Identification of the participant

Nationality: PORTUGUESE

Functions: COUNCILLOR OF THE ADMINISTRATIVE SUPREME COURT OF PORTUGAL

Length of service: about 30 years

Identification of the exchange

Hosting jurisdiction/institution: CONSIGLIO DI STATO

City: ROME

Country: ITALY

Dates of the exchange: from the 3rd to the 14th of October 2011

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The exchange has taken place in the Council of State of Italy (Consiglio di Stato) in Rome and it was a really extraordinary experience for me.

1. To begin with I must refer the excellent programme that was carefully prepared by the President of the 1st Section of the Italian Council of State and scrupulously accomplished with the help of his colleagues, more precisely his colleagues of the 1st, the 3rd, the 4th and the 6th Sections of the Council.

As there were two participants in the exchange in the same period, a Belgian “auditeur” and me, we were asked before for our preferences in terms of juridical matters to treat during the exchange. That is why the exchange was especially directed to public contracts and urbanism/panning law matters (appalti ed urbanistica/edilizia).

Since both of us understand and speak the language of the host country, the chosen language was the Italian one.

As we can see in the programme annexed, during the two weeks I could attend several public hearings and also a plenary assembly (vide in the programme, the “udienzas” on the 4th, the 11th, the 12th and the 14th of October and the “adunanza plenaria” on the 10th of October), always with previous access to files, what gave me the opportunity to study the cases and a better comprehension of the main issues in discussion. I must say that the study of the files was generally made with the presence of a councillor of the respective Section (vide the programme, on the 5th and on the 6th October), in order to give us any explanation about the procedural rules and eventually about any jurisdictional controversy related to the cases in question.
During the exchange, I had also the opportunity to attend a seminar, organized by the Consiglio di Presidenza della Giustizia Amministrativa, in the context of «a corso de formazione per magistrati amministrativi» and a conference organized by the Consiglio di Stato itself.

The seminar took place just in the first day of the exchange (more precisely, on the 3rd of October, from 10.00 to 18.00), in Scuola Superiore dell’Amministrazione dell’Interno (a High School for administrative judges) and it was about « IL regime giuridico degli interventi edilizi dopo D.L. 78/2010 ed il D.L. 78/2011 tra semplificazione e responsabilizzazione» (the juridical regime of the participations on buildings after DL 78/2010 and DL 78/2011, between simplification and responsibility). Vide the programme in annex.

The conference took place in the second week of the exchange (more precisely, on the 12th of October, from 16.30 on), in Consiglio di Stato and it was about “ Il codice del processo amministrativo ad un anno dalla sua entrata in vigour” (the Code of Administrative Procedure, an year after coming into effect).

In the preparation of the exchange, it was not even forgotten a day for a guided art visit, what is really a compulsory matter, in Rome.

The art visit took place in the second week (more precisely, on the 13th October) and the chosen places were Museo Capitolini and Capela Sistina.

During the exchange, I had still the opportunity of having a guided art visit to “Palazzo Spada” (including the “Spada” gallery), which is the residence of Consiglio di Stato.

I also must say I was agreeably surprised with the social programme that was organized, extra the exchange programme, by the Presidents of all the Sections above mentioned. Besides the help that a social programme always provides in terms of an easier integration in a different country, it gave me the opportunity to change ideas with the Italian colleagues and the Belgian participant, about the problems that nowadays worry all the European citizens and also affect the administrative judicial systems of the State Members.

2. The hosting institution, the Consiglio di Stato, is an important organ of the Italian Judiciary, with a place in the Italian constitutional law.

In effect, the Consiglio di Stato derives its authority and power from the articles 100, 103 and 111 of the Constitution of Italy.

The Consiglio di Stato is the supreme organ of judicial administration and decides in second instance. Appeals to the Court of Cassation against decisions of Consiglio di Stato are permitted only for reasons of jurisdiction – vide art*111.

There is also a Consiglio di giustizia amministrativa per la Regione Siciliana, which has the same functions as the Consiglio di Stato, but limited to the administrative authority of the region of Sicilia.

