



INTERNSHIP REPORT AND SUMMARY

Identification of the participant

Name: LANGE
First name: Cassandra
Nationality: Dutch
Country of exchange: Italy

Identification of the exchange

Hosting jurisdiction/institution: Consiglio di Stato
City: Roma
Country: Italy
Dates of the exchange: 9 – 13 Octobre 2023



SUMMARY

With great pleasure and warmth I look back on a very interesting and inspiring exchange with the Consiglio di Stato in Roma. I am deeply indebted not only to my hosts and my own Council of State in The Hague for giving me the opportunity to go to Rome, but also to ACA Europe, which makes these kinds of exchanges possible. Knowing each other and understanding each other's legal system is indispensable for mutual trust. It also makes you realize that within our national judiciaries we all have the same questions and debates and that we have so much to learn and offer each other.

In this report I follow the given format. So Chapter I explains the development of the Exchange Programme and why a visit to the Italian Constitutional Court (ItCC) is included. Chapter II describes the history of the Italian Council of State and why Italy has a 'dual system of jurisdiction', with a separate system of administrative justice. It also describes the judicial and advisory functions of the Italian Council of State and the task of the President of the Council of State to also preside over the Council of Administrative Justice (the self-governing body of the administrative judiciary). The law of the host country is shortly discussed in Chapter III. It describes article 1 CAP, containing the "*ubi ius – ibi remedium*" principle. A principle essential for the good functioning of any rule of law and which also underlies Article 47 CFR. Chapter IV is about the comparative law aspect of the exchange. Attention is paid to the different ways the judiciaries in both countries are organised; involvement of Councillors in law-making; the Job of the Italian Judge to provide effective judicial protection in accordance with the Italian Constitution; mandatory legal representation in administrative procedures in Italy; external communication and the execution phase. Chapter V examines the European aspect of the exchange. More specifically how the Italian system with the ItCC works when Judges apply the fundamental rights in the ItC and/or in the CFR in a concrete case in order to offer effective judicial protection. It describes the discussion in Italy about the role of the ItCC within the European Rule of Law and the criterion determining whether a Judge in a case concerning EU-law may refer to the ItCC for questions about fundamental rights instead of only to the CJEU. And how the ItCC can "intervene" in the dialogue between the Italian Judges and the CJEU in cases concerning EU-law. It goes without saying that this chapter has only scratched the surface of this subject. The last three Chapters are about good practices, benefits of the exchange and suggestions for improvement.

I. Programme of the exchange

To prepare the programme, my hosts kindly asked me in advance about my interests. I sent them a Chapter¹ I wrote, called: *“The Job of the Judge in the Supranational Rule of Law”*. This Chapter compares the Job of the Dutch Judges under the Dutch constitutional culture with their Job in the European legal order. Article 120 of the Dutch Constitution (DC) forbids Judges to test laws against the (fundamental rights in the) DC. But Article 47 of the Charter of Fundamental Rights of the European Union (CFR) instructs all Judges in the EU to offer effective judicial protection in cases in which Union law applies, including the fundamental rights in the CFR. Since EU-law has direct effect, the CFR is applicable regardless of the provisions of the DC. So Dutch Judges are working in two different constitutional cultures.² This can have effect on the way Judges test against fundamental rights and the degree of intrusiveness of the assessment of cases in general. There is currently a (revived) debate in the Netherlands about abolishing the testing ban in the DC. Some are also in favour of establishing a Constitutional Court.

I was therefore particularly interested in the way the Italian legal order works, given Italy has a Constitutional Court. How do the Italian Judges apply the fundamental rights in the Italian Constitution (ItC) in a concrete case in order to offer effective judicial protection? What happens when Union law applies and the Italian Judge has to offer effective judicial protection of fundamental rights in the CFR in a concrete case? Can Judges apply/test against fundamental rights in a concrete case themselves and/or do they ask preliminary questions to the Court of Justice of the EU (CJEU) and/or do they turn to the ItCC for answers first? And how do the Council of State and the Supreme Court relate to the ItCC?

So my hosts organized an extensive program (attached to this report), visiting legal organizations and arranging meetings with judges, professors and lawyers. They included the launch of the book with my Chapter at the end of my stay at the EUI in Fiesole. Also present was a Councillor of the Italian Council of State, who also wrote a Chapter in the book.

