REPORT

Identification of the participant

Nationality: Italian

Functions: Consigliere di Stato (Member of the Council of State of Italy)

Length of service: 18 years

Identification of the exchange

Hosting jurisdiction/institution: Council of State of Turkey (Turkish: Danıştay)

City: Ankara

Country: Turkey

Dates of the exchange: from the 12th to the 23rd of October 2014

SUMMARY

This report is about the ACA-Europe Exchange Program attended by Mr. Ermanno de Francisco, Member of the Council of State of Italy with a length of service of 18 years, at the Council of State of Turkey (in Turkish: Danıştay) from the 12th to the 23rd of October 2014. It’s about things learned during the exchange, and it’s especially about the Turkish system of administrative jurisdiction of last degree, seen by an Italian colleague.

For this reason, there are exposed some opinions of the writer and some of his evaluations are carried out, may be even subjective and not necessarily correct.
I - Programme of the exchange

My exchange program was held from the 12th to the 23rd of October 2014, at the Council of State of Turkey (in Turkish: Daniștay). Over these two consecutive weeks, I worked from Monday to Friday in the first week, and from Monday to Thursday in the second week due to my commitment in Rome and my Turkish host’s trip to Baku, Azerbaijan, on Friday, October 24th. I visited Turkey over the weekend as well as on my last day before returning to Rome.

I stayed in a hotel located just a few kilometers from the new Council of State building, in a recently built area just west of the town of Ankara. I rented a car for my commute to work and to the city center. This allowed me greater independence and helped me to avoid burdening the instrumental resources offered by the hosting institution. I was accompanied by the hosting institution’s car service on the first day, because I had no idea where the Council of State was actually located. My hotel was helpfully suggested to me by my colleagues of the Turkish Council of State, in an e-mail containing some useful and practical advice, sent prior to my departure for Ankara.

During my stay in Ankara, I was assigned to Mr. Ö.F.A., a judge in service at the General Secretariat of the Council of State: he provided me with an office and a computer to use during the week, and he invited me for lunch at the refectory of the Council of State every workday.

Through the many conversations with my Turkish colleague, who was fluent in English, I learned most of the news on the judicial system of the country, and more in particularly on the organization of the Turkish Council of State and the administrative justice in general. For my part, I provided information on the Italian system of administrative justice and on the Italian justice system in general. During my stay at the Turkish Council of State I had a chance to exchange views with several other judges and members of the Council, including the Secretary-General and the President of the Institute.
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My Turkish colleague helped me a lot also in understanding the current socio-cultural phenomena of Turkey. He also accompanied me on a very interesting visit to the Museum of Anatolian Civilization, the flagship of the archeology of the region, which was particularly exciting because it is adjacent to Mesopotamia, the cradle of ancient civilizations and the first point of transition from prehistory to history. I also visited the offices, courtrooms, and secretariats, as well as a wide range of available facilities such as the game room, cafeteria, gym, and laundry.

Discussing with a Member of the Council of State, serving in the Ninth Chamber, I had a comprehensive explanation of the practical ways of exercising jurisdiction in that office. I also attended a hearing at the Ninth Chamber, where the Board, consisting of five members (including the chairman) and assisted by a “reporting judge”, ruled on disputes pertaining to the same Chamber without the presence of the legal representatives.

My activities outside the Council of State also included a visit to the Turkish Academy of Justice, where I conversed at length with the person responsible for Institutional Relations of the Academy, who informed me of its operation and organization.

II - The hosting institution

The Turkish Council of State is often the Court of last resort both in the administrative and in the tax jurisdictions, but, unlike in Italy, many minor disputes cannot be brought before it. In fact, unlike the Italian legal system, in Turkey the tax jurisdiction is a part of the administrative one. Perhaps for this reason, the staff of the Turkish Council of State is significantly greater than the Italian one. It is composed of about 150 Members, divided among as many as 15 Chambers involved in advisory activities (the First Chamber), exercising the jurisdiction of last degree in the field of administrative law (the Second, Fifth, Sixth, Eighth, Tenth, Eleventh, Twelfth, Thirteenth, Fourteenth and Fifteenth Chambers) and in the field of tax law (the Third, Fourth, Seventh, and Ninth Chambers).