The first instance courts are the Administrative Regional Courts (called T.A.R.S).

The Consiglio di Stato has a double nature: on the one hand, it is a legal-administrative consultative body and, on the other hand, it oversees the administration of justice. (vide article 100).

According to the article 103 of the Constitution, « The Council of State and the other organs of judicial administration have jurisdiction over the protection of legitimate rights before the public administration and, in particular matters laid down by law, also of subjective rights.».

The Consiglio di Stato is composed by its President, the presidents of section and the councillors of State and is divided into Sections, the 1st and the 2nd ones have consultative functions, the 3rd, the 4th, the 5th and the 6th ones have jurisdictional functions. There is also a plenary assembly of the judicial sections, composed by 13 members.

The President of the Consiglio di Stato is named by the President of Republic, under the Council of Ministers’ proposal and after being heard the Consiglio di Presidenza della Giustizia Amministrativa, which is the superior administrative organ of the administrative judicial power.

The Presidents of Section are named among the councillors according to their antiquity.
The councillors are selected and named among the councillors of the T.A.R.s (in reason of ½), the university professors (in the reason of ¼) and through public contest (in the reason of ¼).

In what concerns the consultative Sections, the Consiglio di Stato has to be consulted in several cases defined by statute and may be consulted in cases related to bills and normative acts of the European Union and also related to any question concerning the interpretation of statutes or good administration which a minister may wish to submit to the Council.

In what concerns the judicial Sections, the Council functions as a second degree High Court and decides in last instance, only being permitted recourse of its decisions in the strict terms above mentioned.

The President of the Consiglio di Stato defines every year the matters to be treated by each Section of the Council.

As we can see from the exchange programme annexed, the Sections of the hearings were carefully chosen according to the preferred matters referred by the participants in the exchange (pubblici appalti/ and urbanistica/edilizia). Of course these Sections decide also about other matters and I had the opportunity to observe it and to see how intensive is their day-work in order to secure that their decisions are produced in a reasonable time.

3. The Italian and the Portuguese administrative systems have the same historic origins and for a long time have developed, more or less, in the same way, adopting very similar legislation, juridical concepts and administrative and judicial practices.

However, as far as I could observe, there are nowadays some very important differences between the administrative judicial system in both countries essentially related to aspects of the organization of the judiciary and also of the procedure law. I shall point only some of them.

In terms of organization, although in Portugal, such as in Italy, there are two distinct jurisdictions - the ordinary jurisdiction and the administrative jurisdiction –the latter one includes the fiscal courts in Portugal (not in Italy) and that is why it is called «the administrative and fiscal jurisdiction».

Besides that, the judiciary organization in the administrative and fiscal jurisdiction is also made in a different way in Portugal.

In fact, in Portugal, the judiciary organization of the administrative and fiscal jurisdiction is based on three levels of courts (not two, as in Italy): the first instance courts, composed by several Administrative and Fiscal Courts all over the country, the second instance courts, composed by two Administrative Central Courts (one in the North and another in the South of the country) and the last instance court, the Supremo Tribunal Administrativo (The Administrative Supreme Court), in Lisbon.

The first instance courts have general competence in administrative and fiscal matters, the second instance courts are courts of appellation and the Administrative Supreme Court is nowadays, essentially, a court of cassation.

The Administrative Supreme Court, such as the Consiglio di Stato, is the supreme court of the administrative jurisdiction. However, the differences between them are very significant.

For instance, the Supreme Administrative Court has no consultative functions. Both Sections, the Administrative Section (1st Section) and the fiscal Section (2nd Section) have jurisdictional functions.

Constitutionally, it is a court of the same level as the Supreme Court of the ordinary jurisdiction (cf. articles 210, n.1 e 212, n.1 of the Constitution).

In Portugal, the Conselho de Estado (Council of State) is a political consultative organ of the President of Republic, who presided to it (cf. articles 141 e 142 of the Constitution). It has no jurisdictional functions.