Institutions I visited:

- ItCC in the Palazzo della Consulta in Rome
- Council of State in the Palazzo Spada in Rome
- Regional Administrative Court (Tribunali Amministrative Regionali or TAR) of Lazio in Rome
- European University Institute in Fiesole

Hearings I attended:

- Public hearing of the TAR
- Public hearing of Chamber IV of de Consiglio di Stato

¹ Civil Courts and the European Polity, *The Constitutional Role of Private Law Adjudication in Europe*, edited by Chantal Mak and Betül Kas (2023) Hart Publishing Ltd, Chapter 14, p. 243-255.

² For more background information see the afore mentioned book, Chapter 14 called: *“The Job of the Judge in the Supranational Rule of Law”*.

II. The Consiglio di Stato in Roma

The *Council of State* is located in the Palazzo Spada at Piazza Capo di Ferro 13 in Rome. This is an aristocratic palace of the XVI century, with the many beautiful halls and impressive (court)rooms, filled with sculptures, paintings and the most beautifully crafted (ceiling)murals. I received a very warm welcome. And was given my own room in the Palazzo. I was accompanied throughout my visit by the diplomatic advisor of the President, who also gave me an extensive tour through the Palazzo and told me all about its history.

The Council of State is one of the most ancient Italian public institutions and was established in 1831. This is 30 years before the political unification of Italy in 1861. Originally the Council of State was the Council of the King and had only advisory functions. In 1889, with the establishment of the fourth section with genuine jurisdictional functions, the Italian system of administrative justice was officially created. In 1946, just after World War II, the Italian republic was established. In 1948 the ItC came into effect, which confirmed the existence of a separate system of administrative justice. So a 'dual system of jurisdiction' was established, according to which (at least in principle) subjective rights can be enforced by ordinary Courts, while legitimate interests must be claimed before administrative Courts (the TAR and Council of State in the degree of appeal). The Supreme Court has the final say on which Court (the administrative or the ordinary Court) is competent. The ItC also confirmed the double role of the Council of State as the highest level of Italian administrative justice and, at the same time, the highest level of advisory function.

With regard to *the judicial function*, the Council of State is the organ of administrative justice of second instance and the highest Administrative Court in Italy. It is composed of six jurisdictional - and one advisory chambers.³ The Council of State decides with a panel of five judges, including a president of the chamber and four councillors. An appeal to the Court of Cassation is not allowed against the judgments of the Council of State, except for lack of issues concerning the competence of the administrative Judge including the failure to exercise jurisdiction (Article 111, last paragraph, of the Constitution). The jurisdictional sections of the Council of State, ex officio or at the request of a party, may refer to the Plenary Assembly if a relevant point of law has given rise, or could give rise, to jurisprudential conflicts. The Plenary Assembly is composed of the President of the Council of State, who presides over it, and twelve magistrates of the Council of State, assigned to the jurisdictional sections.

The Council of State also performs *advisory functions*. The Advisory Section of the Council of State examines the draft legislative acts for which the opinion of the Council of State is required by law or is otherwise required by the administration. Advisory work is carried out by the First Advisory Chamber and the Advisory Section for Regulatory Acts. In the event of a particularly complex issue the President of the Council of State may set up a special commission, composed of magistrates belonging to both the judicial and advisory sections. If

³ For appeals lodged against decisions of the Autonomous Chamber of Bolzano of the Regional Court of Administrative Justice for the Autonomous Region of Trentino Alto Adige and appeals lodged against the judgments of the Sicilian Regional Administrative Court there are special (procedural) rules, which are not addressed here.

the Consultative Chamber or the Special Committee finds that the point of law submitted to them has given rise to or is likely to give rise to conflicting case-law, it may refer the matter to the General Assembly. The General Assembly is composed of all the magistrates serving at the Council of State and the Council of Administrative Justice for the Sicilian Region, and is convened and chaired by the President of the Council of State.

The President of the Council of State also presides over the President's *Council of Administrative Justice (CdP)*. This is the self-governing body of (only) the administrative judiciary. The CdP deliberates on all matters relating to the legal status of administrative magistrates and on the assignment of appointments, as well as on matters of organization. It also approves the budget; formulates proposals for the adaptation of facilities and services; deliberates on the establishment plan of the staff of the judiciary and formulates directives to the presidents of the judicial offices for the organisation of judicial activity, with the determination of the criteria and procedures for setting the workloads of the magistrates.

