

Provisional Enforcement in the Algerian Code of Civil and Administrative Procedure, as Amended and Supplemented

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Abstract:

Provisional enforcement constitutes one of the most significant exceptions to the general rule under which a judgment may not be compulsorily enforced until ordinary means of recourse have been exhausted or their time limits have expired. Under Algerian law, the legislator has allowed, in specific cases, the attachment of enforceability to a first-instance judgment despite its being open to opposition or appeal. This study examines the regime of provisional enforcement under Law No. 08-09 containing the Code of Civil and Administrative Procedure, as amended and supplemented: its concept and legal basis, its forms and cases as between what is granted by operation of law and what is left to judicial discretion, and its procedural rules and safeguards, foremost among them the objection to provisional enforcement provided for in Article 324, together with the rule of Article 326 barring any recourse against decisions ruling on such objection. It concludes that, although the Algerian legislator has relatively succeeded in balancing judicial efficiency with the protection of the judgment debtor, Article 323 still requires redrafting, notably by adopting the criterion of serious harm resulting from delayed enforcement, and by regulating the security and restitution of the parties to their former position.

Keywords: Provisional enforcement; enforceability; suspensive effect of appeal; objection to provisional enforcement; security (bail); Code of Civil and Administrative Procedure.

Introduction

The philosophy of two-tier adjudication rests on the fundamental premise that a judgment rendered by a court of first instance is open to review before the Court of Appeal, and that this reviewability requires the suspension of its enforcement effect pending its stabilisation — so as to safeguard the rights of the judgment debtor against the execution of a judgment that may subsequently be set aside or modified. Yet an absolute insistence on this rule opens wide the door to the use of ordinary means of recourse as instruments of delay and litigation-prolongation, thereby emptying judicial protection of its substance and transforming a judicially recognised right into a right indefinitely deferred.¹

¹See in this sense: 'Abd al-Rahman Barbara, *Explication du Code de procédure civile et administrative*, Baghdad Publications, Algeria, 4th revised and expanded ed., 2011.

To address this problem, comparative procedural legislation — including that of Algeria — has developed the institution of provisional enforcement, which permits the execution of a first-instance judgment despite its susceptibility to opposition or appeal, or even where such a remedy has in fact been lodged. The Algerian legislator regulated this institution by Law No. 08-09 of 25 February 2008 containing the Code of Civil and Administrative Procedure,² which entered into force after the expiry of one full year from its publication,³ and was subsequently subjected to a series of amendments, the most important of which were introduced by Law No. 22-13 of 12 July 2022.⁴

The importance of studying provisional enforcement lies in the fact that it stands at the intersection of two apparently conflicting values: the efficiency and speed of justice on the one hand, and the protection of the judgment debtor against the premature execution of an unstabilised judgment on the other. Provisional enforcement, to the very extent that it constitutes an instrument for making judicial protection effective, also carries the risk of causing irreparable harm if the judgment covered by it is subsequently annulled or modified on appeal.⁵ Hence the researcher's need to examine the conditions with which the legislator has surrounded this institution and to assess their practical adequacy.

The central research question of this study is: **To what extent has the Algerian legislator, under the Code of Civil and Administrative Procedure as amended and supplemented, succeeded in regulating the institution of provisional enforcement so as to balance the judgment creditor's right to assert their entitlement without delay against the judgment debtor's right not to have enforced against them a judgment that has not yet stabilised?**

This central question gives rise to several subsidiary questions: What is meant by provisional enforcement and where does it stand in the general theory of judicial decisions? What are its forms and cases under Algerian legislation? What safeguards are available to the judgment debtor against it? And what becomes of enforcement already carried out when the judgment is annulled?⁶

The nature of the subject required reliance on the analytical method in deconstructing the legal texts governing provisional enforcement — most notably Arts. 323 and 324 of the

²Law No. 08-09 of 18 Safar 1429 AH (25 February 2008), comprising the Code of Civil and Administrative Procedure, Official Gazette of the Algerian Republic, No. 21, 23 April 2008, as amended and supplemented.

³Law No. 08-09 was deferred for one full year from its publication date before entering into force, making it effective in 2009, to allow the judicial system to adapt to the new provisions.

⁴Law No. 22-13 of 12 July 2022, amending and supplementing Law No. 08-09, Official Gazette, No. 48, 17 July 2022.

⁵Article: "Provisional enforcement of judicial decisions between legal necessity and the risk of abuse," published on the Algerian Scientific Journals Platform (ASJP), article No. 266241.

⁶Omar Zaoudah, *Civil Procedure in Text, Doctrine and Case Law*, Dar Houma, Algeria.

Code of Civil and Administrative Procedure — supplemented by the deductive method for extracting general rules from specific cases, and by the comparative method in two instances: an internal comparison between the general regime of provisional enforcement in civil matters and its specificities in administrative matters, and a limited external comparison with French and Egyptian legislation on points where the comparison revealed shortcomings in the Algerian text.⁷

Accordingly, the study is divided into five sections: Section One deals with the nature of provisional enforcement and its legal basis; Section Two with its forms and cases under Algerian legislation; Section Three with its procedural rules and safeguards; Section Four with the specificities of provisional enforcement in administrative matters and its place in comparative law; and Section Five with proposals for reform of the institution.⁸

Section One: The Nature and Legal Basis of Provisional Enforcement

Sound analysis of the rules governing provisional enforcement requires, first, defining the concept and distinguishing it from neighbouring institutions within the general theory of judicial decisions (Sub-section One), and then identifying the legal basis on which it rests and its legal nature (Sub-section Two).⁹

Sub-section One: The Concept of Provisional Enforcement and Its Distinctions

I. Definition of Provisional Enforcement

The Algerian legislator did not provide a comprehensive definition of provisional enforcement — as is the practice of most procedural codes, which confine themselves to setting out its cases and rules, a commendable approach in principle since definition is a task for legal scholarship rather than for legislation.¹⁰ Algerian doctrine has filled this gap, defining provisional enforcement as *the attachment of enforcement force to a judicial decision that has not acquired the authority of res judicata, such that it becomes executable despite its susceptibility to ordinary means of recourse or despite the actual exercise of those means*.¹¹

This definition reveals that provisional enforcement applies to first-instance judgments — whether in the presence or default of the party — since provisional enforcement cannot be conceived with respect to final judgments that have exhausted ordinary means of recourse: those are enforceable by reason of their nature, not by way of exception.¹² It also reveals that

⁷Ammar 'Awabdi, *General Theory of Administrative Disputes in the Algerian Judicial System*, University Publications Office, Algeria.

⁸Ammar Boudhiaf, *Commentary on the Code of Civil and Administrative Procedure*, Jussour, Algeria.

⁹Ben Chennouf Fairouze, *Lectures on the Code of Civil and Administrative Procedure: Judicial Decisions and Means of Appeal*, Faculty of Law and Political Science, Tissemsilt University.

¹⁰Mohand Amokrane Boubekur, *Civil Procedure: Theory of Action, Theory of Litigation, Exceptional Procedures*, University Publications Office, Algeria, 2008.

