

PART XIII

ENFORCEMENT

CHAPTER 1

CONSTITUTIONAL RIGHTS IN ENFORCEMENT PROCEEDINGS

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1 INTRODUCTION AND GENERAL REMARKS

- 1 The law of enforcement proceedings is a key subject of procedure. Enforcement involves the machinery of society operating within the legal regime of the rule of Law and procedural fairness. Actions that undermine orders of the court or other enforceable titles have moral, social, economic, and even political connotations.
- 2 This report discusses the procedure by which judgments and other enforceable titles are enforced against the debtor for the benefit of individual and singular creditors and the conflicts between their fundamental rights. This process is distinct from insolvency procedures, which tend to a collective satisfaction for all creditors with a claim against the same debtor. Both procedures have common characteristics and features, and they are interconnected. Each insolvency regulation is drafted in the manner most regarded, in a particular legal system, as the most suitable to effectively pursue the underlying policy and prevailing purpose of the insolvency law, be it the protection of the debtor or his creditors or the preservation of employment.¹
- 3 Enforcement proceedings entail coordination with, and cooperation of, separate enforcement bodies. The public interest in legal certainty, transparency, and respect for fundamental rights assumes a major role in the enforcement process.² The singular civil enforcement process encompasses relevant features both of substantive private and procedural law. The efficacy and efficiency of enforcement proceedings are an important key point to evaluate the rule of law.³
- 4 The limitation of party autonomy in certain areas of enforcement (for example the possibility of creating and granting, without additional safeguards, an enforcement title different to a judgment), aims to protect the debtor against unjust enforcement proceedings against them.⁴ This does not prevent the parties from agreeing, as is permitted in declaratory proceedings, to an advance waiver of the use of certain defences or exceptions that remain within the framework of respect for autonomy and free disposal of the parties. In the enforcement context, there are also other limitations seen in the enforcement context on certain objects or the choice of the enforcement proceeding to be applied, as well as the exclusion of the possibility of creating or abolishing (or even annulling) the right of the parties to access the enforcement proceedings as creditor, debtor or

¹ M Cole, 'Il Diritto concorsuale statunitense in un contesto globale', in F Giovanni, *Quaderni di Giurisprudenza commerciale, Soluzione Negoziali e Istituti Preconcorsuali Nella Gestione Della Crisi* (Giuffrè Editore 2013) 223 – 234.

² J Lebre de Freitas, *A ação executiva* (Coimbra 2014) 9-20.

³ N Fischer, *German National Report* (Seoul 2014) 1-12.

⁴ G Lüke, *Die öffentlich-rechtliche Theorie der Zwangsvollstreckung und ihre Grenzen* (Frankfurt 1953) 5-15.

interested third party. Enforcement proceedings should be a place for the rights of both parties and their interests to be balanced adequately.⁵

- 5 The enforcement proceeding is deeply linked with both substantive and procedural law.⁶ In order to commence enforcement proceedings, a legally enforceable title is required. Enforcement in a narrow sense means the right to start enforcement proceedings, and, in a broader sense, refers to the totality of substantive and procedural legal consequences originating from the legal relation, which affect the rights and obligations of the participants of the enforcement proceedings. One characteristic element of this totality is the application of sanctions, which may be directed against persons or property. Within these sanctions, the creditor shall, within the legal framework, have the privilege to specify the type of property of the judgment debtor from which to secure enforcement of his claim. In the course of judicial enforcement, executive force may be employed to force a party compelled for payment of money or for some other conduct to fulfil such obligation. The essence of judicial enforcement lies in the application of executive force. This takes place only in the event of the lack of voluntary performance; executive force is resorted to, in any case, secondarily, with a subsidiary character. The executive force is a provision expressly serving the purpose of the protection of creditors and the general interests of the rule of law so that the bailiff does not need to send a second, completely unnecessary warning to the debtor to perform voluntarily, but instead he or she appears at the debtor's apartment and seizes the debtor's personal assets to cover the debt.

- 6 It is perhaps this difficulty of plurality and the heterogeneity of adjudication that would permit a double procedural-material review and new litigation at the enforcement stage. In some legal systems, the diffuse, nebulous and sometimes contradictory results of declaratory proceedings could negatively affect the celerity and organization of the enforcement proceedings. This may explain why in some legal systems it is strange and rare to find a theorized treatment of the Civil Enforcement Procedural Law as a systematized field. This was observed and highlighted in 1986 by the German professor Stürner⁷ in relation to the research and academic work on civil enforcement in Germany at that time. The same observation had been noted thirty years before in a classic work on Enforcement Law in the Spanish tradition by Carreras⁸. These findings remain true today, and the publications and research on the subject vary greatly in quality, quantity and relevance between the different families of law. Is the law of civil enforcement, with the very broad exception of certain legal systems, an exotic and under-explored field? If the answer - as I suppose - is yes, would the dimension of creditor-debtor fundamental rights provide a new and attractive focus to revitalize the interest and relevance of the subject? A basic work with

⁵ J Stamm, *Die Prinzipien und Grundstrukturen des Zwangsvollstreckungsrechts* (Mohr Siebeck 2007) 15-19.

⁶ Lebre de Freitas (n 2) 21-24.

⁷ R Stürner, 'Prinzipien der Einzelvollstreckung' (1986) 99 Z郑 291, 291-332.

⁸ J Carreras, *El embargo de bienes* (Bosch 1957) 6.

entire comparative contributions on this subject is a collective book containing essays in honour of Professor Gaul, published in 1996 with more than 700 pages under the editorship of the Greek Professor K Beys.⁹ This book provides a comprehensive study on the violation of fundamental rights and enforcement proceedings.

- 7 The conflicts between the fundamental rights of the debtor and the creditor's right of enforcement were initially discussed most deeply in the German bibliography¹⁰, given that they, were mainly German Constitutional Court decisions that described the minimal standards to be recognized from the debtor's perspective: human dignity, the protection of property, the inviolability of personal privacy, the inviolability of the home, personal freedom, the protection of the family, and personal data protection.¹¹ Particular cases were connected with a core of questions. Examples include: should a forced sale with an auction price under 50% of the current market value not be tolerated considering the debtor's right to be fully heard? Should a bailiff (as a judicial assistant) be able to search a home without judicial authorization? Should certain penalties and coercive measures imposed on a debtor for not complying with an 'abstain from doing' judgment be tolerated? Should the personal situation of a debtor who is depressed and in suicide risk be considered, according to the Social State principle?¹² Should proportionality be considered on a case-by-case basis, according to constitutional standards, in the sense of weighing the harm to the debtor against the benefit to the creditor? Should it be determined by the criteria of a Constitutional Court, or by a detailed enforcement law regulation and the application of proportionality on a case-by-case basis, according to the legislator's use of the provision? The subject is part of the connexion between Constitutional and Procedural Law.¹³

2 CONSTITUTIONALITY OF THE ENFORCEMENT PROCEDURE IN THE FRAMEWORK OF FAIR AND DUE PROCESS OF LAW

- 8 It might be said that civil procedure could achieve its goal only with a judgment which recognizes a substantive right, but such a statement would be incorrect.¹⁴ An encounter between the process and the material right should materialize, and this encounter culminates in the concrete factual refund of the substantive legal order violated: the

⁹ F Gaul, 'Zur Problematik der Grundrechtsverletzungen in der Zwangsvollstreckung', in K Beys (ed), *Grundrechtsverletzungen bei der Zwangsvollstreckung* (Dike International 1996) 27 f.

¹⁰ L Rosenberg, H Gaul, E Schilken and E Becker-Eberhard, *Zwangsvollstreckungsrecht* (Munich Beck 2010).

¹¹ The German Constitutional Court decisions with the individual opinion of justice Böhmer are the main starting point (BVerfGE 49, 220 (Constitutional Court, Germany), Judgment 27 September 1978).

¹² See the decisions BVerfGE 1, 97, 105; 36, 73, 84; 65, 182, 193; 22, 180, 204; 59, 231, 263 (Constitutional Court, Germany).

¹³ K Schwab and P Gottwald, 'Verfassung und Zivilprozess', in W Habscheid (ed), *Rechtsschutz und verfassungsmässige Ordnung* (Bielefeld 1983) 1 f.

¹⁴ A Uzelac, 'On the goals of civil procedure', in A Uzelac (ed), *Goals of Civil Justice and Civil Procedure in Contemporary Judicial Systems* (Springer 2014) 3-20.

effective satisfaction of the right claimed, recognized, and declared.¹⁵ The general principles of civil procedure are so general that they are also applicable to the enforcement stage. Or it may be possible to find some special principles applicable to the enforcement. These may have certain similarities with the so-called 'formative principles of the civil proceeding' applicable to the declaratory proceeding, but with some autonomous features that could be applied in this special field of enforcement.¹⁶

- 9 Civil enforcement is comprised of a plurality of discontinuous procedural acts without a uniform nature, which is in contrast to declaratory proceedings and their homogeneity: In the implementation of a judgment, there is a decision of the court, 'an enforceability declaration' which this renders enforcement activities permissible and gives legal support to the executive activities of the State so long as they are carried out within the framework of legality and according to a constitutionally based fair and due process.¹⁷ The coercive activities might primarily affect the debtor's assets and secondarily affect the debtor personally by, for example, restricting their freedom.¹⁸ Additionally, a third possibility is that third-party interests may be affected by enforcement proceedings. Third parties may, therefore, seek to be incorporated into the proceedings, to have their rights adjudicated in the declaratory and ancillary proceedings. This will arise, for example, where the third party alleges an independent, exclusive right to the assets disputed by the original creditor-debtor parties.
- 10 If we need to test the proportionality of the enforcement proceeding in general, we could do it. The balancing of legal principles is a highly significant method of applying the law.¹⁹ Based on an understanding of legal principles as optimization requirements, the article presents the laws, structures and axioms of balancing, on the basis of which the balancing as a whole can be described as a rational, transparent and efficient method. Then the handling of knowledge uncertainties and combinations of principles as well as the role of abstract weights and formal principles are discussed.²⁰ The proportionality test of the limitation of fundamental rights within the enforcement proceedings needs to mention the four sub-components²¹: (i) the measure should have a proper purpose; (ii) the measures

¹⁵ G Tarzia, 'Aussichten für eine Harmonisierung des Zwangsvollstreckungsrechts in der Europäischen Union' (1996) *ZeUP* 231, 231-242.

¹⁶ S Guinchard, 'La garantie de l'exécution de la décision du Juge', in S Guinchard, C Chainas, C S Delicostopoulos et al (ed), *Droit Processuel* (Dalloz 2009) 1015 ff.

¹⁷ H Gaul, E Schilken and E Becker-Eberhard, *Zwangsvollstreckungsrecht* (12th edn, C.H. Beck 2010) 5-20.

¹⁸ H Gaul, *Rechtsverwirklichung durch Zwangsvollstreckung aus rechtsgrundsätzlicher und rechtsdogmatischer Sicht* (1999) 112 *ZZP* 135.

¹⁹ R Alexy, 'The construction of constitutional rights' (2010) 4 *Law & Ethics of Human Rights* 20-32.

²⁰ M Klatt, 'Die Abwägung von Rechtsprinzipien', in C Hiebaum (ed), *Handbuch Gemeinwohl* (Springer 2021) 2-16.

²¹ A Barak, *Proportionality. Constitutional Rights and their Limitations* (Cambridge University Press 2012) 1-12.

undertaken to such a limitation should be rationally connected to the fulfilment of that purpose; (iii) the measures undertaken should be necessary in that there are no other alternative measures similarly for the purpose with lesser harm; (iv) the importance of achieving the purpose and the social importance of preventing the limitation of fundamental rights should be balanced (proportionality *strictu sensu*).²² This chapter deals with the general constitutional foundation of enforcement proceedings. The proper purpose is the protection of fundamental rights of one party (creditor) to claim the enforcement and the use of all means of enforcement to satisfy his right. The modern constitutional theory recognizes positive and negative constitutional rights and stipulates a really wider judicial review of the law's constitutionality around the main issue: describing the scope and limitations of constitutional rights.²³

- 11 The limitations of constitutional rights are sometimes ruled in general in the Constitution but certainly in the sub-constitutional law (statutes or common law).²⁴ The enforcement proceedings impose limitations to fundamental rights so the question arises whether these limitations are in accordance with the Constitution and whether this control is centred on proportionality.²⁵ We could test the constitutionality of the entire enforcement proceeding in the framework of the rule of law, but we could also test each enforcement act. To answer the question of the conflict between the fundamental rights of creditor and debtor, the main problem is the limitation of the fundamental rights.²⁶
- 12 The organic and procedural structure of an enforcement proceeding has to be rational and adequate to that purpose. Finally, the main problem could arise in the test of the balancing of interests and preventing unnecessary limitation of fundamental rights (to be analysed in the next chapter). Although the constitutional theory behind the enforcement might be obvious, it is a prerequisite to dealing with the particular, case-by-case instances of conflicts between the fundamental rights of the creditor and debtor.²⁷ It also provides a general framework in which to find answers to complex problems arising within the singular civil execution process. First, it must be remembered that enforcement is a complex relationship with at least three centres of interest: the creditor, the debtor and the enforcement organ.²⁸

²² R Alexy, 'Proportionality and rationality' in V C Jackson und M V Tushnet (ed), *Proportionality: New frontiers, new challenges* (Cambridge University Press 2017) 13-29.

²³ V Ferreres Comella, *Constitutional Courts and Democratic Values: A European Perspective* (Yale University Press 2009) 10-25.

²⁴ R Alexy, 'Constitutional Rights and Proportionality' (2014) *Revus - Journal for Constitutional Theory and Philosophy of Law* 22, 51-65.

²⁵ N Emiliou, *The Principle of Proportionality in European Law: A comparative Study* (Kluwer 1998) 25-50.

²⁶ B Lepa, *Insolvenzordnung und Verfassungsrecht* (Duncker & Humblot 2001) 5-20.

²⁷ O Cherednychenko, 'Fundamental Rights, in European Private Law and Financial Service', in H Micklitz (ed), *Constitutionalization of European Private Law* (Oxford University Press 2014) 203-208.

²⁸ H Rüßmann, 'Buchbesprechung zu Jauernig, Zwangsvollstreckungs- und Konkursrecht' (1989) *ZZP* 102, 398-404.

Secondly, we will set out the principles, and then develop a couple of principles that are common to declaratory proceedings.²⁹ Finally, we will consider the special principles of enforcement, which have been influenced both by Public and Private law.

