



THE AIRE CENTRE
Advice on Individual Rights in Europe



Joint NGO Response to the Draft Copenhagen Declaration

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Introduction

The AIRE Centre, Amnesty International, the European Human Rights Advocacy Centre, the European Implementation Network, Fair Trials, the International Commission of Jurists, Open Society Justice Initiative and the World Organisation Against Torture (OMCT) welcome this opportunity to respond to the Draft Copenhagen Declaration on the European Convention on Human Rights system presented by the Danish Chairmanship of the Committee of Ministers on 5 February 2018¹. The aforementioned organisations recognise and appreciate the open approach of the Danish Chairmanship in the development of this Declaration, and in particular its willingness to involve civil society throughout the process.

Civil society organisations, including the undersigned, have participated in discussions on the development and reform of the Convention system throughout its history, and in particular, have closely followed and contributed to the current phase of the reform debate since its initiation at Interlaken in 2010. From this engagement and from our

¹ Draft Copenhagen Declaration on the European Convention on Human Rights system , draft 5 February 2018. Available at:https://menneskeret.dk/sites/menneskeret.dk/files/media/dokumenter/nyheder/draft_copenhagen_declaration_05.02.18.pdf

collective experience in working to protect human rights across the Council of Europe region, we are more convinced than ever that the viability and health of the Convention system is crucially dependant on better national implementation of the Convention rights. Accordingly, practical action to implement the Convention rights at national level, and to support and supervise this implementation, must be the urgent and sustained priority of the State Parties in their efforts to strengthen the Convention system.

We therefore welcome the sections of the draft Declaration that address national implementation and execution of judgments. However we regret that, in contrast to the 2015 Brussels Declaration, the overall emphasis of concern has moved away from these urgent matters. Without effective national implementation, the principle of subsidiarity is merely theoretical, and the problems of the Court's caseload cannot be satisfactorily or sustainably resolved. This message should be conveyed in strong non-equivocal terms in the Declaration that is to be adopted in April. Furthermore, we consider that effective execution of judgments, which is closely linked to national implementation, should be prioritised and made more prominent in the Declaration, and addressed alongside the section on national implementation.

Better national implementation also depends on the effective scrutiny and supervision carried out by the Council of Europe institutions, in particular the Court. Subsidiarity means that the primary responsibility for the protection of Convention rights lies at national level: it does not circumscribe the Court's role in supervising the observance of State Parties' obligations under the Convention. It is vital that the independence, authority and role of the Court be maintained, and that the right of individual application be preserved. We therefore welcome the draft Declaration's acknowledgement that the right to individual application is a cornerstone of the Convention system. However we are concerned at proposals and language in many places in the Draft Declaration, in particular in regard to the proposed "dialogue" between State Parties and the Court, that risk undermining the independence and authority of the Court. It is essential that nothing in the Declaration provides a pretext for political pressure on the Court. We make specific recommendations below for amendments necessary to ensure the full respect of the Court's independence.

It should also be emphasised at the outset that the integrity and authority of the Convention system, as with any system for international human rights protection, depends on upholding the principle of the universality of human rights. The draft Declaration's emphasis on subsidiarity must not lead to the fragmentation of European human rights protection or undermine the universality of human rights. We make specific recommendations below to reflect this.

Finally, we are concerned that some language of the draft Declaration, in particular references to the engagement of "States Parties and their populations" in debates on the Convention rights, may support claims that the interpretation of Convention rights should be conditioned by majority views. Given the vital role which the Convention system has played in protecting the rights of discriminated-against minorities across the Council of Europe region, any such suggestion should be avoided.

Commentary and Proposals on the draft Copenhagen Declaration

Introductory section

Independence of the Court:

While a brief reference is made in some parts of the draft Declaration, **we recommend that the introductory section of the Declaration affirms the need to respect and preserve the independence of the Court, being a fundamental tenet of the rule of law.**

Paragraph 4:

