Conference on

EFFECTIVE JUSTICE: CHALLENGES AND PRIORITIES FOR (ADMINISTRATIVE) COURTS

in commemoration of the establishment of the Division of Administrative Courts of the Lithuanian Association of Judges, Law Institute of Lithuania and the Law Faculty of Vilnius University

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The European Network of Constitutional Adjudication: Any Lessons for Administrative Courts?

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The Association of European Administrative Judges, by networking domestic judges and discussing comparatively issues of effective justice, provides an important impetus to the development of European law. In my talk, I will first show the role of such networks for the unfolding of the European legal space and their impact on our understanding of European law. Second, I will sketch more closely the network of constitutional courts which should help to better reflect on the func-

tions of the Association of European Administrative Judges. Third, I will discuss issues of comparative law: how can judges from different jurisdiction tap on the experience of others, for example when they wish to render effective justice, the very topic of our conference.

A. Why and how the AEAJ develops European law

European law must be understood as much broader than EU law. We cannot allow that EU law paternalizes European law. A fitting concept of European law, developed already in the 1960s, embraces certainly EU law, but also the European Convention on Human Rights, domestic laws enacting or responding to such supranational law, as well as European comparative law.[1] To bring the point home: the CJEU decides on EU law, the Lithuanian Supreme Court on Lithuanian law, but both on European law as soon as their decisions affect the European legal space, for which they share responsibility, Article 4 TEU.

The concept of European law is neither innocent nor neutral. For many decades, the underlying idea which brought all these different legal orders together was the thrust to advance European integration. This, however, seems outdated as the sole focus. It appears erratic today to construe elements that *resist* ever closer union—such as the principle of subsidiarity, the protection of identity, limits on competences, the exit option—as being 'outside' European law. This is particularly true because European law includes domestic law, which is more pronounced than EU law regarding this aspect. One of European law's main debates is on the limits of

[1] Hermann Mosler, 'Begriff und Gegenstand des Europarechts' (1968) 28 ZaöRV 481, 484; similarly Gian Piero Orsello, Autonomia e originalità del diritto europeo, in: idem (ed), L'Italia e Europa, Volume II (Abete, Rome, 1966) 419, 422; more recently, Pedro Cruz Villalón, 'European Essentials: A Contribution to Contemporary Constitutional Culture', in Hermann-Josef Blanke, Pedro Cruz Villalón and Tonio Klein (eds), *Common European Legal Thinking. Essays in Honour of Albrecht Weber* (Springer, Heidelberg, 2015) 27, 28; Bernard Stirn, *Vers un droit public européen* (Montchrestien, Paris, 2012) 149.

European integration.[2] The old concept of European law that only includes elements furthering integration thus appears both antiquated and inappropriate. For that reason, we better see the objective of organizing a European legal space at the core idea of European law, much in sync with the leading idea of the Association of European Administrative Judges. The objectives of your statute mirror this idea of European law, when it states to aim "to advance legal redress for individuals vis-à-vis public authority in Europe and to promote the legality of administrative acts, thereby helping Europe to grow together in freedom and justice."

Let us consider for a moment how innovative this concept of European law is. Approaching legal phenomena with the concept of European law differs from traditional legal thinking. The concept brings together norms, doctrines, case law, scholarship that are conventionally attributed to different legal orders and held apart. The different cut of European law is not a side effect but a core feature of the concept. It articulates the manifold experiences of the deep interaction of the various legal phenomena, as we will study throughout this conference. Indeed, in this set-up, the concept frames not only of today's legal experience, but also of today's theories such as European 'multilevel constitutionalism', European composite constructions, most strands of European legal pluralism or European network theories, and not least European federalism. Though these theories differ on important issues, all see the said legal orders so deeply entangled that their entanglement forms part of their identity. Such interconnection, of which your association is an important part, is considered a defining feature of European law.

