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## **CONSULTATIVE COUNCIL OF EUROPEAN JUDGES**

**(CCJE)**

### **OPINION NO.13 (2010) ON THE ROLE OF JUDGES**

#### **IN THE ENFORCEMENT OF JUDICIAL DECISIONS**

##### **I. Introduction**

1. The Committee of Ministers of the Council of Europe instructed the Consultative Council of European Judges (hereafter "CCJE") to adopt, in 2010, an Opinion "on the role of judges in the relation to the other functions of State and other actors in the enforcement of judicial decisions"<sup>1</sup>.

2. The CCJE has drafted this Opinion on the basis of replies to a questionnaire received from 34 member states. The replies of almost all member states identify the existence of serious obstacles to effective and adequate enforcement of judicial decisions. These obstacles arise in the civil, administrative and criminal spheres. With regard to civil and administrative matters, member states report, in particular, the complexity and cost of the enforcement procedures. With regard to criminal matters, member states report for example inadequate prison conditions and laxity in the execution of penalties.

3. This Opinion will propose concrete means to improve the role of the judge in the enforcement of judicial decisions and not deal with the enforcement procedure in general.

4. In order to do so, the judge's role will be examined as regards the enforcement of judicial decisions in the civil, administrative and criminal fields, as well as of decisions taken by international courts, notably by the European Court of Human Rights (hereafter "the Court").

5. To draft this Opinion, the CCJE relies on instruments adopted by the Council of Europe, in particular:

- the European Convention on Human Rights (hereafter "the ECHR"), in particular Articles 5, 6, 8 and 13 and Article 1 of Protocol No. 1;

- the Interlaken Declaration at the High Level Conference on the Future of the Court (February 19, 2010);

- the Recommendation Rec(2003)16 of the Committee of Ministers to member states on the execution of administrative and judicial decisions in the field of administrative law;

- the Recommendation Rec(2003)17 of the Committee of Ministers to member states on enforcement;

- the Recommendation Rec(2006)2 of the Committee of Ministers to member states on the European Prison Rules;

- the Recommendation CM/Rec(2008)2 of the Committee of Ministers to member states on efficient domestic capacity for rapid execution of judgments of the Court;

- Report of the CEPEJ "European judicial systems" (2010 Edition);
- "Enforcement of Court decisions in Europe" (CEPEJ Studies No. 8);
- CEPEJ Guidelines for a better implementation of the existing Council of Europe's [Recommendation on enforcement](#);
- 3rd Annual Report 2009 on the supervision of the execution of judgments of the Court;
- the Convention for the Protection of Personal Data (ETS No. 108);
- the views of the Commissioner for Human Rights "The imperfect implementation of judicial decisions undermines confidence in the justice of states" (31 August 2009);
- the Conventions of the Council of Europe on enforcement of sentences and extradition: the European Convention on Extradition (ETS No. 24) and its protocols (ETS No. 86 and 98), the European Convention for the Supervision of Conditionally Sentenced or paroled (ETS No. 51), the European Convention on the International Validity of Criminal Judgments (ETS No. 70), the Convention on the Transfer of Sentenced Persons (ETS No. 112) and its Additional Protocol (ETS No. 167);

as well as the Court case-law on this matter, in particular:

- [Hornsby v. Greece](#) (19 March 1997, No. 18357/91);
- [Burdov v. Russia Nr 2](#) (15 January 2004, No. 33509/04);
- [Akashev v. Russia](#) (12 June 2008, No. 30616/05);
- [Zielinski and Pradal and Gonzalez and Others v. France](#) (28 October 1999, No. 24846/94 and acc);
- [Cabourdin v. France](#) (11 April 2006, No. 60796/00);
- [Immobiliare Saffi v. Italy](#) (28 July 1999, GC No. 22774/93);
- [Papon v. France](#) (25 July 2002, No. 54210/00);
- [Annoni Di Gussola and Desbordes and Omer v. France](#) (14 November 2000, No. 31819/96, 33293/96).