¹¹Al-Ghouthi Ben Milha, *Algerian Judicial Law*, National Office for Educational Works, Algeria.

¹²Article: "Statutory and judicial provisional enforcement under the Code of Civil and Administrative Procedure," ASJP, article No. 228891, available at: asjp.cerist.dz.

provisional enforcement does not alter the nature of the judgment or the tier of adjudication, but operates upon a single one of its effects — the enforcement effect — advancing it in time.

Some Algerian works refer to it as, but the term adopted by the legislator in Law No. 08-09 — is the most precise, since it qualifies the judgment rather than the enforcement operation itself: it is the *judgment* that is described as subject to provisional enforcement, while enforcement is the legal consequence flowing from that characterisation.¹³

II. Distinctions from Similar Institutions

Three institutions must be distinguished from provisional enforcement. First, *enforceability*: the attribute that renders a judgment susceptible to compulsory execution. Provisional enforcement is merely an exceptional mechanism for attaching this attribute to the judgment before its natural time; the relationship is one of rule to exception, not of synonymy.¹⁴

Second, the *enforcement formula*: the official wording affixed to the enforcement copy of a judgment, by which enforcement agents and the public force are addressed. The distinction is that the enforcement formula is a formal subsequent step at the registry level, whereas provisional enforcement is a substantive characterisation attaching to the judgment by operation of law or by virtue of the operative part of the judgment itself.¹⁵

Third, *res judicata*: an effect relating to the resolution of the dispute and the preclusion of its re-litigation, whereas provisional enforcement concerns the enforcement effect alone. A judgment may accordingly be subject to provisional enforcement without having acquired *res judicata* — and herein lies the exceptionality of the institution.¹⁶

Provisional enforcement must also be distinguished from interim measures: the latter do not aim to satisfy the right but to freeze the debtor's assets pending future satisfaction, whereas provisional enforcement leads to the actual exercise of the right — making its risk to the judgment debtor more acute and explaining the safeguards with which the legislator has surrounded it.¹⁷

III. Legislative History of Provisional Enforcement in Algeria

Provisional enforcement was regulated at an early stage under the repealed Ordinance No. 66-154,¹⁸ which adopted the same division between statutory provisional enforcement and

¹³The legislator used varying terminology for the same concept: Art. 74 and 303 use 'provisionally enforceable', Art. 323 uses 'provisional enforcement', and Art. 509 uses 'enforceable by operation of law'; the difference is terminological only. See also: Nabil Sakr, *Intermediate Commentary on the Code of Civil and Administrative Procedure*, Dar al-Huda, 'Ayn Mellila, Algeria.

¹⁴See: 'Abd al-Rahman Barbara, *Enforcement Proceedings in Civil Matters*, Baghdadi Publications, Algeria.

¹⁵Hamdi Basha 'Omar, *Enforcement Problems under Law No. 08-09*, Dar Houma, Algeria.

¹⁶Abd al-Salam Dhib, *The New Code of Civil and Administrative Procedure: A Critical Study*, Dar Houma, Algeria.

¹⁷Muhammad Hazit, *Notes on the Code of Civil and Administrative Procedure*, Dar Houma, Algeria.

¹⁸Ordinance No. 66-154 of 8 June 1966 comprising the Code of Civil Procedure, repealed by Art. 1065 of Law No. 08-09.

judicial provisional enforcement, and allowed the judgment debtor to raise '*opposition to provisional enforcement*' before the appellate court.¹⁹ Law No. 08-09 therefore did not introduce an entirely new institution but reformulated the previous rules with partial amendments.

The most notable developments are threefold: the replacement of *al-tanfidh al-mu'ajjal* by *al-nafadh al-mu'ajjal* — a welcome terminological refinement; the replacement of '*opposition to provisional enforcement*' by '*objection to provisional enforcement*', to avoid confusion with opposition as an ordinary means of recourse against default judgments; and the addition of a new case to mandatory provisional enforcement — the award of the matrimonial home to the custodial parent.²⁰

This evolution remained largely formal: the legislator preserved the old structure and virtually the same cases without incorporating the criticisms that doctrine and case law had consolidated — particularly regarding the narrow scope of the judge's discretion and the obscurity of certain cases.²¹ The call for revision of Art. 323 therefore persists to this day, notwithstanding the 2022 amendments.

Sub-section Two: The Legal Basis and Nature of Provisional Enforcement

I. The Suspensive Effect of Ordinary Means of Recourse and Its Departure

The Algerian legislator enshrined the general rule expressly in Art. 323 (para. 1) of the Code of Civil and Administrative Procedure: 'Enforcement of a judgment is suspended during the period for ordinary recourse, and is also suspended by reason of its exercise.'²² The provision thus attaches the suspensive effect twice: once to the period itself even if no appeal is lodged, and once to the actual exercise of the appeal, protecting the judgment debtor from execution of a judgment open to annulment.²³

The legislator did not, however, make this an absolute rule: Art. 323 opens with a clear exception for 'judgments mandatorily enforceable by operation of law,' then sets out the cases in which provisional enforcement is ordered notwithstanding opposition or appeal.²⁴ The legal

¹⁹Art. 40 of Ordinance No. 66-154, allowing opposition to provisional enforcement before the appellate court.

²⁰Abd al-Rahman Barbara, Commentary on the Code of Civil and Administrative Procedure, op. cit., on the legislator's approach to the repealed provisions.

²¹Muhammad Hazit, op. cit.

²²Art. 323 (para. 1) of Law No. 08-09: 'Enforcement of a judgment is suspended during the period for ordinary means of recourse, and is also suspended by reason of their exercise.'

²³The precision of Art. 323 para. 1 lies in attaching the suspensive effect to two distinct events: the period itself, even if no appeal is lodged, and the actual lodging of the appeal. See also: 'Abd al-Rahman Barbara, op. cit.

²⁴Art. 323 of Law No. 08-09, op. cit.

basis of provisional enforcement is thus Art. 323, supported by specific provisions scattered through the Code, most notably Art. 303 on interim orders.²⁵

Since provisional enforcement is an exception, it is subject to strict construction: it cannot be applied by analogy, its cases cannot be extended, and the judge cannot order it outside the cases prescribed by law. A judgment ordering provisional enforcement outside the specified cases is liable to be set aside on that point.²⁶

II. The Legal Nature of Provisional Enforcement

Two views compete on the classification of provisional enforcement: one treats it as a substantive privilege that the law confers on certain rights by reason of their subsistence character or the strength of their instrument (e.g., maintenance, authentic instruments); the other treats it as a purely interim procedural measure that does not affect the substantive right and does not bind the appellate court, in the same way as other interim measures.²⁷

The preferable view is that it has a dual nature: as regards its source and rationale it rests on substantive considerations relating to the seriousness of the adjudicated right or its urgency, while as regards its effects it is an interim measure that lapses with its basis, i.e., with the annulment of the judgment covered by it. Two practically important consequences follow: **first**, provisional enforcement is not a matter of public policy and the judge may not order it sua sponte in discretionary cases, nor may it be raised for the first time before the Supreme Court;²⁸ **second**, enforcement carried out pursuant to it is at the risk of the party who requested it, who is liable to restore the parties to their former position and pay compensation if the judgment is annulled.²⁹

Section Two: Forms and Cases of Provisional Enforcement under Algerian Legislation

Provisional enforcement, according to its source, divides into **statutory provisional enforcement** — derived directly from a legal text without need for a request or judicial order — and **judicial provisional enforcement** — derived from the operative part of the judgment upon the party's request, and itself dividing into mandatory and discretionary.³⁰

Sub-section One: Statutory Provisional Enforcement

Statutory provisional enforcement is that which the legislator provides by a specific text for a category of judgments or orders by reason of their nature: the judgment creditor need not

²⁵Art. 303 of Law No. 08-09: 'The interim order does not affect the merits. It is provisionally enforceable with or without security notwithstanding all means of recourse, and is not subject to opposition or objection to provisional enforcement.'

