



Strasbourg, 29 September 2016

**CDL-REF(2016)034**

**Opinion No. 827 / 2015**

Engl. only

**EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW**  
**(VENICE COMMISSION)**

**SPAIN**

**POSITION OF SPAIN REGARDING ITS NEW LEGISLATION  
(ORGANIC LAW 15/2015 OF 16TH OCTOBER) AIMED  
AT THE EFFECTIVE ENFORCEMENT OF THE CONSTITUTIONAL  
COURT'S JUDGEMENTS**

**EXECUTIVE SUMMARY AND REPORT**

## Executive Summary

**Position of Spain regarding its new legislation (Organic Law 15/2015 of 16<sup>th</sup> October) aimed at the effective enforcement of the Constitutional Court's judgements.**

**I. Regarding origins of the legislative power's activity in the 2011-2015 legislature concerning the effective execution of final decisions of High Justice Courts (European Court of Human Rights and Constitutional Court).**

The tasks entrusted by the Constitution to the Spanish Constitutional Court<sup>1</sup>, as happens in most European States,<sup>2</sup> not only span to granting the citizen's fundamental rights but also to settle disputes on competency between organs and national authorities. The latter ensures a good functioning of the State based on the separation of its powers and safeguards the supremacy of the Constitution in a State governed by the rule of law.

The Spanish Constitutional Court,<sup>3</sup> since 1991, and the Spanish Supreme Court, since 2013, had already expressed concerns and made a direct call to the legislature concerning the need that procedural laws shall include proceedings allowing effective enforcement of jurisdictional decisions from all High Courts with jurisdiction in Spain together with the ECtHR judgments. This was also to be applied, in particular, to those of the Constitutional Court.

Conversely, the European Court of Human Rights itself<sup>4</sup> had expressed its concerns for inadequacies when, in some particular cases, the Spanish procedural laws have been a serious obstacle to effectively implement the decisions and final judgements of the Spanish Constitutional Court.

Furthermore, the Autonomous Government of Catalonia gave worrying signs of lack of respect to the Spanish Constitution when it promoted- eluding the requirements set for a referendum by article 92 of the Constitution<sup>5</sup>- a so called "*consultation*" about independence from Spain among "*Catalonian men and women and those residing in Catalonia*". The Constitutional Court suspended the consultation in an interim order of 4<sup>th</sup> November 2014. But

<sup>1</sup> Article 161 of the Spanish Constitution and Article 1 of the Organic Law on the Constitutional Court – developing article 165 of the Constitution- (LOTC hereinafter).

<sup>2</sup> Venice Commission's "General Report of the XVth Congress of the Conference of European Constitutional Courts on Relations of the Constitutional Court with other state authorities"

<sup>3</sup> Thus, regarding the need to enforce the European Court of Human Rights' judgements, it has pronounced itself in judgements 245/1991 (case Bultó), 96/2001 (case Castillo Algar), 240/2005 (case Riera Blume) and 197/2006 (case Fuentes Bobo).

<sup>4</sup> Case 38285/09 *García Mateos v. Spain*, § 44:

**"44. The Court reiterates that the State is required to provide litigants with a system whereby they are able to secure the proper execution of domestic court decisions. Its task is to consider whether the measures taken by the national authorities – a judicial authority in the instant case – to have the decisions concerned executed were adequate and sufficient (see *Ruianu v. Romania*, no. 34647/97, § 66, 17 June 2003), for when the competent authorities are required to take action to execute a judicial decision and fail to do so – or to do it properly – their inertia engages the responsibility of the State under Article 6 § 1 of the Convention (see, *mutatis mutandis*, *Scollo v. Italy*, 28 September 1995, § 44, Series A no. 315 C)."**

In case *Scollo v. Italy*, the administrative authorities refused to observe a judicial mandate. In its judgement of 28/2/1995 the ECtHR declared the violation of Article 6.1 of the Convention and Article 1 of Protocol no. 1, and granted just satisfaction under the former Article 50 ECHR.

<sup>5</sup> Namely, the requirements are the initiative from the President of the Government with prior authorization of the Congress and convocation by the king.

the Catalanian Government disobeyed that suspension. The Constitutional Court finally declared such consultation to be unconstitutional in its n° 138/2015 judgment, of 11<sup>th</sup> June.

That is why the Spanish legislative power, in a responsible exercise of its democratic legitimacy, considered that those needs had to be urgently addressed, not being the social debate which might arise a stumbling block to unduly deter or differ the task.

It is clear that, albeit the strictly jurisdictional nature of Constitutional Courts, the political consequences of their decisions are undeniable, especially when adjudicating on conflicts of competencies among the different constituted powers. This also occurs, *mutatis mutandis*, when, for example, the European Court of Human Rights' judgements trigger passionate social and political debates within the incumbent Member State and beyond. But such enriching political and social debates do not deprive these Highest Courts of their plainly jurisdictional nature and from the need for their decisions to be enforced.

Thus, the recent legislative activity in this matter is aimed at ensuring the rule of law at its highest level: the implementation of the Spanish Constitution by its supreme interpreter, the Constitutional Court.

Accordingly, the Houses of Parliament have passed, within a short period of time, a consistent set of legislative measures:

- Act 25/2014, of 27 November, on Treaties and other international agreements, grants higher rank than ordinary law to the responsibilities derived from International Treaties signed by Spain, including the duty to abide by the final judgement of the European Court of Human Rights under Article 46 of the Convention.
- The review of any final judgement issued by all jurisdictional ordinary orders if needed to enforce an ECtHR's judgement is granted by:
  - o Organic Law 7/2015, of 21 July, amending Organic Law 6/1985, of 1st July, on the Judiciary, at the same time amending laws of civil proceedings as well as ordinary and social and military administrative proceedings.
  - o Act 41/2015, of 5 October, amending the Code of Criminal Procedure.
- Organic Law 15/2015, of 16 October, amending Organic Law 2/1979, of 3 October, on the Constitutional Court, the effective execution of the Constitutional Court's, now under scrutiny.

The above referred concerns, and the subsequent need for an amendment of this last Organic Law, unfortunately proved to be well founded.

Short after the amendment operated by Organic Law 15/2015 was passed, the Catalanian Parliament issued its Resolution 1/XI of 9<sup>th</sup> November 2015. In its §6 it states the following:

***“The Catalanian Parliament, as holder of sovereignty and expressing the constituent power, reiterates that this Assembly and the democratic disconnection process from the Spanish State will not be subject to the decision of the institutions of the Spanish State, and in particular to those of the Constitutional Court, considering that it lacks legitimacy and powers due, inter alia, to its adjudication of June 2010 on the case concerning the Amendment of the Catalanian Statute of Autonomy, which had been previously voted by the people in referendum”***

This resolution was later annulled by the Constitutional Court through judgment 259/2015 of 2<sup>nd</sup> December 2015.

**II. Regarding the management of this democratic need within the remainder countries of the Council of Europe.**

Our constituents, when drafting our 1978 Constitution, and our Constitutional Court, when implementing it, have always shown respect and admiration for the German and Austrian configuration of their respective Constitutional system and Courts.

That is why, when confronted with such need of legal certainty concerning enforcement of judgements of the Constitutional Court in cases of blatant disobedience, the Spanish legislative turned its eyes into those comparative law systems.