The Convention System: In calling for a more “focused and balanced” Convention system, this paragraph appears to misconstrue the meaning and purpose of the principle of subsidiarity as allowing or even requiring the Court to limit or delegate aspects of its material jurisdiction to the State Parties. Such ideas were rejected by the longer-term review conducted by the CDDH in 2014-2015. Subsidiarity is not about challenging the authority of the Court in respect of its scrutiny of Convention compliance by states, it is not about an allocation of jurisdiction on Convention rights and issues between State Parties and the Court. Rather, subsidiarity reflects the respective responsibilities of State Parties to implement rights and of the Court to supervise this implementation, in relation to the *whole* range of Convention rights. Given the Court’s supervisory role over the entire range of cases falling under its material jurisdiction, only better implementation of the Convention (and execution of the judgments) by State Parties can reduce the flow of cases to the Court, as paragraph 33 of the Brighton Declaration confirms. Furthermore, narrowing the scope of the Court’s review runs counter to the idea that human rights should be applied in a consistent manner throughout the Council of Europe region. **Paragraph 4 should therefore be amended to remove the reference to a “focused and balanced” system and to emphasise instead the need for more effective implementation at the national level and its related decrease in the number of cases brought to the Court.**

Paragraph 4 also mischaracterises the principle of subsidiarity by stating that it necessarily entails that “the *protection* of human rights *takes place* primarily at the national level” (emphasis added), thus implying a limited role for the Court. It is the responsibility to ensure Convention rights that falls primarily on State Parties. Whether the protection itself actually takes place at the national level depends upon the effectiveness of national implementation. **The last sentence of para.4 should be re-phrased in terms of the responsibility of State Parties for national implementation rather than the respective roles of State Parties and the Court in the protection of Convention rights.**

Shared responsibility – better balance, improved protection

Paragraph 7:

The “creation” of a workable model: Although the reform process since Interlaken has had a significant impact on the Convention system, to suggest that it has “created” a workable model for the respective roles of the State Parties and the Court mischaracterises the process and overstates its impact. The principle of subsidiarity is and has always been a judicial tool of interpretation created and applied by the Court in

its case-law. It is not a principle that has been created by or during the Interlaken reform process. **Paragraph 7 of the draft Declaration should therefore be amended to clarify that the reform process has contributed to the development of the Convention system, rather than that it has created a new model.**

Paragraph 9:

Subsidiarity and the Margin of Appreciation: The margin of appreciation is a complex principle of judicial interpretation, which has a variable breadth and is inapplicable to certain rights or aspects of rights. It is important to emphasize that the adoption of Protocol 15 has not modified the characteristics and meaning of this principle, nor has it changed those of the principle of subsidiarity. **This paragraph should reaffirm that the principles of subsidiarity and margin of appreciation are judicial tools of interpretation, to be applied and developed by the Court. It should also specify that State Parties do not enjoy any margin of appreciation with respect to some Convention rights.**

Paragraph 10:

Subsidiarity and National Implementation: By positing subsidiarity as a “natural step in the evolution” following incorporation of the Convention into national legal systems, we are concerned that the text minimises the significance of the very real, often large-scale and/or systemic human rights violations that continue to occur throughout the Council of Europe region and that are one of the main causes of the overloading of the Convention mechanisms. **This paragraph should be re-worded to recognise that effective national implementation remains an urgent priority and is a precondition for subsidiarity.**

“secured and determined”: The reference to human rights protection being not only secured but also “determined” at national level is not only inaccurate, it undermines the role and jurisdiction of the Court. The existence and scope of the State Parties’ margin of appreciation is determined by the Court in the application of some Convention rights, and the Court has the responsibility to interpret and determine the material scope of all Convention rights. The idea that rights should be “determined” nationally carries obvious dangers of weakening and fragmentation of the European human rights protection framework, contrary to the principle of universality of human rights. **The term “determined” should therefore be deleted from this paragraph.**

Paragraph 11:

Balance between national and European levels: As noted above in regard to para. 4, it is not appropriate to speak of a “balance” between the national and regional institutions. **The aim should rather be to secure more effective discharge of the responsibilities of these respective actors, so that improved protection of Convention rights may be secured. The paragraph should be amended to reflect this, and the reference to “balance” should be removed.**

Paragraph 13:

Systemic and/or widespread violations: This paragraph appears to presume that the more systemic and/or widespread the human rights violations is, the less the need for an international judicial response. On the contrary, systemic and/or widespread violations of human rights precisely demonstrates the lack of any “effective means of dealing with human rights protection (...) at national level”, and therefore increases the

need for recourse to an international judicial mechanism. In addition, this paragraph appears to contradict statements made in paragraph 4 about the need for the Court to tackle widespread violations and systemic problems. **This paragraph should therefore be amended, including to remove the reference to international solutions being unrealistic. Instead, it should emphasise the fact that effective human rights protection at national level, must be subject to the supervision of the Court.**

