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

**SPAIN**

**OPINION**

**ON THE LAW OF 16 OCTOBER 2015  
AMENDING THE ORGANIC LAW NO. 2/1979  
ON THE CONSTITUTIONAL COURT**

**Adopted by the Venice Commission  
at its 110<sup>th</sup> Plenary Session  
(Venice, 10-11 March 2017)**

**On the basis of comments by**

**Mr Christoph GRABENWARTER (Member, Austria)  
Mr Guido NEPPI MODONA (Substitute Member, Italy)  
Mr Peter PACZOLAY (Honorary President)**

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## I. Introduction

1. By letter of 9 October 2015 the Chair of the PACE Monitoring Committee, Mr Stefan Schennach, requested an opinion of the Venice Commission on the Law of 16 October 2015 amending the Organic Law no. 2/1979 on the Constitutional Court of Spain (hereinafter, “the Amendment”, CDL-REF(2016)035).
2. In his letter, Mr Schennach requested that the opinion not be made public before the parliamentary elections in Spain on 20 December 2015. The Commission therefore envisaged the adoption of the opinion for its session in March 2016 and a visit of the rapporteurs was planned for February 2016. However, in view of the difficulties of forming a Government in Spain, a visit of the rapporteurs to Madrid was postponed from February to April 2016 in the hope of being able to meet, *inter alia* with the newly formed Government.
3. Appeals by the Government of the Basque Region and by the Catalan region against the Amendment were pending before the Constitutional Court since 30 December 2015. As the Amendment concerns the very Law on the Constitutional Court, the Commission decided to continue working on the opinion while the case was pending before the Court.
4. A delegation of the Venice Commission composed of Mr Grabenwarter and Mr Neppi Modona, accompanied by Mr Schnutz Dürr and Ms Amaya Ubeda de Torres from the Secretariat, visited Madrid on 25 April 2016 and had meetings with the Constitutional Court, the Constitutional Commission of the Congress of Deputies, the General Council of the Judiciary, the Ministries of Foreign Affairs and Justice (of the caretaker Government as still no new Government had been formed) and with academics. Following the visit, the Government provided a position paper (CDL-REF(2016)034, hereinafter “the Position Paper”). The Venice Commission is grateful to the Ministry of Foreign Affairs for the excellent organisation of this visit.
5. Shortly after the visit, new parliamentary elections were called for June 2016 and the Commission postponed the adoption of the opinion to its session in October 2016. In September 2016 the President of the Constitutional Court informed the President of the Venice Commission that the Court was about to hand down its judgment in a case brought against the Amendment by the Governments of the Basque and the Catalan Regions and he requested that the Venice Commission postpone the adoption of its opinion on the Amendment until these judgments had been adopted. The Bureau of the Commission agreed to that request. The Court’s Judgment STC 185/2016 in the case brought by the Basque Region was publicly announced on 3 November 2016 (hereinafter “Judgment STC 185/2016”, CDL-REF(2016)001). The case brought by the Catalan Region was handed down on 15 December 2016 as Judgement STC 215/2016 (hereinafter “Judgement STC 215/2016”, CDL-REF(2017)007).
6. The rapporteurs prepared their comments on the basis of the English translations of the Amendment made available by the Spanish authorities and the results of the visit to Madrid. The translation may not accurately reflect the original version on all points. Some of the issues raised may therefore find their cause in the translation rather than in the substance of the provisions concerned. The Ministry of Justice of Spain provided comments on the draft opinion (hereinafter “the Government Comments”).<sup>1</sup>
7. Following its discussion in the Sub-Commission on Constitutional Justice (Venice, 9 March 2017) and an exchange of views with Mr Rafael Andrés Leon Cavero, Government Agent of

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<sup>1</sup> Furthermore the rapporteurs received a position paper from the *Generalitat* of Catalonia.

the Ministry of Justice of Spain, the present opinion was adopted by the Venice Commission at its 110<sup>th</sup> plenary session (Venice, 10-11 March 2017).

## II. General remarks

8. From the outset, the Venice Commission recalls that judgments of Constitutional Courts have a final and binding character and they have to be respected by all public bodies and individuals.<sup>2</sup> This is a corollary of the supremacy of the Constitution. Disregarding a judgment of a Constitutional Court is disregarding the Constitution and the Constituent Power, which attributed the competence to guarantee this Constitution's supremacy to the Constitutional Court. When a public official refuses to execute a judgment of the Constitutional Court, he or she violates the Constitution, including the principles rule of law, separation of power and loyal cooperation of state organs,<sup>3</sup> and measures to enforce this judgment are legitimate. This opinion examines to which extent the Amendment is an appropriate means to achieve this legitimate objective.

