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Council of Europe co-operation programmes to strengthen the Rule of Law

Multilateral seminar on

## **THE ROLE, ORGANISATION, STATUS AND TRAINING OF BAILIFFS**

*Varna (Bulgaria),  
19 and 20 September 2002*

In the framework of its Co-operation Programmes to strengthen the Rule of Law, the Council of Europe organised a multilateral seminar on bailiffs (i.e. enforcement agents) in the enforcement of court decisions in civil and commercial cases. This seminar took place in Varna, Bulgaria, on 19 and 20 September 2002.

The seminar brought together the representatives of several European countries, in particular those from central and eastern Europe, to discuss a range of important and topical issues concerning bailiffs in Europe in particular as regards efficiency in their work, their institutional role and status, the collection of, and access to information, auctions, the service of documents and bailiffs' training.

There was a fruitful exchange of information and expertise which resulted in the adoption of Conclusions (attached) by the participants. It is particularly noteworthy to mention that there was general consensus concerning the proposal of the Bulgarian Ministry of Justice to set up a European Enforcement Training Centre.

This information booklet provides a useful reference point as regards current thinking and trends concerning bailiffs and enforcement in Europe.

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## Conclusions adopted by the participants

The enforcement of a court decision forms an integral part of the fundamental human right to a fair trial within a reasonable time in accordance with Article 6 of the European Convention on Human Rights and Article 13 of the Convention which prescribes the right to an effective legal remedy.

States are under a duty to ensure that all persons in receipt of a final and binding court decision have the right to enforcement. Not to enforce a decision could therefore render this right inoperative and illusory to the detriment of one party.

The participants fully supported Resolution No. 3 of the 24th Conference of European Ministers of Justice 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”.

In the light of the discussions during the seminar, the participants of the Council of Europe seminar agreed that the following common assertions and standards relating to enforcement agents (bailiffs) are necessary in order for their States to strengthen the enforcement of court decisions in civil and commercial cases:

### Role of enforcement agents (bailiffs)

1. Irrespective of their institutional status or position, ‘enforcement agents’ should cover all those persons responsible for carrying out the enforcement process (e.g. bailiffs, enforcement judges, sheriffs, court executors and court or judicial officers).
2. The role, organisation, status and training of enforcement agents should be prescribed in individual laws and/or regulations in order to bring as much certainty and transparency to the enforcement process as possible. As a complementary measure, enforcement agents should also be bound by ethical and professional standards.
3. Enforcement agents should be neutral in their dealings with the parties to enforcement proceedings subject, at all times, to the judicial control of the courts.
4. The powers and responsibilities of enforcement agents should be clearly defined and delineated in relation to those of the judge and the parties to enforcement proceedings (i.e. claimant, defendant and third parties).
5. In the light of the above, States could usefully enact rules which would give enforcement agents more extensive powers so that the enforcement process is carried out as efficiently as possible. In so doing, it would be useful for States to take the following measures:
  - (a) transfer the competence of certain tasks currently performed by the judge to enforcement agents (i.e. so that judges have more time to concentrate on the determination of cases),
  - (b) provide for more appropriate and effective means of serving documents,
  - (c) review and, as the case may be, introduce and enhance:

- the right for enforcement agents to have free of charge, immediate and unfettered access to necessary information on the defendant (e.g. information held by banks, taxation and company registers as well as land and vehicle registers),

- the right for enforcement agents to take coercive measures in order to deter and prevent abuses of the enforcement process including the issuance of financial penalties for late payment and the freezing of defendants' assets after judgment to prevent them from being transferred,

- the right for enforcement agents to perform auction sales in a flexible and transparent manner in order to sell defendants' assets for the highest possible value within the shortest period of time.

(d) audit the process of enforcement to remove unnecessary complexities and duplications (e.g. misuse of appeals to delay the proceedings, multiple evaluation of assets).