There are some occasions when the Chambers decide jointly in their “Plenary Session”: there is a “Plenary Session of the administrative law Chamber”, a “Plenary Session of the tax law Chamber”, and also “The Assembly on the Unification of Conflicting Judgment”, that carries out judicial activity and which is composed of the President, the Chief
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Advocate General, the Vice-Presidents of the Council of State and the presidents and the members of the Chambers, with the exception of the First Chamber which is the advisory one.

As a result of the profound reforms that have taken place in Turkey in recent years (which, among other things, have articulated in two instances the proceedings in the administrative and tax law), the Council of State now acts as judge of (second or) third instance; and it normally has a cassation function, i.e. of annulment of the judgments on which it rules. In short, the Council of State is the Supreme Court of Turkey for administrative law: its sentences cannot be appealed to the Supreme Court of Cassation, but can only be brought to a special “Court of conflicts” (described below), albeit only in cases of conflicts of jurisdiction or of contrasts between definitive judgments made by different jurisdictions.

III - The law of the host country

The Turkish legal system is a "civil law" system based on written law, which in its main lines appears very similar to those of continental Europe and, in particular, to the Italian system. As mentioned above (and despite the two instances that have been recently introduced in Turkey), the Council of State is often a Court of second or unique instance because not all disputes appealed in front of it run through both instances (local Court and regional Court). In fact, some minor cases run without access to the Council of State, and other disputes are introduced directly before the Regional Court, whose decision can be appealed to the Council of State. On the contrary, for some more relevant disputes, the Council of State also operates as a judge of unique instance. When the Council of State cancels the decision being appealed, it returns the case to the Regional Court. At that point, if the Regional Court decides not to conform to the principles of law established by the Council of State, its sentence can be further contested in front of the Council itself, which in this case decides in the appropriate Plenary Session (according to the case, in the “Plenary Session of the administrative law Chamber” or in the “Plenary Session of the tax law Chamber”). The decision of the relevant Plenary Session is then binding for the lower court. Finally, if there is a continuing conflict between the decisions that are taken by the Chambers, “The Assembly on the Unification of Conflicting Judgment” can decide to unify the conflicting decisions, that’s binding for all
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Turkish public authorities, as if it were a written law. Despite the fact that Turkey has a legal system based on written law, in that case the decision of the Council of State operates with effect similar to that of a Supreme Court in a “common law” system.

At the Turkish Council of State there are about 400 administrative judges of the lower courts, acting as “reporting judges” for the 150 members of the Council, to which they do not belong. There is also a Chief Public Prosecutor’s office, where there are about 30 public prosecutors that appear in front of the Chambers, only in specific cases in which the law has considered appropriate that the decision of the Chamber be assisted by a further deepening of the juridical issues scrutinized by the Council. Such a pattern is in some ways similar to the role played by the Advocate General in the Court of Justice of the European Union (although at the European Court the Advocate General concludes on every deal, as opposed to what happens before the Turkey Council of State).

In Turkey – while the ordinary judges are about 14,000 – there are also approximately 1,500 administrative judges in the Local courts and in the Regional courts, whose decisions can be appealed to the Council of State (but only in the cases envisaged by law). The decisions of the Council of State are taken mostly behind closed doors, i.e. without the presence of the parties' representatives, before a Chamber of five members, one of which is the President, and with the assistance of a “reporting judge” who presents the issues of fact and law of the case. However, even if the latter proposes hypothetical solutions, he doesn’t take part in Council decisions (as already said, he isn’t a Member of the Council). Once the Chamber has taken its decision, the “reporting judge” prepares a draft of the proposed motivation and gives it to the Member of the Chamber responsible for the specific case. Based on this input, that Member prepares the draft judgment, both in print and digital formats, and submits it to the president. Then the judgment, always drawn in the dual format, is signed by the five Board members.

A reasonably long period of activity as “reporting judge” is the ordinary point of entry for selection as a Member of the Council of State by the Council of the Judiciary. The latter, in fact, is unique in Turkey for both the ordinary and administrative jurisdictions.