9. During the meetings in Madrid, interlocutors from the opposition insisted that Organic Law 15/2015 had been adopted in an accelerated procedure without sufficient time for discussion. During the meetings and in its Position Paper, the Government insisted that the draft had been introduced by a political group in Parliament and not as a Government proposal. The accelerated procedure with the adoption of the organic law in a single reading was validly applied and numerous amendments to the draft had been introduced and been debated.

10. The constitutionality of the adoption of the law under the accelerated procedure has been confirmed by the Constitutional Court in its Judgments. Referring to its earlier case-law,<sup>4</sup> the Court stated in Judgment STC 215/2016 that *"the particular constitutional relevance of a regulatory text, in light of said regulation article, is not incompatible with its processing in a summary procedure, or is sufficient per se [...] to exclude the use of this parliamentary procedure, from which no matter is excluded, including constitutional reform"*. The Venice Commission has no reason to doubt the constitutionality of the procedure followed. As concerns European standards, the Venice Commission recalls that institutional legislation, like that on the Constitutional Court, needs thorough scrutiny and the opinions of all relevant stakeholders should be considered. Even if Parliament is not obliged to follow their views, a wide consensus is preferable and this input can avoid technical errors, which can defeat the purpose of the legislation.<sup>5</sup>

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<sup>2</sup> CDL-AD(2012)026, Opinion on the compatibility with Constitutional principles and the Rule of Law of actions taken by the Government and the Parliament of Romania in respect of other State institutions and on the Government emergency ordinance on amendment to the Law N° 47/1992 regarding the organisation and functioning of the Constitutional Court and on the Government emergency ordinance on amending and completing the Law N° 3/2000 regarding the organisation of a referendum of Romania, para. 65; CDL-AD(2016)001, Opinion on amendments to the Law of 25 June 2015 on the Constitutional Tribunal of Poland, paras. 109, 136.

<sup>3</sup> CDL-AD(2012)026, Opinion on the compatibility with Constitutional principles and the Rule of Law of actions taken by the Government and the Parliament of Romania in respect of other State institutions and on the Government emergency ordinance on amendment to the Law N° 47/1992 regarding the organisation and functioning of the Constitutional Court and on the Government emergency ordinance on amending and completing the Law N° 3/2000 regarding the organisation of a referendum of Romania, Adopted by the Venice Commission at its 93rd Plenary Session (Venice, 14-15 December 2012), para. 74; CDL-AD(2016)001, para. 130.

<sup>4</sup> STC 238/2012.

<sup>5</sup> CDL-AD(2016)001, Opinion on amendments to the Law of 25 June 2015 on the Constitutional Tribunal of Poland, para. 132; CDL-AD(2016)017, Georgia - Opinion on the Amendments to the Organic Law on the Constitutional Court and to the Law on Constitutional Legal Proceedings, para. 13.

11. The Position Paper explains that the amendments to Organic Law 15/2015 are part of a wider reform and effort to ensure the execution of the judgments of Spanish high courts and those of the European Court of Human Rights, which were triggered *inter alia* by the judgment in the case of *García Mateos v. Spain*.<sup>6</sup> Other elements of this reform are:

1. Law 25/2014 of 27 November 2014 on Treaties and other International Agreements, which attributes a rank above ordinary law to obligations derived from international treaties ratified by Spain. According to the Position Paper, this Law also obliges Spain to abide by the final judgments of the European Court of Human Rights.
2. Procedural legislation ensuring the re-opening of proceedings following a judgment of the European Court of Human Rights (Organic Law 7/2015 of 21 July 2015 and Law 41/2015 of 5 October 2015 amending various other laws).

12. The Position Paper also explains the need for the Amendment with the refusal of the Parliament of Catalonia to respect judgments of the Constitutional Court.<sup>7</sup> Nearly all the interlocutors of the Commission's delegation referred, more or less explicitly, to the separatist movement in Catalonia as the political reason for the adoption of the Amendment.

13. During the meetings in Madrid, the Venice Commission was informed that in case of a refusal to execute a decision of the Constitutional Court, the new procedure under the Amendments to the Organic Law was likely to be invoked before measures were taken as a last resort under Article 155 of the Constitution, which enables the Government, following approval by the Senate, to take all measures necessary to compel the self-governing community concerned to meet its obligations or to protect the general interest.

14. The Amendment is formulated in an abstract manner and does not refer to the situation in Catalonia. Therefore, even if the execution of judgments of the Constitutional Court relating to Catalonia is the first occasion to apply the law,<sup>8</sup> its provisions are of a general normative nature and will be examined as such by the Commission and not in respect of the Catalanian case. This was also the approach by the Constitutional Court in its Judgments STC 185/2016 and STC 215/2016.