Paragraph 14:

Universality of human rights: The final phrase of this paragraph, which refers to rights being “protected predominantly” at national level “in accordance with their constitutional traditions and in light of national circumstances”, is at odds with the universality of human rights, as reflected, inter alia, in paragraph 5 of the Vienna Declaration and Programme of Action. With the rest of the draft Declaration, it reinforces the risks of fragmentation of the European human rights protection framework and runs contrary to the commitment of State Parties to human rights also at the level of United Nations human rights treaties, which the Court regularly takes into account. **This phrase should therefore be deleted.**

National Implementation – the primary role of States

We support efforts made by the Danish Chairmanship in the draft Declaration to highlight the fundamental importance of national implementation of the Convention by its State Parties. The Copenhagen Conference and Declaration should build upon the measures recommended in this regard both in Brighton and Brussels and make further proposals to ensure proper follow-up of these measures.²

In particular, it would be appropriate for the Declaration to give greater emphasis to the role of civil society in implementation of the Convention rights at national level and draw on this to develop proposals for more effective implementation, through engagement of governments with civil society.

Paragraph 16:

Inadequate national implementation: While recognizing that inadequate implementation of the Convention in relation to “serious, systemic and structural human rights problems” poses a significant challenge to the system, the first sentence should refrain from limiting the focus of this paragraph to such situations and to “some States” only. **We recommend using more inclusive language to recognize the importance of adequate implementation of all human rights in all situations in all State Parties; we also recommend that the term “primarily” be deleted.**

Paragraph 20:

Strengthening implementation measures: We welcome the recognition in paragraph 18 that effective national implementation requires the effective involvement of and interaction between a wide range of actors, including civil society. **This recognition should be built on in para. 20 to include a call for State Parties to engage and cooperate with civil society, including lawyers who represent applicants before the Court, to ensure better national implementation of the Convention and more**

² See, in this regard, the joint NGO statement issued at the Brussels Conference:
http://www.amnesty.eu/content/assets/public_statements/Response_to_Brussels_Declaration.pdf

effective execution of Court judgments.

European supervision – the subsidiary role of the Court

Paragraph 22:

The Role of the Court: We consider that the last sentence of this paragraph misstates the role of the Court enshrined in Article 19 of the Convention, by implying that in engaging in substantive review of questions concerning the responsibility of State Parties to protect Convention rights, the Court impermissibly “takes on the role” of the national authorities. **The last sentence of this paragraph should therefore be deleted.**

Paragraph 23:

The margin of appreciation: While this paragraph, which deals with the *scope* of State Parties’ margin of appreciation, draws to a certain extent from para 9 of the Explanatory Report to Protocol 15 and the Court’s case-law, it should clarify that State Parties do not always have a margin of appreciation. Also, it is worth emphasizing that both the existence and the scope of such margin are determined by the Court itself, not by State Parties. **To address these two concerns, the first sentence of the paragraph should be amended to clarify that State Parties may enjoy a margin of appreciation, as determined by the Court. The second sentence should further clarify that State Parties’ margin of appreciation goes hand in hand with the Court’s supervision, as repeatedly mentioned in the Court’s case-law.**

Paragraph 24:

The nature of the Court’s review : As with paragraph 23, this paragraph is problematic as it might be read to imply a general application of aspects of the Court’s jurisprudence that are in fact applicable only to certain rights or aspects of rights. While it draws to a certain extent from the Court’s case-law on the principle of margin of appreciation, it unfortunately mischaracterises it. Indeed, it uses language that is less nuanced than that of the Court, where the Court said that, depending on the circumstances, it was not “necessarily” its task to conduct Article 8 proportionality assessment afresh. We also note that this paragraph unfortunately creates confusion between the principles of subsidiarity and margin of appreciation, since it refers to the former while the case-law it partly draws from refers to the margin of appreciation.³ More broadly, and very importantly, it is not for a political Declaration to seek to determine what and how judicial tools of interpretation, such as the margin of appreciation, apply. This is the sole task of the Court, and it must remain so, including with a view to respecting the Court’s integrity, authority and independence. **This paragraph therefore unacceptably infringes on the role of the Court and should be deleted.**

Paragraph 26:

Asylum and Immigration: It is inappropriate in this paragraph to single out one area of law and appear to press the Court to apply a lower standard of review to such cases, intervening only “in the most exceptional circumstances”. **This paragraph not only interferes with the Court’s task to independently interpret the Convention rights and develop its case-law; it also seeks, without justification, to single out asylum and immigration cases as meriting a lesser and inadequate standard of review by**

³ See *Ndidi v UK*, Application 41215/14, at para 76.

the Court. It should therefore be deleted.

