

A TREATISE FOR INTERNATIONAL ADMINISTRATIVE LAW, PART II: ON OVERGROWN PATHS

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Abstract: *International administrative law represents a special (sub)discipline of administrative law, governing administrative relations with certain foreign element by a set of delimiting norms. The aim of these delimiting norms is to address those situations, where a foreign element (e.g. foreign acts, persons having immunities under international public law etc.) appears in the relations of administrative law. In this respect, several thorny issues may appear. This article aims to address three of them. Firstly, the question of applicable law will be analysed with respect to relations, where a foreign element appears. Secondly, the qualification problem with respect to foreign administrative acts will be addressed. And thirdly, the article will tackle the issue of extraterritorial extensions of competences of domestic authorities abroad and will deal with the issue of applicable law in these situations.*

Keywords: *international administrative law; concept of unity of the forum and the law; delimiting norms; foreign elements; qualification problem; application of foreign law*

INTRODUCTION

“What is presented as international administrative law, or something similar, is just a juristic delusion.”¹ Despite this rather sceptic evaluation, international administrative law is being currently considered as an established (sub)discipline of (municipal) administrative law.² The first part of this article argued³ that certain degree of isolationism represents a characteristic feature of international administrative law. We can only barely refer to any universal international administrative law. On contrary, there are several autonomous systems of international administrative law, existing in respective jurisdictions – *internationales Verwaltungsrecht*, *diritto amministrativo internazionale*, *droit administrative international* etc.

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¹ NEUMEYER, K. Vom Recht der Auswärtigen Verwaltung und verwandten Rechtsbegriffen. *Archiv des öffentlichen Rechts*. 1913, Vol. 31, Archiv des öffentlichen Rechts 129.

² NEUMEYER, K. *Internationales Verwaltungsrecht. Allgemeiner Teil*. Zürich: Verlag für Recht und Gesellschaft AG, 1936, p. III. (“International administrative law represents an integral part of administrative law”). FLEINERGERSTER, T. *Grundzüge des allgemeinen und schweizerischen Verwaltungsrecht*. 2nd ed., Zürich: Schulthess, 1980, sub § 10 (“In fact, we can today refer about international administrative law as about an independent discipline”); GROF, A. Grundsatzfragen des internationalen Verwaltungsrecht. In: R. Mellinshoff – H. Trute (eds.). *Die Leistungsfähigkeit des Rechts*. Heidelberg: C. F. Müller, 1988, pp. 303 et seqq; LINKE, C. *Europäisches Internationales Verwaltungsrecht*. Berlin: Peter Lang, 2001; BREINING-KAUFMANN, C. Internationales Verwaltungsrecht. *Zeitschrift für schweizerisches Recht*. 2006, Vol. 125, No. 1, p. 72. („international administrative law represents a legal discipline *sui generis*”); MENZEL, J. *Internationales Öffentliches Recht*. Tübingen: Mohr Siebeck, 2011, pp. 18 (here, the author argues for existence of a much broader field of law, referred to as *internationales öffentliches Recht* – i.e. choice-of-law in public law).

³ HANDRLICA, J. A Treatise for International Administrative Law. *The Lawyer Quarterly*. 2020, Vol.10, No. 4, pp. 462 et seqq.

Despite this fragmented character, the main aim of international administrative law, existing in various jurisdictions, is the same – to address those situations, where a foreign element appears in certain relations, governed by the (municipal) administrative law. Such “foreign element” is frequently represented by a foreign administrative act. However, a number of other types of foreign elements may appear in administrative relations: a person, which possess a diplomatic immunity under international public law, a foreign citizen in an administrative proceeding for obtaining domestic citizenship, a foreign border patrol, checking identity documents in an international train in the border area of our territory etc. All these cases are addressed by special norms, which are referred to as “delimiting norms” in legal scholarship.⁴ In the area of traffic law, such delimiting norms do provide for recognition of foreign driving licenses in our territory. In the area of university law, a recognition of certain foreign university diplomas is proved. In tax law, the delimiting norms do release those persons, which possess immunities, from certain tax obligations, etc. Thus, international administrative law does not “constitute a province of law of their own,”⁵ as delimiting norms are distributed among various areas of substantive law (such as tax law, social security law, police law, traffic law etc.).⁶

This article aims to address certain thorny issues, arising from application of delimiting norms. Given the strict territorial scope of (municipal) administrative law, the scholarship has paid only marginal attention to these issues so far.⁷

Firstly, the scope of application of substantive law to those cases must be addressed. Fact is, that in the relations of civil law, the domestic courts are frequently required to apply foreign civil law by the rules of choice-of-law. On the other hand, public law has traditionally reflected the concept of unity of the *forum* and the *law*, i.e. the administrative authorities were required to apply exclusively their own (municipal) administrative law. Feature of a foreign element triggers the question, under which circumstances and to what extent will be a foreign administrative law applicable. This issue will be addressed in general terms in the 2nd section.

Secondly, when a delimiting norm provides for a recognition of a foreign administrative act, a problem of qualification arises. Here, a domestic authority is required to classify such foreign act. In principle, it can apply either its own (municipal) administrative law (*lex fori*), or the law, under which the act was issued (*lex causae*). Further, one can also argue for an *autonomous* classification of such foreign administrative act. Consequently, application of delimiting norms may lead to the qualification problem, which will be addressed in the 3rd section.

Lastly, while the first two sections are addressing in principle the application of international administrative law in “inland”, the 4th section aims to deal with those cases, when

⁴ HEMLER, A. *Die Methodik der „Eingriffsnorm“ im modernen Kollisionsrecht*. Tübingen: Mohr Siebeck, 2019, pp. 63 et seqq.

⁵ VOGEL, K. Administrative Law: International Aspects. In: R. Bernhardt (ed.). *Encyclopedia of Public International Law*, 9 – *International Relations and Legal Co-operation in General*. Amsterdam: North Holland, 1986, p. 4.

