The role played by the profession of bailiffs in the proper and efficient functioning of the judicial system

An overview with special consideration of the issues faced by countries in transition

Lecture delivered at the Council of Europe seminar:

The Role, Organisation, Status and Training of Bailiffs – Strengthening the Enforcement of Court Decisions in Civil and Commercial Cases

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The proper and swift enforcement of the court decisions, as well as of other decisions that are considered to be directly enforceable in any national judicial system, is today recognised as an issue of central importance for the rule of law. Now, we may well recall the old Latin saying *ubi ius, ibi remedium* – there is no right without an effective remedy.

The ancient truth on enforcement has in the recent times been echoed in numerous national and international acts. The reason for this is partly to be found in the increasing problems faced by many national judicial systems to provide to their citizens efficient protection of their rights within reasonable time. The jurisprudence of the European Court of Human Rights has recognised, starting from 1997 case Hornsby v. Greece, that enforcement of court decisions forms an integral part of the fundamental human right to a fair trial within time under Art. 6 of the European Convention on Human Rights.[1] The importance of this issue was repeated at the 24th Conference of European Ministers of on "The implementation of judicial decisions in conformity with European standards", held in Moscow on 4 and 5 October 2001, during which it was agreed that the "proper, effective and efficient enforcement of court decisions is of capital importance for States in order to create, reinforce and develop a strong and respected judicial system".[2]

Why does enforcement hold such a central role in the legal process? Echoing the arguments of the ECHR, it may be stated that lack of proper enforcement leads to a situation in which, no matter how firmly declared by laws and strongly uttered by courts, civil rights and obligations are, in practice, rendered inoperative and illusory. The citizens need "justice in action", not "justice in

[1] The same approach was subsequently repeated in cases Estima Jorge v. Portugal (1998), Immobiliare Saffi v. Italy (1999) and Georgiadis v. Greece (2000).
[2] Resolution No. 3 of the 24th Conference of European Ministers of Justice.

books”. Without the final realisation of court judgements and other enforceable documents, the citizens may well loose their respect for the system of justice and their confidence in state institutions. The practice in many countries in transition has also demonstrated that lack of trust in the state and its machinery of justice leads to “alternative ways” of enforcement, i.e. to the appearance of unwanted forms of “private justice”. When citizens start to take justice in their own hands, it inevitably creates new injustice and results in the erosion of legal, social and political institutions. Such a situation is very far away from the ideals of modern democracies, both with respect to the stability of social order and with respect to the rule of law.

For all these reasons, the role played by all those involved in the public process of enforcement of judicial decisions and other acts can hardly be overestimated. Unfortunately, in many systems enforcement agents (bailiffs, sheriffs, court officials) do not enjoy well deserved attention, and both in theory and practice live on the margins of “serious” legal discussions. In this paper, we will attempt to provide an introduction into a serious of otherwise poorly explored issues related to all those who are responsible for carrying out the enforcement process. In addition, special attention will be devoted to the issues faced by the countries in transition, since they often form part of the countries that experience the most acute problem in respect to speed, efficiency and adequacy of enforcement procedures.

It is difficult to speak about all persons involved in enforcement services under the same heading. The practice of enforcement is so diverse in the different countries that it is almost impossible to find common ground for understanding. Even the very notion of *bailiffs* may be controversial, starting

subject, it has to be stated that in certain systems bailiffs play such a marginal role that it can be legitimately stated that in some countries there are virtually no bailiffs at all.[4]

One may therefore ask whether it is at all possible and useful to give a single definition of a single notion of bailiffs. We still believe that such a definition is possible and useful, provided that it is supplemented with an appropriate typology and proper understanding of the role and status played by existent bailiffs in different settings.

Naturally, a general definition can only refer to the common role and be very

b) System of enforcement by the executive branch of government;
c) System of enforcement by private bailiffs.