As regards the Austrian Constitution Art. 146 paragraph 2 B-VG states that:

*"The enforcement of other judgements by the Constitutional Court is incumbent on the Federal President. The enforcement shall in accordance with his instructions lie with the Federal or Länder authorities, including the Federal Army, appointed at his discretion for the purpose. **The request to the Federal President for the execution of such judgements shall be made by the Constitutional Court.**"<sup>6</sup>*

Concerning the German Constitutional system, §35 of the Law regulating the BVerfGG Bundesverfassungsgericht<sup>7</sup> (German Federal Constitutional Court) establishes that:

**"The Federal Constitutional Court's decision may specify who is to execute it; in individual cases, it may also specify the method of execution."**

and §§39, 46 and 79 of the same law provide some examples of the enforcement measures that can be adopted by the German Federal Constitutional Court (i.e. §39 "(...) deny the respondent the right to vote, the right to stand for election, and the capacity to hold public office and may, in the case of legal persons, order that they be dissolved.")

This is also the case of other Council of Europe's Member States.<sup>8</sup>

Indeed, this issue has already been subject of careful consideration from the part of the Venice Commission on previous occasions.<sup>9</sup>

<sup>6</sup> See - 8TH Meeting of the Joint Council on Constitutional Justice. Tallin 19 June 2009. "Report on the Effects and Execution of Constitutional Court Judgments" by Mrs. Britta Wagner, Secretary General of the Austrian Constitutional Court. Doc. CDL-JU(2009)013. Available on the Venice Commission's website: <http://www.venice.coe.int/files/Bulletin/SpecBull-Relations-with-other-State-Powers-e.pdf>.

<sup>7</sup> Available English version at the CC's webpage : [http://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/Gesetze/BVerfGG.pdf?\\_\\_blob=publicationFile&v=1](http://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/Gesetze/BVerfGG.pdf?__blob=publicationFile&v=1)

<sup>8</sup> Such as Switzerland, inter alia.

<sup>9</sup> -Venice Commission Bulletin (July 2012) : General Report of the XVth Congress of the Conference of European Constitutional Courts on Relations of the Constitutional Court with other state authorities ( <http://www.venice.coe.int/files/Bulletin/SpecBull-Relations-with-other-State-Powers-e.pdf> )

-8TH Meeting of the Joint Council on Constitutional Justice. Tallin 19 June 2009. "Report on the Effects and Execution of Constitutional Court Judgments" by Mrs. Britta Wagner, Secretary General of the Austrian Constitutional Court. Doc. CDL-JU(2009)013: [http://www.venice.coe.int/webforms/documents/?pdf=CDL-JU\(2009\)013-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-JU(2009)013-e)

- CDL-PI(2016)002 English 15/03/2016 - Public Compilation of Venice Commission Opinions concerning Constitutional and Legal Provisions for the Protection of Local Self-Government . Accountability. Supervision of local self-government bodies.Sanctions: The proportionality principle ( pages 14 to 20): [http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI\(2016\)002-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2016)002-e)

The Venice Commission's standards have gone even further than Austrian, German, Swiss and Spanish Constitutional systems. These countries provide for a **previous** decision of the Constitutional Court which is to be enforced. But it is foreseeable, as it has been backed by the Venice Commission in its opinion on the Draft Law amending the Constitution presented by the President of Ukraine §24, that some constitutional system might need a quickly **preventive** constitutional enforcement measure from the part of the executive "...when the self-government bodies overstep their constitutional and legal competences and pose a threat to the sovereignty, territorial integrity and security of the state....", which has to **be later revised** immediately by the Constitutional Court.

### **III. Legislative procedure in order to reform the Organic Law on the Constitutional Court as an organic non-governmental bill.**

In Spain legislative proposals posted in the Parliament can originate either in the Government (what is called a "Project of Law") or in at least one of the Political Groups seated in the Parliament alone with-out Governmental intervention (what is called a "Proposal of Law").

In this case, the amendments of the Organic Law on the Constitutional Court came from a Parliamentary Political Group. It was, therefore, a "Proposal of Law".

The bill was drafted in a simple and clear wording. Therefore, the Congress of Deputies' (lower House of the Spanish Parliament) plenary sitting, on a proposal from the Bureau and after consultation with the Board of spokespersons, agreed to process it following the abridged procedure.

This is an ordinary procedure provided for in the Rules of the Parliament. It has been used throughout the years to pass numerous legislative initiatives, without ever having its constitutionality challenged. This happens especially when there is a limited time left before the legislature is bound to end.

Such procedure allows for one reading of the proposal by the plenary sitting of the Congress, another one by the plenary sitting of the Senate and a final vote in the Plenary of the Congress on the proposal - as eventually amended by both chambers- as a whole.

All political groups with parliamentarian representation shall be allowed to examine and analyze the draft, propose amendments (37 amendments were actually produced and debated about this legislative proposal).

A solid majority of the Congress adopted this Organic Law (181/ 350 Deputies). This fact proves the proper functioning of the parliamentarian democracy in this case.

Therefore no breach of the principle of representative democracy guaranteed by Article 3 of Protocol no. 1 to the Rome Convention has occurred. On the opposite, that fundamental right of political participation has been duly respected.

### **IV. Relevant measures provided for in the amendment of the Organic Law on the Constitutional Court (hereinafter, the LOTC).**

The measures under review have been devised as a means to ensure the constitutional rule of law in specific circumstances. This makes them different, as more focused and gradual, than those provided for in the Spanish Constitution in cases of national emergency (article 116<sup>10</sup>) or more "*serious prejudice to the general interests of Spain*" (article 155<sup>11</sup>) (See below).

<sup>10</sup> Regulating states of alarm, emergency and siege.

The contents of the reform have materialized in the new wording of Articles 87 and 92 LOTC.

Article 87 reads as follows:

*“1. The decisions of the Constitutional Court shall be binding on all public authorities. In particular, the Constitutional Court may agree that its decisions are notified in person to any public authority or employee deemed necessary.*

*2. Judges and Courts shall provide the Constitutional Court, as a matter of priority and urgency, with any legal co-operation and assistance it may request.*

*For that purpose, all judgments and decisions of the Constitutional Court shall be considered enforceable titles.”*

Article 92 has been modified and, at present, reads as follows:

*“1. The Constitutional Court shall ensure the effective implementation of its decisions. It may determine within the judgement or decision, or in subsequent acts, who shall be held responsible for the execution, the enforcement measures required and, where applicable, resolve enforcement issues.*

*The Court may also declare the nullity of any decision contravening those pronounced in the exercise of its jurisdiction with regard to their execution, after hearing the Public Prosecutor and the issuing authority.*

*2. The Court may request the assistance of any public administration or public authority in order to en-sure the effectiveness of its decisions which shall be provided as a matter of priority and urgency.*

*3. The parties may promote enforcement issues as established in paragraph 1 to propose the Court the adoption of the necessary enforcement measures to ensure the effective compliance of its decisions.*

*4. In the event it is noticed that a decision pronounced in the exercise of its jurisdiction may not be being complied with, the Court, at its own motion or at the request of the parties to the suit in question, shall require the institutions, authorities, public employees or private persons responsible for the enforcement to inform at that respect within the time limit set out.*

*Once the report is received or when the time limit expires, should the Court find that its decision is being fully or partially unfulfilled, it may adopt any of the following measures:*