- 13 To deal with the conflict between fundamental rights of creditor and debtor in the enforcement process, it is important first to explain the general and comparative foundations and the organic structure of the enforcement procedure. (i) The enforcement might be court-centred, bailiff-centred or mixed, and might be organized on a decentralized or centralized model. These aspects are highly relevant to the dynamics of the proceedings. (ii) Because of both the public law and procedural aspects of the law of enforcement, there are prerequisites to be satisfied by the creditor before he may commence enforcement proceedings in which he has a dominant position. He needs an enforceable title, and there are some further (more or less detailed) requirements.
- 14 Enforcement procedures integrate fundamental procedural rights. In general, the creditor has a right to performance. The right to justice includes the right of access to the courts, the right to a fair trial and the right to enforce a judgment within a reasonable time.³⁰ In France, this was solemnly enshrined in national law in Article 1 of the Law of 9 July 1991 on Enforcement Procedures regarding the execution of all obligations, which means the obligations of judgments.³¹ The protection of these rights is distinct from the legislative, doctrinal, and especially functional and practical importance assigned to other rights or guarantees such as access to justice and the right to an effective remedy. Furthermore, in Japan the right of access to the courts (Sec 32 of Constitution of Japan) is normally considered as including the right to a speedy and public trial by an impartial tribunal and the right to the execution procedure that realizes a right effectively and efficiently (the right to an effective execution).³² The same assertion can be found at the procedural level in the Uruguayan legal system and the so-called *right to effective judicial protection*. This right, widely recognized in international standards, has been ratified by Uruguay, and the Art 8 and 25.1 of the Inter American Convention on Human Rights. In the current Constitution, this right can be considered inherent to the human personality or the republican form of government, and therefore tacitly covered by the constitutional system (Art 72 of

²⁹ J Peyrano, *El proceso civil. Principios y fundamentos* (Astrea 1978) 10-30.

³⁰ E Jeuland, *France National Report* (Seoul 2014) 1-10.

³¹ Pursuant Article L 111-1 of the Code of Civil Enforcement Procedures: 'a creditor may, under the conditions provided by law, compel the defaulting debtor to perform his obligations towards her. Any creditor may pursue a precautionary measure to safeguard its rights'. Also, Article L 111-2 rules 'The creditor with a writ of execution showing a liquid and payable debt can continue the enforcement of the debtor's assets in the conditions of each measurement execution'.

³² For the procedural and enforcement Law in Japan, please see the Civil Execution Act <https://www.japaneselawtranslation.go.jp/en/laws/view/70/en> (accessed June 2024) The Code of Civil Procedure <https://www.japaneselawtranslation.go.jp/en/laws/view/2834/en> accessed June 2024.

Constitution of Uruguay).³³ The Constitution of Portugal guarantees everyone the right of access to a fair trial (Article 20). The procedural law recognizes the debtor the full right to contest the enforcement action to defend himself. Furthermore, the debtor is guaranteed supervision of executive acts and the right to complain about illegal or abusive executives acts during the enforcement proceeding. Also, Art 118 of the Spanish Constitution makes it explicit that the State is under an obligation to enforce the final judicial decision and in Art 24 Par I *enlarges* the right of access justice and to the court.

2.1 European Court of Human Rights on Enforcement Proceedings: Some Cases

- 15 The European Court of Human Rights has declared that the fundamental right to effective enforcement forms part of Art 6 ECHR in a very extensive list of leading cases³⁴, beginning with *Hornsby v Greece* (1997), followed by *Guincho v Portugal* (1984), *Martins v Portugal* (1988), *Burdov v Russia* (2002), *Bodan Vod Greek-Catholic Parish v Romania* (2013), *Çaquir and Others v Turkey* (2013) and also in other cases not mentioned in this report.³⁵
- 16 In *Hornsby v Greece* (Judgment of 19 March 1997) as long as self-tutelage is proscribed, the States are obliged by Art 6 of the ECHR to provide an appropriate organizational structure and procedure for the fulfilment and satisfaction of the credit. The formula in this ruling says it all: It would effectively become illusory if a state party could allow a final and binding decision to be reached if it is eventually going to be inoperative. The execution of the decision integrates the right to a fair and equitable trial.
- 17 With this, the reasonable period of time becomes an imperative applicable not only to the duty to judge but also to the duty of enforcing what is judged, and the means that have as their object the satisfaction of the credit already recognized in a sentence cannot be excluded. Otherwise, the failure of the system to function and the adequate protection of the interests of the creditor and debtor would lead to the denial of justice (*Horvat v Croatia*, Judgment of 26 July 2001).
- 18 Even the European Court of Human Rights delves further into the organization and institutional framework of the execution, identifying the systemic deficiency of a legal system in relation to the malfunction of its internal legislation on execution. That affects a large number of citizens who cannot be satisfied with their rights already declared in court (*Trana v Italy*, Judgment of 16 January 2008). The creation of effective procedures to reduce payment terms (only designed to work and thus be dissuasive), help to stimulate the

³³ S Pereira Campos and G Valentin, *Uruguay National Report* (Seoul 2014) 1-10.

³⁴ N Trocker, 'The Right to Effective Enforcement of Civil Judgments and Orders' (2008) ZZPINT para 13, 115.

³⁵ *Hornsby v Greece* (ECtHR), Judgment of 19 March 1997 [ECLI:CE:ECHR:1997:0319JUD001835791], Nr 18357/91, Reports of judgments and decisions, 1997 II 495; See also *Denilauler v Couchet Frères* (CJEU), Judgment of 21 May 1980 [ECLI:EU:C:1980:130], As. 125/79, Rec. 1980, 1553, para 5.

economy. It not only requires speed and efficiency, which means that we want to achieve a result within a reasonable time and with greater economic efficiency (*Mehmet v Turkey*, Judgment of 17 October 2007). In *Burdov v Russia* (Judgment of 15 January 2009), the European Court itself warned and urged the Russian authorities not to delay and proceed with the timely payment of the debts that had already been established by the courts. In addition, it was recognized that, in the face of such a delay, Member States are obliged to compensate the damages caused by the failure to satisfy the credit. The compensable damages must include moral damage (which includes not only uncertainty and anxiety, but also due protection to the sense of injustice) suffered by citizens.

- 19 With regard to the specific performance and the measures of coercion, the Court has also said that the purpose of such provision is to force the debtor to comply, overcoming the resistance of his opposition or his carelessness, indifference or negligence. The purpose of the sanction is not to compensate the loss suffered by the creditor to live, but to force the debtor to comply, overcoming the resistance of his opposition or his carelessness, indifference or negligence (*Ignaccolo-Zenid v Romania* (Judgment of 25 January 2000); and again incorporated in *Ouzunides and others v Greece* (Judgment of 18 April 2002)).
- 20 In one example, the ECHR ruled that the refusal to enforce a judgment ordering the destruction of a building depriving the applicant of the view and the light 14 years after the judgment was rendered is contrary to law enforcement within a reasonable time. A State must facilitate a private person's access to a court. It must 'assist the applicant in its efforts for the enforcement of judgments' and is condemned even though the delay took its origin in the lack of diligence of a bailiff. The execution must be complete, perfect and certainly not partial.³⁶

2.2 Interamerican Court of Human Rights on Enforcement Proceedings: Some Cases

- 21 The Inter-American Court of Human Rights has also considered the existence of a right to effective enforcement. As an introductory proposal, it referred to 'the proceedings before the unjustified refusal to performance with a provision through which [the creditor] seeks to break the will of the debtor by reserving the exercise of force by the State [...]'. The lack of timely, reasonable and adequate satisfaction of a undoubted titled right (judicially-granted or conferred by virtue of a provision contained in 'general enforceable titles') not only violates the guarantee of effective legal protection, but is also contrary to access to justice, and the fair and equitable process that is due as of right.³⁷ The constitutional issues involved in the enforcement are linked to each other through their public character, both

³⁶ Jeuland (n 30).

³⁷ *Five Pensioners v Peru* (CIDH), Judgment of 28 February 2003 and the later cases *Baena-Ricardo et al. v Panama* (CIDH) Judgment of 28 November 2003 and *Mejía Idrovo v Ecuador* (CIDH) Judgment of 5 July 2011.

because of the public concern and also given that the public may be affected by a state organ or authority. Furthermore, when enforcement arises in private claims, the constitutional limitations and constraints on any public power are applied to the enforcement. It must, however, be recognized that the enforcement body is involved in the proceedings not out of self-interest but rather because of the creditor's rights. The enforcement proceedings should ensure the procedural fairness and equal treatment of the interested parties.³⁸

- 22 The Inter-American Court of Human Rights in *Five Pensionists v Peru* (Judgment of 28 February 2003) declared the independence of the Judicial Power. At the same time, the right to equality, which should support the parties in the process, is notoriously violated, as the execution of the judicial sentence is subject to the will of one of them, paradoxically the defeated party. In view of the above, the Court considered that at this stage there was a clear breach of the aforementioned judgments issued by the Constitutional and Social Law Chamber of the Supreme Court of Justice on 2 May, 28 June, 1 and 19 September and 10 October 1994, in favour of the five pensioners. Given that there are already judgments issued in the development of guarantee actions, which give protection to the *status quo*, the State cannot deviate from said decisions under penalty of incurring violations of the right to property and judicial protection.
- 23 The Court has also recognized the substantive and procedural rights to due and fair credit protection. In the leading case of *Furlán and family v Argentina* (Judgment of 31 August 2012), the Court considered that it was proven that, after an unjustified delay in the civil proceeding for damages, *Sebastián Furlán* had to initiate a second administrative stage in order to obtain payment of the compensation awarded by court ruling. Notwithstanding that the duration of said enforcement process was already jointly analysed in the previous chapter, the Court will examine the following arguments: i) whether the execution of the judgment was complete and comprehensive; ii) if the application of Law 23.982 of 1991 on Economic-financial Emergency was justified in the present case, and iii) if the foregoing had an impact on the right to property. From the facts described above, the Court considered that the execution of the judgment that granted the compensation was neither complete nor comprehensive, since it has been proven that *Sebastián Furlán* should have received ARS 130,000 and actually received approximately ARS 38,000, which it is an amount that is excessively less than that which had been initially ordered.
- 24 Taking the foregoing into account, the Court considered that in the case at hand, the execution of the judgment that awarded the compensation to *Sebastián Furlán* was not effective and led to his lack of judicial protection, since it did not fulfil the purpose of protecting and compensating the rights that had been violated and that were recognized

³⁸ M Cappelletti, *The Judicial Process in Comparative Perspective* (Clarendon Press 1989) 243 f.

through the court ruling. Based on the foregoing, the Court observed that in this case there was an interrelation between the problems of effective judicial protection and the effective enjoyment of the right to property. In effect, when applying a proportionality judgment to the restriction of the right to property that occurred, it is found that Law 23.982 fulfilled a conventionally admissible purpose, related to the handling of a serious economic crisis that affected various rights of citizens. The means chosen to face this problem could be ideal to achieve this end and, in principle, it can be accepted as necessary, taking into account that sometimes there may not be less harmful alternative measures to face the crisis. However, based on the information available in the file, the restriction on *Sebastián Furlán's* right to property is not provided in the strict sense because it did not contemplate any possibility of application that would make the reduction in the compensation amount that corresponded to him less burdensome. There is no type of pecuniary or non-pecuniary forecast in the file that could have moderated the impact of the reduction in compensation or other types of measures adjusted to the specific circumstances of a person with various disabilities that required, for their due attention, of the money already provided by the court as an acquired right in your favour. In the specific circumstances of this case, the non-payment of the full sum ordered by the court in favour of a poor, vulnerable person required a much greater justification for the restriction of the right to property and some type of measure to prevent an excessive effect. Due to all the foregoing, the Court considered that the right to judicial protection and the right to private property, enshrined in Articles 25.1, 25.2.c and 21, in relation to Article 1.1 of the American Convention, were violated in prejudice of *Sebastián Claus Furlán*.

- 25 In addition, the Court stated the violation of other judicial guarantees. In this point, the Court analysed the arguments presented by the parties and the Inter-American Commission regarding: i) *Sebastián Furlán's* right to be heard, and ii) the non-participation of the counsellor for minors in the civil proceedings for damages and damages. Likewise, the Court reiterated that boys and girls exercise their rights progressively as they develop a greater level of personal autonomy. Consequently, the applicator of the right, whether in the administrative or judicial sphere, must take into consideration the specific conditions of the minor and his / her best interests to agree to his / her participation, as appropriate, in the determination of his / her rights. Considering this, the minor shall seek greater access, as far as possible, to the examination of her own case. Likewise, the Court recalled that the Committee on the Rights of the Child has indicated that Article 12 of the Convention on the Rights of the Child not only establishes the right of each child to express their opinion freely in all matters that affect them, but also the article covers the subsequent right to have such views duly taken into account.
- 26 In *Mejía Idrovo v Ecuador* (Supervision decisions of 4 September 2012), the Court has decided on the judicial protection and effective judicial protection in the enforcement of judgments (Article 25 of the American Convention). In view of the facts with respect to

which violations of Article 25 of the Convention are alleged, the Court observed the following points of controversy: a) the suitability and effectiveness of the unconstitutionality remedy; b) the scope of the duty to repair said remedy; c) compliance with the judgment of the Constitutional Court, and d) execution of the judgment of non-compliance issued by the Constitutional Court. Based on the foregoing, the Court analysed in the following whether: a) the unconstitutionality appeal provided judicial protection in accordance with the provisions of Article 25.1 of the American Convention, and b) whether effective judicial protection was provided by the authorities for the enforcement of internal judgments in accordance with Article 25.2.c) of the Convention. Regarding the suitability of the unconstitutionality appeal, the Court finds that there is no controversy between the parties as to whether said appeal was adequate to protect the rights that the alleged victim alleged before the Constitutional Court. However, the State has stated that Mr *Mejía Idrovo* should have alleged paragraph 2 of Article 276 of the current Constitution and not paragraph 1, since the latter could only suspend its effects and not have retroactive effects. Likewise, the State stated that Mr *Mejía Idrovo* should have exhausted a civil action for damages against the State. In this regard, the Court is subject to the decision and scope of the Judgment issued by the Constitutional Court itself on 8 October 2009, through which it interpreted the Judgment of 12 March 2002 of the Constitutional Court and referred to the scope of the reparation and argued that this includes the reinstatement of Mr. *Mejía Idrovo* without considering this as a retroactive effect as well as the recognition of his economic rights and the right of repetition. Due to the foregoing, the Court found that the unconstitutionality appeal was the appropriate remedy suitable to protect the rights infringed in this case.

- 27 Regarding the effectiveness of the remedy, the Court has established that for the remedy to be effective it is not enough that it is provided for by the Constitution or the law or that it is formally admissible, but that it must be truly suitable for establishing whether a human rights violation has occurred and for providing what is necessary to remedy it. Those remedies that, due to the general conditions of the country or even the particular circumstances of a given case, are illusory cannot be considered effective. Specifically, the Court considered that in order to maintain the useful effect of the decisions, the domestic courts, when issuing their rulings in favour of the rights of individuals and ordering reparations, must establish clearly and precisely - in accordance with their scope jurisdiction - the scope of reparations and the forms of execution thereof. In accordance with the standards of this Court and international human rights law, the scope of these measures must be comprehensive in nature, and if possible, return the person to the state before the crime occurred (*restitutio in integrum*). Among these measures are, depending on the case, the restitution of goods or rights, rehabilitation, satisfaction, compensation and guarantees of non-repetition, *inter alia*. In the case at hand, once it was established that the unconstitutionality appeal was adequate to remedy the rights alleged by Mr. *Mejía Idrovo*, the Court observed that the Constitutional Court ruling of 12 March 2002, although it declared unconstitutionality of the executive decree of availability and dismissal, as well as

generally ordered that the damages to the alleged victim be repaired, the alleged victim lacked precision and clarity in determining the scope of the referred reparations and their manner of execution. Subsequently, the Order of the President of the Court of 30 May 2002, contributed to further confuse the scope of the judgment delivered by the plenary session of the Constitutional Court by restricting its application unilaterally, declaring it non-retroactive and therefore preventing the reinstatement of the plaintiff to the Armed Forces. However, later the Constitutional Court clarified the meaning and scope of what was ordered in the judgment of 12 March 2002.