## II. General principles

6. Enforcement should be understood as putting into effect judicial decisions and also other judicial or non-judicial enforceable titles. It may involve an order to do, to refrain from doing or to pay what has been adjudged. It may involve the imposition of financial penalties or a custodial sentence.

7. The effective enforcement of a binding judicial decision is a fundamental element of the rule of law. It is essential to ensure the trust of the public in the authority of the judiciary. Judicial independence and the right to a fair trial (Article 6 of the ECHR) is in vain if the decision is not enforced.

8. The enforcement procedure must be implemented in compliance with fundamental rights and freedoms (Articles 3, 5, 6, 8, 10, 11 of the ECHR, data protection, etc.).

9. The decision to be enforced must be precise and clear in determining the obligations and rights engaged in order to avoid any obstacle to effective enforcement<sup>2</sup>.

10. Decisions of the Court show that, in some cases, legislative or executive powers have attempted to influence enforcement through refusal or suspension or denial of resort to the police. They also have interfered in pending litigation by enacting provisions, often declared as being of a retroactive or interpretative nature, aiming at changing the foreseeable outcome of one or more court cases or introducing new remedies for their review<sup>3</sup>.

11. The enforcement of a decision must not be undermined by extraneous intervention whether from the executive or the legislator by imposing retroactive legislation.

12. The very notion of an "independent" tribunal set out in Article 6 of the ECHR implies that its power

to give a binding decision may not be subject to approval or ratification, or that the decision may not be altered in its content, by a non-judicial authority, including the Head of State<sup>4</sup>. All branches of states should therefore ensure that the legal provisions providing for the independence of courts, existing in their constitutions or at the highest level of their legislation, are construed in such a way that they call for prompt enforcement of judicial decisions with no interference of other powers of the State, with the sole exceptions of amnesty and pardon in criminal matters. The suspension of enforcement of a judicial decision may only take place by way of another judicial decision.

13. There should be no postponement of the enforcement procedure, except on grounds prescribed by law. Any deferral should be subject to the judge's assessment.

14. The enforcement agents should not have the power to challenge or vary the terms of the judgment.

15. If it is necessary for a party to have a decision enforced, the enforcement procedure should be easily initiated. Any obstacle to this, for instance excessive costs, should be avoided.

16. Enforcement should be swift and effective. Therefore necessary funds have to be provided for enforcement. Clear legal regulations should determine the available resources, the authorities in charge and the applicable procedure for their allocation.

17. Member states should provide for an accelerated or urgent enforcement procedure where delay might cause an irreversible wrong (some family cases, cases where the defendant has absconded, cases of expulsion, risk of damage to property, etc.).

18. In order for judges to fulfil their tasks, the judiciary should be entrusted with the following missions concerning enforcement:

- an appeal to a judge if the enforcement is not initiated or is delayed by the relevant bodies; a judge should also be involved when fundamental rights of the parties are concerned; in all cases, the judge should have the power to grant just compensation;
- an appeal or complaint to a judge if there is any abuse in the enforcement procedure;
- an appeal to a judge in order to settle litigation concerning enforcement and to give orders to state authorities and other relevant bodies to enforce decisions; at the final stage, it should be up to the judge to use all possible ways to ensure enforcement;
- to identify and take due account of the rights and interests of third parties and members of the family including those of children.

19. In some systems, parties may be forced to comply with the judicial decision by way of indirect coercion, for example by imposing fines or legal provisions stating that criminal charges may be brought in the case of a refusal to execute. The CCJE considers that such indirect enforcement measures, which should in all cases be provided by the law and allowed by the judge, both in the decision or even afterwards, are especially important to ensure enforcement in urgent matters, in matters in which the specific performance may not be substituted by an equivalent satisfaction and in family matters, in which the use of force may harm the interest of children. In view of the benefits associated with indirect coercion, the CCJE recommends that courts ensure the widest use of such remedies, which also allow in most cases a prompt enforcement.

20. The CCJE considers that a transparent regulatory framework, preferably of legislative nature, should apply to costs of enforcement. The amount of fees should take into account the nature of the activity required from the enforcement agents, not necessarily in proportion to the value of the claim. In case of a dispute, costs should be assessed by the court.

