11th COLLOQUIUM OF THE COUNCILS OF STATE AND OF THE SUPREME ADMINISTRATIVE COURTS OF THE MEMBER STATES OF THE EUROPEAN COMMUNITIES

Summary and conclusions of the colloquium

presented by the general reporter

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SUMMARY AND CONCLUSIONS OF THE 11th COLLOQUIUM

The delegations which represented the Councils of State and the Supreme Administrative Courts of the Member States of the European Communities held in Lisbon, on the 17-19 May 1988, a colloquium about the following subject matter:

The intervention of the courts in the execution of the individual administrative decisions, particularly in the fields of protection of the environment and the protection of political refugees.

The Court of Justice of the European Communities was also represented.

The chairman of the working sessions was the President of the Supreme Administrative Court of Portugal.

The national reports and the general report which made their synthesis were put at the disposal of the delegations.

These reports and the discussions which took place permit to express the summary and to make the following conclusions:

All national systems recognize that the administration, in order to fulfil its tasks, must have the power to enforce by itself, in lieu of the recalcitrant individual, if necessary by constraint or using the public force, the consequences attached to its executory decisions.

However, in this action, the administration must use the means adquate and proportionate to the concerned objective and must act in a way that doesn't cause any harm to the rights and legitimate interests of the individuals.

The jurisdictional protection of the rights and interests of the individuals, concerning the administrative execution, happens mainly on the occasion of the introduction of a judicial review («recours contentieux») against the executory decision.

However, in Denmark, this protection may happen before the execution when the public authority or the concerned individual, can file a suit in an ordinary court in order to obtain a previous decision about the legality of the administrative decision. This competence is parallel to the one of the repressive judge, who can appreciate the legality of the act on the occasion of a criminal procedure against the individual.

In Ireland a jurisdictional intervention before the execution of the decision when an individual introduces an appeal before a judge against the decision is also possible.

The irregular or illegal administrative execution leads to a legal sanc-

tion, which nature varies according to the national regimes and the concrete cases: annulment, nullity, legal inexistence, «voie de fait».

When the execution is performed by an authority or an officer, the irregular or illegal execution implies personal responsibility, civil or disciplinary, and, in more serious cases, also criminal. That execution brings also, if there exists any connection with the functions, the civil liability of the public corporation, which is, in many countries, like France, predominant. In Germany, the civil liability is always of the State. In the United Kingdom, the Crown, in certain matters, is not liable.

In most countries, the victim may bring an action in courts against the public corporation, instead of attacking the officer. In Greece, the individual must always act against the public corporation, not being allowed to bring an action for damages against the officer. In the United Kingdom and Ireland the theory of the responsability of the hierarchic superior may be applied.

The actions for damages fall in the competence of the ordinary courts, except in France, Greece and Portugal, where the competence belongs to the administrative jurisdiction. In almost every country of the Community, the individuals have in general at their disposal legal means of jurisdictional nature against the administrative execution which may offend their rights and legitimate interests.

However, in Belgium, the individual doesn't have at his disposal the «recours contentieux» against the irregular or illegal inexécution, but only the right to a compensation.

In most countries, the administrative jurisdiction is normally competent to decide the.cases of administrative nature, but in Belgium the field of action of the ordinary courts is very extensive. In France, the competence of the administrative judge is the rule. But the ordinary courts intervene in some areas, more important qualitatively than quantitatively.

The case of Italy is a different one, because the competence of the administrative jurisdiction is restricted to the disputes connected with the violation of legitimate interests.

In the «common law» countries — Ireland and the United Kingdom — and in Denmark, it is usually the ordinary court that is competent to decide the administrative litigations. In Spain, an institutional distinction between the ordinary and the administrative courts doesn't exist, but there are courts specialized in administrative litigations.

The national positions agree about the importance of preventing the execution of decisions attacked before a court, which can cause harm to the

rights and legitimate interests of the individuals, and whose immediate execution is not required by a considerable general interest. In order to reach this objective, all national regimes, with the exception of those of Belgium and Denmark, grant the petitioner of a «recours contentieux» the right to ask the court the stay of execution of the decision. However, in Belgium, this situation is mitigated by the competence given to the judge of «référés», civil judge, in what concerns the stay of execution.

