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Workshop on
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The execution of judgments of Constitutional Courts and bodies of equivalent jurisdiction

Keynote address

by
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It is a common feature of national legal systems that specific provision is made to secure execution of the decisions of the courts. Laws may provide that a party to litigation who has been ordered by a court to do something - for example, to make a pecuniary payment to the successful party in the case, or to desist from trespass, infringement of trademark or some other unlawful activity - may suffer sanctions if he fails to obey the order. The nature of the sanctions varies. In some instances there is a financial penalty, such as the addition of interest to the capital sum ordered to be paid. Payment can be secured by the diversion to the creditor of a part of the debtor's wages or the seizure and sale of his property - usually chattels such as furniture or vehicles - or the processes of enforced sale of his land or in extreme cases his bankruptcy, can be set in motion, or even his imprisonment where he is able to pay the debt but refuses to do so. Some jurisdictions have the concept of contempt of court in which a failure to obey a mandatory order of the court can lead to imprisonment for contempt of court (either for a fixed term or until the person is willing to obey - "until he purges his contempt", to use a common law expression); the inter partes issue of unlawful conduct towards another citizen now becomes the public issue of defiance of the court.

The mechanism for invoking the sanction may also vary but most frequently there is a requirement that the party who has had the benefit of the court order must make a specific application to have it enforced (thus risking further loss of legal costs should this fail). Likewise, the agencies of enforcement may vary, as between special officers of the court or the ordinary police.

But in the case of constitutional courts and courts of equivalent jurisdiction the situation is not the same, and the case is, typically, one between a private citizen and a central or local executive authority, resulting in a declaritory order which, if it is made against the authority, is normally obeyed out of respect for the rule of law. Thus, the question of execution - as distinct from legal effect À - does not frequently present a problem, save perhaps in regard to the collection of any legal costs which were awarded against an unsuccessful private citizen; here the ordinary legal procedures for enforcing the payment of costs would be applied.

However, there can be cases where the question of execution may require consideration. In Murphy v. The Attorney General Á the Irish Supreme Court (the country's highest court, with jurisdiction equivalent to that of a constitutional court) heard a challenge to the income tax code. Under that legislation a married couple living together had their individual incomes aggregated together for tax purposes and deemed to be the income of the husband. By contrast, unmarried couples living together were individually taxed on their separate incomes. Because this law resulted in a higher rate of tax being applied, leading to a heavier tax burden on the married couple, it was challenged by Mr & Mrs Murphy as a breach of Article 40 of the Constitution which provides that all citizens shall, as human persons, be held equal before the law, and of Article 41, which pledges the State to guard the institution of marriage and to protect it against attack.

The court rejected the claim under Article 40 (on the ground that the constitutional guarantee related to those attributes which are the essentials of human personality, and was qualified by the Constitution's own recognition of differences of capacity, physical and moral, and differences of social function, and so was not a guarantee of equality before the law in all matters or in all circumstances) but it upheld the claim under Article 41.

For this purpose the court examined similar cases decided in the United States of America Â, the Federal Republic of Germany Ã, Italy Ä and Cyprus Å which the plaintiffs had relied on.

À The question of the effects of decisions of constitutional courts has been very comprehensively dealt with by Professor H. Steinberger in a paper presented at a seminar in Bucharest of the Venice Commission in co-operation with the Bulgarian Constitutional Court. As this document [no. 10 in the Venice Commission series, Science and Technique of Democracy] is available at this meeting, I do not propose to go over the ground which he has so thoroughly covered. See also the paper delivered at Riga by Judge Lapinskas of the Lithuanian Constitutional Court, July 1997 [Venice Commission document CDL - JU (97) 21].

Á [1982] IR 241.

Â Hoeper v. Tax Commission of Wisconsin (1931) 284 US 206

Ã Constitutional Court of the Federal Republic, Case No. 9 of 1957.

Ä Constitutional Court of Italy, Case No. 179/1976.

Å Republic of Cyprus v. Demetriades (1977) 12 J.S.C. 2102.