*a) Impose a penalty payment from three thousand to thirty thousand Euros to the authorities, public employees or private persons failing to comply with the Court’s decision, with the possibility to reiterate the fine until the order is fully enforced.*

*b) Agree the suspension from their duties of any public authorities or Administration employees that are responsible for non-compliance, during the time needed to ensure the Court’s decision enforcement.*

*c) Substitute enforcement of decisions delivered in constitutional processes. In this case, the Court may request the cooperation of the National Government so that, within the terms established by the Court, the necessary measures are adopted to ensure compliance with such decisions.*

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<sup>11</sup> Article 155 of the Spanish Constitution states:

*“1. If an Autonomous Community does not fulfil the obligations imposed upon it by the Constitution or other laws, or acts in a way seriously prejudicing the general interests of Spain, the Government, after lodging a complaint with the President of the Autonomous Community and failing to receive satisfaction therefore, may, following approval granted by an absolute majority of the Senate, take the measures necessary in order to compel the latter forcibly to meet said obligations, or in order to protect the above-mentioned general interests.*

*2. With a view to implementing the measures provided in the foregoing clause, the Government may issue instructions to all the authorities of the Autonomous Communities”.*

d) *Produce certified copies of the particulars of the case required to call for the criminal responsibilities that may correspond*

5. *Under circumstances of special constitutional relevance, where the execution of decisions agreeing the suspension of provisions, instruments or actions challenged is concerned, the Court, at its own motion or at the request of the Government, shall adopt the appropriate measures to ensure proper compliance without hearing the parties. In the same decision the parties and the Public Prosecutor shall be sum-moned to be heard within the common term of three days, after what the Court shall render a decision lifting, confirming or modifying the measures previously adopted."*

The new wording of Article 92 LOTC empowers the Constitutional Court to adopt specific and focused measures intended to render effective the enforcement of its judgements and decisions when confronted with reluctance to comply with them by its recipients.

The sole aim of these powers is, paraphrasing the Venice Commission's Bulletin of July 2012, "safeguarding *the supremacy of the Constitution in a State governed by the rule of law.*"

These measures apply regardless of the national power (be it at national, regional or local level) which refuses to abide by the Constitutional Court's decision.

Neither of these measures entails imposing a penalty. They are subject to restrictive interpretation, they are imposed with respect of the principle of proportionality, and they are devised to be lifted as soon as compliance is granted.

All of them are taken after a formal hearing procedure to the person responsible of the non-compliance with a Court's decision.

As regards the concrete possible enforcement tools:

**a) Penalty payments:**

The enforcement of the penalty payment depends solely on the individual choice of the recipient of the measure, who may avoid the fine by simply adjusting his or her behavior to what has been ordered by the Court. It is a measure envisaged, *inter alia*, in the German and Estonian constitutional systems.

**b) Suspension from duties:**

The suspension from duties:

- easily avoidable, since it cannot be imposed by the Court but after having heard the parties concerned and verified whether the addressee is willing to comply with it or not.
- can only be adopted by the Court when the authority or public employee is liable for non-compliance. It cannot be imposed to those persons who cannot be held responsible of such obstructive behavior.
- Has a very definite purpose, so it is lifted as soon as the unwillingness to comply of its recipient has ceased to exist.

Therefore, this measure complies with the proportionality test carried out by the ECtHR in the Gran Chamber judgment of 6 January 2011 in the *Paksas vs Lithuania* case (n° 34.932/04), § 109<sup>12</sup> and §103 *contrario sensu*.

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<sup>12</sup> "Thus, in assessing the proportionality of such a general measure restricting the exercise of the rights guaranteed by Article 3 of Protocol No. 1, decisive weight should be attached to the existence of a **time-limit and the possibility of reviewing the measure in question.**"

**c) Subsidiary enforcement:**

Subsidiary enforcement is a characteristic measure to enforce obligations not essentially individual in nature, and it is foreseen in all jurisdictional orders, both in Spain and in all European countries.

In particular, in a non-federal State such as Spain, the national government holds the status of constitutional body endowed with specific functions to protect the constitutional order. It can be, therefore, constitutionally entrusted to perform such subsidiary enforcement.

**d) Possibility to adopt interim measures:**

This is a typical power endowed to Constitutional Courts, such as the Bundesverfassungsgericht or, for example, the ECtHR (Art 34.1 in fine ECHR and article 39 of the Rules of Court).

**V. Brief Conclusions**

1. **The Spanish Houses of Parliament felt the need –stemming from long-time known lacunae in the laws ruling judicial proceedings and actual serious recent challenges to the authority of the Constitutional Court- to adopt a set of Laws regarding the enforcement of the judgements and decisions of the Highest National Courts (including the Constitutional Court) and those of the ECtHR.**
2. **The Organic Law which was passed to furnish the Constitutional Court with competencies to adopt measures enforcing its decisions and judgements is aimed at safeguarding the supremacy of the Constitution in a State governed by the rule of law.**
3. **The legislative power has adopted measures already envisaged in relevant comparative constitutional law ( i.a. German, Austrian and Swiss, constitutional systems).**
4. **Neither of the envisaged measures entails imposing a penalty. They are subject to restrictive interpretation, they are imposed with respect of the principle of proportionality, and they are devised to be lifted as soon as compliance is granted.**
5. **The Organic Law has been an initiative from a Political Party seated in the Parliament.**
6. **The Law has been passed through a procedure that allows for one reading by the plenary sitting of each of the Houses of Parliament and a final vote in the Plenary of the Congress. Several amendments have been considered and accepted.**
7. **This measures lie within the remit of the standards set by the Venice Commission, as contemplated in its recent decisions on this subject matter.**

**Spanish Report on the conformity of the 2015 amendment of the Organic Law on the Constitutional Court, providing for procedures to enforce its decisions and judgements, with the European standards for the rule of law in democratic societies.**

## Summary

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**I. Regarding origins of the legislative power's activity in the 2011-2015 legislature concerning the effective execution of final decisions of High Justice Courts. (European Court of Human Rights and Constitutional Court).**

The legislative activity in this matter on the part of the Spanish Parliament is aimed at ensuring the rule of law at its highest level: the implementation of the Spanish Constitution by its supreme interpreter, the Constitutional Court.

The Constitution is the peak of the legal system. It derives directly from the will of the people and is adopted through a special lawmaking procedure. The draft constitution is elaborated by the legislative power, their members being elected *ad hoc* by universal, free, equal, direct and secret suffrage. The final text undergoes a referendum in which all electors shall participate.

These legislative initiatives -now under study- are therefore established upon the cornerstone principles on which the own European Commission for Democracy through Law, better known as Venice Commission, is based.

Indeed, the effectiveness of democracy – etymologically “Government of the people” - is based on the implementation of the Constitution, which has received the final approval of the citizens through a referendum.

In Spain, the protection of such effectiveness of the Constitution, in the event of a conflict between the established powers or an infringement of rights directly recognized for the citizens, is entrusted, by the same Constitution, to the Constitutional Court.

In its capacity as a dispute settlement body, the Court has the status of jurisdictional body.