### III. Comparative overview<sup>9</sup>

15. The respective jurisdiction and institutional setting of the various constitutional courts in Europe vary widely. In particular, the rules on the execution of judgments, where such rules exist at all, differ for every constitutional court. As a consequence, there are no strict common standards on the execution of judgments of constitutional courts.<sup>10</sup>

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<sup>6</sup> "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. ..." Case of *García Mateos v. Spain*, application no. 38285/09, par 44.) <http://hudoc.echr.coe.int/eng?i=001-116985>. In this case, the Spanish Constitutional Court had established that its earlier judgment had not been executed but it did not award a compensation.

<sup>7</sup> The Commission was informed by the Spanish Government that Resolution 1/11 of the Regional Parliament of Catalonia was annulled by the Constitutional Court in judgment number 259/2015. As the competent authorities were unwilling to comply with it, that gave rise, upon request by the National Government, to three decisions adopted by the Constitutional Court on 17 July 2016, 6 October 2016 and 14 February 2017.

<sup>8</sup> *Auto no. 24/2017* of the Constitutional Court of 14 February 2017.

<sup>9</sup> This overview is necessarily incomplete and provides examples rather than a complete picture.

<sup>10</sup> CDL-INF(2001)009, Report on Decisions of Constitutional Courts and Equivalent Bodies and their Execution, p. 18.

16. In some States, there is no judicial review of legislation at all, such as for instance in the Netherlands<sup>11</sup> or in the United Kingdom. In others, the Supreme Court exercises constitutional control, for instance in Cyprus, in Estonia (the Constitutional Chamber of the Supreme Court), in Norway or in Ireland. Typically, the general rules on execution apply also in these cases.

17. The decisions of the Constitutional Court are usually final and binding. For example, Article 171 of the Constitution of Serbia determines that everyone shall be obliged to observe and enforce the decisions of the Constitutional Court. Similar regulations can be found in the legal orders of Albania,<sup>12</sup> Croatia,<sup>13</sup> Hungary<sup>14</sup> and Lithuania.<sup>15</sup> Article 150 of the Constitution of Ukraine states that decisions of the Constitutional Court are mandatory for execution throughout the territory of Ukraine and that they are final and shall not be appealed.

18. According to Section 31 para. 1 of the German Law on the Federal Constitutional Court, the decisions are binding on the constitutional organs of the Federation and the *Länder* as well as on all courts and administrative authorities. Para. 2 goes one step further for certain types of proceedings (in particular various types of norm control proceedings, but also proceedings on individual complaints against judgments). It stipulates that the decision has the „force of law” (*Gesetzeskraft*).

19. In Liechtenstein, enforcement of the judgments of the Constitutional Court is governed by the provisions of the Law on General Procedures of the National Administration. Monetary payments constitute an order of execution under the provisions of the Execution Law.<sup>16</sup>

20. According to the legal order in some States, the enforcement is monitored by the Constitutional Court itself. According to Article 52 of the Constitution of Montenegro, the authority which is obliged to execute the decision of the Constitutional Court shall, after the expiry of a certain time-limit, submit a report to the Constitutional Court on the execution of decisions of the Constitutional Court. According to Article 87 of the Rules of Procedure of the Constitutional Court of “The Former Yugoslav Republic of Macedonia”, the Court monitors the execution of its judgments, and if necessary, may request the Government of the Republic of Macedonia to ensure their execution.

21. In the legal order of some States such as for instance Austria, Croatia,<sup>17</sup> Montenegro or Serbia,<sup>18</sup> it falls to the executive (government or administration) to enforce the decisions of the Constitutional Court. In Austria, according to Article 146 of the Federal Constitutional Law, the enforcement of judgments of the Constitutional Court concerning pecuniary claims against the Federation, the provinces, the municipalities and municipal associations which cannot be settled by ordinary legal process nor be liquidated by the ruling of an administrative authority is implemented by the ordinary courts. The enforcement of other judgments by the Constitutional Court is incumbent on the Federal President. The Constitutional Court is therefore reliant on the assistance of other state authorities, mainly the Federal President who may deploy the Federal Army in order to execute the decisions of the Constitutional Court. This is, however, a mere theoretical option, as decisions are rarely not followed. The Austrian system is based on the

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<sup>11</sup> See Article 120 of the Dutch Constitution. With the exception of constitutional review of legislation for the Caribbean islands Aruba and Curacao and St. Martin. But there is a *de facto* constitutional review in that all courts can test the compatibility of laws with international treaties such as the ECHR.

<sup>12</sup> Article 81 of the Law on the Constitutional Court.

<sup>13</sup> Article 31 of the Law on the Constitutional Court.

<sup>14</sup> Article 39 of the Law on the Constitutional Court. According to the same provision, the Constitutional Court shall establish itself the applicable legal consequences within the framework of the Fundamental Law and of this law.

