autonomous sphere of competence.

THE ASSIGNED SPHERE OF COMPETENCE

The assigned sphere of competence (Art. 119 par. 1 B-VG) comprises those matters which the municipality has to undertake in accordance with Federal state law and regulations of the *Länder*.

The mayor is entrusted with managing these matters. In matters pertaining to federal execution, the mayor is bound to instructions from the competent federal authorities, while in matters pertaining to *Land* execution the mayor is bound to instructions from the competent *Land* authorities.

According to Art. 115 par 2 B-VG, the borders of municipalities have to be determined by the law of the *Länder* pertaining to those municipalities. These laws usually only enumerate the names of the municipalities and leave the definition of the accurate borders to the executive. The laws of the *Länder*, however, stipulate the procedure for border modification.¹⁰ These regulations demonstrate the procedure or conditions for border changes, the merger or separation of municipalities, and so on. Usually the *Land* government has to assess whether it is necessary to pass a *Land* law. Federal government consent is required when change of a municipality border affects the border of a district court.¹¹

MUNICIPAL COOPERATION

Municipalities may decide to cooperate for various reasons. They may cooperate within *Länder* and also between *Länder* – especially when they are situated on different sides of a *Land* boundary but in close proximity to each other.

The most important reasons for cooperation are cost optimisation, organisational reasons for the effective realisation of a project, exchange of experience or a legal obligation for the establishment of associations. It is usually the smaller or medium size municipalities that cooperate to perform their tasks.

Municipalities cooperate in many different ways, ranging from informal cooperation to knowledge transfer and cooperation that is regulated by public law (such as municipality associations, companies or societies).

The Federal Constitution provides for institutionalised cooperation of municipalities only in the form of municipality associations (Art. 116a B-VG), which is the most popular form of inter-community collaboration. According to Art. 118 par. 7 B-VG, single tasks of the own sphere can be transferred to federal authorities by administration communities. Furthermore, cooperation can be established by using private law cooperation or a commercial law society (limited liability companies, stock corporations).

FORMAL TYPES OF COOPERATION

ASSOCIATION OF AUSTRIAN CITIES AND MUNICIPALITIES

The Federal Constitution provides in Art. 115(3) that the Association of Austrian Cities and the Association of Austrian Municipalities represent the interests of municipalities. Both associations have an office in Vienna and in Brussels. The Association of Austrian Cities represents Austria's larger cities, although any local authority is free to join. The association has about 250 members among the total number of 2,359 local authorities in Austria. The association's main task is to represent the interests of local government in discussions about the sharing of tax revenues among the federal and provincial governments and local communities.

The Austrian Association of Municipalities represents interests at local government level. Almost all Austrian local governments belong to the association as voluntary members by way of the associations of the *Länder*.

MUNICIPAL ASSOCIATIONS

According to Art. 116a B-VG, a municipality association has to be

established to fulfil single tasks and is limited to the respective *Länder*. A modification of the Federal Constitution which would allow for the establishment of municipality associations that exceed the borders of the *Länder* is provided for in the SPÖ-ÖVP coalition's cooperation programme, but has so far not been instituted.

A municipality association can be established by voluntary agreement between the municipalities involved, by law or by execution. Municipality associations are one of the most popular types of cooperation and numerous municipality associations exist that deal with such matters (established by *Länder* law) as schools, the registry office or waste and water (waste). Voluntary associations have been established to deal with, among others, tourism and town planning.

ADMINISTRATIVE COMMUNITIES

Administrative communities are 'auxiliary bodies of cooperating municipalities'. Legal regulations for the association and organisation of administrative communities are mostly implemented in the municipal codes of the *Länder*. The communities are created in order to overcome problems, especially for smaller municipalities, resulting from limited personnel and financial resources. Administrative communities were in the past established only for technical auxiliary services but due to the general growth in administration, they aim to help smaller municipalities in other areas too.

INFORMAL COOPERATION

A characteristic of informal cooperation is the low (or non-existent) level of organisation, which means few or no expenses. For this purpose, various conferences are arranged for experts, municipal office leaders and mayors. Since there are no legal regulations specifying the framework of such meetings and/or simple information exchanges, wide ranging participation of municipality representatives, regional and local enterprises, and citizens is possible. However, non-binding cooperation should be limited to matters that are not problem-loaded and which deal with the exchange of experience and knowledge. In addition to conferences and knowledge transfer, informal cooperation in Austria deals with such matters as cemeteries, winter services and the establishment of compost plants.

COOPERATION UNDER PRIVATE LAW

Beside public contracts for establishing administration communities and municipality federations, contractual agreements in the form of private law partnerships are possible for certain matters, for example, cooperation for development. Furthermore, municipalities may use commercial law entities (e.g. limited liability companies, stock corporations) in order to limit risk or to merge private enterprises into public societies. A stock corporation is usually only created for capital-intensive projects (e.g. energy supply).

E-GOVERNMENT

E-Government has been developed during the past few years and is closely linked with inter-community collaboration. Primarily, E-Government helps to coordinate and arrange public administration information and to help the administration to become more customer oriented. This kind of cooperation should help in the development of a high-quality service and transparency for users, and expenses should be reduced due to joint planning and execution. E-Government is a new and lucrative area for productive synergies and contributes to inter-community collaboration within the information technology field.

CONCLUSION

Each Austrian municipality is part of a single *Land*: there are no cross-border municipalities and the establishment of such institutions would require modification of the Federal Constitution. Allocating a municipality as a whole to another *Land* would mean interference in the existence of a *Land* and would need the enactment of corresponding constitutional laws by the respective *Länder*. There is, however, much cooperation among the Austrian municipalities. Municipal associations represent formal cooperation, which is bound to grow in importance and popularity over the years.

ENDNOTES

- 1 See Art. 44 par. 2 B-VG.
- 2 Art. 17 B-VG.
- 3 Art. 115 to 120 B-VG.
- 4 Art. 116 par. 1 B-VG.
- 5 Art. 2 par. 3 and Art. 3 B-VG.
- 6 § 8 par 5 lit d *Übergangsgesetz* 1920.
- 7 Ibid.
- 8 Art. 116 par 1 B-VG.
- 9 653 municipalities have more than 5,000 inhabitants, 72 have more than 10,000.
- 10 Comp §§ 5ff of the Tyrolean law for municipalities; §§ 5 ff of the Vorarlberg law for municipalities.
- 11 § 8 Abs. 5 lit. d *Übergangsgesetz* 1920.

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Intermunicipal cooperation in Germany

KAI SCHADTLE

OUTLINE OF GERMANY'S FEDERAL ADMINISTRATIVE STRUCTURE

Germany has a long federal tradition dating back to the Holy Roman Empire, whose political system was shaped by the characteristics of a federation. Ever since, the federal principle has been a recurrent theme throughout German constitutional history. The German Basic Law (*Grundgesetz*) continues Germany's federative tradition by establishing the Federal Republic of Germany as a federal state.¹

Traditional federal aspects of the Basic Law, such as the statehood of the *Länder* (the federal states or provinces as they are called in South Africa) and the principle of municipal self-administration are therefore to be seen as elements of a preconstitutional German federative character that the Basic Law seized and developed.

The federative order in the Federal Republic of Germany forms an entity whose vertical structure consists of the following political subdivisions: the Federation (*Bund*), the *Länder*, the districts (*Landkreise*) and the municipalities (*Gemeinden*).² The districts and municipalities (local authorities) are part of the constitutional order of the *Länder*.

Following the concept of the Basic Law, the Federation and the *Länder* are strictly separated as far as organisation and functionality are concerned. Admittedly, the federation can exert some influence on the *Länder*. However, the *Länder's* room for manoeuvre in political decision-making is guaranteed by their own quality of statehood. The *Länder* have a wide

range of legislative³ and executive competences⁴ as well as competences of judicial organisation.⁵ It is in this context that the German Constitutional Court (*Bundesverfassungsgericht*) has emphasised that certain core competences must remain within the power of the *Länder*. Such competences are, inter alia, the constitutional law of the *Länder*, organisation of their internal administration, municipal services, police and public order, the school and university system, and land use planning.

The municipal subdivisions are integrated into the administrative structure of the *Länder* and derive their jurisdiction from them. The organisation and the general legal relations of the municipalities comply with the municipal codes (*Gemeindeordnungen*) of the *Länder*.⁶ Municipalities constitute the smallest spatial-administrative entity in the German administrative structure. They have sole responsibility to fulfil any affairs of their local sphere. This includes all those functions that originate from and whose scope is essentially limited to the local municipality and which affect people who live in the municipality. Such functions include municipal infrastructure, water supply, the responsibility for schools as well as the maintenance of local cultural and recreational facilities.

‘Within the limits prescribed by the laws’, the municipalities take independent decisions on when and with which means to fulfil their functions.⁷ In that respect they exercise exclusive territorial, personnel, financial and organisational jurisdiction and are only subject to legal control of the respective *Land*.

Furthermore, supralocal tasks and competences (e.g. in the field of public security and order) may be delegated to the municipalities by laws enacted by the Federation or the *Länder*. The municipalities are subject to legal and functional control by the respective supervisory authority vis-à-vis these supralocal tasks and competences.

According to *Länder* law, municipalities are affiliated and thus constitute a district of municipalities.⁸ Within their respective territory, these districts are in charge of fulfilling public affairs that surpass either the competence or the capacities of a single municipality.⁹ Original tasks as well as complementary or compensational tasks can be distinguished among the districts’ tasks. Original tasks include those that constitute and secure the existence and functionality of the districts (e.g. personnel administration). Complementary and compensational tasks basically remain a competence of the single municipalities; the district merely supports the municipalities’

action because, due to a lack of resources, they are incapable of fulfilling some tasks adequately on their own (e.g. the maintenance of hospitals).

INTERLOCAL MUNICIPAL COOPERATION

Municipal tasks have become increasingly complex due to technical and economic developments. A single municipality, or even a district, is often no longer able to fulfil these tasks alone. The aims of optimising task fulfilment and minimising expenses, as well as a common environmental responsibility, therefore force municipalities to coordinate their work. The need for interlocal municipal cooperation is particularly obvious with regard to the municipal economy (water and energy supply, waste water disposal, waste management), traffic planning and industrial location promotion. However, cooperation is also advisable in the field of general administration in order to strengthen municipalities' power and increase efficiency, for example with respect to data processing.

The local authorities' right to interlocal municipal cooperation is guaranteed by the right to self-government pursuant to Art. 28 para 2 of the Basic Law.

German municipal law provides numerous legal means for such cooperation.¹⁰ The following are some examples.

MUNICIPAL ADMINISTRATION UNIONS

Municipal administration unions (*Zweckverbände*) are public corporations that fulfil certain tasks of self-government. This requires the participation of at least one municipality or district. Besides, membership in a municipal administration union can also be acquired by different legal entities under public law as well as by natural or legal persons under private law, e.g. companies and/or their representatives.

By building up a municipal administration union, the participating municipalities transfer their former responsibility for the fulfilment of municipal tasks to the union; a transfer of functions and competences takes place. For example, there are municipal administration unions in the fields of water and waste water management, trade promotion, schools, culture and (especially youth) welfare.

There are three ways to establish a municipal administration union:

- As a rule, the creation of a municipal administration union takes place voluntarily. Establishing such a voluntary union requires an agreement under public law. In this agreement, all the future members decide unanimously on the union's statute. In most of the *Länder*, it is moreover necessary that the supervising authority approves the statute. Approval and statute shall be publicly proclaimed.
- If for the sake of the common good the establishment of a municipal administration union appears to be imperative, the supervising authority can force a compulsory union by issuing a corresponding order. The ability to order the foundation of a compulsory union is, however, limited as this intervenes with the municipal right to self-government.
- The creation of municipal administration unions can also result from specific legal acts. The *Zweckverband Großraum Braunschweig*, which performs tasks in the field of land use planning and public transport, is such a union.¹¹ In this context, federal law has primacy over municipal law.

The legal relations of a municipal administration union are regulated by the union's statute. Such a statute necessarily has to determine the members and the tasks of the union, its name and seat as well as the financial fundamentals of the union. The union is furthermore competent to adopt statutes within its field of action pursuant to the municipal codes. The *Länder* statutory provisions concerning the adoption of statutes by a municipality are to be applied.

A municipal administration union's institutional structure usually includes an assembly (*Verbandsversammlung*) and a chairperson (*Verbandsvorsitzender*); a union is free to establish additional organs. The assembly is the highest organ of the union and is responsible for all important tasks, such as the adoption of a statute, the dissolution of the union and the election of other organs, especially the chairperson. The assembly comprises at least one representative of each member union. The members of the assembly are elected by the members of the union. The chairperson is the executive organ and legally represents the union.

Municipal administration unions can charge beneficiaries dues and fees under public law but also remuneration under private law. If the union is

still underfunded, it can charge a contribution from its members. The amount of the contribution generally depends on the extent to which the individual members benefit from the fulfilment of the union's tasks.

FUNCTIONAL AGREEMENTS

Municipalities and districts can enter into a contract which rules that one of the participating entities fulfils certain tasks for all of the contracting parties. For example, a contracting party can be allowed to take advantage of a public institution run by another contracting party, i.e. the former local authority transfers its responsibility to fulfil its tasks to the latter. Such functional agreements (*Zweckvereinbarungen*) require the exercising contracting party to be in charge of the respective task. The agreement extends the exercising party's local competence to the territory of the municipality which transfers its competences. This instrument of contractual cooperation allows municipalities to benefit from the gains of collaboration without – as required of a municipal administration union – establishing a legal person. Above all, the advantage over municipal administration unions is the resultant lowering of recurring and non-recurring costs.

With regard to contents, a functional agreement can be designed in such a way that the competence for the fulfilment of the tasks is transferred to one of the members, while the transferring entity completely loses its competence (delegating functional agreement). In contrast, it is also possible that the exercising party only commits itself to the fulfilment of the tasks, while the transferring entity remains responsible for its tasks (mandating functional agreement).

Functional agreements are not subject to any material limitations; the tasks that are undertaken in cooperation can be purely administrative-technical, but can also include the operation of an institution or different services, e.g. municipal accounting control by the competent district authority for a municipality. The complete transfer of all tasks from one municipality to another local authority is, however, not allowed.

A functional agreement can be limited or unlimited in time. In some *Länder*, the law provides for rules of termination. As a rule, functional agreements include provisions for the sharing of costs. The costs borne by the exercising municipality are generally compensated for by the transferring municipality.

WORKING GROUPS

The creation of working groups (*Arbeitsgemeinschaften*) constitutes a loose form of interlocal municipal cooperation. Working groups are based on a contract under public law; however, in contrast to the municipal administration union referred to above, they have neither legal personality nor legislative competences.

Working groups provide a forum in which the participating municipalities can debate common affairs, adjust the plans and work of their institutions and initiate common solutions. Besides municipalities, different administrative entities and natural or legal persons under private law can also participate in working groups.

COOPERATION UNDER PRIVATE LAW

In addition to the forms of interlocal municipal cooperation under public law mentioned above, cooperation can also occur under private law. For instance, two or more municipalities can found a registered association or a corporation under private law. Any of the legal forms under civil law – e.g. a limited liability company (*Gesellschaft mit beschränkter Haftung*) or a stock corporation (*Aktiengesellschaft*) – can be chosen to create such an association or cooperation under private law. If the municipal cooperation is for-profit, the restrictive federal state law provisions of municipal commercial law are to be applied. Moreover, ‘simple’ legal transactions under private law – such as sale or rental contracts concerning real estate or vehicles (e.g. second-hand fire department vehicles, construction vehicles, buses, etc.) – can be a permissible means of cooperation. However, the transfer of competences, e.g. from one municipality to another, is not possible under private law.

INTRAREGIONAL MUNICIPAL COOPERATION

The majority of municipal tasks can be sufficiently fulfilled by the forms of interlocal municipal cooperation described so far. However, these forms reach their limits when there are problems to be addressed that have a supralocal context extending beyond the borders of a district or a district-free city – especially if demographic, infrastructural, geographic and/or cultural peculiarities of a certain region are to be considered. Generally

speaking, these singularities can be better taken into account by the creation of an autonomous supramunicipal administrative entity.

REGIONAL ADMINISTRATION UNIONS

There are various regional administrative unions (*Regionale Kommunalverbände*) above district level (superior municipal administration unions) in eight German *Länder*, whose existence is largely historically determined. The oldest of these unions is the *Bezirksverband Pfalz*, which dates back to the early 18th century.¹² The guiding idea on which these regional administration unions are based is that numerous tasks can only be reasonably fulfilled in a larger regional context – that is, beyond the borders of cities and districts in territorial association. Regional administration unions generally serve the purpose of allowing the appropriate fulfilment of self-government affairs in a historically autonomous region or province that exceeds the reach, administrative power and expertise of a single local authority.

The significance of regional administration unions stems from the fact that they fulfil tasks that closely affect the common interests of their respective citizens. In turning their attention to regional aspects, regional administration unions allow for an efficient and citizen-friendly administration. Typical tasks of regional administration unions are rural conservation and development, the preservation of cultural sites and monuments, regional economic tasks, the supralocal support of social and youth welfare as well as the maintenance of museums and hospitals.

All regional administration unions, with the exception of the Lower Saxon union *Ostfriesische Landschaft*, are based on federal state law.¹³ They are all corporations under public law (*Körperschaften des öffentlichen Rechts*). The institutional structure of a regional administration union normally consists of three organs:

- The assembly (*Verbandsversammlung*) is the main and representative organ and makes the union's main political decisions.
- The directorate (*Verbandsdirektorium*) serves as the central administrative organ.
- The chairperson (*Verbandsvorsitzender*) represents the union.

The mode of election of assembly members differs among the unions. For example, the *Landschaftsverband Westfalen-Lippe* assembly is indirectly elected (i.e. by the representatives of the union's members), whereas the delegates of the *Bezirksverband Pfalz* are directly elected by the citizens living in the region.

Regional administration unions are mostly financed by dues. The union can, however, impose an additional contribution on its members if it has insufficient revenue to cover its costs.

CITY-HINTERLAND ADMINISTRATION UNIONS

Particular problems arise within the framework of the administration in densely populated areas. Mostly, these regions consist of cities and their hinterland. The challenges to and the necessity of a well-ordered territorial and administrative structure is relatively strong in these regions compared to rural areas. Various interests of the inhabitants, often diametrically opposed, have to be balanced – for example, the development of infrastructure (public transport, housing, industrial real estate) on the one hand, and protection against environmental burden and traffic load on the other. Furthermore, problems result from the scarcity and premium on housing and business space in the cities: suburbanisation and increased economic utilisation of the hinterland are the consequences, which threaten to 'bleed the cities' by causing expertise and resources to flow from the cities to regional areas. Concerted action by the city and hinterland is therefore necessary to maintain coherent and comprehensive fulfilment of the respective tasks and to ensure the public benefit.

Such cooperation is primarily implemented by the creation of a city-hinterland administration union (*Stadt-Umland-Verband*); it has to be borne in mind, however, that this notion is a collective term for various intensive forms of cooperation in metropolitan areas rather than a single, specific form of cooperation.