Hearings at the Council of State take place in public form and with the presence of representatives of the parties, as well as possibly of the Public Prosecutor, (only) when, ex officio or at the request of a party, the Board considers it useful or appropriate. In the appeal
With a financial support of the European Union, Judge Exchange Appendix 3 judgment, at least in the context of tax jurisdiction, the expenses charged to the losing party are not settled, because it is supposed that they are already included in those established in the previous level of judgment. Thus, the Council of State determines the costs of the proceedings only in the cases where it decides on first and only instance.

IV - The comparative law aspect in your exchange

Similar to the provisions of Italian law, the Turkish Council of State has a President, a Vice-President, a General Secretary and a set of offices that support the organization of the various judicial Bodies, as well as a “General Assembly” of its members. The office for international affairs and projects handled the organization of my exchange in the “ACA-Europe” program. The Turkish Council of State is characterized by a considerably larger organizational size than the Italian one (which is due only partly to the presence of tax jurisdiction, in addition to the administrative one, which we don’t have in Italy). The Turkish Council has 150 Members and about 400 “reporting judges”, while the components of the entire Italian administrative justice system, of First and Second instance, are only 509 professional judges: 395 of which are in service at the Administrative Regional Tribunals of First Instance, and the other 114 at the Council of State.

As for the division of powers between the administrative courts and the ordinary ones, it seemed quite similar to the relevant criteria applied in Italy. Apart from the dichotomy between the “subjective rights” and “legitimate interest” (a typically Italian distinction), the administrative courts in Turkey have jurisdiction to hear cases in which it is disputed whether a public power was fairly exercised. If no power of public supremacy was exercised, the ordinary courts are competent.

The decisions of last instance taken by the Turkish Council of State are subject to an audit opinion, on the part the Council itself, at the request of the losing party. Such audits seem to be much more extensive, with regard to the conditions for admissibility, than the applications for revision of a judgment before the Italian Council of State.

Turning, for a moment, outside administrative law, even the Turkish Criminal Code was modelled on the Italian Penal Code of 1865 (Code Zanardelli) since 1925 (after the fall of
With a financial support of the European Union, the Ottoman Empire. After 2005, however, the Turkish legal system was partially adapted to the new institutions of the current Italian Penal Code (still based on the Code Rocco, of 1930).

As far as I saw during my stay, Turkey pays particular attention to reports and international comparisons, both with regard to the administrative jurisdiction and to the ordinary one. I was informed, in fact, of the preparation of a visit of the staff of the president of the Turkish Council of State to Baku, Azerbaijan; and of a cultural exchange of the Academy of Justice of Turkey with the Italian School of Judiciary (which is ongoing, and I shall pay attention to its developments here in Italy). The aforementioned Academy of Justice has concluded a meeting with the Ministry of Justice of Qatar, that in 2013 passed the application of “Sharia” and now looks with interest to the legal systems based on written law.

V - The European aspect of your exchange

Since Turkey is not yet a Member State of the European Union, it seems correct, from a European perspective, to make the following brief comments about the Turkish judicial system.

The 22 member of the Council of the Judiciary of Turkey (unique, as already said, for all the jurisdictions) performs functions substantially similar to those of the Organs of self-government of the Italian magistrates: the Superior Council of the Magistrature (C.S.M.) and the Council of Presidency of Administrative Jurisdiction (C.P.G.A.). Although there is a strong presence (and direction) of the Ministry of Justice (the Minister is the chairman and an undersecretary of the Ministry is the deputy), the composition of the Turkish Council of the Judiciary, from a European perspective, looks sufficiently balanced and appropriate, at least in formal terms, to guarantee some degree of independence of the Judiciary from the Executive. In fact, 15 members are elected by the judges: 10 from those of first instance and 5 from those of last instance; and also 10 by ordinary courts and 5 by the administrative ones.

