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ENFORCEMENT SYSTEMS: A COMPARATIVE APPROACH BETWEEN RNM AND THE COUNTRIES IN THE REGION

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Abstract

When it comes to the enforcement system, in one way or another, the debate opens regarding the dilemma of which practice or enforcement system is more effective. Unfortunately, the answer is a bit complicated. Firstly, we can say that the most applied forms are the private enforcement system, the judicial system, and the mixed one, leaving the administrative system as a less applied form. The choice of one enforcement system before another is not implicated by international entities. It's rather a matter of taste or a suggestion of national experts who deal with analysis within the idea of a "more effective judicial system". Almost all the states in the region, except Bosnia and Herzegovina, have made efforts and achieved a degree of privatization of their enforcement systems. The official positions of the states in the region are that they have accepted the privatization of enforcement and relieved the burden from the courts! However, we consider that in all states of the region, there are controversial dilemmas in terms of the role of the bailiff, the enforcement powers, the conditions for the election of the bailiff, and the significant role that the courts continue to have in the enforcement process. Among other things, this research deals with the advantages and disadvantages of each enforcement system and the specific institutes that have been included in the respective systems, such as preparation for the fulfillment of the debtor's obligation in two months (the case of Croatia), higher enforcement fees (the case of RNM), the criteria for the appointment of enforcement officers are much lower (the case of Albania, Croatia, Slovenia, Serbia, Montenegro), etc.

Keywords: Enforcement systems, bailiff, court, private enforcement, judicial enforcement.

1. Introduction

All countries in the region, have approached national reforms, the purpose of which was to increase the efficiency of the national enforcement systems. Enforcement was not prioritized in almost all countries in the region. Approximately this period of crisis for enforcement procedural effectiveness was felt by all states. The consequences of not following the procedures for implementing final legal acts were less severe if they were not enforced or delayed. The international entities were pointing out the shortcomings of each state in the implementation of the guarantee contained in the sixth article of the European Convention on Human Rights. If we analyze the practice of the European Court of Human Rights, we can conclude that the jurisprudence of the European Court has expanded the concept of "the right to a fair trial", including not only the direct trial of the case, but also the procedures of enforcement.

In this context, the right to enforce judicial decisions is considered complete only when the decision has been implemented, i.e. enforced either voluntarily or by force (Kuzencov, E., 2019, f. 144). This authors defends the theory of insuficience of the guarantees contained in the sixth article of the Convention, while other authors refer to the extended interpretation of this article, with the so-called " access to justice" (C.H. & A., 2010). Although the international rules did not contain a decisive obligation for the method of enforcement, they only required that the states individually approach the reform of the enforcement systems,

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which would have the effect on reducing the unenforced cases! In this regard, from the years 2000-2004 onwards, almost all the countries of the region took responsibility for undertaking relevant reforms that would advance the judicial systems, first by removing the burden from the judicial enforcement systems, and second for a more efficient development of the enforcement process with less involvement from the courts.In our country, the initial idea seemed to be different, because initially in the 2004-2007 strategy was stated that: *"The authorization of enforcement would be implemented by the court, while the implementation of the enforcement would be taken by the courts and passed to the bailiff as persons with public authority, whose status is fully regulated by law. In this regard, these changes reduce the possibilities for abuse of legal remedies, because the grounds for appealing enforced decisions will be reduced, and objections will have to be justified and argued. The efficiency of the procedure would be increased given the circumstances that many of the enforcement actions that the court has carried out so far, they will be transferred to the bailiffs who will take upon themselves the conclusions against which no regular remedy is allowed"* (National strategy for european integration of Republic of Macedonia, 2004). It was considered that the recommendations from the Council of Europe as well as from the International Union of Bailiffs are essential in the question of reforming the enforcement system. States should take into account the risk that without effective enforcement systems as a form of "private enforcement" will have negative consequences on public trust, the legal system and its credibility. In this recommendation, among other things, it is stated that: "The enforcement system must be built so that the enforcement practice is created by the demands and needs of citizens and the legal protection it offers with all the social and economic preconditions. The enforcement of court decisions or other enforcement titles should be as easy, efficient and cost-effective as possible; implement the guiding principles related to enforcement effectively by taking and reinforcing all necessary measures in the enforcement function. (Recommendations of the Judicial Officers, 2019). Each state, in its own form and manner, tries to make reforms and adapt to the rules and standards required by international documents, the purpose of which is to protect the rights of citizens in civil processes. Among the most important points of these principles are those that guide how states should regulate enforcement procedures, specifically in finding an adequate balance to establish the foundations of enforcement systems. How the states will manage to find this balance, I consider that it is not so problematic, it is enough for them to consistently and precisely implement the recommendations of professional institutions such as the International Union of Bailiffs or even European institutions, which have previously encountered the same problems or obstacles.