<sup>15</sup> Article 107 of the Constitution.

<sup>16</sup> Article 55 of the Liechtenstein Law on the Constitutional Court.

<sup>17</sup> Article 31 of the Law on the Constitutional Court.

<sup>18</sup> Article 104 of the Law on the Constitutional Court.

assumption that the execution of decisions of a Constitutional Court is a highly political matter and should therefore not be exercised by the Constitutional Court itself.<sup>19</sup>

22. Article 86 of the Rules of Procedure of the Constitutional Court of "The Former Yugoslav Republic of Macedonia" provides that judgments of the Constitutional Court are executed by the entity that passed the law that is annulled or repealed by a judgment of the Court. According to Article 46 of the Law on the Constitutional Court of Serbia, the Court can determine the manner of enforcement of its decisions or rulings.

23. In Germany, the Federal Constitutional Court itself may decide which administrative body shall execute its decisions. According to Article 35 of the Federal Constitutional Court Law, the decision of the Federal Constitutional Court may specify who is to execute it; in individual cases, it may also specify the method of execution. Article 35 of the Federal Constitutional Court Law has the same aim as Article 146 of the Austrian Federal Constitutional Law: The decision-making body and the executive body should be separated because of the highly political nature of the enforcement procedure and its arrangement in specific cases.<sup>20</sup>

24. In the majority of European States, however, there are no explicit rules on the consequences of non-compliance with the decisions of the Constitutional Court. This is due to the fact that, in "older" democracies, there have been only a few real cases of non-compliance.<sup>21</sup>

25. In a number of States such as Albania,<sup>22</sup> Armenia,<sup>23</sup> Moldova<sup>24</sup> and Ukraine<sup>25</sup> the law provides for legal (criminal or civil) sanctions in the event of non-compliance. In the Republic of Moldova, the Constitutional Court may impose an administrative fine amounting to 25 minimal salaries in the case of non-enforcement of the decisions of the Court.<sup>26</sup>

26. The comparative overview provided above shows that there is some diversity with respect to the execution of judgments. One part of the European legal order does not regulate the enforcement of Constitutional Court decisions and the other assigns this task to other state powers. Only in Moldova, the Constitutional Court may impose administrative fines. As a consequence, there are no European standards on who should be responsible for the execution of Constitutional Court decisions.

#### **IV. Assessment of the Amendment to Organic Law 2/1979 of 3 October 1979**

27. Before the introduction of the Amendment, the Organic Law 2/1979 of 3 October 1979 already contained provisions on the execution of the judgments of the Constitutional Court. The original Organic Law 2/1979 had already been amended in 2007 regarding some aspects of the execution of the judgments.

1. Article 87 provided that all public powers were bound by the judgments of the Constitutional Court and that ordinary courts had to give urgent preferential treatment to requests by the Court;

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<sup>19</sup> See Fister, Article 146, in Kneihls/Lienbacher (ed.), Rill/Schäffer-Kommentar Bundesverfassungsrecht, 2014, § 2 with further references.

<sup>20</sup> See Herzog, Die Vollstreckung von Entscheidungen des Bundesverfassungsgerichts, Der Staat 4 (1965), p. 37.

<sup>21</sup> See CDL-INF (2001) 9, p. 21.

<sup>22</sup> Law no 99/2016, amending Article 81.4 of the Constitutional Court Law.

<sup>23</sup> Article 40 of the Law on the Constitutional Court.

<sup>24</sup> Article 28<sup>1</sup> of the Law on the Constitutional Court.

<sup>25</sup> Article 70 of the Law on the Constitutional Court.

<sup>26</sup> Art 82 of the Constitutional Jurisdiction Code

2. Article 92.4 provided that the Constitutional Court was able to take certain measures within the procedure of execution of its decisions.
3. Article 95, provided that the Court was able to impose coercive penalties ranging between 600 and 3000 Euros) on any person – private or public – who does not execute the request of the Court within the requested deadline. These coercive penalties may be repeated until the fulfilment of the obligation by the person concerned, notwithstanding any other responsibility of that person.

28. The Preamble to the Amendments and the Position Paper explain that these provisions were not sufficient to ensure the execution of the decisions of the Constitutional Court and that the Law needed to be adapted to ensure the effectiveness of the decisions of the Constitutional Court, notably when public authorities refuse to comply with the Court's decisions.

29. The Preamble also emphasises that “the guarantee of effectiveness constitutes an essential element without which the rule of law would not exist” and that under the new provisions “the Court may undertake the execution of its decisions either directly or through any other public authority”. The Amendment significantly increases the powers attributed to the Constitutional Court for the execution of its decisions. Articles 80, 87, 92 and 95<sup>27</sup> are amended. Even if some of the measures amended already existed in the Organic Law before the Amendments, it is necessary to examine the measures of execution addressed in the Amendments in their entirety.