⁶ OEHLER, C. *Kollisionsordnung des Allgemeinen Verwaltungsrechts*. Tübingen: Mohr Siebeck, 2005, pp. 128 et seqq. (arguing, that international administrative law represents a special (sub)discipline belonging to the special part of administrative law).

⁷ This is reflected in the subtitle of this article, which is allusion to “On Overgrown Paths”, the last book written by Knut Hamsun (1949).

a delimiting norm of our (municipal) administrative law provides for an extraterritorial power of the domestic administrative authority (a border patrol, checking identity documents in an international train, a police force, following a suspect on a road, while crossing the borders of the State). This section will address the questions, under which circumstances which “extraterritorial extensions” are legal and which law is to be applied by a domestic authority, when acting abroad.

I. TERMINOLOGICAL CLARIFICATION

The terminology used in this article deserves certain clarification:

Firstly, it is a fact that there isn't any common understanding concerning the meaning of the term “administrative act”. The term is understood differently in various jurisdictions (*Verwaltungsakt*, *acte administratif unilatéral*, *atto amministrativo*, *acto administrativo*).⁸ In this context, the scholarship also uses the terms “public acts” and “quasi-public acts.”⁹ For the purpose of this article, the term “administrative act” (or “foreign administrative act”) aims to address all types of unilateral administrative measures issued by the competent administrative authority. Consequently, by using the term “administrative act”, this article will also understand administrative measures such as university diplomas, driver's licences, certificates of airworthiness etc., which are not necessary classified as “administrative acts” in each jurisdiction. This approach is currently generally accepted among legal scholars.¹⁰

Also the term “recognition”¹¹ will be used as an umbrella term, thus covering both the cases of the recognition *ex actu* (i.e. recognition, as based on an act of recognition)¹² and the recognition *ex lege* (i.e. recognition, as based directly on the provision of the applicable

⁸ HANDRLICA, J. *A treatise for international administrative law*. p. 472 (see in particular footnote 57, referring on existing literature, addressing absence of a common understanding of the term „administrative act“).

⁹ PAMBOUKIS, C. L'acte quasi public en droit international privé. *Revue critique de droit international privé*. 1993, Vol. 42, No. 3, pp. 565 et seqq.

¹⁰ NESSLER, V. Der transnationale Verwaltungsakt: zur Dogmatik eines neuen Rechtsinstituts. *Neue Zeitschrift für Verwaltungsrecht*. 1995, Vol. 32, No. 8, pp. 863 et seqq.; RUFFERT, M. Der transnationale Verwaltungsakt. *Die Verwaltung*. 2001, Vol. 34, No. 2, pp. 453 et seqq.; BOCANEGRA SIERRA, R., GARCIA LUENGO, J. Los actos administrativos transnacionales. *Revista de Administración Pública*. 2008, Vol. 6, No. 1, pp. 9 et seqq.

¹¹ For theoretical delimitation of the notion of “recognition”: MENG, W. Recognition of Foreign Legislative and Administrative Acts. In: R. BERNHARDT (ed.). *Encyclopedia of Public International Law*. Amsterdam: Elsevier, 2003, pp. 348 et seqq.; MATTERA, A. The Principle of Mutual Recognition. In: F. Kostoris – P. Schioppa (eds.). *The Principle of Mutual Recognition in the European Integration Process*. New York: AIAA, 2005, pp. 1 et seqq.; KERBER, W., VAN DEN BERGH, R. Mutual Recognition Revisited: Misunderstandings, Inconsistencies and Suggested Reinterpretation. *Kyklos*. 2008, Vol. 61, No. 3, pp. 451 et seqq.; PAMBOUKIS, C. *Les actes publics et la méthode de reconnaissance*. In: P. Lagarde (ed.). *La reconnaissance des situations en droit international privé*. Paris: LGDJ, 2013, pp. 125 et seqq.

¹² The terminology varies in recent legal scholarship: NGUYEN, M. Droit administratif international. *Zeitschrift für schweizerisches Recht*. 2007, Vol. 125, No. 1, p. 122 (*décision de reconnaissance*); MICHAELS, S. *Anerkennungspflichten im Wirtschaftsverwaltungsrecht der Europäischen Gemeinschaft und der Bundesrepublik Deutschland*. Berlin: Duncker & Humblot, 2004, p. 75 (*konkret-aktuelle Anerkennung*); KEESSEN, A. *European Administrative Decisions*. Groningen: Europa Law Publishing, 2009, p. 28 (*mutual recognition decision*).

law)¹³. Thus, a recognition takes place “when a foreign administrative act is treated as valid in an individual case.”¹⁴ While the State, where the administrative act was issued will be labelled as “the home State”, the State, where recognition of a foreign administrative act will be realised, will be labelled as the “the host State”. This terminology will be used also *vis-à-vis* other forms of relations between two States.

The article will further use the term “extraterritoriality” (“extraterritorial extensions” respectively). This term is ambiguous¹⁵ and deserves a more detailed terminological clarification. In this article, the term “extraterritoriality” will not refer to any special status of certain persons, who possess immunities or privileges under international public law. Neither will it refer to the situation, when legislative acts do address certain situations, occurring abroad and link legal consequences to them. This article will use the term of “extraterritoriality” to refer to situations, when an administrative authority of one State acts *legally* beyond the territory of this State (home State), i.e. in the sovereign territory of other State (host State).

Lastly, the term “inland” and “abroad” will be used. Given the autonomous character of international administrative law, the perspective of its norms is always “inland”. When understanding international administrative law as an integral part of the (municipal) administrative law, “abroad” refers to any other (foreign) jurisdiction.

