HELLENIC REPUBLIC

GREEK NATIONAL COMMISSION FOR HUMAN RIGHTS

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Comments on the Bill of the Ministry of Justice titled "Acceleration of proceedings in administrative courts and other provisions"

I. Introduction

The NCHR considers the bill in question as an important step to address the long duration of trials before administrative courts, which often may result in denial of justice. The bill introduces bold procedural changes which may alleviate the overburden of courts. The NCHR has repeatedly stressed the need to tackle the said problem. In 2005, it presented recommendations for improving the implementation of the ECHR in the domestic legal order, several of which concerned the Code of Administrative Procedure.

Since then the problem has become even greater. Furthermore, the continuous lack of an effective remedy for the violation of the right to a trial within reasonable time has resulted, after the *Konti-Arvaniti* judgment, in numerous convictions of Greece for violation of article 13 ECHR, apart from the convictions for violation of article 6 due to the unreasonable time of trials.

The main causes for the accumulation of cases and the unreasonable time of trials are maladministration in conjunction with the overwhelming existence of laws and the inconsiderate use of judicial remedies by the State and public legal entities which account for a very large percentage of cases pending before the Conseil d' Etat. Thus, any procedural reform will not succeed while the function and the mentality of the Administration remain steady. Under the present circumstances the considerable drop of the court's

backlog may be achieved only via the radical decrease of judicial remedies exercised by the State.

Moreover, the intermediate administrative complaint which was established in order to prevent the totality of cases reaching the courts has developed into a simple formality, as it was not equipped with the competent administrative organs examining substantially the cases before them. That is why the members of the administrative organs competent for examining the intermediate complaints should not belong to the services issuing the administrative act under examination and should receive proper training.

II. Comments on the Bill

A) The aim of the Bill

According to the Explanatory Report the main aim of the Bill is "addressing the delays in the administration of justice before both the Council of State and the administrative courts of first and second instance which undermine the rule of law and weaken in practice series of constitutional rights, as well as discouraging the exercise of judicial remedies for the sole purpose of postponing the fulfillment of legal obligations, particularly those relating to payment of taxes".

The Explanatory Report notes that the measures designed take the following directions: a) introduction of new procedures aimed at reducing the large number of trials for the same legal issue, b) simplification of procedures before administrative courts c) enhancement of the procedure of pilot trial, d) measures to prevent the problem of the non conveyance of the file by the Administration – which is a root cause of postponements.

It is further noted that while the Bill introduces measures to prevent the long duration of trials, it does not introduce any measure for restituting the damages generated by the long duration.

B) First Chapter: General Provisions

Article 1: Pilot trial

This article concerns the institution of the pilot trial. The Council of State is to examine any judicial remedy exercised before any administrative court, if it poses “a question of general interest which affects a wider circle of persons”. The case is introduced to the Council of State, at the request of a party or at the request of the competent administrative court by a decision of a three-member committee of the Council of State published in two daily Athenian newspapers and the examination of the relevant case by the administrative court is “postponed”.

The three-member Committee of the Council of State will have to consider: a) whether a relevant request has been submitted, and b) whether the judicial remedy poses "a question of general interest which affects a wider circle of persons”. The first condition is a formality, whereas the second one is substantive. The three-member Committee will adopt a formative or negative decision. In any case, its decision needs to be fully reasoned. This needs to be provided for in the Bill.

The decision of the three-member Committee does not constitute a judicial decision. It is, however (if positive) a preparatory act of the proceedings before the Council of State which affects the legitimate interests of the parties, in view of the binding nature of the Council of State’s judgment in the pilot trial. The same legal interests are affected also by a negative decision. Therefore, pursuant to article 20, par. 1 of the Constitution and 6 par. 1 of the ECHR the parties should be given the opportunity to express their views to the committee before it reaches its decision. Failure to provide such a possibility may be considered incompatible with the constitutional rule of natural judge (article 8, par. 1 of the Consitution).

It needs to be noted, however, that the provisions of this article, in combination with article 12 of the Bill might lead to the "freezing" of the jurisprudence.

