



“The Judicial Officer: Link between Law and Economy, a New Approach to Enforcement”

Presentation of the Work of the Congress

Jos Uitdehaag

Judicial Officer (The Netherlands)

1st Secretary of the UIHJ

General Reporter of the Congress

Minister of Justice

Mr President of the General Council of Judicial Power,

Mr President of the General Council of Procuradores,

Mr Chairman of the Council of Procuradores of Madrid,

Madam 1st Secretary of the Hague Conference on Private International Law,

Madam Representative of the World Bank,

Mr representative of the IMF,

Mr President of the European Commission for the Efficiency of Justice of the Council of Europe,

Mr and Madam representatives of the European Commission,

Mr Head of Legal Services and Communication of the Secretariat of OHADA,

Mr Director General of ERSUMA,

Madam Representative of Ali / Unidroit

Mr Representative of the European Law Institute,

Distinguished professors and members of the Scientific Council of the UIHJ,

Distinguished heads of delegations of the member countries of the UIHJ,

Dear colleagues,

Ladies and gentlemen,

Dear friends of the UIHJ Family,

In 1776 the economist Adam Smith in his famous book “*Wealth of Nations*”¹ wrote:

“ Commerce and manufacturers can seldom flourish long in any state which does not enjoy a regular administration of justice, in which the people do not feel themselves secure in the possession of their property, in which the faith of contract is not supported by law...”

¹ Adam Smith, an inquiry into the Nature and Causes of the Wealth of nations (1776) (V,iii)



Smith referred to economic growth. For such economic growth several factors can be considered important, among: stable macro-economic conditions, competition, investments, use of science, development of a consumer-orientated society, work ethic. Plus: the *rule of law*, or, most important, well-specified and enforced property rights and contracts.

What is the link between the Rule of Law and economy?

It seems obvious that somebody will not develop any products without being well protected. *James Robinson*, economy professor at Harvard University in that respect even stated that the development of an institutional framework within which people do not have to worry on their property or fulfilment of contracts has been essential for the development of the USA in the 19th century.

Development of markets is not just economic development. For markets to develop a legal infrastructure is necessary. Markets exchange property rights and contracts. A clear legal framework is necessary: transparency of legislation, publicly declared, certainty and equality of law and legal procedures and recognition of individual rights and freedom, i.e. the *Rule of law* principles. Those principles guarantee economic growth, economic development: ownership is assured, agreements will be observed, Government is controlled and there is a control on corruption and private possessions are regulated. If not: there will be no trading, nor investments.

There is a causal connection between a well-developed system of judiciary and countries' prosperity. For example *Jamal Ibrahim Haidar*, working for the World Bank and the Paris School of Economics concluded in 2012 that on average, each business regulatory reform is associated with a 0.15% increase in growth rate of GDP.² World bank's yearly Doing Business reports conclude likewise.

For a well-functioning society these principles demand an independent, impartial and efficient judiciary. International organizations such as the World Bank during the years have published a large number of reports indicating the need for these legal principles for economic growth. Judiciary is there to guarantee the fundamental rights of citizens, and to assess to use of State power. Any judicial system that lacks efficiency, transparency, independency or accountability will face problems. The lack of financial means, leads to massive backlogs in courts, both in civil proceedings, but also in enforcement proceedings. It will result in a lack of trust of the general public in the legal system; after all: what is the use of contracting a party in case contractual obligations in case of non-compliance cannot be enforced.

A non-functioning inefficient (or overregulated) legal system will result in long delays within the legal system. Litigation procedures will not be finished in a reasonable time. Unwilling parties, e.g. through delay tactics, will benefit from the system. Contractual obligations and hence assets will remain in the legal system. Non-enforcement of judgments will lead to liquidity problems. It is obvious that this will have its consequences on the economic system and development of markets. The legal system

² Jamal Ibrahim Haidar, The impact of business regulatory reforms on economic growth, in: Journal of the Japanese and international economies, 2012 (26) page 285-307



will become unattractive for market parties and foreign investors. Corruption practices will flourish.

