



### **Identification of the participant**

Surname: PELLISSIER

First name: GILLES

Nationality: FRENCH

Seniority: 26 years (administrative jurisdiction); 16 years (Council of State)

### **Identification of the internship**

Host jurisdiction/institution: Sala 3a del Tribunal Supremo español

Town/city: Madrid

Country: Spain

Dates of the internship: 26/6 to 30/6/2023

## **SUMMARY**

During my 1-week internship at Sala 3a of the Supreme Court of Spain, which has jurisdiction over administrative disputes, I attended two sessions, one of the Admissions Division and the other of Division 4a, and met several of the court's magistrates as well as the coordinator of the team of advisers to the magistrates (letrados). I also met the President of the Audiencia Nacional, the Defensor del pueblo and visited the Council of State.

Although short, this internship allowed me to observe that the most notable differences between French and Spanish administrative disputes, particularly at the level of cassation, lie in the procedure for drafting the decision, which is much more collective in France than in Spain (IV), and in the criterion for admitting appeals in cassation, since in 2015 Spain introduced a new criterion based on 'the objective interest in cassation in the formation of case-law'. I was particularly interested in the way this criterion is applied and the questions it raises for the courts (III).



## I. Internship programme

Institutions visited, hearings you attended, seminars/conferences, magistrates and other judicial staff met, etc.

The aim here is not to detail each of the activities but to offer an overview of the content of the exchange.

If a programme was provided to you by the host institution, a copy of it may be inserted.

The internship lasted 1 week and took place mainly at Sala 3a del Tribunal supremo, which is responsible for handling administrative disputes.

In addition to meetings with the President of the Sala and various magistrates, I met the Letrado coordinador of the Technical Office, who supervises a team of 22 lawyers who assist the magistrates.

I also met the Defensor del Pueblo, the President of the Audiencia Nacional and a Letrado from the Council of State, who gave me a tour of this institution.

I attended two sessions of deliberations by divisions of Sala 3a of the Tribunal Supremo, the Admissions Division and Division 4a.

The flawless organisation of my internship, the kindness of all the people I met, who never measured the time they devoted to me and to whom I would like to express my warmest thanks for their hospitality, and the chance to witness the work of the Tribunal Supremo from within, made my stay as enjoyable as it was instructive.

## II. The host institution

Brief description of the host institution, its place in the judicial organisation of the host country, its organisation, its functioning, etc.

### 1. The place of the Tribunal Supremo in Spain's judicial organisation

Unlike the French system, where the administrative courts alone constitute a judicial system separate from the ordinary courts, the Spanish judicial system is unique. However, the main branches of litigation reappear with, on the one hand, the specialisation of the 'juzgados', single judges of first instance, in civil, criminal, administrative ('contencioso-administrativo') and social disputes and, on the other hand, the specialisation of the chambers ('salas') that make up the courts that rule as a panel ('Audiencia Nacional', Superior Court of Justice, Supreme Court). Although there is only one judicial system, the texts and doctrine speak of an 'administrative litigation jurisdiction' that brings together all the courts specialising in administrative litigation.

From a substantive point of view, the jurisdiction of the Spanish administrative litigation courts is broadly identical to that of the French administrative courts, making it one of the most extensive in Europe: without going into detail, they have jurisdiction over all decisions taken by legal persons governed by public law, their contracts and the contractual and extra-contractual liability they may incur as a result of the damage they cause.

The division of jurisdiction in administrative disputes is fairly complex. Five legal bodies are competent in administrative litigation: the 'Juzgados de lo contencioso-administrativo', the 'Juzgados centrales de lo contencioso-administrativo', the 'Salas de lo contencioso-administrativo de los Tribunales Superiores de Justicia', the 'Sala de lo contencioso-

administrativo de la Audiencia Nacional', the 'Sala de lo contencioso-administrativo del Tribunal Supremo', sala 3ª, where I completed my internship. Although some courts (juzgados and tribunales superiores de justicia) have territorial jurisdiction, all rule in the name of the State.