In Germany, the rule is the suspensive effect of the «recours contentieux». However, the individual has the right to ask the stay of execution when the law or the authority suppresses this effect, so, practically, the german system is similar to those of the other countries.

In Spain, a law concerned with the jurisdictional protection of the fundamental rights considers, in this matter, the stay of execution a general principle, except when this brings a serious harm to the public interest.

In Denmark the possibility of the intervention of a court before the execution of the administrative act minimizes the inexistence of the right to ask the stay of execution.

Only three countries Germany, Italy and Portugal allow the stay of acts already executed. In Portugal, the request of the stay prevents the administration, as a rule, to begin or continue the execution.

In some countries, the stay of execution is an exceptional measure. But opinions have been expressed in order that this procedure might be considered a normal or less restrictive one.

It must be outlined as a common characteristic to every national system that the jurisdictional annulment has a retroactive effect.

However, in Denmark, Ireland and the United Kingdom this effect has to be declared by the judge, and in the Netherlands the Councils of State may determine that the effects of the annuled act shall be partially or totally maintained.

In almost every country, the administration is obliged to carry out the jurisdictional decision. It cannot refuse to issue the acts and to take the measures necessary to fulfil the judgment, except in cases of impossibility (of fact or legal). The legislative validation, considered inconstitutional in Portugal, is the most common example of legal impossibility. Only in Spain and Portugal the law considers, as a legitimate cause of non-performance, a serious damage to the public interest, but in the first of these countries it is necessary that this cause should be appreciated and the non-performance declared by the Cabinet.

The legal non-performance doesn't release, in general, the administra-

tion of compensating the damages caused to the individual by the annulled administrative decision. In Italy the compensation is only due when a subjective right is infringed.

In the majority of the countries the courts have powers and means to oblige, if necessary, the administration to enforce the judgements. These means are, in Denmark, Ireland and the United Kingdom those of the common judicial executive procedure. Other countries, like Germany, Portugal and Italy, have special procedures in order to compel the administration to issue the acts and to take the necessary measures.

In Italy, this procedure is like a judicial review to the execution of «res judicata», which has the nature of a full jurisdiction. In this country and in Luxembourg the judicial decision may be performed by a special commissioner, who acts in lieu of the disobedient authority.

In France, the «astreinte» pronounced against the authority on which depends the execution of the judgement is the principal mean to obtain the enforcement of the administrative jurisdictional decisions. The Councils of State of the Netherlands also know this mean.

There are positions almost unanimous about the necessity of giving the judge truly powerful and efficacious means.

In every country, the illegal non-performace of the «res judicata» implies, as a rule, the disciplinary and civil responsability and, in more serious cases, the criminal one, of the authorities and officers to whom the non-performance is imputed. The illegal non-performance implies also the civil liability of the concerned public corporation. In general, this responsability coexists with the personal responsability of the authorities and officers.

There is in every country a broad intervention of the administration in the field of environment and a more frequent use of the «exécution d'office» (execution in place of the individual) and for the «exécution forcée» (execution against the individual), in order to assure the preservation of the values attached to nature and of the living conditions of the inhabitants of the country. The jurisdictional intervention tends, in every country, not to prevent this action, but, on the contrary to be more severe in the use of the means destined to oblige the individual to obey the orders of the authorities and the jurisdictional decisions.

In what concerns specially the stay of execution, the courts have a tendency to grant it when the executory act may affect the protected values, and not to grant it when the pretension of the individual may affect these values.

The Genève Convention of 1951 about the political refugees is the source of every national regime in this matter, in spite of some particularities and details. The opinions expressed agree in recognizing the convenience of an harmonization of the national regimes.

There are some countries, like Germany, Denmark, Belgium and France, where the granting of the quality of refugee falls in the competence of an independent or autonomous service, whose decisions are susceptible of a judicial review («recours contentieux») except in Denmark.

In some countries where the duality of jurisdictions exists, the deportation of foreigners is controlled by the ordinary courts.

In general, in this matter, the stay of execution is granted in a more extensive way.

Finally, there is a general tendency in order to seek a fair balance between the exigency of the jurisdictional protection of the rights and legitimate interest of the individuals and the need of the administrative action in the name of the general interest.