3 THE FUNDAMENTAL RIGHT TO ENFORCE A CLAIM

- 28 Civil enforcement has increased in importance not only within the European Union (as a result of the need for the free (and secure) movement of goods and the enforceable protection of credit), but also in Latin America, Asia and Oceania, as academics in these regions became increasingly aware of its legal significance and socio-cultural-economic dimensions.³⁹ Constitutional imperatives and human rights both at the regional and national level impose on States the obligation to provide the right of access to justice, to claim, to defend oneself against another, to provide evidence and to participate in all stages that may influence the judicial decision. These obligations have assumed increasing relevance at the later stage of enforcing the judgment handed down.⁴⁰ Legal systems are based on the idea that all subjective rights can be enforced unless otherwise provided for in the law, with these exceptions being of limited importance, and therefore legal systems must contain a detailed set of rules which define the creditor's rights and strike a balance between effective enforcement and protection of the debtor.⁴¹ When the court decides that enforcement of a judgment or order is to take place, there are legal remedies available to creditors to enforce a debt, and, although the related procedures are frequently time-consuming and potentially costly, and there is no guarantee that the creditor will actually receive all of the funds owed them.
- 29 The creditor of money judgments can initiate enforcement according to various processes: seizure of the debtor's goods, attachment of earnings orders, garnishing proceedings (*third party debt orders*), or by charging orders against real property. There are also special

³⁹ S Djankov, O Hart, C McLiesh and A Shleifer, 'Debt Enforcement around the World' (2008) 116 (6) *Journal of Political Economy*, 1105-1149; for a recent comparative study on the enforcement in Europe see *EU Enforcement Atlas-Civil enforcement in the EU: a comparative overview* (February 2021) <https://www.enforcementatlas.eu/wp-content/uploads/2021/03/EU-Enforcement-Atlas-Comparative-Report.pdf> accessed March 2024.

⁴⁰ J Picó i Junoy, *Las garantías constitucionales del proceso* (Bosch 1997) 10-25.

⁴¹ K Kerameus, 'Die Angleichung des Zivilverfahrensrechts in der Europäischen Union vor dem Hintergrund der Schaffung eines Europäischen Zivilgesetzbuches', in European Parliament, *Untersuchung der Privatrechtsordnungen der EU im Hinblick auf Diskriminierungen und die Schaffung eines Europäischen Zivilgesetzbuch* (JURI 103 DE 1999) 85-95.

procedures relating to the recovery of movable and real estate property. Non-money debts can also be enforced. In such cases, non-compliance with an order or an injunction can be sanctioned by a range of coercive measures. In some systems, these may have a punitive nature, for example, the English contempt of court proceedings (*committal proceedings*). The guarantee of the fundamental right to an effective judicial remedy provided by Article 6 ECHR is not limited in its scope to the declaratory phase, but is also applicable to the successful completion of any eventual enforcement proceedings. Most other subjective rights also enjoy the protection of fundamental rights enshrined by the Constitution and Human Rights Conventions.⁴² The Article 6 guarantee does recognize that in some cases, these fundamental guarantees must be limited where conflict arises with the fundamental rights of others.⁴³ It is a constitutional right that claims supported by relevant substantive law should be effectively enforced. The enforcement is applied to claims arising from a private as well as a public law relationship.⁴⁴ There is a connection between the fundamental right to judicial protection and the right of property (from the creditor side).

30 Any *subjective right* can be pursued with the help of the courts and the state officials who are competent for compulsory enforcement. This is true regardless of whether the debtor is a private person or *the State*, ie, the Federations, a State or a subdivision of the Federations, like a federal authority, or a subdivision of a State, like a State authority or a municipality; this is also applicable to the centralized and unitarian State organization. There are some special rules concerning the enforcement of claims against the State; however, enforcement against the State only occurs very rarely, as the State normally abides by final judgments of the courts. According to the German Law, the creditor has a fundamental right to protection by the judiciary (*Justizgewährungsanspruch*). The legal scholars remark that most subjective rights are also backed by individual constitutional guarantees. All *substantive rights* which have an economic value are protected by the fundamental right to property guaranteed by Art 14 of the Federal Constitution (*Grundgesetz*, GG). Art 14 GG protects the right to property in a large sense, including all claims against debtors based on substantive (private or public) law.⁴⁵ The only small exception to the enforceability of all 'substantive rights' are a few 'natural obligations'.⁴⁶

31 Art 14 GG protects property in wider sense. It is not only applicable to protecting all claims or assets which have a pecuniary value against expropriation and other forms of disturbance

⁴² German Federal Code of Compulsory Enforcement in Public Matters (*Bundes-Verwaltungsvollstreckungsgesetz*, VwVG).

⁴³ Federal Supreme Court (*Bundesgerichtshof*, BGH), JZ 2005, 525, 526.

⁴⁴ J Stamm, *Die Prinzipien und Grundstrukturen des Zwangsvollstreckungsrechts* (Mohr Siebeck 2007).

⁴⁵ C Kern, 'Principios de la ejecución individual de acuerdo al Código Procesal Civil alemán: Transparencia y eficiencia', in A Perez Ragone and P Tavorari, *Derecho Procesal Civil Comparado: Homenaje a Rolf Stürner* (Thomson Reuters 2013) 133, 135.

⁴⁶ G Schulze, *Die Naturalobligation* (Mohr Siebeck 2008) 5-20.

by the State, but is also interpreted to require the State to provide for effective means of protecting these claims.

3.1 The Structure and Cultures of the Enforcement: Complex Relationship and its Principles

- 32 The so-called principles of singular civil enforcement are useful to explain and support both the structure and the dynamics of enforcement proceedings. The principles allow for a better explanation and comprehension *lege lata* as *lege ferenda* of the singular civil enforcement. In this area, we are not usually concerned with efficient credit protection, or costs but we are aiming to achieve a suitable framework for the exercise of executive power and coercion of the State over the person and property of the debtor.⁴⁷
- 33 Should we therefore test enforcement law by application of the proportionality principles of constitutional law? Faced with this question, it could be argued that there would be damage suffered by the procedural principles and maxims if they were not compatible with proportionality, and it could even be claimed that they go against principles and rationales applicable on a much more general level to the legal system, such as justice, fairness or the guarantee of the fair and due process of law. A legal system without principles is destined to degenerate and lead to anarchy, injustice, or lack of consistent observance of the law as a result of the loss of legitimacy.⁴⁸
- 34 Enforcement necessarily entails the exercise of executive actions. This implies the existence of an enforceable title and also a procedure with formalities that must be observed, which are not required in declaratory proceedings. The first requirement of the effective action is primarily an enforceable title, which is usually written. Two topics deserve special attention. First, the constitutional principles considered in the underlying dispute and adjudication in the declaratory proceeding do not arise at the enforcement stage. However, secondly, certain principles pertinent to the declaratory proceedings could be applied to the enforcement proceedings. Something similar to this has happened with celerity and procedural economy, which should also now be found in enforcement proceedings.
- 35 The importance of the principles or general foundations in the Law of Enforcement assumes a key role when they relate to the triangular relationship. (i) The creditor requests the enforcement organ to act in enforcement proceedings. Where there is still a lack of compliance by the judgment debtor, the enforcement organ uses all suitable mechanisms and adequate proportionality to achieve the satisfaction of the creditor's rights.⁴⁹ (ii) The

⁴⁷ Stamm (n 44).

⁴⁸ L Alexander and K Kress, 'Against Legal Principles' in A Marmor (ed), *Law and Interpretation: Essays in Legal Philosophy* (1995) 279.

⁴⁹ Stamm (n 44).

relationship between the enforcement organ and the debtor or person against whom judgment has been executed cannot be explained only using the classic principles of the due and fair process of declaratory proceedings. It is the debtor who is going to be limited in his assets and personal sphere. (iii) The substantive and procedural relationship between the creditor and debtor (obligation) must also be remembered, given this relationship increases the legitimacy of aggression towards the personal or property sphere of the debtor. I will now discuss the delicate field of fundamental rights and the constitutional justification for benefitting the creditor at the expense of the debtor. The Spanish enforcement proceeding is synthesised in the inspiring principle of protecting the creditor's interest by fully enforcing them while minimizing the damages suffered by the debtor (proportionality).⁵⁰ This starting statement must be qualified: The constitutional tests and standards might not be directly applied to the determination of whether enforcement should be permitted, but they are relevant because the Law of Enforcement derives its normative legitimacy from acting in accordance with Constitutional Law.⁵¹ If an enforcement act limits a fundamental right, its adequacy and rationality (proportionality) could be tested according to, firstly, the Law of Enforcement, and secondly, constitutionality standards.⁵²

- 36 Where there is no act of opposition by the debtor or a third party, the enforcement procedure can theoretically be divided into three distinct sections. There may be an additional section when there is opposition to the enforcement by the debtor or an interested third party. The first phase starts with the request for enforcement or executive claim and ends with the delivery of the order of compliance and request to perform. Prior to this first phase, some legal systems have a pre-phase one step to confirm the existence of an enforceable title. The second phase consists of two subphases that occur simultaneously and in parallel. The first sub phase concerns preparatory measures to enforcement, which acknowledge the existence of a threat to the debtor's assets and protect against the risk of their dissipation (attachment orders, interim administration, garnishment etc).⁵³ In parallel, the second subphase permits the debtor (the executed) or third parties to assert their respective opposing positions.⁵⁴ It is rarely the case that such opposition is successful, but such challenges are discussed below as a fourth possible stage. The third phase entails the discharge of assets (forced auction) to obtain sufficient liquidity to satisfy the creditor. By adapting the object of enforcement and the precise claim, this

⁵⁰ *Ley de Enjuiciamiento Civil Española* (Spanish Civil Procedural Rules).

⁵¹ F Gaul (n 9) 27 f.

⁵² P Gilles, 'Thesen zur einigen der rechts- und verfassungs-, -verfahrens- und justizpolitischen Aspekte des Themas: Grundrechtsverletzungen bei der Zwangsvollstreckung' in K Beys (ed), *Grundrechtsverletzungen bei der Zwangsvollstreckung* (Dike International 1996) 111 f.

⁵³ M Wolf, 'Eigentumsschutz in der Zwangsvollstreckung' in Beys K (ed), *Grundrechtsverletzungen bei der Zwangsvollstreckung*, (Dike International 1996) 201.

⁵⁴ L Haertlein, *Exekutionsintervention und Haftung* (Tübingen, Mohr Siebeck 2008) 5-30.

basic structure can also be applied *mutatis mutandi* (with different enforcement measures) to non-monetary obligations.

- 37 The eventual fourth stage concerning the opposition either of the debtor or of third parties, will involve the initiation of ancillary, simplified declaratory proceedings, including an evidentiary phase in order to reach a final decision. During this stage, the procedural principles developed for declaratory proceedings are applied. The present work suggests that these principles may share some common aspects with the singular civil enforcement process. Declaratory proceedings require the necessary frameworks to be in place to hear contradictory arguments and to adjudicate on questions of rights. Formality is common in the declaratory proceeding, but it is also used with certain specificity in the enforcement stage. Even if the creditor encourages swift progress through the different stages, the enforcement process will be notoriously marked by a limited officiality.⁵⁵

3.2 General Regulation of Civil Enforcement Proceedings

- 38 The substantive classifications with the most practical relevance in all systems are the division between monetary (debt collection) and non-monetary claims. This supports the distinction between the monetary and non-monetary enforcement, and between direct and indirect enforcement, which relates to the tools available to obtain performance from the recalcitrant debtor. Enforcement proceedings are organized and could be classified according to different theoretical or practical criteria, and the observation and respect of the enforcement rules should also be checked at the end. The criteria would be:⁵⁶ (i) the type or kind of claim to be enforced; (ii) the object upon which the enforcement is levied; (iii) the kind of enforcement activities (specific/non-specific performance, direct/indirect enforcement or the use of coercive measures); (iv) the kind of enforceable instruments that can give rise to enforcement proceeding (judgments or extrajudicial instrument); and (v) the enforcement organ for each enforcement.
- 39 The main criterion considered in the Central European Legal System is the nature of the claim. For example, German Law distinguishes between enforcement for the payment of money, for the delivery of property, and for the doing of or abstaining from any act.⁵⁷ The Romanic Legal Family deals with non-monetary and monetary claims in the same way but is strongly concerned with the different forms of proceeding to obtain money, which vary according to the object against which enforcement is sought. Here, the object of enforcement is deemed more important than the nature of the claim to be satisfied. The ground of distinction is between enforcement against a person (natural enforcement/ *en*

⁵⁵ K Kerameus, *Enforcement Proceedings* (International Encyclopaedia of Comparative Law-Civil Procedure, vol XVI, Mohr Siebeck 2002) 5-30.

⁵⁶ Ibid.

⁵⁷ German Insolvency Code (*Insolvenzordnung*, InsO).

nature/ in natura) and enforcement against assets. Many Latin-American Legal Systems⁵⁸ use the type of enforcement title as the main distinction (eg, judicial and extrajudicial) with different procedures and scope of review and remedies available to different forms of title.

- 40 English Law⁵⁹ considers the different kinds of assets upon which the enforcement is levied, and there are different procedures and distinctions integrated into an enforcement by officers and by the courts (High or County). Although the old distinction between equity and common law has been lost in the USA and in England, the remnants remain in relation to the enforcement proceeding for equitable remedies.⁶⁰
- 41 The parties involved in enforcement proceedings may be considered in a wide or narrow sense. They may include only those directly involved in the enforcement (the creditor and debtor) or they may include all persons who participate in the enforcement, for example, the bidders in the forced sale, any concurrent creditors against the same debtor, or a third-party garnishee (a person who is the debtor's debtor). Even though compulsory enforcement primarily serves the interest of the creditor, the enforcement also takes into account the interests of the debtor and protects him or her from unfair or disproportionate enforcement. The protection of the debtor can also be traced back to the catalogue of fundamental rights in the German Constitution according to the German Constitutional Court.⁶¹ Special interest surrounds the question concerning enforcement against the State and public companies. This question is important from the creditor's point of view because his rights might be protected more or less effectively when the debtor is the State, from whom the fundamental right to enforcement could potentially prove problematic.⁶² From the constitutional perspective, it could be difficult to hold the State as debtor, and therefore to enforce a judgment is complicated. In the Romanic and Latin-American systems, this entails special, indirect enforcement proceedings, where no direct coercion is allowed to compel performance from the State. The Central European legal systems allow (with less complication) enforcement against the State.⁶³
- 42 Let us mention some regulations and ECtHR cases. In Germany, the claims of a private party against 'the State' arising from public law relationships are normally satisfied once there is a final decision.⁶⁴ In relation to Germany, it should be noted at the outset that the

⁵⁸ G Priori, *Proceso y Constitución. Efectividad y ejecución de las resoluciones judiciales* (Palestra 2014) 1-120.

⁵⁹ I Spry, *The Principles of Equitable Remedies* (Sidney, Thomson Reuter 2010) 340.

⁶⁰ Ibid.

⁶¹ N Fischer, *Vollstreckungszugriff als Grundrechtseingriff* (Frankfurt am Main, Vittorio Klostermann 2006) 10-25.

⁶² Cf the case *Hornsby v Greece* (n 35) Report 1997-II, 40.

⁶³ Kerameus (n 55).