II. UNITY OF THE FORUM AND THE LAW AND ITS EXCEPTIONS

In contrast to international private law, international administrative law does not in principle recognise the notion of equality of legal orders.¹⁶ While in relations of private law the States do basically not insist on strict application of (municipal) civil law and allow application of foreign law, this is basically not the case in administrative law. “In matters of public security, economic development, social welfare or taxation, public authorities solely apply their own rules. In general terms, there is no choice-of-law problem in public law and especially in administrative law; there is merely *only one* (emphasis added) general choice-of-law rule which states, that administrative authorities always are bound to apply their own law.”¹⁷

¹³ Neither here, the terminology is uniform: NGUYEN, M. *Droit administratif international*. p. 122 (*reconnaissance de par la loi*); MICHAELS, S. *Anerkennungspflichten im Wirtschaftsverwaltungsrecht*. p. 75 (*abstrakt-antizipierte Anerkennung*); KESSEN, A. *European Administrative Decisions*. p. 28. (*single licence recognition*). The German scholarship has frequently used the term *transnationaler Verwaltungsakt*. NESSLER, V. *Der transnationale Verwaltungsakt*. p. 863; RUFFERT, M. *Der transnationale Verwaltungsakt*. p. 453; BOCANEGRA SIERRA, R., GARCIA LUENGO, J. Los actos administrativos transnacionales. *Revista de Administración Pública*. 2008, Vol. 6, No. 1, p. 9.

¹⁴ WENANDER, H. Recognition of Foreign Administrative Decisions. *Heidelberg Journal of International Law*. 2011, Vol. 71, p. 780.

¹⁵ BEITZKE, G. Extraterritoriale Wirkung von Hoheitsakten. In: K. Strupp – H. Schlochauer (eds.). *Wörterbuch des Völkerrechts*. Berlin: De Gruyter, 1960, pp. 505 et seqq.; MENG, W. Extraterritorial effects of legislative, judicial and administrative acts of State. In: R. Bernhardt (ed.). *Encyclopedia of Public International Law*. Amsterdam: North-Holland, 1987, pp. 155 et seqq.; AUDIT, M. La Compétence extraterritoriale en droit administrative. In: *La competence*. Paris: LexisNexis, 2008, pp. 69 et seqq.

¹⁶ PESTALOZZA, C. Kollisionsrechtliche Aspekte der Unterscheidung von öffentlichem Recht und Privatrecht. *Die öffentliche Verwaltung*. 1974, Vol. 27, No. 2, pp. 188 et seqq.

¹⁷ VOGEL, K. *Administrative Law: International Aspects*. p. 4.

This strict requirement for administrative authorities to apply their own (municipal) law has been referred to as concept of unity of the *forum* and the *law* in the legal scholarship (thereinafter “the concept of unity”).¹⁸ Such requirements is applied to all administrative authorities, acting under the jurisdiction of the State. Consequently, this requirement is in principle also applicable to a foreign authority, acting in the territory of the State, when based on an international agreement (e.g. police or customs officers, acting in an international train in the border area, police force following a suspect on a road and crossing the borders etc.). While this concept stands upon robust dogmatic considerations, legal scholarship¹⁹ has also addressed several exemptions from this concept. However, in this respect, it was stressed, that “the general attitude of the States to private law, i.e. that they are prepared to apply and enforce foreign law as well as their own law, cannot be compared to – much less equated with – the very special reasons, which in extremely rare cases may introduce a legislator to order application of foreign law by public authorities.”²⁰

II.1. Dogmatic reservations against application of foreign law

The most principal reservation against application of foreign law in administrative relations is following: Application of a foreign public will contradict the notion of sovereignty, under which each State provides and executes its own public law. These two features – the jurisdiction to prescribe (*Befehlsgewalt*) on one hand and of the jurisdiction to enforce (*Zwangsgewalt*) on the other hand – have been traditionally understood as pillars of the State sovereignty over a certain territory.²¹ Consequently, allowing application of foreign law in administrative matters will interfere with this concept of sovereignty, as the State will thereby admit that matters of public law are governed by certain *foreign* rules within its own territory.²² Klaus Vogel summarised these dogmatic reservations in his contribution in the *Encyclopedia of Public International Law* in a laconic statement: “A choice-of-law is excluded in administrative matters.”²³

While the above-mentioned reservation is a classic one and is constructed from the perspective of a State, more recently presented considerations do accent the viewpoint of

¹⁸ NEUMEYER, K. *Internationales Verwaltungsrecht*. p. 295; GROF, A. Zum “internationalen Verwaltungsrecht”. *Juristische Blätter*. 1986, Vol. 108, No. 2, p. 213.

¹⁹ VOGEL, K. *Administrative Law: International Aspects*. pp. 4 et seqq; OEHLER, C. *Kollisionsordnung des Allgemeinen Verwaltungsrechts*. Tübingen: Mohr Siebeck, 2005, pp. 122 et seqq. (here, the author provides for classification of situations, where “delimiting law” can be applied: (a) extraterritorial execution of domestic law abroad, (b) execution of foreign law in inland by a domestic administrative authority, (c) execution of foreign law in inland by a foreign administrative authority); HANDRLICA, J. Foreign law as applied by administrative authorities: Grenznormen revisited. *Zbornik Pravnog fakulteta u Zagrebu*. 2018, Vol. 68, No. 3, pp. 193 et seqq. (a study on application of foreign administrative law with respect to the provisions of EU law).

²⁰ VOGEL, K. *Administrative Law: International Aspects*. p. 4.

²¹ BECKER, F. Gebiets- und Personalhoheit des Staates. In: J. Isensee – P. Kirchhof (eds.). *Handbuch des Staatsrecht, Band XI., Internationale Bezüge*. Heidelberg: C. F. Müller, 2013, pp. 194 et seqq.

²² HEMLER, A. *Die Methodik der „Eingriffsnorm“ im modernen Kollisionsrecht*. p. 62.