#### **A. Subsidiary application of the Law on Contentious-Administrative Jurisdiction**

30. Article 80, which provided that the Organic Law on the Judiciary and the Code of Civil Procedure apply to various procedural aspects, was amended to apply, in addition, the Law on Contentious-Administrative Jurisdiction<sup>28</sup> as a supplementary law to the enforcement of decisions.

31. This provision may be relevant in combination with other amendments, notably Article 87 which makes Constitutional Court decisions executable titles and Article 92 as concerns procedural guarantees when penalty payments are imposed and when officials are suspended (see below).

#### **B. Notification of decisions**

32. Article 87.1 was amended to provide that the Constitutional Court may notify its decisions (“*acordar la notificación*”) “in person to any public authority or employee deemed necessary”.

33. The power to notify the decisions to any public authority and employee is consistent with the final and binding character of the decisions of the Constitutional Court. The organs and persons which have an obligation to execute decisions of the Court need to be notified so that they are aware of their obligation and can fulfil this obligation in an efficient and speedy manner. Such notification can remove doubts as to which authority or person is responsible to execute a decision and thus avoid positive or negative conflicts of competence in the execution. Such notification should not only be optional, but be an obligation for the Constitutional Court.

34. The original Article 87 already provided that the ordinary courts shall assist the Constitutional Court as a matter of priority and urgency. The amended Article 87.2 also provides that “[f]or that purpose, all judgments and decisions of the Constitutional Court shall be considered enforceable titles.”

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<sup>27</sup> Article 95 is amended only insofar as the coercive fines foreseen are removed from that article because they are now regulated in Article 92.

<sup>28</sup> <https://www.boe.es/buscar/pdf/1998/BOE-A-1998-16718-consolidado.pdf>.



### **C. Attribution to the Constitutional Court of the task to ensure the execution of its decisions**

35. The amended Article 92 attributes to the Court the task of ensuring the execution of its decisions. During execution, the Court may annul any decision contradicting its own decisions after hearing the Public Prosecutor and the authority that issued the [contravening] decision (para. 1).

36. The Constitutional 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 (para. 2).

37. The parties of the proceedings before the Constitutional Court may promote [submit] enforcement issues ("*promover el incidente de ejecución*") as established in para. 1 proposing to the Court the adoption of the necessary enforcement measures to ensure the effective compliance with its decisions" (para. 3).

38. The attribution of the task to ensure the execution of its decisions in Article 92 is the heart of the Amendments. As the comparative overview has shown, this task is rather exceptional for European Constitutional Courts. While some Courts have the task of monitoring the execution of their judgments or may assign the task of execution to a specific organ or body, no other Court seems to have the overall responsibility of ensuring the execution of its judgments itself.

39. What the obligation to ensure the execution of its decision really means, according to the Spanish Organic Law, depends on the measures which the Court can take to ensure this execution. These will be examined below.

### **D. Competence to annul any decision contradicting a decision of the Constitutional Court**

40. Article 92 para. 1 maintains the provision that the Court may determine within the judgment or decision, or in subsequent acts who shall be responsible for the execution. This provision serves the effectiveness of the Court's case law and, therefore, is a useful instrument for securing implementation of decisions.

41. The competence to annul 'any' decision contradicting its own decisions already existed in Article 92 since 2007. In order to ensure that the Court is seen as a neutral arbiter, this competence should be exercised only upon request by a party (as provided for in Article 92.3). In any case, judgements of the ordinary courts should not be annulled in execution proceedings but only in specific proceedings on the merit.

42. This competence might also overburden the Court. The Amendment makes no distinction between contradicting decisions taken before the Constitutional Court gave its own decision and later ones, which will indeed knowingly contradict the Court's decision. There could be many individual decisions which contradict a given Constitutional Court decision. The scope *ratione temporis* of the competence to annul any decision contradicting a decision of the Constitutional Court should be clarified.

43. It is positive that the Constitutional Court may seek the assistance of any public administration or public authority (para. 2).

### **E. Procedure in case of non-execution**

44. Article 92 para. 4 provides that, in case of non-compliance with one of its decisions, the Constitutional Court may request the institutions, authorities, public employees or private persons responsible for the enforcement to inform [report to] the Court within a certain time limit set by the Court. Once the report is received or the time limit expired, the Constitutional Court may adopt certain measures, if it finds that its decision remains fully or partly unfulfilled. These measures are:

1. Imposition of a coercive penalty payment from € 3.000 to € 30.000 on the authorities, public employees or private persons failing to comply with the decision of the Constitutional Court, with the possibility of reapplying the penalty until the decision is fully enforced;
2. Suspension of any public authorities or civil servants who are responsible for the non-compliance until the decision is implemented;
3. Substitute enforcement of the decision of the Constitutional Court;
4. Production of “certified copies of the particulars of the case in order to call for the criminal responsibilities that may correspond.”