⁶⁴ German Federal Code of Compulsory Enforcement in Public Matters (*Bundes-Verwaltungsvollstreckungsgesetz, VwVG*).

Federation and the States and their agencies normally fulfil claims that have been determined in a final judgment or for which there is another enforceable title. Thus, enforcement against the State does not play an important role. In German civil matters as well as in some public law and social security matters, there are a few special rules for enforcement proceedings concerning a monetary claim against 'the State'.⁶⁵ Monetary claims against the State are most commonly based on public law relationships. In these cases, the first instance court assumes the function of a central authority. It has to warn the debtor and –in line with § 882a Code of Civil Procedure (GCCP, Germany) – may not order enforcement measures against objects which are indispensable for the fulfilment of the debtor's public function or if the enforcement measures sought by the creditor would contradict the public interest. Furthermore, coercive measures against Federal agencies based on public law claims are, in principle, excluded.⁶⁶ Finally, in Argentina, the enforcement against the State has become a complex enforcement regime nowadays, which was subjected to creditors, who in order to give effect to favourable judgments must respect certain terms and conditions that differ and impede the enforcement.⁶⁷ The enforcement against the State is primarily governed by the Argentinian Supreme Court decision '*Pietranera*',⁶⁸ which established the doctrine that the declarative nature of recognized conviction and that the individual cannot proceed to immediate enforcement.⁶⁹ Additional regulation until today has made the situation even more complicated with regards to the restriction to order provisional measures against the State. The ECtHR has decided in cases connected with the 'debtor State' (*Pashov and Others v Bulgaria* (Judgment of 5 February 2013)⁷⁰ and also *Marinković v Serbia* (Judgment of 22 October 2013)⁷¹).

3.3 The Enforcement Body

- 43 The enforcement organ consists of the persons, officials, and individuals (judges/master/bailiff) who intervene in the enforcement proceeding. Despite the obvious

⁶⁵ German Social Security Courts Act (*Sozialgerichtsgesetz, SGG*).

⁶⁶ M Klatt, 'Die Abwägung von Rechtsprinzipien', in C Hiebaum, *Handbuch Gemeinwohl* (Springer 2021) 2-16.

⁶⁷ E Oteiza, *Argentina National Report* (Seoul, 2014) 1-15.

⁶⁸ *Pietranera, Josefa y otros v Gobierno Nacional* (Supreme Court, Argentina), Judgment of 7 September 1966 [Fallos: 265.291].

⁶⁹ E Oteiza, 'El cercenamiento de la garantía a la protección cautelar en los procesos contra el Estado por la ley 26.854' (2013) La Ley, Sup Esp 2013.

⁷⁰ *Pashov and Others v Bulgaria* (ECtHR), Judgment of 5 February 2013 [ECLI:CE:ECHR:2013:0205 JUD002087507] para 58: 'The problem was exacerbated by the fact that Bulgarian Law does not provide for enforcement proceedings against the State institutions[...]'.

⁷¹ *Marinković v Serbia* (ECtHR), Judgment of 22 October 2013 [ECLI:CE:ECHR:2013:1022JUD000535311] para 39: 'When it comes to the execution of final court decisions rendered against the State or entities that do not enjoy sufficient institutional and operational independence from the State, it is not open to the State to cite either the lack of its own funds or the indigence of the debtor as an excuse for the non-enforcement of those decision'.

assumption that the debtor's assets are not to be found in the judicial office, all enforcement systems (even those which are court-centred) need the necessary personnel (of varying degrees of specific qualification) to assist, especially in relation to material enforcement measures to be taken against the debtor. The discussions of the professionalisation of enforcement organ like the French *Commissaire de Justice* (before *Huissier de Justice*) or the Portuguese or Dutch Bailiffs is a central point to bear in mind. Constitutional issues arise when considering whether a system is effective at protecting the contradictory debtor-creditor interests. There is no case directly addressing the issue whether and to what extent extra judicial enforcement proceedings are compatible with the Convention. In *Annoni di Gussola et al v France*⁷², the Court expressed reservations against a 'privatization' of justice. However, this decision did not deal with enforcement proceedings⁷³ but with the striking of a cassation on motion of the defendant in cassation on the ground that the judgment of the lower court was not complied with. What aroused the Court's criticism was that a measure in the public interest such as the temporary striking of a cassation was conditioned upon a motion by the applicant's opponent. This decision, therefore, is clearly limited to the facts of the case before the Court and provides little guidance for the permissibility of extra-judicial enforcement proceedings under the Convention.

- 44 Since Article 6 only applies to final determinations of dispute, thus requiring the existence of an actual dispute, no prior judicial authorization is necessary for enforcement proceedings. Thus, it seems that extra judicial enforcement proceedings are in line with Article 6 as long as the right of access to a court under art 6 ECHR is not violated. This is also true for enforcement proceedings entrusted to private professionals like the *huissier/commissaire de Justice* (bailiff/court officer) in Latin countries and the Scottish *sheriff's officer*. If, however, a debtor contests his obligation (and there has not already been a judicial decision in a prior proceeding), there has to be court proceeding available to decide on the parties 'civil rights and obligations'.
- 45 It is likely, however, that the Court will view the activity of private individuals acting without prior court authorization with more scrutiny in light of Article 8 compared to searches and seizures performed in the exercise of a valid court order.⁷⁴ Furthermore, often *domestic constitutional law* will place limits to the exercise of what are essentially governmental functions by private individuals.⁷⁵ Indeed, it can well be argued from a domestic civil law

⁷² *Annoni di Gussola and others v France* (ECtHR), Judgment 14 November 2000 [ECLI:CE:ECHR:2000:1114JUD003181996], No. 31819/96 and 33293/96 final February 2001.

⁷³ Although the case also involved a private sale of car in the course of 'enforcing' a debt, this issue was not reached by the court.

⁷⁴ *Mialhe v France* (ECtHR), Judgment 26 September 1996 [ECLI:CE:ECHR:1996:0926JUD001897891], Reports 1996-IV.

⁷⁵ VfSlg 14.473 (Constitutional Court, Austria), Judgment of 14 March 1996.

point of view that the enforcement of court decisions belongs to the core of State functions and cannot be left to private individuals.⁷⁶

- 46 A doctrine in Spain and the Latin-American systems addresses a highly centralized court system and uses references to this to support this option against any kind of enforcement carried out the judiciary, including where the judge only has to order the beginning of the enforcement. In these court-centralized systems, all additional enforcement activities are performed by auxiliary officers⁷⁷, and the Bailiff model is deemed a dangerous privatization of an exclusive judicial activity (enforcement) and for this reason could be held unconstitutional. A similar discussion, albeit with a specific difference, took place in Germany with regard to the liberalisation of a legal profession of the 'Gerichtsvollzieher'.⁷⁸ It should be noted that in bailiff-centred systems the parties can request the court to control of acts of the bailiffs. The need for transparency, efficiency and fair treatment of a claim in enforcement proceedings remains as valid for a court-centred model as for a bailiff-centred model. The court-centred model reflects the 'constitutional principles' regarding who should be the enforcement organ, but the system can be objected to from the perspective of efficiency, effectiveness, and transparency regarding the best interest of both the creditor and debtor.⁷⁹
- 47 Thus, there are judicial systems in which the enforcement organ is a court concerned to enforcing judgments and other enforceable titles. Spain, Italy, Central and South American countries are high court-centred systems based on certain constitutional imperatives, which consider enforcement as an adjudicative task that is a continuation of the declaratory proceedings.⁸⁰ It should be remarked that the court activity is in fact delegated to the court's assistants who have different and varied training and limited discretionary powers in relation to the enforcement. The role of the judge is concentrated in the formal direction and control of the execution. He acts only when a conflict arises or to order coercive or compulsory measures.⁸¹
- 48 These models can be evaluated based on three relevant vectors as follow: (i) Organic-institutional Vector (legal framework of the organic function within the institutional model,

⁷⁶ This consideration will only prevent a full privatization of enforcement proceedings in many countries. It does not affect, however, the organization of enforcement organs and their remuneration as long as there is sufficient control over them by public authorities.

⁷⁷ B Hess, 'Different Enforcement Structures' in C Van Rhee and A Uzelac (ed), *Enforcement and Enforceability: Tradition and Reform* (Intersentia 2010) 41.

⁷⁸ D Eickmann, *Vollstreckungssysteme und Gerichtsvollzieherstellung in Europa* (1980) 129-136.

⁷⁹ S Díez Riaza, *Armonización europea en material de ejecución civil: Especial consideración de la introducción del huissier de justice en nuestro ordenamiento* (Consejo General de Procuradores 2002) 1-25.

⁸⁰ M Kengyel and V Harsági, *Grenzüberschreitende Vollstreckung in der Europäischen Union* (Sellier 2011) 385-395.

⁸¹ A Jongbloed, *The bailiff in Europe, utopia or reality?* (Kluwer 2004) 159-165.

control, responsibility, and required level of training); (ii) Functional Vector (functional competence in the implementation and beyond (official business), dedication and unofficial activities, implementation of technologies); and (iii) Financial Vector (with fees, without fees and a combinatory system). Relevant to this study is the World Bank report on costs of implementation and enforcement officers, with further evidence to analyse each potential model. In conclusion, support for the transparency, efficiency and the whole enforcement organ favoured the bailiff-centred model.⁸² Furthermore, there are recommendations in Europe for alternative models to the court-centred approach.⁸³ As conclusions, the main recommendations are drawn from comparative experience based on recognised good practice outlined by the CEPEJ.⁸⁴ The bailiff-centred model needs special attention for the checks and balances in place, control and deontological aspects already in place.

- 49 In the more than 40 years since its adoption, the ECHR has also significantly influenced civil procedure in all European countries. While the right to be heard, generally expressed in the maxim *audiatur et altera pars*, and general notions of procedural fairness were by no means new to European States, the Convention has directed attention to many aspects hitherto neglected and has brought about significant improvements and refinements. This influence, however, has in large measure been restricted to the procedure until a judgment is rendered, whereas the possible implications of the Convention for enforcement proceedings have received comparatively little attention. Contrary to the considerable amount of literature dealing with domestic constitutional guarantees and enforcement law, relatively little has been written on the influence of the ECHR in this respect. Only in recent years in the case law of the European Court of Human Rights concerning the enforcement of civil judgments have become more frequent.
- 50 This paper will try to examine the influence of the ECHR in this respect on an abstract level, not so much against the background of any particular legal system. In light of the author's legal education and professional background, however, naturally emphasis will be placed on civil law countries and particular German speaking countries, ie, countries with whose language and legal system I am most familiar with.
- 51 Analysing the influence of the ECHR on enforcement proceedings is difficult in several respects: One reason is that the wording of the Convention itself is not very specific. Thus,

⁸² K Henderson et al, *Barriers to the Enforcement of Court Judgments and the Rule of Law* (World Bank 2003).

⁸³ H Gramckow, 'Effective Processes and Enforcement Agents' (Washington, World Bank 2012), *passim*; Cf A Uzelac, 'The Role played by the Profession of Bailiffs in the Proper and Efficient Functioning of the Judicial System: An Overview with Special Consideration of the Issues Faced by Countries in Transition' Lecture delivered at the Council of Europe seminar, 'The Role, Organisation, Status and Training of Bailiffs – Strengthening the Enforcement of Court Decisions in Civil and Commercial Cases' (Varna, Bulgaria, 2002) *passim*.

⁸⁴ See Guidelines for a better implementation (CEPEJ) <https://rm.coe.int/16807473cd> accessed 10 August 2024.

as a main source of the law we have to rely on decisions of the European Court of Human Rights. Unfortunately, the decisions of the Court often lack the precision of reasoning we are used to, or at least expect from domestic courts. Thus, the factual and domestic legal background of many decisions is not always entirely clear. What is more important perhaps is that the Court decides on a case-by-case basis with the main emphasis clearly being placed on an attempt to do justice in individual cases.⁸⁵ The function of providing orientation for future cases and systematic development of the law seems to be of secondary importance to the Court. An attempt to deduce general principles from the decisions of the Court thus faces considerable difficulty. In many respects, the case law of the Court seems to resemble the parts of a giant jig-saw puzzle which have to be assembled in order to get a full picture of the law of human rights. While certainly not endeavouring to assemble the entire puzzle, this paper attempts to explore how some parts of the case law may fit together. The requirements of the Convention in the area of enforcement law outlined in this article not only provide a guideline for present day enforcement practice, but may also serve as the framework for future reform in this field.

3.4 Substantive Guarantees

3.4.1 *From Perspective of the Judgment Creditor*

3.4.1.1 The Protection of Property (Article 1 of Protocol No 1)

- 52 Arguably the most important substantive guarantee the Convention provides for a creditor is Article 1 of Protocol No 1, which guarantees the 'peaceful enjoyment' of one's 'possessions'.⁸⁶ This provision contains the only protection of a purely economic right in the framework of the Convention.⁸⁷ While possessions in the sense of Article 1 of Protocol No 1 are in the first place all those rights which are called property rights in the national systems, the Convention guarantee is not limited to the technical notion of property in national law. Rather, the term 'possession' or 'biens' in this provision has an autonomous meaning. Therefore, the Commission has held from the very beginning that all rights which are well-founded in national law can basically benefit from the guarantee of Article 1. They may be claims, immaterial rights or even rights granted under public law.⁸⁸ Today it is well

⁸⁵ F Matscher, 'Methods of Interpretation of the Convention', in R Macdonald, F Matscher and H Petzold, *The European System for the Protection of Human Rights* (1993) 63.

⁸⁶ Article 1 paragraph 1 of Protocol No 1 provides: 'Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law'.

⁸⁷ J A Frowein, 'The Protection of Property' in R Macdonald, F Matscher and H Petzold, *The European System for the Protection of Human Rights* (1993) 515.

⁸⁸ Ibid 517.

established that a 'claim' can constitute a 'possession' within the meaning of Article 1 of Protocol No 1 if it is sufficiently established to be enforceable.⁸⁹

- 53 While the State cannot be held responsible for a debtor's lack of means,⁹⁰ failure to provide adequate means to enforce a 'claim' may constitute a violation of Article 1 of Protocol No 1. It has to be pointed out, however, that the protection granted by Article 1 of Protocol No 1 is not absolute. Member States clearly enjoy a wide *margin of appreciation* as to the ways and means of enforcement of civil judgments⁹¹ and as to ascertaining whether the consequences of enforcement are justified in the general interest for the purpose of achieving the object of the law in question. Particularly in spheres such as housing, which play a central role in the welfare and economic policies of modern societies, the Court will respect the legislature's judgment as to what is in the general interest unless that judgment is manifestly without reasonable foundation.⁹² Thus, a temporary stay of enforcement proceedings for social reasons, eg, in eviction proceedings, generally will be compatible with the Convention.⁹³
- 54 A violation of a creditor's substantive rights as protected by the Convention, therefore, will only be found in extreme cases which amount to a *de facto* denial of enforcement. This may also be true if a retroactive statute were enacted which, in effect, completely bars enforcement of a court decision.⁹⁴ Similarly, a *gross violation of procedural fairness* which results in an arbitrary denial of an application for enforcement measures may amount to a

⁸⁹ *Stran Greek Refineries and Stratis Andreadis v Greece* (ECtHR), Judgment 9 December 1994 [ECLI:CE:ECHR:1994:1209JUD001342787], Series A no 301-B, para 59; *Burdov v Russia* (ECtHR), Judgment 18 April 2002 [ECLI:CE:ECHR:2002:0507JUD005949800]; *Immobiliare Saffi v Italy* (ECtHR), Judgment 28 July 1999 [ECLI:CE:ECHR:1999:0728JUD002277493] (eviction proceedings).

