HELLENIC REPUBLIC

GREEK NATIONAL COMMISSION FOR HUMAN RIGHTS

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EVALUATIONS OF THE DRAFT LAW ON 'COMPLIANCE OF THE ADMINISTRATION WITH COURT JUDGMENTS AND PROMOTION OF JUDGES OF THE REGULAR ADMINISTRATIVE COURTS TO THE RANK OF COUNCILLOR OF STATE'*

INTRODUCTION

At an international level, the prevailing modern principle calls for the elimination of the privileged position of the state, the organs of local government and the public enterprises in relation to their opponent when the latter is a private individual. The principal aspects of this principle are (a) the enforced execution of judgments against the state, the organs of local government and the public enterprises; (b) the undeviating compliance of the administration with judicial judgments; (c) the equalisation of the default interest which the state, on the one hand, and individuals, on the other, are under an obligation to pay.

The response up to now of the Greek legal order to international and European case law developments in the safeguarding of the right to the execution of national court judgments is a successful example of the compliance of Greece with the European and international *acquis*. In a very short time from the point when - chiefly - the case law on the European Convention of Human Rights (ECHR)[1] and on the International

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Covenant on Civil and Political Rights (ICCPR)[2] highlighted the right to the execution of court judgments without discrimination as to whether the the party convicted was an individual or the state, the Greek legal order conformed accordingly.

First of all, the Greek judge had held, as early as 1998, the legislative prohibition in force up till then of enforced execution against the state and the other legal persons which enjoyed this abusive privilege up to that point to be contrary to the ICCPR.[3]

The recent judgment 21/2001 of the Plenum of the Court of Cassation of the Areios Pagos set the seal on the turn in the case law of the Greek courts on the right to the execution of judgments. This judgment of the Areios Pagos confirms the direct and supra-legislative force of the provisions of the ICCPR and of the ECHR and holds that these provisions give grounds for rights in favour of persons subject to its field of application. These provisions, the Areios Pagos stresses, guarantee not only free access to the courts but also the actual satisfaction of the right which has been acknowledged by the court, that is, the right to enforced execution without which recourse to the court would be divested of its value and usefulness. Consequently, the enforced execution of court judgments which award pecuniary claims against the state and the serving of an order for payment of such claims is now permissible.

The constitutional legislator has introduced these new trends into the Constitution (Revision of 2001) by means of the right of the citizens to require the compliance of the administration with court judgments, already adopted by the case law. Revised Article 95, para. 5 of the Constitution lays down the following: "*The administration shall be under an obligation to comply with court judgments. The dereliction of this obligation shall give rise to liability for every competent organ, as the law provides. The law shall determine the measures necessary to ensure the*

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[1] European Court of Human Rights (EurCHR), *Hornsby* judgment, 19.3.1997, Receuil 1997, p. 495.

[2] European Court, reference *Fei v. Colombia*, No. 514/1992.

[3] Thiva Single-Member Court of First Instance 360/1998, *NoB* 46 (1998), p. 1600.

compliance of the administration.". Article 94, para. 4, sub-para. 3 of the Constitution, also revised, lays down the following: "*Any other competence of an administrative nature may be entrusted to the civil or administrative courts, as the law provides. Included in these competences shall be the taking of measures for the compliance of the administration with court judgments. Court judgments shall also be enforced against the state, local government organisations and public law legal persons, as the law provides.*"

The draft law entitled 'Compliance of the administration with court judgments, etc.' which the Minister of Justice has sent to the National Commission for Human Rights has as its purpose the regulation of the compliance of the administration with court judgments, in implementation of Articles 95, para. 5 and 94, para. 4 of the Constitution.[4]

It a well-known fact that the instances of non-compliance with court judgments or of their non-execution are far from rare in the case of the state. However, where they are most frequently encountered is in the case of public law legal persons.

It is particularly the organs of local government - above all the municipalities - not infrequently jealous of certain new rights which they possess, with the right of expropriation first and foremost - which abuse the exercise of this power, and as a rule then employ every means in order to delay payment to the party entitled. And even when this has been preceded by the determination of a certain compensation by the court, the execution of the relevant court judgment by the municipalities ends up as a veritable trial and tribulation - not infrequently with a dubious outcome - for the beneficiary.