45. The procedure foreseen in paragraph 4 of Article 92 has two stages, a reporting stage and a stage on measures by the Court in case of non-fulfilment. As such, the obligation to report to the Constitutional Court is not problematic, as long as the time limits set by the Court are reasonable.

### **F. Penalty payments**

46. Coercive penalty payments already existed in the Organic Law before the Amendments in its Article 95. The Amendments, however, substantially increased the amounts of these payments from between 600 and 3.000 Euros to between 3.000 and 30.000 Euros (a 5-fold increase of the lower and a 10-fold increase for the upper limit of the penalty). Imposing such drastic payments would change the nature of these payments, notably when this is done repetitively until the decision of the Constitutional Court is executed and very high total amounts could be payable. The Government pointed out that in the past the Constitutional Court never imposed these penalties. The Venice Commission does not doubt that the Constitutional Court would apply these provisions in a proportionate manner but it examines the Amendments from an abstract point of view.

47. . The wording of the Amendments does not clarify whether it is the authority that has to pay the penalty or the office-holder from his or her personal funds. In Judgment 215/2016, the Constitutional Court seems to contemplate only individuals when it refers to salaries and states that the “*subjective scope of application is not limited to authorities or public employees, but also covers any citizens failing to follow the Court’s resolutions; consequently, based on the salary of public employees, it cannot be affirmed in principle that the amounts set are always, irresistibly and necessarily, disproportionate*”. The law or its application should provide for different treatment when penalty payments concern respectively public authorities, office holders and individuals.

48. According to the Judgments of the Constitutional Court, they do not have penal character under the Spanish Constitution. In Judgment 215/2016, the Court held that “*it is not a sanctioning measure in strict terms, as it does not have a repressive or retributive purpose due to an illegal conduct, but acts as coercion or encouragement to fulfil a legal duty, in other words, to dissuade its non-fulfilment. Thus, no matter how burdensome the consequence of the disputed measure for the person ordered to fulfil it, it does not follow a strictly repressive, retributive or punishment purpose, the defining features of punitive measures, but aims at guaranteeing the effectiveness and fulfilment of Constitutional Court resolutions*”.

49. As concerns the Convention, notably because of the level of these penalties, they may be considered to be “criminal charges” under Article 6 of the European Convention on Human Rights,<sup>29</sup> if the other criteria of the case law of the European Court of Human Rights are fulfilled, at least as far as private persons are concerned and there are good reasons that call for a similar assessment where public employees are concerned. Conversely, when a fine is imposed on an authority, which is to be paid from the budget of that authority,<sup>30</sup> the penal character of the sanction within the meaning of Article 6 ECHR cannot be established because the Convention protects the rights of individuals only and not that of state authorities.

50. As a consequence, the fair trial guarantees of Article 6 ECHR are required for penalty payments imposed on individuals. The application of the Law on Contentious-Administrative Jurisdiction and, notably, its provisions on hearings and on evidence may provide such guarantees. It is for the Constitutional Court to apply them appropriately in individual cases.

51. The main issue of the penalty payments is whether they can be enforced. The measures under Article 92.4 apply only when the authority or person concerned already refused to abide by the final and binding decision of the Constitutional Court and the request for a report on the execution does not result in its execution. This amounts to questioning the Constitutional Court’s authority.

52. There is no doubt that an overt refusal to execute the decisions of the Constitutional Court constitutes a flagrant violation of the Constitution and that this needs to be remedied. The question is why an authority, which already violated the Constitution by refusing to execute a final and binding decision of the Constitution, would abide by another decision of the Constitutional Court imposing a penalty payment. It is possible that this authority would not respect this measure either.

53. Such a flagrant and repetitive disrespect of the Constitutional Court’s decisions can severely undermine its authority and, in turn, that of the Constitution. Once the Constitutional Court has made a decision and there is a refusal to implement this decision, other bodies should step in, in order to defend the Constitution and the Constitutional Court. Giving the power of execution of its decisions to the Constitutional Court may seem as an increase of power at first sight. However, in a system of separation of powers, the division of competences of adjudicating on the one hand, and of executing its results, strengthens the system of checks and balances as a whole, and in the end, also the independence of the Constitutional Court as a decisive factor of the rule of law. The perpetrator should certainly be forced to obey the judgment of the Constitutional Court, but not by the Constitutional Court, which does not have the practical means to force the office holder to comply with its decision.