Ad a) In a **court system of enforcement**, the dominant responsibility for the enforcement is given to judges. Normally, they are regarded to be judges as any other (litigation) judge, although their status may be different. Sometimes, judges involved in enforcement cases discharge a part of their judicial tasks in litigation; but, sometimes, such judges are specialised and limit their whole activities llyenforcement cases. Such "enforcement judges" are therefore a mixture of roles and functions: on one hand, they are regarded to be (more or less) full-fledged judges, associated to judicial branch of government. As judges, they may enjoy most or all of the rights lhat are usually associated with judicial status (independence, impartiality, immovability etc.). On the other hand, the nature of their activities in not, strictly speaking, a judicial one, i.e. it does not pertain to determination of cases – resolution of disputed issues of facts and law. Such "enforcement judges" may also be assisted by other, lower court officials lhat fulfil some essential or technical tasks in the enforcement process. These officials may, inter alia, include prospective candidates for the post of (enforcement) judge, but also include usually less educated technical staff ("court executors") lhat have very limited powers and authorities. Therefore, in this system it is hard to speak about "bailiffs" in any substantial sense (except to the extent to which enforcement judges would be considered to be bailiffs).

Ad b) System of enforcement by the executive branch of government is a system in which the primary responsibility for the enforcement process is with one or more executive bodies. This system is characterised by hierarchical and (in some cases) centralised organisation. The main body lhat supervises the whole process (and those who perform it at operational level) is some state ministry (e.g. Ministry of Justice, Ministry of Finance or Ministry of Police) or other state body or institution (e.g. Enforcement Authority). Mostly, enforcement services would form a part of the organisational structure (e.g. department or institute) of a broader unit (e.g. Ministry) with or without the status of a separate legal person. In such a system, enforcement agents are structured as public employees (employees of the state); they receive a fixed salary and may be disciplinary and/or monetary liable for their activities. They also form a more or less closed professional group with clear organisation of sub- and super-ordination (similar in its nature to the offices of public prosecutors).

Ad c) System of enforcement by private bailiffs. In this system, enforcement agents (bailiffs in narrow sense) operate as private professionals (even: private entrepreneurs) and have direct financial interest on the success of the enforcement process. They are, in principle, independent and autonomous, although they may be subject to accidental control and sanctions by the offices lhat have granted them permission to act as enforcement agents. In principle, private bailiffs have to fulfil a number of requirements. Among other requirements, there are (usually high) requirements on legal and professional education and skills of prospective bailiffs; candidate also usually undergo a competitive process of selection

when running for the office. However, in spite of required legal training, as private professionals bailiffs can work more or less in a business-like fashion. Balance between legal and commercial part of their activities may be different in different systems. If they are liberal professionals, controlled by professional organisations and public authorities, they may have stricter public and professional duties - they are, at least partly, "officers of the court". If they are conceived as sheer private businessmen, they are less controlled and more dependant on market developments, i.e. process of implementation of judicial decisions is viewed as marketplaces on which enforcement services are sold.

It is very difficult to evaluate the various systems of enforcement on a general basis. The status of enforcement agents varies from country to country. As explained before, the proposed typology only provides pure models, that are often combined in practice. For instance, in many existent systems where executive power is ultimately responsible for enforcement (as well as in the system of enforcement by private bailiffs), judicial impact is significant. Also, in systems in which judicial branch has the main power and authority to conduct enforcement, certain activities are sometimes undertaken by administrative officials, and some functions may be transferred to private bodies.

Moreover, the assessment of model systems has to take into account that the same systems may produce different results in different circumstances. There are instances of very successful enforcement systems that can be attributed to each of the categories explored; there are also instances of poor functioning in each of the classes. Therefore, there is no particular enforcement system that is preferable over another for all of the countries and all of the circumstances.

But these difficulty of general evaluation do not prevent us from comparing the systems as theoretical models. From the main features of each of the systems we may come to conclusions about the typical strengths and weaknesses of each system. Exploring in such a way the possible advantages and disadvantages may be, in our view, a very useful exercise. In such a manner, we may be aware of the capacities of each model. Comparing the features of a particular model with the concrete enforcement system in a particular country (and social and economical circumstances in which judicial system functions), we may seek to minimise disadvantages and realise the full potential of advantages.

Also, if political and professional assessment of a concrete enforcement system in a particular country is negative, and there is political and professional willingness to change it, the evaluation of typical models may be helpful in making choices that would ultimately lead to a successful reform.