The 'Juzgados de lo contencioso-administrativo' are made up of a magistrate ruling alone. Each magistrate therefore forms a 'juzgado'. He or she is assisted by a secretary, who helps with the processing of cases, and a registry team. The juzgados, whose number varies according to the size of the population (19 in Madrid), are based in the provincial capital. In principle, they have jurisdiction to hear appeals at first instance against decisions by local authorities (municipalities and Autonomous Communities) and against decisions by decentralised State authorities. There are a number of exceptions to this jurisdiction, based on the subject matter (for example, town planning disputes) or the amount in dispute (in matters of administrative sanctions or liability).

The 'Juzgados centrales de lo contencioso-administrativo', also consisting of a single magistrate, located in Madrid, have jurisdiction to hear at first instance decisions relating to public employees taken by ministers and secretaries of state and against certain acts of central government or public sector bodies. They were created in 1998 to reduce the workload the High Courts of Justice and the Audiencia Nacional.

The 'Salas de lo contencioso-administrativo de los Tribunales Superiores de Justicia' are collegiate courts. The High Courts of Justice are based in the capital of the Autonomous Community. The 'Sala de lo contencioso-administrativo' has between one and nine divisions, depending on the volume of litigation (Madrid has nine; Cáceres, in Extremadura, has only one). The 'Sala de lo contencioso-administrativo' of the High Court of Justice is competent to hear in the first and last instance appeals relating to acts of local authorities that are not assigned to the 'Juzgados de lo contencioso-administrativo' and to hear appeals against orders and judgments handed down by these 'juzgados', where the sum in dispute exceeds 30,000 euros.

The 'Sala de lo contencioso-administrativo de la Audiencia Nacional', based in Madrid, has jurisdiction in the first and last instance to hear appeals that do not fall within the jurisdiction of the 'Juzgados centrales de lo contencioso-administrativo' and to hear appeals against orders and judgments handed down by these juzgados (same condition as regards the value of the dispute).

Lastly, the 'Sala de lo contencioso-administrativo del Tribunal Supremo' has residual jurisdiction at first instance to rule on appeals against acts of the Council of Ministers, the Supreme Council of the Judiciary and administrative acts issued by parliamentary assemblies, the Constitutional Court, the Court of Audit and the Ombudsman. The Supreme Court is above all the court of cassation for certain final rulings handed down by the juzgados, the high courts of justice and the Audiencia Nacional.

In addition to these jurisdictional bodies specifically assigned to administrative litigation, there is also a remedy that can be used to challenge an administrative act when it infringes a fundamental right guaranteed by the Constitution, once the ordinary legal remedies have been exhausted: this is the 'amparo' (protection) remedy, brought before the Constitutional Court.

2. The organisation and operation of the Sala de lo contencioso-administrativo of the Tribunal Supremo (Sala 3a).

### 2.1. Organisation

The Supreme Court is the highest court in the Spanish judicial system. Its seat is in Madrid. It is made up of five ordinary chambers (salas): civil, criminal, administrative litigation, social and military, as well as special chambers to settle questions relating to the division of jurisdiction between the courts and between the chambers of the Supreme Court.

Sala 3<sup>a</sup>, de lo contencioso-administrativo, includes in principle, with its president, 33 magistrates, which makes it the largest in quantitative terms of the Supreme Court.

The crisis that the General Council of the Judiciary has been experiencing for 5 years now is affecting the composition of the Supreme Court: the General Council of the Judiciary, which appoints the presidents of the courts, the chambers of the Supreme Court and the members of the Supreme Court, was not renewed 5 years ago, as it should have been when its members' terms of office expired, due to the lack of the necessary qualified majority of deputies. The General Council, which remains in office, does not have the power to appoint magistrates, so departures are not replaced. Thirteen magistrate posts on Sala 3a are currently unfilled, and Sala 3a is presided over by the most senior magistrate.

Within the chamber, magistrates are organised into five divisions, each of which (currently) comprises four or five magistrates. Division 1 is responsible for allowing appeals in cassation: it is chaired by the President of the Sala and comprises a member of one of the other four divisions, who holds this position for 1 year. A sixth division, chaired by the President of the Sala and comprising the presidents of Divisions 2 to 5, has exclusive jurisdiction over acts of the General Council of the Judiciary.

Magistrates are assisted by a Technical Office, made up of 22 lawyers (letrados), all of whom, since the reform of the cassation procedure – which has led to a very significant increase in the number of appeals (see III) – are dedicated to examining whether appeals should be admitted. New recruitment of lawyers should make it possible to assign some of them to other divisions and to compensate to some extent for unfilled magistrate posts.