So there is a necessity for a well-functioning legal system in order to develop economic growth.

Consequences of the past financial crisis are obvious: banks initiated a substantial number of foreclosures; e.g. in USA a lot of people lost their houses. Unemployed increased substantially and rapidly. According to ILO, the International Labour Organisation over 50 million workers became unemployed. A lot of other workers were confronted with reduced wages and worse working circumstances. More people became dependent on social security benefits. Governments were forced to reduce their budgets and in a number of cases had to provide expensive bailout packages for the financial institutions.³

Haidar had another interesting conclusion:

“ In addition, the onset of the global economic crisis has led to a slump in global economic growth. However, the extent to which economic growth has decreased differed among countries, which reformed at least one area during the 3 years, that preceded the recent financial crisis to those which did not. Using a unique micro, business regulatory reforms data from the World Bank Doing Business project, this study signals that reforms, which improved business and investment climate, may have helped to mitigate the effects of the 2008 global slump in economic growth. Countries with more business regulatory reforms enjoyed higher economic growth rates. ”⁴

Indeed, nowhere during the past years to causal connection between law and economy was so obvious as in the financial crisis. The financial crisis has had its influence on political, economic and social rights. Or as the secretary-general of the Council of Europe Mr Thorbjørn Jagland in 2014 stated:⁵

“People’s rights are ... threatened by the impact of the economic crisis and growing inequalities. ... European societies have suffered the effects of the recent economic crisis, which has deeply affected social cohesion in many member States, and which may eventually threaten both the rule of law and democracy.”

³ For example ILO, the International Labour Organisation issued its World Social Protection Report 2014-2015 in which it stated that the global financial and economic crisis has forcefully underlined the importance of social security as a human right, and as an economic and social necessity. With regard to the European countries concluded that they have reduced a range of social protection benefits and limited access to quality public services, these measures have contributed to increases in poverty and social exclusion together with persistent unemployment, lower wages and higher taxes. This affected 123 million people in the European Union, 24 per cent of the population, many of them children, women, older persons and persons with disabilities. In the executive summary of the report, the ILO concludes that: “The achievements of the European social model, which dramatically reduced poverty and promoted prosperity in the period following the Second World War, have been eroded by short-term adjustment reforms.

⁴ Haidar, page 295

⁵ Mr Thorbjørn Jagland, secretary-general of the Council of Europe in “State of democracy, human rights and rule of law in Europe” (SG(2014)1- Final), pp. 5 and 40



Besides the Council of Europe also numerous other international organizations are paying attention to the legal system in relation to economic developments. There is a necessity to improve the efficiency and effectiveness of the legal system. Legal reform initiatives of the international financial institutions such as the Asian Development Bank, World Bank and International Monetary Fund nowadays mainly focus on the relationship between law and economic performance. World Bank has established special working groups for personal bankruptcy, insolvency, debtor-creditor regimes and securities; The International Monetary Fund demands reform of the legal system as prerequisite to obtain a loan; Uncitral comes with model laws in the field of securities, is paying attention to the development of alternatives for court proceedings such as mediation and ADR, European court of Justice is interfering in the field of enforcement. Politicians are interfering in enforcement. Catherine Ashton, former EU-commissioner for Justice noted after an ECJ judgment on enforcement:

“This judgement matters for citizens. It is important to know that in these difficult times of financial crisis, EU law is there to ensure fairness.”

Indeed: the economic crisis has affected human rights, including enforcement. The ECtHR did not rule out the possibility that a complaint alleging that the amount of a pension or of other social benefits was wholly insufficient might in principle raise an issue of inhuman or degrading treatment under Article 3 of the ECHR.⁶ Those social benefits or pensions are not the only example. Also other questions were raised, e.g. with regard to housing and eviction. For example the obligation to secure shelter for certain vulnerable persons might be possible in exceptional cases based on article 8 ECHR (right to family life).⁷ Also local courts are judging like this: for example in 2012 the Estonian Supreme Court delivered a decision advising the first-instance court to explore alternative, less radical means when re-examining the case.⁸ In Spain in 2013 legislation on consumer protection was amended⁹ (Code of Civil Procedure and Law on Mortgages) enabling a court who considers that a term in an enforceable document may be deemed unfair, can, after hearing of the parties, be ordered either unavailable, or enforcement can be ordered without the application of such a term, e.g. the default interest on credits.

