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O P I N I O N

BULGARIAN LAW ON THE ADMINISTRATIVE COURT

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Comments on the bulgarian Law on the Administrative Court

1. It is difficult to comment on the present darf law because to a remarkable degree the Law on civil procedure is applicable also to proceedings before the administrative court. Not knowing the Law on civil procedure it is impossible to judge whether certain provisions (for instance whether representation by an advocate in proceedings before the Administrative Court is obligatory or not, whether reopening of proceedings is provided for) are forgotten or provided for in the Law on civil procedure. Therefore, the following comments should be seen in that light and concentrate on main problems.

2. The competence of an Administraitve Court in modern law is circumscribed by a general clause. This is not done in the present draft, This fact makes is necessary to insert complicated provision concerning the competence of the Administrative Court and to provide for exemption as done in Art. 5. It would be less complicated to provide for a provision according to which

a) all individual administrative acts are open for complaints,
b) for infringement of the subjective rights of the applicant,
c) after exhaustion of remedies.

Drafting such a provision should shorten very much Art. 3 and Art. 5 could be deleated because the administrative acts mendtioned in that provision do not infringe subjective rights of persons.

Art. 3 para. 1 mentions "normative acts" leaving open the question whether regulations are included in such a term. To rescind regulations should be a prerogative of the constitutional court.

3. No provision is contained in the draft for the case that an administrative authority or subordinated administraitve courts fail the reder a decision or judgement within a certain time limit. A provision according to which in such a case the Administrative Court can be seized and decides in the merits is recommended.

4. Furthermore, the is no express protection against factual administrative acts, as for instance arrestation or search of a home. Such acts are they regarded as "administrative acts" or exists a lacuna.

5. As far as charpter 3 of the draft is concerned, the provisions to solve conflicts of competence are rather complicated. To set up a special court is a costly solution. It could be considered to entrust such a competence to the Constitutional Court. The fact that according Art. 9 para 1 the court meets in private may - obviously there is no public and oral hearing - raise problems under Art. 6 para 1 of the European Human Rights Convention if the court has to deal with criminal charges or civil rights. (this applies to other provision also, see Art. 25 para. 3 or 31 para 1). Futhermore, it is unrealistic to impose on the court a time limit of only three months. What happens if the court does not decide within that time limit? Will in such a case the court became incompetent to deal with the case? That would not be an advisable solution. So the provision will be ineffective. In the present context it sould be pointed out that other provisions of the draft also introduce time limits for decisions. What has been said before, apply to those provision also.

6. In Art. 18 para the beginning of the time limit for a complaint is left open.

Art. 19 does not say which organ of the local selfgovernment is competenz to lodge a complaint. Art. 21 para 1 provides no direct access to the court in cases of complaint according to Art. 3 para 2. Doea exist a specific reason for that? Direct access to court should be regarded as essential. What happens if the authority whose decision is complaint against does not send the complaint to the Administrative Court? The complicated procedure provided for in Art. 21 para 2 could be avoided if direct access to the court is granted. Art. 25 provides for an admissibility decision. Such procedures are time consuming, costly and not necessary. As far as Art. 25 para 2, no. 3 is concerned it may be stated that not personal interest or direct interest (what does that mean?) are of importance, but whether a sujective right of the applicant could be violated. The complaint is to be rejected of "obviously not subjective right of the applicant has been violated".

7. One of the most important provisions is Art. 42 because that provisions answers the question what shall happen when the administrative decision is repealed by the judgement of the court. But it is only stated that the judgement must be executed. It would be advisable to elaborat on that provision. What is of interest for the applicant is that a new decision complaying with the legal opinion of the court is rendered or such a legal situation is established. Art. 42 para 2 provides as a sanction for noncompliance with the judgement the dismission of the public servant responsible. Since such a decision is left to the president of the Administrative Court this seems to be a breach of the principle of seperation of powers. On the other hand this is not a solution in the interest of the applicant. For the protection of his interests a new complaint to the court against the failing of the administration - within a certain time limit - to render a new decision could be envisaged.

8. The present draft is rather unclear as far as two points are concerned:

a) Has the Administrative Court only the competence to repeal an administrative act if found illegal or has the court to decide the case in substance (as to the merits) ?

b) Has the Administrative Courts the competence to control the administrative court the case complained agaist only as to the law or also to the facts ? In view of Article 6 para. 1 of the ECHR this an important question insofar als civil rights or a criminal charge is involved.

Both question should be clearly answered in the present law.

9. The present draft provides in serveral provisions for a "procureur". His competences are rather unclear. Art. 35 gives the impression that the "procureur" has a function like an advocate general. On the other side according to Art. 45 para 2 he has the right to complain. It is not indicated under which condition the "procureur" may lodge an appication before the Administrative Court. In this context it should be pointed out that the main function of an Administrative Court is to saveguard the subjective rights of persons. Complex legal problems may be created if an organ is established which - eventually against the interests of the persons involved - may seize the Administrative Court (in the interest of objective legality). In any way it is necessary clearly to define the competences and functions of the "procureur". Probably, however, the "procureur" is superfluous.

10. Part II of Charpter 4 deals with the procedure "pour une abrogation des actes administratifs", Partei III of the same charpter with the "prodédure de cassation"; where is the difference between "abrogation" and "cassation"? Is it necessary to make such a differention? Both types of procedures are regulated very similar. It would be a simplification to merge the legal provision for both procedures.