#### Organisation of enforcement agents (bailiffs)

6. States should consider whether enforcement agents should be managed and organised centrally or whether it could be more efficient for them to devolve responsibilities. At the very least, enforcement agents should be given a sufficient level of autonomy in the organisation of their work *inter alia* to motivate them.
7. The organisation of the work of enforcement agents should incorporate ways of improving efficiency in the search for defendants and their assets. As a profession, enforcement agents should make every effort to obtain access to necessary electronic and other registries of assets and to facilitate the setting up of enforcement databases. To this end, note was taken of the progress made in these areas by the Nordic countries.
8. As part of the overall development of the enforcement process, the profession of enforcement agents could be usefully consulted (e.g. in a manner similar to that currently carried out by the Ministry of Justice of Bulgaria) to strengthen the relations between the profession and the State. In so doing, enforcement agents are encouraged to establish their own national associations to strengthen their profile and encourage dialogue.

#### Status of enforcement agents (bailiffs)

9. Enforcement agents should be persons authorised by the State or the law to carry out the enforcement process.
10. In affirming their political commitment to developing and strengthening the enforcement process, States should ensure that there is adequate financing of their enforcement services. To this end, enforcement agents should be adequately remunerated through a system of tariffs and fees and have the proper working conditions and resources (e.g. premises, vehicles, telephones etc) necessary to carry out the enforcement process as efficiently as possible.
11. The status of enforcement agents varies from country to country and there is no one particular status which is preferable over another even though there is a general trend in European countries towards the liberal profession. In determining the status of enforcement

agents, States could therefore consider whether certain services currently performed by State officials could be transferred.

12. Enforcement agents should be accountable for their actions and be held liable to disciplinary, civil and/or criminal proceedings if they abuse their position.
13. No matter what institutional and organisational status is attributed to enforcement agents what is important is their performance and, as a corollary, their ability to be motivated and to excel in their profession should include a regular review of their work, working conditions, salaries and training.

#### Training of enforcement agents (bailiffs)

14. Enforcement agents should be well educated and trained in enforcement practices and procedures.
15. The training of enforcement agents is vital to the overall efficiency and effectiveness of the enforcement service. Enforcement agents who are regularly trained according to well-structured aims and objectives provide for a more motivated and dynamic profession. Investment in them is an investment in the enforcement process and in the promotion of the Rule of Law.
16. The Bulgarian proposal for the development and establishment of a European Enforcement Training Centre is welcomed. Such a Centre would provide for a dynamic international approach to exchanging expertise and improving the quality of training in Europe.

#### Follow-up to the seminar

In the light of the above, it is desirable for the Council of Europe to continue its good co-operation with the represented States by providing its expertise through similar multilateral and also bilateral seminars, as well as written assessments and practical guidance of its experts. To this end, the Council of Europe is invited to support the proposal for a European Enforcement Training Centre.

# **The role played by bailiffs in the proper and efficient functioning of the judicial system - an overview with special consideration of the issues faced by countries in transition**

by Alan Uzelac, Associate Professor, Croatia

## **Introduction**

The proper and swift enforcement of 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 their citizens with efficient protection of their rights within reasonable time. The jurisprudence of the European Court of Human Rights (ECHR) has recognised, starting from 1997 case *Hornsby v. Greece*, that the 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.<sup>1</sup> 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”.<sup>2</sup>

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 law and strongly uttered by courts, civil rights and obligations are, in practice, rendered inoperative and illusory. Citizens need “justice in action”, not “justice in books”. Without the final realisation of court judgements and other enforceable documents, citizens may well lose their respect for the system of justice and their confidence in state institutions. The practice in many countries in transition has also demonstrated that a 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

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<sup>1</sup> The same approach was subsequently repeated in cases *Estima Jorge v. Portugal* (1998), *Immobiliare Saffi v. Italy* (1999) and *Georgiadis v. Greece* (2000).

<sup>2</sup> Resolution No. 3 of the 24th Conference of European Ministers of Justice.

countries that experience the most acute problem in respect to speed, efficiency and adequacy of enforcement procedures.

### **Bailiffs – problem of definition**

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 *bailiff* may be controversial, starting with the problem of translation into different European languages.

Those denoted as “bailiffs” in whatever sense also play in practice rather different roles, and appear in rather different forms. One typical demonstration of such differences could be acquired by assessment of social status and respect enjoyed by those who are called “bailiffs” in different legal systems. Without prejudging the precise results of such a possible research, it could be stated with certainty that some of the systems regard the bailiff’s profession as a very desired, esteemed and attractive post within the legal system, whereas in the other system it is associated with hard, repelling and poorly paid jobs.