⁹⁰ See, eg, *Gasus Dosier- und Fördertechnik GmbH v The Netherlands* (ECtHR), Judgment 23 February 1995 [ECLI:CE:ECHR:1995:0223JUD001537589], A306-B, para 65 in fine.

⁹¹ See also *Emsenhuber v Austria* (ECtHR), Decision 11 September 2003 [ECLI:CE:ECHR:2003:0911DEC005453600], no 54536/00, where the Court found that a decision refusing a building permit did not necessarily have to be enforced by tearing down the building built without a permit, but that another way to give effect to the decision would be by way of pecuniary compensation to the neighbour for the unlawfully erected building.

⁹² *Immobiliare Saffi v Italy* (n 89) para 49; *Palumbo v Italy* (ECtHR), Judgment 30 November 2000 [ECLI:CE:ECHR:2000:0622JUD004301298], para 26.

⁹³ A different result is reached, of course, if the duration of the stay in effect renders the right enforcement of which is sought nugatory. For repeated stays of execution by legislative measures, see *Immobiliare Saffi v Italy* (n 89); *Palumbo v Italy* (n 92).

⁹⁴ Most recently, this issue was raised in a number of applications against Greece. See, eg, *Vasilopoulou v Greece* (ECtHR), Judgment 21 March 2002 [ECLI:CE:ECHR:2001:0322DEC004754199]. The Court noted, however, that Member States here enjoy a wide margin of appreciation. This aspect of the Court's case law, however, is beyond the scope of this article since it deals with an outright denial of enforcement under national law rather than with the influence of the Convention on enforcement proceedings as such.

violation also of a creditor's substantive rights.⁹⁵ Apart from such extreme cases, however, Article 1 of Protocol No. 1 offers little guidance as to the rights a creditor should enjoy in order to be able to enforce a judgment debt. In most cases, therefore, the focus of the examination of the influence of the Convention on enforcement proceedings will have to be directed at the applicability of the more specific procedural guarantees set forth in Article 6.

3.4.1.2 The Right to Respect for Private and Family Life (Article 8)

- 55 Occasionally, a failure to enforce a judgment may also deserve scrutiny in light of Article 8 ECHR.⁹⁶ Thus, in 2004 in *Cvijetic v Croatia* the Court held that a States' failure to enforce an *eviction* judgment may constitute a violation of Article 8. This, however, apparently is only true if someone seeks to regain his private dwelling place. Clearly, Article 8 is not available to the owner of an apartment who seeks eviction of a tenant for failure to pay his rent without any intent of using the apartment himself.⁹⁷
- 56 Another area where Article 8 is of possible relevance for enforcement proceedings is the enforcement of decisions on *custody and rights of access*. It is well established that the enforcement of these decisions falls under art 8 European Convention on Human Rights (ECHR).⁹⁸ Thus, in this case Articles 8 and 6 overlap to a certain extent.⁹⁹ While the essential

⁹⁵ It is well established in the Court's case law that a violation of Article 6 can, in addition, constitute a violation of a substantive right. See, eg, cases concerning the enforcement of custody rights and rights of access discussed.

⁹⁶ Article 8 ECHR provides:

'(1) Everyone has the right to respect for his private and family life, his home and his correspondence.

(2) There shall be no interference by public authority with the exercise of that right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health and morals, or for the protection of the rights and freedoms of others'.

⁹⁷ That the Court is reluctant to stress the protection under Article 8 too far is also apparent from *Kyrtatos v Greece* (ECtHR), Judgment 22 May 2003 [ECLI:CE:ECHR:2003:0522JUD004166698], where the Court found that extensive construction works in an environmentally protected swamp did not violate rights of neighbours under Article 8.

⁹⁸ *Margareta and Roger Andersson v Sweden* (ECtHR), Judgment 25 February 1992 [ECLI:CE:ECHR:1992:0225JUD001296387], Series A no 226-A; *Nuutinen v Finland* (ECtHR), Judgment 27 June 2000 [ECLI:CE:ECHR:2000:0627JUD003284296], Reports 2000-VIII 1994; *Ignaccolo-Zenide v Romania* (ECtHR), Judgment 25 January 2000 [ECLI:CE:ECHR:2000:0125JUD003167996], Reports 2000-I; *Sophia Gudrun Hansen v Turkey* (ECtHR), Judgment 23 September 2003 [ECLI:CE:ECHR:2003:0923JUD003614197] (EUR 15,000 non-pecuniary damages awarded); *Sylvester v Austria* (ECtHR), Judgment 24 April 2003 [ECLI:CE:ECHR:2003:0424JUD003681297].

⁹⁹ It has to be remembered, though, that these provisions serve to protect different interests. While Article 6 affords a procedural safeguard, Article 8 serves the wider purpose of ensuring proper respect for, *inter alia*, family life. In light of the different interests protected by these provisions, it is justified to examine the same set of facts under both Articles. See, eg, *McMichael v United Kingdom* (ECtHR), Judgment 24 February 1995 [ECLI:CE:ECHR:1995:0224JUD001642490], series A no 307-B, 57, para 91. However, occasionally the Court focuses only on Article 8 in such cases, considering it not necessary to examine the facts of the case also under Article 6. See *Sylvester v Austria* (n 98), para 76.

object of Article 8 is to protect the individual against arbitrary action by public authorities, there are also positive obligations inherent in an effective ‘respect’ for family life.¹⁰⁰ The Court has repeatedly held that Article 8 includes a right for parents to have measures taken that will permit them to be reunited with their children and an obligation on the national authorities to take such action.¹⁰¹ While due to the special nature of these cases, any obligation to apply coercion in this area is limited, the Court stresses that national authorities have to take all the necessary steps to facilitate execution as could reasonably be demanded in the special circumstances of the case.¹⁰² Necessary measures may include the advice of social services, assistance of psychologists or child psychiatrists.¹⁰³ Furthermore, public authorities have to attempt to locate the child, at least to some extent, *ex officio*.¹⁰⁴ This position is likely to be in conflict with the traditional view held in many countries that it is for the creditor to take the initiative and point out to the authorities the location where enforcement measures are to take place.

3.4.2 From Perspective of the Judgment Debtor

3.4.2.1 The Protection of Property (Article 1 of Protocol No 1)

- 57 Article 1 of Protocol No 1 does not forbid enforcement proceedings *per se*. A seizure of assets belonging to the debtor in the course of enforcement proceedings does not constitute an ‘expropriation’ in the sense of this provision. Moreover, such a measure clearly is in the public interest and ‘provided for by law’. Several decisions of the Commission point out that Article 1 of Protocol No 1 primarily is aimed at providing protection against arbitrary expropriation, but not against lawful enforcement of a court decision. Also the Commission in dismissing the complaint as manifestly ill-founded indicated¹⁰⁵. While this suggests that rights under this provision may be violated if the debtor’s property is sold at an unreasonably low price, there is arguably no general ‘*proportionality*’ requirement under

¹⁰⁰ *Keegan v Ireland* (ECtHR), Judgment 26 May 1994 [ECLI:CE:ECHR:1994:0526JUD001696990], Series A no 290, para 49.

¹⁰¹ *Eriksson v Sweden* (ECtHR), Judgment 2 June 1989 [ECLI:CE:ECHR:1989:0622JUD001137385], Series A no 156, 26-27, para 71; *Margareta and Roger Andersson v Sweden* (n 98) 30, para 91; *Olsson v Sweden* (no. 2) (ECtHR), Judgment 27 November 1992 [ECLI:CE:ECHR:1992:1127JUD001344187], Series A no 250, 35-36, para 90; *Hokkanen v Finland* (ECtHR), Judgment 23 September 1994 [ECLI:CE:ECHR:1994:0923JUD001982392], Series A no 299-A, 20, para 55; *Nuutinen v Finland* (n 98) 83, para 127; *Ignaccolo-Zenide v Romania* (n 98) 265, para 94; *Sylvester v Austria* (n 98) para 58; *Sophia Gudrun Hansen v Turkey* (n 98) para 97.

¹⁰² *Hokkanen v Finland* (n 101) 22, para 58; *Ignaccolo-Zenide v Romania* (n 98) 265, para 96; *Sophia Gudrun Hansen v Turkey* (n 98) para 99.

¹⁰³ See the *Ignaccolo-Zenide* and *Sophia Gudrun Hansen* (n 98).

¹⁰⁴ *Ignaccolo-Zenide v Romania* (n 98) para 111; *Sylvester v Austria* (n 98) para 71.

¹⁰⁵ It is well recognized in other contexts that the fundamental rights have certain ‘implicit limitations’. What these are cannot be determined by a general formula; it follows rather from the assessment of the individual case. See eg, the *Golder v The United Kingdom* (ECtHR), Judgment of 21 February 1975 [ECLI:CE:ECHR:1975:0221JUD000445170], Series A no 18.

the Convention. In this context, it has to be remembered that a debtor – as long as he is solvent (otherwise he can, and in most countries has to, file for the opening of bankruptcy proceedings) – can always avoid enforcement proceedings by voluntarily complying with the judgment. Some national courts, however, assume that there is a prohibition under (domestic) constitutional law against sales at an unfairly low price.¹⁰⁶

- 58 Some decisions of the Court even suggest that even the seizure of goods belonging not to the debtor, but to a *third party* may be permissible under certain circumstances.¹⁰⁷ In dealing with fiscal rights of preference under Dutch law, the Court noted that the power of recovery against goods which are in fact in a debtor's possession although nominally owned by a third party was not an uncommon device to strengthen a creditor's position in enforcement proceedings; it could not be held incompatible *per se* with the requirements of Article 1 of Protocol No 1.¹⁰⁸ Thus, the right of landlords levying distress for rent to seize any third party goods found on the rented premises under English law seems to be in accordance with the Convention. The same holds true for the traditional civil law rule that a landlord enjoys a lien *ex lege* on all goods found on the premises occupied by the tenant (*invecta et illata*).

3.4.2.2 The Right to Respect for Private and Family Life (Article 8)

- 59 A search of debtor's residence and subsequent seizure of goods in the course of enforcement proceedings *per se* probably does not constitute a violation of art 8 ECHR. Even if this is seen as an interference, it will generally be justified as being in accordance with the law and aimed at the protection of the rights and freedoms of others. While there is no general *warrant requirement* under Article 8, recent case law suggests that a warrant may be required if the statute authorizing the search and seizure lacks the necessary specificity.¹⁰⁹ Moreover, the absence of a warrant may be factor considered by a court when

¹⁰⁶ See BVerfGE 46, 325 (332) (Constitutional Court, Germany) [NJW 1978, 368].

¹⁰⁷ See, particularly, *Gasus Dosier- und Fördertechnik GmbH v The Netherlands* (n 90) (concerning seizure of a concrete-mixer in which the applicant had a fiduciary ownership).

¹⁰⁸ *Gasus Dosier- und Fördertechnik GmbH v The Netherlands* (n 90) para 66.

¹⁰⁹ *Crémieux v France* (ECtHR), Judgment of 25 February 1993 [ECLI:CE:ECHR:1993:0225JUD001147185], A256-B, para 40, and *Funke v France* (ECtHR), Judgment of 25 February 1993 [ECLI:CE:ECHR:1993:0225JUD001082884], A256-A, para 57: 'Above all, in the absence of any requirement of a judicial warrant the restrictions and conditions provided for in law [...] appear too lax and full of loopholes for the interferences with the applicant's rights to have been strictly proportionate to the legitimate aim pursued.' It should be pointed out, however, that these decisions did not concern civil enforcement proceedings, but a search by customs officials in a criminal proceeding. For another decision concerning a search by customs officials, see *Mialhe v France* (ECtHR), Judgment of 26 September 1996 [ECLI:CE:ECHR:1996:0926JUD001897891], Reports 1996-IV.

assessing the overall circumstances of a search or seizure.¹¹⁰ Also, in many countries there may be a warrant requirement under domestic constitutional law.¹¹¹

- 60 It should be noted that while the rights provided for by the Convention generally also apply to legal persons, only *individuals* are protected by Article 8. Thus, according to a decision of the ECJ concerning the search of business premises of *Hoechst AG*, Art 8 ECHR does not include *companies*.¹¹²

3.4.2.3 Compulsion and Personal Liberty

- 61 Enforcement law, particularly in connection with the enforcement of judgments enjoining a debtor to perform, or refrain from certain activity, often provides for sanctions in case the debtor fails to comply with the judgment. This is perfectly in line with the substantive guarantees of the Convention. In fact, Article 5 paragraph 2 ECHR expressly even permits *detention* for non-compliance with a lawful court order or in order to secure the fulfilment of an obligation prescribed by law.
- 62 In other contexts, enforcement proceedings can also involve elements of compulsion. A debtor is often required to provide information as to his financial situation and the whereabouts of his assets. While such compulsion does not violate the Convention,¹¹³ the subsequent use of such information in a criminal proceeding may be ‘unfair’ under Article 6 ECHR.¹¹⁴

¹¹⁰ See also *Chappell v The United Kingdom* (ECtHR), Judgment of 30 March 1989 [ECLI:CE:ECHR:1989:0330JUD001046183], series A no 152-A (concerning an Anton Pillar order, no violation found).

¹¹¹ See BVerfGE 51, 97 (Constitutional Court, German) [NJW 1979, 1539]: While the German Code of Civil Procedure (Art 761 GCCP) requires a court authorization only for night-time entries of a home, the Constitutional Court has held that in light of the constitutional protection of homes this provision ought to be extended per analogy to all entries of a home. The situation is less clear under Austrian law. Section 26 of *Exekutionsordnung* (the Enforcement Act) authorizes the bailiff to enter and search the debtor’s residence. While constitutional law contains what would appear to be an unqualified warrant requirement for all searches, arguably historically the purpose of this provision was only to provide a protection against searches in the context of a criminal proceeding, which were seen as particularly intrusive. Some contemporary commentators believe that the warrant requirement also applies to seizures in the context of civil enforcement proceedings. W Jelinek et al, ‘Verfassungsrechtliche Aspekte der Zwangsvollstreckung in Österreich’, in K Beys (ed), *Grundrechtsverletzungen bei der Zwangsvollstreckung* (Dike International 1996), 301 ff.

¹¹² *Hoechst AG v Commission of the European Communities*, Case C-46/87 and C-227/88 (CJEU), Judgment 21 September 1989 [ECLI:EU:C:1989:337] [NJW (1989) 3080].

¹¹³ The situation is different, of course, when someone is compelled to provide information in connection with a (pending or contemplated) criminal proceeding. See, eg, *Funke v France* (n 109) para 42-44.

¹¹⁴ See *Kansal v The United Kingdom* (ECtHR), Judgment 27 April 2004 [ECLI:CE:ECHR:2004:0427JUD002141302]; BVerfGE 56, 37 (Constitutional Court, Germany) [NJW 1981, 1431].