As I said before, nowadays, the Administrative Supreme Court is a court of cassation and decides in third degree when the recourse is about a question of great juridical and/or social relevancy or is clearly necessary for a better application of law (vide artº150 do CPTA).

Nevertheless, in certain cases established by law, the Administrative Supreme Court decides in second instance, the so-called recourse per saltum (artº157º do CPTA) and even in first instance (for example, when the demand is the annulment of certain entities’ administrative decisions, such as the President of Republic, the Parliament and
its President, the Council of Ministers, the Prime-Minister, the Constitutional Court, the Administrative Supreme Court, the Count Court, the Militar Supreme Court and their Presidents – cf. article 24 n.1 a) E.T.A.F.). Besides that, the Administrative Supreme Court has the function to uniform the jurisprudence of the high administrative courts (artº 152 do CPTA). There is no appeal against the decisions of the Administrative Supreme Court, except to the Constitutional Court and only about constitutional issues.

Another distinctive trace is about the competence to decide conflicts of jurisdiction, since in Italy, as I could observe, they are a competence of the Sezione Unite della Corte di Cassazione and, in Portugal, they are conferred by law to a special court, the Tribunal de Conflitos (Court of Conflicts), that is a jurisdictional organ composed by equal number of councillors of both jurisdictions (3 of each), presided by the President of the Administrative Supreme Court.

4. In terms of procedure law and judicial practice, the dominant idea nowadays is the same in both countries - to guarantee the citizens’ effective judicial protection. However, the ways chosen are different in many aspects, as far as I could observe.

For instance, the Portuguese Administrative Procedure Code, come into force in 2004, has broken with the French tradition and has adopted a procedural system very similar to the German one, permitting not only all kinds of demands against the Public Administration, under the idea « each right, each action » (cf. art. 2, n. 2), but also all kinds of preventive measures in order to guarantee the utility of the judicial decision in the main procedure (cf. art.112).

The Portuguese administrative judge has nowadays large jurisdictional powers which include, for instance, the possibility to condemn the public administration to adopt the due administrative act (art. 66) and to address injunctions to the public entities. Now, the administrative jurisdiction can be considered a full jurisdiction, without the limitations that it had before.

The Italian Administrative Procedure Code, come into force in 2010, as far as I could see, did not go so far. The model adopted keeps the traditional line, although with some important innovations in order to enlarge the citizen’s judicial protection. For instance, the « giudizio di ottemperanza », that defines the way the judicial decision shall be executed (art. 112 e ss) and the « misure cautelari monocratiche », that are preventive measures adopted by the singular judge in case of real seriousness and extreme urgency artº 56, n.1).

But the Italian administrative judge, now as before, has no competence for controversies related exclusively with subjective rights, which are of the competence of the Court of Cassation. Although the administrative judges may have, in certain matters established by law, exclusive jurisdiction, they only may decide about subjective rights since they are related to legitimate interests. That is to say, the discussion between those two concepts is still the criterion to establish the limits of the administrative jurisdiction.

There are many other aspects in which procedural law and judicial practices differ in both countries, however it is impossible to enounce all of them here.

5. In terms of the substantial law and as far as I could observe, there is an evident approach of legislations in matters such as environment, public contracts, fundamental principles and citizens’ rights, naturally in great part influenced by the European law. For instance, in both countries was recently published a Code of Public Contracts (in Italy in 2006 and in Portugal in 2009), which transpose the European Directives 2004/17/CE and 2004/18/CE.

Indeed, the European instruments, and the jurisprudence of the Court of Justice, as well as the jurisprudence of the European Court of Human Rights have contributed a lot to approach the administrative legislations and judicial practices of the State Members.

In concrete, I had the opportunity to attend some hearings, in which were placed some questions related to violation of the European principles of free concurrence and proportionality in public contracts and also
of non discrimination in a case against the refusal by the Public Administration to recognize the period of time in which an Italian teacher worked in an other State Member, what was relevant for a public contest he was candidate.

In regard to the activities I took part in the exchange, there is an aspect of the Italian law that particularly interested me.

