



Identification of the participant

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Country of exchange: Portugal

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Hosting jurisdiction/institution: Spain, Tribunal Supremo

City: Madrid

Country: Spain

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SUMMARY

This was a one-week exchange at the Tribunal Supremo of Spain to get to know the main jurisdictional Institutions of the Hosting Jurisdiction.

Although Spain and Portugal share a common history and a common legal and constitutional culture, there are relevant differences arising from the different administrative organization of the two countries: Spain is organized on a regional basis and Portugal relies on a unitary political structure. This leads to a different and more complex jurisdictional organization in Spain, especially on issues of administrative law. Nonetheless, Spain has recently approved procedural legal reforms for administrative issues that have led to a better functioning of the system. This has avoided the privatization of some relevant aspects of its jurisdictional functions such as those imposed on Portugal during the financial crisis period.

As such, comparing both systems, and particularly the functioning of the Administrative Supreme Court, proved to be very enlightening and allowed me to understand some aspects that could be improved in the Portuguese system.



REPORT

I. Programme of the exchange

During my stay at Tribunal Supremo (Spain), the host institution provided me with a complete overview of the organization of the Spanish judicial structure and its functioning (Annex 1). I met the President of the Third Room twice, and I was guided daily by a Judge of the third section of the Court, who kindly explained to me many of my queries over comparing the systems. I was also able to meet the coordinator of the judicial support team twice, who explained to me in detail the judicial technicalities of the Spanish law and routines of the court on the "recurso extraordinario de casación contencioso-administrativo" (extraordinary contentious-administrative appeal).

I also visited other Spanish Judicial Institutions, such as the General Council of the Judiciary (Consejo General del Poder Judicial), the High Court of Madrid (Superior Tribunal de Justicia de Madrid), the National Court (Audiencia Nacional) and the Ombudsman (Defensor del Pueblo). The interviews with the main figures in these Institutions helped a lot to improve my understanding of the Spanish system.

II. The hosting institution

The Supreme Court, based in Madrid, is the highest court and the court of last resort in the Kingdom of Spain. It provides final decisions in all legal issues (excluding constitutional issues), including tax and administrative issues in its "Third Room" (article 55 of the judicial power organization law), which has been my focal point of interest in this exchange.

In its Third Room, the Supreme Court can exercise original and exclusive jurisdiction over some matters of great importance, such as judicial review from administrative acts of the highest political institutions, such as the Council of Ministers, the General Council of the Judiciary or the Parliament, among others.

However, the main function of this Third Room is to act as a special appellate court that rules on precedents on all jurisdictional issues.

Supreme Court decisions can be overruled by the Constitutional Court on constitutional matters. In addition, as all High Courts of the European Countries, it can refer questions to the European Court of Justice, and it must also be in conformity with decisions from the European Court of Human Rights.

III. The law of the host country

Portuguese and Spanish law have a lot in common, not only because of their common history and tradition, but also because both countries entered the European Union in the same year of 1986. It is also worth noticing that my previous activity as academic public law professor and my continuing roles on Spanish academic research groups at different Spanish universities give me a thorough knowledge of Spanish administrative and tax law, including on legal procedure questions, so my main interest was on the actual functioning of the Institutions within the Spanish system.

In essence, my main objective with this exchange was to study the administrative procedural rules and praxis of the Spanish judicial system, mainly that of the Supreme Court, trying to discern the differences from the Portuguese system and the reason why



delays in Portugal leaves the country in such a bad state compared to Spain, despite being a bigger and more complex system that shares with Portugal the same cultural and juridical tradition.

My focus on the exchange was the legal competences of the Third Room of the Supreme Court, and within them, the legal regime of the extraordinary contentious-administrative appeal before the Supreme Court after the reform introduced by Law 7/2015 (Ley Orgánica 7/2015), which entered into force on 26.07.2016.

Article 86 Special Appeal before the Supreme Court on administrative issues (regulated by Ley 29/1998, Ley reguladora de la Jurisdicción Contencioso-administrativa)

Artículo 86.

1. Las sentencias dictadas en única instancia por los Juzgados de lo Contencioso-administrativo y las dictadas en única instancia o en apelación por la Sala de lo Contencioso-administrativo de la Audiencia Nacional y por las Salas de lo Contencioso-administrativo de los Tribunales Superiores de Justicia serán susceptibles de recurso de casación ante la Sala de lo Contencioso-administrativo del Tribunal Supremo.