²⁶Article: "Provisional enforcement between legal necessity and risk of abuse," ASJP, No. 266241.

²⁷Sa'ih Senqouqa, Concise Commentary on the Code of Civil and Administrative Procedure, Dar al-Huda, 'Ayn Mellila, Algeria.

²⁸Jilali Baghdadi, Judicial Precedent in Civil Matters, National Office for Educational Works, Algeria.

²⁹See: 'Abd al-Rahman Barbara, Enforcement Proceedings, op. cit.

³⁰Article: "Statutory and judicial provisional enforcement under the CCAP," ASJP, No. 228891.

request it, and the judge has no power to grant or withhold it — it attaches to the judgment upon its delivery, even if the operative part is silent.³¹

Its most prominent application in Algerian case law is interim orders: Art. 303 provides that an interim order does not affect the merits, is provisionally enforceable with or without security notwithstanding all means of recourse, and is not subject to opposition or objection to provisional enforcement.³² This is logical: interim jurisdiction exists precisely to confront imminent danger; suspending enforcement on appeal would defeat its purpose.³³

The legislator further immunised this category from the objection under Art. 324 — a double immunity that part of the scholarship criticises as depriving the judgment debtor of all safeguards against orders that may be made in conditions of haste and without thorough examination.³⁴ The severity of this criticism is mitigated, however, by the fact that the interim order does not acquire *res judicata* as against the court of the merits, and remains open to appeal within the legal period.

Statutory provisional enforcement is not confined to interim orders; its applications are distributed across scattered provisions: Art. 74 on orders to produce a document or extract an official copy, which the judge decides 'by an order provisionally enforceable by virtue of the original copy';³⁵ and Art. 311 on *ex parte* orders, which are enforceable by the original copy and subject to a three-month lapse period from the date of delivery.³⁶

Its broadest application is in social matters: Art. 509 provides that an order by the president of the social division for immediate enforcement 'is enforceable by operation of law notwithstanding all means of recourse,' while Art. 507 strips appeal of its suspensive effect for orders of that president.³⁷ The rationale is quintessentially social: wages are tied to the worker's

³¹Al-'Arabi Shahat 'Abd al-Qadir, *Principles of Civil and Administrative Procedure under Law No. 08-09*, Dar Houma, Algeria.

³²Art. 303 of Law No. 08-09: 'The interim order does not affect the merits. It is provisionally enforceable with or without security notwithstanding all means of recourse and is not subject to opposition or objection to provisional enforcement.'

³³Lahsen Ben Sheikh Ath Melouya, *Selected Texts in Administrative Interim Jurisdiction*, Dar Houma, Algeria.

³⁴Abd al-Salam Dhib, *op. cit.*

³⁵Art. 74 (last para.) of Law No. 08-09: 'The judge decides the application by an order provisionally enforceable by virtue of the original copy of the order.'

³⁶Art. 311 (para. 2) of Law No. 08-09, on *ex parte* orders being enforceable by the original copy.

³⁷Art. 509 of Law No. 08-09: 'This order is enforceable by operation of law notwithstanding all means of recourse'; see also Art. 507 on the non-suspensive effect of appeal against orders of the president of the social division.

subsistence needs and employment stability is linked to social peace — both are too urgent to await the stabilisation of a judgment.³⁸

Also within this category is the conciliation record drawn up before the family affairs judge, treated by Art. 443 as an enforcement instrument upon deposit,³⁹ and divorce judgments under Arts. 450 and 451, whose cassation appeal is expressly declared non-suspensive by Arts. 435 and 452.⁴⁰

An important distinction must be noted between statutory provisional enforcement and the mere absence of the suspensive effect for extraordinary means of recourse: Art. 348 provides that extraordinary means and their time limits produce no suspensive effect, and Art. 361 applies the same rule to cassation.⁴¹ The distinction is fundamental: in those cases the judgment has already acquired *res judicata* and its force is ordinary rather than exceptional — it is not 'provisional' enforcement at all.⁴²

Also to be included within this category, in our view, are *ex parte* orders by reason of their non-contentious, immediate nature, orders relating to the conduct of proceedings and investigation, and any matter for which a specific provision in substantive legislation requires the enforcement of judgments notwithstanding appeal, in consideration of social or economic factors.⁴⁴ Sound application in each case requires recourse to the specific text, since statutory provisional enforcement is neither presumed nor susceptible to analogical extension.⁴³

Sub-section Two: Mandatory Judicial Provisional Enforcement

Art. 323 (para. 2) provides: 'Save for judgments mandatorily enforceable by operation of law, provisional enforcement shall be ordered notwithstanding opposition or appeal, when requested, in all cases where the decision is based on an authentic instrument, an acknowledged promise, a prior judgment having the force of *res judicata*, in maintenance matters, or granting the matrimonial home to the custodial parent.'⁴⁴

³⁸Note: Arts. 507 and 509 do not use the term 'provisional enforcement' but negate the suspensive effect and decree enforcement by operation of law — a different characterisation but the same practical result.

³⁹Art. 443 (para. 3) of Law No. 08-09, deeming the conciliation record an enforcement instrument.

⁴⁰Arts. 435 and 452 of Law No. 08-09, on the non-suspensive effect of cassation on divorce judgments.

⁴¹Art. 348 of Law No. 08-09: 'Extraordinary means of recourse and their time limits produce no suspensive effect, unless the law provides otherwise'; see also Art. 361 on cassation.

⁴²Abd al-Rahman Barbara, *Commentary on the Code of Civil and Administrative Procedure*, op. cit.

⁴³Sa'ih Senqouqa, *Concise Commentary on the Code of Civil and Administrative Procedure*, Dar al-Huda, 'Ayn Mellila, Algeria.

⁴⁴Note: the Official Gazette text reads 'in a period of maintenance' — an obvious drafting error for 'in maintenance matters'; corrected in practice and should be rectified in any future amendment. See also: Art. 323 (para. 2) of Law No. 08-09.