As the “General Report of the XVth Congress of the Conference of European Constitutional Courts on Relations of the Constitutional Court with other state authorities”<sup>13</sup> –subject of a special Bulletin of the Venice Commission- holds in respect of the task of Constitutional Courts in the Council of Europe member states:

*“In exercising the duties and jurisdiction specific to the unitary or federal character of the State, such State bodies may, vertically or horizontally, generate legal disputes resulting from legal acts or from the deeds, actions or omissions thereof. As mentioned in Germany’s Report, the resolution of disputes between organs (Organstreit) is not intended to reconcile subjective rights but rather to clarify the jurisdiction system set up by the Constitution.*

*In most States, such legal disputes are settled by the Constitutional Courts except for the following states: Denmark, Ireland, Luxembourg, Monaco, Norway and Turkey, where such a procedure does not exist.*

*The analysis of all national reports shows that the control exercised by the Constitutional Court as regards legal disputes between authorities is not intended to secure their rights but to settle such disputes primarily in order to ensure compliance of the State bodies’ conduct with their jurisdiction as stipulated in the Constitution, for a good functioning of the State based on the separation of its powers and, finally, for safeguarding the supremacy of the Constitution in a State governed by the rule of law.”*

Article 1 of the Organic Law on the Constitutional Court which makes provision for its composition, functions and procedures (LOTC in Spanish, issued in compliance with Article 165 of the Spanish Constitution) states:

*“1. The Constitutional Court, as supreme interpreter of the Constitution, is independent of the other constitutional bodies and subject only to the Constitution and this organic Law.*

<sup>13</sup> <http://www.venice.coe.int/files/Bulletin/SpecBull-Relations-with-other-State-Powers-e.pdf>

2. *The Constitutional Court is unique and its jurisdiction covers the whole national territory*”

The Constitutional Court is therefore a jurisdictional body, unique in the Spanish constitutional order, composed by judges appointed by the executive, the judiciary and legislative State powers.

It is not a political body and, in establishing its settings and functions, follows the tradition of the Continental constitutional systems. The German and Austrian constitutional models were specially considered when drafting this aspect of our constitutional system.

Albeit the strictly jurisdictional nature of our Constitutional Court, the political consequences of its decisions are undeniable, especially when adjudicating on conflicts of competencies among the different constituted powers. But these reactions are not exclusively associated to the Constitutional Court’s judgments and decisions but also are usual when judgments and decisions by all high Courts of Justice within the Judiciary on sensitive matters are issued. This also happens, for example, inter alia, when the Supreme Courts decide on the outlawing of political parties or when the ECtHR adjudicates on sensitive issues. Such decisions and judgements, for obvious reasons, always trigger political and social debate in the incumbent Member States that do not deprive those Courts from their plainly jurisdictional nature.

Since 1991, the Spanish Constitutional Court has already expressed concerns at the need that all procedural laws shall envisage proceedings allowing effective enforcement of jurisdictional decisions from all bodies with jurisdiction in Spain,<sup>14</sup> particularly in such sensitive areas as the protection of fundamental human rights granted to all citizens by the Constitution. This was primarily claimed by the Constitutional Court with regard to judgments and decisions of the highest Courts, such as the European Court of Human Rights. In this respect, a specific mandate was targeted to the legislative power.

The lack of legislative response was also the main reason why the Supreme Court, on the occasion of a need for an effective execution of an important ECtHR’s judgement, has adopted a decision from the Criminal Division of the General Chamber on 12 November 2013. On its last section, the Supreme Court decreed that *“the Court considers it necessary that the Legislative Power makes provision with the necessary clarity and accuracy of appropriate legal remedies regarding the effectiveness of the ECHR’s decisions.”*

More recently, the European Court of Human Rights itself, as an example of dialogue between judges to cooperate with the common aim of ensuring the effectiveness of constitutional provisions, has expressed its concerns about the shortcomings that Spanish procedural laws might pose to effectively implement the decisions and final judgements of the Spanish Constitutional Court.

In the ECHR’s judgement of 19/2/2013 in the case 38285/09 García Mateos v. Spain, § 44, the ECtHR emphasizes, in an instant case which entailed difficulties for the enforcement of a specific judgment issued by the Spanish Constitutional Court, the following:

**“44. The Court reiterates that *the State is required to provide litigants with a system whereby they are able to secure the proper execution of domestic court decisions. Its task is to consider whether the measures taken by the national authorities – a judicial authority in the instant case – to have the decisions concerned executed were adequate and sufficient (see *Ruianu v. Romania*, no. 34647/97, § 66, 17 June 2003), for *when the competent authorities are required to take action to execute a judicial decision and fail to do so – or to do it properly – their inertia engages the responsibility of the State under Article 6 § 1****

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<sup>14</sup> Thus, regarding the need to enforce the European Court of Human Rights’ judgements, it has pronounced itself in judgments 245/1991 (case *Bultó*), 96/2001 (case *Castillo Algar*), 240/2005 (case *Riera Blume*) and 197/2006 (case *Fuentes Bobo*).

**of the Convention** (see, *mutatis mutandis*, *Scollo v. Italy*, 28 September 1995, § 44, Series A no. 315 C).<sup>15</sup>

The Spanish Parliament has been much concerned recently about these kinds of problems, which clearly derive from legal shortcomings or lacunae. It has been quite conscious of the fact that they had a negative impact on legal certainty, which is the cornerstone of the rule of law at constitutional level.

Due to this concern, rightly pointed out by the ECtHR and by the Spanish Constitutional Court itself, and in this vein both Houses of Parliament have recently passed a coherent set of legislative measures. It is integrated by the following rules:

- Law 25/2014, of 27 November, on Treaties and other international agreements, which grants higher rank than ordinary law to the responsibilities derived from International Treaties signed by Spain, including the duty to abide by the final judgement of the European Court of Human Rights under Article 46 of the Convention.
- By means of the following legal amendments, the review of any final judgement issued by all High Courts of Justice which might be necessary to enforce an ECHR's judgement shall be allowed:
  - o Organic Law<sup>16</sup> 7/2015, of 21 July, amending Organic Law 6/1985, of 1st July, on the Judiciary, at the same time amending laws on civil proceedings as well as ordinary and social and military administrative proceedings.
  - o Law 41/2015, of 5 October, amending the Code of Criminal Procedure.
- Through Organic Law 15/2015, of 16 October, amending Organic Law 2/1979, of 3 October, on the Constitutional Court<sup>17</sup>, contemporary to the former. This amendment aims at the effective enforcement of the Constitutional Court's decisions and judgments when any of the constituted powers which form the Kingdom of Spain shows reluctant to comply with them.

## II. Regarding the management of this democratic need within the remainder Member States of the Council of Europe.

Spain is not alone in this effort, for guaranteeing the effectiveness of the Constitution is a basic requirement for the shake of keeping democracies healthy within the Member States of the Council of Europe.

<sup>15</sup> In case *Scollo v. Italy*, the administrative authorities are those who refuse to observe a judicial mandate. In the judgement of 28/2/1995 the court declared the violation of Article 6.1 of the Convention and Article 1 of Protocol no. 1, and gave just satisfaction under the former Article 50.

<sup>16</sup> It refers to an Organic Law, which directly develops basic constitutional provisions, thus requiring a qualified majority (the overall majority of the Members of Congress in a final vote on the bill as a whole) under Article 81 of Spanish Constitution. It forms part of the "Constitutionality block".

<sup>17</sup> It refers to an Organic Law, being applicable the reference of the former footnote. Moreover, this Organic Law, because of its special constitutional relevance, forms part of the body of constitutional rules and principles. Article 165 of the Spanish Constitution provides that:

"Art 165

An organic act shall make provision for the functioning of the Constitutional Court, the status of its members, the procedure to be followed before it, and the conditions governing actions brought before it."