The scope of existing organisations ranges from the creation of an autonomous corporation under public law (e.g. the regional administration union *Region Hannover*)¹⁴ to a foundation under private law (e.g. the civil law association *Gesellschaft bürgerlichen Rechts TechnologieRegion Karlsruhe*)¹⁵ and even to informal cooperation in bodies that are not established by law. The institutional structures of the respective unions

therefore differ. For example, the *Region Hannover*, a model of a city-hinterland administration union with a high degree of integration, has two organs that are democratically legitimised – the assembly (*Regionalversammlung*) and the chairperson (*Regionspräsident*) – while the *TechnologieRegion Karlsruhe*, as a civil law association, does not have an elected organ.

Multifunctionality is characteristic of city-hinterland administration unions. In contrast to municipal administration unions, city-hinterland administration unions are usually responsible for the fulfilment of myriad tasks which originate from city-hinterland issues. However, the quality and quantity of the city-hinterland administration unions' tasks diverge. At most, a union can fulfil all of the districts' tasks, sometimes even more (e.g. the *Region Hannover*). The minimum scope of tasks requires common coordination of regional development planning (e.g. the *TechnologieRegion Karlsruhe*). Typically the scope of duties of city-hinterland administration unions includes regional planning, public transport, social responsibilities (welfare aid, hospitals, social housing and youth welfare), environmental protection, promotion of the local economy and tourism as well as responsibility for primary education, culture, sports and recreational facilities.

Financing city-hinterland administration unions depends, above all, on allocations from its members. The amount of the respective allocation is often equivalent to the tax revenues of the single members. Beside allocations paid by members, an allocation paid by the respective *Land*, originating from municipal financial equalisation, regularly constitutes an additional source of revenue.

INTERSTATE ADMINISTRATION UNIONS

Regions perceived by citizens to form a territorial and/or economic entity due to their real interdependences are often split by the borders of two or more *Länder*. The area of the *Metropolregion Rhein-Neckar* is a good example: it is located at the intersection of three *Länder* (Baden-Württemberg, Hesse and Rhineland-Palatinate) and extends into the territory of 15 districts or district-free cities. Such regions are interested in equal and concerted regional development and therefore need political-administrative coordination.

If regional planning, e.g. in the field of economic promotion, were not coordinated among the *Länder* (and the local authorities), competition could result due to strategically overlapping interests; this would increase the risk of developing economically disadvantageous infrastructure. In order to avoid such problems, these regions are considered as an entity, which allows for the coordination of particular regional tasks, notably land use planning, between the *Länder* involved. The most institutionalised form of cross-border administrative cooperation is the creation of an interstate administrative union (*Ländergrenzen überschreitender Regionalverband*).¹⁶

In contrast to regional cooperation in regional administration unions (discussed above), interstate administration unions do not constitute a form of intermunicipal, but rather interstate, cooperation: the *Länder* (not the municipalities) found the union.

As the *Länder*'s sovereignty is limited to their territories, interstate administrative cooperation requires a legal agreement between the participating *Länder*.¹⁷ Such cooperation is usually based on a state treaty.¹⁸ Furthermore, friction with the federalist principles of the Basic Law is to be avoided: the creation of an interstate administration union must not infringe on the independence of a *Land*, i.e. the federal state must not abandon its governmental authority; the transfer of competences to the union must not be irrevocable; and a transfer of competences that infringes on the core of guaranteed municipal self-government affairs¹⁹ is prohibited.

At the level of the institutional structure, there are no fundamental differences between interstate administration unions and 'regular' regional administration unions. Like the latter, interstate administration unions are corporations under public law. Their political decision-making takes place primarily in the assembly (*Verbandsversammlung*).

The director (*Verbandsdirektor*) is head of the union's administration and he/she legally represents the union; some interstate administration unions have an additional administrative board. As cross-border cooperation often takes place in the field of regional planning and development, interstate administration unions also have various planning committees.

Interstate administration unions receive annual grants from the contracting *Länder* for the purpose of covering the union's costs. If this revenue does not suffice, they can charge allocations from the municipalities located in the union's territory.

EXCURSUS: LOCAL GOVERNMENT CENTRAL ASSOCIATIONS

Local government central associations constitute a specific forum for intermunicipal cooperation. They are generally associations under private law and do not fulfil sovereign administrative tasks. Instead, they are merely lobbying groups and represent their members' interests vis-à-vis state and societal organs/institutions. At the federal level, for example, local government central associations shall be given a hearing in the legislative procedures if a bill affects affairs of the municipalities or the unions;²⁰ in some *Länder* there are similar provisions of participation. Internally, the local government central associations promote the exchange of experiences between members and advise them.

There are three local government central associations in the Federal Republic of Germany: the German Association of Cities and Towns (*Deutscher Städtetag*) which includes more than 4,400 cities and towns; the German Association of Towns and Municipalities (*Deutscher Städte- und Gemeindebund*) which includes more than 12,500 towns and municipalities; and the German County Association (*Deutscher Landkreistag*) which includes all 301 districts.

INTERNATIONAL MUNICIPAL COOPERATION

In principle, the federation is in charge of maintaining foreign relations,²¹ and in a limited number of cases the *Länder* also enjoy such competences.²² The municipalities thus cannot maintain foreign relations. However, municipal cooperation with foreign local authorities is possible as long as it is limited to local affairs. Therefore, the guarantee of municipal self-government in Art. 28 para 2 of the Basic Law allows crossing of the German border when the fulfilment of municipal tasks requires cooperation with municipalities in neighbouring states.

Two fields of tasks can be distinguished when it comes to international municipal cooperation: on the one hand the common safeguard of the location by cooperative planning, e.g. by improving cross-border infrastructure, and on the other hand administrative-technical cooperation in the field of general public service, e.g. cooperation for securing or improving drinking water quality or waste and waste water management.

Although the municipal right to cooperate with local authorities beyond the German border originates from the right to self-government,

cooperation must be in conformity with the law.²³ Thus, federal or federal state law can impose limits on the permissibility of international municipal cooperation. For instance, municipal law in some *Länder* requires a treaty between the federal state and the neighbouring entity before the creation of an international municipal administration union. There are also specific provisions under public international law that deal with intermunicipal cooperation, for example the *Karlsruher Übereinkommen* as amended on 23 January 1996 (Agreement of Karlsruhe);²⁴ these treaties have the same legal status as federal laws.

CONCLUSION

This chapter has illustrated the various forms of intermunicipal cooperation in Germany, starting with a territorial frame of reference – interlocal, intraregional and international. Notwithstanding the sketchy nature of the chapter, it should be clear that the cooperative instruments which German municipal law provides for local governments are sufficiently detailed to tackle cross-border, supralocal issues satisfactorily.

Finally, municipalities' great willingness to cooperate with each other and their respective flexibility have to be emphasised, without which even the biggest range of judicial instruments for cooperation would be in vain. In that respect, the municipalities' readiness to cooperate in order to promote public benefits is, above all, due to their own governmental responsibility, guaranteed by the Basic Law.²⁵

ENDNOTES

- 1 See Preamble, Art. 20 para. 1 Basic Law.
- 2 The Federal Republic of Germany consists of 16 *Länder* – 13 territorial states and three city states (Berlin, Bremen, Hamburg). In principle, only the constitutions of the territorial states provide for districts and municipalities as further subdivisions ('third level'). There are currently 301 districts and 12,234 municipalities in Germany (January 2009).
- 3 See Art. 70, 72, 74 Basic Law.
- 4 See Art. 30, 83, 85 Basic Law.
- 5 See Art. 92 Basic Law.
- 6 See *Gemeindeordnung für Baden-Württemberg (GemO)* as amended on 24 July

- 2000 (*Baden-Württemberg Law Gazette*, 2000, p 582), rectified by law on 14 October 2008 (*Baden-Württemberg Law Gazette*, 2008, p 343). Available at www.landesrecht-bw.de.
- 7 See Art. 28 para. 2 Basic Law.
 - 8 See *Landkreisordnung für Baden-Württemberg (LkrO)* as amended on 19 June 1987 (*Baden-Württemberg Law Gazette*, 1987, p 289), rectified by law on 14 October 2008 (*Baden-Württemberg Law Gazette*, 2008, p 343). Available at www.landesrecht-bw.de.
 - 9 Big cities (greater than 100,000 inhabitants) constitute an exception. They are in principle not part of a district and exercise the tasks of districts on their own, as far as their own territory is concerned. There are currently 113 district-free cities in Germany (January 2009).
 - 10 See with regard to Baden-Württemberg the *Gesetz über die kommunale Zusammenarbeit (GKZ)* as amended on 16 September 1974 (*Baden-Württemberg Law Gazette*, 1974, p 408), rectified by law on 14 December 2004 (*Baden-Württemberg Law Gazette*, 2004, p 883). Available at www.landesrecht-bw.de.
 - 11 See the *Gesetz über die Bildung des Zweckverbandes 'Großraum Braunschweig'* as amended on 27 November 1991 (*Lower Saxony Law Gazette*, 1991, p 305), rectified by law on 18 May 2006 (*Lower Saxony Law Gazette*, 2006, p 203). Available at www.zgb.de.
 - 12 For more information about the *Bezirksverband Pfalz* see www.bv-pfalz.de.
 - 13 See the *Gesetz über den Kommunalverband für Jugend und Soziales Baden-Württemberg (Jugend- und Sozialverbandsgesetz – JSVG)* as amended on 1 July 2004 (*Baden-Württemberg Law Gazette*, 2004, p 572), rectified by law on 14 October 2008 (*Baden-Württemberg Law Gazette*, 2008, p 355). Available at www.landesrecht-bw.de.
 - 14 For more information on the *Region Hannover* see www.hannover.de.
 - 15 For more information on the *TechnologieRegion Karlsruhe*, see www.trk.de.
 - 16 In addition to the possibility of creating an interstate administration union, there are different less institutionalised forms of cross-border cooperation in various regions, e.g. the mere coordination of regional politics by informal working groups. Moreover, there are further special aspects concerning the cooperation between territorial states and city states, e.g. between Brandenburg and Berlin.
 - 17 Beyond these restrictions, Art. 28 para 2 Basic Law allows the municipalities to cooperate without the participation of the *Länder*, as far as cooperation is limited to tasks of their local competence and does not interfere with or usurp competences of the Federation or the *Länder*. If these conditions are met, there are no principal differences to the forms of cooperation described herein.
 - 18 See, for example, the *Staatsvertrag zwischen den Ländern Baden-Württemberg, Hessen und Rheinland-Pfalz über die Zusammenarbeit bei der Raumordnung und Weiterentwicklung im Rhein-Neckar-Gebiet*. Available at www.verband-region-rhein-neckar.de.
 - 19 See Art. 28 para 2 Basic Law.

- 20 See § 69 para 5 of the internal rules of procedure of the German *Bundestag*.
- 21 See Art. 32 para 1 Basic Law.
- 22 See Art. 32 para 3, Art. 24 para 1a Basic Law.
- 23 See Art. 28 paragraph 2 Basic Law.
- 24 *Übereinkommen zwischen der Regierung der Bundesrepublik Deutschland, der Regierung der Französischen Republik, der Regierung des Großherzogtums Luxemburg und dem Schweizerischen Bundesrat, handelnd im Namen der Kantone Solothurn, Basel-Stadt, Basel-Landschaft, Aargau und Jura, über die grenzüberschreitende Zusammenarbeit zwischen Gebietskörperschaften und örtlichen öffentlichen Stellen* as amended on 23 January 1996 (*Federal Law Gazette*, 1997, Sect. II, p 1158). Available at www.espaces-transfrontaliers.org.
- 25 See Art. 28 para 2 Basic Law.

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Transboundary local governance in Switzerland

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INTRODUCTION

Transboundary cooperation among local government units has become an important issue in Switzerland in recent years. The Swiss federal state is made up of comparatively small political units which must increasingly seek cooperation with neighbouring units in order to fulfil their duties in an efficient manner. The need for closer cooperation within and across cantonal and national boundaries is reinforced by increasing mobility as well as economic, social and cultural developments, in particular when it comes to urban planning, public and private transport, healthcare, security, schooling and culture.

While cooperation is an issue of vital importance for many Swiss communes, the country does not have to deal with the issue of local governments being split between regions. This is because communes are the legal creations of cantons: one commune cannot possibly belong to two different cantons.

A number of communes have in recent years decided to merge with each other in order to organise their tasks more efficiently. So far, all mergers have taken place within one canton. In the past, some communes have considered merging with the municipalities of another canton for geographical or cultural reasons; however, since the merged commune could not possibly be ruled by the laws of two cantons, the merger would involve a change of cantonal borders. No such undertaking is currently

under way, but discussions in this regard have taken place in the canton of Jura (discussed later).

Since Switzerland and its cantons are small geographical units and many major cities function as local centres across cantonal and national borders, cooperation within cantons is not always sufficient. Communes, cantons, the confederation and neighbouring states have therefore begun to experiment with new and innovative forms of governmental cooperation. Some of these transboundary projects are based on informal dialogue and information exchange, while others rely on legal structures and formalise the cooperation in order to render it more efficient and reliable. Most cooperation projects have proved to be successful and have received financial support from the confederation, neighbouring states or even the European Union (EU). However, many important questions, including the democratic legitimacy of the projects, are still open to debate.

The chapter gives a brief overview of the federal structure of Switzerland. This is followed by examples of transboundary cooperation among local entities across cantonal and national boundaries.

OVERVIEW OF THE SWISS FEDERAL SYSTEM

The Swiss federal state was founded in 1848 when, after a short civil war, 25 formerly independent states (the cantons of Switzerland) decided to relinquish part of their sovereignty and to centralise a number of issues of common interest. The federal structures of Switzerland have proved to be very successful and the borders of its constituent units have been stable. The only major modification took place in 1978 when the canton of Jura was created after a series of popular votes in a number of French-speaking districts of the canton of Berne and at the federal level. Switzerland thus comprises 26 cantons with far-reaching autonomy.

The Federal Constitution of 1848 (revised in 1874) was in force until 1999 when an updated constitution was adopted. Partial revisions of the constitution come about quite frequently. They are initiated by the Swiss parliament or by a popular initiative and require the approval of both the popular majority and the majority of the cantons. As will be discussed, some of the recent revisions have modified the traditional federal system, clarified the vertical distribution of power and strengthened new forms of cooperative federalism.

The Federal Constitution focuses on power sharing between the confederation and the cantons. Even though the communes are hardly mentioned in the Federal Constitution, they form a third state level and play an important role in the Swiss federal system. Each canton consists of a number of communes, which are the smallest political units in Switzerland. The communes are the legal creations of the cantons and their autonomy is defined by cantonal law.

The following is a brief outline of the three levels of the Swiss state and how their autonomy and organisation is defined.

THE CONFEDERATION

The people and the 26 cantons form the Swiss confederation.² Its aim is to protect the liberty and rights of the people, to safeguard the independence and security of the country and to promote the common welfare, sustainable development, internal cohesion and cultural diversity.³ The willingness to protect and promote unity as well as diversity within Switzerland is prominently mentioned in the Preamble.⁴ Both in the past and today, federal structures have proved to be helpful in keeping together a country divided by ethnic groups and a variety of languages and religions.

The confederation is competent in all issues that the Federal Constitution assigns to it.⁵ Where the Federal Constitution is silent, the power to deal with the issue remains with the cantons. A shift of competence from the cantons to the confederation therefore requires a constitutional amendment and must be approved by the majority of the population and the cantons.

Centralisation processes have become quite common in Switzerland in recent years, but they can only take place when a majority of the cantons agree to relinquish their power in a specific field.

According to a new provision, the confederation shall only undertake the tasks that the cantons are unable to perform or which require uniform regulation by the confederation.⁶ This principle of power sharing is further strengthened by a new Article 5a of the Federal Constitution which integrates the European principle of subsidiarity into the Swiss constitutional law: 'The principle of subsidiarity must be observed in the allocation of and performance of state tasks.' The latter provision is meant to codify an underlying principle of the Swiss state (*Leitgedanke*) and relates

not only to power division between the confederation and the cantons but also to the allocation of state tasks between cantons and communes.

Both new constitutional provisions aim at protecting and strengthening the federal and strongly decentralised structures of Switzerland and at setting up a constitutional brake to centralisation processes. Competences shall only be transferred to the next level of government if the lower level – acting on its own or jointly – is unable to fulfil the task. Since assigning power to the higher level shall only take place in situations where cantons or communes cooperating with each other prove to be unable to fulfil the task, intercantonal and intercommunal cooperation has gained new importance. Whenever cooperation succeeds, the constitution prohibits a shift of competence.

THE CANTONS

The cantons are the constituent units of the Swiss federation. Cantons are sovereign to the extent that their sovereignty is not limited by the Federal Constitution.⁷ The Swiss cantons are highly unequal in terms of area, population and financial power. While almost 1.2 million people live in the urban canton of Zurich, the rural canton of Appenzell Innerrhoden has a population of less than 15,000 people. Despite these differences, all cantons enjoy equal rights.

According to the Constitution, the cantons shall decide on the duties they fulfil within the scope of their competence.⁸ Cantons enjoy large autonomy in financial, organisation and legal matters. The confederation has to respect this autonomy and leave the cantons sufficient tasks and resources of their own.⁹ Both the confederation and the cantons are obliged to support each other in the fulfilment of their duties and to cooperate with each other.¹⁰

Cantons have to adopt a democratic constitution capable of being revised if the majority so request. Cantonal constitutions must be approved by the confederation, but the federal parliament has to guarantee a constitution when it is not contrary to federal law.¹¹ However, any cantonal provision that contradicts federal law is null and void.¹² Cantons are free to establish communes on their territory and to define their tasks and their autonomy. All 26 cantons have decided to divide their territory into communes; however, the autonomy guaranteed differs considerably from canton to canton (see below).

THE COMMUNES

Since the communes are legal creations of their canton, their autonomy depends on cantonal law. The level of autonomy allocated under cantonal law is guaranteed by the Federal Constitution¹³ and any interference can be challenged and appealed against at the Swiss Federal Court.

The autonomy that Swiss communes enjoy differs considerably from canton to canton. While, for instance, the cantons of Berne, Thurgau and Schaffhausen entrust the communes with many tasks and responsibilities, the role of communes is quite limited in the canton of Geneva. Typically, Swiss communes fulfil important duties in the fields of construction and zoning law, local infrastructure, transport, water and energy supply, waste management, schooling, social assistance, etc.

Communes have to abide by federal and cantonal principles (i.e. respect democratic rights, separation of powers, and rule of law) and laws. In smaller communes, all inhabitants with the right to vote participate in the commune council; they elect members of the executive body and vote directly on laws and decisions. In larger communes, inhabitants elect representatives who sit in the commune parliament.

Many communes have experienced great difficulty in recent times finding capable people willing to run for office at a communal level. The lack of human resources has been so severe in some instances that affected communes have been forced to merge with neighbouring communes. Many communes have decided to merge with others and most cantons have supported such endeavours financially and otherwise due to efficiency and financial gains. There are presently more than 2,700 communes in Switzerland, but their number is dropping quite fast.

LOCAL GOVERNANCE COOPERATION ACROSS CANTONAL BORDERS

Since communes are legally founded by cantons, it is inconceivable under Swiss law that a commune would cover the territory of more than one canton: the communal boundaries match with the boundaries of the cantons. A commune belonging to two different cantons would be exposed to two very different legal frameworks in terms of its autonomy, organisation and powers as well as the cantonal law it has to respect. Consequently, no Swiss commune is divided by cantonal borders, and such a commune presumably would not come into being by the merger of two

neighbouring communes which belong to different cantons. Local governments that are willing to cooperate across cantonal borders therefore have to find less far-reaching ways of sharing duties and responsibilities.