In this research, we will also include discussion such as the establishment of the foundations of one or the other enforcement system, the analysis of the types of enforcement systems currently applied by the states in general. The purpose of this comparison is to find any advantages and shortcomings of the respective enforcement systems, without excluding the specific institutions that countries in the world have successfully incorporated into their national systems.

2. Circumstances that affect the selection of one or the enforcement system

States today are generally oriented by the organization and operation of enforcement duties on a liberal basis, specifically at the world level 68.42% are entities that perform enforcement functions on a liberal basis, 21.05% are civil servants, and 5.26% are mainly enforcement agents/officers (Stoica, 2012). Macedonia, France, Poland, Slovakia, Romania, Slovakia, Moldova, Latvia, Lithuania, Luxembourg, Hungary, the Netherlands, Belgium, Spain, similar to it and Latin American countries, etc. are listed as states with a liberal enforcement system;

Countries that have liberalizing tendencies, e.g. Germany, Russia, Italy, Austria, etc.; Denmark and Liechtenstein have public bailiff; Forms of civil servants in countries such as France, Belgium, the Czech Republic, Moldova, Kazakhstan, Romania and Belgium; as well as Asian countries (judicial system), Mexico (judges), etc. Currently, European enforcement agents are organized on a liberal basis in a proportion of 73.33%, and only a percentage of 26.67% are civil servants. The percentage of enforcement agents organized either on a liberal basis or in the system of civil servants is extremely reduced, namely 7.14% (Stoica, 2012).

According to professor Kamilovska, in defining the segments related to the enforcement system, the creation of an institutional framework for enforcement, its implications on the enforcement structure, as well as for an adequate enforcement control mechanism, all states had to adhere to the following conditions: *'First - Following international guidelines - where states must define a clear legal framework on the structure of enforcement, which means that the enforcement process must be clearly defined in legislative terms; the enforcement procedure should not be overly complicated and formalized, nor burdened with a series of unnecessary steps or decisions that must be taken by the authorities, and care should be taken for the efficiency of the enforcement process, simplifying and facilitating enforcement as much as possible, which is most easily achieved with clean and easily understood solutions. Secondly - the application of the modern concept of enforcement - which is based on the premise that even if the state is freed from affairs which in essence do not represent "Judgment", it still retains the function of control, regardless of the chosen enforcement model. In all systems, the intervention of the court is inevitable as a guarantee for the legality of the actions, taking into account the interest of the parties, participants and third parties in the enforcement''*(Zoroska-Kamilovska, 2013). According to third opinions, today there are tendencies to liberalize the enforcement functions, as a consequence of the opposite contemporary trends, in favor of the new paradigms of the market economy and capitalism, which in the past private functions were suppressed. Other causes may be the result of inefficient public enforcement structures that where unable to enforce decisions and fulfill the function for which they were appointed, as well as very weak equipment, untrained people, very low payments, etc.