Our constituents, when drafting our 1978 Constitution, and our Constitutional Court, when implementing it, have always shown respect and admiration for the German and Austrian configuration of their respective Constitutional Courts.

That is why, when confronted with such need of legal certainty concerning enforcement of judgements and decisions of the Constitutional Court in cases of open disobedience, and in order to modify the "Organic Law of the Constitutional Court" – integrated by the constituent assembly (articles 81 and 165 of the Spanish Constitution) in the so called "Constitutionality block" -, the legislative turned its eyes into those comparative law systems.

As regards the Austrian Constitution Art. 146 paragraph 2 B-VG states that:

*"The enforcement of other judgements by the Constitutional Court is incumbent on the Federal President. The enforcement shall in accordance with his instructions lie with the Federal or Länder authorities, including the Federal Army, appointed at his discretion for the purpose. **The request to the Federal President for the execution of such judgements shall be made by the Constitutional Court.**"<sup>18</sup>*

Concerning the German Constitutional system, §35 of the Law regulating the BVerfGG Bundesverfassungsgericht<sup>19</sup> (German Federal Constitutional Court) establishes that:

**"The Federal Constitutional Court's decision may specify who is to execute it; in individual cases, it may also specify the method of execution."**

§§39, 46 and 79 of the same German law provide some examples of the enforcement measures that can be adopted by the German Federal Constitutional Court (i.e. §39 "(...) deny the respondent the right to vote, the right to stand for election, and the capacity to hold public office and may, in the case of legal persons, order that they be dissolved.")

In the Swiss constitutional system almost the same type of legislation applies. If an authority of a Swiss canton refuses to enforce a judgment of the Federal Supreme Court, the Swiss Confederation could impose it by means of a federal execution. According to the Swiss Constitution, the Federal Council ensures compliance with federal law, as well as the cantonal constitutions and cantonal treaties, takes the measures required to fulfil this duty and it ensures the implementation of the judgments of federal judicial authorities (Art. 182 para. 2, Art. 186 para. 4). Additionally, the Federal Assembly is empowered to take measures to enforce federal law (Art. 173 para. 1 lit. e). Such measures in the context of a federal execution include – in theory and governed by the principal of proportionality – substitute performances, suspensions of financial contributions or, as an ultima ratio measure, a military intervention.

In Estonia, in case a public body with executive powers is reluctant or fails to implement a court's (including Supreme Court who is also a constitutional court in Estonia) judgment or decision, § 248 of the Code of Administrative Court Procedure foresees the possibility to impose a fine up to 32,000 euros to that body. The imposition of the fine does not relieve the participant who failed to execute the order made in the judgment or decision, or the compromise approved by the court, from the obligation to execute the order or compromise within reasonable time, or deprive a participant of the proceedings in whose interest the order was made or the compromise was approved, of the right to apply to the court for the imposition of a new fine on account of failure to execute an order made in the court judgment or failure to execute the compromise. There are also remedies available for the individual under the State

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<sup>18</sup> See - 8TH Meeting of the Joint Council on Constitutional Justice. Tallin 19 June 2009. "Report on the Effects and Execution of Constitutional Court Judgments" by Mrs. Britta Wagner, Secretary General of the Austrian Constitutional Court. Doc. CDL-JU(2009)013. Available on the Venice Commission's website: <http://www.venice.coe.int/files/Bulletin/SpecBull-Relations-with-other-State-Powers-e.pdf>.

<sup>19</sup> Available English version at the CC's webpage : [http://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/Gesetze/BVerfGG.pdf?\\_\\_blob=publicationFile&v=1](http://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/Gesetze/BVerfGG.pdf?__blob=publicationFile&v=1)

Liability Act that grants the individual a right to claim for compensation for damages (Chapter 3 of the State Liability Act).

Indeed, this issue has already been subject of careful consideration from the part of the Venice Commission on several occasions, as the following documents, among others, attest:

- *Venice Commission Bulletin (July 2012)* :

*General Report of the XVth Congress of the Conference of European Constitutional Courts on Relations of the Constitutional Court with other state authorities*<sup>20</sup>

See sections:

“II. RESOLUTION OF ORGANIC LITIGATIONS BY THE CONSTITUTIONALCOURT”, subsection “8. Ways and means for implementing the Constitutional Court’s decision: actions taken by the public authorities concerned afterwards”, pages 36-37.

” III. ENFORCEMENT OF THE CONSTITUTIONALCOURT DECISIONS”, pages 38-51.

- 8<sup>TH</sup> Meeting of the Joint Council on Constitutional Justice. Tallin 19 June 2009. “Report on the Effects and Execution of Constitutional Court Judgments” by Mrs. Britta Wagner, Secretary General of the Austrian Constitutional Court. Doc. CDL-JU(2009)013<sup>21</sup>
- CDL-PI(2016)002 English 15/03/2016 - Public Compilation of Venice Commission Opinions concerning Constitutional and Legal Provisions for the Protection of Local Self-Government. Accountability. Supervision of local self-government bodies. Sanctions: The proportionality principle (pages 14 to 20).<sup>22</sup>

The Venice Commission’s standards have gone even further than those of Austrian, German, Swiss and Spanish Constitutional Law.

In effect, these national constitutional systems provide for a **previous** decision of the Constitutional Court which is to be enforced when confronted with direct reluctance from the respondent constitutional institution concerned (be it of the legislative, judiciary or executive, at national, regional or local level).

But it is foreseeable that some constitutional systems might need a quick preventive constitutional enforcement measure from the part of the executive, which has to be later revised immediately by the Constitutional Court in order to ascertain the conformity with the Constitution of such extraordinary decisions.

As the Venice Commission rightly points out in its opinion on the Draft Law amending the Constitution presented by the President of Ukraine:<sup>23</sup>

**“24. It seems fully justified that the President of Ukraine, in his or her capacity as guarantor of the constitution and of local self-government, should have the power to intervene – more rapidly and efficiently than the Verkhovna Rada - when the self-government bodies overstep their constitutional and legal competences and pose a threat to the sovereignty, territorial integrity and security of the state. (...) A short deadline should be put to the Constitutional Court to decide the matter. (...)”**

<sup>20</sup> Available on the Venice Commission’s website: <http://www.venice.coe.int/files/Bulletin/SpecBull-Relations-with-other-State-Powers-e.pdf>.

<sup>21</sup> See [http://www.venice.coe.int/webforms/documents/?pdf=CDL-JU\(2009\)013-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-JU(2009)013-e)

<sup>22</sup> See [http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI\(2016\)002-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2016)002-e)

<sup>23</sup> See CDL-AD(2009)024

**III. Legislative procedure in order to amend the Organic Law on the Constitutional Court. Draft Law posted through a non-governmental legislative proposal stemming exclusively from a Parliamentarian initiative of a Political Group.**

In Spain legislative proposals posted in the Parliament can originate either in the Government (what is called a “*Project of Law*”) or in at least one of the Political Groups seated in the Parliament alone without Governmental intervention (what is called a “*Proposal of Law*”).

In this case the amendment of the Organic Law on the Constitutional Court came from a Parliamentary Political Groups which was later supported by several parliamentary groups. It was, therefore, a “*Proposal of Law*”.