Since the merger of communes has become more frequent over the past few years, some communes have considered amalgamating with a commune from a neighbouring canton. We illustrate the legal and political hindrances involved in such a project by using the example of the cantons of Berne and Fribourg. We then refer to the case of Jura, and finally examine some examples of less formal cooperation across cantonal borders.

MERGERS ACROSS CANTONAL BORDERS

Albligen, a small commune of the canton of Berne with only 197 inhabitants, is faced with severe problems due to scarce financial and personnel resources. It had two possible merger options: the commune could either enter into merger negotiations with Wahlern, another commune of the canton of Berne; or with Übersdorf, a commune belonging to the canton of Fribourg. From a geographic point of view, the obvious partner would have been the Fribourg commune of Übersdorf, since Albligen is surrounded by Fribourg communes and is separated from Wahlern by a river and a canyon.

Almost half the population favoured a merger with Übersdorf, even though they were aware that this would mean an amendment to cantonal borders. A small majority of the commune council voted for a merger with the canton of Berne. They considered that although Wahlern was located further away, Albligen belonged to the same canton. A merger with Übersdorf and the necessary amendments to cantonal borders seemed too complicated and time consuming. Moreover, it would have meant that the inhabitants of Wahlern, who are traditionally Protestant and German speaking, would have joined a canton that is traditionally Catholic and bilingual. Had Wahlern opted for Übersdorf, it would have fallen under a French-speaking capital, the city of Fribourg (where hospitals, schools and the university are situated).

THE CASE OF JURA

Since 1815, the French-speaking and mainly Catholic region of the Jura was

part of the canton Berne (which is German-speaking and mainly Protestant); it was given to Berne as a compensation for the loss of other regions. Tensions came to a climax in 1947 when the politician Moeckli was refused a key post because he was French speaking. Along with cultural, religious and economic reasons, this led the people of the Jura to agitate for an institutional separation from Berne. After the establishment of the canton Jura, the Berne district of Laufental, which did not want to join the new canton, later opted to join the canton Basel Landschaft. In the course of the establishment of Jura, the Federal Court elaborated rules and procedures applicable to the amendment of cantonal borders.

Creation of the canton of Jura

In 1969, the canton of Berne amended its constitution and edited a constitutional clause giving the seven jurassian and French-speaking districts of the canton the right to self-determination. Since the clause amended the constitution, it had to be accepted by all citizens of the canton Berne (both jurassian and non-jurassian).

The implementation of this right to self-determination led to a slue of popular referenda: first, the population of the seven jurassian districts decided they wanted to form a new canton. The decision was, however, very close – in fact the idea of a new canton was rejected by three of the districts. In a second step, these three districts held an internal referendum as to whether or not their district should leave the canton of Berne. All of them decided to stay with Berne. One district (Laufental) later opted to join a third canton since the creation of the new canton geographically separated the district from Berne and made it an exclave of Berne (discussed later). Finally, 14 communes in these three districts (situated at the border of the new canton) voted on whether or not they wanted to leave their districts and become part of the new canton. As a result of these local referenda, eight communes left their former district to become part of the new canton. When the borders were finally fixed, the people of the new canton of Jura accepted the jurassian constitution (which had previously been prepared). Only then could the Swiss Federation as a whole give its approval by amending the Swiss Federal Constitution to include the new canton. The majority of the Swiss population and the cantons overwhelmingly accepted the creation of Jura, and the new canton was given sovereignty in 1979.

However, the creation of the new canton did not eradicate all tension: three jurassian and French-speaking districts had decided to remain with the canton of Berne, a fact that was not liked by many inhabitants of Jura who continued to work for an ‘institutional unity’ including all French-speaking districts of the region of Jura. Consequently, they made several attempts to unite with the three jurassian districts of Berne.

The first attempt was to facilitate for the districts staying with Berne to join the new canton; after all, the jurassian constitution’s draft contained a clause stipulating that the new canton would welcome neighbouring districts wishing to become part of that canton. Such a clause does not pose any problems when all the cantons concerned accept the idea of shifting their borders. This, however, was no longer the case. The canton of Berne claimed that the districts and the communes had decided not to become part of Jura and that this decision should be respected. The Federal Parliament, in upholding this view, considered the draft clause to be in violation of the duty of consideration and support between cantons¹⁴ and decided to refuse the federal guarantee (see above).

As a second attempt, the canton of Jura challenged the validity of the referenda that had taken place in the jurassian districts. It claimed that Berne’s financial support for anti-separatist groups during the voting process had falsified the outcome. Even though such financial support had taken place, the Federal Court decided to uphold the result.¹⁵ It argued that support could only have violated the political rights of the inhabitants of the districts deciding to remain with Berne (and they were claimants), not the rights of Jura which did not exist at the time.

A third attempt was undertaken in 1988 by a group of jurassian people. In an initiative (*Unir*), the group proposed a law stating that the reunion of the canton of Jura with the three jurassian districts still belonging to Berne was to be a major aim of the jurassian parliament and government. The Federal Court, called upon by the canton of Berne, decided that the initiative violated the duty of each canton to consider and support other cantons and put an end to the initiative.¹⁶

The Federal Council and the executive bodies of Berne and Jura formed the interjurassian assembly (*assemblée interjurassienne*) to calm the situation and create a platform for discussion. The assembly, which began working in 1994, aims at finding a political solution to the situation. It has, however, no institutional power and can only adopt proposals.

A new initiative called *un seul Jura* (one Jura) was launched in 2003 in the canton of Jura. ‘One Jura’ would oblige the government to work out a proposition (without the collaboration of Berne) for the institutional reunion of the French-speaking jurassians in Berne and Jura. The jurassian parliament declared the initiative to be valid (against the recommendation of the government). The jurassian government transferred the initiative to the interjurassian assembly, which now proposes to abandon the districts and to form a new canton of Jura comprising six communes (including the districts now belonging to Berne) and to have the capital in a district that is to join Jura. These proposals are currently being discussed.

The district of Laufental

The story of Laufental, closely linked to the creation of Jura, is interesting. Laufental is a German-speaking district which would have become an exclave of Berne after the creation of the canton of Jura. This is why the amendment of Berne’s constitution on the self-determination of the jurassian people gave the district of Laufental the right to hold a referendum on whether or not to join any of the neighbouring cantons.

A majority within the district of Laufental voted against the creation of the new canton; predictably, the outcome of the second popular voting was not to become part of Jura. Laufental then had to decide which neighbouring cantons it wished to negotiate with for possible inclusion.

The popular vote singled out the canton of Basel Landschaft. But when it came to the question of actually joining Basel Landschaft, the voters of Laufental surprisingly decided to remain with Berne. When, independently of Laufental’s referendum, financial irregularities within the canton of Berne’s administration were discovered, the case was taken to the Federal Court.¹⁷

In its decision, the Federal Court considered that it was a political entity’s obligation to inform its citizens about political decisions. However, the Federal Court came to the conclusion that Berne was not allowed to give secret financial support (using public funds) to a private committee that was in favour of a particular outcome of the referendum. Under these circumstances, reasoned the Federal Court, it was not possible to tell what would have been the outcome of the popular vote had the Canton of Berne refrained from giving any financial support. The second referendum held

on the same question in 1989 indeed had a different outcome: the people of Laufental chose to be part of the canton of Basel Landschaft.

Rules and procedures for amending cantonal borders

According to the jurisprudence established in the Jura case, an amendment of cantonal borders involves three steps:

- First, all communes involved have to decide whether they want to belong to a neighbouring canton. The decision has to be made by popular referenda in the communes involved.
- Second, both cantons involved have to accept the amendment of cantonal borders. Popular referenda therefore have to take place in the canton giving up a part of its territory as well as in the canton expanding its territory.
- Third, the amendment needs approval at federal level. Since any modification of cantonal borders implies a modification of the federation's constituent units, the modification has to be accepted by the majority of the Swiss population and the cantons.

The amendment of cantonal boundaries can be realised when all three levels of the Swiss state have agreed.

COOPERATION ACROSS CANTONAL BORDERS

Most communes wishing to cooperate across cantonal borders do not even consider amendments to such borders. Local communities are usually historically grown and linked to their cantons by cultural, economic, linguistic and religious ties. Yet many entities (both communes and cities) wish to collaborate with their neighbours, cantonal borders notwithstanding. Above all, major cities situated at a cantonal border and their agglomerations extending into the neighbouring canton seek cooperation. The difficulties these communes are facing might be similar to those experienced by South African local communities split between two or more provinces.

In Switzerland, most difficulties encountered by transboundary endeavours result from the fact that cantons and communes enjoy far-reaching autonomy; consequently, competences can differ considerably. While in one canton the parliament is the competent body to adopt and implement a regional development scheme, in another it is the executive power. Moreover, the competences given to the local units vary from one canton to another, which renders cooperation more difficult. This and the involvement of various public actors make transboundary cooperation a difficult and time-consuming task.

In addition to these legal difficulties, transboundary cooperation projects face practical and political hindrances as well. Many cantons and communes fear losing part of their autonomy by getting involved in binding arrangements. In addition, politicians and state officials show a strong tendency to focus on the interests of the community they are representing and are reluctant to defend transboundary interests. In fact, loyalty conflict can arise and re-election issues are often taken into account by the main actors. Last but not least, the financing of transboundary projects can be tricky.

Since 2001 the Swiss confederation has financially supported more than 30 group ‘agglomeration’ projects; some led to better cooperation in the groups. Since there are no federal rules on how to organise transboundary cooperation of communes and cantons, the solutions chosen vary considerably. Two of these cooperation projects are presented below.

The agglomeration of Schaffhausen

The agglomeration of Schaffhausen spans three cantons: Schaffhausen, Zurich and Thurgau. An association (*Verein Agglomeration Schaffhausen – VAS*) was founded in 2006 to facilitate and strengthen cooperation between the three cantons and communes involved.¹⁸

The cantons of Schaffhausen, Zurich and Thurgau and around 50 communes are members of VAS. Most members are represented by their unit’s executive power. The VAS executive committee and administrative office set up agglomeration projects and present them at the general meeting. The general meeting, at which all members are represented, is held once a year. It decides by three-quarter majority whether the projects presented will be pursued or not.

The role of VAS is limited to planning and organising transboundary agglomeration projects. In order to realise the projects, all cantons and communes affected need to pass a public contract committing the signatories to project implementation. Once a project is approved, the association applies for financial support from the confederation.

For instance, VAS has proposed a project to optimise traffic infrastructure throughout the agglomeration. The project analyses current traffic problems in the region and presents a roadmap on how to solve the problems until 2020. The project includes the construction of a motorway linking the city of Zurich to a commune of Schaffhausen and the improvement of public transport across cantonal boundaries.

The agglomeration of Zurich–Aargau

The agglomeration of Zurich spans the boundary of the canton of Aargau. In order to facilitate cooperation, the two cantons have founded the *Plattform Aargau Zürich* (PAZ).¹⁹ PAZ has set up a discussion forum where information is exchanged and proposals are developed. Representatives of the executive of the Zurich and Aargau cantons, local councils from all the communes involved and planning experts meet twice a year, but do not take any binding decisions. The main issue under discussion over the past few years has been improving the traffic situation.

LOCAL GOVERNANCE COOPERATION ACROSS NATIONAL BORDERS

Since Switzerland is located in the middle of Europe, cooperation with surrounding countries is vital. Foreign relations are the responsibility of the confederation which, according to the Federal Constitution, shall respect the powers and interests of the cantons.²⁰

With regard to transboundary cooperation, the confederation has signed a large number of international agreements facilitating collaboration in fields of common interest. Some of the projects are supported by the EU. In fact, Switzerland participates in 492 projects funded by the EU's Interreg III programme aimed at strengthening cooperation within regions of Europe. The confederation has provided 40 million Swiss francs to participate in the current Interreg IV (2007–2013) programme.

The cantons can sign international agreements within their

competencies. Some of these agreements provide for the establishment of advisory or special commissions. Advisory commissions aim to formalise information exchange and provide for a forum where recommendations can be adopted, while special commissions focus on more specific issues and projects.

Cities situated at the state border are particularly interested in transboundary cooperation. Since the 1960s, issues of common interest – such as access to hospitals and schools, roads, fisheries and hunting – have been dealt with across the borders. Geneva, for instance, agreed to transfer tax money to France in order to compensate for the many people who pay taxes in Geneva but who reside in neighbouring France. Rheinfelden in Germany and Rheinfelden in Switzerland, separated by the Rhine, decided to build one city centre instead of each having their own.

Two transboundary collaboration projects related to the agglomeration of Geneva and Basel are presented in more detail.

THE AGGLOMERATION OF GENEVA

The agglomeration of Geneva spans cantonal borders to Waadt and Wallis and to the territory of France. Several agreements have been signed in order to facilitate urban planning. For instance, the *Comité régional franco-genevois*,²¹ the oldest official transfrontier cooperation committee, brings together the Swiss canton of Geneva and the French departments Ain and Haute-Savoie. Experts from Geneva, Ain and Haut-Savoie elaborate concepts for transfrontier cooperation committee's working groups. These are coordinated by commissions for specific issues (e.g. health policy) and supervised by the officials in charge of the respective areas in Geneva, Ain and Haut-Savoie. The officials meet once a year and decide on the projects they wish to hand over to the assembly committee. The prefects of the departments of Ain and Haute-Savoie and the members of parliament and government of Geneva are represented in the assembly. They decide on the recommendations presented by the supervisors.

In order to implement a project, all political units involved have to sign an agreement committing them to realisation of the project. The entire process is overseen by the Swiss Federal Department of Foreign Affairs and the French Ministry of Foreign Affairs. Results of such cooperation include a convention to coordinate the ambulance services, emergencies and the

first aid of some hospitals in Geneva, Ain and Haute-Savoie. According to the convention, the medical unit closest to an accident scene intervenes regardless of state borders. Moreover, an agreement was signed to enhance the railway connections between two frontier communes, and the authorities agreed to build a third railway jointly financed by the local French railway, the canton of Geneva and the confederation.

THE AGGLOMERATION OF BASEL

The city of Basel is situated at the borders of Germany and France, and its agglomeration spans three countries. The *Trinationale Eurodistrict Basel* (TEB) was founded in 2007 to support cooperation in this tri-border area.²² The TEB is an association under French law. The 62 members of the association are cantons, communes, cities and regions of Switzerland, Germany and France. All members are represented at the general meeting, which determines the overall framework of the cooperation and sets priorities. The executive committee consists of eight representatives of each member state and is responsible for the planning and implementation of projects. The district council, in which 20 Swiss, 15 French and 15 German officials are represented, has to be informed regularly about association activities. The association's funds come from membership fees and local, national and European sources.

CONCLUSION

Various forms of transboundary cooperation have developed within and across Switzerland. It is difficult to compare them or evaluate their success according to general criteria since they all follow specific (and sometimes limited) aims and are suited to the local needs of a region. No model can be generalised and none of the examples given above can be considered more efficient or successful than others.

More formal and binding cooperation seems to be preferable for larger projects with greater financial and political impact at stake. Smaller projects have been successfully implemented based on very informal structures. The efficiency of local and informal cooperation is often underestimated. Regular information exchange and common meetings seem to solve – and even prevent – many problems on their own.

However, many issues remain. On the one hand, some of the issues under discussion cannot be solved at the local level since they overstrain local units (e.g. environmental protection, high-level healthcare, universities and research, airport and traffic planning). In these and other fields, efficient solutions can only be found on a larger scale. On the other hand, many cooperation projects raise questions regarding democratic legitimacy and accountability. Most cooperation projects are controlled by the executive power and limit the role of local parliaments and the people. They are therefore often considered as a foreign body in the Swiss constitutional order and many parliamentarians do not feel comfortable handing over competencies to transboundary bodies.

ENDNOTES

- 1 With the collaboration of Hussein Noureddine and Isabelle Käppeli, research assistants, Constitutional and Administrative Law, University of Fribourg.
- 2 Art. 1 Swiss Federal Constitution (SFC).
- 3 Art. 2 SFC.
- 4 ‘The Swiss People and the Cantons ... determined to live together with mutual consideration and respect for their diversity’.
- 5 Art. 3 SFC.
- 6 Art. 43a SFC.
- 7 Art. 3 SFC.
- 8 Art. 43 SFC.
- 9 Art. 47 SFC.
- 10 Art. 44 SFC.
- 11 Art. 51 SFC.
- 12 Art. 49 SFC.
- 13 Art. 50 SFC.
- 14 Art. 44 SFC.
- 15 BGE 117 Ia 233.
- 16 BGE 118 Ia 195.
- 17 BGE 114 Ia 427.
- 18 See www.vas.sh.ch.
- 19 See www.paz.ch.
- 20 Art. 54 SFC.
- 21 See www.cfrginfo.org.
- 22 See www.eurodistrictbasel.eu.

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Cross-boundary local government cooperation in Spain

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CONSTITUTIONAL FRAMEWORK

Political power in Spain under the Constitution of 1978 is distributed at three levels: state (*Estado*); autonomous communities (*Comunidades Autónomas*); and local authorities, that is, municipalities (*municipios*) and provinces (*provincias*). Articles 148 and 149 of the Constitution establish two lists outlining jurisdictional capacity. The first enumerates the powers that autonomous communities can assume, although the actual powers of each community are expressly set forth in the statute of autonomy of each autonomous community. The second lists the exclusive powers of the state in specific areas. Both the state and autonomous communities can, and must, pass acts (primary legislation) and regulations (secondary legislation) for the exercise of these powers. The relationship between the different types of legislation is not hierarchical but rather complementary (*competencial*). This signifies that the jurisdictional limits for the state and the autonomous communities are set forth in the framework of their powers. However, in some areas the state itself lays down the fundamental regulation for the whole territory, which in turn has to be developed by the autonomous communities. In this case there is no hierarchical relationship, but rather a material one resting in the determination of what is basic or essential and what is not.

The powers of local authorities are not specified in the Constitution, which only expressly guarantees local self-government.¹ The specific

powers of local governments have to be determined through legislation passed by the state and the autonomous communities, in accordance with the distribution of their respective jurisdictions in each sphere. The responsibilities of provincial councils are set forth in Article 36 of the (State) Basic Local Government Act 1985 (LBRL) in terms of a reduced list of provincial powers based on the idea of cooperation and assistance to municipalities. The autonomous communities have not increased this narrow framework of powers.

For the autonomous communities – especially for Catalonia and the Canary Islands – the provinces compete with them for territorial public authority. From their perspective, the provinces are frequently considered as a relic of the centralised state which prevailed during the dictatorship. Apart from these exceptions, the provincial organisation and functioning is broadly similar throughout Spain.

Likewise with the municipal governments, the composition of the assemblies, the electoral system, and the financing or management of public services does not differ noticeably in the different autonomous communities; and the relevant powers are determined by the state and regional legislation. For the exercise of powers, both municipalities and provinces have legislative authority, but just for the passing of by-laws (secondary legislation) that are subordinated to the primary legislation of the state and the autonomous communities. They can thus define their internal organisation by means of regulations (by-laws). In other words, the so called ‘organic regulation’ determines the way in which municipal councils operate – and through by-laws they can regulate the matters within their jurisdiction which are determined by the state or regional legislation, such as planning, noise, traffic, etc.