In the latter systems, bailiffs are almost viewed as the “pariahs of the legal order” – as “those whose occupations and habits of life involve polluting activities”<sup>3</sup> such as sweeping the unclean situations in which debtors do not want (or cannot) fulfil their obligations.

Thus, the term “bailiff” may encompass rather different groups of people, distinguished by their education, knowledge, skills and authorities. Such bailiffs in different jurisdictions range from low-level work force to top professionals, from poorly qualified assisting personnel to excellent experts of highest academic and professional order. To realise the complexity of the 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.<sup>4</sup>

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 formal – we may speak of “all those persons responsible for carrying out the enforcement process”. Such a broad definition would, admittedly, include a number of categories that would customarily not regard themselves as “bailiffs”. Here, we would in particular point to the persons commonly known in some systems as “enforcement judges”, but there are also other names and categories used in practice, e.g. sheriffs, court executors and court or judicial officers. In order to embrace all these categories in one single neutral term, the Council of Europe has used in its recent documents the term *enforcement agents*. It is the term that may also be equalised with the notion of *bailiffs in broad sense*.

However, in many jurisdictions that know and use the term “bailiff”, this term is usually associated with a distinct private profession. With such a meaning, the term bailiff is reserved for members of

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<sup>3</sup> See the definition of untouchables (*pariahs*), Encyclopaedia Britannica (CD-ROM ed. 97).

<sup>4</sup> This can, e.g., be attributed to some court systems of enforcement in which the judges play such an extensive role that (unless they themselves are regarded as “bailiffs”) there is very little room for other enforcement agents. *See infra* III.a.

a liberal profession that is authorised by law to perform some or all of the services directly linked to the process of enforcement of court decisions and, where applicable, other legal acts that fulfil conditions for direct enforcement (enforcement titles). In order to avoid confusion, we will in this paper use the term “bailiff” as *bailiff in broad sense*, i.e. encompassing both “public” enforcement agents and private bailiffs.

### **Typology of enforcement systems**

Although enforcement systems appear in a great variety of divergent features, they may be analysed according to their prevailing characteristics. In this part, we present a typology of enforcement systems, aware that such a typology, when applied to a concrete system, may not be entirely appropriate. But, the following typology is elaborated as a collection of ideal-types, i.e. of pure systems that may exist in real life in a number of transitory forms and features. However, as with most ideal-types, we assume that this typology may be useful in analysing concrete situations.

According to dominant features, especially with respect to allocation of the main responsibility for enforcement, there may be three types of enforcement system:

- a) Court system of enforcement
- b) System of enforcement by the executive branch of government
- c) System of enforcement by private bailiffs

#### *a) Court system of enforcement*

In a **court system of enforcement**, the dominant responsibility for the enforcement is given to judges. Normally, they are regarded as any other type of (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 to enforcement 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 that are usually associated with judicial status (independence, impartiality, immovability etc.). On the other hand, the nature of their activities is 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 that 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”) that 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).

#### *b) System of enforcement by the executive branch of government*

**A system of enforcement under 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 that supervises the whole process (and those who perform it at operational level) is a 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).

*c) System of enforcement by private bailiffs*

**A system of enforcement comprising private bailiffs.** In this system, enforcement agents (bailiffs in the narrower sense) operate as private professionals (even private entrepreneurs) and have direct financial interest in 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 that 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, candidates also usually undergo a competitive process of selection. 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 dependent on market developments (i.e. the process of implementation of judicial decisions is viewed as a market place on which enforcement services are sold).