A. THE PROCEDURE FOR THE COMPLIANCE OF THE ADMINISTRATION WITH COURT JUDGMENTS

[4] The rapporteurs have taken into account Judgment 5/2002 of the administrative Plenum of the Council of State with observations on the draft law and the relevant proposals of the working-team under Emeritus Professor E. Spiliotopoulos, set up by the Minister of Justice (Decision No. 111661 oik./6.7.2001).

The most drastic means of compliance of the administration would doubtless be the adoption of the German model, that is, the introduction of the action for specific performance when compliance is not forthcoming and the re-activation of Articles 105 and 106 of the introductory law to the Civil Code on the personal liability of the organs of the state to pay compensation, a liability which was abolished by the Civil Servants' Code and the Code of Municipalities and Communes, even when the party responsible acted with *dolus*.
The draft law of the Ministry of Justice adopts milder measures.

Article 1 of the draft repeats the constitutional obligation of compliance with court judgments and defines which judgments give rise to an obligation of compliance.
It is proposed that those judgments which are issued in the proceedings for interlocutory judicial protection, which is safeguarded by Article 20, para. 1 of the Constitution should be expressly included in the judgments which give rise to an obligation of compliance.

Article 2 of the draft seeks to regulate the competence to take measures to ensure the compliance of the administration.
In other countries, the ascertainment of non-compliance and the imposition of the sanction is entrusted to a three-member council of the court which handed down the judgment. But in view of the fact that, on the one hand, the draft law introduces into the Greek legal order new regulations on issues of exceptional importance for the administration of justice and the functioning of the rule of law, and, on the other, the relevant decisions which ascertain non-compliance and impose the sanction cannot be challenged before higher courts, it has been judged more desirable - at least for the first period - that this competence should be entrusted to a three-member organ of each of the relevant supreme courts. And this is what the draft law provides.

As to the composition of the three-member council of each of the relevant supreme courts, the draft law provides for the participation of the President of the relevant supreme court and of two members of the Special Supreme Court, or of two Councillors of State, or of two judges of the Court of Cassation of Areios Pagos, or of two judges of the Court of Audit. However, taking into account the very large number of cases pending before the courts (particularly the administrative courts), membership of the three-member council of persons who do not know the file of the case, because they did not take part in its adjudication, will lead with certainty to further - inadmissible - delay in the final compliance of the administration and the satisfaction of the citizen. *For that reason, it is felt to be more correct for this three-member council to be made up on each occasion by the President (or his alternate) of the formation (e.g., Division) of the supreme court which issued the judgment and two members of this formation, to be chosen by the President. If the judgement has not been issued by the supreme court but by a lower court, the three-member council of that formation which would have been competent to give judgment in the case if it had been introduced before the supreme court will be competent.*
In the light of the foregoing considerations, *we consider it more correct for the third paragraph of Article 2 of the draft law, which precludes the participation of the judges who issued the judgment in the composition of the three-member council which is to supervise the compliance of the administration, should be withdrawn, given, moreover, that the task of the council is not jurisdictional (it does not re-judge the case) but administrative.*

Article 3 of the draft correctly entrusts the whole of the relevant procedure (ascertainment of non-compliance and imposition of the pecuniary sanction) to one and the same organ, the three-member council.
The regulations of paragraphs 2, 4 and 6 of Article 3 of the draft law are positive.

On the other hand, problems are created by the first paragraph of Article 3 of the draft, which provides, in effect, for six successive periods for compliance: 1. the period in which the interested party awaits compliance, that is, from the issuing of the judgment until the submission of the application by the interested party to the three-member council; 2. the period from the submission of the application of the interested party to the ascertainment of unjustified non-compliance; 3. the period - a 'set time-limit' - for the exposition of the views of the administration on the failure to comply; 4. the period - a 'reasonable time-limit' for compliance; 5. the extension period of the latter deadline, if there is grave cause; 6. the period until full and final compliance in practice. With this procedure, compliance is unjustifiably delayed, and, instead of reinforcing, it weakens the protection of the party who has been vindicated by the court, which does not correspond to the concept of Article 95, para. 5 of the Constitution and, *a fortiori*, to the fundamental principle of the rule of law of Article 20, para. 1 of the Constitution. It is worth noting that the stage of the execution of the judgments clearly falls within the concept of the obligation of giving judgment on cases before the courts within a reasonable time which stems from Article 6, para. 1 of the ECHR[5] and Article 14, para. 1 of the ICCPR.[6] In other words, if the unjustifiable tardiness of the compliance of the Greek administration is added to the already slow procedures of the Greek courts (already scores of convictions by the European Human Rights Court for delay in the administration of justice), the total time for adjudication of cases in the Greek legal order and the satisfaction of the citizen who has been wronged will greatly exceed the "reasonable time" of Article 6, para. 1, ECHR and of Article 1, para. 1, ICCPR. *It is proposed that an upper limit of one month for stages 2*