[2] This is the core issue at the origin of European legal pluralism, the 1993 decision by the German *Bundesverfassungsgericht* on the Maastricht Treaty (BVerfGE 89, 155); Julio Baquero Cruz, 'The Legacy of the Maastricht-Urteil and the Pluralist Movement' (2008) 14 European Law Journal 389.

Horizontal networking as provided by the Association of European Administrative Judges adds a very important dimension to European law. Once, domestic law, as an expression of national sovereignty, created a self-contained regime of legal communication. Contacts with public institutions of other countries were channelled through the foreign ministry. Today, it is normal for domestic office holders to engage directly with their European peers, often within institutionalized networks, as we do at this conference.

This horizontal opening of national legal spaces transcends the original understanding of European law which was focussed on the vertical relationship between one domestic legal order and EU or Council of Europe institutions. The new horizontal focus stresses the comparative dimension of European law, becoming a routine experience for many, as today at this conference. This increases the need to gain some understanding of various legal systems, not least because institutionalized networks lead to peer review. That is what happens at this conference. So how to think about this? Let see this on the example of constitutional courts.

B. The Institutionalized Network of Constitutional Courts[3]

1. The Phenomenon

While claims of a 'global community of judges' remain speculative, there are sound indications that judges within the European legal space are truly coming together. The corresponding interaction has seen a substantial increase, even institutionalization, over the past years. Many judges stand in close contact with col-

[3] This part builds on Armin von Bogdandy, Peter M. Huber, Christoph Grabenwarter, § 95 Verfassungsgerichtsbarkeit im europäischen Rechtsraum, in: idem (eds.), Handbuch Ius Publicum Europaeum, Band VI, Verfassungsgerichtsbarkeit in Europa: Institutionen (C. F. Müller, Heidelberg, 2016),1.

leagues from other Member States. Many judges regularly inform themselves and counsel each other in congresses, during visits, and via e-mail. There is evidence for further forms of informal contact between judges of different courts. One can interpret this practice as a network from a sociological perspective, as an association (*Verbund*) from a legal perspective, and as legal comparison from a methodological one.

Nowadays, many national apex courts make English versions of important judgments available online to be heard outside of their national constituencies. The reasons for this approach are yet to be investigated. There have been claims that the stature of a court within its country increasingly depends on its international recognition. But there is also a genuinely European dimension. By disseminating their verdicts in other states and languages, the constitutional courts strengthen their European interaction, for these verdicts are an essential part of the communication that connects them to one another.

It is safe to say, and I quote the judge at the Austrian constitutional court Grabenwarter, that the contemporary practice of constitutional jurisdiction is not isolated any more, but rather embedded in a broader European process, a process that develops the European legal space.

Such embedding of constitutional courts' decision making can be seen as serving five functions: of connection, of translation, of legitimation, of filling lacunae in legal protection, and, last but not least, of controlling the Union and the European Court of Human Rights.

The *function of connection* reflects that constitutional courts are a particularly im-

portant link between state courts and the European courts. Constitutional courts are often the first courts that have to deal with new jurisprudence from the ECJ or the ECHR and hereby assimilate new European jurisprudence into national legal discourses. Conversely, constitutional court verdicts form the basis for European court judgments when those European judgments are informed by comparative law.

The *function of translation* means that constitutional courts disseminate a 'European legal culture' within the national legal orders.

Constitutional courts furthermore carry out a *function of legitimation*. By receiving and referencing European decisions affirmatively, they accord them the additional legitimation that is often decisive for their reception by state courts.

Constitutional courts are also capable of *filling lacunae in legal protection*. It is their responsibility to bring the human rights of the Convention to fruition within the national law promptly. Where the jurisdiction of the ECJ ends, that is, regarding primary law, the courts have a supplementary function of legal protection indispensable in ensuring that membership in the EU does not conflict with ECHR requirements.

Finally, constitutional courts have a *function of control*, in particular at the interface between EU law and national law. They exercise this function of control mostly in two ways: first, through the so-called *identity review*, to protect substantive constitutional law and the core values of constitutional law. Part of this identity review consists in monitoring that the minimum standards of human rights protection are complied with. Second, the courts exercise the function through the ultra vires review, namely by offering protection against massive breaches of competence by European institutions.