²³ VOGEL, K. *Administrative Law: International Aspects*. p. 4 (nevertheless, this contribution of Vogel provides for several exemptions from this rule; further, Vogel correctly points, that a foreign administrative law can be also applied by courts in the matters of private law).

a citizen.²⁴ From his perspective, the administrative authorities are strictly bound by (municipal) administrative law and can execute only obligations, arising from this law.²⁵ From the viewpoint of a citizen, it would be in contradiction to the principle of legality of administration, if several frameworks of administrative law would be applicable towards him. Further, the requirement of publicity of such applicable law is being accented. Any application of foreign law in administrative matters would presume, that such law is being made public in inland, including any amendments and alternations.²⁶ Finally, the necessity for appropriate and functional judicial protection represents a major limit to any application of foreign law in administrative matters.²⁷ Such application would presume capability of administrative courts to review not only domestic administrative law, but also foreign one.

All these reservations towards application of foreign law by domestic administrative authorities imply, that the concept of unity is being considered as a general principle of international administrative law.²⁸ In this concern, some authors explicitly deny any possibility for application of foreign law in administrative matters.²⁹ So, the starting point of the further analysis is following: When dealing with a foreign element, the domestic administrative authorities do apply the same (municipal) administrative law, as they apply *vis-à-vis* domestic cases.³⁰

II.2. Application of foreign law by domestic authorities

Despite dogmatic reservations, a necessity to require application of foreign law in administrative matters may arise. In some cases, legislator deems it appropriate to apply the law of the home State with regard to a certain subject.³¹ In other cases, such requirement may arise from an international agreement. The only possible solution, how to reconcile such necessity with the reservations outlined above is to include requirement of application of foreign law into corresponding delimiting norm of (municipal) administrative

²⁴ KOPP, F. Kollisionsrecht im öffentlichen Recht. *Deutsches Verwaltungsblatt*. 1967, Vol. 99, No. 10, p. 469; PAPIER, H., OLSCHESKI, B. Vollziehung ausländischer Verwaltungsakte. *Deutsches Verwaltungsblatt*. 1976, Vol. 108, No. 10, p. 477; ACHTERBERG, N. *Allgemeines Verwaltungsrecht*. Heidelberg: C. F. Müller, 1982, p. 38; LINKE, C. *Europäisches Internationales Verwaltungsrecht*. pp. 12 et seqq.; OEHLER, C. *Kollisionsordnung des Allgemeinen Verwaltungsrechts*. pp. 314 et seqq.

²⁵ LINKE, C. *Europäisches Internationales Verwaltungsrecht*. pp. 12 et seqq.

²⁶ OEHLER, C. *Kollisionsordnung des Allgemeinen Verwaltungsrechts*. p. 315.

²⁷ BALDUS, M. *Transnationales Polizeirecht*. Baden Baden: Nomos, 2001, p. 239.

²⁸ NEUMEYER, K. *Internationales Verwaltungsrecht*. p. 295.

²⁹ Eg. SCHNYDER, A. *Wirtschaftskollisionsrecht: Sonderanknüpfung und extraterritoriale Anwendung wirtschaftsrechtlicher Normen unter Berücksichtigung von Marktrecht*. Zürich: Schulthess, 1990, p. 45; and more recently HEMLER, A. *Die Methodik der „Eingriffsnorm“ im modernen Kollisionsrecht*. p. 62. An opposite argument was presented by BLECKMANN, A. *Die völkerrechtlichen Grundlagen des internationalen Kollisionsrechts*. Köln: C. Heymanns, 1992, p. 36.

³⁰ So explicitly in RUDOLF, W. Territoriale Grenzen der staatlichen Rechtsetzung. In: *Referate und Diskussion der 12. Tagung der Deutschen Gesellschaft für Völkerrecht in Bad Godesberg*. Heidelberg: C. F. Müller, 1973, p. 13.

³¹ In this respect, Klaus Vogel refers to a short period at the end of the 1970s, when Soviet Union taxed foreign companies trading in the Soviet territory according to their own domestic tax law, before a special Soviet statutory laws governing taxation of “capitalist” enterprises were enacted. VOGEL, K. *Administrative Law: International Aspects*. p. 4.

law.³² In order to guarantee legal certainty, such delimiting norms must be explicit enough to provide for its goal.³³

Following example can illustrate the issue. The statutory law, governing the area investment enterprises and investment funds, provides for a special provision, entitled “Violation of the foreign law”.³⁴ The domestic authority is here required to take necessary measures *vis-à-vis* a holder of a foreign licence, who is providing investment services in our territory. Such measures are to be taken in the case, the competent authority of the home State of such licence holder will notify to the National Bank, that this licence holder is violating his notification obligations, provided by the applicable law of the home State. Here, the National Bank has, *inter alia*, competence to “to restrict the scope of the licence, or to stipulate requirements for pursuing of certain activities.”³⁵ If applying this competence, the domestic authority will be required to open a review proceeding with concern to the foreign licence in order to “restrict its scope”. In such review proceeding, violation of the foreign law must be proven. Thus, the discussed provision provides for a possibility, that the domestic administrative authority will apply foreign (administrative) law.