III. Italian law

Several Councillors gave me excellent presentations about the general system of administrative justice, the Code of Administrative Process⁴ (CAP), the new Public Procurement Code that entered into force on 1 April 2023 and effective remedies in the administrative procedure. For this report only one aspect of the Italian law can be developed. Coming from the Netherlands the Italian administrative procedural rules stood out.

Stemming from 2010 Italy has a relatively new CAP and can therefore be considered as one of the most modern codes on procedural law. The CAP is very concise and clear. It has only 76 pages, five Books and 137 Articles. The approach was not to regulate the entire administrative procedural law (contrary to the Dutch General Administrative Law Act, GALA), but to give a set of procedural rules based on principles and outlines. If a certain situation has not been regulated, the administrative Judge can fall back on civil procedural law (Article 39 CAP).

Book 1, Title 1, of the CAP starts in Chapter 1 with the “General principles”. The very first Article in the CAP is about the principle of effectiveness. Namely that the administrative jurisdiction shall ensure full and effective protection in accordance with the principles of the ItC and European law. This is an elaboration of the “*ubi ius – ibi remedium*” principle, which also underlies Article 47 CFR. This principle is essential for the proper functioning of the rule of law and forms the core of my Chapter on “*the Job of the Judge*”. I was therefore impressed to see this principle in such a prominent place in the CAP.

Book 4 about compliance and special rites gives in Title 1 general provisions on the compliance proceedings. Article 112 par 1 CAP stipulates that the decisions of the administrative court have to be carried out by the public administration and the other parties. And the subsequent Articles explain which administrative Judge is competent and how this

⁴ Legislative decree 2 July 2010, n. 104 - also known as the administrative trial code - is a law of the Italian Republic that regulates the functioning of the administrative trial before the TAR and the Council of State.

Judge can order the enforcement of a judgment. This means that once administrative Judges are competent, they handle all disputes concerning legitimate interests from start to finish.

IV. The comparative law aspect in the exchange

Organisation

Where Italy has a 'dual system of jurisdiction' with a separate system of administrative justice in the Netherlands the organisation of the administrative judiciary is much more complex.

In the Netherlands the courts of first instance consist of three sectors: civil, administrative and criminal law sections. So on a regional level the administrative Judges are integrated in the ordinary Judiciary. Furthermore, the Netherlands has four highest administrative judges: the Tax Chamber of the Supreme Court, the Administrative Jurisdiction Division of the Council of State, the Central Appeals Tribunal for social security and the civil servants and the Administrative High Court for Trade and Industry. In 2013 the legislator has made a provision in the GALA (Article 8:10a par 4) so that a multi-Judge chamber of one of the administrative high courts (with the exception of the Supreme Court) may refer a case to a large chamber, with also Judges of the other high courts, if it considers this advisable with a view to legal unity or legal development.

Finally, contrary to Italy the Netherlands does not have a separate Council for the *administrative* Judiciary. There is only one Council for the Judiciary. This is a coordinating administrative body, presiding over the eleven district courts (*including the administrative judges*), the four courts of appeal, the Central Appeals Tribunal and the Administrative High Court for Trade and Industry. The Council of State and the Supreme Court do not fall under the scope of the Council for the Judiciary.

Involvement of Councillors in the making of laws

It was surprising to learn that Councillors of the administrative jurisdiction division of the Council of State were directly involved in the making of the CAP. The same applies to the new Public Procurement Code. In the Netherlands, because of the Procola judgment of the European Court of Human Rights (ECtHR 28 September 1995, ECLI:NL:XX:1995:AG0214) and the Kleyn judgment (ECtHR 6 May 2003, ECLI:NL:XX:2003:AF8328), advisory tasks and judicial tasks within the Dutch Council of State are nowadays strictly separated. Let alone that Councillors of the judiciary are directly involved in law-making. Interesting though are the results of this cooperation between the legislator and the judiciary. Both laws are clear and concise and mainly reflect the principles and broad outlines of the laws concerned. The question is how Judges deal with the room this leaves for interpretation. And how this affects the Judge's freedom to deviate from this law in the event of an alleged violation of (fundamental rights in) the Constitution.