Article 2: Appeal/cassation against a judgment finding a law in violation of the Constitution or an international convention

The article provides for the possibility of appeal or cassation against an administrative court's judgment which finds the provision of a law unconstitutional or in violation of an international convention, even if according to standard procedural rules there are no judicial remedies left. The aim of this provision is the unity of jurisprudence. This provision may not hinder any administrative tribunal from referring a question to the EU Court of Justice (formerly ECJ).

Article 3: Applications for cassation on the part of the State or Public Legal Entities

The State and the Public Legal Entities are represented before courts by the Council of State or its members. The said article requires, prior to the lodging of an application for cassation before the Conseil d' Etat by the State or the Public Legal Entities, to lodge an advisory opinion by the Council of State considering at least one of the reasons of cassation admissible. According to the Explanatory Report the procedure will result in the "screening" of applications for cassation on the part of the State.

Chapter Two: Amendments to the legislation of the Conseil d' Etat
Άρθρο 6: Report of the Rapporteur Judge

This article significantly weakens the institution of the Rapporteur, a key element of the functioning of the Council of State which contributes substantially to the proper administration of justice, and therefore to the effective judicial protection of individuals. In particular:

According to par. 1 of article 22 PD 18/1989 in force, the Rapporteur prepare a summary report that includes the facts, the data certified by documents, the questions raised and his/her reasoned opinion on these questions. The Bill under consideration abolishes the reasoned opinion of the

Rapporteur. According to the Explanatory Report the reasoned opinion constitutes an important cause for delays.

First, we note that the aforementioned justification for abolishing the opinion of the Rapporteur is quite odd given that he/she will have to submit it at the deliberations. The Rapporteur will most probably have shaped his/her opinion before the hearing Chances when studying the case file. Thus, its abolishment will not contribute to the acceleration of the proceedings. Furthermore, given that in the case of a negative opinion applicants withdraw their case, the abolishment might have the opposite results.

We note that under article 6 of the Bill the Rapporteur's report will not include a reasoned opinion, but simply "the questions raised." Thus, it will pose the legal questions on which the court must adjudicate. Article 6, par. 1 ECHR, however, requires that the party to the case has knowledge of any document concerning the facts of the case and their legal classification. It is therefore necessary for the report to be communicated to the parties.

Article 7: Rejection of manifestly inadmissible or unfounded judicial remedies

This article amends par. 1 of article 34A PD 18/1989, concerning the admissibility of judicial remedies before the CoE. The rejection of judicial remedies which are manifestly inadmissible or unfounded, will be decided by a chamber of three judges of Council of State (instead of five) upon the Rapporteur's recommendation. The party will be notified for the referral of his case to the three judges' chamber.

We note that the parties should be given the opportunity to present their views in writing before a decision is reached by the chamber the formation, at least for those remedies which are submitted directly to the Council of State. Otherwise, the rejection will result in precluding access to justice without a prior hearing, which would be incompatible with article 20, par. 1 of the Constitution and article 6, par. 1 of the ECHR.

Article 12: Admissibility conditions for applications of cassation or appeals

According to par. 3, application for cassation or appeal is allowed only when it is argued in the memorandum submitted that there is no relevant jurisprudence by the State Council, or that the contested judgment is contrary to the jurisprudence of the Council of State or of another Supreme Court or to an irrevocable decision of an administrative court. Thus, an institution similar to the Anglo-Saxon precedent is introduced into the Greek legal order.

We note that these provisions preclude the alteration of jurisprudence and the interpretive development of law by adapting to changing social conditions and/or supranational law. It should be added as a permissible ground for cassation or appeal, the opposition of the contested decision to the jurisprudence of the EU Court or an international tribunal (ex. ECtHR).

Chapter Three: Amendments to the Code of Administrative Courts Procedure

Article 22: Payment of 50% of the owed tax or customs' duties as admissibility condition

This article sets as a condition of admissibility of the appeal in tax and customs disputes the payment of 50% of the amount adjudicated by the court of first instance. However, the Council of State has held that the payment of high amount as a condition of admissibility of the appeal is contrary to article 20, par. 1 of the Constitution because it renders extremely difficult the use of the judicial remedy.