[5] From the case law of the ECHR, see chiefly the Portuguese judgment *Silva Pontes*, 23.3.1994, series A 286-A, para. 33, and the more recent (Italian) judgment *Zappia*, 26.9.1996, Receuil 1996-IV, para. 18, and (Portuguese) judgment *Estima Jorge*, 21.4.1998, Receuil 1998-II, pras 35 - 37.

[6] From the case law of the ICCPR, see the report *Morael v. France*, Communication No. 207/1986. Report *Fei v. Colombia*, Communication No. 514/1992. Report *Munoz v. Peru*, Communication No. 203/1986.

and 3, of three months for stage 4 and of one month for stage 5 should be set.

In the third paragraph of Article 3 of the draft law, there is provision for the imposition irreversibly and in a lump sum of the pecuniary sanction when non-compliance of the administration with court judgments is ascertained. *It is proposed that the more drastic measure of the augmentation of the sanction be adopted in cases of non-compliance (not of defective compliance) until such time as the administration complies; that is to say, the level of the pecuniary sanction would be scaled in proportion to the duration of the non-compliance. This measure - of the augmentation of the sanction - is provided for,* inter alia*, in the Community legal order (Article 228, EC Treaty, formerly 171).*

Given that it is the very poor functioning of the public administration is notorious and that delay in providing a service to the citizen is well established, whether there is a court judgment to be executed or not - a situation which has given rise to the widely circulating term '*grigorosimo*' - the 'sweetener', now firmly established, and used with scarcely a hint of contempt, of a widely varying sum, given to the civil servant for doing his/her duty - the increased severity of the law is necessary in order to achieve an improvement (not, of course, a complete correction of the situation). A rising scale of the sanction is one of the means useful to this end, as is that which immediately follows.

In the fifth paragraph of Article 3 it is provided that the sum of the pecuniary sanction is debited to the ministry, the local government organisation, or the public law legal person to which the authority which has not complied is subject. *On the other hand, there is no provision for the impositon of pecuniary sanctions on the those truly responsible for the non-compliance, who are both the political organs in charge who issue enforceable acts (prefect, minister, general secretary of a region, local governemt organs, etc.) and the civil servants (e.g., forestry inspector, tax inspector).* Consequently, the draft law gives rise to the paradoxical concept of the collectively liable impersonal authority, on which it imposes

the pecuniary sanctions and leaves without any pecuniary sanction the natural persons cited above who actual commit the unlawful act.[7] The result is that a pecuniary sanction is imposed on the citizen-taxpayer (the relevant expenditure is entered on the state budget), which, as it serves as the price paid for the non-compliance of the administration, not only fails to discourage the organs of the administration from acting illegally, but, on the contrary, ensures that they are covered.

It is proposed that there should be provision in the draft law for the possibility of the organ responsible for the ascertainment of the non-compliance to issue, itself, the act the issuing of which is the object of the non-compliance, thus substituting for the administration. Such a regulation is in harmony with the broad entrusting of administrative competences to the judicial power provided for by the new Article 94, para. 4, sub-para. 3 of the Constitution. The relevant procedure can be determined by the decree to be issued by delegation of Article 3, para. 7 of the draft law.

We consider it desirable that the useful institution stipulated (Article 3, para. 2) of the authorised judge should be reinforced by the draft law, so that he can serve generally as the link between the three-member council, the authority which is under an obligation to comply, and the citizen, and as the source of information for the three-member council on the execution-implementation or the continuation of the non-execution-implementation of the administrative decision by the administration at all the stages of the procedure. In this way the task of the three-member council will be facilitated generally, even more if a pecuniary sanction on a rising scale is introduced.

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[7] See Judgment 5/2002 of the administrative Plenum of the Council of State, p. 5, and proposals of the working team under Emeritus Professor E. Spiliotopoulos, p. 7 of the explanatory memorandum.

* Sub-Commission A (Civil and Political Rights) of the NCHR adopted this part (B) of the proposal at its session of 26 June 2002.

Article 4 of the draft law sets the seal on the recent case law of the Court of Cassation of Areios Pagos on the issue of enforced execution against the state (see Introduction).