Paragraphs 27, 28, 30:

Recommendations to the Court: We are concerned that the language in paragraphs 27, 28 and 30, which “encourage” or “strongly encourage” the Court to develop its jurisprudence in particular ways, undermines the independence of the Court. Furthermore, there is a worrying ambiguity in paragraph 27’s call for a more “robust” application of the principles of subsidiarity and the margin of appreciation. The paragraph appears to consider it sufficient justification for this measure that it would provide “important incentives for national authorities properly to fulfil their Convention role”. However, it is not clear that it would do so: in fact, it seems likely that weaker regional supervision could have the opposite effect. **Paragraphs 27, 28 and 30 should therefore be deleted.**

Interplay between national and European levels – the need for dialogue and participation

We are deeply concerned that proposals for “dialogue” between the Court and State Parties governments have the potential to inappropriately lead to political pressure on the Court, compromising its independence and authority. We emphasise that the Council of Europe institutional framework, as well as the Convention system, provides a framework for State Parties to develop human rights through various standard-setting and related processes involving the participation of the Court and its Registry. Outside of this already existing framework, the proper place for government’s engagement with the Court is through legal submissions in cases in which they are a party, or in which they choose to intervene as a third party.

Beyond these fora, direct dialogue between governments and the Court carries grave risks for judicial independence and therefore for the rule of law, as would a similar dialogue at the domestic level between a government and a Constitutional or Supreme Court. Although government representatives may engage in wider debates about the Convention system and jurisprudence, such debates should include a wide range of stakeholders and experts and should not directly address the Court. In particular, they should not provide a forum for State Parties to address grievances about the Court’s case-law directly to the Court.

We urge the Danish Chairmanship and all State Parties to refrain from adopting any formulations in the Declaration that would place undue pressure on the Court in its interpretation and application of the Convention. The Declaration should be amended to make clear that interactions between governments and the Court can be pursued only within the frameworks of the Committee of Ministers’ standard setting and related processes, or of litigation before the Court. Beyond this, debate on the Convention system and standards should involve a range of stakeholders, including civil society and applicants’ representatives, and should respect the independence of the Court.

Paragraphs 32 and 33:

The role of the Court: These paragraphs appear to suggest that the Court’s interpretation of the Convention rights is conditional on the general agreement of State Parties and other stakeholders. Such proposals carry inherently high risks for and potentially infringes on the principle of judicial independence and the effective protection of the Convention rights. The qualifying clause, as in paragraph 33,

stipulating that the dialogue should take place with respect for the independence of the Court, is insufficient to mitigate these concerns. **These paragraphs should be deleted or substantially re-written to refer to inclusive debate on questions related to the Convention rights and the Convention system, rather than to dialogue with the Court.**

Paragraph 34:

Means for State Parties to influence the Court: While paragraph 34 refers to the already existing possibility for State Parties to intervene as third parties in a given case, this paragraph also refers to a need, in a specific case and as part of the ongoing legal proceedings in this case, for “appropriate access”, without further clarification, and suggests the establishment of “further possibilities to state their views and positions, and draw attention to the possible consequences for their legal systems”. Such proposals appear to not only pave the way for possible abuses of on-going judicial proceedings related to an individual’s case and application, but also risk actually undermining the Court’s authority should it rule contrary to the submissions related to the “possible consequences for their legal systems”. Furthermore, this paragraph fails to acknowledge that Council of Europe and other international bodies as well as non-state actors also intervene as third parties before the Court. It would be inappropriate for enhanced access or representation to be accorded to State Parties within third party interventions or similar mechanisms, without extension to such other actors, including civil society. **This paragraph should therefore be deleted or significantly revised.**

Paragraph 36:

Dialogue and Participation: Dialogue and participation within the judicial level on the one hand, i.e. between the European Court and the highest domestic courts, and dialogue and participation within the political level on the other hand, i.e. between State Parties including within the Committee of Ministers meetings, is certainly to be welcomed. Dialogue and participation between the political and the judicial levels, however, potentially poses a fundamental challenge to the rule of law. **This paragraph should therefore be amended to clarify that judicial dialogue and political dialogue should take place separately.**

Paragraph 38:

Referral to the Grand Chamber: As a fundamental tenet of the rule of law, it is within the exclusive competence of the Court to decide on its internal rules of procedure, including regarding whether or not any amendment is deemed by the Court to be appropriate; this bedrock principle should explicitly be recalled here. The current formulation of this paragraph (“invites the Court to adapt”) also places inappropriate pressure on the Court. Furthermore, there is no legitimate reason why such a mechanism should be limited to State Parties as opposed to including other possible third party interveners, as foreseen by Article 36 of the Convention. **This paragraph should therefore be amended to avoid calling on the Court to take measures that are within its exclusive competence, and to acknowledge the possibility that parties other than State Parties should be able to indicate support for referral.**

Paragraph 39:

Third party intervention: This paragraph problematically places third party states in a more privileged position than other potential third party interveners, in particular in sub-paragraphs (b) and (d). From the point of view of applicants to the Court, who

already often have much less legal advice and fewer resources at their disposal than State Parties, increased third party interventions by State Parties could place them at an even greater disadvantage. Increased opportunities for third party interventions by State Parties should not only be extended to other actors, but should take account of the imbalance in resources between State Parties and non-state actors, which is likely to further increase the disadvantage to applicants. Furthermore, it is unclear what sub-paragraph b seeks to achieve, given that questions to the parties are already available from the moment the case is communicated. In addition, similarly to para 38, the existing formulation (“invites the Court to support”) is too prescriptive. **The language of this paragraph should be amended to avoid calling on the Court to take measures that are within its exclusive competence, and to ensure that State Parties are not privileged more than other potential third party interveners.**

Paragraph 41:

Texts expressing the views of third parties: This paragraph proposes the adoption by State Parties to the Convention of “texts expressing their general views” about “areas of the Court’s case law of particular interest to them”. While some qualifiers are introduced (“if appropriate”), and the need to respect the independence of the Court is mentioned, this paragraph nonetheless carries a high risk that political pressure will be, inappropriately, placed on the Court. This risk is not significantly mitigated by the final sentence of the paragraph, which refers to the independence of the Court, given that the measure proposed is in fact contrary to such independence. Although State Parties can legitimately adopt texts in the framework of the Committee of Ministers, these texts should set standards and guidance that reflect and build on the jurisprudence of the Court, rather than undermine or question it. **This paragraph should therefore be amended to clarify that any texts adopted should be in the framework of the Committee of Ministers, and should not “express the general views” of State parties on “the general development of areas of the Court’s case law” but rather develop standards based on the jurisprudence of the Court. Furthermore, the second sentence of the paragraph, which could be interpreted as putting political pressure on the Court, should be deleted.**

Paragraph 42:

Informal Meetings of State Parties: This paragraph is directly linked to paragraph 41, and therefore raises similar concerns. In addition, it also appears to broaden the range of topics that would be discussed and may include, for instance, the Court’s methods of interpretation. It also fails to include a reference to the necessary respect for the Court’s independence. **The proposal made in this paragraph should therefore be revised so as to better ensure proper respect for the role and responsibilities of the Court, its independence, as well as its integrity and authority.**

The caseload challenge – the need for further action

Paragraph 44:

Analysis of the Court caseload: For the sake of transparency and accuracy, and given the necessary evidence-based approach in any reform process, the source of the stated analysis should be clarified so as to better understand whether or not the figures, analysis and related conclusions described in this paragraph are coming from an official and independent Council of Europe source, e.g. the Court. This is especially important since paragraph 45 then draws from such assessments a peremptory conclusion that “further steps must be taken”.

Paragraph 45:

Reducing the caseload: This paragraph should refer not only to the need for State Parties to better implement the Convention, but also to more promptly execute the Court's judgments.