The word 'shall' indicates that the judge's power is bound, not discretionary: once provisional enforcement is requested and one of the five cases is present, the judge must order it and may not refuse — failing which, the judgment is liable to be set aside on that point.⁴⁵

Case 1: Judgment based on an authentic instrument. An authentic instrument is conclusive as to the legal acts and material facts it records and may only be challenged by the procedure of forgery;⁴⁶ the right it evidences is of such strength that deferring its assertion on account of an ordinary appeal is unjustified. Doctrine notes, however, that the holder of an already-enforceable authentic instrument does not ordinarily need a judgment, confining this case to non-enforceable authentic instruments or those giving rise to a dispute as to interpretation or performance.⁴⁷

Case 2: An acknowledged promise. This is the most debated case in Algerian scholarship, as the legislator neither defined nor conditioned the 'acknowledged promise.' The construction that renders it coherent is that it refers to the judgment debtor's acknowledgment during the proceedings of the obligation or its generating fact — so that the right is established by the debtor's own admission.⁴⁸ The provision has been criticised for its obscurity and rarity in practice, with calls for redrafting or deletion.⁴⁹

Case 3: Judgment based on a prior judgment with the force of res judicata. The right has already been judicially determined by a stable judgment; the subsequent judgment merely draws its consequences. It is unacceptable to defer enforcement because of an appeal that is expected to fail.⁵⁰ The prior judgment must actually have res judicata effect and the classic triple identity of parties, subject-matter, and cause must be present.⁵¹

Case 4: Maintenance matters. Maintenance is of a subsistence character that tolerates no deferral: it is awarded to meet a daily need, and delay until the appeal is decided may cause severe harm to the judgment creditor, especially where minor children are involved.⁵² The

⁴⁵Art. 323 (para. 2) of Law No. 08-09; see also: 'Ammar Boudhief, op. cit.

⁴⁶Art. 324 of Ordinance No. 75-58 (Civil Code), as amended, on the probative force of authentic instruments.

⁴⁷See analysis of the authentic-instrument case: 'Abd al-Rahman Barbara, op. cit.; see also: Omar Zaoudah, op. cit.

⁴⁸Article: "Statutory and judicial provisional enforcement under the CCAP," ASJP, No. 228891.

⁴⁹Ben Chennouf Fairouze, op. cit.

⁵⁰See: Muhammad Hazit, op. cit., on the conditions for relying on a prior judgment with the force of res judicata.

⁵¹On res judicata and its conditions, see: Jilali Baghdadi, op. cit.

⁵²Law No. 84-11 of 9 June 1984 (Family Code), as amended by Ordinance No. 05-02 of 27 February 2005, particularly the provisions on maintenance and the residence for exercising custody.

legislator acted wisely in including this case, consistently with family law's philosophy of protecting the weaker party.⁵³

Case 5: Award of the matrimonial home to the custodial parent. Introduced by Law No. 08-09 and not found in the repealed Code, this is a logical extension of custody protection: awarding custody without shelter for the custodian and child is meaningless.⁵⁴ The legislator made provisional enforcement in all five cases without security, to spare the judgment creditor.⁵⁵

The mandatory nature of provisional enforcement in these cases is conditional, in all instances, upon an explicit request from the interested party: the judge may not order it *sua sponte*, as the matter is not one of public policy. To do so would be to decide *ultra petita*.⁵⁶

Sub-section Three: Discretionary Judicial Provisional Enforcement and Security

After specifying the mandatory cases, Art. 323 (para. 3) opens a discretionary door for the judge: 'The judge may, in all other cases, order provisional enforcement with or without security when there is urgency.' The provision creates a discretionary power but conditions it on urgency.⁵⁷

Two observations arise. First: tying discretionary provisional enforcement solely to urgency unduly narrows its scope — urgency in the technical sense may be absent yet delayed enforcement may still cause serious harm (e.g., where the debtor dissipates assets to render the judgment worthless). Published Algerian studies have accordingly proposed amending Art. 323 to add the criterion of serious harm resulting from delayed enforcement alongside urgency, following comparative models.⁵⁸

Second: the legislator left the judge to choose between ordering provisional enforcement with or without security, without providing criteria. Security in this context is a financial guarantee provided by the judgment creditor to cover losses that may be suffered by the judgment debtor if the enforced judgment is annulled. The legislator explained the manner of its provision and deposit in the enforcement rules.⁵⁹ The default — inferred from the text and the fact that mandatory cases operate without security — is that provisional enforcement is ordered without security, security being an exceptional condition left to the judge's

⁵³Al-'Arabi Belhaj, Concise Commentary on the Algerian Family Code, University Publications Office, Algeria.

⁵⁴Nabil Sakr, *op. cit.*

⁵⁵Abd al-'Aziz Sa'd, Marriage and Divorce under the Algerian Family Code, Dar Houma, Algeria.

⁵⁶Mohand Amokrane Boubekeur, *op. cit.*; see also: Tahri Hussein, *op. cit.*

⁵⁷Art. 323 of Law No. 08-09, previously quoted.

⁵⁸Article: "Provisional enforcement between legal necessity and risk of abuse," ASJP, No. 266241.

⁵⁹See Art. 586 of Law No. 08-09 on the manner of providing and depositing security.

assessment in light of the circumstances, particularly the judgment creditor's solvency, the nature of the object adjudicated, and the possibility of restitution.⁶⁰

Good reasoning requires the judge, in this case, to state the grounds for urgency and to record in the operative part whether security is required or not, since omitting this information generates serious problems at enforcement and opens the door to disputes before the enforcement judge.⁶¹

Section Three: Procedural Rules and Safeguards

Sub-section One: Conditions and Formalities of Ordering Provisional Enforcement

I. Conditions

Ordering judicial provisional enforcement — whether mandatory or discretionary — requires the following conditions. **Condition 1:** An explicit request from the interested party: the judge does not order it *sua sponte*; the request may be included in the initiating pleading or a subsequent brief, provided it is filed before the close of argument.⁶² **Condition 2:** The request must fall within one of the legally prescribed cases or urgency must be present in other cases. **Condition 3:** The judgment must by its nature be susceptible to enforcement, i.e., it must contain an order for performance — provisional enforcement is inconceivable for declaratory or constitutive judgments that contain no obligation (e.g., a judgment dismissing the claim or declaring a contract valid).⁶³ **Condition 4:** Reasoning — in discretionary cases the judge must state the grounds on which they based their finding of urgency, failing which the judgment is void on this point.⁶⁴

II. Formalities and Effect on Enforcement

Provisional enforcement is established in the operative part of the judgment and noted in the enforcement copy so that the judicial officer is aware of it when conducting enforcement. Its most important procedural effect is release from the waiting period set in the notice to comply: enforcement may begin as soon as the formal notice has been served, without

⁶⁰Security in provisional enforcement differs from procedural security required for third-party opposition and application for review (Arts. 385 and 393 of Law No. 08-09): the latter guarantees the seriousness of the challenge, the former indemnifies harm caused by the enforcement itself. See also: Hamdi Basha 'Omar, op. cit.; 'Ammar Boudhiaf, op. cit.

⁶¹Al-'Arabi Shahat 'Abd al-Qadir, op. cit.; see also: Hamdi Basha 'Omar, op. cit.