The bill was drafted in a simple and clear wording. Therefore, the Congress of Deputies’ (lower House of the Spanish Parliament) Plenary, on a proposal from the Bureau and after consultation with the Board of spokespersons, agreed to process it following the shortened procedure.

This is an ordinary a procedure provided for in the regulations ruling the internal functioning of the Parliament. It has been used throughout the years to pass numerous legislative initiatives without ever having its constitutionality challenged.

Such procedure allows the members of both Houses of the Parliament (the Congress-Lower House- and the Senate –Higher House-) an opportunity to debate on the whole text. All political groups with parliamentary representation shall be allowed to examine and analyze the draft, propose amendments (actually, 37 amendments were produced and debated) and, in the end, they shall take part in a Plenary sitting in order to decide on the final adoption or rejection of the whole text.

The overall majority of the Congress adopted this Organic Law. A very qualified majority backed its approval. This fact proves the proper functioning of the parliamentarian democracy in this case.

Therefore no breach of the principle of representative democracy guaranteed by Article 3 of Protocol no. 1 to the Rome Convention has occurred. On the opposite, that fundamental right of political participation has been duly respected.

**IV. Relevant measures provided for in the amendment of the Organic Law on the Constitutional Court (hereinafter, the LOTC).**

The contents of the reform have materialized in the new wording of Articles 87 and 92 LOTC.

Article 87 reads as follows:

*“1. The decisions of the Constitutional Court shall be binding on all public authorities. In particular, the Constitutional Court may agree that its decisions are notified in person to any public authority or employee deemed necessary.*

*2. Judges and Courts shall provide the Constitutional Court, as a matter of priority and urgency, with any legal co-operation and assistance it may request.*

*For that purpose, all judgments and decisions of the Constitutional Court shall be considered enforceable titles.”*

Article 92 has been modified and, at present, reads as follows:

*“1. The Constitutional Court shall ensure the effective implementation of its decisions. It may determine within the judgement or decision, or in subsequent acts, who shall be held*

*responsible for the execution, the enforcement measures required and, where applicable, resolve enforcement issues.*

*The Court may also declare the nullity of any decision contravening those pronounced in the exercise of its jurisdiction with regard to their execution, after hearing the Public Prosecutor and the issuing authority.*

*2. The Court may request the assistance of any public administration or public authority in order to ensure the effectiveness of its decisions which shall be provided as a matter of priority and urgency.*

*3. The parties may promote enforcement issues as established in paragraph 1 to propose the Court the adoption of the necessary enforcement measures to ensure the effective compliance of its decisions.*

*4. In the event it is noticed that a decision pronounced in the exercise of its jurisdiction may not be being complied with, the Court, at its own motion or at the request of the parties to the suit in question, shall require the institutions, authorities, public employees or private persons responsible for the enforcement to inform at that respect within the time limit set out.*

*Once the report is received or when the time limit expires, should the Court find that its decision is being fully or partially unfulfilled, it may adopt any of the following measures:*

- a) Impose a penalty payment from three thousand to thirty thousand Euros to the authorities, public employees or private persons failing to comply with the Court's decision, with the possibility to reiterate the fine until the order is fully enforced.*
- b) Agree the suspension from their duties of any public authorities or Administration employees that are responsible for non-compliance, during the time needed to ensure the Court's decision enforcement.*
- c) Substitute enforcement of decisions delivered in constitutional processes. In this case, the Court may request the cooperation of the National Government so that, within the terms established by the Court, the necessary measures are adopted to ensure compliance with such decisions.*
- d) Produce certified copies of the particulars of the case required to call for the criminal responsibilities that may correspond.*

*5. Under circumstances of special constitutional relevance, where the execution of decisions agreeing the suspension of provisions, instruments or actions challenged is concerned, the Court, at its own motion or at the request of the Government, shall adopt the appropriate measures to ensure proper compliance without hearing the parties. In the same decision the parties and the Public Prosecutor shall be summoned to be heard within the common term of three days, after what the Court shall render a decision lifting, confirming or modifying the measures previously adopted.”*

Even before this amendment, the LOTC already envisaged -in Article 87- the duty of all public authorities to comply with the Court's decisions and judgements, and –in Article 92- conferred upon the Court the power to enforce them, solving any preliminary issues that might arise. The Court could declare the nullity of any provision contravening its decisions and judgements.

The new wording of Article 92 LOTC empowers the Constitutional Court to adopt additional measures intended to render effective the enforcement of its judgements and decisions when confronted with reluctance to comply with them by its recipients.

The sole aim of these powers is, paraphrasing the Venice Commission's Bulletin of July 2012, “safeguarding the supremacy of the Constitution in a State governed by the rule of law.”

Neither of these measures entails imposing a penalty. They are subject to restrictive interpretation, they are imposed with respect of the principle of proportionality, and they are devised to be lifted as soon as compliance is granted.

**All of them are taken after a formal hearing procedure to the person responsible of the non-compliance with a Court's decision.**

After these general reflections on the aims and extents of the LOTC amendment, we will further elaborate about the main novelties are contained in article 92, section 4 paras. a, b and c, and section 5 of this same article.

**a) Penalty payments.**

The first of such measures, to impose penalty payments, was already provided for in the original wording of article 95.4 LOTC, dated back to 1979. The only difference with the original wording is the increase in the amount due.

The penalty payment does not constitute a criminal penalty as its purpose is not to impose a punishment for the breach of a rule but to constitute a means to obtain the compliance with a Court's decision or judgement. The penalty is not of a remunerative or repressive nature. The penalty payment tries to avoid the non-compliance of a Court's decision, tries to modify the behaviour of a person who refuses to act in accordance with it. Likewise, the penalty payment is not imposed indefinitely or repeatedly over time but it is brought to a halt as soon as the order is fully enforced.

The increase in amount of penalty payments is within the legitimate remit of the legislator's constitutional power, which is fully justified by the importance conferred upon the compliance of the Constitutional Court's decisions.

The enforcement of the penalty payment depends solely on the individual choice of the recipient of the measure, who may avoid the fine by simply adjusting his or her behavior to what has been ordered by the Court.

This kind of measure is quite usual in constitutional comparative law, as has been pointed out before.

**b) Suspension from duties.**

As it occurs with penalty payments, the suspension from duties is not punitive in nature inasmuch as the measure was neither designed to punish a behavior nor to repress it. It has only been devised to prevent the persistence on non-compliance with a Constitutional Court's decision or judgement.

This is supported by the fact that the time limit to enforce the suspension from duties of any public authority or public employee held responsible for non-compliance is set "*during the time needed to ensure the Court's decision enforcement*". It shall endure only until the reluctance of the recipient party to abide by the Constitutional Court's judgements and decisions does cease to concur. This is a circumstance that depends solely on the will of the person held responsible.

Therefore the suspension is easily avoidable, since it cannot be imposed by the Court but after having heard the parties concerned and verified whether the addressee is willing to comply with it or not.

It is a measure that can only be adopted by the Court when the authority or public employee is liable for non-compliance. It cannot be imposed to those persons who cannot be held responsible of such obstructive behavior.

It is a measure with a very definite purpose, which is lifted as soon as the unwillingness to comply of its recipient has ceased to exist.

Finally, this measure lies within the Constitutional Court's jurisdictional power. It has been directly aimed at safeguarding its jurisdictional function, directly rooted in Article 161 of the Spanish Constitution. It may be necessary to achieve the compliance with the Court's judgements and decisions. It is an aspect of every Court's powers to enforce rulings issued when adjudicating within the remit of its constitutional competencies.