In Hoeper's case the US Supreme Court had held, by a majority of six judges to 3, that to assess a husband's tax on his wife's income violated the "due process" which is guaranteed by the Fourteenth Amendment, but the Irish constitution does not contain such a provision. In the German case the provision in the tax law of joint assessment of married couples, the avowed aim of which was to restore the working wife to the home Æ, was held unconstitutional, not as infringing Article 3 of the Basic Law which provided that all people should be equal before the law, but as being incompatible with Article 6 (1) of the Basic Law, which calls for the special protection of marriage and the family by the State. In the Italian case, where the tax payers had successfully challenged the constitutionality of the aggregation of the married couple's income for tax purposes, the relevant provisions of the Italian constitution (Articles 3, 29 and 53) had no equivalent in the Irish constitution. Likewise the provision in the Cyprus constitution upon which the case mainly depended (that every person is bound to contribute according to his means towards the public burdens) had no Irish equivalent.

The Supreme Court held that even though the Irish income tax code conferred many revenue, social and other advantages and privileges on married couples and their children, the nature and potentially progressive extent of the tax burden imposed on them was such as to amount to a breach of the constitutional pledge in Article 41. It therefore declared the legislative provisions to be repugnant to the constitution.

Æ In Ireland the basis of the provision was historical rather than ideological. Income tax was introduced as a temporary measure during the Napolionic wars but lapsed in 1815 and was not reintroduced until 1842. Since under the law the earnings and income of a married woman belonged to her husband (who could therefore, for example, recover her wages from her employer even though they had already been paid to her unless she had obtained her husband's authority to receive them), a situation which remained unchanged until the Married Woman's Property Act, 1870, it was thought only equitable that the husband should pay the income tax on both of their incomes. But when the wife's earnings became her property in 1870 no corresponding change was made to the income tax code - perhaps through male chivalry or a belief that in the classes liable to tax no husband would countenance his wife going to work. Oversight is a more likely explanation.

As can be imagined, the decision of the court caused much excitement, not least among the tax payers of the country, whose hopes ran high. Since the condemned legal provisions dated back to 1967 the government was much alarmed at the implications for the national exchequer and it feared that attempts would be made by individual tax payers to execute the Supreme Court judgment by way of judgements of the ordinary courts on foot of claims for repayment of taxes already paid. It therefore applied to the Supreme Court for a ruling on whether its judgement

was to operate prospectively or retrospectively and, if retrospectively, relative to what period of time and to what taxpayers, if any, other than Mr & Mrs Murphy.

The five judge court divided on these questions. The Chief Justice held that a decision of invalidity of law can only operate from the moment such invalidity is declared by the court, because of the wording of the constitution itself and the requirements of an ordered society.

As to the first ground, Article 25.4 of the constitution provides that

> "every Bill shall become and be law as on and from the day on which it is signed by the President … ",

while Article 15.4 says

> "every law enacted by the Oireachtas [Parliament] which is in any respect repugnant to this Constitution … shall .. to the extent only of such repugnancy, be invalid".

If invalidity is held to date back to the enactment of the law, he said, a conflict would exist between these two constitutional provisions. But the doctrine of harmonious interpretation requires the courts to seek to avoid where possible such a conflict, and this is achieved by interpreting invalidity as occurring only when the court has so pronounced.

As to the second ground, the Chief Justice said that he found it unthinkable that a people who enacted a constitution in the interests, inter alia, of achieving a "true social order" (in the words of its Preamble) should have intended that, under that constitution,

> "laws, formally passed, which went into operation and which were respected and obeyed, could, years after their enactment, be declared never to have had the force of law. Such an interpretation of the Constitution would provide for our people the very antithesis of a true social order - an uneasy existence fraught with legal and constitutional uncertainty."