⁶²Abd al-Rahman Barbara, Commentary on the CCAP, op. cit.; see also: Omar Zaoudah, op. cit.

⁶³Muhammad Hazit, op. cit.; see also: Al-Ghouthi Ben Milha, op. cit.

⁶⁴Arts. 275 et seq. of Law No. 08-09 on the requirements and reasoning of judgments; see also: 'Abd al-Rahman Barbara, op. cit.; Ben Chennouf Fairouze, op. cit.

observing the ordinary fifteen-day period.⁶⁵ This is the most practically significant effect of provisional enforcement for the litigant.⁶⁶

A practical problem raised by doctrine and case law alike is how to challenge the provisional-enforcement component: is the entire judgment appealed, or are the merits appeal and the objection to provisional enforcement treated separately? The accepted practice is that the two are distinct: the appeal goes to the court of the merits following general rules, while the objection to provisional enforcement is a specific autonomous procedure governed by Art. 324.⁶⁷

In practice the question also arises whether provisional enforcement can be severed — ordered for one part of the operative part but not the rest. The better view allows and indeed favours this where the judgment decides multiple claims not all falling within the prescribed cases: e.g., if maintenance and damages are awarded together, provisional enforcement covers only the maintenance component, since the exceptional rationale does not apply to the other.⁶⁸

III. The Role of the Judicial Officer and Enforcement Difficulties

The judicial officer, as the enforcement agent, must verify that the instrument presented to them is actually covered by provisional enforcement — as stated in the operative part and in the enforcement copy — and that security has been provided where the judgment so conditioned enforcement. If it appears that the judgment is not covered by provisional enforcement and the time limits for appeal have not expired, the officer must refrain from enforcement or face professional and civil liability.⁶⁹

If a legal or material difficulty obstructs enforcement, any interested party may raise an enforcement dispute before the competent court — a procedure distinct from the objection to provisional enforcement: the enforcement dispute concerns the enforcement operation itself and its conditions, while the objection concerns the characterisation of the judgment as provisionally enforceable and the risk of continuing it.⁷⁰

A recurring practical difficulty is partial enforcement: the judgment creditor may have commenced enforcement when an order to stay provisional enforcement is made before completion. The better view is that the stay order does not reach back to acts validly done

⁶⁵See Art. 609 of Law No. 08-09 on the 15-day notice-to-comply period, and Art. 614 on enforcement of interim orders.

⁶⁶Art. 609 of Law No. 08-09.

⁶⁷Article: "Appeal against a judgment ordering provisional enforcement notwithstanding opposition or appeal," ASJP, No. 184100.

⁶⁸Article: "Statutory and judicial provisional enforcement under the CCAP," ASJP, No. 228891.

⁶⁹Hamdi Basha 'Omar, Enforcement Proceedings under Law No. 08-09, op. cit., on the judicial officer's role.

⁷⁰See provisions on enforcement difficulties and the jurisdiction of the court president in Law No. 08-09.

before it was made but prevents further enforcement from that date, the fate of what was done remaining conditional on the outcome of the substantive appeal.⁷¹

Sub-section Two: Objection to Provisional Enforcement

I. Competent Court and Admissibility

The objection to provisional enforcement is the fundamental safeguard available to the judgment debtor against the execution of an unstabilised judgment, provided for in Art. 324:⁷²

*'Objection to provisional enforcement may be raised before the president of the court before which the appeal or opposition is pending, who may, by way of summary proceedings, stay provisional enforcement if it considers that continuation may produce serious or irreversible consequences. The president shall rule on the objection at the earliest hearing.'*⁷³

The competent court is the president of the appellate court — not the court that rendered the judgment — a logical solution since the first-instance court has exhausted its jurisdiction upon delivery of judgment. The president decides by way of summary proceedings, i.e., through simplified and speedy procedures, at the earliest hearing — making this mechanism an emergency protection commensurate with the nature of the risk it confronts.⁷⁴

The conditions for admissibility, extracted from the text and general rules, are: first, the existence of a substantive remedy by way of opposition or appeal — the objection is ancillary and cannot exist independently; second, an explicit request from the judgment debtor — the president may not stay enforcement *sua sponte*; third, the application must be made before enforcement has been completed — there is no purpose in staying enforcement that has already been fully carried out.⁷⁵

II. The President's Power and the Status of the Ruling

On the merits, the legislator entrusts the president with assessing whether continuation of enforcement would produce 'serious or irreversible consequences' — a flexible criterion subject to broad discretion, though doctrine has settled that it refers principally to situations in which enforcement leads to a state of affairs that is impossible or difficult to reverse, such as

⁷¹Sa'ih Senqouqa, op. cit.

⁷²Art. 324 of Law No. 08-09: 'Objection to provisional enforcement may be raised before the president of the court before which the appeal or opposition is pending, who may, by way of summary proceedings, stay the provisional enforcement if it considers that continuation may produce serious or irreversible consequences. The president shall rule on the objection at the earliest hearing.'

⁷³Art. 919 of Law No. 08-09, on the summary stay-of-execution procedure.

⁷⁴Muhammad Hazit, op. cit.; 'Abd al-Rahman Barbara, Enforcement Proceedings, op. cit.

⁷⁵Sa'ih Senqouqa, op. cit.

demolition of a building, transfer of real property to a third party, or enforcement over assets at risk of dissipation.⁷⁶

The most common scenarios in which the objection is accepted include: the court erroneously characterising its judgment as final when it is first-instance; ordering provisional enforcement outside the cases prescribed by Art. 323; or deciding beyond the scope of the request.⁷⁷ In all these scenarios the president does not examine the merits of the right but confines themselves to reviewing the validity of the provisional-enforcement characterisation and the risk of continuing enforcement.

Art. 325 adds an explicit condition: 'The objection to provisional enforcement is not admissible unless it is established that the judgment ordering it has been challenged by appeal or opposition.'⁷⁸ The provision makes the objection an ancillary remedy and places on the objecting party the burden of proving the existence of the principal challenge by presenting evidence of its registration. This condition prevents the objection from being used as a device to obstruct enforcement without genuine intent to appeal, though it raises in practice the issue of the time needed to register the appeal and obtain proof — time during which enforcement may have already occurred.⁷⁹

The legislator settled the status of the ruling deciding the objection in Art. 326, precluding any means of recourse against it.⁸⁰ The purpose of this immunity is manifest: to prevent the principal litigation from being burdened with ancillary disputes that delay the decision on the substantive appeal and strip the objection mechanism of its urgent character.

In our view this immunity goes too far: it closes the door on the review of an assessment that may be erroneous in a matter of profound consequence for the judgment debtor's patrimony. A shortening of the time limits for recourse rather than their outright exclusion would suffice.⁸¹ In any event, the practical result is that the president's assessment on this point is final — placing on that court the duty of particularly careful reasoning to compensate for the absence of subsequent review.⁸²

⁷⁶Article: "Provisional enforcement between legal necessity and risk of abuse," ASJP, No. 266241; see also: Hamdi Basha 'Omar, op. cit.

