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EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

SPAIN

CONSTITUTIONAL COURT JUDGMENT ON UNCONSTITUTIONALITY APPEAL ["RECURSO DE INCONSTITUCIONALIDAD"] NO. 229-2016, BROUGHT BY THE BASQUE GOVERNMENT

The Plenary Meeting of the Constitutional Court, consisting of Mr. Francisco Pérez de los Cobos Orihuel, President, Ms, Adela Asua Batarrita, Ms. Encarnación Roca Trías, Mr. Andrés Ollero Tassara, Mr. Fernando Valdés Dal-Ré, Mr. Juan José González Rivas, Mr. Santiago Martínez-Vares García, Mr. Juan Antonio Xiol Ríos, Mr. Pedro González-Trevijano Sánchez, Mr. Ricardo Enríquez Sancho and Mr. Antonio Narváez Rodríguez, Magistrates, have issued

IN THE NAME OF THE KING

the following

J U D G M E N T

In unconstitutionality appeal ["*recurso de inconstitucionalidad*"] no. 229-2016, brought by the Basque Government, represented by the Court Attorney Mr. Felipe Juanas Blanco and under the legal counsel provided by Mr. Carlos Zabaleta Alvarez and Mr. Zelai Nikolas Ezkurdia, Lawyers ascribed to the Legal Services of the Autonomous Community of the Basque Country, against Public General Act ["*Ley Orgánica*"] 15/2015, of 16 October, reforming Public General Act 2/1979, of 3 October, of the Constitutional Court, on the enforcement of Constitutional Court resolutions to guarantee the rule of law. The following persons appeared as parties to the suit and submitted their pleadings: The Attorney of Parliament, Ms. Paloma Martínez Santa María, acting for and on behalf of the Congress of Deputies, and the State Attorney, acting on behalf of the Government. Mr. Pedro González-Trevijano Sánchez acted as Reporting Judge, indicating the opinion of the Court.

I. Background Facts

1. On 15 January 2016, the Court Registry received an unconstitutionality appeal, brought by the procedural representatives of the Basque Government against Public General Act 15/2015, of 16 October, reforming Public General Act 2/1979, of 3 October, on the enforcement of Constitutional Court resolutions to guarantee the rule of law (Official State Gazette (BOE) of 17 October 2015), as well as against single article, section three, according to the wording given to b) and c), sections 4 and 5, of Article 92 of the Public General Act of the Constitutional Court (LOTC).

2. After describing the content of the challenged Act. the governing writ of this process begins by stating the main theory upheld: "[…] regulatory amendments have provided the Constitutional Court with a series of enforcement devices that alter its constitutional layout and distort it, ranking constitutional jurisdiction above the other constitutional bodies, which should prevail, particularly in the exceptional situations foreseen. In our opinion, this constitutes a breach of the constitutional system ["*bloque de constitucionalidad*"] established in Title IX of the Spanish Constitution, particularly Articles 161 and 164 in relation to Art. 117.3, of the Spanish Constitution (CE), on the attribution of competence to the Constitutional Court". Furthermore, other infringements of constitutional provisions are claimed: the principle of criminal legality (Art. 25 CE), the granting of privileges ["*aforamiento*"] foreseen in constitutionality matters (Arts. 71 and 102 CE and Art. 32 of the Statute of Autonomy of the Basque Country (EAPV), in relation to Art. 24 CE), a fundamental right to participate in politics (Art. 23 CE), the principle of political independence of Autonomous Communities (Arts. and 143 CE), as well as Art. 155 CE. Basically, it all involves "a material reform of the Spanish political system, which we consider unconstitutional, affecting the balance between territorial powers and, consequently, the constitutional consensus itself achieved in 1978".

The appeal is being brought against the Public General Act as a whole, further to the legislative procedure used to pass the Act, and against several sections thereof: the new

wording given to b) and c) in sections 4 and 5 of Article 92 LOTC. The claims made include the unnecessariness of the reform, acknowledging the absence of a constitutionality parameter. In this regard, reference is made to a lack of reflection and the availability of judicial remedies against infringements of Constitutional Court resolutions (Arts. 164.1 CE and Arts. 38, 87, 92 and 95.4 LOTC; criminal channels, and Art. 155 CE, in this order).

The reasons for this unconstitutionality are divided into five large groups, summarised below:

a) Legislative procedure: a breach of Arts. 23 CE, 150.1 of the Regulations of the Congress of Deputies (RCD) and 129.1 of the Senate Regulations (RS).