Concerning the delicate matter of independence, it might be observed that an excessive preponderance, not adequately compensated, of members of the Board directly elected by the Judges – while providing an “external” guarantee of independence of the Judiciary from the Government – seems to expose the Judiciary itself to an excess of “self-referentiality”, that strongly reduces its so-called “internal independence”. In fact, judges
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The composition of the Turkish Constitutional Court – which also operates as the Turkish Court of Human Rights in the last instance – is based on 17 components, picked equally from among the various superior courts, universities, legal professions, Civil Servants and the first class judges from the lower courts; the Members are selected from several lists of names assembled by the categories to which they belong, within which some are chosen by the Parliament, but the majority (10 Members out of 17) are chosen directly by the President of the Republic.

Contrary to the Italian system (where unfortunately it doesn’t exist), Turkey has a “Court of conflicts” which resolves the conflicts of jurisdiction and those between sentences of different jurisdictions. It is structured in two sections, the civil and the criminal, each composed by an equal number of representatives of the different jurisdictions. The Civil Chamber rules on the conflicts between the Supreme Court, the Council of State and the Military Administrative Court; while the Criminal Chamber does it between the Supreme Court and the Supreme Military Court.

The recruitment procedures for judges (separately for each jurisdiction) is based on a competition for entrance into the aforesaid Academy of Justice, consisting of multiple choice quizzes, rather than on essays as provided under the Italian law system. A six-month education, followed by 18 months of practical training, that the Academy of Justice of Turkey provides to the new judges before they are entrusted with judicial functions, completes the recruitment procedure. It should be noted that the powers of direction of the Ministry of Justice were reduced in 2003, giving more autonomy to the Academy, which had operated inside the Ministry from 1985 to 2003.

VI - Good Practice within the host jurisdiction

The number of judgments delivered by the Turkish Council of State is very impressive.

In fact, at least with regard to the tax Chambers, each pronounces about 10,000 final judgments per year; plus about 1,000 interim decisions, and, despite the average greater
With a financial support of the European Union complexity of the subject, the reported numbers are basically the same also in the ten administrative Chambers.

The outsider’s feeling is that the human resources that allow the Turkish Council of State to reach such an extremely high productivity, at least with regard to the number of delivered judgments, are precisely the above mentioned 400 supporting “reporting judges”.

VII - The benefits of the exchange

My exchange experience has been extremely interesting and positive.

It allowed me not only to gain a broad knowledge of the practical workings of the Turkish administrative jurisdiction, but also gave me the opportunity to work closely with my new Turkish colleagues who were very welcoming. Among other features of such workings, I mostly appreciated the standing practice in the last instance Court, where many judges from the lower Courts assist the judges of the Council of State. Such collaboration between judges belonging to different instances seems to be extremely useful in creating an extra pool of resources for the Council of State. It appears very valuable also for the younger judges of the local Courts, who can use the high quality professional experience so acquired either to be selected as Council of State members, or to strengthen the local Courts to which they go back.

In Italy, we have a roughly similar arrangement at the Court of Cassation, which is however quantitatively much less significant than in Turkey; where there are almost three young “reporting judges” for each Member of Council of State, while no similar arrangement exists in the Italian administrative jurisdiction. I think it would be very useful to try to experience something like the aforesaid Turkish collaboration arrangement at the Council of State of Italy. However, such an experiment would definitely require an appropriate increase in staff, considering that, for the administrative jurisdiction, in Italy the current staffing is three or four times lower than in Turkey. Such a strong imbalance is not justified even if we take into account that in Turkey, unlike in Italy, the administrative jurisdiction also decides tax disputes.

This shows that in Italy no one can justifiably complain about the slowness of trial system, nor can such problems be solved, until we decide to allocate adequate resources, both
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VIII - Suggestions

I’m very glad to have been selected to participate in ACA-Europe Judicial Exchange Programme: so, I was able to learn about the Court system of such a great and interesting country.

I cannot give specific suggestions to ameliorate the ACA-Europe Exchange Programme, I think it’s already very good. I may only imagine that it would be even more useful if the individual exchanges were held with the participation of two judges, coming from different countries: in that way I think there would be, in addition to a better socialization, a trilateral exchange of different jurisdictional experiences.

I really hope to be able to participate in another exchange program elsewhere in the future.