The constitutional structure of Spain has remained stable since 1978, but salient reforms have been made to the statutes of autonomy governing the different regions of the country. These reforms have been geared towards increasing the level of regional self-government. The last round of statutory reforms (Catalonia in 2006, and Andalusia, Aragon and Balearic Islands in 2007) achieved a level of regional autonomy easily equal to or surpassing that which prevails in many federal countries. Nevertheless, the term ‘federal’ is normally avoided in Spanish territorial and political debates due to the separatist connotations associated with its use since the beginning of the 19th century.

The ‘quasi-federal’ character of the Spanish state can be easily demonstrated by considering some significant features of the autonomous communities. First, the statutes of autonomy are drafted and initially passed by the regional parliaments – within the boundaries of the Constitution – and only then finally approved by the Spanish parliament. Every autonomous community has a parliament which exercises extensive, even exclusive, jurisdiction in a wide range of important matters – for example, education, public security, local government, urban planning and environmental protection. And the administrative functions of the autonomous communities are even wider, since they apply not only to the regional laws but also to most of the state ones too. Some autonomous communities, including the Basque Country, Catalonia and Navarre, also have their own police forces. Finally, although the administration of justice is an exclusive power of the state, the autonomous communities possess important powers relating to the judicial bureaucracy.

In the context of increasing autonomy with regard to the autonomous communities, the state retains exclusive jurisdiction vis-à-vis those areas listed in Article 149 of the Constitution. These powers refer to the fundamental regulation of many areas, such as public administration (which includes the essential regulation of administrative procedure, the management of civil servants, public contracts, local government, etc.), economic activity and the national insurance system. Many of these also include the guarantee of equality in terms of the rights and duties of nationals throughout the whole territory, as well as responsibilities for, among others, immigration, international relations, defence, administration of justice, etc. But the reality is that most of these powers have to be exercised in tandem with the autonomous communities, for instance with regard to rivers and hydrological resources, airports, health, technological research, etc.

TIERED STRUCTURE OF GOVERNMENT AT REGIONAL AND LOCAL LEVEL

At present, there are four basic levels at which public authority is exercised in Spain: the central state; autonomous communities; provinces; and municipalities. These four levels of government are directly established and guaranteed by the Constitution of 1978. The entire state is comprised of 17 autonomous communities (plus two autonomous cities in north Africa –

Ceuta and Melilla) and two types of local authorities: 43 provinces and 8,108 municipalities.

Unlike municipalities, provinces do not always exist as local bodies in all the autonomous communities. In some autonomous communities (Asturias, Madrid, La Rioja, Cantabria, Murcia, Balearic Islands and Navarre) provinces are only subdivisions of the state and not local governments. In the Basque Country, provinces are substituted by the 'historical territories' of Álava, Guipúzcoa and Vizcaya. The distribution of local entities is complex in the case of the archipelagos.

The Autonomous Community of the Canary Islands comprises two provinces; each province has several islands and each island is a local entity. The Autonomous Community of the Balearic Islands does not have provinces, but the islands that comprise the archipelago function as local entities too.

Thus the primary structure of local government in Spain is based on two entities: municipalities and provinces. The elements of both types of local government are very different. Municipalities can be large with over 500,000 inhabitants (as in Madrid, Barcelona, Valencia, Seville, Zaragoza and Malaga) or, as is more common, medium or small – of the 8,108 Spanish municipalities 6,817 have under 5,000 inhabitants. The same applies in the provinces: the most populated provinces such as Barcelona, Zaragoza or Malaga each have over a million inhabitants, while others like Soria seldom ever exceed 90,000.

But this inequality causes problems in the structure of government because the interests of the larger municipalities are difficult to reconcile with those of the more numerous, smaller ones. While large cities openly question the functions and even the existence of the provinces, the small municipalities are clearly dependent on them. Another example is the problem of reconciling the interests of the different sized municipalities in the context of exclusive associations of municipalities and provinces (the Federation of Municipalities and Provinces, for the whole of Spain, and the Federations of Municipalities for each autonomous community).

The territorial power structure can only be explained in a historical-political context: it is clearly difficult for a population of 44 million inhabitants to justify the existence of 17 autonomous communities, let alone the existence of over 8,000 municipalities (of which over 80% have a population of under 5,000 inhabitants and only 2% exceed 50,000

inhabitants). Altogether, this means the existence of one public agent for every 18 citizens (one for 81 citizens at state level, one for 35 citizens at autonomous community level and one for 74 citizens at local level), divided more or less equally between women and men. However, despite the inefficiency inherent in the high number of primarily territorial entities, the reduction or merger of these entities is not on the agenda of the political parties. Territorial identity is deeply rooted in Spain and any attempt to amalgamate municipalities would face strong social resistance.

In addition to these levels of government – directly guaranteed under the Constitution – the Spanish constitutional system makes allowances for (although it does not impose) the existence of other local bodies: those established by the autonomous communities (e.g. the *comarcas* counties) in Catalonia and Aragon); and single-purpose institutions established by the municipalities for the efficient management of local public services (the municipal commonwealths). The creation of these other entities is a frequent cause of political conflicts. In the case of the *comarcas*, dissension arises because they try to usurp the functional position that would typically fall to the provinces.

The Constitution establishes the existence of provinces and does not allow for their extinction, thereby giving rise to parallel rivalry between them and the counties. As regards this problem, the new statutes of autonomy for Catalonia (2006), Andalusia, Aragon and the Balearic Islands (2007) do not promote provincial powers.

In addition, both Madrid (3,128,600 inhabitants) and Barcelona (1,605,602 inhabitants) have their own specific legal order. Each of these cities has a special law adopted by the state: Act 1/2006 of 13 March, on the Special Regime for the Municipality of Barcelona; and Act 22/2006 of 4 July, on the Capital Status and Special Regime for Madrid. Both laws either regulate the participation of the respective local councils in the management of state infrastructures (e.g. airports, stations, etc.) or create specific measures for the improvement of municipal organisation or the exercise of specified municipal powers such as traffic regulation. Furthermore, despite the demands of Madrid and Barcelona, neither of these two special laws contains specific measures that improve their financing. In general terms the special laws applicable to Madrid and Barcelona do not differ in any essential manner between these two cities and other city municipalities.

LOCAL GOVERNMENT POWERS

The Constitution does not grant specific powers to the local entities, nor does it distribute local power between provinces, municipalities and islands. As mentioned earlier, Article 137 of the Constitution guarantees the local autonomy of municipalities, provinces and islands but without any great precision. The Spanish local system therefore lacks a constitutional 'universal clause' which irrefutably establishes the powers of local government, as exists for example in German local law.² In recent years certain scholars have presented the argument that Article 137 CE (right to local autonomy) should include a 'universal clause' of powers manifested in the so-called 'principle of subsidiarity'. Moreover, these scholars argue that such universal powers can only be limited by law and in terms of the principle of proportionality. These opinions have clearly been influenced by German public law and, especially in recent years, by the principle of subsidiarity pursuant to the terms of Article 4.3 of the 1985 European Charter on Local Autonomy (ratified by Spain in 1988). Thus far such opinions have not been accepted by the Constitutional Court, even though since 1999 some dicta appear to herald a new doctrine in this direction (for example in STC 159/2001, on urban planning).

The State Act 7/1985, on local authorities (LBRL) does not directly give powers to municipalities; it enumerates matters or functional areas in which the state and regional acts have to allocate a 'minimum' of jurisdiction to the municipalities. In the majority of cases the laws governing the autonomous communities transfer these powers. This is due in part because the local interests normally correspond to matters assigned to the autonomous communities, in terms of their respective statutes. Nevertheless, according to state law (Article 25.2 LBRL), municipal councils must be empowered to perform in the following areas: safety in public places; urban planning for vehicular traffic and pedestrians; civil defence; fire fighting; urban regulations; historic-artistic heritage; environmental protection; supplies; abattoirs; markets and consumer and user protection; public health; cemeteries and funeral services; social services; water; public lighting; street cleaning; waste; sewage; public transport; cultural and sports activities; and building maintenance (schools). In all of these areas, legislation (normally of the regional parliaments) must confer the necessary powers to municipalities (although not necessarily exclusively).

In addition, as provided for under Article 26.1 of the LBRL, municipalities are directly responsible for a certain minimum of public services. These required services increase according to the number of inhabitants and must be managed according to state law or, as in most cases, regional laws. These laws do not usually contain specific financial provisions. The funding of each public service therefore comes from the common financial resources of each municipal council which, as shall be explained later, are regulated by state legislation. There is therefore a clear separation between the territorial entity that regulates the local services (normally the autonomous community) and the territorial entity that regulates local income (normally the central state).

Finally, Article 28 of the LBRL completes the outline of the powers and public services bestowed on the municipalities by authorising them to perform ‘complementary activities’ to those of other administrations in the following areas: education; culture; promotion of women; housing; health; and environmental protection. These local activities have clearly surpassed their ‘complementary’ nature and have become in effect essential municipal obligations that are in high demand and valued by citizens. This is particularly the case vis-à-vis policies on equality, children’s education, treatment of drug addicts and urgent health care. In addition to ‘complementary activities’ formally included under Article 28 of the LBRL, municipalities also perform new tasks (especially social services) without specific empowerment to do so. Two especially noteworthy examples include the social integration of immigrants (both legal and illegal) and activities revolving around international cooperation, which is highly developed in the municipalities of Catalonia.

While the new constitutional order of 1978 did not substantially change the powers of municipalities, the provinces experienced a significant reduction of their functions to the benefit of the emerging autonomous communities. The Constitutional Court accepted the reduction of provincial powers – in favour of the autonomous communities – provided it did not exceed the ‘essential core’ of provincial powers. As stated in STC 32/1981, on Catalan provincial councils, ‘the adaptation of the provinces to the new scheme of functional distribution of power cannot continue, except through an amendment of the Constitution, [including] the elimination of the Province as an entity with autonomy for the management of its own interests’. So far, constitutional case law has identified the irrepressible core

of provincial autonomy with the traditional function of ‘cooperation and assistance’ to municipalities. This cooperative function is often expressed as a ‘spending power’, so that the core of provincial autonomy is, in essence, financial autonomy.

COOPERATION BETWEEN MUNICIPALITIES THAT STRADDLE REGIONAL AND INTERNATIONAL BOUNDARIES

CROSS-BORDER MUNICIPAL COOPERATION: THE INFLUENCE OF EU INITIATIVES

A considerable number of municipalities in Spain share a border with Portugal or France. For example: on the frontier with Portugal: Tomiño, Tui and Salvaterra de Miño (in Galizia), Ciudad Rodrigo, Vilvestre, Fermoselle, Saucelle, and Fuentes de Oñoro (in Castilla & Leon), Mérida, Olivenza and Badajoz (in Extremadura), Ayamonte (in Andalusia); and sharing a border with France are: Irún and Hondarribia (in the Basque Country), Urdazubi and Erratzu (in Navarra), Astún, El Formigal and Benasque (in Aragon), Sort, Figueres, Lladorre and Puigcerdà (in Catalonia).

The particularities arising from the location of these municipalities make social integration and economic development difficult. That is why these municipalities have traditionally promoted the development of different cooperative instruments in connection with local self-government. In this respect the European Charter of Local Self-government of 1985 foresees the right to local authority association and refers to cooperation with entities of other countries (Article 10). The instruments of cooperation involve the municipalities themselves, but also the provinces or even the regional entities. In order to explain them we must take into account the different structures created in the framework with respect to both international law and European community law.

Traditionally, intermunicipal cross-border cooperation has been developed in the framework of the so called Treaty of Madrid – the European Outline Convention on Transfrontier Co-operation between Territorial Communities or Authorities of the Council of Europe, 21 May 1980. In accordance with this treaty, international cooperation requires the celebration of bilateral or multilateral conventions or treaties between municipalities or the regions themselves, but not between states. Two protocols were passed in 1998 and 2001 in order to enforce these

conventions, but Spain has ratified neither. The specific regulation of conventions that develop the European Outline Convention is contained in two bilateral treaties – one with France (Treaty of Bayona) and one with Portugal (Treaty of Valencia).

The Treaty of Bayona, 10 March 1995, governs cross-border cooperation between local authorities and regions. With this aim, different kinds of bodies are foreseen: in accordance with French law, the so called ‘public interest groups’ and ‘public-private societies’; and in keeping with Spanish legislation, the ‘consortia’, which are regulated under Article 87.2 LBRL (as modified by the Act 57/2003 on modernisation measures for local government). Spanish and French law must determine the requirements for the participation of territorial entities in these bodies. They can have legal authority or not. If they do not have legal authority they cannot pass binding agreements for their members.

The Treaty of Valencia, 3 October 2002, in contrast to the Treaty of Bayona, contains a more detailed regulation of the different cooperative bodies that can be created. All of them are public law bodies, but the treaty accepts the creation of entities in accordance with private law if this possibility respects the legal orders of the states, as well as both European community and international law. The treaty differentiates between:

- bodies without legal status – the so called ‘work groups’ or ‘work communities’; and
- bodies with legal status – in Portugal the ‘public law associations’ and ‘inter-municipal companies’, and in Spain the ‘consortia’ (in accordance with Article 87.2 LBRL).

The former (lacking legal status) are restricted to making proposals, giving advice and making arrangements to promote cooperation. They must have:

- an assembly, composed of representative members of the different municipalities or regions;
- a chairman who must be taken in turn by members of the different cooperative entities;

- a deputy chairman; and
- a secretary.

The latter (with legal status) can instigate a wider range of execution activities, such as the implementation of public works or the rendering of public services. Spanish legislation governs the functioning of the consortia; while the relevant Portuguese legislation regulates the functioning of both public law associations and intermunicipal companies. The legislation of each country governs the participation in these bodies by their local authorities or regions and usually foresees the creation of a control authority that must oversee the development of the cooperation. In addition, the articles of association that accompany the convention of cooperation must contain the essential aspects for the functioning of the body – namely, composition, decision-making rules, financing and budgeting rules, contract rules, etc.

The problem of determining the applicable legislation was foreseen in the European Outline Convention: each territorial entity must fulfil the national requirements, and if there are doubts about the applicable legal order, the legislation of the country governing the territorial entity that assumes the most part of the financing or the most important part of the activity must be applied. The jurisdiction follows the applicable legal order, although it is possible to agree arbitration.

As noted, the local authorities or autonomous communities decide on the creation of cooperative bodies, without state participation. But in order to guarantee the legality of these bodies, in Spain the state has passed a regulation (Real Decreto 1217/1997) that contains a provision requiring compulsory communication to the state of cooperative conventions or treaties. Following this communication the state can indicate if the convention infringes on the European Outline Convention or one of the bilateral treaties with Portugal or France. If the violation is not rectified, the conventions are ineffective. The specific procedure for this communication has been developed through an Agreement of the Conference for European Communities Matters, 2 December 1996, and an Agreement on the National Commission for Local Administration, 30 January 1997.

To date 49 conventions on cross-border cooperation have been inaugurated under the framework of the Valencia (22) and Bayona (27)

treaties. Most of them are between local authorities (25) – for instance: the convention between Almeida (Portugal) and Ciudad Rodrigo and another 18 municipalities of the province of Salamanca, 2006 (to be published); and the cooperation convention between the municipalities of Sort and Saint Giron (France), 16 February 2001. But there are also conventions between local authorities and regions (9),³ and between regions (15).⁴ The majority of these conventions have created different bodies (43) that usually have no legal status (30) and which pursue the promotion of cooperation in general. There are, however, other bodies with legal status (13), some of which (9) have a specific purpose – for example, the promotion of the Catalan language, cultural activities, waste collection, management of a shared tunnel, drainage of sewage waters, railway infrastructure, etc.

Over the past few years, European authorities have introduced other mechanisms of intermunicipal and interregional cross-border cooperation, which have enriched the cooperation promoted by the European Outline Convention and national legislation. The European Commission instigated a new programme called Interreg in the 1990s, aimed at developing cross-border cooperation with the financing of the European Regional Development Fund, the member states and the European Commission itself. This programme has had different stages: Interreg I (1991–1993), II (1994–1999) and III (2000–2006), which introduced as a target interregional and transnational cooperation, and, currently, Interreg IV (2007–2013). In fact many of the bodies created in accordance with the treaties of Bayona and Valencia had as their target the expenditure coordination of funds derived from this European Union (EU) programme, which are oriented toward the construction of infrastructure, the improvement of services and commerce, and the strengthening of institutional cooperation. Many interregional cooperation instruments are likewise supported by this programme.

Owing to the importance of cross-border cooperation – which is considered a touchstone of European integration – a new form of cooperation has recently been introduced in the EU through the new Regulation (EC) No 1082/2006 of the European Parliament and of the Council of 5 July 2006, on a European Grouping of Territorial Cooperation (EGTC). The EGTC aims to facilitate cross-border, transnational and interregional cooperation between its members: member states, regional authorities, local authorities and other public bodies – that

must be situated in at least two member states. The powers of the EGTC are determined through a cooperation convention that is entered into voluntarily by its members, and which is an established legal entity of the EGTC. In any case, the EGTC cannot assume legislation or policy powers, or indeed any power that implies the exercise of authority. The articles of association must establish the following elements: a list of members; aim of the EGTC; title name; location of the head office; organs, composition and decision-making process; working languages; contract rules; financing and budgeting rules; and the appointment of an independent body for auditing and financial control. The applicable legislation will be that of the country where the legal residence of the EGTC is determined.

In Spain, the application of this new form of cooperation requires re-interpretation of the internal legal order, which was created for the adoption of the cross-border cooperation forms pursuant to the Treaty of Madrid. In addition it has required the passing of the Royal Decree 37/2008, 18 January, which governs the authorisation procedure in relation to the participation of Spanish entities in EGTC. In reality the consortia created under the framework of the bilateral treaties with France and Portugal are more flexible than the EGTC in the requirements for their creation and functioning. The initiative has received a favourable reception and has already been put into practice, for example, with the creation of three EGTCs with regional character: Galicia-Norte de Portuga and Duero-Douro with Portugal; and Pirineos-Mediterráneo with France.

INTERREGIONAL MUNICIPAL COOPERATION: THE INFLUENCE OF REGIONAL INITIATIVES

The state act on local authorities 7/1985 (LBRL) foresees different instruments of intermunicipal cooperation that are developed by regional legislation. One of the most important in this context is the *mancomunidad*, which is a voluntary association of municipalities. Since the decision of 2 November 1995, the Supreme Court opposed the creation of municipal *mancomunidades* by municipalities of different autonomous communities and the incorporation of new municipalities of different autonomous communities into pre-existing *mancomunidades*. This situation has changed recently.

The reform instigated by Act 57/2003, on Measures for the Modernization of Local Government, introduced a new Article 44.5 LBRL

which establishes the possibility of creating *mancomunidades* between municipalities of different autonomous communities. Nevertheless, the possibility of cooperation between local authorities of different autonomous communities depends on regional legislation, which can anticipate, or not, this form of cooperation.