Here it needs to be mentioned that the economic crisis should not be the accelerator towards legal intervention. Situation in countries is different and also, and already before the economic crisis, in such countries economic and social circumstances were at a low level. How strange it would be in case the economic crisis now is used as an argument to legal protection.

Socio-economic rights imply obligations of the State to guarantee those rights; to respect, protect and fulfil those rights.

⁶ *Larioshina v. Russia* 10 from 2002 (“complaint about a wholly insufficient amount of pension and the other social benefits [could], in principle, raise an issue under Article 3 of the Convention”.) and *Budina v Russia* from 2009

⁷ *Yordanova and Others v. Bulgaria*, no. 25446/06, 24 April 2012

⁸ Judgment of the Civil Law Chamber of the Supreme Court of Estonia in case no. 3-2-1-121-12, 14 November 2012. ⁸

⁹ Law 1/2013



This refers to *access to justice*. In that respect article 6 ECHR has acted as a provision used by vulnerable persons to find access to justice, despite financial obstacles.¹⁰ See for example *Apostol v. Georgia*:

“the imposition of the obligation to pay expenses in order to have that judgment enforced constitutes a restriction of a purely financial nature and therefore calls for particularly rigorous scrutiny from the point of view of the interests of justice”.

With regard to the *peaceful enjoyment of possessions* we can for example refer to social security benefits that are, e.g. under the ECHR protected as a possession.¹¹ It does not mean a guarantee to provide such social security benefit, but prevents refusal based on e.g. sex, marital status or nationality. Another example can be found with regard to article 8 ECHR (respect for private and family life and respect for the home). In the case *Mc Cann v. United Kingdom* the ECtHR considered on the subject of the applicant’s eviction from a local authority-owned dwelling, that “[t]he loss of one’s home is a most extreme form of interference with the right to respect for the home”, with the result that any such measure was permissible under the Convention only if it was possible to have its proportionality effectively reviewed by the courts”.¹² In the case *Yordanova v. Bulgaria* the ECtHR even considered that an obligation to secure shelter to particularly vulnerable individuals could flow from Article 8 of the Convention in exceptional cases.¹³ The recognition of the right of housing can be found back in various jurisdictions. ECtHR in its landmark case *James and others v. United Kingdom*:

*“Eliminating what are judged to be social injustices is an example of the functions of a democratic legislature. More especially, modern societies consider housing of the population to be a prime social need, the regulation of which cannot entirely be left to the play of market forces”.*¹⁴

Economic developments have its influence on society. The economic disruptions caused worldwide economic losses, people became unemployed and States had to cut the State budgets. It is clear that the financial crises causes changes in the civil justice system: people want to be compensated for their losses, will initiate civil proceedings and, consequently, enforcement. At the same time the financial collapse leads to state budgets under stress. This stress, we can see in practice, caused major changes in the court mechanisms and in litigation. Civil procedure systems are reorganising, introducing different instruments e.g. for small and/or uncontested claims, there is an increasing attention for alternatives for civil procedure such as mediation and ADR.

Micro economic rights need to be protected. Enforcement connected with human rights. The *Hornsby vs Greece* case in 1997 already considered that enforcement is part of the fair trial principle as mentioned in article 6 ECHR. It made enforcement a fundamental, a human, right. Human rights

¹⁰ *Apostol v. Georgia*, 28 February 2007, application no. 40765/02

¹¹ *Stec and Others v. the United Kingdom* (dec.) [GC], nos. 65731/01 and 65900/01, ECHR 2005-X

¹² *McCann v. the United Kingdom*, application 19009/04

¹³ *Yordanova and Others v. Bulgaria*, no. 25446/06, 24 April 2012.