It is about the juridical nature of «La denuncia di inizio di attività» (D.I.A.), in English, the declaration of beginning of activity, and its consequences in terms of «La tutela giurisdizionale del terzo» (il terzo is any person who can be affected by that private activity)

There is a strong controversy in the Italian doctrine and jurisprudence about these matters and they were debated in the seminar I attend in the first day.

The aim of D.I.A is to permit the exercise of a private activity without obtaining the previous administrative authorization required before. To exercise the declared activity, the private has only to wait for 30 days after the presentation of D.I.A.

The D.I.A can nowadays be presented even in the field of «technical discretionary» of the Public Administration.

The Italian doctrine and the jurisprudence has been divided about the nature of D.I.A. – some of them defend it is a private act, others intend to see in D.I.A. a kind of tacit administrative authorization to exercise the activity.

The dominant jurisprudence of the Consiglio di Stato sustains that D.I.A. is an instrument of liberalization of the private economic activity, qualifying it as a private act and excluding expressly it can have be a tacit authorization. And being a private act, the administration can only exercise the power of «autotutela» against D.I.A. and the person affected by the activity can only demand to Administration to exercise that power and in case of silence of the administration, may react in court against it. ( vide, for instance, Cons. Stato, sez. V, 19 June 2006, n. 3586, sez. IV, 22 July 2005, n. 3916, sez. IV, 4 September 2002, n. 4453).

However, some decisions of the Consiglio di Stato have, on the contrary, considered that D.I.A is not an instrument of liberalization of the private activity. It is only a means of procedural simplification, equivalent to a tacit administrative authorization, with procedural nature. So, according to this understanding, the persons eventually affected by D.I.A. may contest the tacit authorization of the activity within the general delay of 60 days counted from their knowledge of D.I.A. (cf. Cons. Stato, sez. VI, 5 April 2007, n. 1550 e sez. IV, 12 September 2007, n.4828).

The consultative Section for the normative acts of the Consiglio di Stato in an advice of 21 May 2007 has expressly considered that the D.I.A is a means of «Liberalizzazione della attività private».

More recently, the Consiglio di Stato sustained again the private nature of D.I.A, however it considered that being impossible a demand of annulment of D.I.A, since there is no administrative act, the person affected by D.I.A may use, exceptionally, the «azione di accertamento autonomo». Otherwise, it would be violated the constitutional principle of effective judicial protection established in art. 24 of the Constitution of Italy ( vide Cons. Stato, sez IV, 09 February 2009, n. 717)

In fact, the main question of this controversy is how can be guaranteed the citizen’ judicial protection in such a case, since the matters of D.I.A are, by law, of the exclusive competence of the administrative judges and, as we said before, they have no competence to decide controversies related exclusively with subjective rights, being not at least pacific the admissibility of the «azione di accertamento autonomo» in the administrative justice.

That is why the solution given by Consiglio di Stato in its decision nº717/2009 is so important, since it opens a way to enlarge the administrative judges’ powers and, consequently, the citizen’ judicial protection.
Finally, about the benefits of the exchange, I must say that we always learn a lot with this kind of experiences because although we can always read about the administrative law and judicial practices of other countries, nothing compares to a lived experience, in loco.

I also must say, it was very profitable for me the presence of a participant of other country, which enlarged and enriched the change of ideas about administrative justice in our countries and in Europe, in general.

I think these exchanges are really the best way to know other administrative judicial systems and to compare and see how good and how bad it is our own country judicial system. And, naturally, they can contribute a lot to approach and improve the administrative judicial practices and even the legislations of the European State Members.

At the moment, I am the president of the Association of Magistrates and Judges of the Administrative and Fiscal Jurisdiction of Portugal, whose social object is to study, develop and divulge the public right, specially the administrative and fiscal rights and the fundamental citizens’ rights. To accomplish this aim the Association organizes events, namely conferences. So, I have a good opportunity to transmit to the associated members all the information and knowledge acquired in this exchange and, in this way, I can contribute somehow to improve the administrative jurisdiction in my country.