The autonomous communities must respect the following rules for the creation of *mancomunidades*:

- The preparation of the articles of association must be done by the elected members of all the participant municipalities.
- The affected provinces must prepare a report about the association.
- The municipal councils of the participant municipalities must pass the articles of association of the *mancomunidad*.
- The organs of the municipalities must be representative of the participant municipalities.

Besides these requirements, the creation of interregional *mancomunidades* is circumscribed in another way. Since 2007, with the reform of the Organic Act 2/1986 on Security Forces by means of the Organic Act 16/2007, municipalities can create *mancomunidades* for the service of local policy. But municipalities must be located in the same autonomous community. For this purpose the creation of interregional *mancomunidades* is also prohibited.

In practice, the creation of this kind of interregional *mancomunidades* is relatively new. The first one was the *mancomunidad de municipios del Bajo Deva*, created in 2006 by the municipalities of Ribadedeva (Asturias) and Val de San Vicente (Cantabria) which are separated by the Deva River, for the revitalisation of tourism in their respective territories. The autonomous community of Castilla and León is also trying to develop this kind of municipal association because 61 *mancomunidades* in its territory are located in the cross-border areas adjacent to other autonomous communities.

With this new form of cooperation, regional governments seek to improve financing of the rendering of services by the *mancomunidades*,

which will improve the quality of services. But this new form of cooperation shows a new trend: for now the initiative for the creation of interregional municipal associations comes from the regional governments more than from the municipalities. Perhaps in the future, when cooperation of this kind becomes more usual, the municipalities themselves will assume the initiative for the creation of this type of *mancomunidades*.

Another instrument of cooperation, besides the *mancomunidades*, are the consortia – which are the legal form of the Spanish organs created for cross-border cooperation with France and Portugal. Their legal regulation is foreseen in Article 6 of the Administrative Procedure Act 30/1992. This form of cooperation involves municipalities as well as other territorial entities such as provinces and autonomous communities or even the state. The scope of activities of consortia used to be narrower than that of *mancomunidades*, and the impetus for their establishment normally comes from the superior territorial entities. A successful example of this kind of association is the consortium for the management of the Natural Park of Picos de Europa, composed of three autonomous communities – Asturias, Cantabria and Castilla y León.

ENDNOTES

- 1 Articles 137, 140 and 141.
- 2 According to Article 28 II of the German Constitution (*Grundgesetz*) and the German case law since BVerfGE 89, 127 (Rastede).
- 3 For instance, the convention between the autonomous community of Catalonia and the municipality of Perpignan (France), 2005 (to be published).
- 4 For instance, the cooperation protocol between Extremadura and the Center Region (Portugal), 12 December 1997; and also the cooperation protocol between the Region of Aquitania (France) and the autonomous communities of the Basque Country and Navarra, 17 February 1998.

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European Union experiences with transborder cooperation between municipalities and regions

HEINRICH HOFFSCHULTE

INTRODUCTION

The Treaty of Rome in 1956/57 and the institution of the big single market of the European Union (EU) from 1993, led to the gradual removal of internal frontiers in Europe. This has resulted in a challenge for the new border regions, especially in terms of their relations with the Central and Eastern European countries.

Here, as with all external frontiers, it is a matter of establishing new social, political and economic contacts with neighbours. This is completely changing the everyday life of people on both sides of old and new frontiers.

Transfrontier cooperation is attractive in border regions from the perspective of furthering European construction. It may be more or less intense and take various forms. It is now common knowledge that the border regions play a special role in the 'Europe of the Regions'.

This chapter on local and regional transborder cooperation will revolve around five basic instruments and points, namely the:

- European Outline Convention on Transfrontier Cooperation between Territorial Communities or Authorities of 21 May 1980;
- European Charter for Local Self-Government from 1985/88 and the Council of Europe studies and works based on it;

- EU treaties, structural policy and funds;
- objectives and work of the German–Dutch Committee for Regional Development; and
- bilateral treaty concluded between the German and Dutch states at Anholt on 23 May 1991.

THE EUROPEAN OUTLINE CONVENTION ON TRANSFRONTIER COOPERATION
BETWEEN TERRITORIAL COMMUNITIES OR AUTHORITIES OF 1980

The European movement received fresh impetus at the beginning of the 1950s when members of the European Federalist Movement destroyed frontier posts between France and Germany in symbolic action.

As early as 1949, the Council of Europe and its Parliamentary Assembly – made up of representatives of all the member states – stepped up their efforts to abolish borders. The formal obstacles associated with frontiers gradually lost importance thanks to the easing of formalities at borders through the initiatives of the Council of Europe and the European Coal and Steel Community (the so called Montan Union, 1951), the abolition of visa requirements by the European Economic Community (signed in 1956) and many other treaties and agreements.

Nevertheless, the borders remained a huge obstacle to the economic development of neighbouring countries. The issue was submitted for examination by a Council of Europe committee on local and regional affairs set up in 1952. Finally, a Conference of Local and Regional Authorities of Europe was created within the Council of Europe to work for the necessary economic, political and social integration of ‘natural regions divided by State frontiers’.

The Parliamentary Assembly of the Council of Europe commissioned a study in 1964 on the state of transfrontier cooperation among local authorities. As a result it became convinced that the conclusion of a European convention to facilitate transfrontier cooperation was a vital legal prerequisite to overcome all the obstacles.

Many plans emanating from associations of local authorities and the Council of the Municipalities and Regions of Europe, on the initiative of the Council of Europe, led to the conclusion in Madrid of the European

Outline Convention on Transfrontier Cooperation between Territorial Communities or Authorities on 21 May 1980. The contracting parties in this Outline Convention undertook to facilitate and foster transfrontier cooperation. This cooperation is to be established in respect of the rights of the territorial authorities of the country concerned and the other public services in accordance with the internal legal framework of the signatory states. The Outline Convention was ratified by the Federal Republic of Germany on 21 September 1981 and entered into force on 22 December 1981. The Netherlands, as neighbour, adopted the convention on 26 October 1981 and it entered into force on 27 January 1982.

This European convention establishes a constitutional legal framework, which, when the Council of Europe member states concerned conclude bilateral or trilateral contracts, creates a state legal framework for forms of cooperation also guaranteed by public law.

Regarding the content of the cooperation project, the European Outline Convention enumerates the fields of national, regional and local development, the environment and the improvement of infrastructure, in particular joint rail, road, motorway and waterway links as well as international air links. Also included are specific services to be provided to individual citizens who are often baffled when faced with different legal contexts on either side of a border, particularly regarding social legislation, the provision of goods and services, quality standards, insurance matters, etc.

According to the Outline Convention, the contracting parties undertake, in particular, to:

- facilitate and foster the transfrontier cooperation of local and territorial authorities and administrations (Article 1);
- support the conclusion of contracts in line with the Council of Europe models (Article 3);
- resolve all the legal, administrative and technical difficulties that could cause problems for transfrontier cooperation (Article 4);
- fully inform one another on the possibilities for implementing contracts (Article 6 and 7); and

- inform the Council of Europe on the conclusion of such contracts (Article 8).

It is true that the Outline Convention provides no concrete answers to many questions. The Parliamentary Assembly of the Council of Europe, and above all its Committee on the Environment, Regional Planning and Local Authorities, would have liked it to go much further. There is, for example, a Scandinavian convention of 1977 that is much more concrete. Nonetheless, the Outline Convention was an important first step, which made member states aware of their duty to facilitate transfrontier cooperation.

The essential point of the contract lies in its recognition of the principle that local and regional authorities can institutionalise direct cooperation without having to go through the ‘proper channels’, involving complicated dealings with diplomatic representatives, national governments and other administrations. The private law cooperation arrangements that existed before can continue to operate. The law does not put an end to them but opens up to the partners the possibility of consolidation in a transfrontier public law framework, on a voluntary basis.

The Outline Convention takes account of the regulations in force in the Netherlands and in the two German *Länder* of Lower Saxony and North Rhine-Westphalia for cooperation between local authorities or administrations and service providers.

There are laws governing cooperation between local authorities in all the contracting states. In Lower Saxony and North Rhine-Westphalia, cooperation between municipalities is governed by an act. In the Netherlands, there is an act and municipal regulations of 20 December 1984. In addition, since 30 March 1976 an agreement has been in force between the Kingdom of the Netherlands and the Federal Republic of Germany governing cooperation in the field of regional development (agreement of 30 March 1976, cf. *infra*, II).

THE EUROPEAN CHARTER OF LOCAL SELF-GOVERNMENT AND THE COUNCIL OF EUROPE'S STUDIES

The first six member states of the Council of Europe signed the European Charter of Local Self-Government in 1985. This signified the end of a long battle to convince the sovereign states that decentralisation and

administrative structures of local (and regional) self-government were not merely ‘internal affairs’, but deeply embedded in the democratic aim for citizens to take control of their own (local) affairs. First attempts to get these local rights secured and guaranteed had been made by the mayors of more than 16 post-war nations in Europe during a congress in May 1953 at the historical Palace of Versailles, which unanimously voted in a European Charter of Local Liberties. Finally, 32 years later, the draft convention was accepted by the governments and is now a valuable instrument for decentralisation and the strengthening of local autonomy.

Of relevance to this chapter is Article 10 of the Charter, which guarantees the following:

1. Local authorities shall be entitled, in exercising their powers, to co-operate and, within the framework of the law, to form consortia with other local authorities in order to carry out tasks of common interest.
2. The entitlement of local authorities to belong to an association for the protection and promotion of their common interests and to belong to an international association of local authorities shall be recognised in each State.

And a more general formula in Article 4 of the Charter states that:

2. Local authorities shall, within the limits of the law, have full discretion to exercise their initiatives with regard to any matter which is not excluded from their competence nor assigned to any other authority
-
4. Powers given to local authorities shall normally be full and exclusive. They may not be undermined or limited by another, central or regional, authority except as provided for by the law.

The strict definition in Article 4 of ‘any matter which is not excluded from their competence’ has become the focus of broad acceptance of the principle of subsidiarity. This rule is now a fundamental principle in the Council of Europe as well as in European constitutional treaties since the Treaty of Maastricht (1992).

The principle of subsidiarity is now also enshrined in the United Nations (UN) International Guidelines on Decentralisation and Strengthening of Local Authorities.¹ This document was agreed to by all UN member states and will be a point of reference for all local authorities and their national (and international) associations worldwide when they discuss decentralisation and the strengthening of local authorities with their specific national (and/or regional) governments.

A broad Explanatory Report has been added to the Charter to provide interpretations and tools for governments as well as to help implement the charter, which has become a ‘success story’. Of the 47 UN members, only Andorra, Monaco and San Marino as small or ‘local’ states have not ratified the Charter.²

Based on this binding treaty and convention, the representation of local and regional authorities by a congress in the structures of the Council of Europe³ does ongoing work developing local authority and self-government in the member states and publishes regular progress reports. Intermunicipal and transborder cooperation is constantly discussed.

FROM ROME (1957) TO LISBON (2008): THE EU AND ITS TREATIES, STRUCTURAL POLICY AND FUNDS

Since the beginning of the European Common Market, the opening of internal borders and a growing transborder reality has become the central point for local (and regional) authorities.

Some interesting situations have arisen though. There have been instances when, for example, a state or *Land* has shown little interest in a ‘minor’ problem in a border region, often infrastructurally and economically cut off from the industrial or commercial centres by its border status. However, when one side became interested for whatever reason in developing the local or regional situation and the EU signalled interest, engagement and financial support, the hesitating ‘partners’ on the other side of the border usually decided to become involved.

THE GERMAN–DUTCH COMMITTEE ON REGIONAL DEVELOPMENT OF 1976

To meet the specific needs associated with regional development, the agreement of 30 March 1976 established a German–Dutch Committee on

Regional Development, with a number of specialised regional sub-committees. Its planning includes regional and territorial development projects on the (German) North Rhine-Westphalia side, and a regional development programme and planning services on the Dutch side.

The specific objectives of the arrangements in North Rhine-Westphalia include the following:

- Conservation and improvement of the 'site quality' of the *Land* of North Rhine-Westphalia with its extensive road infrastructure.
- Taking into account residential areas and their structures, especially the built up areas between the peripheral Dutch towns, the Rhine-Ruhr sector and the (German–Dutch–Belgian) region of Aachen, Maastricht and Liege and the Brussels–Antwerp region.
- Creating the necessary conditions for improved economic interaction between European states in order, in particular, to profit from the advantages that can be derived from transfrontier division of labour in a given area. This could be envisaged in such fields as the environment, open space planning, road, rail and port/harbour policy, and regional economic policy.
- Improving transfrontier cooperation in a more restricted sense, i.e. the cooperation of bilateral committees on regional development with regional and sectoral development services on both sides of the border, in order to find a solution to problems that arise, and consultation on measures to be taken in the border area which impact regional development – for example, setting up an industrial complex, building transport infrastructure or establishing conservation areas or nature parks.

There is also a German–Belgian regional development committee, bringing to three the total number of areas in which transfrontier regional development planning is practised.

A special legal framework was instituted for this type of cooperation by the European Regional/Spatial Planning Charter adopted in 1983 by the Council of Europe's Conference of European Ministers responsible for

Regional Planning. This Charter was signed by all 21 Council of Europe member states (at that time, there are now 47 states), including Belgium, the Netherlands and the Federal Republic of Germany. This Charter stipulates that states should coordinate regional development, the purpose being to:

open up the frontiers and institute transfrontier consultation and co-operation and joint use of infrastructure facilities. States should facilitate direct contacts between the regions and localities concerned, in accordance with the European Outline Convention on transfrontier co-operation between territorial authorities in order to promote increasingly close contacts between the populations concerned. In the frontier areas, no project which could have harmful consequences for the environment of neighbouring countries should be carried out without previous consultation of those States.

THE GERMAN–DUTCH STATE TREATY OF 1991

The need for clarification and a public law base for transfrontier cooperation was stressed, in particular, by frontier bodies and authorities when transfrontier activity developed. A particular role was played in this context by the localities belonging to the oldest German–Dutch Euregio.

By virtue of the delegation of framework powers by the 1980/81 convention, the Kingdom of the Netherlands, the Federal Republic of Germany and the two *Länder* of North Rhine-Westphalia and Lower Saxony, ten years later, in 1991, concluded a state treaty for the concrete realisation and application of the convention in the whole of the German–Dutch border region. The contracting parties thus embarked on a path that had already been traced.

The Kingdom of the Netherlands had concluded an agreement with Belgium and Luxembourg on 12 September 1986, permitting transfrontier cooperation between local territorial authorities on a public law basis. This agreement entered into force on 1 April 1991. In 1969 Lower Saxony and North Rhine-Westphalia had signed an (inter-German) contract on transfrontier cooperation, choosing the same path, i.e. the public law basis of transfrontier common purpose associations (*Zweckverbände*) or communities of municipalities (*Kommunalgemeinschaften*), as well as ‘joint land and water management associations’ (contract of 23 April/9 May 1969).

Both the Netherlands and Germany wished to exclude the direct cooperation of the states in such associations in the framework of the state contract of 1991, arguing that there was no need, or that the cooperation between states should not take this form of association, as it is not provided for in the Council of Europe Framework Convention. The state treaty offers a solution, establishing the framework for a more advanced form of cooperation. Compared to the existing possibilities, public law cooperation provides a stronger structure based on democratic participation and control.

In the context of this cooperation, prerogatives fall to the new institutions which are normally limited to public law local authorities. This means that a greater number of tasks can be done – and done better. Above all, however, this system guarantees local authorities the possibility of acting directly on both sides of the border and in a public law framework, instead of calling upon federal and *Land* government services.

The state treaty thus offers localities varied legal forms of cooperation in different states, i.e. common purpose associations (*Zweckverbände*), communities of municipalities (*Kommunalgemeinschaften*) and/or the conclusion of public law agreements. In order to avoid problems that could arise from the fact that Dutch and German legislation is not identical, the state contract contains the principles of these legal systems concerning the organisation and procedure, making additional reference to the national law concerned. This means in principle that when drafting its statute and rules, the association (to be created) has to decide which national legislation it opts for. In the case of the German–Dutch Euregio, the partners decided to create a common purpose association (*Zweckverband* according to German law) under North Rhine-Westphalia legislation.

The treaty excludes the delegation to the local territorial authorities of another contracting state party of the power to exercise (reserved) sovereign rights on the territory of the neighbour foreign state, while nevertheless permitting local territorial authorities to exercise the sovereign rights of a foreign partner on the latter's instruction and on its behalf. The purpose of this restriction is, on the one hand, to respect the constitutional law barriers between the German *Länder*, which are not authorised to transfer a sovereign power to foreign state services. On the other hand, the *Zweckverband* can commit the local authority members concerned to implement the measures decided by it through the exercise of their own sovereign powers.

Legal protection is generally provided by the national provisions on legal procedures. Thus citizens or other third parties may uphold rights resulting from transfrontier cooperation against local territorial authorities through the legal procedure which would be open to them in any case outside transfrontier cooperation.

CONCLUSION

In 1648, when, after 30 years of war, the 'Peace of Westphalia' was signed in Münster and Osnabrück by the governors of Europe, where many countries had lost over 30% of their populations, an entire continent finally had hope for European peace. Again, this peace treaty set or confirmed new frontiers. The Holy Roman Empire of the German Nation had become more federal with many small but sovereign states, city-states and kingdoms, while France had extended its territory and was becoming increasingly centralised. The borders nevertheless continued to be the cause of disputes and bloody wars. Tolerance among the religions, which embittered the disputes of territories and 'nations', was far from encompassing respect for the individual and was limited to the mutual respect of increasingly divided states: *cuius regio – ilius religio*.

The objective of lasting peace was far away; and having recently ended another century of disastrous wars, we sometimes might feel it is still too far away. A 'cold war' separated populations that suffered through totalitarianism, centralist communism and frequently insurmountable borders, isolating them from their neighbours and often forcing families to live on different sides of a border. People even spoke of 'eternal enemies' – as was said just over half a century ago about the Germans and the French.

What a change has come about in countries such as France and Germany, in the Netherlands and, more recently, between Poland and Germany. And even in the madness in the Balkans, the EU and the Council of Europe try to prove that we have learned our lessons.

Since the end of the Second World War, populations and their local representatives have endeavoured to make borders disappear and lose their significance, and this began long before the states started moving in the same direction. In their eyes, they are doing their bit to establish a new order of peace in a Europe in which frontiers will no longer be the painful scars of the past, but simply the boundaries of administrative areas.

ENDNOTES

- 1 See www.unhabitat.org when it reports on Resolution 21/3 of the Governing Council of UN-Habitat from 20 April 2007.
- 2 See Treaty Office at <http://conventions.coe.int>.
- 3 CLARE, www.coe.int/congress
- 4 For further information and in the context of future development regarding decentralised cooperation, refer to the work of the Decentralised Cooperation Committee of the United Cities and Local Governments (UCLG) – an international family of local authorities created by merger of the former International Union of Local Authorities, United Towns Organisation and Metropolis, the union of megacities around the world. After multiple discussions it has presented a draft UCLG Charter on Decentralised Co-operation (January 2009), available at www.cities-localgovernments.org. It sums up experiences with decentralised cooperation by local authorities throughout the world.

Integration of local communities in Brazil and the new public consortia law

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INTRODUCTION

The integration of local communities in Brazil is a complex problem because, in spite of being a federal republic, the cooperation mechanisms utilised by the sub-national governments are going through a process of refinement that may require some decades of political effort within a democratic context.