### **G. Suspension of officials**

54. The Amendment allows the Constitutional Court to suspend any public authority or civil servant who is responsible for the non-compliance of a decision of the Court until that decision is implemented. A series of questions arise in this respect.

55. First, after the discussions during the Venice Commission’s visit to Madrid and even after the Judgments STC 185/2016 and STC 215/2016, it remains unclear whether this suspension refers only to civil servants or also to elected officials. The Judgments point out that the Court will decide on a case by case basis, while insisting all public bodies are bound by Constitution.

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<sup>29</sup> As the term “penalties” may suggest.

<sup>30</sup> The Amendments do not clarify whether it is the authority that has to pay the penalty or the office-holder from his or her personal funds.

The Government Comments point out that judges can be suspended only by the General Council of the Judiciary, pursuant to Article 383 of the Organic Law on the Judiciary.

56. The suspension of Members of Parliament who have a democratic mandate from the sovereign people could also be problematic as they are protected by the prerogatives of the Constitution (notably inviolability, Article 71). The Government Comments point out that with the exception of administrative-parliamentary duties as member of the Bureau of Parliament, the Amendments do not envisage the suspension of Members of Parliament. However, as pointed out above, the wording of the Amendments remains imprecise. The suspension of other elected officials raises questions as well. On the other hand, the suspension of civil servants and not directly elected office holders seems less problematic. The Organic Law should clearly define the personal scope of suspension.

57. In the light of the Eskelinen-case law,<sup>31</sup> the suspension of any public authorities or administrative employees is also likely to concern a “civil right” leading to the applicability of Article 6 ECHR. As a consequence, fair trial particular guarantees would be required (public hearing, equality of arms etc.). The subsidiary application of the Law on Contentious-Administrative Jurisdiction might provide the necessary guarantees.

58. It can be presumed that the Constitutional Court would apply the measure of suspension of an official – as temporary measure – within the framework of the guarantees provided for by the Constitution and the Convention.

59. Another issue is the effect of the suspension. During the suspension, the suspended office holder cannot exercise his or her powers. In itself, the suspension does not result in the replacement of the person concerned with another office holder. According to the Preamble of the Amendments and the Position Paper, the suspension – like the penalty payments - should induce the suspended office holder to execute the decision of the Constitutional Court and the suspension should last only while the officeholder refuses to execute the decision of the Constitutional Court. However, if the office-holder can no longer exercise his or her powers, how is he or she expected to execute the Court’s decision? Judgment STC 215/2016 states that the measure will be lifted when the authority or public official is no longer “unwilling” to comply. In order to solve that problem, it would seem necessary that the office-holder first promise to execute the decision; the Court would then end the suspension in order to enable the execution by the office holder. The Amendments should address this practical question.

60. This issue may be moot if the rules governing the office of the suspended official provides for the official’s (his or her deputy) substitution and the substitute executes the Constitutional Court’s decision. Then the suspension of the office holder would end. If however the substitute in turn refuses to execute the decision, he or she should probably be suspended as well. This could be repeated until the decision is executed. Such repeated suspension could lead to an absurd situation.

61. Finally, the same problem arises as for the penalty payments. If the decision of the Constitutional Court is not executed, then it is possible that the office holder concerned would also ignore his or her suspension and remain in office. This would seriously undermine the authority of the Constitutional Court.

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<sup>31</sup> ECtHR, Vilho Eskelinen and others v. Finland (GC), no. 63235/00 of 19 April 2007.

## **H. Substitute enforcement**

62. Article 92 para. 4 item 3 provides for substitute enforcement of the Constitutional Court's decisions. The Constitutional Court may request the cooperation of the National Government in this case.

63. The Government of the Basque Region claimed that the substitute enforcement changed the nature of the system of supervision of the self-governing communities by the Spanish State. In Judgment STC 185/2016, the Constitutional Court rejects this claim and makes a clear distinction between the measures of execution under the Amendment and the measures under Article 155 of the Spanish Constitution, which enable the Government to take measures against self-governing communities which do not follow their constitutional or legal obligations when this is "seriously prejudicial to the general interest of Spain". These measures are taken by the Spanish Government "following approval granted by the overall majority of the Senate". They are taken by political actors. The measures of execution under the Amendment on the other hand are taken by the Constitutional Court, a judicial organ, in cases of the non-execution of one of its judgments. As such, they do not relate to the system of supervision of autonomous communities under Article 155 of the Constitution and do not denature this system as had been alleged by the Basque Government.

64. The Venice Commission is of the opinion that substitute enforcement of decisions of the Constitutional Court is not problematic. The Constitutional Court is likely not to execute this measure itself, but to request the cooperation of the Spanish Government. Therefore, the Court is not itself burdened with performing the required acts.

