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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

O P I N I O N

BULGARIAN LAW ON THE ADMINISTRATIVE COURT

by

Mr A. SUVIRANTA
(Finland)

ANTTI SUVIRANTA

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Draft Bill on the Supreme Administrative Court of the Republic of Bulgaria

COMMENTS

Introduction

I have been asked to present my observations on a Draft Bill on the Supreme Administrative Court of the Republic of Bulgaria. My comments are based on a French translation of the Draft [CDL (95) 80].

The proposed act is intended to regulate the competences of the Supreme Administrative Court as well as the procedure before the Court (Art. 1, para. 1 of the Draft). In contrast, the structure, the composition and the organisation of work of the Court as well as the position of the judges and other officials of the Court are regulated in the Act on the Organisation of the Judicial System (Art. 1, para. 2). The last mentioned questions remain consequently outside the scope of my comments.

Fundamental provisions on the Supreme Administrative Court are included in Chapter Six ("Judicial Power") of the Constitution of the Republic of Bulgaria. These constitutional provisions are in my opinion faithfully observed in the Draft. Even in other respects, the provisions of the Draft would as a whole regulate the competences of, and procedures at, the Supreme Administrative Court in a satisfactory manner. My comments in the following will concern some details of the Draft only.

Supervision of Other Authorities

According to the Constitution, the courts (in general) shall supervise the legality of the acts and actions of administrative bodies (Art. 120), and the Supreme Administrative Court shall exercise supreme judicial oversight as to the precise and equal application of the law in administrative justice (Art. 125). The latter provision is repeated exactly in the Draft, but from all administrative bodies, the "supreme administrative organs" have been singled out for having the legality of their acts and actions supervised by the Supreme Administrative Court (Art. 2).

A supervisory function of this kind is a very delicate matter, regard taken to the independence of the courts and to the separation of powers between the executive and judicial branches. On the basis of the cited provisions alone, the Supreme Administrative Court can in my opinion neither give orders to the authorities under its supervision nor amend or abrogate their acts or actions on its own initiative. The provisions can on the other hand be valuable in preventing the Supreme Administrative Court from being isolated in an "ivory tower", without insights in the functioning of the society around it. Somewhat similar provisions in Finland have been used as a base for co-operation between authorities for educational and related purposes.

Emergency Situations

Citizens and legal entities are according to Art. 120 para. 2 of the Constitution free to contest any administrative act which affects them, *expect those listed expressly by the laws*. A list restricting the competence of the Supreme Administrative Court is included in Art. 5 of the Draft. According to subparagraphs d and e of paragraph 2 of this article, the Supreme Administrative Court has no competence to examine contestations of acts by which "Sont réglementées ou sont résolues des questions liées à une guerre déclarée ou à un état

de guerre ou une force majeure déclaré" or "Sont réglementées ou sont entreprises des mesures provoquées par des catacysmes ou des avaries graves de production".

In my opinion, these exclusions are unnecessary and contrary to the Rule of Law. In emergency situations, drastic measures are often needed. Such measures must, however, be based on competences granted by the Constitution or legislation under it; and to protect themselves against unfounded measures, individuals and entities should be able to contest the measures in courts of law. These matters are also treated in the Report of the Venice Commission on Emergency Powers [CDL-EM (94) 2 Revised 2].

The emergency situation requires on the other hand often that the emergency measures are executed swiftly. Any unsolved difference about the legality of a measure should then not hamper the execution. Under the Draft, the availability of legal redress against an emergency measure would cause no difficulties in the case of contestations of normative acts or requests of cassation against decisions of lower administrative jurisdictions: in these cases, the contested measure may be executed despite the contestation, except as far as the Supreme Administrative Court orders otherwise (Arts. 20 and 55).

Appeals against individual administrative acts, however, suspend the execution of the administrative decisions, except as far as the Supreme Administrative Court allows an execution before the appeal is decided (Art. 20, para. 2). The emergency situation might require that the administrative decision be executed before the Supreme Administrative Court is able to decide whether the execution should be allowed. To cope with this defect, it is not, however, necessary to prohibit appeals against such administrative decisions altogether. It is sufficient with a legal provision entitling any administrative authority to declare that an emergency measure decided by it may be executed despite any appeal, except as far as

the Supreme Administrative Court eventually forbids the execution.

According to Art. 6 of the European Convention on Human Rights, everyone is entitled to have his civil rights and obligations determined by an independent and impartial tribunal, and according to Art. 13 of the Convention, everyone whose rights and freedoms as set forth in the Convention are violated shall have an effective remedy before a national authority. It is true that measures derogating from the obligations of the Convention may be taken under its Art. 15 in time of war or other public emergency threatening the life of the nation, but only to the extent strictly required by the exigencies of the situation. I cannot see that a prohibition to contest an administrative decision could ever be strictly required by the exigencies of an emergency situation as long as the contestation is not allowed to delay the execution of the decision.

Minority Languages

According to Articles 22 and 45 of the Draft, all applications to the Supreme Administrative Court shall be in Bulgarian. Bulgarian is according to the Constitution (Art. 3) the official language of the Republic. This constitutional provision may not make the requirement of Bulgarian language in applications absolutely indispensable. With regard to the work of the Venice Commission in the field of the protection of minorities and to the standards of the Council of Europe in this field, I would in any case like to refer to legislative possibilities of various kinds to help persons without a complete command of the official language to approach National authorities, the Supreme Administrative Court included.

Sense of Some Definitions

Individual administrative acts are in paragraph 2, subparagraph 1 of the Complementary Dispositions of the Draft defined as "les actes délivrés *d'après la forme due de la loi* d'un organe administratif *compétant dans les limites du pouvoir qui lui est donné* avec lesquels *conformément à la visée de la loi* sont crées des droits ou des obligations ou sont concernés des droits ou des intérêts *défendus juridiquement à des differentes personnes*" (my italics). This definition is obviously not intended to be taken literally: it cannot be the intention of the Draft to deny contestations of administrative decisions on the ground that they are formally deficient, outside the competence of the authority or official making them, etc. The definition should in my opinion be rectified accordingly. In the definition of normative acts in paragraph 1, subparagraph 1 of the Complementary Dispositions there is a corresponding phrase which refers to rules made "*à la base et en application de la Loi*". A rectification is in my opinion needed also here.