After explaining the legislative procedure followed, a breach of Congress Regulations is claimed, on the grounds that neither requirement has been met (Art. 150.1 RCD and Art. 129.1 RS and Constitutional Court Judgment (STC) 274/2000, of 15 November, Legal Grounds (FJ) 10) in order to apply for an abridged legislative procedure ["*procedimiento de lectura única*"] (if advisable due to the nature of the text or if possible due to its simplicity). The first requirement is deemed as infringed because the reform "includes amendments of constitutional relevance not open to discussion, as these affect essential constitutional principles and values, basic matters related to a constitutional body affecting relations with the other public powers". As regards the second requirement, "the case is far from "simple", as the amendments introduced by the reform are technically complex and involve an analysis of the institutional position itself of the Constitutional Court and the nature of its constitutional competence".

It is recalled that, according to STC 103/2008, of 11 December, an abridged legislative procedure "greatly limits the possibilities of participating in the legal enactment process"; according to STC 99/1987, of 11 June, "a failure to follow the precepts regulating this legislative procedure could render an act unconstitutional, if this breach substantially alters the decision-making process in Parliament". Thus, the abridged legislative procedure followed to enact Public General Act 15/2015 infringes the Regulations of both Chambers, as part of the constitutional system (Art. 28.1 LOTC), seriously conditioning the decision-making process of the Chamber in breach of the fundamental *ius in officium* held by all deputies and, consequently, in breach of Art. 23 CE.

Furthermore, the draft bill was presented, promoted and passed with the votes of a single parliamentary group, receiving a challenge and dismissal from the other groups. Given that protests and complaints were submitted by the entire opposition in Parliament, in this case the Constitutional Court would be entitled to judge these decisions, pursuant to its repeated case-law, indicating that the Court should not impose its opinion over that of Parliament in order to settle any irregularities in procedures involving parliamentary decisions, not entirely regulated and which, at the time, did not generate any protest in Parliament [Constitutional Court Judgments (SSTC) 136/2011, FJ 10 e); 176/2011, FJ 4; 209/2012, FJ 4 c); and 120/2014, FJ 2 e)].

b) The attribution of competence to the Constitutional Court in breach of Arts. 117.3, 161 and 164 CE.

This challenge is being brought against the three sections indicated above [b) and c) of sections 4 and 5 of Article 92 LOTC]. Basically, it is claimed that when designing and institutionally positioning the Constitutional Court according to Title IX of the Constitution, no measure whatsoever was intended that is similar to the ones implemented by the reform; as a result, one may conclude that the legislator of public general acts has adopted a constituent position, exceeding the entitlement granted under Art. 165 CE; and, two, the reform entails a qualitative change in the nature, position and functions of the Constitutional

Court, seriously altering its balance and how its weight is set of with that of the other State powers.

The LOTC is not exempt from constitutional control: the legislator of public general acts, foreseen in Art. 165 CE, is subject to limitations, derived from both Title IX of the Constitution and the Court model, inferred from a joint interpretation of the Constitution and its underlying constitutional principles (STC 49/2008, of 9 April). The enforcement measures introduced by the reform, which are hereby challenged, are *ultra vires*, to the point of altering the institutional position of the Court with serious detriment to the horizontal and vertical balance of powers, implicit in the Constitution, ultimately disregarding the constitutional justice model designed by the Constitution. The Constitutional Court is configured by the Constitution as a constitutional body and, in turn, as a unique court of justice; it is precisely the articulation or interaction of both components which makes it peculiar and distinct within the institutional structure of the State, determining its status and position as part of the constitutional order. As a constitutional body, the Constitution will determine is composition, status and competence system, directly assigning its fundamental attributions, nature and position. Along with the other constitutional bodies, it makes up the base for the State model; in this layout of particular importance is the set of relations established between the same, which is why a material change in these relations will entail a change in the system itself. The Court is also in charge of guaranteeing the supremacy of the Constitution and of ensuring the validity of the distribution of powers it establishes, which it why constitutional jurisdiction acts as a basic institutional guarantee of the constitutional rule of law. Its essential task is to avoid the State's functions-powers departing from the Constitution, facilitating a dialogue amongst these powers as part of a democratic system. This function will be severely hindered if it departs from the position assigned to it by the Constitution.