⁷⁷Muhammad Hazit, op. cit.

⁷⁸Art. 325 of Law No. 08-09: 'The objection to provisional enforcement is not admissible unless it is established that the judgment ordering it has been challenged by appeal or opposition.'

⁷⁹The phrase 'unless it is established' in Art. 325 places the burden of proof solely on the objecting party. In practice, a receipt of filing or a certificate from the registry suffices. See also: Muhammad Hazit, op. cit.; Nabil Sakr, op. cit.

⁸⁰Art. 326 of Law No. 08-09, precluding any means of recourse against rulings deciding an objection to provisional enforcement.

⁸¹Muhammad Hazit, op. cit.

⁸²The bar in Art. 326 applies only to the ruling on the objection, not to the underlying judgment subject to provisional enforcement, which remains open to the prescribed means of recourse. Confusion

An important exception qualifies this safeguard: Art. 303 expressly provides that interim orders are not subject to objection to provisional enforcement, leaving the judgment debtor in that case with no remedy other than an appeal within the legal time limit.⁸³ We consider this restriction an infringement of the right to a fair hearing that warrants reconsideration, at least by conferring on the appellate court an exceptional power to stay enforcement where irreversible consequences are demonstrably threatened.⁸⁴

III. Effect of Provisional Enforcement on the Fate of the Opposition

The Algerian legislator addressed a distinctive consequence of provisional enforcement in the context of opposition: the general rule under Art. 327 is that a default judgment that is opposed 'becomes as though it had never existed,' but the text expressly excepts judgments subject to provisional enforcement.⁸⁵ The mere lodging of opposition therefore does not nullify the judgment covered by provisional enforcement — it remains operative and continues to produce enforcement effects until the opposition is decided.⁸⁶

This reflects a sound legislative policy: if opposition automatically extinguished a provisionally enforceable default judgment, provisional enforcement would become a theoretical privilege annulled at will by the absent judgment debtor. Yet this same effect multiplies the risks of provisional enforcement in default judgments, where the judgment debtor had no opportunity to present a defence and now faces ongoing enforcement before being heard — making the objection under Art. 324 the only safety valve in this scenario.⁸⁷

Sub-section Three: Effects of Provisional Enforcement and Consequences of Annulment

The direct effect of provisional enforcement is that the judgment may be compulsorily executed pursuant to it despite the appeal: an enforcement copy is issued to the judgment creditor and the judicial officer carries out enforcement within the terms of the operative part. However, this enforcement is by its nature temporary, resting on a judgment open to annulment.⁸⁸

If the appellate court annuls or modifies the provisionally enforced judgment, the basis for enforcement lapses with retroactive effect and the parties must be restored to their former position. Restitution occurs either voluntarily or compulsorily on the basis of the new

between the two is a recurrent error in practice. See also: 'Abd al-Rahman Barbara, Commentary on the CCAP, op. cit.

⁸³Art. 303 of Law No. 08-09.

⁸⁴'Abd al-Salam Dhib, op. cit.

⁸⁵Art. 327 (para. 2) of Law No. 08-09: 'The case is re-examined on the merits and as a matter of law, and the judgment or decision that was opposed becomes as though it had never existed, unless that judgment or decision was subject to provisional enforcement.'

⁸⁶The exception in Art. 327 draws a careful distinction: opposition nullifies the default judgment, yet provisional enforcement survives — the case is retried but the enforcement instrument remains operative until the opposition is decided.

⁸⁷'Abd al-Salam Dhib, op. cit.

⁸⁸Hamdi Basha 'Omar, op. cit.

judgment, which is itself the enforcement instrument for that purpose. Where restitution in kind is impossible — as where the asset has been transferred to a bona fide third party — the obligation converts to monetary compensation.⁸⁹

The liability of the judgment creditor who proceeded with enforcement is governed by the general rules of tortious liability.⁹⁰ There is debate as to its basis: one view requires proof of abuse or bad faith, holding that enforcement of a judgment in one's favour is not wrongful per se; the preferable view — more consistent with the philosophy of provisional enforcement — is that it is objective liability based on risk-bearing, since the judgment creditor enforced on their own responsibility a judgment they knew to be unstabilised.⁹¹

Here the true function of security becomes clear: it is a pre-constituted guarantee covering the consequences of annulment, held in favour of the judgment debtor until the final resolution of the dispute. The Algerian legislator is accordingly criticised for making security optional without criteria and for failing to regulate by specific provision its fate and the procedure for drawing on or recovering it, leaving the matter to general rules — a shortcoming that weakens its practical value as a safeguard.⁹²

Sub-section Four: Provisional Enforcement in Algerian Judicial Practice

A review of Algerian judicial practice as reflected in the national case law collections and the Supreme Court Law Journal reveals a number of governing principles.⁹³

Principle 1: Judicial provisional enforcement is not a matter of public policy and the judge may not order it *sua sponte* even where one of the cases in Art. 323 (para. 2) is present, nor may it be raised for the first time before the Supreme Court. Conversely, statutory provisional enforcement attaches to the judgment or order even if the operative part is silent, since it derives from legislation not from judicial order.⁹⁴

Principle 2: The provisional-enforcement component is severable. Ordering provisional enforcement outside the specified cases, or without a request, exposes the judgment to annulment on that point alone, without affecting the remainder of the operative part — which explains the practice of separating the merits appeal from the challenge to the provisional-enforcement component.⁹⁵

Principle 3: Erroneous characterisation. Characterising a first-instance judgment as final does not give the judgment creditor a valid enforcement instrument and is one of the

⁸⁹See: 'Abd al-Rahman Barbara, Enforcement Proceedings, op. cit.; Omar Zaoudah, op. cit.

⁹⁰Arts. 124 and 138 of Ordinance No. 75-58 (Civil Code) on tortious liability.

⁹¹Hamdi Basha 'Omar, op. cit.

⁹²'Abd al-Salam Dhib, op. cit.

⁹³See: Jilali Baghdadi, Judicial Precedent in Civil Matters, op. cit.; the Supreme Court Law Journal; the Council of State Journal.

⁹⁴Arts. 323 and 324 of Law No. 08-09.