Substantial law

As already mentioned under I, Article 120 DC forbids Dutch Judges to test laws against the (fundamental rights in the) DC. A similar Article such as Article 1 CAP (see under III), that states that the administrative jurisdiction shall ensure full and effective protection in accordance

with the principles of the Dutch Constitution, is therefore missing in the GALA. Instead Dutch Judges can test directly against the European Convention of Human Rights (ECHR) on the basis of Article 94 DC. This Article stipulates that statutory regulations in force within the Kingdom shall not be applicable if such application is in conflict with provisions of treaties or of resolutions by international institutions that are binding on all persons. Dutch Judges cannot declare (articles in) laws void, but they can declare (articles in) laws inapplicable in a concrete case on that basis. So via the ECHR Dutch Judges can circumvent the ban on testing against the DC to some extent. As mentioned earlier, EU-laws, including the CFR, have direct effect, so a national testing ban in principle does not prevent the assessment of fundamental rights in cases concerning EU-law.

Judicial practice

A striking difference in judicial practice arises from procedural law. In Italy it is (in principle) mandatory to have legal representation in order to litigate but for the procedure before the advisory Chamber, while in the Netherlands in administrative procedures one is also allowed to litigate personally. The effect of this difference is noticeable on several levels.

Starting with the level of the right of access to justice. I've been told that litigating with a lawyer and court fees are very expensive in Italy. Without legal aid fees it will be difficult for ordinary people to litigate in administrative procedures. For that reason in the Netherlands a lawyer is not obligatory in order to litigate. And upon request you can be exempted from paying court fees if you have less financial resources.

An other level is about the hearings. In the hearings I attended in first instance and in appeal, the parties themselves were absent. This gives a very different dynamic in the courtroom. In the Netherlands the parties are usually present during the hearing, also if they have legal representation. They may speak for themselves and also have the right to speak in person for the last time before the hearing is closed (Article 8:65, par 2, GALA). The participation of the parties during the hearings often gives more context behind the legal conflict and with that insight in the actual conflict and possibilities to solve it. In Italy the procedures seem more written-oriented and the function of the hearing seems different. At the hearings the communication between the Judges and the representatives of the parties is more business-like, focussed on legal points and mainly on the more procedural aspects. The administrative law procedure in Italy looks a lot like the civil proceedings we (used to) have in the Netherlands.

Also different (although the opinions deviated) might be that in the Netherlands the administrative Judge is obliged to *ex officio* supplements the legal grounds (Article 8:69, par. 2, GALA). This means that even though a certain Article/legal ground is not explicitly mentioned the Judge, given the facts and the arguments of the parties, has to apply this Article if applicable to the situation. This is especially important in the Dutch judicial practice, since parties can litigate in person and do not always know which Article to refer to. But also when a party is represented by a lawyer the Judge still has to *ex officio* supplement the legal grounds. In Italy in the area of evidence (fact finding) and investigative activities the administrative Judge may, like the Dutch Judge, *ex officio* supplement the facts (Book 2, Title III, CAP and Article 8:69, par. 3, GALA).

Communication

The Dutch Council of State sees the ACA-Europe Forum as a useful tool to communicate with members of ACA-Europe about all kinds of EU law topics and compare solutions. This also provides insights into how to assess (the implementation of) rules in EU-directives and regulations. As I understand the ACA-Europe Forum is not used (very often) in Italy. Unfortunately there was no time to go into this in more detail.

Furthermore in the Netherlands the Council of State has press Councillors and a Public Relations (PR) division with trained lawyers to draw attention to the more important and influential judgments. If necessary, the core of the judgment is put in the spotlight in more understandable language (of course without deviating from the content of the judgment). As I understand the Italian Council of State does not have a PR division. Once the judgment is delivered, there is no further communication: the judgment should speak for itself.

Execution phase

The Italian 'dual system of jurisdiction' has the advantage that the administrative Judge also handles the execution phase. According to Article 8:41a GALA the Dutch administrative Judge has to settle the dispute as definitively as possible. But the execution phase is left in the hands of the civil Judges. So it is therefore not always easy for administrative Judges to oversee the actual effects of their judgments (as was one of the issues in the *Childcare Allowance Affair*, see my Chapter about *the Job of the Judge*). And thus if the dispute is settled as definitively as possible.

V. The European aspect of your exchange

I was particularly interested in how the Italian system with the ItCC works when Judges apply the fundamental rights in the ItC and/or in the CFR in a concrete case in order to offer effective judicial protection.

Together with an Italian Councillor I visited the ItCC. We had very interesting and enlightening conversations about this topic with a Constitutional Judge and with a Professor of Public Law and Study Assistant at the ItCC. There just had been a seminar in Rome in May 2022 about this topic. This seminar was dedicated to the landmark judgment No. 269/2017 rendered by the ItCC and was about the Double Preliminary Question. A special issue about this conference was recently published in the Italian Journal of Public Law (Vol. 15, issue 1/2023), which collects the contributions presented at this seminar. In short a few remarks.