Even if one court is perfectly capable of carrying out this function alone, acting

together promises to be more effective, as the development of the jurisprudence regarding limits and identity proves. If several constitutional courts develop similar lines of judicial reasoning in concert and in close temporal connection, they will not be suspected of treading a national and individual path.

At the same time, the horizontal interaction can foster common responsibility of Member States' courts for the European legal space, develop the orientations and working methods of the national judges, and promote a common terminology and thus a common legal culture. All in all, the networking of constitutional courts makes a particular contribution to the maturation of the European legal space, whose different legal orders are not federally bound together but have a loose connection characterized by legal pluralism.

For all these reasons, a close link between the national institutions entrusted with the administration of justice has become an important element of European law. To advance along that path, it is important to overcome language barriers, to further institutionalize the exchange of judgments, fortify a regular dialogue as we do today, and to develop legal concepts and patterns of argumentation which are used throughout Europe.

2. Fora, Institutions, and Problems

The Conference of European Constitutional Courts is a particularly important forum. It goes back to the year 1972 and was originally intended to strengthen constitutional jurisdiction in the socialist countries. At first, it consisted solely of exchanging experiences in a diplomatic fashion. Today and thanks to the European integration, it represents a network that brings together institutions with constitutional court competences from all over Europe into what is now a close interactive

relationship.

At least in official declarations, this institutionalized network has considerable effect. In his function as representative of the Conference of European Constitutional Courts, the president of the Lithuanian court, Jugde Kuris, even spoke of a 'community of European constitutional courts' during the fifth conference of Asian constitutional courts in 2007.

Then there are several further fora of the network of constitutional courts, of which I only mention the Venice Commission. Indeed, the Venice Commission is not only a forum but also a true institution that links the European constitutional courts. It is led by a President and consists mostly of current and former constitutional judges. It pursues two initiatives which substantively network European judges. The 'Bulletin on Constitutional Case-Law', published since 1993, contains summaries of important rulings from over 60 constitutional and supreme courts collected by the courts' liaison officers. CODICES, the InfoBase on Constitutional Case Law, is larger still and includes 7000 additional rulings in English and French. Its aim is to 'greatly facilitate comparative research by practitioners.' Developing its potential even further and more specifically is part of the agenda for the coming years.

It is a remarkable yet consistent factor of the diverse institutions of European network-building that these institutions do not overlap fully with membership in the European Union. This association of administrative judges is a good example. The domestic institutions use larger and smaller fora for their horizontal networking. This decreases the influence of the Union bodies and thus the danger of Union monopolization. Yet, there is no doubt that the courts of EU Member States form a sort of 'core group' that determines the networks' orientation.

The concept of a network should not conceal that there are significant asymmetries. For instance, the country reports for the XVIth Congress of the Conference of European Constitutional Courts show that the comparative perspective hardly ever extends to the jurisprudence of all involved constitutional courts but mostly follows a selective course. A few courts regularly play an important role—above all, the *Bundesverfassungsgericht*.[4] It is cited particularly often irrespective of linguistic or regional ties.[5]

The reasons for this asymmetry should be manifold. The president of the Czech constitutional court expounds that his court had 'identified' itself with the case law of the *Bundesverfassungsgericht*.[6] Such an identification may be explained with the German constitutional court's particularly strong role, one that other courts might seek to have as well. Furthermore, an analysis of the jurisprudence of all courts would overburden the financial resources, which are often meagre. To be sure, language and familiarity play an important part: the prominent role of the *Bundesverfassungsgericht* can also be traced back to Germany's weight and German financial research assistance. More than a few judges of other European states have spent research stays in Germany and speak the language. Legal orders with less conducive conditions are not in the limelight as often.