En el caso de las sentencias dictadas en única instancia por los Juzgados de lo Contencioso-administrativo, únicamente serán susceptibles de recurso las sentencias que contengan doctrina que se reputa gravemente dañosa para los intereses generales y sean susceptibles de extensión de efectos.

2. Se exceptúan de lo establecido en el apartado anterior las sentencias dictadas en el procedimiento para la protección del derecho fundamental de reunión y en los procesos contencioso-electorales.

3. Las sentencias que, siendo susceptibles de casación, hayan sido dictadas por las Salas de lo Contencioso-administrativo de los Tribunales Superiores de Justicia sólo serán recurribles ante la Sala de lo Contencioso-administrativo del Tribunal Supremo si el recurso pretende fundarse en infracción de normas de Derecho estatal o de la Unión Europea que sea relevante y determinante del fallo impugnado, siempre que hubieran sido invocadas oportunamente en el proceso o consideradas por la Sala sentenciadora.

Cuando el recurso se fundare en infracción de normas emanadas de la Comunidad Autónoma será competente una Sección de la Sala de lo Contencioso-administrativo que tenga su sede en el Tribunal Superior de Justicia compuesta por el Presidente de dicha Sala, que la presidirá, por el Presidente o Presidentes de las demás Salas de lo Contencioso-administrativo y, en su caso, de las Secciones de las mismas, en número no superior a dos, y por los Magistrados de la referida Sala o Salas que fueran necesarios para completar un total de cinco miembros.

Si la Sala o Salas de lo Contencioso-administrativo tuviesen más de una Sección, la Sala de Gobierno del Tribunal Superior de Justicia establecerá para cada año judicial el turno con arreglo al cual los Presidentes de Sección ocuparán los puestos de la regulada en este apartado. También lo establecerá entre todos los Magistrados que presten servicio en la Sala o Salas.

4. Las resoluciones del Tribunal de Cuentas en materia de responsabilidad contable serán susceptibles de recurso de casación en los casos establecidos en su Ley de Funcionamiento.

Essentially, this article says that this “special” appeal can only take place to review a decision on grounds of law (not facts) which has infringed a legal precept, from a procedural or substantive standpoint, **if it contains elements that may objectively establish a precedent.**

As I had already studied the Spanish case law on special appeal admissions, my main point of interest was how the work was internally organized in order to assess what issues might contain such elements and how they deal with the substantial procedural issues. Getting to grips with this reality helped me to understand what is wrong with the Portuguese system.

IV. The comparative law aspect in your exchange

Based on the knowledge I acquired during the Exchange, I can point out some main differences:

i) On the “extension” of the “special” appeal

In Spain, grounds for applying for the appeal to be heard can only be motivated by the need to objectively establish a precedent or check if any such precedent in force can be applied to the particular “new” circumstances of the case.

In Portugal, the admission of this appeal can also be motivated by the need to better apply the law to the case (and mainly cases are admitted with such a purpose) which transforms the Portuguese Supreme Court into an ordinary court of second appeal.

In Spain, a “special appeal” cannot be used to overturn or nullify the decision appealed, but in Portugal this is a common request that has to be addressed whenever the Court admits a hearing for such a special appeal.

In Spain, the decision to hear the appeal is based on a specific question, whereas in Portugal, a decision to hear the case is akin to a permit to re-examine the whole process, including the juridical re-evaluation of the facts.

ii) On the “procedure” of admission itself

In Spain, the decision to admit or deny this special appeal is taken by the presidents of the specialist subsection on which the Third Room of the Court is organized, presided by the President of the Room. These presidencies are assigned on a rotating basis. However, before that decision, there is much intense and relevant work done by the council cabinet, to identify the relevant precedents, to draft the questions to be decided and to summarize the main points of the relevance and novelty of such questions.

In Portugal, the decision to admit or deny a special appeal is taken by the three senior judges of the Room, without any support, and all the emphasis relies on the appeal instead of the need to formulate a precedent, which is not even the goal of the appeal.