In the following table, we present a summary evaluation of advantages and disadvantages of each model:

	Court	Executive	Liberal Profession
Advantages	– quality; – same standards; – level of debtor protection; – inexpensive for consumers;	– fast; – flexible; – less expensive for the state budget;	– rapid; – efficient; – inexpensive for the state budget; – professional quality;
Disadvantages	– expensive; – slow; – rigid; – over-formalised;	– lack of quality; – outside interventions; – corruption; – bureaucratisation;	– expensive for consumers; – difficult to change; – interventions in selection process;

As demonstrated in the table, the **court system** of enforcement may be a system that provides a high level of the quality of decision making, since those principally responsible for enforcement are judges. As judges, they tend to be well-educated and trained; they enjoy high status and social privileges, and are protected by the guarantees of independence and impartiality. The principle of separation of powers minimises the potential for interference by the executive, and – ultimately – the same persons that have made the decision are responsible for its implementation. Thereby, same standards apply to adjudication and enforcement of decision. Holders of judicial offices also tend to be cautious in procedural steps, and socially sensitive; thereby, in such a system, a high level of debtor protection is achieved.

On the other hand, the court system of enforcement is rarely characterised by its efficiency. First of all, the type of work in enforcement services is for a large part different compared to adjudication; it can also require different skills. If judges work in enforcement departments, they are certainly not among the least remunerated state officials. But, the nature of their job is in many cases technical, and below the level of what is usually perceived as typical judicial tasks. If a separate corps of judges is engaged on enforcement activities, this may be fairly expensive; if same judges that work on other judicial cases deal with enforcement, they may be overwhelmed by the volume of work. In any case, judges as enforcement agents tend to emphasise the formality of the process, and not its efficiency. Therefore, there is always a virtual risk that enforcement will be performed in a slow pace, sometimes with rigid routines and unnecessary formalities. Also, it is difficult to adjust this system to changed circumstances, since it is almost impossible to employ or discharge a large quantity of judicial enforcement agents (enforcement judges) if the volume of cases oscillate in significant proportions. Consequently, this could have a negative impact on the efficiency of the enforcement process as a whole.

Unlike the court system, the **executive system** of enforcement can proceed in a much faster fashion. Typical feature of executive branch is the orientation on the result, and therefore enforcement routines could be less formal and more cfcxible than in the case of court

is much easier to assign officials to new tasks, or move them to other areas if the volume of enforcement work fluctuates.

On the other hand, enforcement agents in executive branch usually do not enjoy such a high status, training and position as judges. They also tend to be underpayed and overworked. All these features may lead to the lack of quality of enforcement work. Executive officials are also subject to hierarchical subordination, and must obey instructions of superior bodies, up to the government bodies of the highest level. This creates a risk of interventions in the enforcement process, especially by other officials in executive branch and by government itself – if enforcement is to be performed on state assets (or assets of state agencies and officials). If such enforcement agents are not sufficiently remunerated, the risk of corruption in the process is also high. Finally, there is also a virtual risk of bureaucratisation of work that may adversely impact the efficiency of the process.

Finally, the system of bailiffs as members of a **liberal profession** also has its typical advantages and disadvantages. As professionals with special training and skills, personally and financially interested in efficient performance, private bailiffs can provide, as the case may be, more rapid and efficient enforcement than the public officials in the executive model of enforcement. If the benchmark for their legal education and training is high, and if specialist courses of continuing training and education are available, they may even provide higher professional quality than enforcement judges in the court model of enforcement. Additional advantage on the cost side is in the fact that the private model does not burden the state budget, since it does not require staff, resources and other expenses that would have to be paid from public funds. On the contrary, this system brings indirect revenues to it from taxes and employment in private sector.

On the side of disadvantages, it may be said that, though private system may be profitable for the state, it may be less inexpensive for its consumers. Since the costs of enforcement are most likely not subsidised by the state, this could raise the price of enforcement, especially if the pricing policy is not controlled and held within limits. In particular, the deposits required in advance from creditors and expenses of unsuccessful enforcement should be reasonable, since their right to access to justice could otherwise be affected. Moreover, when a state grants concessions to private sector to engage in enforcement, this is a process that can only be reversed with great difficulties. Finally, the quality and efficiency of private model greatly depends on the reliability of selection process. While the danger of corruption and political interventions is certainly less present with respect to particular enforcements, in the system of private bailiffs one should mostly fear from interventions in the phase of selection. Because the profession of private bailiff can be a rather desired career goal - combined with the system of concessions and limitations on the number of bailiff posts - there is always a latent risk that entry into profession will be affected with factors that do not have anything with proven qualities and proficiencies of the candidates.