Among the key factors that determine this status are: Monopoly in the free exercise of professions, determination of fees, centralization of enforcement structures, high requirements for professionalism, training and continuing education, etc. (C.H. & A., 2010). I consider that generally the powers of the enforcement agents are very limited, while the court has a very large role in determining the enforcement. I say this considering that many of the systems, although listed in the privatized systems, still did not succeed in building a level of independence of the enforcement function. The existence of judicial enforcement systems is not less desirable if it has proven in practice to be sufficiently effective. But the problem arises when states are identified with liberal enforcement systems (enforcement duties are centralized in judges) while the bailiffs perform more of a technical role of a servant. In these circumstances, the recommendations mentioned above are crucial for building an effective enforcement system.

3. Types of enforcement systems applied in national enforcement systems

Enforcement in the past has been considered a method of providing legal protection mainly judicial or administrative, but the choices of contemporary systems oscillate between concepts similar to decision-making on the one hand and purely administrative methods on the other, without neglecting the existence of different systems transitional/or combined between them (Andenas & Pnerhammer, 2005). Therefore, today the generally accepted concept is that of the division between the system, orientated by the courts, the system oriented on private

subjects (bailiffs as persons with public authorizations), the mixed system in which elements from the two previous forms are applied, as well as administrative system. There are many opinions regarding the characteristics of enforcement systems. Actually, they are sufficiently divergent, but I would say that one of the most important divisions of enforcement systems are: The judicial system, there are judges who have power; enforcement judges who are specialized; and court bailiffs who have very limited authority and follow the judge's instructions; 2. The enforcement system as an executive branch of the government - where the enforcement powers are concentrated in one or more entities, centralized hierarchical bodies and supervised by the relevant Ministries, which may be that of Justice, Finance or any other ministry. In this system, bailiffs have a fixed salary and are responsible for their actions in disciplinary terms (persons similar in nature to public prosecutors' offices); 3. The private enforcement system – the bailiffs are professional persons in the enforcement process; independent in their work and autonomous; professional conditions for appointment where candidates are subject to competitive selection, compulsory training; on these systems the balance between commercial and legal aspects depends on the respective system, the more privatized and organized as a form of business, the more independence they are; if they are organized as a public authority then they can be exercised as professional duties or as partially judicial bodies (Uzelac, 2020). The most applied systems are the judiciary, private and mixed systems, while the administrative system is less applied in enforcement practices and is slightly more specific.

Administrative systems are usually under the competence of state agencies that have enforcement powers, they manage cases that do not enforce cases of the worker's return or family matters. The agency has competence for monetary claims, for movable items, the handing over of items from the debtor to the creditor, while for the enforcement of claims related to securities, it is also a bit debatable because they are monetary claims, but for them, the courts still have exclusive competence (Zoroska-Kamilovska, 2013). According to Salmanova, the enforcement procedures are the logical continuation of the judicial procedure or administrative legal relations, especially when we talk about the final stage when the decisions are enforced (Salmanova, 2015).

Gilles in a research points out that the enforcement of decisions has often encouraged the development of public-private partnerships of enforcement, as a result of illegal enforcement practices. On the one hand judicial bailiffs ensure the state capacity of coercion and information from administrative institutions, while private bailiffs are able to perform other forms of enforcement pressure on the debtor to find additional information about the debtor. This is viewed more as a manifestation of state power in a vertical aspect than the efficiency of the state's coercive prerogatives in enforcing decisions. (Faverel-Garrigues, 2015). Among the states of the region which are applying such a combination of enforcement systems, is the Republic of Kosovo, but more or less also the Republic of Albania. In Kosovo, we have parallel enforcement where private bailiff enforce cases for which the are not exclusive competences provided by law (immovable property, family and labor matters). In Albania, state judicial bailiffs and those organized on a private basis operate, where the first group serves as court officials, while the other group act only on requests for which both parties have voluntarily expressed their will to enforce.