In terms of local politics, the most pertinent issue for Brazil is not the communities, municipal territories divided by separatist processes among states, or border conflicts with other countries. Rather, the main issue is territorial integration vis-à-vis cooperation among the several federative entities.

This is because, despite being a very large country (almost continental), the borders of Brazil have been practically the same since the beginning of its history a little more than 500 years ago. The strongest efforts at border enlargement date back to the colonial period when the main ‘enemy’ was the region’s geographical accidents (forests, rivers, mountains, etc.). The litigations between Portugal and Spain were also solved during Brazil’s colony phase.

During the empire period, the most significant international conflict for the country was against Paraguay (1864–1870). This relatively short period of war between the two countries was followed by peaceful coexistence and vibrant trade that still prevails.

In territorial terms, Brazil's greatest innovation of late has been the relatively recent creation of new states and municipalities. This non-litigious phenomenon began after the advent of the 1988 Constitution and following regional political motivations.

Brazil does, however, have problems similar to other young nations. Its independence and development process have some commonalities with other countries in the southern hemisphere (in South America and Africa) and in Asia. A problem in terms of internal macro-structure politics is the culture of poor cooperation that exists between the municipalities and neighbouring cities, as well as among the federated states.

From our perspective, Brazil is not a federation fully deserving this name yet. There are some important exceptions mainly in the southern region of the country where, due to European colonisation, one can notice a stronger cooperative spirit in the economy and in local politics. Besides these cultural aspects that should be overcome one step at a time, Brazil has a second weakness caused by the circumstances of history and international politics. Brazil tends to hold on to a highly centralised culture of power – a legacy of the colonial (15–18th centuries) and imperial (19th century) periods. This extreme centralisation suffocates the manifestations of autonomy and creativity among the sub-national government spheres.

It could not be any other way: the Portugal Crown governed Brazil from the Metropolis, Lisbon, in the Iberian Peninsula for hundreds of years, and for a short period from Rio de Janeiro when Dom João XVI and his court moved to Brazil to escape the Napoleonic invasions. A spirit of national pride and the 'dream of a better future', encouraged by many generations, point to a transformation of this culture of dependence on the king and exacerbated paternalism.

Against this cultural and historical backdrop, this chapter will briefly cover the establishment and consolidation of the federal government system in Brazil, starting from the proclamation of the republic in 1889. It then moves on to the central theme of this publication, namely, the challenge of integrating local communities and border cities through models of joint and cooperative governance at local and regional levels.

THE BRAZILIAN FEDERATION

Brazil is a huge country covering an area of more than 8.5 million km² and

with a population of 180 million inhabitants. The country is divided into 26 member states, one federal district (where the capital, Brasília is located) and 5,564 municipalities. Except for the federal district and Fernando de Noronha (an archipelago on the Brazilian northeastern coast that has its own juridical status), the national borders are defined by the territory of the member states, which in turn are made up of the municipalities that comprise them.

Brazil has maintained a strong tradition of regional governments. Even when it was a Portuguese colony (1500–1822), Brazil had several regional governments (captaincies or provinces) that used to deal directly with the Metropolis. Moreover, Brazil has inherited the tradition of the Iberian municipalities, which are self-governed based on the privileges granted by the Crown (*forais*) and have much autonomy.

In spite of the tradition of decentralised governments, the Brazilian state started to adopt the federative model only from 1889 with the advent of the republic and the Constitution of 1891. It is worth remembering that from independence in 1822 to 1889, Brazil was a unitary monarchy with its territory divided into provinces.

The foundation of the federal state strengthened the regional governments at first, but decreased the importance of the municipalities which started to be treated as a responsibility of each state. However, the municipalities began to recover autonomy with the promulgation of the 1946 Constitution, which already reflected the country's growing urbanisation process and the consequent growth and importance of the cities. A little more than 40 years later, this decentralisation process intensified (as will be discussed) with the promulgation of the 'Citizenship' Constitution of 1988.

THE BRAZILIAN MUNICIPALITY AS A FEDERATIVE ENTITY

The Constitution of 1988 introduced a great innovation, namely, that a municipality would be considered as a federative entity, just as the member states. In other words, each municipality, no matter its population, was given several competences assured by the National Constitution. In addition, municipalities had their own constitution, named Municipal Organic Law, written by the legislators within the scope of the local parliament, the Chamber of City Representatives.

The Federal Republic of Brazil was the first country in the world to adopt this type of triple configuration whereby the federation simultaneously comprises the Government of the Union, state governments and municipal governments. This change has a strong historical basis that deserves attention in terms of comparative studies on Latin American democracies.

Between 1964 and 1985, Brazil – as with several other countries in the region – lived under an authoritarian regime that suppressed civil freedoms, especially political participation. There was a strong centralisation of power in this process: the federal government, controlled by the military, concentrated tax resources and political-administrative competences, depleting the member states and municipalities of any power. Direct election was maintained only for mayors of small municipalities.

Following the collapse of the authoritarian regime, the Constitution of 1988 was committed to re-democratisation. There was, however, fear that the centralising and authoritarian process could emerge again. In order to avoid this, the constitutional congressmen understood that the best way to guarantee continuity of the democratic order would be to truly strengthen local government. Municipalities were thus granted the status of a federative entity.

In this context, the recovery of the ‘municipalist movement’, which had started in the 1950s but was aborted following the military coup d’état, was of great importance. This movement gained new political space and was supported by the decentralisation processes undertaken by several state governors who were elected directly in 1983 in terms of the gradual military-managed process of democratic opening. In short, the municipality in Brazil started to exercise a new role as a federative ‘unit’ and became a fundamental element of political dynamics at the local level, with national clout.

To repeat: besides each member states, each municipality is a federative entity within itself. This condition only makes sense if it is a real expression of the autonomy of the communities that form municipalities. The democratic regime and the freedom of association and expression therefore take on much importance.

Other federations, such as India, have followed the same path of giving municipalities the status of a federative entity. This is a sign that local autonomy is an open and challenging theme at both national and international levels.¹

Finally, speaking of globalisation and changes in the international political scenario, one must mention that Brazil does not have strong separatist tendencies (like other well known federations).

Although Brazil is said to feature many countries in one, there is strong national unity based on, among others, the Portuguese language and a common cultural legacy. Moreover, Brazil is the only Portuguese-speaking country in South America, surrounded by several Hispanic-American nations. This helps to consolidate internal cohesion. However, as we shall see, there is room for improvement in the quality of intergovernmental relations at a sub-national level.

THE ASYMMETRY OF THE MUNICIPALITIES

Recognition of the enormous autonomy of the municipalities does, however, cause problems because the different municipalities vary greatly. For example, the powerful Municipality of São Paulo has 10.5 million inhabitants and a budget of some US\$8.5 billion, while other municipalities have only some 1,000 residents. In legal-constitutional terms, they are all autonomous municipalities with a broad capacity for self-government and similar competences. In practice, however, the differences are considerable, particularly from a financial perspective – some municipalities are very rich while others are very poor, especially those on the outskirts of big cities.

The Brazilian model has thus adopted a system of cooperative federalism in which the regional governments and the national government act in order to cooperate and complement the performance of local governments. The system of common competences foreseen in Article 23 of the Constitution guarantees this vertical cooperation.

In other words, if a municipality cannot fulfil a task efficiently due to, for example, the lack of technical and financial resources, it can receive assistance from the regional (state) or national government in order to develop its own competence locally.

This is not, however, a matter of substituting the local action for other action developed by the regional or national governments. Rather, it is a case of anticipating that regional or national governments may come to cooperate with the local government to enable the necessary conditions so that action is developed locally.

In other hypotheses, taking into account the large size of some

municipalities, certain regional or national competences may be delegated to municipalities, thereby increasing decentralisation.

THE PRINCIPLE OF SUBSIDIARITY

The key to understanding the Brazilian system of competences is the principle of subsidiarity. The principle originated in the social doctrine of the Catholic Church.

Its formulation is better known as *Quadragesimo Anno* (1931) of Pope Pius XI, in which it is affirmed that the state must not take on the role of families or citizens, nor must the larger political groups substitute what can be accomplished by the smaller political groups. This same principle is adopted by the European Union.

Thus, the role of the regional and national governments is not to substitute the local government but to provide support to it – especially in terms of technical, administrative and financial support – so that local government can fulfil its tasks properly.

THE PROBLEM OF SCALE

It is, however, recognised that many municipalities do not have appropriate economies of scale to manage certain issues. For instance: a landfill for the treatment and discharge of solid waste can be economically unfeasible for one municipality, but more feasible when a group of municipalities share the facility. The same can be said concerning other matters such as water supply, health services, school transportation, etc.

THE PROBLEM OF COORDINATION

In other situations, scale is not the problem – such as the Municipality of São Paulo which has 10.5 million inhabitants, and many of its neighbouring municipalities that have more than one million inhabitants. Here, the problem might be coordination.

Such municipalities face the conurbation phenomenon, that is: only one city, but with government divided into several municipalities. In such a situation, public policies developed in one municipality will affect others, thus coordination among them is required.

INTEGRATED MANAGEMENT TOOLS

Integrated management may therefore be necessary for reasons of scale, coordination or both; and the Brazilian Constitution provides several tools to enable integrated management.

COMPULSORY INTEGRATED MANAGEMENT

The first tools are of a compulsory nature, whereby a regional or national law integrates the action of certain municipalities regarding the exercise of some competences. In this case, the local governments concerned do not have a choice: it is a forced integration which does not depend on the will of those involved. In cases where the municipalities concerned are within the same federal state, which is most common, the instrument is created through a regional law and is called a ‘metropolitan region’, ‘urban gathering’ or ‘micro-region’:

- A metropolitan region – for instance, the Metropolitan Region of São Paulo with 39 municipalities – involves an enormous conurbation from which results a big city comprising different municipal governments.
- An urban gathering is the integration of several cities making up a network, but not necessarily with conurbation.
- A micro-region involves the integration of several municipal governments, even though not derived from intense urbanisation, mainly in rural areas with more intensified economies, in general, by the agro-industry.

If the municipalities integrate different federal states, the tool is created by national law and is designated as an Integrated Development Region of the Federal District (RIDE). RIDes simultaneously integrate the national government, state governments and municipalities involved. However, the compulsory instruments, especially the RIDes, have not achieved good results. The local governments are resistant to them and worry that they might give the federal government power to interfere in the autonomy of regional and local governments. The Brazilian Supreme Court has not resolved these matters, despite several cases awaiting judgement.

When one urban gathering (or community) is divided by the border of two municipalities or states, it is in practice the population that ends up deciding whose services, equipment and public infrastructure they prefer to use. The ‘dormitory cities’ phenomenon is typical in all 13 metropolitan regions of Brazil. There are cases of municipalities in rural zones with several districts within its territory, some of them located in border zones.

This is the case, for instance, with the municipality of Itapeceirica da Serra (in the previously mentioned Metropolitan Region of São Paulo) or Álvares Machado, in the surroundings of the important Paraná River, in the western region of the state of São Paulo. São Paulo is the richest state in the Brazilian federation with about 40% of the gross national product and a total population of more than 40 million inhabitants. Álvares Machado, with about 15,000 inhabitants, has two urban centres – the city itself and a district on the border with Presidente Prudente, the main city in the region.

In spite of having their civil and electoral registration in the city of Álvares Machado, the population of this district prefer to use the health and education services in Presidente Prudente, as well as its commercial centre. Owing to this practice, the mayor of Presidente Prudente has been requesting the State Government of São Paulo to authorise the annexation of that district in the rural area of Álvares Machado to its territory, which in fact would be more logical. However, the population is resisting this move and the mayor of Álvares Machado refuses to accept the transfer because he does not want to lose voters and people, especially since many resource transfers to a municipality depend on the number of its inhabitants. Therefore, it is precious and disputed ‘political capital’.

Although the community is divided, at the end of the day they prefer to use the public services in Presidente Prudente due to the closer proximity. This is one of many such cases in Brazil, a country with vast rural territories and scattered villages that make up what we call ‘enlarged borders’ or ‘no-man’s land’.

It is also common in Brazil for a municipality with a larger and better equipped hospital to end up serving municipalities from the whole region without contributions from the neighbouring city governments to pay for the medical services. What’s more, neighbouring city mayors often buy ambulances just to take their citizens to the regional hospital, without paying any compensation.

So, while there is much local autonomy in Brazil in that a municipality

is a federal entity, this exists without effective arrangements for coordination or horizontal cooperation. Solutions for integrating divided or scattered communities are ad hoc and are motivated by the citizens.

For these and other reasons, there have been calls for Brazil's democracy to become more elastic in terms of institutional arrangements. Among them, the mechanism of 'volunteer integrated management', which will be discussed next, has been more successful than the compulsory integrated management tools.

VOLUNTEER INTEGRATED MANAGEMENT

Over and above the compulsory tools already presented, there are also the voluntary tools in which the own federative entities establish cooperation ties. Although such tools were used in the past they produced limited results because they were more political agreements than contracts. In other words, they were not legally binding and could be undone without any consequences. However, the situation changed completely with a constitutional alteration to the 1998 Federal Constitution, providing for the creation of 'public consortia' and 'associated management of public services'. These institutions are regulated by the 2005 Public Consortia Law and a 2007 executive order from the President of the Republic.

Thus, in addition to the political agreements, legally binding contracts started to exist to enable certain projects which should have been compulsorily to get off the ground without their execution being hindered for political reasons, such as the autonomy clause.

Several cooperation projects along this line have been undertaken, both among municipalities and between a group of municipalities and regional governments, especially in the fields of health, water supply, sewer systems, trash collection, environmental promotion and regional development. All these projects bring great benefit to the local populations who start to be better assisted and treated in the presence of integration rather than division.

COOPERATION GENERATES COMMITMENT

In addition, cooperation among sub-national governments, when translated into concrete targets and true commitments, generates contractual legal bonds, including the involvement of financial resources.

Owing to the strong bonds created by the process of establishing a public consortium – or the more complex associated management of public services – these models demand consent from the legislative power of each municipality as well as from the regional (state) governments involved. It is important to emphasise that, being a federative entity, the Brazilian municipality has its own autonomous legislative power before the houses of representatives that assemble the state congressmen.

Such legal protection allows for the development of projects that require high levels of investment, as well as those which need to be paid off over a long period, exceeding the duration of the four-year term of the elected sub-national governments.

These contracts can lead to the creation of a governmental agency that belongs to more than a federative entity (public consortium), as well as discipline a certain joint work programme, either concerning an investment or providing a public service remunerated by rate (programme contract).

COOPERATION PRODUCES RESULTS

It can be concluded from the Brazilian case that freely agreed cooperation produces the best results since the obligations of each party are defined through concrete targets, and yet there is still legal protection equivalent to that for other contractual commitments.

For instance, based on this premise, solid waste in the municipalities of the Metropolitan Region of Curitiba, capital of Paraná State (south of the country), is receiving treatment and adequate disposal. This is also the case in several municipalities integrating the state of Santa Catarina, also located in the southern region of the country, which is known for its strong cooperation culture that is a legacy of the European immigrants who settled there a long time ago.

In the field of public health, thousands of intermunicipal health consortia are operating in Brazil today. For instance, in the previously mentioned state of Paraná, an intermunicipal health consortium exists for each region of the state.

A signal of the high organisation of these multigovernmental entities is the fact that nowadays they are united in a single association (the Association of the Municipalities of Paraná), which represents them at state level. There are also advances in the state of Minas Gerais, where several

consortia were created to allow thousands of people to receive advanced medical services.

The water supply policy recently adopted by Bahia State also deserves mention.² It will be developed through public consortia integrated by the state government and municipal governments, along the same lines as the concept adopted by the state of Piauí with several municipalities in its southern region, and which led to the formation of the Regional Sanitation Consortium of the South of Piauí.

In the field of regional development, the assistance agency of the southern region of Brazil also deserves mention. The Regional Development Bank of the Far South was set up in 1961 and integrated the states of Rio Grande do Sul, Santa Catarina and Paraná. It is a pioneering initiative established under the previous constitutional regime and well before the legal landmark of the Public Consortia Law, which provides legal safety to these kinds of inter-federative arrangements.

The issue is more complex when it comes to joint management involving conurbation municipalities located in different states. Only three RIDEs have been established, namely: Federal District–neighbouring cities; Petrolina–Juazeiro; and Teresina–Timon. These projects are still at the implementation phase.

The most shining example of cooperation, however, is the associated management of water supply and sewer system services. The regional governments created service companies that act on behalf of the municipalities through programme contracts (foreseen in the Public Consortia Law), by assisting the population and charging rates. It is estimated that by 2010 more than 70% of the Brazilian urban population will have water supply services rendered through that kind of contract.

CONCLUSION

Although many projects which came up after the legal change of 2005/2007 are still being developed, the results are already positive. But success is heavily dependent on negotiation and dialogue among the communities and governments involved. The instruments created by Brazilian legislation have formed the institutional spaces to produce consensus and joint decisions, enabling the exercise of cooperation and the learning of new political practices through which common interests are made possible.

As mentioned at the beginning of the chapter, political poverty impacts on the problem of horizontal cooperation. The consortia are thus still viewed with scepticism by many mayors who had negative experiences with colleagues in neighbouring areas who did not make an effort to participate in the regional integration processes.

The lessons for the present and future are simple: dialogue and negotiation should be taken seriously; they should be guaranteed and encouraged institutionally; and finally, they should be protected legally in order to be the counterpoint of political disputes. Only in this way can common interests overcome the differences and divisions among citizens and lead the way forward to a policy of unity, justice and fraternity.

ENDNOTES

- 1 For further studies on contemporary federative regimes, visit: www.forumfed.org.
- 2 State Law of Basic Sanitation, from 1 December 2008.

CHAPTER 12

Mechanisms of cooperation in Mexico's federal system

JOSÉ M SERNA

INTRODUCTION

This chapter discusses the various forms of cooperation between the federal, state and local governments in Mexico's federal system. The Mexican Constitution features a series of provisions that allow for collaboration between the different levels of government. This chapter outlines the provisions and refers briefly to specific cases.

JOINT AND COORDINATED PLANNING

REGULATION OF METROPOLITAN ZONES THAT INCLUDE TWO OR MORE URBAN CENTRES BELONGING TO TWO OR MORE STATES

According to Article 115-VI of the Mexican Constitution, whenever two or more urban centres located in the municipal territories of two or more states form, or tend to form, a demographic continuum, the federation, the states and the respective municipalities (in the framework of their corresponding competences) shall plan and regulate in a joint and coordinated manner the development of said centres, following the federal statute on that matter.

The federal statute on that matter is the so called General Law on Human Settlements, which establishes general rules and guidelines on urban planning and urban regulation that have to be followed by state legislatures when passing their own state law on urban development (these state statute

laws are named in different ways in the different states). In addition, the municipal rulings on urban development and urban planning have to conform to both federal and state statutes on that matter.

It is important to point out that the state constitutions and state statutes also allow for the joint and coordinated planning and regulation of metropolitan zones within one single state. In these cases, the federal government is not a party in the corresponding agreement.