21. For purposes of guaranteeing access to justice, alternative legal aid or financing arrangements should be proposed to claimants who are unable to pay the costs of enforcement (by public funding or reduction of costs).

22. The vital importance of enforcement to comply with the Rule of law requires that data about enforcement are included in systems of evaluation of justice and in information on judicial systems provided to court users, the general public and the media, as proposed in Opinion No. 6 of the CCJE (Parts A and C).

23. The CCJE recommends that the Council for the Judiciary, or any other relevant independent body, publish regularly a report on the effectiveness of enforcement, including data on delays and their

causes, as well as on different enforcement methods. A special section should deal with the enforcement of judicial decisions against public entities.

### III. The role of the judge in the enforcement of judicial decisions in civil matters

24. Enforcement of a judicial decision shall not require the commencement of entirely fresh proceedings and enforcement procedures shall not permit reopening of the merits of the original judicial decisions. But the judge may have power to suspend or postpone enforcement to take account of the particular circumstances of the litigants, for example to give effect to Article 8 of the ECHR.

25. If the rule of law is to be maintained and litigants' trust in the judicial system is to be ensured, enforcement activities must be proportionate, fair and effective. For example, tracing and attachment of the defendants' assets should be made as effective as possible, while taking account of the applicable provisions on human rights, protection of personal data and the need for judicial review.

26. When the parties are free to dispose of their rights and where the parties together reach a lawful agreement on enforcement, no legal provision should prevent the agreement from taking effect.

27. The fundamental right of data protection should be reconciled with the possibility to use, within enforcement procedures, information contained in databases on assets of debtors. This requires a precise legal regulation of the procedure and the authorisation to resort to the database, with the aim to guarantee an effective and complete enforcement and prevent any misuse. All state organs in charge of databases containing the information needed for effective enforcement should be bound to convey this information to the courts.

28. Repeated use of information on a defendant's assets in connection with subsequent proceedings to which the same defendant is a party should have a clear and specific legal framework (setting of strict time limits for retention of data, etc.) and be subject to all procedural prerequisites to start an enforcement procedure.

### IV. The role of judges in the enforcement of judicial decisions in administrative matters

29. The CCJE considers that most of the principles set out regarding enforcement in civil matters also apply "*mutatis mutandis*" to enforcement in administrative matters, whether enforcement is against a private person or a public institution.

30. However, some special considerations arise concerning the execution of judicial decisions against public entities. These may arise in administrative law, but also in civil law disputes.

31. First, the CCJE considers that, in a state governed by the Rule of law, public entities are above all bound to respect judicial decisions, and to implement them in a rapid way "*ex officio*". The very idea of a state body refusing to obey a court decision undermines the concept of primacy of the law.

32. A large amount of cases brought before the Court concerns the non-execution of judicial decision by public bodies. A state should respect judgments delivered against it without delay and without requiring the claimant to use enforcement procedures. The Court has repeatedly admitted claims by claimants who have either not used such procedures, or have had to do so, saying that "a person who has obtained an enforceable judgment against the state as a result of successful litigation cannot be required to resort to enforcement proceedings in order to have it executed"<sup>5</sup>.

33. When recourse to forced execution is necessary, states should ensure that their domestic legislations allow criminal and disciplinary prosecution of officials to whom refusal or delay of execution is attributable, as well as to question their civil liability.

34. States should recover against such officials any additional costs incurred due to refusal or delay of enforcement. Acts by public officials delaying or denying enforcement should always be subject to an effective judicial review.

35. Legislative interference with pending execution is impermissible above all when a public entity is the debtor.

36. The same enforcement agents, as for enforcement against private bodies, should be competent and the same procedural principles should apply. Judges should not suffer restrictions in applying the same legal provisions and in ensuring effective compensation for delays in the enforcement procedure (indexation, default interest at the same rate generally applicable, specific damages, other penalties)<sup>6</sup>.