### 2.2. Operation

Like the other 'administrative' courts in Spain, the Sala de lo contencioso-administrativo of the Supreme Court hardly ever holds hearings. The bulk of the court's collegiate activity therefore consists of a weekly meeting of each division, which generally lasts for the morning and is similar to a deliberation.

At this meeting, which is not open to the public and is chaired by the President of the Division, each member magistrate of the Division in turn presents the cases he or she has prepared: he or she summarises the dispute, the legal issue(s) raised and the solution he or she proposes. This is followed by a very free and informal collegiate discussion, at the end of which a solution is adopted by the division.

In the event of a tie among the members of the division deliberating, three members of another division will deliberate to reach a majority.

The magistrate-rapporteur will then draft the decision corresponding to this solution. As dissenting opinions may be published, when the solution adopted by the division does not correspond to what he or she proposed, the president always asks the magistrate-rapporteur whether he or she agrees with it, which is generally the case. If he or she strongly disagreed with the solution, the drafting could be entrusted to another magistrate.

The drafting of the decision, which takes place after the collegiate meeting, is not discussed by the members of the division. In practice, only the president reads them and has virtually no say in their drafting, which explains why rulings of the Supreme Court – and indeed those of all the courts – are written in a much more personal style than in France: it is therefore possible to identify the style of a particular magistrate.

Plenary meetings, attended by all Sala members, may be held if the Sala president so decides or if a division so requests. But these are rare, given the time-consuming nature of a deliberation during which each member takes the floor, in order of seniority.

### III. The law of the host country

In the light of the activities undertaken, describe one aspect of the national law of the host country that was of particular interest to you.

A major reform of the cassation procedure took place in Spain in 2015: Organic Law No 7/2015 of 21 July 2015 replaced the criterion for admissibility of an appeal in cassation based on the amount in dispute with the criterion of ‘the objective interest in cassation in the formation of case-law’<sup>1</sup>, which is assessed by the Supreme Court.

I was particularly interested to know how this new criterion, which is substantially different from the previous one, had been applied in administrative litigation for nearly 6 years and what questions it raised. Interviews with judges and with the coordinator of the Technical Office, which deals exclusively with the admission of appeals in cassation, as well as attendance at a session of the Admissions Division of Sala 3a of the Supreme Court, gave me an insight into the practice of this criterion and the considerations to which it gives rise, which I will attempt to summarise below.

In order to take full stock of this reform, it is worth recalling the evolution<sup>2</sup> of the structure of the<sup>3</sup> Spanish administrative litigation jurisdiction.

Between the Law of 27 December 1956, which created the modern administrative litigation jurisdiction, and the reform of 2015, several laws profoundly modified the organisation of this jurisdiction, which was characterised by a two-tier system of jurisdiction and widespread collegiality. The first instance was made up of 15 Audiencias territoriales, each comprising three magistrates; their rulings were appealed before one of the three administrative litigation chambers (salas) of the Supreme Court (TS). These were merged into one (Sala 3a) in 1985,

<sup>1</sup> ‘Interés casacional objetivo para la formación de la jurisprudencia’.

<sup>2</sup> Diez-Picazo, L. M. (2023). Sobre la estructura de la jurisdicción contenciosa-administrativa. *Revista de Administracion Publica*, 220, 13-33.

<sup>3</sup> In Spanish law, jurisdiction does not refer to a jurisdictional order as in France, but to the material competence of the various subdivisions of the jurisdictional bodies.

with no change in the number of magistrates. Appeals could be lodged against all judgments, except in rare cases (staff matters; local taxes), where the amount in dispute exceeded 80,000 pesetas.

This structure<sup>4</sup> was successively modified by the creation of the Audiencia Nacional (AN), with jurisdiction at first instance, in 1977, the transformation of the Audiencias territoriales into Tribunales superiores de justicia (TSJ) in 1985 and the creation, in 1998, of single-member judicial bodies, the juzgados and juzgados centrales de lo contencioso-administrativo. Collegiality was therefore no longer the general rule at first instance.