This view was not shared by his four colleagues, who held that the effect of the provision in the constitution that "the Oireachtas shall not enact any law which is in any respect repugnant to this Constitution" was to restrict the law-making power of parliament to exercise within constitutionally designated limitations, and, that being so, for the courts to hold an unconstitutional law to be valid until the date of judgment would be to sanction something which the constitution prohibited and to supersede the constitution. Article 15.4 provides that the consequence which follows the enactment by the Oireachtas of unconstitutional legislation is that the legislation "shall be invalid" - not that it shall 'become invalid', and the word is "invalid", not 'voidable', liable to be deprived of legal effect, and thus it is void ab initio.
As for the question of obtaining a refund of taxes that had already been paid under the condemned legislation, the Chief Justice's opinion was that all the taxes that had been overpaid by Mr Murphy up to the date of the judgment of the High Court (from which the Attorney General had appealed to the Supreme Court) had been lawfully collected and so they need not be refunded to him. But taxes paid by him after the judgment of the High Court had been paid under protest (which, in the absence of duress, is not the same thing as unwillingly) and were

therefore recoverable by him. This principle applied equally to all other taxpayers.

By contrast, the second judge who constituted the minority decision held that all such taxes collected since the enactment of the legislation were recoverable because they had been demanded colore officii and therefore must be regarded as having been paid under duress.

The three judges who constituted the majority on this issue took a different view.

> "While it is central to the due administration of justice in an ordered society that one of the primary concerns of the courts should be to see that prejudice suffered at the hands of those who act without legal justification, where legal justification is required, shall not stand beyond the reach of corrective legal proceedings, the law has to recognise that there may be transcendent considerations which make such a course undesirable, impractical, or impossible …..
>
> For a variety of reasons, the law recognises that in certain circumstances no matter how unfounded in law certain conduct may have been, no matter how unwarranted its operation in a particular case, what has happened has happened and cannot, or should not, be undone. The irreversible progressions and bye-products of time, the compulsion of public order and of the common good, the aversion of the law from giving a hearing to those who have slept on their rights, the quality of legality - even irreversibility - that tends to attach to what has become inveterate or has been widely accepted or acted upon, the recognition that even in the short term the accomplished fact may sometimes acquire an inviolable sacredness, these and other factors may convert what has been done under an unconstitutional, or otherwise void, law into an acceptable part of the corpus juris."

Applying this principle, they held that the only excess taxes that were recoverable by Mr Murphy were those that had been paid by him subsequent to the institution of the proceedings challenging the tax, because until then the state received the taxes in good faith, in reliance on the presumption that the law was in accordance with the constitution, and had in every tax year justifiably altered its position by spending the taxes and by arranging its fiscal and taxation policies and programmes accordingly. The primary purpose of an order of restitution is to restore the status quo in so far as the repayment of money can do so. But in this case the position had become so altered, the logistics of reparation so weighted and distorted by factors such as inflation and interest, the prima facie right of the taxpayers to be recouped so devalued by the fact that, as members of the public, and particularly as married couples, they had benefited from the taxes thus collected, that it would be inequitable and unreal to expect the state to make full restitution.

At a meeting which is discussing the present topic it would not seem right to omit a reference to what I believe is a unique case, concerning the Constitutional Court of the Republic of Belarus.

In the autumn of 1996 extensive amendments to the (1994) Constitution of Belarus were proposed by the President of the Republic, Mr Lukashenko, to be put to the people in a national referendum. However, before the referendum took place the Chairman of the Supreme Council [Parliament} requested the Constitutional Court to examine the conformity with the constitution of the Supreme Council's decree of 6th September which provided, inter alia, that the result of the referendum would have binding effect. In its judgment on 4th November 1996 the Constitutional Court found a number of procedural and formal defects in the decree of the Supreme Council. It concluded that the submission of the constitutional amendments to a binding referendum was unlawful and it invited the Supreme Council to bring its decree into conformity with the court's judgement.