4 PROCEDURAL GUARANTEES: APPLICABILITY OF ART 6 ECHR

4.1 Introduction

- 63 While the substantive guarantees of the ECHR and Protocol No 1 generally pose few problems in the context of enforcement proceedings since they are not very specific, they provide for numerous exceptions and States always have a certain margin of appreciation. The scope of applicability of the procedural guarantees of Article 6 to enforcement proceedings is more difficult to determine. Article 6 paragraph 1, first sentence ECHR provides: ‘In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law’. As indicated in the introduction to this paper, the significance of this provision for enforcement proceedings has received only little attention so far. National courts apparently have some difficulty in determining the possible impact of Article 6 on enforcement proceedings, sometimes resorting to apodictic, yet inconsistent if not outright contradictory views.¹¹⁵ Yet the possible implications of a full applicability of Article 6 to enforcement proceedings are quite far-reaching: If this provision were fully applicable to enforcement proceedings, this would extend not just the reasonable time requirement and some very general notions of fairness to enforcement proceedings, but all specific guarantees Article 6 provides for, such as the requirement of a public hearing and of a public tendering of the decision would also apply to enforcement proceedings. This would place many continental procedural systems at considerable difficulty. Suffice it to point out that in some countries at least certain enforcement measures, particularly seizures, may take place without prior court authorization. Even in countries which require such judicial authorization, the decision is usually made in an *ex parte* proceeding in which defendant is not heard. Furthermore, in most countries the decision on such applications is rendered without a hearing taking place; most countries resort to a mostly, if not exclusively, written proceeding.
- 64 There may also be some less obvious consequences: In *Morel v France*, a decision concerning a French bankruptcy proceeding, the Court has expressed reservations against a judge opening a bankruptcy proceeding if he had been involved in a reorganization proceeding previously.¹¹⁶ Does this mean that, assuming Article 6 fully applies to enforcement proceedings, the judge authorizing enforcement proceedings must not be the same judge who rendered the judgment enforcement of which is now sought? The answer is probably

¹¹⁵ A good example of the difficulties national courts have in dealing with this question is provided by the Austrian Supreme Court. In a 1998 decision, it stated that there can be no doubt that Article 6 ECHR does not apply to enforcement proceedings (3 Ob 243/98a (Supreme Court, Austria), Judgment of 25 November 1998). A few years earlier, the same court stated that it had ‘always’ applied Article 6 to enforcement proceedings (3 Ob 42/95 (Supreme Court, Austria), Judgment of 26 April 1995 [SZ 68/83]).

¹¹⁶ *Morel v France* (ECtHR), Judgment of 6 June 2000 [ECLI:CE:ECHR:2000:0606JUD003413096], No 34130/96.

no. As the Commission has stated repeatedly: ‘It does not jeopardize the impartiality of a judge if he has previously dealt with other cases brought against the same person’.¹¹⁷ The decision in *Morel*, which applied principles originally developed in the field of criminal procedure¹¹⁸ to bankruptcy proceedings, should probably be limited to the specific facts of the case. While in the case of a reorganization proceeding and a subsequent bankruptcy proceeding concerns about an involvement in the judge in the reorganization proceeding may seem understandable (although, in the authors opinion, a little far-fetched), this certainly does not apply to an order authorizing enforcement proceedings. In light of both the routine character of such decisions and of the fact that such decisions are rendered in a highly formalized proceeding leaving little room for judicial discretion, it appears extremely unlikely that participation of the judge of the title stage in subsequent enforcement proceedings is considered a violation of Article 6.

65 Another problem that an application of Article 6 to enforcement proceedings would bring about is the principle of ‘equality of arms’. This principle, which the Court derives from the general fairness requirement of Article 6, can be defined as the requirement to be able to comment on all the evidence adduced or observations filed with a view to influencing the court’s decision. It is worth noting here that in many European countries, applications for the authorization of enforcement proceedings are dealt with *ex parte*.

66 In one of the few decisions squarely addressing the issue, the Commission has held:¹¹⁹

As a general rule, enforcement proceedings following a civil court judgment do not come within the scope of art 6-1 ECHR. They do not themselves determine a dispute relating to civil rights, but presuppose a prior determination these rights by an independent court. However, in the context of enforcement proceedings questions might have to be determined which involve a decision on civil rights of the parties, such as partition of property.

67 While the complaint was dismissed as manifestly ill-founded, the Commission noted: ‘Insofar as the execution proceedings in the present case may be considered to constitute the determination of civil rights, the Commission has accordingly examined this complaint in light of Art 6-1 of the Convention’. In the following sections, an attempt will be made to explore what decisions in an enforcement proceeding have to be regarded as

¹¹⁷ *Schmid v Austria* (ECtHR), Commission decision of 09 December 1987 [ECLI:CE:ECHR:1987:1209DECO01183185], No 11831/85, DR 54, 144; *Krone v Austria* (ECtHR), Commission decision of 21 May 1997 [ECLI:CE:ECHR:1997:0521DEC002897795], No 28977/95.

¹¹⁸ It is well established that under Article 6 the investigating judge (*juge d’instruction*) may not be the judge deciding on guilt or innocence of a defendant. See, eg, *De Cubber v Switzerland* (ECtHR), Judgment of 26 October 1984 [ECLI:CE:ECHR:1984:1026JUD000918680].

¹¹⁹ *Krone v Austria* (n 117). See also CD 42, 145 and DR 48, 225 (application to question witnesses in a public hearing).

determinations of civil rights and obligation and thus requiring compliance with the guarantees provided for by Article 6.

4.2 Development of the Case-Law

- 68 The European Court of Human Rights reads Article 6 broadly and interprets it as a guarantee of a ‘right to a court’¹²⁰, of which the right of access to court is but one aspect.¹²¹ While the wording of Article 6 seems not to cover enforcement proceedings, in a number of cases the Court applied the reasonable time requirement to enforcement proceedings. In the opinion of the Court, the right to a court guaranteed by Article 6 ‘would be illusory if a State’s domestic legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one part. It would be inconceivable that Article 6 ECHR should describe in detail procedural guarantees afforded to litigants – proceedings that are fair, public and expeditious – without protecting the implementation of judicial decisions; to construe Article 6 as being concerned exclusively with access to a court and the conduct of proceedings would be likely to lead to situations incompatible with the principle of the rule of law which the Contracting States undertook to respect when they ratified the Convention. Execution of a judgment given by any court must therefore be regarded as an integral part of ‘trial for the purposes of Article 6’.¹²² While sometimes the Court used the term ‘enforcement’ in a non-technical sense and subjected the implementation of the decision of an administrative court reversing the decision of an administrative authority to the

¹²⁰ *Golder v United Kingdom* (n 105).

¹²¹ J A Frowein (n 87) 515.

¹²² See, eg, *Hornsby v Greece* (n 35) 510-511, para 40; *Immobiliare Saffi v Italy* (n 89) para 63; *Antonakopoulos et al v Greece* (ECtHR), Judgment of 9 December 1994, Series A no. 301-B; *Vasilopoulou v Greece* (n 94); *Dimitrios Georgiades v Greece* (ECtHR), Judgment of 28 March 2000 [ECLI:CE:ECHR:2000:0328JUD004120998]; *Burdov. v Russia* (ECtHR), Judgment of 18 April 2002 [ECLI:CE:ECHR:2002:0507JUD005949800], para 34; *Rybakykh v Russia* (ECtHR), Judgment of 24 July 2003 [ECLI:CE:ECHR:2003:0724JUD005285499], para 55.

reasonable time requirement,¹²³ several decisions of the Court actually deal with the duration of enforcement proceedings in the technical sense of the word.¹²⁴

- 69 In what probably has to be regarded as a significant, if largely unobserved development, the Court recently held that *res judicata* is also protected under Article 6.¹²⁵ It would be an infringement of the rights guaranteed by Article 6 to allow a final decision to be set aside on the application of the public prosecutor, a procedural device traditionally found in many Eastern European countries. In the opinion of the Court, one of the fundamental aspects of the rule of law is the principle of legal certainty, which requires, among other things, that where the courts have finally determined an issue, their ruling should not be called into question.¹²⁶ Legal certainty presupposes respect of the principle of *res judicata*, that is the principle of finality of judgments. The Court also stated that departures from that principle are justified only when made necessary by circumstances of a substantial and compelling character.¹²⁷

4.3 Analysis

- 70 When analysing the applicability of Article 6 to enforcement proceedings, a number of important principles of Article 6 have to be remembered which, although well-established, frequently tend to be overlooked in the discussion of the matter: First, Article 6 applies only to decisions about *civil* rights and obligations, ie, *substantive* rights and obligations, not to decisions on purely *procedural* questions. Second, from the fact that the French text of Article 6 speaks of ‘contestatation’ it has been inferred that for Article 6 to be applicable the

¹²³ *Hornsby v Greece* (n 122). The case concerned an administrative decision on an application for a license to operate a foreign language school. The case is also significant in that it is one of the few cases that was decided both by the European Court of Human Rights and by the European Court of Justice (*Commission of the European Communities v the Hellenic Republic*, Case C-147/86 (CJEU), Judgment of 15 March 1988 [ECLI:EU:C:1988:150]). A more recent example is *Krombach v France* (ECtHR), Judgment of 13 February 2001; *Krombach v Bamberski*, Case C-7/98 (CJEU), Judgment of 28 March 2000 [ECLI:EU:C:2000:164]).

¹²⁴ *Martins Moreira v Portugal* (ECtHR), Judgment of 26 October 1988 [ECLI:CE:ECHR:1988:1026 JUD001137185] (defendant was bankrupt when proceedings were over); *Di Pede v Italy* (ECtHR), Judgment of 26 September 1996 [ECLI:CE:ECHR:1996:0926JUD001579789], *Zappia v Italy* (ECtHR), Judgment of 26 September 1996 [ECLI:CE:ECHR:1996:0926JUD002429594] (enforcement proceedings concerning a judgment debt of ITL 5 million from 1969 – 1993); *Comingersoll S.A. v Portugal* (ECtHR), Judgment of 6 April 2000 [ECLI:CE:ECHR:2000:0406JUD003538297] (enforcement proceedings on bills of exchange ‘which by their very nature need to be dealt with expeditiously’ lasting 12 years); *Palumbo v Italy* (n 92) (eviction proceedings); *Cvijetic v Croatia* (ECtHR), Judgment of 26 February 2004 [ECLI:CE:ECHR:2004:0226JUD0071 54901] (eviction proceedings lasting from 1994 – 2002. The delay was in part due to demonstrations of war veterans preventing eviction).

¹²⁵ *Rybakykh v Russia* (n 122); see also *Brumarescu v Romania* (ECtHR), Judgment of 28 October 1999, Reports 1999-VII.

¹²⁶ *Rybakykh v Russia* (n 122) para 51; *Brumarescu v Romania* (n 125) para 61.

¹²⁷ *Rybakykh v Russia* (n 122) para 52.

settlement of a *dispute* concerning a right or obligation must be at issue.¹²⁸ Thus, Article 6 paragraph 1 requires not only that the matter concerns civil rights or obligations, but that there be a dispute (contestatation) concerning the particular rights or obligations. The dispute must be genuine and of a serious nature. The claimed judicial proceedings must lead to a 'determination' of civil rights or obligations.¹²⁹ Thirdly, Article 6 only applies to *final* determinations as opposed to preliminary decisions.

- 71 While enforcement proceedings have to be seen as a part of the original proceeding for purposes of the reasonable time requirement, they normally do not entail a decision about a 'civil right', nor do they ordinarily decide a 'dispute' (contestatation). This is true from the viewpoint of both parties: As for the debtor, the institution of enforcement proceedings ordinarily requires that a determination of the obligation of debtor has already occurred in a prior proceeding. Furthermore, in light of remedies available to the debtor, be it an appeal or the institution of a separate lawsuit challenging the enforcement proceedings, the decision on an application for authorization of enforcement proceedings (which in continental Europe is often granted *ex parte*) clearly does not constitute a final determination for purposes of Article 6. But the same is true from the creditor's point of view: The creditor generally has a choice of several enforcement methods; a decision on any one application for authorization of particular enforcement measures does not affect the existence of his claim.¹³⁰
- 72 Yet the Court has found that enforcement proceedings constitute an *integral part* of the trial. While this phrase may be helpful in justifying the extension of the reasonable time requirement to enforcement proceedings (which apparently is the primary reason why the Court adopted it), it offers little guidance as to whether and to what extent the other guarantees provided for by Article 6 also apply to enforcement proceedings. Since enforcement proceedings normally do not fulfil the requirements for the applicability of

¹²⁸ This concept of 'dispute', however, should not be construed too technically and should be given a substantive rather than a formal meaning: A difference of opinion between the parties concerned is sufficient, provided that it is 'genuine and of a serious nature'. This interpretation was enunciated for the first time in the *Le Compte, Van Leuven and De Meyere v Belgium* (ECtHR), Judgment of 23 June 1981, Series A no 43, [ECLI:CE:ECHR:1981:0623JUD000687875], 20. J Frowein (87) 515.

¹²⁹ However, the 'determination' need not form the main point or even the purpose of the proceedings. It is sufficient that the outcome of the claimed judicial proceedings may also be 'decisive for' or may 'affect' the determination and/or the exercise of the right, or the determination and/or the fulfilment of the obligation, as the case may be. That right or obligation does not have to constitute the direct object of the procedure; moreover, the determination need not necessarily concern the existence of a right or obligation, but may also relate to its scope or modalities (*Le Compte, Van Leuven and De Meyere v Belgium* (n 128) 22; *Bentham v The Netherlands* (ECtHR), Judgment of 23 October 1985, Series A no. 97 [ECLI:CE:ECHR:1985:1023JUD000884880] 15 ff. J A Frowein (n 87) 515.

¹³⁰ The result may be different if the only feasible way of enforcement is denied. This result, however, does not require us to assume that all guarantees of Article 6 apply to enforcement proceedings. Rather, it can also be explained by subjecting enforcement proceedings only to a general fairness test as suggested in the text below.

Article 6 outlined above (a fact which can hardly be assumed to have escaped the Court), the term *integral part of the trial* probably should not be understood as implying a full application of all guarantees provided by Article 6 to enforcement proceedings. The best explanation seems to be that for purposes of Article 6 the proceedings at the title stage and enforcement proceedings have to be examined together for some purposes without all guarantees of Article 6 necessarily also applying to the latter. Thus, apart from the reasonable time requirement (the application of which to enforcement proceedings is well established) enforcement proceedings are probably only subject to a general fairness test, ie, whether *basic notions* of fairness have been complied with.¹³¹ For a proceeding to be *fair* under Article 6 ECHR, sufficient legal ways of enforcement have to be available (with States probably – as in the context of the ‘right to a court’ in general – enjoying a certain margin of appreciation here), but the only procedural requirements the Convention imposes on enforcement proceedings is that they are decided within a reasonable time and that they conform to general notions of fairness whereas the other more detailed guarantees of Article 6 do not apply to enforcement proceedings as such.¹³² Thus, the Commission probably stated the law correctly when observing that ‘as a general rule, enforcement proceedings following a civil court judgment do not come within the scope of Article 6’.¹³³ In some instances, however, a determination of civil rights and obligations does occur in enforcement proceedings. These instances will be examined in the next section of this paper.