The measure is appropriate. This type of measure may eventually interfere with rights recognized in the Convention. But such interference is legitimate.

According to the European Court of Human Rights case-law, when the Court is called upon to examine interference by the public authorities with the exercise of one of the rights enumerated in articles 8 to 11 or article 3, Protocol no. 1, which can be limited, it always analyses the issue in three stages. The Court seeks to answer three questions:

- Was the interference in accordance with a "law" that was sufficiently accessible and foreseeable?
- If so, did it pursue at least one of the "legitimate aims" which are exhaustively enumerated in articles 8 to 11 or article 3 protocol no. 1?
- If that is the case, was the interference "necessary in a democratic society" in order to achieve that aim? In other words, was there a relationship of proportionality between the aim and the restrictions in issue?

Well then, the requirements claimed by such case-law are met in this case.

Assuming that the measure has been adopted by an Organic Law, duly published, the suspension of functions is fit to achieve its aims, that is to say, the duly compliance with the Constitutional Court's decision or judgement.

The suspension from duties of any public authority or public employee removes any obstacle that entails the willingness to resist the compliance with what has been ordered by the Court.

The provisional suspension from their duties of the responsible person in an organization who voluntarily refuses to comply with a jurisdictional decision or judgement, may remove an obstacle for the duly enforcement of those.

The measure is necessary in those cases in which an authority or public employee is prevented from acting according to the Court's decision or judgments due to legal or material reasons. The measure is proportionate, strictly speaking, compared with other alternatives which might be more restrictive of rights, such as the permanent replacement from duties or the implementation of criminal measures. This later options would certainly represent a much greater interference than the suspension from duties.

The suspension from duties is appropriate. It is not unreasonable to consider a range of scenarios where the annulment by the Constitutional Court of a decision opposing to what has been ordered by the Court might not be enough to its enforcement. This might happen, for example, when the authority or public employee who has to deprive the annulled decision of all its effects fails to do so, allowing for a null and void unconstitutional act to remain effective and ignoring such nullity statement. Or in the event that a positive action is imposed upon an authority or public employee in order to redress the altered legal order and she or he purposefully fails to do so.

Well then, all these cases fall within the scope of fulfilling the enforcement which corresponds to the Court as a result of decisions and judgements adopted in various types of constitutional procedures.

We must assume that such measure would only be imposed if the addressee can be held responsible, if she/he voluntarily decides not to accomplish the decision due, and her/his deliberate unwillingness to comply with is proved.

The doctrine of the case *Paksas v. Lithuania* (GC - 34932/04, judgment of 6 January 2011) does not apply to the regulation introduced by the LOTC reform. The Constitutional Court is not entitled to deprive citizens of their right to vote or to stand as a candidate.

The measure adopted has neither the extent nor the content blamed in paragraph 103 of the judgement mentioned, when asserting that:

*“notes the extent of the consequences of his removal for the exercise of his rights under Article 3 of Protocol No. 1; as positive constitutional law currently stands, he is permanently and irreversibly deprived of the opportunity to stand for election to Parliament. This appears all the more severe since removal from office has the effect of barring the applicant not only from being a member of parliament but also from holding any other office for which it is necessary to take an oath in accordance with the Constitution (see paragraph 34 above)”.*

On the contrary, the requirements of proportionality stated in paragraph 109 have been fulfilled:

*“Thus, in assessing the proportionality of such a general measure restricting the exercise of the rights guaranteed by Article 3 of Protocol No. 1, decisive weight should be attached to the existence of a time-limit and the possibility of reviewing the measure in question.”*

Regarding the suspensive measure set forth by the LOTC, its effectiveness is revised and discontinued as soon as the Constitutional Court’s request has been accomplished and therefore it does not have a prearranged deadline.

### **c) Subsidiary enforcement.**

Section(c) provides for: *“subsidiary enforcement of decisions delivered in constitutional processes. In this case, the Court may request the cooperation of the National Government so that, within the terms established by the Court, the necessary measures are adopted to ensure compliance with such decisions”.*

Subsidiary enforcement is a characteristic measure to enforce obligations not essentially individual in nature, and it is foreseen in all jurisdictional orders, both in Spain and in all European countries.

The reform is only intended to extend the use of this enforcement measure to the constitutional jurisdiction.

It is also a characteristic of the constitutional systems within the countries of the Council of Europe (Switzerland, Germany, Austria, Estonia, etc...) for the Constitutional Courts to confer the subsidiary enforcement of its judgements and decisions only to national governments, and not to regional or local authorities.

In particular, **in a non-federal State such as Spain**, the national government holds the status of constitutional body endowed with specific functions to protect the constitutional order.

It lies within the Constitutional Court’s jurisdictional power. It has been directly aimed at safeguarding its jurisdictional function, rooted in Article 161 of the Spanish Constitution. It may be necessary to achieve the compliance with the Court’s judgements and decisions. It is an aspect of every Court’s powers to enforce rulings issued when adjudicating within the remit of its constitutional competencies.

The measure shall be deemed reasonable in accordance with the criteria set by the ECtHR’s case-law.

Given that the measure has been adopted by an Organic Law, duly published, the measure of subsidiary enforcement is liable to achieve the intended purpose, that is to say, the duly compliance with the Constitutional Court’s decision.

The subsidiary enforcement removes any obstacle or unlawful resistance to the compliance with what has been ordered by the Court in its judgements or decisions.

The subsidiary enforcement entrusts the State authorities to perform the duties that in a normal situation of respect for the rule of law might be of the competence of a regional or local authority but, for legal or material reasons, show unwillingness to comply with certain Constitutional Court’s decision or judgement.

The measure is proportionate if compared with some much more restrictive alternatives as might be the dissolution of the defaulting body or the implementation of criminal measures which undoubtedly shall mean greater interference.

The measure is proportionate, strictly speaking, compared with other alternatives which might be more restrictive of rights, such as the permanent replacement from duties or the implementation of criminal measures. This later options would certainly represent a much greater interference than the suspension from duties.

The subsidiary enforcement is appropriate. It is not unreasonable to consider a range of scenarios where the annulment by the Constitutional Court of a decision opposing to what has been ordered by the Court might not be enough to its enforcement. This might happen, for example, when the authority or public employee who has to deprive the annulled decision of all its effects fails to do so, allowing for a null and void unconstitutional act to remain effective and ignoring such nullity statement. Or in the event that a positive action is imposed upon an authority or public employee in order to redress the altered legal order and she or he purposefully fails to do so.

Well then, all these cases fall within the scope of fulfilling the enforcement, which corresponds to the Court as a result of decisions and judgements adopted in various types of constitutional procedures.

We must assume that such measure would only be imposed if the addressee can be held responsible, if she/he voluntarily decides not to accomplish the decision due and her/his deliberate unwillingness to comply with is proved.

**e) Adoption of interim measures in order to strengthen enforcement of Court's orders.**

Finally, section 5 of article 92 LOTC foresees a procedure for the Constitutional Court to adopt straightforwardly enforcement measures, subject to immediate contradictory judicial review, in the event of blatant non-compliance with its own previous decisions staying the executive force of provisions, acts or actions challenged in an ongoing constitutional procedure. This power can only be used "*(...) under circumstances of special constitutional relevance (...)*".