The means of appeal have also evolved: in 1992, the TS became the court of cassation for judgments of the AN and the TSJ and, in 1998, the TSJ were given jurisdiction to hear appeals against judgments of the juzgados. These remedies were subject to the amount in dispute, which has steadily increased. In 2011, the minimum amount required to open an appeal was increased to 30,000 euros and to 600,000 euros for cassation, i.e. double and quadruple the amounts respectively compared with the previous amounts in 1998. As a result, there is only dual jurisdiction for certain juzgados judgments, provided that the dispute exceeds 30,000 euros.

The 2015 reform therefore replaced the criterion for admitting appeals to the Court of Cassation based on the amount in dispute with the criterion of 'the objective interest in cassation in the formation of case-law'.

It is the result of an initiative by Sala 3a of the Supreme Court, whose magistrates first produced a memorandum ('exposicion razonada') in 2006, before a non-judicial plenary assembly adopted a draft reform (2014), which was to take concrete form in the adoption of a law a year later.

The abandonment of the criterion of the amount in dispute is obviously a step forward: both by its purpose and by its very high level, it excluded from the scope of cassation a very large number of matters<sup>5</sup>, for which the rule of law was never interpreted by the court whose task it was.

Replacing it with a subjective criterion that requires each appeal to be assessed raises more questions.

From a purely procedural point of view, the first effect of the reform is potentially to extend the remedy of cassation to all decisions of first instance or appeal and therefore to bring a much larger number of cases before the TS.

In Spain, the admissibility of an appeal in cassation is determined by the court whose decision is being challenged. It ensures that the conditions governing the form of the appeal (which are fairly precise) and the other rules governing admissibility (time limit, in particular, or, prior to the reform, the amount in dispute) are met. A decision not to allow the appeal may be the subject of a complaint to the TS. Apart from these complaints, only appeals that were eligible and admissible were therefore referred to the TS.

Henceforth, while verification of the conditions of admissibility remains within the jurisdiction of the judge hearing the case on the merits – and as such it is up to him or her to

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<sup>4</sup> See II. 1. Concerning the division of powers between these bodies.

<sup>5</sup> Mr Diez-Picazo gives the example of a sector as new and sensitive as the protection of personal data, which could never be brought before the TS because the maximum fines are 300,000 euros.

check that the appeal formally justifies the existence of an ‘objective interest in cassation’ – only the TS is competent to assess this interest. The Cassation Appeals Division, which previously dealt only with complaints against refusals to admit appeals, now deals with all appeals, i.e. around 9 000 per year. The Technical Office, whose members previously assisted the magistrates of all the divisions, has been assigned exclusively to the Appeals Division since the reform. Approximately 10 % of appeals are allowed, in a reasoned decision that sets out the issue of interest in cassation. The parties will then only be able to discuss this point. If an appeal is not allowed, an order is issued without stating the reasons.

However, the main interest of the reform lies in the purpose of this criterion and the interpretation given to it by the TS.

The idea of making the admission of an appeal in cassation conditional on its relevance to the formation of case-law is not new: outside Spain, the American Supreme Court and the German Supreme Court select the appeals they wish to hear. In Spain itself, such a condition, linked to the number of situations affected, was included in the conditions for admissibility of appeals where the amount in dispute was indeterminate (Article 93.2 e, LJCA, formerly). Above all, Organic Law 6/2007 of 24 May introduced a similar criterion of superior constitutional interest (‘especial trascendencia constitucional’) for the admission of amparo applications, which directly inspired the 2015 reform.

The purpose of this criterion is to focus the activity of the Court of Cassation on its role of unifying the interpretation of the law. As the explanatory memorandum to the 2015 Act states, the aim is ‘to strengthen the remedy of cassation as the means par excellence of ensuring uniformity in the judicial application of the law’. This new criterion brings about a genuine paradigm shift in cassation: of the three previous appeals in cassation, which combined to varying degrees the protection of the individual rights and interests of the applicant and the general interests of the body of law, only the latter are now in theory capable of justifying the admission of the appeal<sup>6</sup>. In practice, the reality is more nuanced.

A question of law likely to be of interest for the formation of case-law must not, however, be viewed separately from the dispute in which it arises. It is up to the applicant to demonstrate that the infringement of the substantive or procedural rule of law that he or she is invoking in the case in question is of interest in cassation<sup>7</sup>.