With respect to the issue of application of foreign law, one must bear in mind, that a foreign law is never capable to provide of any such requirement *vis-à-vis* domestic administrative authorities. It is the (municipal) administrative law, which must provide for application of any foreign law.³⁶

In this concern, Klaus Vogel once argued,³⁷ that “it would seem more appropriate (and more in accordance with legal philosophy) to interpret this type of reference as one of substantive law, as if enacting a domestic rule which is *similar* (emphasis added) to the foreign one.” However, this line of argumentation did not gain much reflection in the later scholarship,³⁸ which argued that a delimiting norm constitutes a form of a *renvoi* (*Verweisung*). Thus, such norms do limit application of (municipal) administrative law and enlarge applicability of foreign law into our legal order. While such foreign law is to be applied by domestic administrative authorities, there is no precedence of this foreign law over the domestic law. Both are to be treated equal in these cases.³⁹

II.3. Application of foreign law by foreign authorities, acting in inland

The concept of unity is being further challenged in those situations, a host State is allowing a foreign authority to act in his own territory. When acting in the jurisdiction of the

³² HOFFMANN, G. Internationales Verwaltungsrecht. In: I. Münch (ed.). *Besonderes Verwaltungsrecht*. Berlin: De Gruyter, 1985, p. 851; LINKE, C. *Europäisches Internationales Verwaltungsrecht*. p. 127; OEHLER, C. *Kollisionsordnung des Allgemeinen Verwaltungsrechts*. pp. 146 et seqq.

³³ HOFFMANN, G. *Internationales Verwaltungsrecht*. p. 851.

³⁴ Act No. 240/2013 Coll., § 571.

³⁵ Act No. 240/2013 Coll., § 539 Par. h.

³⁶ SCHNYDER, A. *Wirtschaftskollisionsrecht*. p. 62.

³⁷ VOGEL, K. *Administrative Law: International Aspects*. p. 4.

³⁸ RUDOLF, W. *Territoriale Grenzen der staatlichen Rechtsetzung*. pp. 37 et seqq.; HOFFMANN, G. *Internationales Verwaltungsrecht*. pp. 865 et seqq.; GROF, A. *Grundsatzfragen des internationalen Verwaltungsrechts*. pp. 319 et seqq.; OEHLER, C. *Kollisionsordnung des Allgemeinen Verwaltungsrechts*. pp. 146 et seqq.

³⁹ OEHLER, C. *Kollisionsordnung des Allgemeinen Verwaltungsrechts*. p. 148.

host State, the foreign authority must be in principle required to apply (municipal) administrative law of this host State. This stems from the concept of sovereignty of the host State over his territory. At the same time, such foreign authority is bound by requirements of his own legal framework to apply its own administrative law. This conflict must be reconciled by a delimiting norm, providing for the law applicable in these situations.⁴⁰

Regularly, such delimiting norms are provided by international agreements on police co-operation, which provide for competences of foreign police and custom officials in the territory of the other State.⁴¹ Here, the international agreement has to explicitly address the issue of law, which is to be applied by such officials. Consequently, delimiting norms can provide, that a foreign authority is applying its own public law. The Agreement on Establishment of a Joint Centre of Police and Custom Co-operation “Petrovice-Schwandorf” of 2012 provides, that German police and custom official can act in the branch of the Joint Centre in our territory, “in accordance with their own legal framework and subordinated to their own jurisdiction”.⁴² Also the consular officers of another State are following their own domestic law, when acting in the administrative matters in inland.

Here, the 2nd section can be summarised briefly. The concept of unity represents a general principle in international administrative law. That means, that the administrative authorities in inland must in principle apply the (municipal) administrative law. However, this law can provide for application of foreign administrative law by a corresponding delimiting norm. In such rare situations, foreign law can be applied in administrative matters in inland – by both domestic and foreign administrative authorities.

III. QUALIFICATION PROBLEM

After clarifying the issue of law applicable to administrative relations with a foreign element, the problem is qualification must be addressed. The qualification problem arises in those situations, domestic administrative authority must deal with a foreign administrative act. The problem reflects the fact, any uniform understanding of the “administrative act” is missing. This opens the doors for different qualifications of an act in various jurisdictions. In her pioneering dissertation, Hannah Schwarz labelled the qualification problem as being a result of divergencies of “legal and administrative traditions of the respective jurisdictions”.⁴³

Following examples can illustrate the issue: Firstly, the statutory law, governing the field of road traffic, provides⁴⁴ that the domestic administrative authority is in certain situations required to replace a foreign driving licence, issued by a EU Member States, for the domestic one. In this respect, it is provided, that “in case of doubts about the validity of the foreign

⁴⁰ Ibid., pp. 315 et seqq.

⁴¹ BALDUS, M. *Transnationales Polizeirecht*. Baden Baden: Nomos, 2001, pp. 239 et seqq.

⁴² The Agreement between the Ministry of Interior of the Czech Republic and the Ministry of Interior of the Federal Republic of Germany on Establishment of a Joint Centre of Police and Custom Co-operation “Petrovice-Schwandorf” of 13th February 2012, 22/2013 Coll. of International Agreements, Art. 2 Par. 2.

⁴³ SCHWARZ, H. *Die Anerkennung ausländischer Staatsakte*. Berlin: Grünewald, 1935, p. 30.

⁴⁴ Act No. 361/2000 Coll., § 116 Par. 1.

driving license”, the domestic administrative has to approach the diplomatic representation of the home State.⁴⁵ Thus, in evaluation of the validity of the foreign driving licence, the domestic authority has to qualify such licence. Secondly, the Visa Code provides that visa for transit or permanent stay for third country nationals in the territory of the EU are to be issued by consulates of the respective Member States.⁴⁶ An application shall be examined and decided on by the consulate of the competent Member State in whose jurisdiction the applicant legally resides. Further, the Visa Code provides for rules on annulment and revocation of the issued visa.⁴⁷ Here, it is provided, that a visa shall – in principle – be annulled by the competent authorities of the Member State which issued it. However, in specific cases, a visa may be annulled by the competent authorities of another Member State.⁴⁸ When using this competence, the domestic authority will be required to qualify the foreign visa. Thirdly, the statutory law, governing the field of peaceful uses of nuclear energy provides, that the domestic authority can issue authorisation for a transport of radioactive waste abroad, when a positive statement of the destination and transit States do exist.⁴⁹ Consequently, a potential review of such authorisation will imply necessity to qualify these foreign statements.