⁹⁵Jilali Baghdadi, op. cit.

clearest grounds for accepting an objection to provisional enforcement, since the proper legal characterisation prevails over what the operative part states.⁹⁶

Principle 4: The standard of review. The assessment of whether 'serious or irreversible consequences' exist is a substantive matter falling within the discretionary power of the president of the appellate court; it is not amenable to review since the ruling on the objection is not subject to any means of recourse under Art. 326 — placing on that court a duty of particularly careful reasoning.⁹⁷

Principle 5: Effect of annulment on completed enforcement. Enforcement carried out under a provisionally enforced judgment that is subsequently annulled is retroactively without basis and requires restitution — even if the individual procedural steps were valid at the time, since the validity of a step does not survive the lapse of its foundation.⁹⁸

Section Four: Provisional Enforcement in Administrative Matters and Comparative Law

Sub-section One: Provisional Enforcement before Administrative Courts

The Algerian legislator dedicated a separate book to administrative procedure within Law No. 08-09⁹⁹ without providing a comprehensive regulation of provisional enforcement therein — raising the question of whether Arts. 323 and 324 apply to administrative matters. The prevailing view is that the general rules in Book One apply to administrative litigation unless a specific provision derogates from them or they are incompatible with the nature of such litigation.¹⁰⁰

The distinctive feature of administrative matters is that the general rule is the *non-suspensive effect of an appeal against an administrative decision* — based on the privilege of self-executing authority (*privilège du préalable*) — and that stay of execution is the exception, subject to strict conditions assessed by the administrative judge. This makes the logic of provisional enforcement relatively inverted in administrative matters: the issue is not accelerating enforcement of the judge's decision but ensuring that it is enforced at all against the administration.¹⁰¹

Successive amendments — most notably Law No. 22-13¹⁰² — accordingly moved towards strengthening the mechanisms for compelling the administration to comply with administrative court judgments: the *astreinte* was activated and enforcement procedures were

⁹⁶Hamdi Basha 'Omar, op. cit.; 'Abd al-Rahman Barbara, Enforcement Proceedings, op. cit.

⁹⁷Art. 326 of Law No. 08-09.

⁹⁸Hamdi Basha 'Omar, op. cit.; 'Abd al-Rahman Barbara, Enforcement Proceedings, op. cit.

⁹⁹Book Four of Law No. 08-09 governing proceedings before administrative courts.

¹⁰⁰Lahsen Ben Sheikh Ath Melouya, op. cit.

¹⁰¹Lahsen Ben Sheikh Ath Melouya, op. cit.; see also: Mas'oud Shihab, General Principles of Administrative Disputes, vol. 1, University Publications Office, Algeria, 2013.

¹⁰²Law No. 22-13, amending and supplementing Law No. 08-09, op. cit.

clarified¹⁰³ — serving the same purpose that provisional enforcement serves in civil matters: preventing the judicial decision from becoming a theoretical pronouncement.¹⁰⁴

and the summary stay-of-execution procedure provided for in Article 919.¹⁰⁵ This duality has attracted well-founded criticism: the introduction of the summary stay-of-execution procedure was sufficient in itself to dispense with the legacy regime inherited from the 1966 Code.¹⁰⁶

As regards the enforcement of judgments rendered against the administration, the position under Law No. 08-09 was that first-instance judgments of administrative courts were susceptible to enforcement, since neither appeal nor cassation had a suspensive effect. This meant that administrative matters were, in the broad sense of the term, subject to statutory provisional enforcement by operation of law.¹⁰⁷

Law No. 22-13, however, reversed this position by linking enforceability to the final character of the judgment or decision — on the model of what obtains before the ordinary courts — following the creation of administrative courts of appeal as a second tier of adjudication in administrative matters.¹⁰⁸ This transformation has a direct bearing on the subject under study: administrative matters have moved from a logic of immediate enforceability to a logic of suspensive effect, which makes the need for an express regulation of provisional enforcement before administrative courts more pressing today than it was before 2022.¹⁰⁹

Correlatively, the legislator reinforced the mechanisms for compelling the administration to comply with judgments: Article 980 requires that the order imposing an

¹⁰³See articles published on ASJP on enforcement of administrative court judgments in light of the 2022 amendment; see also: al-Hadi Khadhrawi and Iman Bounacer, "Legal mechanisms for ensuring administrative compliance with court judgments," ASJP, No. 128934, pp. 1–17.

¹⁰⁴Arts. 833–837 of Law No. 08-09 on stay of execution of administrative decisions; Art. 835 requires expedited examination with shortened time limits.

¹⁰⁵Art. 919 of Law No. 08-09, *loc. cit.*

¹⁰⁶Mas'oud Shihab, *op. cit.*; Lahsen Ben Sheikh Ath Melouya, *Selected Texts in Administrative Interim Jurisdiction, op. cit.*; Rachid Kheloufi, *Administrative Litigation Law, op. cit.*; 'Abd al-Qadir 'Adou, *Administrative Disputes, op. cit.*; Ahmad Mahiou, *Administrative Disputes, op. cit.*

¹⁰⁷"The latest developments in the enforcement of administrative court judgments under Law No. 22-13 amending and supplementing Law No. 08-09," ASJP, article No. 236926.

¹⁰⁸"Procedural developments in administrative matters — a study in light of Law No. 22-13 amending and supplementing Law No. 08-09," ASJP, article No. 205887.

¹⁰⁹Tying enforceability to finality in administrative matters under Law No. 22-13 means that what was previously immediate enforcement has now become an exception requiring a specific legislative text — an effect that multiplies the importance of the *astreinte* and monetary-condemnation mechanisms under Arts. 980 and 986. See also: "Procedural innovations in administrative law in light of Law No. 22-13," ASJP, article No. 226894.

astreinte specify the date from which it begins to run;¹¹⁰ and Article 986, as amended by Article 10 of Law No. 22-13, reinstated the provisions governing the enforcement of judicial instruments embodying a monetary condemnation against public bodies, following the repeal of Law No. 91-02.¹¹¹ These mechanisms serve the very same purpose for which provisional enforcement was devised in civil matters: preventing the judicial decision from degenerating into a theoretical pronouncement.¹¹²

Sub-section Two: Provisional Enforcement in Comparative Law

Comparative analysis reveals that Algerian legislation now stands in a relatively rearguard position. The French legislator — which previously shared the same division between statutory and judicial provisional enforcement — effected a radical transformation by the Decree of December 2019, in force from 1 January 2020: provisional enforcement was made the default for all first-instance judgments, the judge retaining power to exclude it by reasoned decision when incompatible with the nature of the case.¹¹³ The rule was thus stood on its head: enforcement became the principle, stay the reasoned exception.¹¹⁴

Egyptian legislation, by contrast, retained the traditional division: Art. 287 of the Code of Civil and Commercial Procedure bars compulsory enforcement while appeal is available unless provisional enforcement is prescribed by law or ordered by the judgment, while Art. 288 provides statutory provisional enforcement without security for judgments in urgent matters and *ex parte* orders.¹¹⁵ This is closer to the Algerian model, though broader in the enumeration of cases.

The comparative lesson is twofold: first, the general trend in modern legislation is towards expanding provisional enforcement as a tool against dilatory appeals; second, this expansion is only sound if accompanied by enhanced judicial supervisory powers and a reinforced duty of reasoning — something the current Algerian text lacks.¹¹⁶

¹¹⁰Art. 980 of Law No. 08-09, requiring the order imposing an *astreinte* to specify its commencement date.

¹¹¹Art. 986 of Law No. 08-09, as amended by Art. 10 of Law No. 22-13, reinstating the provisions on enforcement of judicial instruments embodying a monetary condemnation against public bodies, following the repeal of Law No. 91-02.