**Advantages and disadvantages of certain types of enforcement systems**

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. In systems in which the 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
<b>Advantages</b>	<ul style="list-style-type: none"> <li>– quality;</li> <li>– same standards;</li> <li>– level of debtor protection;</li> <li>– inexpensive for consumers;</li> </ul>	<ul style="list-style-type: none"> <li>– fast;</li> <li>– flexible;</li> <li>– less expensive for the state budget;</li> </ul>	<ul style="list-style-type: none"> <li>– rapid;</li> <li>– efficient;</li> <li>– inexpensive for the state budget;</li> <li>– professional quality;</li> </ul>
<b>Disadvantages</b>	<ul style="list-style-type: none"> <li>– expensive;</li> <li>– slow;</li> <li>– rigid;</li> <li>– over-formalised;</li> </ul>	<ul style="list-style-type: none"> <li>– lack of quality;</li> <li>– outside interventions;</li> <li>– corruption;</li> <li>– bureaucratisation;</li> </ul>	<ul style="list-style-type: none"> <li>– expensive for consumers;</li> <li>– difficult to change;</li> <li>– interventions in selection process;</li> </ul>

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, the same standards apply to the adjudication and enforcement of decisions. The 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. 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 in enforcement activities, this may be fairly expensive; if the same judges 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 at 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. A typical feature of the executive branch is the orientation towards results, and therefore enforcement routines could be less formal and more flexible than in the case of court systems. Such a system is typically also less expensive, at least because the officials in the executive branch tend to receive lower remuneration than judges. The flexibility of the system is greater, since it 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 the executive branch usually do not enjoy such a high status, training and position as judges. They also tend to be underpaid and overworked. All these features may lead to a 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 the 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. There is the additional advantage on the cost side 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.

As regards the disadvantages of this model, it may be said that, although the 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 the private sector to engage in enforcement, this is a process that can only be reversed with great difficulties. Finally, the quality and efficiency of the private model greatly depends on the reliability on its 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 such interventions during 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 by factors that do not have anything to do with the proven qualities and proficiencies of the candidates.

### **The role, organisation, status and training of bailiffs - open questions**

In addition to presenting a typology of enforcement systems, in the following presentation I would like to systematise the main issues linked to the bailiff profession.

I will be presenting four professional aspects (here referred to as the 'ROST analysis'): the Role, Organisation, Status and Training. I 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 microanalysis that could be viewed as a contrast to the previous macro-analysis. However, for the purposes of this short introduction, I will limit this to a brief presentation of questions that may arise in any model and system of enforcement.

### *Role*

- How extensive should the role of bailiff be?

Bailiffs have rather different overall tasks in different systems. In some of the systems, they are the main "players" when the need of compulsory enforcement arises. In other systems, they only play the role of assisting staff and limit their participation to rather technical tasks. Therefore, the strategic choice that is made in every system is whether to limit the role of bailiffs to **full control of the enforcement process** or to reduce it to **implementation only** of substantive decisions taken elsewhere (e.g. by enforcement judges, by parties or by some other agencies).

- What should regulate and motivate enforcement activities?

Further question with respect to bailiffs' role would relate to the main logic and rules of their operation. It is generally agreed that enforcement should be regulated by law, in a transparent and sufficiently precise fashion. However, there could be different views with respect to strictness of regulation. The actions of bailiffs in enforcement may be motivated by the **strict principle of legality** (there should either be a detailed legal provision, or court order), or bailiffs may be given **discretionary powers** to make certain choices in the process. An interrelated question is about the main source of arguments in the strategic decision-making - whether they are drawn from **law** or from **economy** (i.e. whether bailiffs should follow only **legal** or **commercial logic**) too - especially when the liquidation of debtor's assets is concerned (auction etc.).

- At which point in time are bailiffs engaged?

An additional question about the role of bailiff is when a bailiff should be engaged. Bailiffs may be engaged either **immediately** after the 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 are taken. For instance, after judgement there may be a process of certification that the judgement has become enforceable. It may be required that the judge or other official issues a writ of execution. Conditions that may be required, and the time needed can vary considerably.

- What are the functions of bailiffs in the enforcement process?

A lot of the preceding questions depend on the determination of the functions of bailiffs in the enforcement process. The principal issue here is linked with the scope of authorities given to

bailiffs. One of the principal dilemmas here deals with the extent of initiative that bailiffs should have, especially with respect to determining the means, scope and time of execution. This initiative is also reflected in the active or passive role that bailiffs could have in respect of collecting information relevant for enforcement process, in particular with respect to assets owned by the debtor. The bailiffs' role could be limited to the role of **executors only** (i.e. persons that act upon information obtained by the court or the parties) or can extend to the role of active **collectors of information**. In the latter case, bailiffs should have sufficient authority and means, in particular in relation to various public registers (company register, registers of immovable property; registers of motor vehicles; IP registers; registers of addresses and bank accounts etc.). They may also have public authorities with respect to private persons (companies and/or individuals). In the search for information, some of their authorities might need to be balanced with other values and human rights - e.g. their right to look into bank accounts has to be compatible with the right to privacy and the protection of sensitive information. Bailiffs and/or other agents (judges, public officials) may also have right to request directly from the debtor/defendant a solemn declaration of the assets owned.