Besides, according to the jurisprudence of the ECtHR although article 6 does not require the existence of courts of further instance, when such courts do exist they need to provide for the guarantees of a fair trial, such as access to court.

Article 23: Repetition of the trial in case of conviction by the ECtHR

It adds a new article to the Code of Administrative Courts Procedure which provides for the reopening of the case where the ECtHR has held that a judicial decision was in breach of the right to a fair trial or another right provided for by the ECHR.

This provision should be extended, *mutatis mutandis*, in cases where the Court of Justice of the EU has held that a court decision is in breach of EU law.

Άρθρο 34: Stay of execution of an individual administrative act

The new provision limits significantly interim protection. In particular: a) Interim protection is granted "if the applicant argues and proves that the immediate execution of the act contested would cause irreparable harm or if the court considers that the remedy is manifestly founded." Consequently, interim protection is precluded when the reparation of the harm is "particularly difficult", as was the case.

Chapter Four: Transfer of competencies

Article 49: Competence for cases regarding aliens and the acquisition or loss of Greek nationality

The NCHR strongly supports UNHCR's request to be granted the capacity to intervene as a third party in cases concerning granting refugee status or subsidiary protection.

As far as the transfer of competence for cases of Greek nationality from the Conseil d' Etat to administrative courts of appeal is concerned the NCHR would like to express its concerns. In view of the implementation of new Law 3838/2010 which amended significantly the Greek Code of Nationality -in particular article 6 which provides for the reasoning of decision accepting or rejecting a naturalization application-, it would be advisable for the time being for the Conseil d' Etat to preserve that competence in order for a coherent jurisprudence to be generated.

Chapter Five: Special Procedures before administrative courts

Article 55: Legality of detention of an alien under deportation

Article 55 adds a new paragraph to article 76 of Law 3386/2005, according to which the judge will review also the legality of the detention of an alien under deportation. This amendment comes in the light of the two recent judgments of the ECtHR (*S.D. v. Greece, and Tabesh v. Greece).* This new provision, however, does not resolve all questions of interpretation as they have emerged in practice.

Even under Law 2910/2001 article 44 of which provided expressly for the review of detention's legality the courts were consistently upholding that the review of detention's legality did not extend to deportation's legality which included the order for detention.

Therefore, in order for the provision to be in full compliance with article 5 par. 4 ECHR it needs to be provided for that the judicial review of the detention encompasses also the review for the legality of the deportation order on which the detention order is premised.

Furthermore, according to the ECtHR' case law in order for detention to fall under the exception of article 5, par. 1 (e) ECHR and to be legal it needs to take place in facilities and under conditions which comply with the requirements of article 3 ECHR so as not to result in inhuman or degrading treatment of the detainee (*Saadi v. United Kingdom,* 29.01.2008, par. 74, *A.A. v. Greece,* 22.07.2010, par. 89, *Tabesh v. Greece,* 26.11.2009, par. 34-44). Thus, inappropriate detention conditions should be provided for as a ground for opposing detention.

Chapter Six: Amendment to the legislation regarding the compliance of the Administration with domestic judgments of administrative courts

Article 56

Article 56 amends Law 3068/2002 regarding concerning the Administration's compliance with domestic judicial decisions. According to par.

2 the review of the Administration's compliance with the judgments of administrative courts is assigned to three-member councils established in every administrative court, and not to the three-member council of the Conseil d' Etat. The NCHR in its report of 2009 on the "Compliance of the Administration with domestic judgments" had recommended the decentralization of the procedure by the establishment of three-member councils at every Court of Appeal in order to supervise the Administration's compliance with the judicial decisions delivered by courts of its region. Par. 2 attempts to do that. However, the desired decentralization should be done at the level of appeals courts which have more experienced judges.

Furthermore, we need to note that the present Bill is an opportunity to amend broadly and radically Law N. 3068/2002, in the light of another ECtHR's judgment in the case of "Union of Private Clinics of Greece & others v. Greece", and the judgment 2347/2009 of Areios Pagos, on the basis of the NCHR's recommendations.

21 October 2010