¹¹²‘Ammar Boudhiaf, *Reference Work on Administrative Disputes*, *op. cit.*

¹¹³Art. 514 of the French Code of Civil Procedure, as amended by Decree No. 2019-1333 of 11 December 2019, in force from 1 January 2020, making provisional enforcement by operation of law the default for first-instance judgments. (Comparative text cited for comparison only.)

¹¹⁴The fundamental difference between the French and Algerian approaches is not in the number of cases but in where the burden of reasoning lies: in France the judge must reason a departure from provisional enforcement; in Algeria the judge must reason an order for it. This reversal signals a philosophical shift from protection to efficiency.

¹¹⁵Arts. 287 and 288 of the Egyptian Code of Civil and Commercial Procedure. (Cited for comparison only.)

¹¹⁶Article: "Provisional enforcement between legal necessity and risk of abuse," ASJP, No. 266241.

Section Five: Proposals for Reform

Sub-section One: General Proposals

An assessment of provisional enforcement in Algerian legislation yields several observations. **First:** The legislator retained the traditional division inherited from the repealed Code — between mandatory and discretionary cases — without revisiting its philosophy, whereas modern legislation has moved towards a unified criterion and expanded judicial discretion with a mandatory-reasoning requirement.¹¹⁷

Second: The 'acknowledged promise' case remained obscure — undefined and unconditioned — making its practical application rare. It is proposed either to delete it or to replace it with a clearer formulation referring to the debtor's acknowledgment established during the proceedings.¹¹⁸

Third: Tying discretionary provisional enforcement solely to urgency unduly narrows its scope. It is proposed to add the criterion of serious harm that may be suffered by the judgment creditor from delayed enforcement, coupled with a requirement that the judge provide specific reasoning.¹¹⁹

Fourth: Security provisions require more precise legislative regulation as to the criteria for imposing it, its quantum, the procedure for drawing on it, and its fate upon confirmation or annulment of the judgment, so that it effectively serves its function as a counterpart to the risk of provisional enforcement.¹²⁰

Fifth: Excluding interim orders from objection to provisional enforcement warrants reconsideration — at least by conferring on the appellate court an exceptional power to stay enforcement upon proof of a risk of irreversible consequences, reconciling the effectiveness of interim jurisdiction with the protection of the judgment debtor.¹²¹

Sixth: The matter of restitution of the parties to their former position must be regulated by a specific and clear provision determining its procedure, time limit, and competent court, rather than leaving it to case law and general rules — a lacuna that generates complex enforcement disputes.¹²²

Seventh: The effectiveness of provisional enforcement cannot be assessed by the text alone but by the extent to which judicial practice internalises it. In practice, many judgments fail to decide on a request for provisional enforcement despite it being made, or merely record it in the operative part without reasoning, or describe it in general terms without specifying whether security is required — defects that complicate enforcement and fuel disputes.¹²³ Any

¹¹⁷Article: "Statutory and judicial provisional enforcement under the CCAP," ASJP, No. 228891.

¹¹⁸Nabil Sakr, op. cit.

¹¹⁹Article: "Provisional enforcement between legal necessity and risk of abuse," ASJP, No. 266241.

¹²⁰Al-'Arabi Shahat 'Abd al-Qadir, op. cit.

¹²¹Abd al-Salam Dhib, op. cit.

¹²²Al-Ghouthi Ben Milha, op. cit.

¹²³Al-'Arabi Shahat 'Abd al-Qadir, op. cit.

legislative reform must therefore be accompanied by ongoing training for judges and judicial officers on these delicate questions.

Eighth: The progressive digitisation of court proceedings and enforcement can contribute to making provisional enforcement effective — by reducing the time for delivering and serving enforcement copies and ensuring precise tracking of when enforcement commenced — serving at the same time to protect the judgment debtor by providing a reliable date from which any stay order takes effect.¹²⁴

Sub-section Two: Proposed Redraft of Article 323

Building on the foregoing, and seeking to reconcile the requirements of efficiency with the safeguards of the judgment debtor, the following redraft of Art. 323 is proposed:

'Enforcement of a judgment is suspended during the period for ordinary means of recourse, and is also suspended by reason of their exercise, unless the judgment is mandatorily enforceable by operation of law or is subject to provisional enforcement. Provisional enforcement shall be ordered, notwithstanding opposition or appeal, when requested, in all cases where the decision is based on an authentic instrument, an acknowledgment established in the debtor's name during the proceedings, a prior judgment having the force of res judicata, in maintenance matters, in salary and wage matters, or granting the matrimonial home to the custodial parent. The judge may, in all other cases, on application, order provisional enforcement with or without security where there is urgency, or where delay in enforcement would cause serious harm to the judgment creditor — stating in the judgment the grounds on which the order is based, failing which the order shall be set aside on that point. Where security is ordered, the judgment shall specify its quantum and the manner of its provision; it shall remain deposited as a guarantee of the judgment debtor's rights until the final resolution of the dispute.'

The advantages of this redraft are fourfold: the general rule and the exception are consolidated in a single provision; the obscure formula 'acknowledged promise' is replaced by the clearer 'acknowledgment established in the debtor's name during the proceedings'; the criterion of serious harm is added alongside urgency; and mandatory reasoning and regulated security are introduced.¹²⁵

Conclusion

This study examined the institution of provisional enforcement in the Code of Civil and Administrative Procedure as amended and supplemented, as a calculated exception to the rule of the suspensive effect of ordinary means of recourse — its aim being to prevent appeal from becoming a tool of delay, without allowing it to be turned into a means of harming the judgment debtor.

The study reached a number of conclusions, most importantly: that provisional enforcement is a characterisation attaching to the judgment, not a procedural step in the

¹²⁴Nabil Sakr, op. cit.

¹²⁵Al-'Arabi Shahat 'Abd al-Qadir, op. cit.; Tahri Hussein, op. cit.

enforcement process, and that it does not affect the merits or bind the appellate court; that it divides, by source, into statutory enforcement requiring no request or order, mandatory judicial enforcement in the five cases of Art. 323 para. 2, and discretionary judicial enforcement conditioned on urgency in all other cases; that judicial provisional enforcement is not a matter of public policy and is neither ordered nor stayed *sua sponte*; and that the objection under Art. 324 constitutes the central safeguard of the judgment debtor, although it is denied to them in interim orders by Art. 303.

The study further concluded that enforcement carried out pursuant to provisional enforcement is at the risk of the requesting party, that annulment of the judgment entails restitution and compensation where restitution in kind is impossible, and that security is the natural instrument for covering this risk — yet its regulation in Algerian law remains incomplete.

Accordingly, it is recommended: to redraft Art. 323 around the twin criteria of the seriousness of the instrument and the risk of serious harm from delay; to regulate security and restitution by specific provisions; to clarify the procedural pathway for challenging the provisional-enforcement component as distinct from the merits appeal; and to continue enhancing enforcement mechanisms in administrative matters in the spirit of Law No. 22-13.

The overarching aim remains constant: that the judicial decision should be the embodiment of judicial truth and an effective instrument for asserting rights within a reasonable time. Justice that is slow is not complete justice; justice that is precipitate is not safe justice; and between these two imperatives the institution of provisional enforcement finds its place.

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