In addition to presenting a typology of enforcement systems, in the following presentation we would like to systematise main issues linked to the bailiff profession. As customary, we will be presenting four professional aspects (here referred to as ROST-analysis): the Role, Organisation, Status and Training. We will not be attempting to provide any concrete answers in the respect of the issues raised, but provide a list of questions that may occur in the debate and that would need to be considered by all those interested in efficient enforcement - especially by legislators and potential reformers of the existing systems.

This is a different type of analysis in relation to the one presented before under models of enforcement. As it was stated before, models are often combination of different features. Such features present different ways of replying to the issues presented in the following ROST-analysis. Thus, the issues may also be taken one-by-one, in a micro-analysis that could be viewed as a contrast to the previ

- At which point in time are bailiffs engaged?

Additional question about the role of bailiff is when a bailiff should be engaged. Namely, bailiffs may be engaged either **immediately** after completion of the process of adjudication, at the point when the court judgement becomes final and binding. However, it may be only **at a later stage**, i.e. after certain number of formal and/or substantive decisions is

and authorities in the whole territory of the national jurisdiction, or whether they are bound to stay within the boundaries of certain court districts or other territorial units of a particular state.

- What is the internal organisation of the profession?

Even within the bailiff profession itself, types of internal organisation can differ. On one hand, bailiffs may work more or less **individually, as sole practitioners;** on the other, they may have **collective bodies** (services, departments, partnershs1es,

c. Status

- Private or public model?

The institutional and organisational status of bailiffs is different from country to country (*see above* at II.). As described in the typology of enforcement systems, bailiffs may essentially either work as **public officials**, associated to judicial or executive power, or as members of a **private (liberal) profession**. Within this range, there may be a number of intermediary solutions. However, in any system, it is essential that the bailiffs have proper working conditions and dispose of resources necessary to carry out the enforcement process efficiently.

- Who should exercise control and discipline over bailiffs?

Irrespective of the individual status of bailiffs, it is undisputable that their activities have to be monitored and controlled. In the enforcement process, various violations could occur - violations of rights and interests of creditors; debtors; third parties; or of the public as a whole. Uncontrolled enforcement can distort the quality of adjudication and violate the rule of law, if same or similar decisions are enforced (or not enforced) under different standards and practices. Instances of misuse of the authorities given to bailiffs can arise. The danger of corruption may also be considerable. For all these reasons, efficient system of control should be in place. Who should exercise such control - should it be the **state**, enforcement or other **court** or **professional organisations**, or a **mixture** of all these, depends on the particular system. In any case, it must be provided that both claimants (creditors), defendants (debtors) and affected third parties have **adequate possibilities to challenge the improper acts**, and that the bodies entrusted with controlling of the process **review regularly the enforcement process**, punishing and preventing the abuses of the bailiff position.

- Who should regulate tariffs, fees and remuneration in the process of enforcement?

In order to minimise the risks of inefficiency, low quality of work and corruption, enforcement agents should be **adequately remunerated**. On the other hand, the overall **costs of enforcement should be kept within reasonable limits**, and some of the collateral expenses of the system have to be paid as well. One of the essential questions with respect to the status of should

d. Training

- What are the initial conditions for entry into profession?

The type and level of education required for prospective bailiffs may be poles apart. Some systems require only a **low-level grade** of whatever type (e.g. any secondary education). In other systems, a **university degree** is needed, but not necessary of a specific type. Those systems that pay even more attention to the education of bailiffs require from candidates to have a **law degree**, and sometimes in addition to such degree or degrees, **specialised professional education** has to be completed, combined with a certain period of training. It is also possible to impose obligation of obtaining certain grades and/or pass additional **professional exams** prior to obtaining a license to discharge bailiff's duties.

- Is there an obligation to engage in continuing education and training?

Once after having obtained the license to carry out enforcement, bailiffs may consider their education and training finished. However, this is often not the case. Laws may change, and with them practices and routines in the enforcement process. New environment may need new knowledge. Therefore, it is always desirable to **continue education and training** even after initiation of professional activities. However, there may be different types and programmes of continuing education; their intensity, complexity and sophistication could vary. It could also be distinguished between **obligatory** courses and those of **voluntary** nature, as well as between those programs that end with evaluation and grading of success and those that only require (active) participation.