The main risk posed by such a criterion, immediately highlighted in legal literature, is that of arbitrariness resulting from the indeterminacy of its content. In order to limit it, because its intrinsically subjective nature will never allow it to be eliminated, Article 88 of the Ley reguladora de la jurisdicción contenciosa-administrativa (LJCA) establishes two lists of cases in which there is an objective interest in cassation: the first (Article 88.2)<sup>8</sup> lists nine cases in

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<sup>6</sup> Dominguez Luis, J.-A., El Tribunal Supremo y el nuevo recurso de casación contencioso-administrativo : interés casacional objetivo y tutela judicial efectiva, in Estudios de derecho publico en homenaje a Luciano Parejo Alfonso, Tirant lo Blanch, 11/ 2018, pp. 593-642.

<sup>7</sup> Article 88.1 of the Ley reguladora de la jurisdicción contenciosa-administrativa (LJCA): ‘El recurso de casación podrá ser admitido a trámite cuando, invocada una concreta infracción del ordenamiento jurídico, tanto procesal como sustantiva, o de la jurisprudencia, la Sala de lo Contencioso-Administrativo del Tribunal Supremo estime que el recurso presenta interés casacional objetivo para la formación de jurisprudencia.’

<sup>8</sup> Article 88.2 of the LJCA: ‘El Tribunal de casación podrá apreciar que existe interés casacional objetivo, motivándolo expresamente en el auto de admisión, cuando, entre otras circunstancias, la resolución que se impugna:

which the cassation judge 'may consider that there is an objective interest in cassation': contradictory interpretations of the rule of law by the lower courts; the contested [judicial] decision makes an interpretation of the rule of law likely to seriously affect general interests; the contested decision affects a large number of situations, by itself or by its scope; decides an unresolved question of the constitutionality of the law; is based on an erroneous interpretation of constitutional case-law or the case-law of the Court of Justice of the European Union; rules on an appeal that directly or indirectly calls into question a general rule or an agreement between public administrations or was handed down under the special procedure for the protection of fundamental rights. The second (Article 88.3)<sup>9</sup> lists five cases in which this interest is presumed, a presumption which, according to the last paragraph, may be set aside: the absence of case-law relating to the rules to which the contested decision applies; the contested decision clearly disregards case-law; the contested decision declares a general rule null and void, except where it is clearly of no significance; in appeals against acts issued by regulatory bodies falling within the jurisdiction of the Audiencia Nacional and against acts of the Governments or Government Councils of the Autonomous Communities.

The length and open-ended nature of these lists (the first sets out an option; the second a rebuttable presumption) show that their purpose is not so much to constrain the Court of Cassation in its power to assess the interest in cassation of an appeal as to provide litigants with guidelines to enable them to identify the interest in cassation in their dispute that they should assert. They do, however, give an idea of the different aspects of this concept, which not only covers the interpretation of the law: the number of situations affected by the contested decision

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a) Fije, ante cuestiones sustancialmente iguales, una interpretación de las normas de Derecho estatal o de la Unión Europea en las que se fundamenta el fallo contradictoria con la que otros órganos jurisdiccionales hayan establecido.

b) Siente una doctrina sobre dichas normas que pueda ser gravemente dañosa para los intereses generales.

c) Afecte a un gran número de situaciones, bien en sí misma o por trascender del caso objeto del proceso.

d) Resuelva un debate que haya versado sobre la validez constitucional de una norma con rango de ley, sin que la improcedencia de plantear la pertinente cuestión de inconstitucionalidad aparezca suficientemente esclarecida.

e) Interprete y aplique aparentemente con error y como fundamento de su decisión una doctrina constitucional.

f) Interprete y aplique el Derecho de la Unión Europea en contradicción aparente con la jurisprudencia del Tribunal de Justicia o en supuestos en que aun pueda ser exigible la intervención de éste a título prejudicial.

g) Resuelva un proceso en que se impugnó, directa o indirectamente, una disposición de carácter general.

h) Resuelva un proceso en que lo impugnado fue un convenio celebrado entre Administraciones públicas.

i) Haya sido dictada en el procedimiento especial de protección de derechos fundamentales.'