¹⁴ *James and Others v. the United Kingdom*, 21 February 1986, § 47, Series A no 98



protection is expensive, however especially in times of financial crisis the need is growing. In that respect the remark that was made at a seminar organised in January 2013, by the ECtHR, is clear:

“Failure to comply with human rights requirements will only in exceptional and limited circumstances be justified by a lack of resources. In reality compliance with human rights standards is not only even more necessary in times of economic crisis because of increased vulnerability, it also makes a contribution to recovery by establishing the conditions necessary for stability and the proper functioning of the rule of law, both essential for economic growth.”

It are these aspects that will be the focus at the Madrid Congress. In three major themes and a final roundtable of the Scientific Council we intend to go into detail to discuss these aspects:

1. Fair and efficient justice: an equitable global economic development, a right for every justiciable

Panel 1: *Fair and efficient justice and enforcement*

Panel 2: *Recent economic development and its consequences for the organisation of enforcement*

Roundtable: *the role of the international organisations in economic development and fair justice*

2. The role of the mondial enforcement agent as an answer on economic development

Panel 1: *Domestic and cross border legal services*

Panel 2: *From enforcement agent to judicial officer*

Roundtable: *The enforcement agent: legal interface with economic partners*

3. 21st century approach to enforcement

Panel 1: *The need for harmonization of enforcement*

Panel 2: *New Approaches – New Tools to Enforcement*

Roundtable: *Harmonization of enforcement*

4. Panel scientific council: Harmonizing legislation: the need for a World Code on Enforcement: fair principles for enforcement;

Economic developments will ask for a different view of the profession of enforcement agent. Taking into consideration the protection of certain micro-economic rights, enforcement is no longer something obvious. As a legal professional in the field of enforcement we have to be aware on a new playing ground.

Rather than an enforcement official, in the future our profession will demand a broader view, a different approach towards debt collection, or, more general creditor and debtor satisfaction. Instruments like mediation and debt rescheduling will become part of our work.

The financial crisis has shown ever more people are in financial problems, many people suffer from over indebtedness, politicians, but also international organisations are interfering in enforcement (e.g. changing legislation on disclosure, discussion on the humanity of an eviction). Our profession will be changing.



The current financial crisis is considered by many as an opportunity to legal reform, to improve the legal system, including enforcement. In that respect UIHJ has a lifelong experience in strengthening enforcement and knowledge of the enforcement systems in various countries. Presently we have 85 member countries.

Gordon Brown at the end of the G20 Summit in London (April 2009) referred to the decision of the G20 to reform the international financial institutions to overcome this crisis and prevent future ones, the need to promote global trade and investment and reject protectionism, to underpin prosperity.

With our experience we can contribute to stabilise economy and, more important to prevent families and business to go through another recession. I am convinced that to restore confidence and trust, to put economy on track a well-functioning efficient and effective enforcement system is an absolute necessity. Such a system will demand international standards, cross border commitments and regulations, balancing the rights of the creditor, but also of the debtor.

“It took the occurrence of economic crises to consider that the failure to enforce judicial decisions was not only an obstacle to economic development, but it also helped to plunge the world into an even greatest crisis” as president Netten said in his speech.

We, UIHJ, have a central role in the future development of enforcement and thus of economy. We are one of the major organizations for legal professionals in the world. We are active in a number of international organizations, we have experience in legal reform projects and, last but not least, we have the experiences of 85 member countries!

It is against this background that UIHJ has developed Comonex (Code mondial de l'exécution; the Global Code of Enforcement), a set of principles, based on international best practices, on enforcement. Enforcement in the broadest sense: enforcement procedures, enforcement organization, including the use of IT and communication technology. But also: other areas to will need to be covered by our profession: including debt recovery, cross-border enforcement, mediation, post-judicial mediation, declaration of assets, fast track procedures, rescheduling of debts, bankruptcy proceedings, legal auctions, etc.

For now, I welcome you all and I wish you all a good Congress.