37. Judgments concerning a decision by an administrative authority denying an alien's right to stay on the state's territory frequently involve the question whether the alien could be expelled. In this context, expulsion constitutes the enforcement of the authority's decision. The CCJE considers that, in order to secure effective judicial review, states should not prevent the court from examining the admissibility of expulsion in its final or interim decision concerning the act taken by the administrative authority.

#### **V. The role of judges in the enforcement of judicial decisions in criminal matters**

38. In criminal matters, respect of the Rule of law requires the full implementation of criminal sanctions or penalties, regardless of the nature of the sentence imposed. Thus, member states should refrain from developing policies which result in minor penalties that are not actually enforced, whether for budgetary reasons, lack of prison accommodation or expediency. The result of such policies is to undermine the authority of judicial decision making, and thereby the rule of law itself.

39. A penalty may take the form of a term of imprisonment, a fine, or another sanction (for instance, disqualification from driving, professional prohibition, etc.). As a general rule, the actual implementation of such sanctions is not a matter for the judge to decide on; such measures are to be put into effect by prosecutors, police authorities or any relevant administrative authority. Either public or private officials, such as bailiffs may be appointed by a judge or another competent authority to carry out such duties. In any case, the performance of such powers and the implementation of penal measures have a direct impact on individual rights. The role of a judge is to protect and guarantee such rights within the framework of the judicial decision to be enforced.

40. A term of imprisonment may be looked at from two different standpoints. The first relates to modalities of the enforcement of the sentence, namely the duration and mode of implementation which may involve questions such as remission of sentence, parole, limited detention or provisional release under judicial supervision or electronic surveillance. The second standpoint relates to the physical or psychological conditions or the effects of imprisonment, which may give rise to questions as to the lawfulness of the detention itself or the conditions of the detention.

41. In some member states, the modalities of enforcement of the sentence may fall within the function of judges. In other member states, this category is dealt with by a parole board or other administrative authorities. In either case, the implementation of such measures must be subject to fairness in procedure and to judicial supervision and review.

42. Any alteration in the nature or location of the detention, for example by placement in a psychiatric institution because of the prisoner's mental health, must be subject to a right of appeal or judicial review.

43. Deprivation of liberty, of whatever nature, must at all times be in accordance with Article 3 and Article 8 of the ECHR. A person detained by police authorities or a sentenced prisoner must not, at any time, be subject to inhuman or degrading treatment. Human dignity must be protected at all times during detention. The requirements of Article 8.1 of the ECHR (respect for private and family life) must also be met, subject to the stipulations of Article 8.2 of the ECHR (possibility of interference by a public authority). It is the duty of the judge to protect and vindicate these rights and guarantees as applicable in each member state.

44. In some member states, the judge carries out *ex officio* the supervision of prison conditions. In other member states, the judge cannot assume *ex officio* jurisdiction in this matter. Whatever system in force, the legislation of each Member states should enable the convicted person, his/her counsel as well as the prosecution to bring a case before the judge whenever the conditions of detention violate fundamental rights guaranteed by Articles 3 and 8 of the ECHR. This legislation should also provide mechanisms that allow independent administrative authorities to supervise prison conditions and to refer, if need be, a case to the Court.

45. Contact between a judge and enforcement authorities (Ministry of Justice, prison authorities, social services, the directors of prisons) will generally be limited to disputed enforcement issues, both in the event that such authorities are questioned on conditions of detention or modalities of implementation of the penalty, and in the event that they are requested to provide their opinion as to how the penalty is to be implemented. In all cases, the judge must take all necessary steps to be provided with all relevant information by the authorities. These authorities must also provide and submit such information to the parties contesting any relevant issue.

46. Implementation of non-custodial sentences may have an impact on property (for instance fines, forfeitures or the closing of a business) or affect personal rights (such as a prohibition to exercise certain rights, disqualification from driving). All such issues may give rise to legal issues. A convicted

person must be able to address and request a judge to review any disputes which arise thereof.