<sup>9</sup> Art. 88.3: 'Se presumirá que existe interés casacional objetivo:

a) Cuando en la resolución impugnada se hayan aplicado normas en las que se sustente la razón de decidir sobre las que no exista jurisprudencia.

b) Cuando dicha resolución se aparte de la jurisprudencia existente de modo deliberado por considerarla errónea o de modo inmotivado pese a haber sido citada en el debate o ser doctrina asentada.

c) Cuando la sentencia recurrida declare nula una disposición de carácter general, salvo que esta, con toda evidencia, carezca de trascendencia suficiente.

d) Cuando resuelva recursos contra actos o disposiciones de los organismos reguladores o de supervisión o agencias estatales cuyo enjuiciamiento corresponde a la Sala de lo Contencioso-administrativo de la Audiencia Nacional.

e) Cuando resuelva recursos contra actos o disposiciones de los Gobiernos o Consejos de Gobierno de las Comunidades Autónomas.

No obstante, en los supuestos referidos en las letras a), d) y e) el recurso podrá inadmitirse por auto motivado cuando el Tribunal aprecie que el asunto carece manifiestamente de interés casacional objetivo para la formación de jurisprudencia.'

or the place in the hierarchy of norms of the act in dispute may also be taken into account. The fact remains that, apart from these particular cases, the interest in cassation will most often be measured against the current state of the case-law of the Supreme Court, which may lead to a certain immobility in the case-law, either because the applicants will be discouraged from appealing where there is case-law, or because the Supreme Court may not see the point of reviewing its case-law at the stage of an admission where the arguments of the parties have not been fully developed.

In addition to these general risks, Mr Diez Picazo, a Supreme Court magistrate, points out in the aforementioned article 'a number of difficulties and limitations that 6 years of application have revealed': procedural irregularities have more difficult access to the Court of Cassation, because almost everything has already been decided; repetitive cases, particularly numerous in tax or civil service matters, clog up the TS without contributing anything to the case-law: even though only the first appeal has an objective interest in cassation, it would be as arbitrary as it would be unjust if only the first applicant were to obtain the quashing of the decision contrary to his or her interests, which, in the absence of a mechanism for dealing with series of cases presenting the same legal problem, leads to all the appeals being admitted; if the interpretation of the rules of the Autonomous Communities does not fall within the remit of the TS, and is therefore never of interest in cassation, the boundary between autonomous rule and State rule is not always clear; finally, there are differences of approach between the judges of the TS as to whether the applicant must expressly refer to one of the cases of interest in cassation included in the aforementioned lists of Article 88. Similarly, the fact that the appeal is allowed only on the point of law that is of such interest may pose a problem when the case file reveals other errors of law that cannot be censured.

To conclude this brief presentation of this new criterion, we can quote Mr Diez Picazo once more: 'The great advantage of the new appeal in cassation procedure is that it is open to virtually any question and any matter. But this is at the cost of a largely discretionary admission, which ... while encouraging the development of case-law, leads to an erosion of the effectiveness of the right to appeal in concrete cases'.

As he points out, this erosion of the right to appeal is exacerbated by the fact that there is no right of appeal against decisions handed down at first and last instance by the High Courts of Justice and the Audiencia Nacional, which generally deal with more far-reaching questions and issues. Admittedly, the TS may take account of the practical effects of the decision in order to recognise an interest in cassation. But this will always depend on the assessment of the TS.

The generalisation of appeals against the most important decisions, for which Mr Diez Picazo argues, by entrusting the two levels of court with the effective protection of litigants' rights and interests, would make it both more acceptable and more legitimate for a Court of Cassation to concentrate on developing case-law.

#### **IV. The comparative law aspect of your internship**

What were the main similarities and differences you observed between your own country and your host country in terms of jurisdictional organisation and practice, substantive law, etc.? Please give details.

As my internship lasted only 1 week, during which I attended only two sessions, I did not have the opportunity to delve into substantive legal issues. But the little I did see convinced me that the main differences between French and Spanish administrative law are not so much in substantive law (the two laws share a tradition of Latin law, a legal context marked by European law and Spanish law has been influenced by French administrative law) as in litigation procedure.

The first general difference is that, unlike French administrative litigation, the rules of civil procedure apply to Spanish administrative litigation in the absence of a special rule. This is a consequence of the unity of Spanish jurisdiction.

With regard more specifically to the cassation procedure, two particularly important differences seem to me to be worth noting.

The first is the specificity of the condition for admissibility of an appeal in cassation under Spanish law set out in III above.

The second concerns the process of drafting the legal decision.