It is important to emphasize that Italy has, contrary to the Netherlands, a dualist legal system. So international treaties have to be implemented in national law, before they can have effect. Therefore constitutional review of also these laws is reserved for the ItCC. This left the ItCC in conflict over its role to uphold fundamental rights when Union law applied. Who is competent to assess the constitutionality of laws implementing Union law? The current framework for the ItCC's relation with the CJEU was established in judgment No. 170/84 with the so called "Granital model". In that judgment the ItCC accepted the two basic principles of

EU law: supremacy and direct effect. Since then, judicial conflicts between national law implementing EU-law and the fundamental rights from the CFR, even where they overlap with those from the ItC, involved only the ordinary Judges and the CJEU.

But with the entry into force of the CFR in 2009, with the wider implications of fundamental rights when EU-law applies, the ItCC wanted to reconsider the “Granital model”. The landmark judgment No. 269/2017 introduced a dual preliminaryity. This has been refined and modified by subsequent judgments of the ItCC indicating the allocation of tasks between the ItCC and the CJEU. While recognizing the supremacy of CJEU in matters concerning EU-law and fundamental rights, the ItCC gives the ordinary and administrative judge the choice to go before either or both. But there is no obligation to go before the ItCC first. So an ordinary judge, before submitting a preliminary ruling to the CJEU, can first ask the ItCC to review an internal act with regard to both domestic and European fundamental rights. By doing this, the ItCC can conduct a constitutional review before the CJEU issues a ruling on the matter. Via this way, the ItCC can “intervene” in the dialogue between the ordinary Judge and the CJEU. In doing so the ItCC hopes to prevent conflicts instead of resolving them afterwards. This reassessment of the “Granital model” raises many questions about the criterion when ordinary Judges may (also) refer to the ItCC. One criterion might be the increasing relevance of national authorities’ margin of discretion in the implementation of EU law.

The main pathway of access to the ItCC is the ‘incidental procedure’. When a Judge is called upon to apply a legal provision the constitutionality of which is questionable or suspect, the Judge is required to suspend the proceedings and refer the case to the ItCC, so that the legislation may be reviewed. The same pathway applies when a legal provision might be in conflict with the ECHR. And when Union law comes into play and there is doubt about compatibility with both domestic fundamental rights and the CFR, it depends on the development of the new “269 model” whether the court may or must refer to the ItCC.

VI. “Good Practice” within the host jurisdiction

- The high-quality discussions within the judiciary and legal science about the position of the ItC and the ItCC within the European Rule of Law. And about how fundamental rights are assessed.
- The EUI in Fiesole, that brings together Judges and legal scientists and practitioners from all over the EU to discuss the core of fundamental rights of the CFR and how Judges can apply them in their national legal orders.
- The clear and concise way in which laws such as the CAP and the new Public Procurement Code are set up, beginning with the general principles and goals it wants to achieve.
- The inclusion of the first Article in the CAP about the task of the Judge to provide effective judicial protection in their cases. Essential for the proper functioning of the Rule of Law.
- The Judge's responsibility for the legal procedure from the beginning to the end, including the execution phase. Important if a Judge wants to settle the dispute as definitively as possible.



- The way in which the entire administrative procedure has been digitized. Very efficient.

VII. The benefits of the exchange

For me this was a very inspiring exchange with many benefits. On a professional level my understanding of the Italian legal system has deepened. My understanding has also grown of the ways in which a Constitutional Court can impact the preliminary ruling procedure before the CJEU and, in doing so, can influence discussions on general principles and fundamental rights within the EU. It became clear to me how a Constitutional Court can make a constructive contribution to the interpretation and development of fundamental rights, not only within the national rule of law, but also within the European Rule of Law. Furthermore, at a collegiate level I was also very impressed by the cordiality and openness with which everyone spoke to me. And even on a cultural and culinary level I have been spoiled with impressive tours, lunches and dinners. I will remember this exchange with great pleasure and warmth. And I hope to one day be able to return this favor by receiving my colleagues from the Italian Council of State in The Hague.

VIII. Suggestions

Once contact was made with my Italian host, everything went very well and I couldn't have wished for a better host or Exchange Programme. The only aspect of the Exchange Programme that might be improved is the accessibility of ACA-Europe for questions about the different phases of the Exchange Programme.