4.4 Full Application of Guarantees of Article 6 ECHR

- 73 If a determination of civil rights occurs only at the enforcement stage, the requirements of Article 6 ECHR have to be met in this respect. For purposes of the Convention, it is immaterial whether the proceeding leading to a decision is categorized as being part of the

¹³¹ It is well established that the ‘right to a court’, of which the right of access is one aspect, is not absolute; it is subject to limitations permitted by implication and calls for regulation by the State, which enjoys a certain margin of appreciation in this regard (*Annoni di Gussola v France* (n 72), para 48; *Edificaciones March Gallego S.A. v Spain* (ECtHR), Judgment 19 February 1998 [ECLI:CE:ECHR:1998:0219JUD002802895], Reports 1998-I, 290, para 34; *García Manibardo v Spain* (ECtHR), Judgment 15 February 2000 [ECLI:CE:ECHR:2000:0215JUD003869597], ECHR 2000-II, para 36).

¹³² This construction of Article 6 is similar to the Court’s decisions on legal aid: While the Court consistently has held that an application for legal aid falls outside the scope of Article 6 (see, eg, *Ivanova v Finland* (ECtHR), Judgment of 28 May 2002 [ECLI:CE:ECHR:2002:0528DEC005305499], no 53054/99), it has also pointed out that availability of legal aid for indigent defendants may be important in assessing the fairness of a proceeding (see *Airey v Ireland* (ECtHR), Judgment of 9 October 1979 [ECLI:CE:ECHR:1979:1009JUD000628973], Series A no 32) and that the decision on an application for legal aid may not be arbitrary.

¹³³ *Krone v Austria* (n 117).

‘title stage’ of the proceedings or part of enforcement proceedings under national law.¹³⁴ A good example for a determination of civil rights only at what is considered to be the enforcement stage under national law is Portuguese law according to which in an action for damages the final determination of ‘*quantum*’ can be reserved for the enforcement proceedings.¹³⁵ In a number of decisions dealing with this aspect of Portuguese law, the Court has held that if the national law of a State makes provision for proceedings consisting of two stages – one when the court rules on the existence of an obligation to pay and another when it fixes the amount owed – it is reasonable to consider that, for purposes of Article 6 paragraph 1, a civil right is not ‘determined’ until the amount has been decided.¹³⁶ The determination of a right entails deciding not only on the existence of that right, but also on its scope or the manner in which it may be exercised.¹³⁷

- 74 Another example are *severance (partition) proceedings*: In some countries, the decision as to how a jointly owned property be partitioned is rendered only at the enforcement stage.¹³⁸ In these cases, it is quite clear that the decision involves a ‘determination of a civil right’, even if it is rendered at a stage of the proceedings categorized as ‘enforcement proceedings’ under national law.¹³⁹
- 75 Another area where Article 6 may be of importance on the enforcement stage is *eviction proceedings*. In *Immobiliare Saffi v Italy*¹⁴⁰, the Court held:

As the tenant did not contest termination, the only outstanding point concerned the date of repossession. For so long as that date was put back owing to the tenant’s refusal to leave voluntarily, which entailed a *de facto* extension to the lease and a subsequent

¹³⁴ It is well established that the nature of the right or obligation under domestic law is not decisive: what matters is whether according to general objective principles, in which context the legal systems of the other contracting States must also be taken into consideration, the character of a ‘civil right’ or ‘civil obligation’ can be assigned to the right or obligation at issue, taking into account in particular the capacity of the person claiming the right and the conditions in which he exercises or wishes to exercise it. See *König v Germany* (ECtHR), Judgment of 28 June 1978, Series A no 27, 30; *H. v Belgium* (ECtHR), Judgment of 30 November 1987 [ECLI:CE:ECHR:1987:1130JUD000895080], Series A no 127, 33 – 34.

¹³⁵ Section 661 paragraph 2 Portuguese Code of Civil Procedure. See *Guincho v Portugal* (ECtHR), Judgment of 10 July 1984 [ECLI:CE:ECHR:1984:0710JUD000899080], Series A no 81; *Silva Pontes v Portugal* (ECtHR), Judgment of 23 March 1994 [ECLI:CE:ECHR:1994:0323JUD001494089]; see also *Martin Moreira v Portugal* (ECtHR), Judgment of 26 October 1988 [ECLI:CE:ECHR:1988:1026JUD001137185], Series A no 143, para 44. In this case the Court found a violation because already the first stage of proceedings took too long.

¹³⁶ *Silva Pontes v Portugal* (n 134) para 30.

¹³⁷ *Silva Pontes v Portugal* (n 134) para 30, citing *Pudas v Sweden* (ECtHR), Judgment of 27 October 1987 [ECLI:CE:ECHR:1987:1027JUD001042683], Series A no 125-A, para 31. In *Silva Pontes*, the Court also expressly stated that the dispute (contestation) over the applicant’s right to damages would only have been resolved by the final decision in the enforcement proceedings (para 33).

¹³⁸ See *W. v Austria* (ECtHR), Judgment of 13 July 1988 [ECLI:CE:ECHR:1988:0713DEC001075784], No 10757/84, DR 56, 36 (not decided because *W.* lacked standing).

¹³⁹ *Krone v Austria* (n 117).

¹⁴⁰ *Immobiliare Saffi v Italy* (n 89).

restriction on the applicant's right of property, there continued to be a dispute for the purposes of art 6.

While this probably only was intended to justify the application of the time requirement of Article 6 ECHR, a determination of a 'civil right' may occur in eviction proceedings if the court can stay or defer enforcement and, thus, in effect extend the lease.¹⁴¹

- 76 The *imposition of sanctions* for failure to comply with a court order also raises questions as to whether Article 6 applies to such proceedings. While the kind of action(s) that the defendant is required to perform or abstain from has been determined at the title stage of the proceedings, the question of whether the defendant actually failed to comply with the decision was not at issue.
- 77 One final example may illustrate some of the difficulties the issue of whether or not a determination of a civil right occurs in enforcement proceedings may pose in a civil law system: In some countries, the court, by *ex parte* order, levies an *attachment* on defendant's wages and simultaneously orders the employer to pay the wages to the judgment creditor. It has been suggested that this was already a determination of civil rights and, therefore, the order to the employer should be issued separately only after the attachment order was served upon the defendant and he had an opportunity to be heard.¹⁴² Regardless of the possible merits of this view under national law, reliance on Article 6 of the Convention in this context seems misplaced. As pointed out *supra*, the guarantees of this provision do not apply to all decisions having some influence on the civil rights of a person, but require that there is a genuine dispute. In the context of enforcement proceedings, since the possibility of attachment proceedings is a standard way of enforcement authorized by statute, it is hard to envisage in what respect there could be a genuine *dispute* (contestation) triggering the guarantees of Article 6. Moreover, the Convention does not necessarily require that defendant is heard *ex ante*; even if – *arguendo* – we assume that Article 6 applies to this situation at all, the requirements of the Convention could be satisfied if there are remedies *ex post* enabling the debtor to challenge the attachment.

¹⁴¹ In *Immobiliare Saffi* (n 89) the delay of the enforcement proceedings was in part (although not exclusively) due to a repeated extension of stays of eviction proceedings by legislative measures, not by court orders.

¹⁴² T Hoeren, 'Der Pfändungs- und Überweisungsbeschuß: Praktikabilität vor Verfassungsrecht?', (1991) NJW 410.

ABBREVIATIONS AND ACRONYMS

ACCP	Code of Civil Procedure (Argentina)
ALI	American Law Institute
ARS	Argentine Peso
Art	Article/Articles
BGH	<i>Bundesgerichtshof</i> (Federal Court of Justice) [Germany]
CEPEJ	<i>Conseil de l'Europe Commission européenne pour l'efficacité de la justice</i> (Council of Europe European Commission for the efficiency of justice)
cf	<i>confer</i> (compare)
ch	chapter
CIDH	<i>Corte Interamericana de Derechos Humanos</i> (Interamerican Court of Human Rights)
CJEU	Court of Justice of the European Union
EBRD	European Bank for Reconstruction and Development
ECLI	European Case Law Identifier
ECtHR	European Court of Human Rights
ed	editor/editors
edn	edition/editions
eg	<i>exempli gratia</i> (for example)
ELI	European Law Institute
etc	et cetera
EU	European Union
EUR	Euro
ff	following
fn	footnote (external, ie, in other chapters or in citations)
GCCP	Code of Civil Procedure (Germany)
GDPR	General Data Protection Regulation (EU)
GG	<i>Grundgesetz</i> (Federal Constitution) (Germany)
ibid	<i>ibidem</i> (in the same place)
ICPR	Civil Procedure Regulations (Israel)
ICT	Information and Communication Technologies
ie	<i>id est</i> (that is)
IIDP	<i>Instituto Iberoamericano de Derecho Procesal</i> (Iberoamerican Institute of Procedural Law)
ITL	Italian Lira
n	footnote (internal, ie, within the same chapter)

no	number/numbers
para	paragraph/paragraphs
pt	part
Sec	Section/Sections
supp	supplement/supplements
trans/tr	translated, translation/translator
UK	United Kingdom
UKCPR	Civil Procedure Rules (UK)
UNIDROIT	<i>Institut international pour l'unification du droit privé</i> (International Institute for the Unification of Private Law)
UP	University Press
US / USA	United States of America
USD	United States Dollar
v	versus
vol	volume/volumes
WB	World Bank

LEGISLATION

International/Supranational

European Convention for Human Rights.

Ibero-American Convention for Human Rights.

National

Abgabenordnung (Fiscal Code) (Germany).

Bundesverwaltungsvollstreckungsgesetz (Federal Code of Compulsory Enforcement in Public Matters) (Germany).

Civil Code (*Bürgerliches Gesetzbuch*, BGB) (Germany).

Civil Execution Act (Japan).

Code de Procedure Civil (Code of Civil Procedure) (France).

Code of Civil Procedure (Japan).

Code of Civil Procedure (Portugal).

Code of Civil Procedure (*Zivilprozessordnung*) (Germany).

Constitución Española (Constitution of Spain) (Spain).

Exekutionsordnung (Enforcement Act) (Austria).

General Code Process (Uruguay).

Gesetz zur weiteren Fortentwicklung des Finanzplatzes Deutschland of 21 June 2002, Federal Gazette (*Bundesgesetzblatt*, BGBl), part I, p 2010 (Germany).

Grundgesetz (Basic Law for the Federal Republic of Germany) (Germany).

Insolvenzordnung (Insolvency Code) (Germany).

Law 19.090 (Uruguay).

Ley de Enjuiciamiento Civil Española (Civil Procedural Rules) (Spain).

Sozialgerichtsgesetz (Social Security Courts Act) (Germany).

Verwaltungsgerichtsordnung (Code of Administrative Court Procedure) (Germany).

CASES

International/Supranational

- CIDH *Baena vs. Panamá*, Decision 28 November 2003 (2003).
- CIDH *Cinco Pensionistas vs Perú* (2003) 28 February 2003 (2003).
- CIDH *Furlan vs Argentina*, Decision 31 July 2012 (2012).
- CIDH *Mejia Idovro vs Ecuador*, Decision 5 July 2011 (2011).
- CJEU *Denilauler/Couchet Frères*, Judgment of 21 May 1980, As 125/79, Rec 1980, n 5.
- ECHR *Airey v Ireland*, Judgment of 9 October 1979, series A no 32.
- ECHR *Annoni di Gussola v France*, Judgment 17 October 2000.
- ECHR *Annoni di Gussola v France*, judgment of 14 November 2000 No. 31819/96 and 33293/96 final February 2001.
- ECHR *Antonakopoulos et al v Greece* (1994).
- ECHR *Bentham*, Judgment of 23 October 1985, Series A no 97.
- ECHR *Bieliec vs Montenegro* (2009).
- ECHR *Brumarescu v Romania*, Judgment of 28 October 1999, Reports 1999-VII.
- ECHR *Burdov v Russia*, Judgment of 18 April 2002.
- ECHR *Chappell v UK*, Judgment of 30 March 1989, series A no 152-A.
- ECHR *Comingersoll S.A. v Portugal*, Judgment of 6 April 2000.
- ECHR *Commission of the European Communities v the Hellenic Republic*, Judgment of 15 March 1988, no 147/86.
- ECHR *Crémieux v France*, Nr. 1147/85.
- ECHR *Cvijetic v Croatia*, Judgment of 26 February 2004 (eviction proceedings lasting from 1994 – 2002).
- ECHR *De Becker* Judgment of 27 March 1962, Series A no 4.
- ECHR *DeCubber v Switzerland*, Judgment of 26 October 1984.
- ECHR *Di Pede v Italy, Zappia v Italy* (1996).
- ECHR *Dimitrios Georgiades v Greece*, Judgment of 28 March 2000.

ECHR *Edificaciones March Gallego S.A. v Spain*, Judgment 19 February 1998, Reports 1998-I, § 34.

ECHR *Emsenhuber v Austria*, Decision of 11 September 2003, no 54536/00.

ECHR *Eriksson v Sweden*, Judgment of 2 June 1989, Series A no 156.

ECHR *Funke v France*, judgment of 25 February 1993, A256-A § 57.

ECHR *García Manibardo v Spain*, Judgment 15 February 2000, § 36, ECHR 2000-II).

ECHR *Gasus Dosier- und Fördertechnik GmbH v The Netherlands*, Judgment of 23 February 1995, A306-B.

ECHR *Golder v United Kingdom*, Judgment of 21 February 1975, Series A no 18.

ECHR *Guincho v Portugal*, Judgment of 10 July 1984, Series A no 81.

ECHR *H v Belgium*, Judgment of 30 November 1987, Series A no 127.

ECHR *Hokkanen v Finland*, Judgment of 23 September 1994, Series A no 299-A.

ECHR *Hornsby v Greece*, Judgment of 25 February 1997, Reports 1997-II.

ECHR *Ignaccolo Zenide v Romania*, Judgment of 25 January 2000, Reports 2000-I.

ECHR *Immobiliare Saffi v Italy*, Judgement of 28 July 1999, ECHR 1999-V.

ECHR *Ivanova v Finland*, Judgment of 28 May 2002, no 53054/99.

ECHR *J.B. v Switzerland*, no 31827/96, ECHR 2001-III.

ECHR *Kansal v UK*, Judgment 27 April 2004.

ECHR *Keegan v Ireland*, Judgment of 26 May 1994, Series A no 290.

ECHR *König*, Judgment of 28 June 1978, Series A no 27.

ECHR *Krombach v Bamberski*, Judgment of the ECJ of 28 March 2000.

ECHR *Krombach v France*, Judgment of 13 February 2001.

ECHR *Kyrtatos v Greece*, Judgment of 22 May 2003.

ECHR *Le Compte, Van Leuven and De Meyere*, Judgment of 23 June 1981, Series A no 43.

ECHR *Margareta and Roger Andersson v Sweden*, Judgment of 25 February 1992, series A no 226-A.

ECHR *Martin Moreira v Portugal*, Judgment of 26 October 1988, Series A no 143.

ECHR *McMichael v United Kingdom*, Judgment of 24 February 1995, series A no 307-B.

ECHR *Miailhe v France*, Judgment of 26 September 1996, Reports 1996-IV.

ECHR *Morel v France*, Judgment of 16 May 2000, No 34130/96.

ECHR *Nicolow vs Macedonia* (2007).

ECHR *Nuutinen v Finland*, Judgment of 27 June 2000, Reports 2000-VIII 1994.

ECHR *Olsson v Sweden* (no 2), Judgment of 27 November 1992, Series A no 250.

ECHR *Palumbo v Italy*, Judgment of 30 November 2000.