On the following day the President issued a message to the Supreme Council which suggested that it ignore the decision of the court (despite the provision in Article 129 of the constitution that decisions of the court are final and subject to no appeal or protest), and he also issued a decree which stated that decisions adopted by referendum would enter into force ten days after their promulgation. Nevertheless, the Supreme Council proceeded to amend its earlier decree so as to provide that the value of the referendum result would be consultative rather than binding. The referendum took place on the stipulated date, 24th November, and the amendments were declared adopted by a large majority of the people. Since that date the President and government have treated the amendments as having had full force and effect. Of the 11 judges of the Constitutional Court, 5, including the chairman, resigned in protest and another was later dismissed by the President. On 4th March 1997 a new court was constituted, the majority being presidential nominees. The next day the President filed a motion for the revision of the judgement of 4th November 1996. On 15th April the court issued its judgement. It criticised the reasoning upon which the earlier decision was based and held that under Article 74 of the 1994 constitution when the President proposed a constitutional referendum it was for him and not the Supreme Council to determine whether or not the result should be binding; and that under Article 77 constitutional amendments that were made by way of a referendum were final and binding. Furthermore, the court said, the Supreme Council decree of 6th September 1996 was of an administrative, and not a normative, character and consequently it was not within the competence of the Constitutional Court to review it. Accordingly, it revoked the judgment of 4th November 1996.

As far as I am aware the unhappy sequence of events in Belarus which has just been described is unique and it is for that reason that I have gone into such detail. It is unnecessary to discuss the legal reasoning upon which these judgements of the Constitutional Court were based; indeed, to do so would be to distract from the important principle which is involved, namely, that a decision of the highest organ of the judicial power was publicly and deliberately disregarded by the executive power. In any country this would be a matter of great gravity; it is particularly regrettable in a new state which has not yet had sufficient time to place on a firm footing those institutions which are necessary in a state governed by the rule of law.

It is an obvious principle that in any state which claims to be governed by the rule of law the decision of the court in which is vested the highest authority in declaring the law must be given

effect; to fail to do so would be to negate the principle. The vindication of the legal rights of a citizen in a case where the highest judicial authority has found that there has been a denial of those rights, and the restoration of legality, both of which are the object of the litigation, require that the executive organ of the state comply with the judgement.

An important decision earlier this year of the European Court of Human Rights is of considerable interest in this regard. Article 6.1 of the European Convention on Human Rights states that

> "In the determination of his civil rights and obligations … everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

In the case of Hornsby v. Greece [107/1995/613/701], decided last March, the applicants who were UK nationals living in Greece, applied in 1984 to the Ministry of Education in Athens for authorisation to establish a private school for teaching English. Their request was refused on the ground that a Greek law of 1941 restricted such authorisations to persons of Greek nationality. The applicants first complained to the Commission of the European Communities which referred the case to the European Court of Justice in Luxembourg. That court held [Commission of the European Communities v. The Helenic Republic, judgment number 147/86] that by prohibiting nationals of other Member States from setting up foreign language schools Greece had failed to fulfil its obligations under the Treaty of Rome which created freedom of establishment throughout the European communities.

The applicants then challenged the Ministry's decision in the Greek courts. In May 1989 the Supreme Administrative Court upheld their claim and set aside the decision of the Ministry. However, time passed and despite many requests by the applicants the authorities failed to give effect to the decision of the Supreme Administrative Court. Accordingly, the applicants complained to the European Commission of Human Rights at Strasbourg that the Greek authorities had been in breach of Article 6.1 of the Convention.

The Commission upheld their application and in accordance with normal procedure the case went to the European Court of Human Rights. The Greek government argued that the applicants' complaint did not fall within the scope of Article 6.1 ("everyone is entitled to a …. hearing …. ") because that Article guarantees only the fairness of the actual trial - that is, the proceedings conducted before the judicial authority - and did not extend to the subsequent delay of the administrative authorities in implementing the judicial decision.

In its judgment of 19th March 1997 the European Court of Human Rights held by a majority of 7 to 2 that the right of access to a Court which is guaranteed by Article 6.1 would be illusory if a state's "legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party. It would be inconceivable that Article 6 should describe in detail procedural guarantees afforded to litigants - proceedings that are fair, public and expeditious - without protecting the implementation of judicial decisions … Execution of a judgement given by any court must therefore be regarded as an integral part of the 'trial' for the purposes of Article 6."

The Court went on to say that by seeking judicial review in administrative proceedings concerning a dispute whose outcome is decisive for a litigant's civil rights, the litigant seeks not only annulment of the relevant decision but also, and above all, the removal of its effects.
This is an extremely important judgment and is of relevance not just to Greece but also to every member state of the Council of Europe and to every state which wishes to join that organisation, since it has established a precedent which, we may assume, will be followed by the court in the future should similar cases come before it.