EXAMPLE – METROPOLITAN COMMISSIONS

Within the general framework of laws established by Article 115-VI mentioned above, Article 122-G of the Constitution establishes more specific laws concerning the coordination of planning and execution of actions in the metropolitan zone of Mexico City, in the areas of urban planning, environmental protection, preservation and restoration of ecological balance, transport, potable water and drainage, collection, treatment and disposal of solid waste, and public security. In relation to these matters, the governments of the federal district, states and municipalities that surround Mexico City can enter into agreements for the creation of metropolitan commissions in which they shall cooperate in said policy areas, according to the respective statutes.

These metropolitan commissions shall be created by agreement of the participating entities; and in the instrument for their creation the parties shall determine their composition, structure and functions. These commissions shall:

- establish the basis for entering into agreements that define territorial fields of responsibility and the functions or public services and actions related to the areas mentioned above;
- establish the basis to define the contribution of each party in terms of material, human and financial resources necessary for cooperation; and
- establish all other laws required for the joint and coordinated regulation of the development of the metropolitan zone, the provision of services and the execution of actions agreed to by the members of the commission.

Since the mid-1990s, the governments of the state of Mexico, the federal district (Mexico City) and the federal government started to create a series of metropolitan commissions for the joint and coordinated planning and execution of policies in different areas. Today, these commissions are as follows:

- Metropolitan Commission on Water and Drainage (27 June 1994)
- Metropolitan Commission on Transport and Transit (27 June 1994)
- Metropolitan Commission on Public Security and Justice (27 June 1994)
- Metropolitan Commission on Human Settlements (23 June 1995)
- Metropolitan Commission on the Environment (13 September 1996)
- Metropolitan Commission on Civil Protection (6 March 2000)

These agreements contain regulations on the following:

- Structure of the commission: the commission is formed with top officials of the three governments, who are responsible for the corresponding policy area. Equal representation in the commission is not necessary but decisions are taken by consensus.
- Each commission has to draft and approve its own internal regulations.
- The chair (presidency) of the commission alternates between the state and the federal district.
- Each commission is supported by an advisory council, comprising specialists and academics in the corresponding policy areas. The latter are invited by the commission to form part of the advisory council.
- Each commission has a technical secretary in charge of keeping a registry of the commission's decisions and monitoring their implementation.
- In the agreements, the parties agree to contribute the relevant resources needed to support the commission's work.

The governments of the state of Mexico and the federal district signed an agreement on 23 March 1998 to form an Executive Commission of Metropolitan Coordination. This is intended to be the top instance of

coordination between both governments. It is responsible for coordinating, evaluating and monitoring the plans, programmes, projects and actions that have been jointly agreed upon in the framework of the metropolitan commissions mentioned above. It is also responsible for setting the metropolitan agenda and establishing the priority in which metropolitan problems and demands shall be dealt with.

The Executive Commission of Metropolitan Coordination is co-chaired by the governor of the state of Mexico and the chief of government of the federal district. It comprises seven top officials of the state and eight top officials of the federal district. Its decisions are taken by consensus. The commission is supported by a technical council whose members are appointed by the governor of the state of Mexico and the chief of government of the federal district, who can also invite specialists to join. There is also a co-secretariat comprising the general coordinator of metropolitan matters (a public official of the state of Mexico) and the under-secretary of metropolitan coordination (a public official of the federal district).

EXAMPLE – AGREEMENT OF JOINT URBAN REGULATION

In 1998 the government of the state of Tlaxcala and the municipal governments of Apizaco, Santa Cruz Tlaxcala, Tetla, Tzompantepec, Yauhquemecan and Xaloztoc signed the Agreement of Joint Urban Regulation. The aim of the agreement is to set the legal framework to plan, in a joint and coordinated way, policies related to the use or designation of urban land, territorial reservoirs, environmental conservation zones and urban development. The agreement includes clauses on:

- the establishment of an Intermunicipal Commission on Joint Urban Regulation;
- the parties' duties to plan and regulate in a coordinated manner the urban zone in their jurisdiction and to elaborate the internal rules of the commission (the commission is responsible for elaborating a leading plan of urban regulation); and
- the duties regarding necessary actions and making investments required from the signing parties to solve problems related to urban development.

INTERMUNICIPAL COORDINATION AND ASSOCIATIONS OF MUNICIPALITIES

Article 115 of the Mexican Constitution provides for a sphere of competence that belongs to municipalities. Municipal governments have the power to pass legislation related to the public services that fall under their exclusive jurisdiction, such as potable water, cemeteries, markets, parks, public security and transit, among others; however, this competence has to be exercised according to the bases provided by the legislature of the state to which they belong.¹ Each state legislature in Mexico has therefore passed an Organic Law on Municipalities, which contains more specific rules about the coordination and association of municipalities.

Article 115-III of the Constitution states that municipalities, with the authorisation of their respective councils, can coordinate themselves or form associations for improving the public services they provide and the functions they perform. In addition, whenever the association is intended to include municipalities of two or more states, the respective municipalities must obtain the approval of the corresponding state legislatures.

EXAMPLE OF COOPERATION BETWEEN MUNICIPALITIES

In 2007 the municipal governments of Huimanguillo and Cárdenas (both in the state of Tabasco) entered into an Agreement of Coordination and Collaboration for the Construction of Public Works.

The specific goal of the agreement is to construct two roads that join an urban centre which has expanded and is now located within the territory of both municipalities. The clauses of this agreement establish different duties for the parties involved, for example the duty: to tar a defined part of each road; to finish the corresponding public works in a defined period of time; and to advance all the necessary administrative procedures in order to award the contracts required to perform the public works in question, among others.

EXAMPLE OF ASSOCIATIONS OF MUNICIPALITIES

In 2007 the municipality of Torreón (state of Coahuila) and the municipalities of Gómez Palacio and Lerdo (both of the state of Durango) entered into an agreement to form an association in terms of Article 115-III of the Mexican Constitution. This agreement of association required the

approval of the respective municipal councils. Moreover, since the association involved municipalities from different states, the three municipalities had to request the authorisation of the respective state legislatures.

According to the agreement, the three municipalities shall make joint efforts for the provision of public services and the construction of public works; moreover, they shall determine urban planning policies in the metropolitan zone and design proposals for the organisation and distribution of the different ‘uses of land’ (zoning) within the metropolitan zone.

They shall also establish common policies for the disposal of solid waste, administration of potable water, drainage, as well as the treatment and disposal of residual water, among other policy areas that correspond to the municipal level of government.

It is important to mention that, typically, agreements for the association of municipalities have to incorporate clauses that refer to:

- the object of the agreement;
- instances of decision making;
- financial contributions of the parties to make the association work;
- operative instances;
- validity;
- clause of termination of and retirement from the agreement; and
- method for decision making.

AGREEMENTS BETWEEN MUNICIPALITY AND STATE ...

... that allow the state to be temporarily in charge of services or functions that belong to the exclusive competence of the municipality

The second paragraph of Article 115-III of the Mexican Constitution states that when the municipal council considers it necessary, it shall enter into agreements with the state government it belongs to, to allow the latter – directly or through the corresponding institution – to be temporarily in charge of services or functions that belong to the exclusive competence of the municipality.

In this case the agreement can establish that the state government shall be fully in charge of the service or the function; or it can establish that the

service or function shall be provided or performed in a coordinated manner by the state and the municipality.

EXAMPLE – MUNICIPALITIES OF VERACRUZ AND BOCA DEL RÍO

In 1994 the municipalities of Veracruz and Boca del Río (both from the state of Veracruz) entered into a cooperation agreement with the government of the state of Veracruz for the provision of public security in both municipalities. It is important to note that public security is a matter that in principle falls in the sphere of exclusive competences of municipalities. This agreement produced the System of Intermunicipal Police in the municipalities of Veracruz and Boca del Río.

This system is formed by:

- a technical council comprising top officials of the state government and the municipal presidents of the municipalities involved. It takes its decisions by majority vote (the state government officials form the majority of appointees in this council) and its main responsibility is to establish general policy guidelines on public security in the municipalities involved (mainly, drafting the Intermunicipal Security Plan);
- an advisory committee, which has advisory functions, comprising prestigious people who live within the territory of the municipalities involved; they are appointed by the technical council; and
- an operative coordinator appointed by the state governor on the advice of the technical council. This person is in charge of executing the Intermunicipal Security Plan, as well as the internal regulations of the Intermunicipal Police. He/she has direct command power over the intermunicipal police forces.

However, the municipality of Veracruz opted out of the agreement in 2005, which was revoked by the agreement of the parties. This implied the devolution of public security to the municipality of Veracruz. This took place through a Program for the Transfer of the Public Service of Preventive Police to the Municipality of Veracruz, drafted according to the rules and principles established by an act passed by the state legislature.²

AGREEMENTS BETWEEN MUNICIPALITY AND STATE...

... that allow the state to administer taxes which, in principle, are the competence of the municipality

According to Article 115-IV (A) of the Mexican Constitution, municipalities can enter into agreements with their state government to allow the latter to administer taxes that are, in principle, the competence of the municipal government.

EXAMPLE – AGREEMENTS OF ADMINISTRATIVE COLLABORATION

It is relatively common in Mexico's federal system to find agreements of administrative collaboration between a state government and a municipal government, by which the latter transfers to the former the power to collect taxes on real property – which is a tax that in principle falls in the exclusive competence of the municipal level of government.

This is the case, for example, in the 2006 agreement by the government of the state of Yucatán and the municipal government of Tunkás. The clauses of this agreement establish, among others, that:

- the state government shall be in charge of collecting taxes on real property that corresponds to the municipality;
- the state government has the right to 7.5% of what is collected in said way; and
- the state government shall transfer to the municipal government the amounts it collects every month (discounting the 7.5% mentioned above).

The parties are, however, free to terminate the agreement at any time, but need to give one month's notice.

AGREEMENTS BETWEEN A MUNICIPALITY AND THE FEDERAL GOVERNMENT ...

... to allow the municipality to be responsible for the administration of federal zones

Article 115-IV (H) of the Mexican Constitution makes it possible for

municipalities and the federal government to sign agreements that allow the former to be in charge of the administration of federal zones.

EXAMPLE

Taking into consideration the wording of Article 115-IV (H) of the Constitution, one would expect to find an agreement between the federal government and a municipality. However, what we find in practice are agreements signed by the federal government (through the Ministry of Finance), a state government and a municipality, by which the state, 'through a municipality', shall be in charge of the operative functions of administration of federal taxes related to granting concessions, authorisations or extensions of concessions for the use of federal zones (i.e. beaches that are under federal jurisdiction), or for the use of real property located in such federal zones.

In addition, this kind of agreement typically establishes that the state, 'through the municipality', shall exercise the operative functions of determining and collecting federal taxes related to the federal zone, in terms of the applicable federal legislation and the Agreement of Administrative Collaboration on Federal Fiscal Matters signed between the federal government and the respective state.³

AGREEMENTS BETWEEN THE FEDERAL GOVERNMENT AND THE STATES ...

... by which the states become responsible for the exercise of functions, and the execution and operation of public works and public services that are federal government competences

According to Article 116-VII of the Mexican Constitution, the federal and state governments can enter into agreements by which the states become responsible for the exercise of functions, and the execution and operation of public works and public services that are of the competence of the former, whenever economic and social developments may deem it necessary.

EXAMPLE – TRANSFER OF FUNCTIONS

It is common to find in practice Specific Agreements for the Assumption of Functions on Inspection and Surveillance of Forests, entered into by the

federal government (through the Federal Ministry on the Environment) and a state government, by which the federal government allows the state government to perform functions that in principle correspond to the former.

The normative framework for this option is Article 116-VII of the Constitution, the (Federal) Act on Environmental Protection and Balance of the Ecology, and the (Federal) Act on Sustainable Development of Forests. The procedure for this transfer of functions includes: the application by the state government to be in charge of the federal functions; a series of requirements that the state government has to meet in order to be eligible for the transfer; a joint evaluation of these requirements by the federal and state governments; and finally, signing of the corresponding agreement.

AGREEMENTS BETWEEN STATES AND MUNICIPALITIES ...

... by which municipalities become responsible for the public services and functions that the federal government transferred to the states

The second paragraph of Article 116-VII of the Mexican Constitution allows for agreements between the states and municipalities, by which the latter become responsible for the public services and functions that the federal government transferred to the states, in terms of the first paragraph of Article 116-VII. The author was, however, unable to find a concrete example of such an agreement.

ENDNOTES

- 1 See Article 115 of the Mexican Constitution. It must be pointed out that unlike the federal and state legislatures, the municipalities cannot pass 'enactments' (*leyes*). They are able to produce rulings that are known as *bandos de policía y buen gobierno, reglamentos, circulares* and *disposiciones administrativas*.
- 2 Act for the Transfer of Functions and Public Services from the State to the Municipalities.
- 3 See, for example, the Annex to the Agreement of Administrative Collaboration in Administrative Matters signed by the federal government, the government of the state of Quintana Roo and the municipality of Cozumel, on 10 November 1997.

Split populations and the challenges of local government cooperation in Nigeria

ISAWA ELAIGWU

LOCAL GOVERNMENT IN THE NIGERIAN FEDERATION

Nigeria has a federal system of government comprising three tiers: the federal, state and local governments. Each tier of government has constitutionally guaranteed autonomy in the areas of its operation. The 1999 Constitution of the Federal Republic of Nigeria recognises local government as a guaranteed tier of government. However, section 7(1) of the Constitution provides that state governments shall ‘ensure their existence under a law which provides for the establishment, structure, composition, finance and functions of such councils’.

The powers and responsibilities of each tier of government are delineated in the Constitution. These powers and responsibilities are contained in the legislative lists. The Exclusive Legislative List contains 68 items under the exclusive competence of the federal government, while the Concurrent List contains 12 items over which both the federal and state governments can legislate. The residual jurisdiction is assigned to the states. All matters not identified in the exclusive, concurrent and local government lists come under the jurisdiction of the states. These residual powers are extensive and include health services, rural development and social welfare. States nevertheless often complain that the federal government has too much power and that the legislative list should be revised in their favour.

Local governments also have their functions clearly stated in the Fourth Schedule of the Constitution.

The functions assigned to local government as a guaranteed tier of government include:

- participation in the economic development of the state (such as section 1(a–k)), the establishment and maintenance of cemeteries, burial grounds and homes for the destitute and infirm; licensing of bicycles, trucks and others; establishment, maintenance and regulation of abattoir, markets, motor parks, etc.; construction and maintenance of roads, streets, drains, parks and gardens; provision of public conveniences, sewage and refuse disposal; registration of all births, deaths and marriages, etc.;
- provision and maintenance of primary, adult and vocational education;
- development of agriculture, other than exploitation of minerals;
- provision and maintenance of health services; and
- other functions conferred on the councils by the State House of Assembly.

The fiscal and monetary powers of each tier of government have also been delineated, especially by Decree No.21, 1998 which has since become an Act of the National Assembly. Local governments are expected to generate their own revenue in part from: entertainment tax, motor park duties, property tax, trading and marketing licences; radio and television licences and rates; shop and kiosk rates, tenement rates; on-and-off liquor licences; slaughter slab fees; marriage, birth and death registration fees; cattle tax payable by cattle owners only; signboard and advertisement permit fees; and customary burial ground permit fees.

All tiers of government rely heavily on centrally generated revenue, which is pooled in the Federation Account. The formulae for sharing revenue in the Federation Account between the three tiers of government (vertically) and among governments on the same tier (horizontally) are worked out by a statutory intergovernmental relations body – the Revenue Mobilisation Allocation and Fiscal Commission (RMAFC).

The current vertical revenue sharing formula is: federal government 48.5%; states 24%; local governments 20%; and special funds 7.5%. When

the Supreme Court declared the 7.5% special funds illegal, however, former president Olusegan Obasanjo signed a presidential order in May 2002, adding this fund to the federal government's allocation and increasing the federal government's share of the Federation Account to 56%. State and local governments rejected the amendments contained in the presidential order. This led to another presidential order in July 2002 stipulating a new revenue formula: federal government 54.68%; states 24.72%; and local governments 20.60%.¹

Apart from the lingering controversies over the sharing of revenue accruing to the Federation Account, the state and local governments have also been in dispute over the maintenance of the State Joint Local Government Account. The local governments and the RMAFC accused the state governments of misinterpreting and misusing the constitutional powers given to them in section 162(5-8) of the 1999 Constitution, which provides for onward redistribution of funds to local government councils in a state. State governments were alleged to have been illegally deducting funds meant for the local governments.² This is a key area of conflict in intergovernmental relations between the two tiers of government.

SPLIT POPULATIONS (TOWNS AND CITIES) IN THE NIGERIAN FEDERATION

There are no clear cases of local governments being split between state boundaries in Nigeria, even though there are many cases where the population of a town or city straddles state boundaries. Often these have posed challenges to state and local governments in such areas as security, service delivery, infrastructure, welfare and taxation. Experience has shown that these challenges can best be tackled by some form of intergovernmental cooperation; however, the wheels of intergovernmental relations move slowly and are not conflict-free.

Nigeria's level of urbanisation was estimated to be at 44% in 2000 and is projected to increase to 55.4% in 2015 and 63.5% by the year 2030. The annual growth rate of the urban population is estimated at 3.7% between 2000 and 2015, and 2.6% between 2015 and 2030.³ The annual growth rate of the rural population is estimated to be 0.6% between 2000 and 2015, and 0.3% between 2015 and 2030. Thus, Nigeria expects tremendous urban population growth by 2030. This is a major challenge for Nigerian cities, which currently face serious strain and stresses.

Nigeria has quite a number of cities and big towns all contained in the 774 local government councils (LGCs) in 36 states and the Federal Capital Territory (FCT) Abuja. The largest city is Lagos, which has become a megacity in that all the LGCs in the mainland and island are virtually urban. The city has become a conurbation, stretching beyond the boundaries of the state to parts of neighbouring Ogun State.

Other cities such as Ibadan, Kano, Kaduna, Sokoto, Port-Harcourt, Jos, Yola, Onitsha, Warri, Enugu and Ilorin are split into two or more LGCs. For instance, Kano metropolis comprises eight LGCs (Dala, Gwalle, Nasarawa, Fagge, Kano Municipal, Tarauni, and parts of Ungogo and Kumbotso). Ibadan (the largest traditional city in sub-Saharan Africa) is also divided into at least five LGCs: Ibadan Central, Ibadan North, Ibadan North West, Ibadan South East and Ibadan South West LGCs. Kaduna is divided administratively into four LGCs: Kaduna North, Kaduna South, Igabi and Chukun LGCs. Similarly, the population in Jos, the capital city of Plateau State, is split into three LGCs: Jos-East, Jos-North and Jos-South.

In addition, the expansion of the cities of Lagos and Abuja has given rise to the growth of populations across state boundaries. In the case of FCT Abuja, which has administrative and operational structures similar to the federal state, the population is growing beyond the federal territory to neighbouring Nasarawa and Niger states. Development along the northeastern axis of the city extends the population into Karu (with a part in the FCT and the another in Nasarawa State). The population living between Zuba in the FCT and Suleja in Niger State, is affected by the state boundaries. The FCT has a population of 1,405,201, excluding satellite towns in Nasarawa and Niger states where the bulk of Abuja's low-income workers, artisans and traders reside. These satellite towns include part of Karu and Nyanya, Mararaba and Suleja. While these satellite towns service Abuja municipality, their populations are counted as part of the states in which they live, even though they spend most of their time in the FCT.