47. It is also necessary to ensure that judges, responsible for executing sentences, have specific training allowing them to clearly understand any legal, technical, social and human dimensions of this matter. Such training must be devised and led in interaction with all the authorities or services involved in the process of implementation including judges, prosecutors, ministerial officials, prison staff and administration, directors of penal institutions, as well as social workers, lawyers and others.

## **VI. The role of judges in the enforcement on the international level**

### **1. Implementation of decisions of the European Court of Human Rights**

48. In its Opinion n<sup>o</sup> 9, the CCJE gave its viewpoint on the role of the judge regarding the implementation of international case-law, especially that of the Court. It has, notably, specified how the judge should comply with the Court's case-law.

49. When a state is condemned to pay compensation by the Court, the creditor should, in case of non-enforcement of the decision of the Court, have the right to request the enforcement by the national judge, without prejudice to measures which could be taken at a supranational level.

### **2. International co-operation and cross-border enforcement**

50. At a time where justice is characterised by growing mobility and the development of international trade, the priority should be given to develop and promote an area of justice common to European citizens, by removing any remaining obstacles in the exercise of their rights. Thus judicial rulings must be recognised and enforced between member states without hindrance.

51. The principles of mutual trust and recognition are cornerstones of the construction of a European legal area, while respecting the diversity of national systems. Mutual recognition implies that decisions given at the national level have an effect in other member states, in particular in their legal system. It is therefore essential to increase exchanges between legal professionals. Their different networks should reinforce and restructure themselves and coordinate with each other.

52. Systematic European training for all judges and prosecutors should be provided; they should take part in training initiatives or exchanges in other states. Moreover, distance teaching programmes (e-learning) and common training material should be developed to instruct the judicial professions on how to deal with the European mechanisms (relations with the Court, the CJUE, use of the instruments of mutual recognition and judicial co-operation, comparative law, etc.).

#### **a. In civil and administrative matters**

53. In civil litigation, judicial rulings should be enforced directly and without any further intermediate measure. It will thus be necessary to move ahead gradually and cautiously with the process of eliminating the exequatur clause from certain decisions in civil and commercial matters.

54. Meanwhile, the speed of procedures and the effectiveness of the enforcement of court decisions should be enhanced by improved international arrangements regarding the taking and enforcement of provisional and precautionary measures.

55. In addition, mutual recognition could be extended to areas not covered yet by European law and essential to everyday life, such as inheritances and wills, matrimonial property regimes and the pecuniary consequences of the separation of couples.

#### **b. In criminal matters**

56. In criminal matters, international co-operation involves many areas. Examples to be recalled may concern the serving of a sentence in the country of origin, determined by a judicial decision issued in another country, extradition requests, the European Arrest Warrant, the recognition of judicial decisions in criminal matters, judicial cooperation, etc.

57. The enforcement of a foreign judgment is to be realised under a convention between states and is based on mutual trust in the judicial system of each of them. The judge in the country of enforcement must honour that trust. Thus, this judge shall not change or challenge the decision of the judge in the country of origin. He or she will not refuse the execution thereof other than on the grounds of exclusion provided in the convention between the countries of enforcement and of origin, or when the decision is contrary to the fundamental rights of the persons concerned.

58. However, in the area of transfer of condemned persons, the judge can adapt the sanctions pronounced by the foreign judge when this possibility exists under the convention binding the states concerned.

## VII. Conclusions

**A. The effective enforcement of a binding judicial decision is a fundamental element of the rule of law. It is essential to ensure the trust of the public in the authority of the judiciary. Judicial independence and the right to a fair trial is in vain if the decision is not enforced.**

**B. The very notion of an "independent" tribunal set out in Article 6 of the European Convention on Human Rights implies that its power to give a binding decision may not be subject to approval or ratification, or the decision altered in its content, by a non-judicial authority, including the Head of State.**

**C. All branches of states should ensure that the legal provisions providing for the independence of courts, existing in their constitutions or at the highest level of their legislation, are construed in such a way that they call for prompt enforcement of judicial decisions with no interference by other powers of the State, with the sole exceptions of amnesty and pardon in criminal matters. The suspension of enforcement of a judicial decision may only take place by way of another judicial decision.**