Paragraph 47:

Resources of the Court: While this paragraph flows from paragraph 20(h) of the Brighton Declaration, it fails to mention that such goals were made dependent on the Court having "appropriate resources". **The paragraph should be amended to reflect this clarification.**

Paragraph 48:

Summary procedures: It is not for State Parties to "accept" the recourse to so-called "summary procedures". **The term "accepted" should therefore be deleted.**

Paragraph 50:

Repetitive Applications: The right to individual application, including to receive an individualised judicial decision, needs to be reaffirmed, so as to avoid any possible denial of justice for case management purposes. **The text should therefore stipulate that any measures proposed should respect the right of individual application.**

Paragraph 52:

Sufficient budget for the Court: This paragraph could be further strengthened, including by building on paragraph B(1)(f) of the Brussels Declaration.

Paragraph 54(a):

Friendly Settlements and Unilateral Declarations: The aim of friendly settlements and unilateral declarations should not be to "avoid the need for the Court's adjudication", thus preventing the development of potentially important case-law. The applicants' right of individual application and related right to access an effective remedy also often entail the need for the applicant precisely to have an adjudication of their case by the Court. Furthermore, since the implementation of unilateral declarations are not monitored by the Committee of Ministers, an increased recourse to such tools would be problematic. **Therefore, any debate on this topic should include consultation with applicants' representatives and civil society, and this should be specifically mentioned in this paragraph.**

Paragraph 54(b):

New Mechanism in inter-State and International Conflict Situations: There is a particular need for the Court to tackle serious, systematic and widespread human rights violations. Such cases precisely call for an effective judicial response and no new mechanism should displace such cases from the judicial to the political level; furthermore, individual victims of human rights violations should retain their right to individual application and to access judicial remedy for violations of their Convention rights. **This paragraph should be deleted.**

Interpretation – the need for clarity and consistency

Paragraph 55:

Judicial Interpretation: The term “reasonably” in this paragraph does not reflect the principles of interpretation of the Court and should be deleted.

Paragraphs 60 and 61:

Interpretation of the Convention: These paragraphs inappropriately encourage the Court to develop its interpretation and application of the Convention in particular ways. **The paragraphs amount to unacceptable political pressure on the Court and should therefore be deleted.**

Selection and Election of judges – the importance of co-operation

Paragraph 66:

National selection procedures: We welcome this paragraph, but consider that it could be strengthened by more specific proposals regarding the process by which qualified candidates are included on lists for election as a judge. At present, many State Parties lack a national legal framework or a clear, comprehensive and transparent procedure for nominating judges for election. Such frameworks, which can support transparency in the selection procedure should also be designed to facilitate progress towards gender parity and greater diversity amongst judges of the Court. **We therefore propose that text should be added in paragraph 66 calling on State Parties to establish a national legal framework or regulations governing shortlisting, interview and selection of judicial candidates, and ensuring that selection is carried out through fair and transparent processes, by an independent body.**

Execution of judgments

We welcome this section, which contains many important measures such as those recommended in paragraphs 75 and 77. However we encourage the Danish Chairmanship to place greater emphasis on the need for more effective execution of judgments as an essential means of strengthening the Convention system and to take the opportunity to propose more concrete follow-up to the Brussels Declaration.

In order to better emphasise the importance of execution of judgments, and its close links with national implementation, we propose that this section should be moved and placed immediately after the section on national implementation.

We further propose that this section be strengthened by reaffirming the call in paragraph C(1)(j) of the Brussels Declaration relating to the need for increased resources of the Department for the Execution of Judgments, so as to allow it to fulfil its primary role, including its advisory functions, and to ensure co-operation and bilateral dialogue with the States Parties.

This section would also be strengthened by the insertion of a clause, renewing the call in section C(1)(a) of the Brussels Declaration, for the Committee of Ministers to “use in a graduated manner all of the tools at its disposals in the supervision process” including interim resolutions and, where appropriate, Article 46.

Paragraph73:

Execution of judgments by State Parties: We consider it appropriate to recognise here, that although there has been some progress by some State Parties in the execution of judgments, serious weaknesses remain, and further efforts are required by national authorities. **We therefore propose that text should be added in this section, noting that inadequacies and delays in execution continue to pose a major challenge to the Convention system, and calling on all State Parties to work with all national authorities, legislative, executive and judicial, to ensure more effective and prompt execution of judgments.**