In Spain, collegiality is usually reduced to the minimum of a single deliberation within the division, as I described in section II.

In France, it is more developed, particularly within the Council of State: while, as in Spain, the case is investigated and analysed by a member of the relevant division/chamber, then presented and debated within the chamber that adopts a solution, this so-called investigation session, which is the only one in Spain, is only the first phase of the process in France. Collegiality is more developed within the Council of State, including during this first session, since each case is examined twice, by the member of the chamber and then by the president or one of his or her assessors.

There is then a public hearing, at which the public rapporteur, an institution that does not exist in Spain but is similar to the Advocate General at the CJEU, presents his or her reasoned opinion on the case orally, and at which the lawyers may present oral observations. This is followed by the deliberations of a panel that, for cases of a certain magnitude, is composed of nine members, only four of whom belong to the chamber that heard the case (the president of the chamber, his or her two assessors and the rapporteur), the other judges being the president and the two assessors of another chamber, a member of yet another chamber, and the president of the panel who is the president of the Administrative Jurisdiction Division or one of his or her three deputies. The public rapporteur is therefore not part of the formation.

A new discussion takes place during this deliberation, which concerns both the resolution of the dispute – which may therefore be different from that adopted by the chamber during the investigation session, since only four people out of nine take part in the two sessions and these four are free to vote – and the drafting of the decision.

The drafting of decisions is also very different in the two countries. Spanish decisions are both much longer and much less standardised. From the point of view of structure and reasoning, they resemble decisions of the European courts: the previous proceedings and the facts are recalled, the arguments of the parties are set out in some detail; the applicable law is analysed, the precedents cited and all the stages of the reasoning leading to the solution are set out. It is not uncommon to read doctrinal considerations. From the point of view of style as well as content, drafts vary greatly depending on the magistrate drafting them. Finally, dissenting opinions are allowed.

Compared with Spanish decisions, decisions of the Council of State are notable for their uniformity of style and conciseness. These two characteristics are as much the result of history as they are of the way in which decisions are made. The various stages leading up to the decision make it a collective work, which quickly eludes the judge-rapporteur. For the deliberation to also cover the drafting, this must be sufficiently concise and impersonal. As a result, the statement of reasons merely recalls the applicable rule of law, the relevant factual circumstances and the essential reason justifying the application of the rule of law to the case in question. Precedents are not cited, and solutions rejected are not mentioned. All this information can be found in the conclusions of the public rapporteur or in commentaries on legal doctrine. Dissenting opinions are not allowed.

## V. The European aspect of your internship

Did you have the opportunity to observe the implementation of or references to instruments of EU law, the European Convention on Human Rights, etc.? What were the main difficulties encountered? Please give details.

I had the opportunity to take part in a very interesting discussion within the Cassation Appeals Division on a question that concerns both the application of European Union law and the coexistence in Spanish law of administrative appeals (which come under the jurisdiction of the ordinary courts) and amparo appeals (which come under the jurisdiction of the Constitutional Court).

The remedy of amparo allows anyone whose fundamental rights have been infringed to bring a case before the Constitutional Court (TC).

The issue under discussion in the Division concerned the scope of a decision of the TC (Sentencia 55/2023, de 22 de mayo de 2023) annulling a decision to expel a foreign national who had no right of residence, and all the judicial decisions (first instance; appeal; dismissal of the appeal in cassation) that led to the rejection of his administrative appeal.

On the merits, the TC considered that both the court of first instance and the appeal court had breached EU law, according to which Directive 2008/115/EC cannot allow a Member State whose national law punishes unlawful residence in principle with a fine and provides for expulsion only in the presence of aggravating circumstances to base an expulsion decision in the absence of such circumstances (CJEU 8 October 2020, C-568/19). However, the courts concerned had directly based the legality of the expulsion decision on the Directive.

The problem posed to the Supreme Court (TS) by this decision of the TC concerned not the substance of the law but the procedure. In the case decided by the TC, the TS had not accepted the appeal in cassation on the grounds that there was no objective interest in cassation (see III), since the question of the legality of an expulsion order in these circumstances had already been decided by the TS (admittedly in a different way from the TC). But the TC did not take into account the reason for the decision of the TS: it annulled it like the others on the grounds that the expulsion of the foreigner violated his fundamental rights.