Lagos State is believed to have a population of over 10 million. Lagos was the former federal capital and is the industrial and commercial nerve centre of the country. It is experiencing a huge population explosion, which has led to the population spilling over into neighbouring Ogun State. Developments in Lagos State have spread beyond the 20 local governments in Lagos to at least four LGCs (Ado-Odo/Ota, Ifo, Obafemi, Owode and Sagamu) in Ogun State, and by extension into Oyo State. The adjoining

areas in the two neighbouring states serve as extensions of industrial layouts of Lagos State, slums and estates as wells as religious camp sites where Lagosians go for worship.

Twenty-one out of Nigeria's 36 states share international boundaries with neighbouring Francophone countries. Instances of split populations are more obvious along busy routes that cross international boundaries. Since there are hardly any differences between the communities on either side of border posts, members of these communities move more or less freely across the border. In Ikom (Cross River State) the community is split by the Nigeria–Cameroon border. The same is true in Porto Novo (or at Seme border post). Sokoto and Jigawa states have a similar experience with Niger Republic. In many cases a community has been split by international boundaries.

CHALLENGES OF LOCAL GOVERNMENT COOPERATION

While the geographical boundaries of state and local governments are clear, the socio-economic and security boundaries of split populations in relation to bordering states and local governments are very fluid. For instance, some workers live in one state or local government with their families but spend most of their working hours in Abuja, only coming home at night to sleep and then leave again very early the next morning. To focus only on the fact that such people are 'resident' in neighbouring states is to ignore the crucial challenges of split populations: these workers put pressure on water, electricity, sewage, security and other infrastructure and services in the area in which they work.

INFRASTRUCTURE DEVELOPMENT AND THE PROVISION OF PUBLIC SERVICES

One implication of population explosion and city expansion is that infrastructure and services such as water, roads, sewage, accommodation, power and others are over-stretched. This is worse in satellite towns for middle- and low-income citizens. The consequence is the emergence of slums around a city, requiring urgent intervention from federal and state governments. Similarly, health problems such as HIV/AIDS have increased, thus taxing the capacity of any single local government or sub-national state. For most of the affected population, lack of land for expansion (given

rapid population growth) has made it impossible for facilities to meet growing demand. This has created policy problems and dilemmas.

MOBILE POPULATIONS AND PLANNING

A population census is the basis of good planning when it comes to effective service delivery. However, a problem of accurate headcount arises in some split populations where there is a demarcation between inhabitants' places of work and places of residence. This was one of the reasons why the population count of Nigeria's federal capital, Abuja, was contested. Prior to the census in 2006, the population of the FCT was estimated to be over five million, but the 2006 census figure came out at 1,405,201. The gap between the census figure and city administration estimates can be partly attributed to population mobility across the boundaries of (Nasarawa and Niger) states and the FCT.

A sizeable number of low- and middle-income workers (in the private and public sectors) reside in the two neighbouring states and they were counted in their place of residence. While these satellite towns (in different local government councils) service Abuja municipality, their populations are counted as part of the states in which they live.⁴ Since in Nigeria population is one of the principles in sharing centrally generated revenues, the FCT is therefore robbed of the essential revenue needed to provide adequate services, especially transportation and security.

SECURITY

The level of crime in big cities like Abuja and Lagos has soared what with the population explosion and pervasive unemployment. Insecurity of life and property is posing a great challenge to the Nigerian police and other agencies. Criminals move freely from one state to another to carry out their operations. While security agencies have done their best, the pressure is great and mounting, and has necessitated the need for cooperation in security matters beyond the boundaries of states. This has raised the issue of intergovernmental relations in the area of security – i.e. cooperation between neighbouring states and local governments.

There is only one police force in Nigeria and it is controlled by the federal government. Police staff posted to various states are under the

command of the police headquarters in Abuja, even though the governor of a state is the chief security officer of that state. This compounds the problem of responding to security issues at sub-national levels. However, state and local governments have responded in different ways by providing the police force with arms and ammunitions, communication gadgets, vehicles and helicopters for surveillance and allowances to officers and men of the force. But there is still room for a more coordinated response by neighbouring states to improve the security of life and property of split populations in their domains.

TAXATION

Taxation is an important area for the welfare of the population of local governments. Internally generated revenue is a crucial part of the development package of any government. Given the fluidity of movement of the Nigerian population across boundaries, taxation often becomes a problem. First, individuals are expected to be taxed in states and local governments of their residence. For instance, for most public servants who reside in one local government or work at the state headquarters and reside in another local government or state, their taxes are deducted at source by their offices. This robs their area of residence of desirable taxes.

Second, it is sometimes difficult to catch in the tax net private, small-scale enterprises that are located in one local government or state, and whose employees work elsewhere. Such workers may slip through the net by claiming to reside in another tax area, while not paying any tax in the area of their residence.

Tax collection is often a problem where a population is split by political boundaries – state or local government. Yet these revenues are badly needed to provide the required services for an often unpredictable number of people, given their movements. However, while the problems faced by inhabitants of split communities are similar, it is apparent that neighbouring states do not always plan cooperatively.

FEDERALISM AND INTER-CITY COOPERATION

While horizontal cooperation among LGCs in split cities is essential, the vertical pattern of cooperation with other tiers of government in Nigeria's

federal grid gives greater meaning to local government cooperation. Currently, local governments are hardly governments; they are more like local administrations or appendages of state governments. Like state governments, local governments are dependent on funds from the Federation Account for up to 95% of their annual budgets. The Federation Account is also dependent on oil revenues. The resources of local governments are therefore subject to the vagaries of international markets.

In addition, because cities and local governments spend most of the funds (statutorily allocated to them) on salaries, they have little left for development programmes and services. Fiscal complacency at sub-national level has endangered their autonomy as well as their freedom to select their priority programmes and to execute them. In many cities where efforts are made to generate funds internally, rent-seeking behaviour of the collectors creates profuse leakages, which make public treasuries virtually empty in spite of such collections.

State and federal governments need to encourage cooperation among local governments in order to help mobilise all to achieve declared objectives. Their roles in providing an intergovernmental framework for cooperation among cities, and necessary interventionist funds to actualise city projects, are indispensable. Again it is the duty of the three tiers of government – federal, state and local – to establish liveable cities and towns in which all inhabitants can have their basic needs met and contribute to the effective improvement of the same.

RESPONSES TO THE CHALLENGES OF SPLIT POPULATIONS

The most institutionalised response to the problems and challenges faced by split populations in Nigeria is the Lagos-Ogun Megacity project. This initiative attempts to bring together the three tiers of government affected by the unplanned expansion of Lagos. The federal government intervened by setting up the Lagos Megacity Development Authority to handle problems of over-stressed infrastructure, services and utilities that have gone beyond the two neighbouring states. This agency oversees the development of the Lagos-Ogun Megacity region, which is more than 153,540 ha.

In the case of FCT Abuja, the Cities Alliance under UN-Habitat is a project designed to chart a course for the sustainable development of Karu

Township as a bustling suburb of the FCT. This intervention engages local, state and federal governments as well as residents and civil society in providing urban services to the growing migrant population in Karu town.

CONCLUSION

Split populations across political and/or administrative boundaries pose grave challenges to governments. Often in a federal polity, inter-governmental efforts at dealing with such problems have proven to be more responsive to these challenges because the challenges can overwhelm the capability of one government. Split populations in local governments and states is one area that truly tests the fragility or otherwise of cooperative federalism in the delivery of services.

ENDNOTES

1. The table is a summary of the revenue-sharing formula (vertical)* since 1981

Formula (proposed and operational)	REVENUE ALLOCATION (%)			
	Federal government	State government	Local government	Special funds#
1981	55	30.5	10	4.5
1989	55	32.5	10	2.5
1990	50	30	15	5
January 1992	50	25	20	5
June 1992-April 2002	48.50	24.00	20.00	7.50
May 2002 (Executive Order)	56.00	24.00	20.00	-
July 2002 (Executive Order)	54.68	24.72	20.60	-
RMAFC Proposal (December 2002)	46.63	33.00	20.37	-
RMAFC Proposal (20 Sept. 2004)	53.69	31.10	15.21	-

* *On the horizontal plane, the RMAFC in December 2002 recommended the following sharing formula: equality 45.23%; population 25.60%; population density 1.45%; internal revenue generation efforts 8.31%; landmass 5.35%; rural roads/internal waterways 1.21%; potable water 1.50%; education 3.00%; and health 3.00%.*

The Supreme Court ruling in April 2002 nullified the allocation for special funds which the federal government previously monopolised.

See Elaigwu JI, *The Politics of Federalism in Nigeria*. London: Adonis and Abbey, 2007, p 251; Elaigwu JI, Logams PC & Galadima HS (eds), *Federalism and Nation Building in Nigeria: The Challenges of the 21st Century*, Abuja: NCIR, 1994; *Vanguard*, Lagos, 22 February 2004, pp 12-15; *Daily Trust*, Abuja, 9 January 2004, p 2.

2 *Daily Trust*, Abuja, 18 December 2003, pp 1-2.

3 United Nations Centre for Human Settlements (Habitat), *Cities in a Globalization World: Global Report on Human Settlement 2001*. London: Earthscan Publication Ltd., 2001, pp 270-271.

4 Agbola T, A profile of violence, urban security and prevention in the City of Abuja, Nigeria. In Federal Ministry of Works and Housing (ed), *Report on the Launching of Urban Good Governance*. Ibadan: Fountain Publications, 2001, pp 153-190.

Summary and conclusion

BERTUS DE VILLIERS

INTRODUCTION

The experiences of local governments in federations that deal with communities living across provincial boundaries make fascinating reading and provide valuable insight into the way federations grow, adjust and adapt to resolve local problems and challenges. The experiences show how provinces within federations can use their powers to be policy-making laboratories where local challenges are addressed in a way that suits local conditions. This ability to experiment may offer valuable lessons to the South African provinces where a one-size-fits-all approach is often pursued.

South Africa is one of the youngest federations in the world. Although the country can offer much in terms of its experiences in establishing its Constitution, South Africa continues to benefit immensely from the practical experiences of older federations. South Africans already benefited from the experiences of other federations when they negotiated and drafted their Constitution. The many practical ways discussed in this publication of how other federations deal with the challenges that face cross-border communities can assist South Africa in overcoming the highly contentious issue of provincial boundary alterations, by implementing formal and informal mechanisms to address community concerns.

CHALLENGES FACING CROSS-BORDER COMMUNITIES

Although there has in recent years been a flurry of comparative research

into various aspects of federalism, few if any studies have dealt with the challenges faced by communities that straddle provincial boundaries. Such communities are often affected by the fact that their services are offered by two separate provincial governments and two separate local authorities. It is therefore not unheard of that the type and quality of services offered to one part of the community may differ in quality and quantity from the services offered to another part of the community. This inequality often leads to resentment and dissatisfaction.

In affluent and highly mobile communities, dissatisfied persons may 'vote with their feet' by relocating to a part of the community that receives the best services. But this is a luxury that is often not affordable to the poor; and especially in a developing economy such as South Africa, it is simply not practical to tell people they can relocate to an area where services are better. Practical arrangements, other than alterations to provincial boundaries, need to be made to ensure proper and consistent service delivery to an entire community regardless of it being split by a provincial boundary.

The vast range of experiences discussed in this publication show how the challenges faced by communities that live across provincial borders are dealt with by different federations.

It is hazardous to attempt to summarise the respective experiences since they are so rich and vast, but I also recognise that many readers of this publication are in policy- and decision-making positions and may benefit from a brief summary. I will therefore attempt to highlight some of the most discernable trends that arise from the respective case studies presented herein.

SUMMARY

CROSS-BORDER COMMUNITIES NOT UNIQUE

It is not uncommon for communities to reside across provincial and even international boundaries. In all of the case studies presented herein, there are examples of communities that are split by a provincial boundary. Communities in South Africa that face similar challenges can therefore benefit from the rich international experiences.

South Africa is therefore not unique when it comes to issues such as those in Merafong, Mutsi, Bushbuckridge and Matatiele. There may in due course also be other examples where communities through population

expansion 'grow' across a provincial boundary. The challenges faced by communities that live across provincial boundaries will increase over time – especially when it comes to Gauteng and the provinces that abut it.

One lesson that is obvious from the case studies is that provincial boundary adjustments are not seen as the first response to the challenges of a split community. In fact, few if any of the case studies resorted to provincial boundary adjustment as a way of resolving challenges faced by a community that is split by a provincial boundary.

REASONS FOR CROSS-BOUNDARY PROVINCIAL COOPERATION

International experience shows there are many reasons why communities that live on opposite sides of a provincial boundary may demand greater cooperation between their respective local authorities. These include: the perception of improved service delivery by one local authority compared to another; ethnic cohesion between communities; the sharing and pooling of resources between local authorities; economies of scale; bulk service acquisition and provision; and common challenges and demands.

In South Africa the demands for alterations to provincial boundaries are closely associated with the initial demarcation of the provinces in 1993. The problem spots that were identified at that time remain unresolved. Experience has shown, however, that it is unlikely that amending provincial boundaries would solve the problems. Boundary adjustments often lead to demands for more adjustments. That is not to say that a boundary adjustment should never be considered – but it should be kept as a very last resort and only be employed where no other models of cooperation have worked.

There are various reasons why local governments that are situated on opposite sides of a provincial boundary cooperate with each other. In some instances it may be for a specific service to be delivered, while in others it may lead to the establishment of an integrated forum with highly coordinated planning and service delivery. The needs of a local population must therefore be the driving factor to determine what the scale and scope of cooperation should be.

AMENDMENT OF PROVINCIAL BOUNDARIES IS RARE

It is extremely rare for provincial boundaries to be amended for the sole

purpose of accommodating an entire community into a single province. Federations realise that ad hoc alterations to provincial boundaries often lead to unintended consequences and to demands for more boundary alterations. Federations therefore do not as a rule deal with cross-border communities by way of amending provincial boundaries.

South Africa's experience in Merafong and Matatiele with the amendment of a provincial boundary to address the concerns of a local community show how ineffective and even dangerous and destabilising provincial boundary adjustments can be. The preferred way to address the challenges faced by communities that are split by a provincial boundary is to develop formal and informal ways of cooperation between the respective local and provincial governments.

The essential test for service delivery to communities in South Africa is that a provincial boundary should not be seen as a wealth-fence or the reason for poorer services than those available in another part of the community within a neighbouring province. Demands for provincial boundary adjustments will increase if provincial boundaries become a symbol of entrapping one part of a community in low-quality services while another part receives high-quality services.

LOCAL GOVERNMENT BOUNDARIES COINCIDE WITH PROVINCIAL BOUNDARIES

As a rule, local government boundaries coincide internationally with provincial boundaries. If a community is split by a provincial boundary, it is therefore likely that such a community would be served by more than one local authority – each within the sphere of the province in which it is located. Local authorities therefore face a choice either to go about their business in an independent way or to cooperate with each other to ensure that services across the entire community are consistent. The needs of the entire community are therefore addressed by way of cooperation between local governments rather than the imposition of a single local government that straddles a provincial boundary.

COOPERATION ACROSS INTERNATIONAL BOUNDARIES IS INCREASING

The prevalence of communities that are split by international boundaries is also on the increase. There are many examples, especially within the

European Union (EU), where communities are split by an international boundary.

The EU has by far the most advanced and sophisticated legal and policy framework within which local governments can cooperate across international boundaries.

South Africa does not yet have a high demand for local governments to cooperate across international boundaries but there are examples where ad hoc informal liaison occurs. There are, however, many examples where the South African provinces cooperate with neighbouring states. Such discussions often involve functions that fall within the powers of local governments.

It is likely that in future some of the rural local areas of South Africa and neighbouring countries may benefit from the experiences in Europe where closer cooperation started with specific projects (e.g. tourism, industrial development, border security) and over time led to separate institutions with wide-ranging powers and functions.

PRAGMATISM IS THE DRIVING FORCE

Pragmatism generally determines what type of cooperation is undertaken between local communities and whether formal or informal structures and mechanisms are put in place to structure the cooperation.

None of the case studies discussed in this publication provides for a single, elaborate and comprehensive legal framework within which all cross-border provincial cooperation between local governments *must* take place. It is left to the leaders of the local communities, local governments and provincial governments to determine the type, nature and scope of the cooperation and whether the cooperation is formal or informal.

The South African Constitution provides ample direction and opportunity for cooperation between the respective spheres of government. The cooperation can take many forms ranging from informal policy coordination for which no formal agreement is required, to formal agency and delegation arrangements. S154(1) of the Constitution obliges the national and provincial governments to support local government and to build its capacity to enable it to deliver services better. The national and provincial governments may assign duties to the local governments pursuant to s 156(4) of the Constitution, and a municipality has the right to

exercise any power concerning a matter reasonably necessary for the effective performance of its functions.

MOST COMMON FORM OF COOPERATION IS BETWEEN LOCAL GOVERNMENTS WITHIN THE SAME PROVINCE

The most common form of cooperation between local governments takes place within the boundaries of the same province or state. The case studies show that although cross-boundary cooperation does occur, cooperation within the same province flourishes the most. The main reason for this is that local governments within the same province are subject to the same statutory framework under the auspices of that province. The starting point for cooperation is therefore the same.

VARIOUS FORMS OF COOPERATION

The case studies highlight the various forms of cooperation that can occur between local governments in neighbouring provinces. These include the following:

- Informal cooperation, consultation and coordination between staff, elected officials and consultants. This type of cooperation allows each local government to conduct its own affairs, but at least it is aware of what the other local government is doing and it may attempt to harmonise its own policies without being obliged to do so.
- Joint policy development and planning for single or multifaceted challenges and issues facing both authorities. This type of cooperation enables local governments to take uniform policy approaches after consultation and coordination with each other.
- Formal cooperation by means of a deed, contract or statute. This type of cooperation places formal, legally enforceable obligations on local authorities to cooperate in certain policy areas.
- Entering into an agency arrangement whereby one local authority agrees to deliver services on behalf of the other authority as its agent. This type

of cooperation may involve a local authority with better resources in a certain fields (e.g. libraries, sporting facilities, road maintenance) providing a service to the entire community.

- Forming a partnership whereby the two local authorities share resources (financial, administrative or human) to deliver a better service to their respective communities. This type of cooperation involves local authorities integrating one or more department to save costs and improve service delivery.
- Delegation whereby the national government or two provincial governments delegate a function to two local authorities to discharge on behalf of the delegating authority. This type of cooperation may be instigated by a national or provincial government with a grant that is tied to a condition of joint planning and implementation by the two recipient local governments.
- Forming a new public or private entity for the delivery of a specific service. This type of cooperation entails the creation of a separate entity to deliver specialised services, for example electricity generation and distribution, refuse removal and water purification.

CONCLUSION

In conclusion, the challenges faced by communities in South Africa that are split by a provincial boundary are not unique. Many federal states have had to develop mechanisms to ensure that the quality of services provided to split communities are consistent and of equal quality. A provincial boundary adjustment is often not even an option, and where it is, it is pursued only as a last resort. As a rule, local governments that abut each other across a provincial boundary tend to cooperate by way of informal and formal mechanisms in order to best service the interests of their communities.

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