In all these situations, the competent authorities can choose among three different approaches: (a) to classify the foreign act, based on the law of the home State (*lex causae*), (b) to use (municipal) administrative law, i.e. the administrative law of the host State (*lex fori*) or (c) to qualify respective foreign act as an autonomous element (*autonomous qualification*).

III.1. Lex causae

“While being recognised in inland, a foreign administrative act cannot be considered to represent an act of the domestic administration.”⁵⁰ Consequently, a foreign administrative act will *remain* – even after establishing effects *vis-à-vis* in inland – to represent an act issued under the legal framework of its home State. Legality of such a foreign administrative act can in principle be reviewed only pursuant to the legal framework of the foreign framework. This doctrinal approach has been shared by majority of legal scholarship.⁵¹

Taking this doctrinal approach into consideration, one may argue for the use of the *lex causae* in any cases where the administrative authorities of the host State will address a foreign act. Such approach will have two advantages: Firstly, it reflects the fact that

⁴⁵ Act No. 361/2000 Coll., § 116 Par. 3.

⁴⁶ Regulation (EC) No. No 810/2009, Art. 4.1.

⁴⁷ Regulation (EC) No. No 810/2009, Art. 34.1.

⁴⁸ *Ibid.*

⁴⁹ Act No. 263/2016 Coll., § 144 Par. 2.

⁵⁰ NEUMEYER, K. *Internationales Verwaltungsrecht*. p. 348.

⁵¹ WEISS, K. *Die Anerkennung ausländischer Verwaltungsakte*. Flenje: Verlag Seesen, 1932, pp. 70 et seqq.; SCHWARZ, H. *Die Anerkennung ausländischer Staatsakte*. pp. 30 et seqq.; VOGEL, K. *Qualifikationsfragen in Internationales Verwaltungsrecht*. *Archiv des öffentlichen Rechts*. 1959, Vol. 84, No. 3, pp. 54 et seqq.; KÖNIG, K. *Die Anerkennung der ausländischen Verwaltungsakten*. Köln: Carl Heymann Verlag, 1965, pp. 19 et seqq. GROF, A. *Grundsatzfragen des internationalen Verwaltungsrecht*. pp. 305 et seqq.; DELLA CANANEA, G. *From the recognition of foreign acts to trans-national administrative procedures*. In: R. Arana Munoz (ed.). *Recognition of Foreign Administrative Acts*. New York: Springer, 2016, pp. 225 et seqq.

a recognised foreign administrative act still represents the act of the home State. Secondly, such approach can address potential gaps between legal features existing in both the State of origin and the State of recognition.⁵²

However, application of the *lex causae* may cause also major difficulties. The concept of unity is requiring that administrative authorities apply exclusively their own (municipal) administrative law. Under this situation, the administrative authorities can only hardly qualify a foreign administrative law under the *lex causae*. Such qualification would be in general terms possible – however only based on an explicit delimiting norm (*renvoi*), provided in the applicable statutory law.⁵³ Reflecting this obstacle, legal scholarship has argued⁵⁴ that the *lex causae* cannot, in principle, represent a solution of the qualification problem in the cases discussed.

III.2. Lex fori

When approaching the qualification problem from the perspective of the concept unity, one may come easily to a conclusion, that the domestic administrative authority must always use their own law (i.e. *lex fori*). The scholarship has traditionally argued⁵⁵ for this approach, when addressing the qualification problem. Unless a *renvoi* to foreign law is provided, using the *lex fori* continues to represent the only viable option to comply with the concept of unity. Thus, when applying the *lex fori* for qualification of a foreign administrative act, the competent administrative authority of the host State will be required to find a corresponding form of administrative measure⁵⁶ in the municipal administrative law – a feature that has been labelled *Wirkungsangleichung* (or *Wirkungsgleichstellung*) in German scholarship.⁵⁷

However, also this approach has several disadvantages: Due to the absence of harmonisation in administrative law, the use of the *lex fori* can lead to precarious situations, such as when an act will be qualified differently in the home State and in the host State. Such situations will represent an inevitable result of a *Wirkungsangleichung*, as for the competent administrative authority of the host State, it will not always be possible to find an identical administrative measure as provided by the *lex causae*. An act that qualifies as an “administrative act” in one jurisdiction, may qualify as a “quasi-administrative act”, or a pure “statement” in the other.⁵⁸ In this respect, Kerstin Reinacher

⁵² KEGEL, G., SCHURIG, K. *Internationales Privatrecht*, 9th ed. München, 2004, p. 341.

⁵³ HANDRLICA, J. Qualification Problem in Administrative Law. *Casopis pre pravni vedu a praxi*. 2020, Vol. 28, No. 3, pp. 337 et seqq.

⁵⁴ KÖNIG, K. *Die Anerkennung der ausländischen Verwaltungsakten*. p. 19.

⁵⁵ NEUMEYER, K. *Internationales Verwaltungsrecht*. p. 348; SCHWARZ, H. *Die Anerkennung ausländischer Staatsakte*. p. 32; KÖNIG, K. *Die Anerkennung der ausländischen Verwaltungsakten*. p. 20.

⁵⁶ KROPHOLLER, J. *Internationales Privatrecht*, 6th ed. Tübingen: Mohr Siebeck, 2006, § 16.1., (with respect to application of *lex fori* in international private law) and KMENT, M. *Grenzüberschreitendes Verwaltungshandeln: Transnationale Elemente deutschen Verwaltungsrechts*. Tübingen: Mohr Siebeck, 2010, pp. 259–260. (with respect to application of *lex fori* with respect to foreign administrative acts).

⁵⁷ BURBAUM, S. *Rechtsschutz gegen transnationales Verwaltungshandeln*. Baden Baden: Nomos Verlag, 2003, p. 31; MENZEL, J. *Internationales Öffentliches Recht*. pp. 336 et seqq.