## **I. Certified copies as a basis for criminal prosecution**

65. Article 92 para. 4 item 4 provides for the production of certified copies presenting the details of the case concerned for the purpose of enabling criminal prosecution of the persons refusing the execution of the decision.

66. The certificates are the basis for the prosecution service and the ordinary courts and they are, as such, not problematic. The burden of execution would in this case shift to the prosecution service and to the ordinary judiciary, which is welcome.

## **J. Suspension of acts**

67. In cases of special constitutional importance,<sup>32</sup> Article 92 para. 5 empowers the Constitutional Court to suspend acts at its own motion or at the request of the Government. The Court suspends such acts without hearing the parties. However, in the decision on such measures, the Court summons the parties and the Public Prosecutor within three days. After such a hearing, the Court decides on lifting, maintaining or modifying these (provisional) measures.

68. The suspension of acts without hearing the parties could be an issue, notably if the case were to fall under the scope of Article 6 ECHR. However, a hearing is held already three days after this measure is taken and the parties concerned can express their views at that hearing. Often, Constitutional Courts or even their Presidents can adopt interim measures in urgent cases. Therefore, there is no objection against this measure, given that a hearing is held shortly after the measure is taken. However, the Court should not act on its own motion but only upon request.

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<sup>32</sup> In its Judgment 215/2016, the Court mentions as an example of a matter with huge constitutional significance: "*declaration of sovereignty and the right of self-determination of the people of an Autonomous Community*".

## V. Conclusions

69. The Venice Commission recalls that judgments of Constitutional Courts have a final and binding character. As a corollary of the supremacy of the Constitution, judgments of Constitutional Courts have to be respected by all public bodies and individuals. Disregarding a judgment of a Constitutional Court is equivalent to disregarding the Constitution and the Constituent Power, which attributed the competence to ensure this supremacy to the Constitutional Court. When a public official refuses to execute a judgment of the Constitutional Court, he or she violates the principles the rule of law, the separation of powers and loyal cooperation of state organs. Measures to enforce these judgments are therefore legitimate. In the light of the absence of common European standards, this opinion examines to which extent the Amendment introduced to Organic Law no. 2/1979 on the Constitutional Court of Spain is an appropriate means to achieve this legitimate objective.

70. The Amendment attributes to the Constitutional Court the task of executing its decisions. When there is a refusal to execute a decision of the Court, the Court may take a series of measures, including imposing repetitive coercive penalties and suspending the official refusing execution.

71. The comparative overview shows that the responsibility for the Constitutional Court to contribute to the execution of its own decisions is the exception. This task is usually attributed to other state powers. Attributing the overall and direct responsibility for the execution of the Constitutional Court's decision to the Court itself should be reconsidered, in order to promote the perception that the Constitutional Court only acts as a neutral arbiter, as judge of the laws.

72. Several of the measures which the Constitutional Court can take when it encounters a refusal to execute one of its decisions do not raise any problems, for instance requesting the National Government to substitute the execution or requesting the prosecution and the ordinary courts to initiate criminal proceedings. There is also no objection to the Court requesting information or reports on the execution of its decisions.

73. However, two measures raise questions: the repetitive, coercive penalty payments applied on individuals and the suspension from office of officials who refuse to execute the Courts' decisions.

74. The personal scope of the suspension from office remains unclear and should be specified. It could be problematic if it were to include directly elected officials, who are not excluded by the wording of Article 92. The law or its application should provide for different treatment when penalty payments concern respectively public authorities, office holders and individuals.

75. In order to enhance the perception of the Constitutional Court as a neutral arbiter, the Court should not act on its own motion but only upon request by a party in exercising the execution powers under the Amendment.

76. However, another serious concern against attributing to the Constitutional Court the task of executing its own decisions is that the Court has to take these measures – coercive penalty payments and suspension of officials – in a situation where the Court is already facing a refusal to execute its decisions. It is not unlikely that the person refusing the execution will also refuse to pay the penalty or ignore the suspension and continue exercising his or her office. This could challenge the authority of the Constitutional Court and, in turn, that of the Constitution itself.

77. In such a case, other state bodies should step in, in order to defend the Constitution and the Constitutional Court. The attribution of the power of execution of its decisions to the Constitutional Court may seem as an increase of power at first sight. However, the division of

competences of adjudicating on the one hand, and of executing its results, strengthens the system of checks and balances as a whole, and in the end, also the independence of the Constitutional Court.

78. The Venice Commission does not recommend that these powers be attributed to the Constitutional Court. However, in the light of the absence of common European standards in this field, the introduction of such powers does not contradict such standards.

79. The Venice Commission remains at the disposal of the Parliamentary Assembly and the Spanish authorities for any further assistance they may require.