The sole aim of the amendment on this point has been to provide the Constitutional Court, as a jurisdictional body, with specific powers in order to guarantee the enforcement of its own decisions, through the adoption by the Court, not by the Government, of appropriate interim measures.

Concurrence of "*circumstances of special constitutional relevance*", represent the prior minimum requirement for the Court to decide such measures on its own motion or for granting them wholly or in part at the Government's request, if appropriate.

The previous assessment on whether such circumstance truly exists or not, is only bestowed to the Constitutional Court. And the Court itself shall also adopt, on the account of its previous analysis, any measure deemed appropriate, or shall either reject or grant them, fully or in part.

It exclusively entails a Constitutional Court's decision on the need for immediate enforcement of its own previous declarative decisions, when a constitutional procedure is pending. It has nothing to do with a Government's prerogative whatsoever. The Government may only file a request as a procedural party concerned by the ongoing constitutional procedure.

According to Article 92.5, the enforcement measures may be adopted directly by the Court, without a prior hearing to the parties. But at the same time, the own article imposes to the Court itself the obligation to summon the parties and the Public Prosecutor in order to hear them within three days. Following this procedure, the Court shall freely proceed, according to its sole consideration, to either wholly or partly confirm or revoke the measures adopted.

Comparatively, we should bear in mind that some European Constitutional Courts may act to the same extent. Thus, the *Bundesverfassungsgericht* [German Federal Constitutional Court] may in some cases order the application of interim measures without prior hearing.

**The own European Court of Human Rights, under Article 39 of the Rules of the Court, may adopt any urgent interim measure without the previous hearing of the respondent**

**State, should it appreciate an impending or irretrievable risk of the requesting party when it is needed for the proper administration of justice.** It is not unusual that the ECtHR imposes an interim measure straightforwardly without summoning the incumbent State to any written or oral contradictory proceedings. The interim measure adopted shall be then maintained until the judgement on the merits is adopted or even further.<sup>24</sup>

Article 92.5 is ultimately a provision which does not breach Article 13 of the Rome Convention by itself regarding the fundamental right guaranteeing access to an effective judicial remedy. Such right provides that standpoints of the parties concerned may be known (ECHR case *Klass v. Deutschland*, 6 September 1978). And likewise it must be recalled that the thoroughness of this same right has been qualified by the ECtHR itself whenever it comes to the prosecution of parliamentary provisions (case *Goodwin v. United Kingdom*, of 11 July 2002).

**V. Differences between measures which may be adopted under Article 92 LOTC, following the reform introduced by the OL 15/15, and the measures provided for in Articles 155 and 116 of the CE.**

- **Characteristics of the measures envisaged in articles 155 and 116 of the Spanish Constitution (CE).**

Article 155 of the Spanish Constitution states:

*“1. If an Autonomous Community does not fulfil the obligations imposed upon it by the Constitution or other laws, or acts in a way seriously prejudicing the general interests of Spain, the Government, after lodging a complaint with the President of the Autonomous Community and failing to receive satisfaction therefore, may, following approval granted by an absolute majority of the Senate, take the measures necessary in order to compel the latter forcibly to meet said obligations, or in order to protect the above-mentioned general interests.*

*2. With a view to implementing the measures provided in the foregoing clause, the Government may issue instructions to all the authorities of the Autonomous Communities”.*

According to Article 155 CE, if a Self-governing Community does not fulfil the obligations imposed upon it by the Constitution or by other laws, or acts in a way that is seriously prejudicial to the general interest of Spain, the Government may take all measures necessary to compel the Community to meet said obligations, or to protect the abovementioned general interest. The intended measure is very similar to the referred to as federal coercion by the German constitution.

To this end, a procedure has been established: to lodge a complaint with the President of the Self-governing Community and approval of the measures granted by the overall majority of the Senate.

We may essentially point out that it is a governmental measure, which must be authorized by the Senate in the event that the Self-governing Communities seriously fail to fulfil their constitutional obligations.

In a sense, article 155 of the Constitution has the same constitutional basis as the exceptional measures that can be adopted in other cases of serious constitutional urgency under article 116 of the same Constitution (states of alarm, emergency and siege).

These last provisions establish a constitutional gradual approach to cope with serious menace against the constitutional system, even endangering its own existence.

<sup>24</sup> For an example, see the ECtHR judgment of 24/4/2014 in case A.C. and others vs. Spain number 6528/11, where interim measures were maintained for some time after the judgment was issued by the Court.

In such cases the Constitutions of our surrounding legal environments (i.e. in Germany) confer exceptional powers to the State or Federal Government to face those challenges efficiently, always under close parliamentary scrutiny –which is endowed to the Lower Houses of Parliament (in Spanish to the Congress according to article 116) or the Higher Houses of the Parliament (in Spain, the Senate according to article 155)-.

It is only in these extreme situations, which pose a serious risk of constitutional wreckage, that, hypothetically, these constitutional safeguards might apply.

For example, if there might eventually be a straightforward forceful strong reluctance from one or several Regional or Local Governments to comply with judgments and decisions of the Constitutional Court, overtly challenging the Court's enforcement powers, posing a risk to the constitutional system as a whole, then article 155 might apply. If the situation reaches further gravity, then article 116 might also be applicable.

- **Characteristics of the enforcement powers endowed to the Constitutional Court by the amendment of the LOTC.**

Notwithstanding, measures established in Article 92 LOTC are jurisdictional measures adopted by the Constitutional Court in the event of a specific unfulfilment, **either by the State or by the Self-governing Autonomous Communities (Regional Governments)**, of decisions or judgements issued by the Court itself.

That is to say, the title which legitimizes such measures is radically different than that which was analyzed in the previous paragraph.

Measures of Article 92 LOTC are legitimated by the compliance with the judgements of our highest Constitutional Court and, hence, to guarantee the compliance with the Constitution and the rule of law. Moreover, there is a necessary precondition to implement such measures: failure to comply with a decision of the Court, being this jurisdictional body legitimated to act since it has been established by the Constitution itself and the Organic Law governing its own functioning.

In adopting these measures, there is also a precondition to the use of the Court's assessment. Those bodies, authorities, public employees or individuals who are in charge of compliance with the Court's decisions and judgements have to inform about the claimed unwillingness to comply. During this initial stage the "offending party" might take or suggest to the Court whatever measures it deems appropriate in order to comply with the Court's decisions. Likewise, such measures are not intended to control the Self-governing communities from the part of the State. These measures are taken by the Constitutional Court itself for non-compliance with its judgements or decisions in order to fulfil the constitutional mandate, according to which public authorities are bound by the Constitution and the rest of the legal provisions (Article 9.1 CE).

There is no doubt that some of these measures, as the subsidiary enforcement, shall involve the Government's intervention. But the Government does not hold control over the measures adopted by the Court whatsoever, since it only supports the Constitutional Court for the purpose of enforcing its decisions, within the terms specified by the Court itself.

In such cases, the Government does not have the power to take these measures (yet it may only be able to request them in some cases). It is the Constitutional Court the one which shall decide whether granting or not the execution measures necessary to guarantee the compliance with its judgements and decisions. It will only agree with those measures in order to ensure the primacy of the Constitution, which all citizens and public authorities are called upon to comply with. This leads to the need for the Constitutional Court to be furnished with the legal powers to achieve such essential constitutional task.