[4] Compare the Croatian, Hungarian, Polish, and Slovenian country reports for the XVIth Congress of the Conference of European Constitutional Courts, Verfassungsgerichtshof der Republik Österreich (ed), *The Cooperation of Constitutional Courts in Europe: Current Situation and Perspectives* (2014) 364 ff, 549 ff, 747 ff, and 923 ff.
[5] See Martin Gelter and Matthias Siems, 'Networks, Dialogue or One-Way Traffic ? An Empirical Analysis of Cross-Citations between Ten of Europe's Highest Courts' (2012) 8 Utrecht Law Review 88.
[6] Pavel Rychetský, 'Quelques remarques touchant à la coopération des Cours constitutionnelles en Europe et à leurs perspectives', in Verfassungsgerichtshof der Republik Österreich (ed), *The Cooperation of Constitutional Courts in Europe: Current Situation and Perspectives* (2014) 105.

Bearing in mind that the different constitutional orders are in principal of equal value, the ongoing network-building should keep a critical eye on these asymmetries. This stresses how important it is that all courts participate in the CODICES data bank and are willing to make English-language versions of their judgments available online.[7]

C. The Basis of European Comparative Jurisprudence

The entire network-building leads to comparison of domestic laws. It will be a substantial part of our conference. Indeed, European law scholarship has included from the beginnings the study of domestic laws as well as the outright comparison of domestic laws should lay bare common principles that (a) help interpret transnational law, (b) help institutions make law, and (c) help identify a common *ordre public*. Accordingly, comparative law so far mostly concerned the vertical relationship between the EU and Member States.

The horizontal network brings up the additional question on how to use the comparative argument when interpreting and applying domestic law. To what can a Portuguese judge use an insight gained at this conference from her Swedish colleague? To conclude, some thoughts on that.

There is no consensus with respect to the legal value of comparative legal arguments in domestic law. Usually, the use of comparisons falls into one of three different types: the support of a statement; the development of a conceptual framework meant to support a statement; and the delineation of contrasts.

[7] Examples for constitutional courts in smaller legal orders with difficultly accessible languages include the Lithuanian court, which publishes English-language versions of its rulings at http://www.lrkt.lt/en/court-acts/search/170, and the Slovenian one (http://www.us-rs.si/en/case-law/search-3441/) (last accessed on 27 April 2016).

These three types are first and foremost analytical. It remains to be seen whether and when a comparative argument is legally admissible and which value it has. If the comparison is meant to support a statement, the next step consists in verifying whether there is comparability. Difficult questions arise here; at the same time, it brings to the fore the most important specificity of legal comparison in the framework of European law.

The reason for this specificity is that unlike probably all other forms of legal comparison, the intra-European comparison occurs between legal orders bound together with a constitutional link backed up by strong institutions. Even if they remain different legal orders, all Member States legal orders do constitute *one* legal space. *All* legal acts of *any* public authority in the European Union are based at least on the common legal principles of Article 2 TEU. Article 2 TEU sets a constitutional standard that applies to any exercise of public authority in the European legal space, be it through the Union or through the Member States. As Article 7 TEU demonstrates, every activity of the Member States is to be measured against this standard. This common legal foundation establishes a presumption of fundamental compatibility.

Furthermore, all the bodies of public authority carry a common *legal* responsibility for this core of the European legal space pursuant to Article 4(3) TEU. Since a common responsibility can only be discharged dialogically in a pluralist structure, one can establish a presumption in favour of comparative argumentation as a building block for the development of common normativity. This is especially true for constitutional discourse and thus for constitutional jurisdiction, but it also applies to administrative law.

Accordingly, using comparative arguments within the European legal space is, in principle, legally sound. This validates a tremendous tool for having insights and ideas. Of course, this presumption that intra-European legal comparison is generally admissible does not translate into an ‘anything goes’. Each comparative argument must prove its worth in the context of the specific problem, as that of effective justice, which brought us together here in Vilnius. But a principle is set and a presumption established: any judge knows how useful that is for crafting sound arguments. Along these lines, the Association of European Administrative Judges with its comparative outlook helps to construe the European legal space and advances European law.