In line with the foregoing observations, *it is proposed that the first sub-paragraph of Article 4 should be worded as follows: "Non-appealable and provisionally enforceable adverse judgements against the state and public law lgal persons shall be enforceable instruments within the meaning of Article 904 of the Code of Civil Procedure. Instance (1) of Article 909 of the Code of Civil Procedure ('Provisional enforcement cannot be ordered against the state, municipalities and communes') is hereby rescinded."*

It is also proposed that the second sub-paragraph of the first paragraph should be amended in such a way as to permit the actual satisfaction of the citizen.

Article 5 of the draft law makes provision for liability to compensation only for the State and public law legal persons and not for the person (natural person - organ) at fault, apart from the pecuniary sanction of the three-member council.

It is proposed that the following second paragraph should be added:

Together with these legal persons, the organ - natural person at fault which is competent to take the action necessary for compliance shall be liable in full. By competent organ shall be meant in the case of the State the competent minister or any other organ competent by law or by virtue of delegation or of authorisation to sign. In the case of public law legal persons and local government authorities, the members of the board of management or of the prefecture or municipal or commune council or any other organ competent by law or by virtue of delegation or of authorisation to sign shall be liable. Disputes in accordance with this article as to the liability of the competent organ shall be subject to the jurisdiction of the court which is competent to give judgment on disputes arising from the corresponding liability of these legal persons.

Finally, it is proposed that provision should be made for the mandatory exercise of a right of recourse of the State or public law legal persons against the organ - employee responsible.

Article 5 of the draft law provides for disciplinary action against the competent employee, in parallel with any penal liability on his part. It is proposed that the following sub-paragraph should be added to paragraph 1:

"*Any recommendation to the contrary of his superior in the hierarchy shall not constitute grounds for the relief of the employee of liability, but, shall, on the contrary, constitute an aggravating circumstances for the establishing of the liability of the former.*"

It is also proposed that a new article (6a) *should be added at this point* on the penal liability of the competent organs:

"*The organ competent in accordance with Article 5, apart from the members of the Government and deputy ministers, who are subject to penal liability in accordance with Article 88, para. 1 of the Constitution, where it does not, out of grave negligence or malice, proceed to actions necessary for compliance or the execution of a court judgment, shall be sentenced to imprisonment of up to two years. If this omission is made with the purpose of obtaining a benefit for itself or another or of prejudicing the legal person or someone else, the organ shall be sentenced to imprisonment of at least a year.*"

Article 7 of the draft law *should be re-formulated and also include the "more particular definition of the instances of and procedure for subrogation in the issuing of the act when this constitutes the content of compliance*" (see above in Article 3).

Finally, it is proposed that the first paragraph, which lays down that the provisions of the draft law shall be applied only to the decisions which are

issued after the coming into force of the law should be struck out from Article 8. As was noted at the outset, the obligation of the administration to comply with court judgments long ago constituted an international obligation of Greece which has already led to adverse judgments against the country at the European Human Rights Court, and is not created, but simply regulated, by the future law (the draft law under consideration). Consequently, it is legitimate for the provisions of the new law to be applied to decisions which were issued before the coming into force of the law, but only where non-compliance continues and it comes into force.

B. DEFAULT INTEREST OF THE STATE*

The provision of Article 21 of the Second Chapter of the code of laws on trials of the State (Royal Decree of 26 June / 10 July 1944) lays down that included among the substantive privileges of the State is the percentage of the default interest which is paid by the State and which amounts today to 6%, in comparison with individuals, who pay 11.25% (June 2002).

The draft law of the Ministry of Justice on the compliance of the Administration does not rescind this old privilege of the State, which, however, is no longer tolerable by the Greek legal order, for two reasons:

(a) By Judgment 21/2001, the Plenum of the Court of Cassation of Areios Pagos held that the International Covenant on Civil and Political Rights (ICCPR) produces results in law for the Greek legal order and that by Article 3 ICCPR, Greece undertook the obligation, on the one hand, to guarantee that every individual whose rights and liberties recognised in the Covenant are infringed shall have the appropriate recourse at his disposal, and, on the other, to *guarantee the execution by the competent authorities of every judgment which admits the relevant recourse*. Referring, moreover, to Article 14, para. 1 of the ICCPR, which guarantees the right to a fair trial, the Plenum of the Areios Pagos held that court judgments must have *drastic and effective action*. In the same direction, it

held Article 6, para. 1 ICCPR to be consonant with Article 20, para. 1 of the Constitution.