Membership of the Council of Europe brings with it specific obligations. Member states by becoming parties to the European Convention on Human Rights bind themselves under international law to respect and give effect to decisions of its institutions. The European Court of Human Rights itself has no powers of enforcing its judgements but under Article 53 of the Convention, each member state undertakes to abide by the decision of the court in cases in which it is a party. Under Article 32 of the Convention the Committee of Ministers has the function of decising whether there has been a violation of the Convention in those cases where a complaint has been made to the European Commission of Human Rights, the Commission has examined the complaint and expressed its opinion, and the case has not been referred to the Court by the parties. In such cases the committee decides on the complaint and, if it finds a violation of the convention, it prescribes the steps the member state concerned must take to redress the violation, and the time within which it must do so. It may be remarked here that for some time there has been a good deal of criticism of the conferring of what is clearly a quasi-judicial role on a non-judicial body, especially since that body will contain the political representative of the government which is a party to the case being adjudicated on - though apparently in practice only very seldomly has the representative refused to vote in favour of a finding by the Committee of Ministers against his own country where the Commission in its opinion has found a violation of the Convention.

Under the new procedures provided for by Protocol Number 11 to the Convention which will come into effect on 1st November 1998 this adjudicatory function of the Committee of Ministers is abolished.

The committee will, however, retain its monitoring function under Article 54 of the Convention. That article provides that the Committee of Ministers shall supervise the execution of the judgments of the Court as well as the execution of its own decisions under Article 32. Under the new procedures provided for by Protocol Number 11 (which will result, inter alia in the abolition of the Committee of Ministers' function under Article 32 and the ceasing to exist of the two present part-time legal institutions, the European Commission of Human Rights and the European Court of Human Rights, and their replacement by a new European Court of Human Rights which will be a full-time body) the Committee of Ministers will retain its function of monitoring the enforcement of the judgments of the Court.

The monitoring takes the form of reviewing the progress of the implementation of the judgement every six months where the implementation necessitates such steps as changes in domestic law, the reopening of legal proceedings which had led to the violation, the giving of an undertaking by the state concerned not to enforce an order of expulsion or confiscation, the removal of a conviction from the criminal records, etc. Where the judgement requires the payment to the complainant of money as "just satisfaction" the case is reviewed by the

committee at every session until total payment is made.

Despite the absence of any sanction which the Committee of Ministers could impose on a state which refuses to give effect to a judgment of the Court - other than the ultimate sanction of expulsion from the Council of Europe - the member state as a matter of course have acted correctly, even where major changes in their law or practice have been made necessary by the judgment; the German and Italian codes of criminal procedure concerning pre-trial detention and the French law of secrecy of telephonic communications are among many important changes in the domestic law made, no doubt with varying degrees of enthusiasm, by member states as a result of a judgement against it or indeed against another member state.
Should this monitoring process have an equivalent in domestic law? In countries which have an ombudsman or equivalent, his annual report can be relied upon to draw attention to unfulfilled corrections of administrative procedures which he has previously found wanting, with consequent political embarrassment. Constitutional Courts, however, have traditionally tended to rely upon the respect for the rule of law and sense of propriety of the Executive to obey decisions of the court and, of course the fact that if the situation which has been found wanting in the case is not remedied by the Executive, another litigant is likely to launch an identical challenge to it with a predictable outcome.

However, it may be thought desirable to give consideration to the question of a more formalised method of ensuring compliance with findings of the constitutional court where an existing legislative instrument or administrative procedure has been condemned and requires either abolition or amendment if it is to meet constitutional norms. Obviously any such system would have to guard against drawing the court into the political arena and respect the separation of state powers by avoiding interference with executive or legislative functions. Even in countries where the separation of powers is long established there are occasionally tensions between the court and the other organs; members of the legislature often believe that their election by the people has conferred upon them not merely a popular mandate but also superior wisdom, while governments have sometimes been known to ask whether the judges inhabit the real world - even though a decision of the constitutional courts can give them a useful excuse for introducing an unpopular measure.