The Republic of Croatia has a less good experience, which in 2008 tried to completely privatize the system similarly to the current enforcement system of the RNM, but fortunately in 2010 the enforcement practice was reformed with the introduction of the Act on Public Enforcement (Narodne Novine no. 139/10) and Act on enforcement (Ovršni zakon, Narodne Novine no. 139/10). Slovenia is one of those states which claims that it is successfully applying enforcement on a liberal basis. However, we consider this state to be roughly on the same lines as the Republic of Serbia and Montenegro, where enforcement powers are reserved

for the courts, while the public bailiffs have a very small scope of enforcement, either for the enforcement of requests from municipal public services, or requests for which the parties have voluntarily agreed to be enforced by them. A specific situation in the Croatian system is the enforcement of monetary claims over HRK 50,000 with the permission of the Croatian Chamber of Commerce (Chapter 12, Act on Croatian Enforcement). With a completely judicial enforcement system still remains Bosnia and Herzegovina. They are subsequently organizing discussion tables with the aim of reviewing the current enforcement system, but without success in taking concrete steps to liberalize the enforcement duties.

4. Advantages and disadvantages of enforcement systems

Attempts to analyze the most effective enforcement system have been made continuously, but can we say that there is a more functional or better system than all the others? Very rightly, Uzelac points out that we cannot say this, because each system has its advantages and disadvantages, but we can say that we can compare the characteristics of the models in particular with an enforcement system based on the socio-economic circumstances and the way how the court system works, minimize the disadvantages and understand the potential advantages of that system.

The best illustrated overview of the shortcomings and advantages of the legal systems is presented by Uzelac: The system of judicial enforcement - a very formalized system; reorganize; slowly; high cost to the state; offers quality by protecting the rights of debtors with the same standards and low cost for citizens; Enforcement system - poor quality; corrupt; bureaucratic system with foreign interventions; low cost to the state; fast and flexible system; Private system - consumer-friendly system; difficult to change and interventions in the selection process for the election of bailiffs; on the other hand it is very fast; efficient; low cost to the state budget; bailiffs are persons with qualifications, professional, etc (Uzelac, 2006). If we consider this criteria and analyze the enforcement systems like that of the RNM, but also the countries of the region, we will see that each one has its advantages, but also has its own disadvantages. I consider that they can always be avoided, only the political will is enough to establish the institutions that would help in overcoming that concrete problem. For example, the case of RNM. In our country, the bailiff has all the enforcement powers, both in the determination, as well as in the implementation of the enforcement. The bailiff plays a very active role in the enforcement procedure, but the principle according to which he exercises activities and an active role is in a subordination relationship with the principle of formal rigor (Durac, 2014).

In this regard, all powers related to legal remedies are reserved to the court as first instance legal remedies, as well as appeals. In RNM, there is no need to follow a procedure for "allowing enforcement", which in all other systems, this is almost an inevitable action, making the court a factor from the beginning of the enforcement process. In fact, we also have opinions in favor of this rule, among them is professor Janevski, who emphasizes that the first stage allowing the enforcement to begin with the submission of the proposal for the initiation of the procedure. At this stage, the court decides on the merits of the proposal for enforcement, analyzing whether the creditor had the right to demand compulsory enforcement against the debtor specified in that document.

In order to fulfill the request that is defined in the enforcement document, this stage ended with the decision by which the proposal for enforcement is accepted or rejected in full or in part (Јаневски & Зороска-Камиловска, 2011). If RNM would apply this institution, then it would exclude from use the objections that the parties could submit regarding the enforcement document or *titulus executions*. If we take into account the second element of the private system, it turns out that RNM is one of the systems with the highest enforcement fees that

appear to be high burden to the parties, and this eases the position of the state, but even more interestingly, it favors the enrichment of the bailiffs. And this is precisely the main criticism directed on our national system. In the 2004 Judicial Reform Strategy of the Republic of Macedonia was said: *"Our country is a leader not only in the region, but also beyond. Fast track enforcement status is achieved when 50% of cases are completed within 1 year at no cost to the state; Over 500 people are employed in the enforcement offices and a large amount of money (over 1 billion euros) has been put back into legal circulation in the country"*(National Strategy, 2017-20).