ECHR *Pralika vs Bosnia Hersegovina*.

ECHR *Pudas v Sweden*, Judgment of 27 October 1987, Series A no 125-A.

ECHR *Rybakykh v Russia*, Judgment of 24 July 2003.

ECHR *Silva Pontes v Portugal*, Judgment of 22 February 1994.

ECHR *Sophia Gudrun Hansen v Turkey*, Judgment of 23 September 2003.

ECHR *Stran Greek Refineries and Stratis Andreadis v Greece*, Judgment of 9 December 1994, Series A no 301-B, § 59.

ECHR *Sylvester v Austria*, Judgment of 24 April 2003.

ECHR *Vasilopoulou v Greece*, Judgment of 21 March 2002.

ECHR *W v Austria*, No 10757/84, DR 56, 36.

ECHR *Weh v Austria*, 8 April 2004.

ECHR *X v Germany*, Decision of 14 March 1980, application no 8469/79.

EU Commission decision *Krone v Austria*, Judgment of 21 May 1997, No 28977/95.

National

BGH JZ 2005, 525, 526 (Supreme Court, Germany).

BVerfG 49, 220 (Constitutional Court, Germany), Decision 27 September 1978.

BVerfGE 1, 97, 105 (Constitutional Court, Germany).

BVerfGE 22, 180, 204 (Constitutional Court, Germany).

BVerfGE 36, 73, 84 (Constitutional Court, Germany).

BVerfGE 46, 325 (332) (Constitutional Court, Germany) [NJW 1978, 368].

BVerfGE 49, 220, 232; 51, 97, 113; 57, 346, 356-357 (Constitutional Court, Germany).

BVerfGE 51, 97 (Constitutional Court, Germany) [NJW 1979, 1539].

BVerfGE 56, 37 (Constitutional Court, Germany) [NJW 1981, 1431].

BVerfGE 59, 231, 263 (Constitutional Court, Germany).

BVerfGE 65, 182, 193 (Constitutional Court, Germany).

BVerfGE 68, 193, 222; 83, 201, 208 f (Constitutional Court, Germany).

Pietranera, Josefa y otros v Gobierno Nacional (Supreme Court, Argentina) Judgment 7 September 1966 [265.291].

VfSlg 14.473 (Constitutional Court, Austria).

BIBLIOGRAPHY

- Alexander L and Kress K, 'Against Legal Principles' in Andrei Marmor (ed), *Law and Interpretation: Essays in Legal Philosophy* (1995) 279.
- Alexy R, 'Constitutional Rights and Proportionality' (2014) 22 *Revus - Journal for Constitutional Theory and Philosophy of Law*, 51-65.
- , 'Proportionality and rationality' in V C Jackson und M V Tushnet (ed), *Proportionality: New frontiers, new challenges*, (Cambridge University Press 2017), 13-29.
- , 'The construction of constitutional rights', (2010) 4 *Law & Ethics of Human Rights*, 20–32.
- , *Theorie der Grundrechte* (Suhrkamp 1986).
- Baer S, 'Dignity, Liberty, Equality: A Fundamental Rights Triangle of Constitutionalism' 59 (4) *The University of Toronto Law Journal* (2009), 417-468.
- Barak A, *Proportionality. Constitutional Rights and their Limitations* (Cambridge University Press, 2012).
- Baumann J and Brehm W, *Zwangsvollstreckung* (Gieseking 1982).
- Beys K, *Grundrechtsverletzungen bei der Zwangsvollstreckung* (Eunomia Verl 1996).
- Brunner K, *Der Gerichtsvollzieher des 21. Jahrhunderts Ein Bericht des stellvertretenden Bundesvorsitzenden Karl-Heinz Brunner über den 21. Weltkongress der UIHJ* (2012).
- Canaris C, *Grundrechte und Privatrecht* (1984), 201-246.
- Canstein R, *Lehrbuch des österreichischen Civilprocessrechts* (2nd edn) II 783.
- Cappelletti M, *The Judicial Process in Comparative Perspective* (Clarendon Press 1989).
- Carreras J, *El embargo de bienes* (Bosch 1957).
- Cassagne E, 'El plazo y otras restricciones a las medidas cautelares: A propósito de la ley 26.854', *Suplemento Especial - Cámaras Federales de Casación*.
- Cherednychenko O, 'Fundamental Rights, in European Private Law and Financial Service', in H Micklitz (ed), *Constitutionalization of European Private Law*, (Oxford University Press 2014), 203-208.
- Cherednychenko O, *Fundamental Rights, Contract Law and the Protection of the Weaker Party* (Sellier 2007).

Cole M, 'Il Diritto concorsuale statunitense in un contesto globale', in F Giovanni (ed), *Quaderni di Giurisprudenza commerciale, Soluzione Negoziali e Istituti Preconcorsuali Nella Gestione Della Crisi* (Giuffrè Editore 2013), 223 – 234.

Díez Riaza S, *Armonización europea en material de ejecución civil: Especial consideración de la introducción del huissier de justice en nuestro ordenamiento* (Consejo General de Procuradores 2002).

Djankov S, Hart O, McLiesh C and Shleifer A, 'Debt Enforcement around the World', (2008) 116 (6) *Journal of Political Economy* 1105-1149.

Dworkin R, *Taking Rights Seriously* (Harvard University Press 1977).

Eickmann D, *Die Rationalisierung der Zwangsvollstreckung und ihre Auswirkungen auf den Gerichtsvollzieher* (1977), 103-110.

-----, *Vollstreckungssysteme und Gerichtsvollzieherstellung in Europa*, (1980) 129-136.

Emiliou N, *The Principle of Proportionality in European Law: A comparative Study* (Kluwer 1998).

Fenge H, 'Entscheidungen über den Schuldnerschutz in der Zwangsvollstreckung nach unterschiedliche Wertordnungen', in K Beys, *Grundrechtsverletzungen bei der Zwangsvollstreckung* (Dike International, 1996), 69.

Ferreres Comella V, *Constitutional Courts and Democratic Values: a European Perspective* (Yale University Press 2009).

Fischer N, *German National Report*.

-----, *Vollstreckungszugriff als Grundrechtseingriff* (Frankfurt am Main, Vittorio Klostermann 2006)

Freitas J, *A ação executiva*, (Coimbra 2014).

Frowein J A, 'The Protection of Property the European System for the Protection of Human Rights', in R Macdonald, F Matscher and H Petzold, *The European System for the Protection of Human Rights*, 515.

Gaul F, 'Zur Problematik der Grundrechtsverletzungen in der Zwangsvollstreckung', in K Beys, *Grundrechtsverletzungen bei der Zwangsvollstreckung* (Dike International 1996), 27.

Gaul H, E Schilken and E Becker-Eberhard, *Zwangsvollstreckungsrecht* (12th edn, C.H. Beck, 2010).

-----, *Rechtsverwirklichung durch Zwangsvollstreckung aus rechtsgrundsatzlehrer und rechtsdogmatischer Sicht* (1999) 112 ZZP, 135.

Gilles P, 'Thesen zur einigen der rechts- und verfassungs-, -verfahrens- und justizpolitischen Aspekte des Themas: Grundrechtsverletzungen bei der Zwangsvollstreckung', in K Beys, *Grundrechtsverletzungen bei der Zwangsvollstreckung* (Dike International 1996), 111.

Gramckow H, *Effective Processes and Enforcement Agents* (Justice Reform Practice Group, World Bank 2012).

-----, *Effective Processes and Enforcement Agents* (World Bank 2012).

Guinchard S, *La garantie de l'exécution de la décision du Juge, Droit Processuel*, (Daloz, 2009), 1015.

Haertlein L, *Exekutionsintervention und Haftung* (Mohr Siebeck 2008).

Heiderhoff B and Skamel F, *Zwangsvollstreckungsrecht* (2nd edn, C.F. Müller 2013).

Hess B, *Die Neueorganisation des Gerichtsvollzieherwesens in Deutschland* (Nomos 2006).

-----, *Tradition and Reform Van Rhee* (Intersentia 2010), 41.

Hoeren T, 'Der Pfändungs- und Überweisungsbeschuß: Praktikabilität vor Verfassungsrecht?', (1991) NJW 410.

Jelinek W, 'Verfassungsrechtliche Aspekte der Zwangsvollstreckung in Österreich', in K Beys (ed), *Grundrechtsverletzungen bei der Zwangsvollstreckung* (Dike International 3, 1996), 301ff.

Jeuland E, *France National Report*.

Jongbloed A, *The bailiff in Europe, utopia or reality?* (Kluwer, 2004).

Kahlke, NJW 1991, 2688.

Keith et al, *Barriers to the Enforcement of Court Judgments and the Rule of Law* (World Bank 2003).

Kengyel M and Harsági V, *Grenzüberschreitende Vollstreckung in der Europäischen Union* (Sellier 2011).

Kerameus K, 'Die Angleichung des Zivilverfahrensrechts in der Europäischen Union vor dem Hintergrund der Schaffung eines Europäischen Zivilgesetzbuches', in *Untersuchung der Privatrechtsordnungen der EU im Hinblick auf Diskriminierungen und die Schaffung*

eines europäischen Zivilgesetzbuch (Workpaper, JURI 103 DE, October 1999; PE 168.511), 85-95.

-----, 'Enforcement Proceedings' (2002), XVI (10) International Encyclopedia of Comparative Law-Civil Procedure (Tübingen, Mohr Siebeck).

Kern C, 'Principios de la ejecución individual de acuerdo al Código Procesal Civil alemán: Transparencia y eficiencia', in Á Perez Ragone and P Tavorari Goycoolea (ed), *Derecho Procesal Civil Comparado: Homenaje a Rolf Stürner* (Thomson Reuters, 2013), 133.

-----, *Typizität als Strukturprinzip des Privatrechts* (Mohr Siebeck 2013).

Klamaris N, 'Zum Stand des griechischen Zwangsvollstreckungsrechts', 121, 475.

Klatt M and Meiste M, *The Constitutional Structure of Proportionality*, (Oxford University Press, 2012).

Klatt M, 'Die Abwägung von Rechtsprinzipien', in C Hiebaum (ed), *Handbuch Gemeinwohl* (Wiesbaden, Springer 2021), 2-16.

-----, 'Proportionality and justification', in E Herlin-Karnell und M Klatt, *Constitutionalism justified. Rainer Forst in discourse* (Oxford University Press 2019), 159-196.

Lepa B, *Insolvenzordnung und Verfassungsrecht* (Duncker & Humblot 2001).

Lücke G, *Die öffentlich-rechtliche Theorie der Zwangsvollstreckung und ihre Grenzen* (Frankfurt 1953).

Matscher F, 'Methods of Interpretation of the Convention', in R Macdonald, F Matscher and H Petzold, *The European System for the Protection of Human Rights*, 63.

Menut B, Mesut, *Pour un Code mondial de l'exécution, L'harmonization des procédures d'exécution dans un espace de justice sans frontière* (Paris 2006), 21-75.

Nakamura H, 'Grundrechtsverletzungen bei der Zwangsvollstreckung' in Japan, K Beys (ed), *Grundrechtsverletzungen bei der Zwangsvollstreckung* (Dike International 1996), 491ff.

Núñez R, A Pérez and M Vargas, *Hacia una mejor ejecución civil*, (Thomson Reuters 2013).

Oteiza E, 'El cercenamiento de la garantía a la protección cautelar en los procesos contra el Estado por la ley 26.854', La Ley, Sup Esp 2013.

-----, *Argentina National Report*.

- Ovey C and White R, *The European Convention on Human Rights* (4th edn, Oxford OUP 2006).
- Pellegrini A, 'Cumprimento da sentença. Temas atuais da Execução civil' (Sao Paulo, 2007), 1-10.
- Pereira Campos S and Valentin G, *Uruguay National Report*.
- Peyrano J, *El proceso civil. Principios y fundamentos* (Astrea 1978).
- Picó i Junoy J, *Las garantías constitucionales del proceso* (Bosch 1997).
- Priori G, *Proceso y Constitución. Efectividad y ejecución de las resoluciones judiciales* (Lima Palestra 2014).
- Ronald M, F Matscher and H Petzold, *The European System for the Protection of Human Rights* (Brill 1993) 345.
- Rosenberg L, Gaul H, Schilken E and Becker-Eberhard E, *Zwangsvollstreckungsrecht* (Munich Beck 2010).
- Rüßmann H, 'Buchbesprechung zu Jauernig, Zwangsvollstreckungs- und Konkursrecht', (1989) ZJP 102, 398-404.
- Schulze G, *Die Naturalobligation* (Tübingen Mohr Siebeck 2008).
- Schwab K and Gottwald P, 'Verfassung und Zivilprozess', in W Habscheid, *Rechtsschutz und verfassungsmässige Ordnung* (Bielefeld Giesecking 1983).
- Spry I, *The Principles of Equitable Remedies* (London Thomson Reuter 2010).
- Stamm J, *Die Prinzipien und Grundstrukturen des Zwangsvollstreckungsrechts* (Tübingen Mohr Siebeck 2007).
- Stürner M, *Der Grundsatz der Verhältnismässigkeit im Schuldvertragsrecht* (Tübingen Mohr Siebeck 2010).
- Stürner R, 'Prinzipien der Einzelvollstreckung' (1986) ZJP 99, 291-332.
- Tarzia G, 'Aussichten für eine Harmonisierung des Zwangsvollstreckungsrechts in der Europäischen Union', (1996) ZeuP 231-242.
- Terhechte J, *Konstitutionalisierung und Normativität der europäischen Grundrechte* (Tübingen Mohr Siebeck 2011).
- Trocker N, 'The Right to Effective Enforcement of Civil Judgments and Orders' (2008) ZJPINT 13, 115.

Uzelac A, 'The Role played by the Profession of Bailiffs in the Proper and Efficient Functioning of the Judicial System: An Overview with Special Consideration of the Issues Faced by Countries in Transition', in *The Role, Organisation, Status and Training of Bailiffs – Strengthening the Enforcement of Court Decisions in Civil and Commercial Cases* (Varna Bulgaria 2002).

-----, *On the goals of civil procedure see Goals of Civil Justice and Civil Procedure in Contemporary Judicial Systems* (Cham Heidelberg Springer 2014).

Van Rhee R and Uzelac A, *Enforcement and Enforceability. Tradition and Reform* (Antwerp Intersentia 2010).

Verbic F, 'El nuevo régimen de medidas cautelares contra el Estado Nacional y su potencial incidencia en el campo de los procesos colectivos' (2013) Sup. Esp., *La Ley* 1.

Vittoria P, 'Giusto processo ed effettività della tutela giurisdizionale esecutiva nelle recenti e meno recenti modifiche del codice di procedura civile' (2009) in *Riv. es. forz.*, 365ff.

Webber G, *The Negotiable Constitution: on the Limitations of Rights* (Cambridge University Press 2009).

Wolf M, 'Eigentumschutz in der Zwangsvollstreckung', in K Beys, *Grundrechtsverletzungen bei der Zwangsvollstreckung* (Athen Dike International 1996) 201.

Zöllner W, 'Materielles Recht und Prozeßrecht' (1990) *Archiv für die civilistische Praxis* 190, 471-495.

Zucca L, 'Conflicts of Fundamental Rights as Constitutional Dilemmas', in E Brems, *Conflicts Between Fundamental Rights* (Antwerp Intersentia 2008) 19-37.