⁵⁸ HANDRLICA, J. *A Treatise for International Administrative Law*. p. 472 (see in particular footnote 57).

argued⁵⁹ that a hypothetical situation can arise when the administrative law of the host State will be unable to qualify the nature of the foreign administrative act, due to the absence of a corresponding institute.

Consequently, neither application of the *lex fori* can be considered a flawless approach.

III.3. Autonomous qualification

Taking the problems arising by the application of both the *lex causae* and the *lex fori* to the qualification problem, one may argue that a foreign administrative act represents an *autonomous* feature. While this line of argument was, with respect to foreign administrative acts, elaborated⁶⁰ by Klaus König. The concept of *autonomous* qualification presumes the existence of an autonomous legal form, existing isolated from the (municipal) administrative law.

However, this approach also implies severe inconsistencies.⁶¹ The concept of unity implies, that a foreign administrative act is always product of the law, applicable in the home State. Due to lack of any harmonisation of in this area, one can only barely argue, that both two foreign administrative acts – being issued in two different jurisdictions – do represent the same autonomous feature.

Thus, the concept of unity implies, that the only viable option with respect to the qualification problem is represented by the *lex fori*. Theoretically, a delimiting norm can provide for a *renvoi* and require qualification pursuant the foreign law.

IV. EXTRATERRITORIAL EXTENSIONS

In previous sections, attention was paid to the enforcement of administrative law in inland. This section aims to address those cases, when domestic administrative authorities are acting abroad. The issue deserves initial clarification: Statutory laws do frequently refer to certain facts that arose from outside the territory of the State. Thus, (municipal) administrative law may oblige a domestic source of environmental pollution to use certain counter-measures, irrespective of whether the pollution occurs in the inland or abroad. It may also take periods of employment into consideration for the purposes of social security payments. The statutory laws in the area of financial law do regularly take into consideration certain taxes, paid by the inland taxpayer abroad. Such territorial extensions are frequently referred to as “extraterritorial” applications of administrative law, etc.⁶²

While these “extraterritorial applications” are in principle allowed under international public law, a clear border is given by the limit between the features of ‘inland’ and ‘abroad’ with respect to acting of administrative authorities in the territory of another State.⁶³ Any

⁵⁹ REINACHER, K. *Die Vergemeinschaftung von Verwaltungsverfahren am Beispiel der Freisetzungsrichtlinie*. Berlin: Taschenbuch, 2005, pp. 65 et seqq.

⁶⁰ KÖNIG, K. *Die Anerkennung der ausländischen Verwaltungsakten*. p. 20.

⁶¹ MENZEL, J., *Internationales Öffentliches Recht*. pp. 336 et seqq.

⁶² HANDRLICA, J. *A Treatise for International Administrative Law*. p. 471.

⁶³ VOGEL, K. *Der räumliche Anwendungsbereich der Verwaltungsrechtsnorm*. Frankfurt am Main: Alfred Metzner, 1965, pp. 415 et seqq.

administrative activity of the State in the sovereign territory of other State will basically be *illegal*. In this respect, this section aims to deal with those cases, when the (municipal) administrative law provides, that domestic administrative authority must act abroad. These features will be referred to as “extraterritorial extensions” in this section.

IV.1. The feature of “unilaterality” of delimiting norms

We can identify several examples of extraterritorial extensions in out (municipal) administrative law. The statutory law, governing the field of banking provides, that “activities of (in inland authorised) banks in the territory of other States are under the administrative surveillance of the National Bank; including control in their premises.”⁶⁴ Thus, beside the competence of the National Bank to control (in inland authorised) banks in our territory, the (municipal) administrative law gives the National Bank also competence to act abroad. Police and customs officials do possess similar competences to act abroad in certain scope, provided by respective international agreements.

The issue of extraterritorial extensions has a direct link to one of the basic features of the delimiting norms, which is referred to as “unilaterality.”⁶⁵ The concept of “unilaterality” reflects the fact – given by the principle of equality of the States, as provided by international public law – that (municipal) administrative law is capable merely to govern administrative relations with respect to inland. Consequently, delimiting norms can provide, that a foreign authority will act in inland (a foreign supervising authority will control the branches of foreign banks in inland, a police official can control passengers in an international train in inland, etc.). However, a delimiting norm, provided by (municipal) administrative law cannot itself constitute the power of a domestic authority to act abroad.⁶⁶ Such powers must be always provided by a corresponding delimiting norm, existing in the host State (i.e. in the foreign law).⁶⁷

Thus, the feature of “unilaterality” of delimiting norms implies in reality that the domestic authority (National Bank, police or customs officials etc.) can act in the foreign territory *only* based on a delimiting norm, provided in the law applicable in this territory. Consequently, extraterritorial extensions in (municipal) administrative law are always conditioned by a feature of *reciprocity*.⁶⁸ Without a delimiting norm, provided by the administrative law of the host State, any enforcement of extraterritorial extensions will be in contrary to international public law.

⁶⁴ Act No. 21/1992 Coll., § 25 Par. 1.

⁶⁵ SIEHR, K. *Ausländische Eingriffsnormen im inländischen Wirtschaftskollisionsrecht. Rabels Zeitschrift für ausländisches und internationales Privatrecht*. 1988, Vol. 52, pp. 41 et seqq. (here, the author refers about “introvert unilaterality of delimiting norms”); NIEDOBITEK, M. *Das Recht der grenzüberschreitenden Verträge*. Tübingen: Mohr Siebeck, 2001, pp. 366 et seqq.; SIEMS, M. *Die Harmonisierung des Internationalen Deliktsrechts und die »Einheit der Rechtsordnung«*. *Recht der internationalen Wirtschaft*. 2004, Vol. 9, No. 6, pp. 662 et seqq.; DUTTA, A. *Durchsetzung öffentlichrechtlicher Forderungen ausländischer Staaten durch deutsche Gerichte*. Tübingen: Mohr Siebeck, 2006, pp. 399 et seqq.