What is the significance of this decision? Should the merits of the case now take precedence over admissibility, and should all appeals be admitted if it appears that the fundamental rights of the applicant have been disregarded by the courts of first instance or appeal? An affirmative answer would radically change the general principles of litigation. Admissibility is assessed

before the merits of the case are examined, and if the objective conditions of admissibility are not met, the appeal cannot be admitted, regardless of the relevance of the arguments. On the other hand, it has been suggested that certain conditions governing the formal presentation of appeals in cassation and the requirement of an objective interest in cassation, which depends directly on the relevance of the grounds of appeal raised, should not be an obstacle to the eligibility and admission of appeals in such cases.

The Admissions Division discussed this issue informally, outside the context of any given case, in order to initiate a discussion within the court on this subject, which concerns it as a whole. It will certainly receive an 'official' response before long in the form of a decision of the TS. It showed the difficulty of striking a balance between substance and procedure, between guaranteeing the rights of the public, in particular the right to judicial review, compliance with EU law and supervision of the exercise of this right, a difficulty made more acute in Spanish law by the fact that two courts can rule concurrently on the possible infringement of a fundamental right.

## VI. The 'good practice' aspect within the jurisdiction visited

What are some characteristics of administrative law or administrative litigation in the country visited that would be worth exporting to other countries? (E.g.: binding procedural deadlines, mandatory prior administrative appeal, correction of illegality during proceedings, etc.)

At first glance, Spanish administrative litigation makes use of all available means to ensure that proceedings are as swift as they are efficient.

Firstly, the generalisation of the pre-litigation procedure should make it possible to avoid numerous disputes. Unfortunately, this is not the case, as the administration seems reluctant to acknowledge its mistakes. While this preliminary procedure does not avoid litigation, it does help to prepare it: there are fewer exchanges between the parties and cases are ready to be heard more quickly than in France.

Secondly, the administrative litigation procedure is characterised at all levels by a quest for efficiency designed to ensure reasonable time frames for judgment: a single judge widely used in the first instance; appeals reserved for certain disputes, on the basis of criteria that some contest (see III); the decision-making process reduced to a minimum, without a hearing (see IV). In spite of this, the time taken to bring cases to court remains a source of concern, particularly at first instance in jurisdictions where litigation activity is highest.

Lastly, with regard more specifically to cassation, the new criterion for admitting appeals represents an interesting mechanism for concentrating the resources of the cassation judge on what constitutes the essence of his or her office, i.e. unifying case-law. It is too early to say whether this is 'good practice' that other Courts of Cassation should adopt. But the questions it poses and the answers that the case-law of the TS provides and will provide are bound to be of interest to the other European Courts of Cassation, which are probably all confronted with the difficulty of defining their role in a context of constant increase in the number of appeals and budgetary constraints.

## VII. Benefits of the internship

What benefits did you derive from your internship? Will these benefits be useful in your professional practice? How do you think you will be able to share the knowledge gained during your internship with your colleagues?

Although short, this 1-week internship, combining individual meetings with attendance at the court's working meetings, gave me what I believe to be a fairly accurate overview of how the jurisdiction works and how litigation is conducted. I was thus able to see for myself how the new system for admitting appeals in cassation is applied and the very delicate issues it still raises.

In addition to the benefits of learning about a system that is different from one's own, the experience also provides food for thought about one's own practices. The new criterion for admitting appeals in cassation, which was of particular interest to me (see III), thus provides food for thought on the role of the cassation judge, which is not just a personal matter and which I will certainly be sharing with my colleagues at the Council of State.

## VIII. Suggestions

What aspects of the Judges' Exchange Programme do you think could be improved? In what way?

Before considering what could be improved, I would like to emphasise the extent to which the very existence of this European Judges' Exchange Programme represents an opportunity for those taking part and a powerful vehicle for building a common legal culture within the Union. As for this internship, like the one I had completed in the same context 16 years earlier at the High Court of Justice in Madrid, the quality of the welcome at the court enabled me to make the most of it.

As the week I spent in Sala 3a at the Supreme Court exceeded my expectations, I have no suggestions for improvements. But I share the view expressed by my colleague Ms Hédary, who spent 2 weeks in the same court a few months earlier and whose internship coincided with that of another European magistrate, that such a situation should be encouraged as far as possible. This multiplies the number of comparisons and reciprocal knowledge of national systems.