In terms of the selection of enforcement officers, training and qualifications, RNM is comparatively ahead of all other states, specifically Article 33 of the Act on Enforcement (Official Gazette of the Republic of Macedonia no. 72/16 and the Act on Amendments and Supplements to the Enforcement Act (Official Gazette of the Republic of Macedonia no. 233/18). Specifically, if we consider Albania, the prerequisites for appointment to the position of bailiff (Article 33 Act on the organization and operation of state judicial enforcement, approved in January 18, 2001, Official Gazette no. 8730; amended by Act No. 108/2016, dated 27.10.2016)). Even private bailiffs in the Republic of Albania must meet generally not too difficult conditions, higher education, one-year training, and two years of experience with enforcement work (Article 16, Act of Private Judicial Enforcement Service of 2008, Official Gazette no. 10031, dated 11.12.2008). The enforcement systems of Slovenia, Croatia, Serbia and Montenegro are not far from the approach of the Albanian legislation, especially the position of the public bailiff is more similar to that of judicial enforcement officers than private ones.

Another feature that is often noted is the speed enforcement! We should really analyze this element carefully, especially when we place it in the list of advantages! The deadline for voluntary enforcement in our system is 8 days, and in our opinion is the worst deadline amongst all systems! Debtor's delay is often result of a difficult economic situation. Although the Act on Enforcement foresees provisions for limitation and exemption from enforcement, but how far can we effectively protect especially the cases of blocking of bank accounts of persons who belong to the categories protected by law. I say this with great certainty, having experience from preliminary empirical research. Unfortunately, the results show violations of the rules for limitation and exclusion of enforcement, suggesting that citizens should not be blocked of bank accounts (with 48 % of respondents), without providing information about the source of income of the subject (debtor) (Etemi-Ademi & Zendeli, 2021). Even the main criticism directed at our national system since the Enforcement Act of 2005 has been related to the practice of blocking bank accounts, without any warning and without investigating the source of income. In 2016 and with the subsequent changes, the situation improved, leaving the burden on the bank itself that in the case of enforcement actions related to the same revenues, the bailiff has no compensation either for blocking or unlocking the bank account (Article 28, Act on Amendment and Supplement to the Enforcement Act, Official Gazette of Republic of Macedonia no. 233\2018).

The digitalization of the enforcement system and the creation of a sophisticated system for sending notifications and documentation of the enforcement process are two issues that RNM has not yet addressed. RNM often refers to the similarities with the Slovenian system, then we should take a little from the experience of this country e.g. electronic enforcement of requests; reduction of procedural costs, if the procedure is conducted in electronic form - Case of Croatia (Article 62, paragraph 1, Law on Croatian Enforcement); electronic presentation of the proposal for the enforcement of the reliable document (Case of Serbia), etc. Regarding the situation of non-notification for the start of the enforcement process, there are best practices of the state and the region in this regard as well. Specifically, in the Republic of Bulgaria, the possibility of submitting legal remedies is foreseen, for specific cases when the procedure has

been initiated, while the party is not notified about it at all (see article 435, Code of Civil Procedure of the Republic of Bulgaria).

5. Conclusions and Recommendations

Undoubtedly, reaching an agreement initially as a concept between political subjects is problematic, let's not talk about when the demands of institutions that provide municipal services, the business community, the opinions of citizens represented by organizations and other subjects are added to this circle, they are a consensus pretty hard to come by. However, I consider that if there is always a determination for procedural success, a solution will be created with concrete results in enforcement practice. I consider that every national system should be prepared a priori for the result and reactions to the actions taken. If we start from the idea that the selection of national systems is a careful selection between political trends and real economic and social demands, then reforming the enforcement system should not be problematic at all. In the case of RNM, we have a situation of almost 20 years of private enforcement, again it turns out that there are problems, and they are mainly of a socio-economic nature. This form suits the state system and especially the private executor, but it is increasingly becoming the burden on the citizen, because initially he does not have adequate notice, let alone the economic opportunity to fulfill the debt. We cannot say that efforts have not been made, especially with the changes of 2018, but again, even this did not remove the negative opinion created by citizens from 2005 with the installation of this system. There are opportunities and forms for the review of the current system, and we constantly point them out, but again for the application of these institutions that systems in the region have already invested, there must be a political will in order for them to be implemented in our enforcement practice.

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