In Spain, the parties only present their arguments after the admission of the appeal, and they are limited to 15 folios. In Portugal, the arguments are disclosed along with the petition for the appeal and there are no limits, and so, many times, the parties present longer documents with more than 100 folios.

i) On the deliberation of the appeal

In Spain, after the admission of the appeal, the decision on it is taken up by a specialist section of the Third Room (with 5 to 7 judges). The president of the specialist section organizes the work schedule each month, selecting the cases that should be deliberated, weekly, in each session. The reporter presents the arguments, answering, firstly whether the precedents identified are correct and suitable for the question, or proposing a change or an addition or a clarification to them, and then applies those precedents to the circumstances of the case in order to provide a judgment. After acknowledging the judgment and the arguments, the Reporter will elaborate on the decision, upload it onto the system, and all the judges of the section will sign it. The President of the section will assure that the decision has been written in accordance with what was deliberated in the session.

In Portugal, once the appeal is admitted, the reporter will prepare a draft of the decision and send it to the other members of the section. There is no specialization in the section, nor any organization of it. The work in each session varies a lot and depends only on the reporters, because they decide what to do and to present. The session is also very different. Each reporter presents a case, which has mostly been previously agreed with the other members of the section, and it is not uncommon that two different sections decide similar questions differently, which will be then submitted to a special appeal of uniformization.

V. The European aspect of your exchange

During my exchange I also addressed the question of how both courts deal with European Law, mainly a preliminary ruling before the ECJ.

We have concluded that Portugal presents more preliminary ruling processes before the ECJ, but this does not mean that Portugal is more concerned with EU Law. The Tribunal Supreme more often uses the "act clair" doctrine.

It is worth noticing on this matter that in both themes where European Law raises more doubts – tax law (mainly VAT issues) and public contracts – Spain has a more harmonious system to solve conflicts, because the original competence belongs to independent administrative bodies that uses the same standards (tribunales económico-administrativos in tax matters and tribunales administrativos de contratación pública in public contracts matters), so the appeal before the jurisdiction is based on an "administrative doctrine" that is easier to address in mass litigation.

In contrast, in Portugal, after the financial crises legal reforms imposed by the troika (BCE, European Commission and IMF), the arbitration system on administrative and tax issues flourished. This means that no uniformity can be granted. Moreover, on administrative arbitration the decisions are hardly public. The heterogeneity of the criterion used to solve the same issues is enormous and the law assigned the Supreme Court the difficult task of uniformizing the arbitration decision, but without imposing any penalty on arbitrators that do not apply court precedents. So, by now, there is a mass of tax issues coming from arbitration system and there is a black hole of administrative contracts litigation, which is mainly addressed outside the jurisdictional court system.

It was rewarding to see that a bigger and more complex country can address mass litigation on public issues with a more robust answer, coming from the constitutional jurisdictional institutions and without trampling on the rule of law. I might conclude that Portugal does not need more judges, it only needs to be better organized and to be strong enough to fight against vested interests.

VI. "Good Practice" within the host jurisdiction

The exchange and the personal dialogue with the Spanish colleagues were also a great opportunity to ask for some practical issues on our work, like:

- the use of academic citations on the grounds of a decision, which is common in Portugal and almost forbidden in Spain, which, personally, I think is a good practice;
- the definition of a common structure and limits for the pleadings, which is adopted in Spain by a decision of the Consejo General del Poder Judicial and accomplished by all lawyers and is totally forbidden in Portugal;
- the hearings in some processes that are more complex or socially more relevant to legitimize the rule of law judicial decision, which happens in Spain and never happens in Portugal.

I could also take note of some good practices in the Tribunal Supremo's Daily routines, like the 'continuous journey' combined with teleworking, which looked to be more effective to increase productivity.

VII. The benefits of the exchange

During my exchange in the Tribunal Supremo, it was also rewarding noticing that although the political problems that nowadays threaten the rule of law and the democratic states' organization are common (as it has been clearly noticed from the visit to the Consejo Superios del Poder Judicial), an institutional judicial model can be more resilient than a privatized one, as it is the Portuguese.

VIII. Suggestions

I think these Exchange Programmes are a good opportunity to get to know our jurisdictions, similar institutions, its procedure legal regimes and its concrete functioning.

In addition, besides the institutional organization, I would like to add that having a tutor during the stay is excellent, because you can talk with a Colleague and get answers to all your questions, so I'm very grateful to the Spanish Supreme Court for adopting this model.

I just would like to add that perhaps the new communication tools could be useful in a previous preparation of the exchange, like a preparation only meeting.