In my opinion, the success of the Exchange Programme depends essentially on the persons who organize it in each country. So, it varies certainly from country to country.

This one it was my second experience. The first one was in Denmark and, as I expected, both were very good, however, very different.

The important for me is the aim of each visit.

In Denmark, my objective was to know by inside a judicial administrative system completely different from the one of my country – a unique jurisdiction, a very different administrative and juridical culture.

In Italy, my objective was to know by inside a judicial administrative system with the same origin and in many aspects similar to the one of my country, although with different evolution in some aspects.

In both exchanges, I felt how important is to change ideas and share other realities and to reflect about them.

It is not easy to give suggestions to improve the Programme Exchange, since I think it is very good as it is. But, in fact, we can always do better.

So, I make a suggestion. Why not try to do a kind of « Erasmus Programme », in which administrative and fiscal judges could work together in other State Members, for a longer time, in order to study more deeply and find solutions for the relevant matters in terms of harmonization of administrative and fiscal legislation and judicial practices, specially in the fields that the European Union is interested in implementing to overtake the present crisis?

I think it could be a good step for the consolidation of Europe.

SUMMARY

I. The exchange has taken place in the Council of State of Italy, in Rome, and was carefully prepared, as we can see in the programme annexed. It was especially directed to public contracts and urbanism/planning law and it was given to the participants the possibility to have access to files, to attend public hearings and even a seminar organized by the Consiglio di Presidenza della Giustizia Amministrativa and a conference organized by the Consiglio di Stato itself. In the preparation of the exchange, it was not forgotten a day for a guided art visit and also a social programme.

II. The hosting country, such as my own country (Portugal), has two distinct jurisdictions – the ordinary jurisdiction and the administrative jurisdiction.

The Council of State of Italy, such as the Administrative Supreme Court in Portugal, is the supreme court of the administrative jurisdiction.

In spite of the similarities, there are significant differences between the administrative judicial systems of both countries, above all in what concerns the organization and the procedural law.
III. For instance and in terms of organization, the Council of State of Italy has consultative and jurisdictional functions and the Administrative Supreme Court of Portugal has only jurisdictional functions. Indeed, the Council of State of Portugal is a political consultative organ presided by the President of Republic. In Portugal there are three levels of administrative courts (TAFs, TCAs and STA), while in Italy there are only two levels (TARs and C. Stato). The Council of State of Italy is a court of appellation and the Administrative Supreme Court of Portugal is a court of cassation.

IV. In terms of procedure law and judicial practice, the dominant idea is nowadays the same in both countries – to guarantee the citizen's effective judicial protection. However, the ways chosen are different in many aspects, as the Italian Administrative Procedure Code keeps the traditional structure of the procedure, although introducing some important innovations, while the Portuguese Administrative Procedure Code has broken tradition and adopted a procedural system very similar to the German one. In terms of substantial law, there is an approach of legislations in great part influenced by the European law.

ANNEX
GUIDELINES FOR DRAFTING THE REPORT

I- Programme of the exchange
Institutions you have visited, hearings, seminars/conferences you have attended, judges/prosecutors and other judicial staff you have met…
The aim here is not to detail each of the activities but to give an overview of the contents of the exchange.
If you have received a programme from the hosting institution, please provide a copy.

II- The hosting institution
Brief description of the hosting institution, its role within the court organisation of the host country, how it is functioning…

III- The law of the host country
With regard to the activities you took part in during the exchange, please develop one aspect of the host country’s national law that you were particularly interested in.

IV- The comparative law aspect in your exchange
What main similarities and differences could you observe between your own country and your host country in terms of organisation and judicial practice, substantial law..? Please develop.

V- The European aspect of your exchange
Did you have the opportunity to observe the implementation or references to Community instruments, the European Convention of Human Rights,…? Please develop.
VI-The benefits of the exchange
What were the benefits of your exchange? How can these benefits be useful in your judicial practice? Do you think your colleagues could benefit of the knowledge you acquired during your exchange? How?

VII- Suggestions
In your opinion, what aspects of the Exchange Programme could be improved? How?