Without doubt, the drastic and effective action of a court judgment cannot but be bound up with the default interest. The low default interest in force for the State, today approximately half that which the individual litigant is forced to pay - while in the past it was many times lower - permits the State to *reduce the drastic action of enforceable judgments against it* and to reduce its opponent to a position of disadvantage. The opponent of the State knows that he does not enjoy *an equality of weapons and a fair trial*, since the favourable default interest today permits the State to ignore for a long period of time the imperative need for court judgments to be executed against it.

(b) However, of greater importance in the case of default interest is the right to protection of property, as that is protected by the European Human Rights Convention.

As the Plenum of the Areios Pagos held in two very important judgments, 40/1998[8] and 14/1999[9], the right of the State to bring into force laws which it judges necessary to regulate the use of goods in accordance with the public interest is not affected by the provision of Article 1 of the first additional Protocol to the EHRC. On the other hand, this provision safeguards respect for an individual's property, of which it can deprive him only for reasons of the public benefit. Included within the concept of property, in accordance with the earlier case law, are obligational rights, and more particularly claims, whether recognised by judicial or arbitral decisions, or merely generated in accordance with national law, provided that there is a lawful expectation, by virtue of the law in force up to the time of the recourse to the court, that they can be satisfied judicially.

In the light of the above, the prohibition of enforced execution for the satisfaction of claims against the Greek State, including private law claims against the state, public law legal persons and state private law legal persons - after the arming of these claims with an executable instrument - leads, in reality, not simply to the violation of the right to the

execution of the judgments and of the relevant Article 6, para. 1 ICCPR, but also to the unjustifiable deprivation of an item of property of the State's creditor, without there being any public benefit reason. Such legislative behaviour is in direct conflict with the regulatory content of the provision of Article 1 of the first additional Protocol to the EHRC.

In the light of the above observations of the Plenum of the Areios Pagos, it will be seen that the privilege of the State of paying only this default interest of 6% to its creditor must be based in principle on grounds of public benefit, otherwise it is contrary to Article 1 of the first additional Protocol to the EHRC. Up to the present, the State has not argued, nor has the legal theory identified public benefit grounds. Nevertheless, even if the legislator were to maintain that reasons of public benefit call for the deprivation of a property right and had recognised certain special privileges of the State in certain judicial disputes, such as that which sets a reduced default interest, these privileges are subject to a check on their harmonisation with *principle of proportionality*, which is fundamental to the Greek legal order. This principle demands the observance of proportion between the aim pursued and the means used. If the aim pursued is the drastic action of a court judgment and the protection of the State, then 6% as the default interest is certainly not based on the principle of proportionality when for all other litigants it is 11.25%.

The question of the privileges of the State was judged by the European Human Rights Court in its judgment *AKA v. Turkey* (23.9.1998) and in more than 50 similar - later - judgments against Turkey. More specifically, the compensation for compulsory purchase of the property of the appellant was paid with considerable delay by the Turkish administration. The calculation of the corresponding interest was made on the basis of the percentage determined by the law of the state (30%) and in complete disharmony with actual inflation (70%) and the monetary status of the Turkish pound. The court, accepting the reasons of public benefit which called for the specific compulsory purchase, examined it in proportion to the protection of the fundamental rights of the individual. It held that the

delay in the payment of the compensation, in conjunction with the constantly worsening monetary parity of the Turkish pound, placed the appellant in a difficult position and unanimously judged that he had a right to additional compensation, which, moreover, it awarded in American dollars for reasons of monetary security.

It is, therefore, clear that any prejudice to the property of a creditor of the State should not only be based on a grave reason of public interest, which, in the case of default interest, the Greek State or public law legal persons have nor put forward, but, in addition, the principle of proportionality should be observed, which is obviously infringed when default interest is approximately half of that which an individual is obliged to pay when he is the debtor.

To sum up, we consider that the draft law in question is a very useful attempt to improve the functioning of the public administration - which is so defective generally - in the field of the execution and implementation of court judgments. It is hoped that certain changes proposed above will contribute to the reduction of the tribulations and injustice which work particularly against citizens who are not in a strong socio-economic position in their relations with the State.

On the provisions of the draft law which concern the promotion of judges of the regular administrative courts to the rank of Councillor of State, the NCHR does not regard it as expedient to adopt a position.

4. 7. 2002