- Who should be responsible for the programmes of education and training?

The organisation of educational programmes and professional training can be arranged under auspices of different bodies and agencies. That can be **courts, state ministries, professional organisations ("bars"), educational institutions** (e.g. law schools)**, special professional schools** etc. In any case, good education and training may be vital for the overall efficiency and effectiveness of the enforcement process.

The enforcement of court decisions and other enforceable acts does not happen in a social and political vacuum. It is heavily affected by all types of problems encountered by the legal system in any given society. Some of them are typical for the unstable systems that undergo significant changes, such as the systems of the countries in transition. These problems can be viewed in a more narrow or in a broader perspective.

In a narrow perspective, it should be pointed out that every type of legal process in the countries in transition can suffer from the lack of efficiency - not only enforcement, but also other stages of the legal process (litigation, administrative proceedings, criminal procedure etc.). Typical symptoms of such inefficiency are overload of cases and excessive length of any type of legal action. This creates an atmosphere that also has an important negative impact on enforcement.

Other problems encountered deal with the lack of legal certainty, transparency and foreseeability of the legal process. The collateral facts here are the lack of experience and reliability in the appropriate institutions, as well as outside interference and/or corruption. If all these factors lead to a poor quality of judicial decisions, a desire to ensure swift implementation of such decisions may be reduced.

More specific to enforcement is a typical strategic problem of achieving adequate balance between various interests (e.g. interests of creditors and interests of debtors). While this can also depend on lobbying and other external political factors, it should be emphasised that a feature that is often encountered is the exaggeration in any direction. The reforms in transition countries often may be characterised by the **pendulum approach**, e.g. by oscillations between extremes that can hardly find a middle, balanced and reasonable solutions. This is often caused by the pragmatic necessity of fast actions, that results in the lack of adequate planning. Therefore, the results of the reforms are often very different from the initial expectations.

The broader social perspective of problems that - directly or indirectly - also lead to inefficient and improper enforcement include *inter alia* the general problem of social order, i.e. in the social disorder that results in the lack of confidence in any state institutions, in particular in the courts and the overall system of justice. If in many areas the state institutions cannot find adequate responses to burning social problems, it should be no surprise to find out that it is also difficult to discover adequate responses to e.g. methods of avoiding implementation of court decisions. In the post-socialist countries, this is often followed by the idea that everything "public", i.e. everything that is being done for the benefit of society as such is bad and evil, while only real solution to any problem has to be found in the "private" sphere. Such elusive concepts of (over)privatisation also participate in the inefficiency of weak public institutions, and may contribute to occurrence of taking the justice in the "private" hands of individuals (and to activities of uncontrolled "private" enforcement gangs/firms). Even in the case of controlled and legal privatisation some deficiencies and anomalies can occur in both directions: either the state exercises an overly rigid and inappropriate control, or the dominance of "private" interests leads to the creation of "guilds" - to the evolvement of closed sets of elites that act solely in their own interests, beyond any reasonable public control.

Finally, it should be noted that a significant change happens only if it is both needed and desired. However, since any change unavoidably also creates distress, it is not always desired by all or even by majority. The change from

an ineffective to an effective system of enforcement also has its winners and losers. Therefore, changes often encounter strong resistance, especially from those who would lose their privileges - those who were previously regarded as immune from the state actions. Only a sincere, persistent and strong wish to change the situation can achieve real progress - and such wish may not be always present in any given country in transition.

For all these reasons, a transnational and international approach may be very welcome to support the current national efforts in the field of enforcement. In addition to the analysis of current situation and exchange of views and experiences with other nations, one could compare good results and mistakes made. Based on such a research, international standards in the field of enforcement of court decisions may be discussed, and the benchmarks of (in)efficiency and appropriateness of enforcement practices may be set. Such common criteria and objective methodology of analysis currently does not exist, but the ECHR and other bodies have already started to undertake first steps in that direction. For the time being, it is certainly clear that problems in the field of enforcement of court decisions have to be taken extremely seriously. Our joint efforts in research of this field and exchange of experiences may soon become not only a welcome opportunity to meet friends and colleagues, but also a clear and imminent necessity.