⁶⁶ OEHLER, C. *Kollisionsordnung des Allgemeinen Verwaltungsrechts*. p. 319.

⁶⁷ HEMLER, A. *Die Methodik der „Eingriffsnorm“ im modernen Kollisionsrecht*. p. 62 (providing also for overview of existing arguments against the concept of “unilaterality”).

⁶⁸ SCHNYDER, A. *Wirtschaftskollisionsrecht*. p. 62.

IV.2. Domestic authorities, acting abroad

The feature of extraterritorial extensions represents another challenge for the concept of unity. If acting abroad, the domestic administrative authority must – in principle – apply its own (municipal) administrative law.⁶⁹ Consequently, extraterritorial extensions will cause an “export” of (municipal) administrative law abroad. At the same time, when analysing the topic from the viewpoint of the host State, the cases of extraterritorial extensions would imply application of foreign law in its territory.⁷⁰ However, such applications are permitted only, when a corresponding delimiting norm, provided by the (municipal) administrative law of the host State so provides.⁷¹

This dormant conflict is to be reconciled explicitly. Several approaches are possible. Firstly, a delimiting norm may provide, that domestic authority will apply its own (municipal) administrative law, when acting abroad.⁷² This first approach will imply application of foreign law in the territory of the host State. Secondly, a delimiting norm may call for application of the law of the host State. Currently, this is the case in many international agreements, governing the field of police and customs cooperation. Thus, the Agreement between the Czech Republic and Austria on Police Cooperation of 2005 provides, that “police officials are required to act pursuant to the provisions of this Agreement and pursuant to the law of those State, where they are acting”.⁷³ Also the Protocol on Establishment of Joint Police Patrols in the Seaside Resorts in Bulgaria provides, that the domestic police officials, serving in these seaside resorts during the touristic season, are “subordinated to domestic (i.e. Bulgarian) legal framework”.⁷⁴ Thirdly, by the absence of explicit delimiting norm, one can argue, that when acting abroad, a domestic authority must always apply the law of the host State. Such interpretation would be the implication of the sovereignty of the host States and its exclusive jurisdiction over its territory. At the same time, the third presented constellation is not desirable, as the (municipal) administrative law of the home State will still require, that the authority applies its own law.⁷⁵ Lastly, a very complicated situation may occur by existence of conflicting delimiting norms.⁷⁶

Consequently, extraterritorial exemptions do represent another case, when domestic administrative authorities may be required to apply foreign law.

⁶⁹ VOGEL, K. *Der räumliche Anwendungsbereich der Verwaltungsrechtsnorm*. p. 415; RUDOLF, W. *Territoriale Grenzen der staatlichen Rechtsetzung*. p. 13; BALDUS, M. *Transnationales Polizeirecht*. p. 236; OEHLER, C. *Kollisionsordnung des Allgemeinen Verwaltungsrechts*. pp. 316 et seqq.

⁷⁰ OEHLER, C. *Kollisionsordnung des Allgemeinen Verwaltungsrechts*. pp. 149 et seqq.

⁷¹ *Ibid.*

⁷² See example given in the footnote 42.

⁷³ The Agreement between the Czech Republic and Austria on Police Co-operation of 14th July 2005, 65/2006 Coll. of International Agreements, Art. 11 Par. 4.

⁷⁴ The Protocol between the Ministry of Interior of the Czech Republic and the Ministry of Interior of Bulgaria on Establishment of Joint Police Patrols in the Seaside Resorts in Bulgaria of 19th June 2005, 38/2014 Coll. of International Agreements, Art. 4 Par. 2.

⁷⁵ OEHLER, C. *Kollisionsordnung des Allgemeinen Verwaltungsrechts*. p. 150.

⁷⁶ I.e. the delimiting norms in the (municipal) administrative law of the home State will require application of the law of the host State, while the delimiting norm in the the (municipal) administrative law of the host State will require application of the law of the home State.

IV.3. Foreign authorities, applying our administrative law abroad

Finally, the problem of application of our (municipal) administrative law by foreign authorities must be mentioned. Such situation may arise as consequence of a delimiting norm, provided in a foreign law. Such delimiting norm may require a foreign administrative authority to apply our law in certain situations, when a specific foreign element arises.

In general, problems arising will be similar, as by application of foreign law by our administrative authorities.

V. CONCLUSIONS

As a special (sub)discipline of (municipal) administrative law, international administrative law is dealing with those administrative relations, where a foreign element arises. In this regard, the norms of international administrative law are decisive for decision on the law applicable to situations arising.

In contrast to private law, where the States traditionally recognise normative equality of various regimes of private law, the concept of unity of the *forum* and the *law* requires with respect to administrative law, that domestic administrative authorities apply exclusively (municipal) administrative law. This is applicable regardless, whether the subject of decision making is a case exclusively of domestic nature, or a matter where a foreign element appears. Also, in principle, the domestic authority is required to apply (municipal) administrative law regardless whether it acts in inland, or abroad.

A delimiting norm, which is provided by provisions of (municipal) administrative law can cause deviations from the above-mentioned rules. So, a delimiting norm may require the domestic administrative authority to apply foreign law in certain situations. Also, a delimiting norm can provide, that a foreign authority will act in our territory, while applying its own (i.e. foreign) law. If a delimiting norm does not provide otherwise, the concept of unity also implies, that a domestic authority has to always apply the *lex fori*, when qualifying the character of foreign acts.

A vice versa, a foreign delimiting can provide for an extraterritorial extension of competences of domestic administrative authorities. Here, the domestic authorities will be also – in principle – required to apply our (municipal) administrative law, unless a delimiting norm would provide otherwise (i.e.).