**D. There should be no postponement of the enforcement procedure, except on grounds prescribed by law. Any deferral should be subject to the judge's assessment. The enforcement agents should not have the power to challenge or vary the terms of the judgment.**

**E. In criminal matters, states should refrain from developing policies which result in minor penalties that are not actually executed.**

**F. The CCJE considers that, in a state governed by the rule of law, public entities are above all bound to respect judicial decisions, and to implement them in a rapid way "*ex officio*". The very idea of a state body refusing to obey a court decision undermines the concept of primacy of the law.**

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**G. Enforcement should be fair, swift, effective and proportionate.**

**H. The parties should be able to initiate enforcement proceedings easily. Any obstacle to this, for instance excessive cost, should be avoided.**

**I. All enforcement proceedings must be implemented in compliance with fundamental rights and freedoms recognized by the ECHR and other international instruments.**

**J. The deprivation of liberty must be in accordance with the rights protected by Articles 3 and 8 of the ECHR, while having regard to the stipulations recognized by Article 8.2 of the latter. It is the duty of the judge to protect and vindicate these rights.**

**K. Whether the modalities of execution of a sentence are under the responsibility of the judge, a parole board, or an administrative authority, the implementation of such measures must be subject to fairness in procedure and to judicial supervision and review.**

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**L. The principles of trust and mutual recognition are cornerstones of the construction of a European legal area. Mutual recognition implies that decisions given at the national level have an effect in other member states, in particular in their legal system. It is therefore essential to increase exchanges between legal professionals. Their different networks should reinforce and restructure themselves and coordinate with each other.**

**M. The CCJE recommends that the Judicial Councils, or any other relevant independent body, should regularly publish a report on the effectiveness of enforcement. A separate section should deal with the execution of judgments against public entities.**

<sup>1</sup> See the 2010 terms of reference of the CCJE approved by the Committee of Ministers at the 1075th

meeting of the Ministers Deputies (20th January 2010).

<sup>2</sup> See *Privalikhin vs. Russia* of 12 May 2010: the Court reaffirmed that in order to decide if the execution delay was reasonable, the Court will look at how complex the enforcement proceedings were, how the applicant and the authorities behaved, and what the nature of the award was (see also *Raylyan v. Russia*, no. 22000/03, § 31, 15 February 2007).

<sup>3</sup> See for example, *Immobiliare Saffi v. Italy*, 28 July 1999, and other 156 cases v. Italy; *Zielinski and Pradal and Gonzales and others v. France*, 28 October 1999; *Cabourdin v. France*, 11 April 2006.

<sup>4</sup> See for example, *Van de Hurk v. the Netherlands*, 19 April 1994; *Findlay v. The United Kingdom*, 25 February 1997, especially §77.

<sup>5</sup> See *Koltsov v. Russia*, 24 February 2005, §16; see also *Petrushko v. Russia*, 24 February 2005, §18; *Metaxas v. Greece*, 27 May 2004, §19.

<sup>6</sup> Such compensation is also a direct requirement of the ECHR (in particular Article 1 of Protocol no. 1). According to the Court, the mere fact that the authorities complied with the judgments cannot be viewed as automatically depriving the applicant of his/her victim status under the Convention, if no adequate redress was offered for the delay in proceedings (see for example, *Petrushko v. Russia*, 24 February 2005, §15). The adequate compensation eventually paid after the delay must take into account the various circumstances with a view to compensate the gap between the sum due and the sum finally paid to the creditor and to compensate for losses of use (see for example, *Akkus v. Turkey*, 9 July 1997, *Angelov v. Bulgaria*, 22 April 2004, *Eko-Elda Avee v. Greece*, 9 March 2006). Redress may also be demanded for non-pecuniary damages (see for example, *Sandor v. Romania*, 24 March 2005). The absence of state responsibility for delay under these different heads of prejudice could not be justified by the impossibility of establishing any *culpa* or fault on the part of public authorities (see *Solodyuk v. Russia*, 12 July 2005, §16).

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