### *Organisation*

- With which agencies should bailiffs be associated? For what territory?

Bailiffs may, as a profession, be organised at various levels and maintain loose or less loose relations with various bodies. This part of organisation also largely depends on the role given to bailiff profession - e.g. whether enforcement agents are conceived basically as **officers of the court** or as **private entrepreneurs**. Consequently, bailiffs may or may not have close organisational relations with courts, public authorities, governmental agencies and other professions engaged in the justice system (lawyers, notaries, *Rechtspfleger*). However, the organisation also depends on the **level of localisation** - i.e. to the issue whether enforcement agents have access to and authority 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 the one hand, bailiffs may work more or less **individually, as sole practitioners**; on the other, they may have **collective bodies** (services, departments, partnerships). Within these bodies, there may be a different level of mutual sub- and super-ordination. In certain jurisdictions, bailiffs may only work as **individuals**, in others, bailiffs (or law) establish enforcement agencies with **legal personality**. This is also connected to the issue of **professional liability**, e.g. whether it should be limited or unlimited, and who will guarantee damage caused by wrongful enforcement (individual/collective liability).

- What role should professional organisations play?

Irrespective whether they work individually or collectively, bailiffs may wish to establish their professional organisations. They may play an important role with respect to the development of enforcement practices. However, their role may be different - from a mere **exchange of views** on professional issues to considerable **jurisdiction over the members** of the organisation. Additional issues are whether such organisations ("bars") are **established by law**, or by free **agreement** of their members; whether there should be **one** or **several** professional organisations; whether there should be **compulsory** or **voluntary membership**; whether organisation should have authority to issue or participate in issuing rules on professional ethics, common standards and discipline.

Finally, such organisations may or may not have certain public authorities (e.g. with respect to the process of selecting and licensing the new members of the profession etc).

- Free access to the bailiff profession or *numerus clausus*?

An important question with respect to the organisation of the bailiff profession is whether there should be no (or very loose) **limitations with respect to the number of bailiffs** in any one jurisdiction, or whether the number of bailiffs should be strictly determined (*numerus clausus*) so that a new bailiff may be appointed only after a vacancy has been created following a retirement or the inability to perform, or by legislative changes opening new posts. In this respect, issues are similar to those of some other legal professions (e.g. the notaries public). The limitations are sometimes justified by the desire to ensure high standards and a closer control of enforcement agents. Those advocating a lack of limitations, on the contrary, invoke the right of young lawyers to freely choose their profession and express a view that the market is better at regulating social needs than the state authorities.

#### *Status*

- Private or public model?

The institutional and organisational status of bailiffs is different from country to country. 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 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 the 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, an 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 enforcement process?

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 bailiffs is about the authority to regulate tariffs, fees and remuneration in the process of enforcement. Possibilities are, naturally, different, ranging from the strict statutory regulation, administrative decrees, *ad-hoc*

determination by a body in the process (court, ministry), self-regulation by bailiff organisation and/or free agreement between the parties and enforcement agents. No matter what the system is, it is essential that the system incorporates adequate incentives for effective enforcement, and that the costs are reasonable and evenly distributed.

### *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 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 the 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?

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 environments may need new knowledge. Therefore, it is always desirable to **continue education and training** even after the 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 the 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.

### **Conclusions - enforcement systems in the context of the problems faced by the countries in transition**

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 could 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 the 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 typically 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 the occurrence justice taken into 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 involvement 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 the 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 state action. Only a sincere, persistent and strong wish to change the situation can achieve real progress - and such a 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 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 researching this field and in exchanging our experiences may soon become not only a welcome opportunity to meet friends and colleagues, but also a clear and imminent necessity.