Consequently, the distribution of powers (basically in horizontal terms) is not adequately guaranteed by the constitutional jurisdiction; instead of aiming to prevent a concentration of State power, it strengthens it by attributing rights with respect to measures such as suspension or substitute enforcement [Arts. 92.4 b) and c) and 92.5 LOTC], eventually breaking this delicate equilibrium. The Constitutional Court may affect State politics, without conditioning them, as is the case now as a result of the reform: it may "correct" steps and decisions taken by the constitutional bodies, but may not participate in the adoption of said steps and decisions, let alone replace them in the exercise of decision-making and actions. The Court is not ranked above the other constitutional bodies; each one is supreme in its own order. Although the Court is certainly supreme in constitutional interpretation matters, the parity amongst these bodies means that one of them cannot predominate and affect the deciding independence of the rest.

Art. 164.1 CE is the constitutional provision with which any analysis of Public General Act 15/2015 should start off: it establishes the characteristics and specific features of constitutional judgments, to particularly include the erga omnes effects of any declaration of unconstitutionality of a rule enjoying status as an act, as well as the limits involved in the enforcement of resolutions. Furthermore, any decision adopted by the Constitutional Court when enforcing its resolutions will depend on the nature or type of suit in which the Judgment was delivered, as well as its specific content. Next, the writ goes over the "large competence units" included in constitutional jurisdiction, and the types of judgment that may be delivered:

i. When providing an abstract control over rules, an unconstitutionality pronouncement is *per se* merely declaratory. Consequently, a judgment settling an unconstitutionality appeal or issue ["*cuestión de incontitucionalidad*"] does not involve any type of enforcement, as it displays general effects with its mere official publication (Art. 38.1 LOTC; Constitutional Court Decision (ATC) 309/1987, of 12 March; STC 231/2015, of 5 November). The effects derived from this type of judgment are not related to enforcement but to the application of the

law covered by the judgment. Both the law and its application are separate and subject to different principles than those governing jurisdictional enforcement. What we need to ask ourselves is whether the legislator is entitled to overlook a ruling and constitutional doctrine, upholding the content of a provision declared as unconstitutional or not in line with the constitutional interpretation provided by the Court: in which cases and with what consequences may the foregoing be upheld with respect to constitutional review. Of relevance in this regard are the

Resolutions adopted by the Plenary Meeting of the Criminal Chamber on 25 April 2006: "1.- Article 5.1 LOPJ, interpreted according to Articles 117.1, 161.1 b) and 164.1, may not prevent the Supreme Court from exercising its full jurisdiction further to the powers directly conferred by Article 123.1 CE. 2.- Current case-law on the interruption of statutes of limitation should prevail, despite Constitutional Court Judgment 63/2005". As regards the Executive, reference is made to what STC 38/2012 states, directly referring to the principle of institutional loyalty: "The State Attorney, in turn, does not deny the fact that the challenged Resolution has overlooked the doctrine contained in SSTC 95/2002 and 190/2002 […]".

ii. Judgments settling positive competence conflicts, which are declaratory or constituent, as it is decided which body holds the disputed competence and, where appropriate, the provision, resolution or act is annulled, giving rise to the conflict, do not need any enforcement whatsoever, but rather require a mere processing to ensure that the resolution is effective, both within and outside a constitutional process. The Judgment may provide as it deems fit with respect to *de facto* or *de iure* situations created further to the annulled provision or resolution in conflict (Art. 66 LOTC). "What is necessary" is no other than what is foreseen in Art. 40 LOTC in the event of an annulment of a rule by a Judgment declaring unconstitutionality. As regards judgments delivered in negative conflicts of competence, the only activity expected from the Court is its notification to the opposing bodies; the one declared competent will be obliged to act [within a certain period of time, as applicable, further to Art. 72.3 a) LOTC]: its refusal or subsequent inactivity are unrelated to the judgment's enforcement.

iii. Judgments settling conflicts between constitutional bodies do not operate differently from positive competence conflicts, and declarations on the constitutionality of international treaties do not raise any issue as regards enforcement.

iv. Judgment delivered in appeals for constitutional protection ["*recursos de amparo*"] may significantly vary as a result of combining various components (the power/body responsible for the harm, petition made, etc.) and, consequently, may be enforced in various ways. This constitutional procedural device is similar to that of a contentious-administrative court: whenever a breach is caused by the Administration, the Constitutional Court is in the same position as a contentious-administrative court vis-à-vis the Administration. Judgments of conviction are enforceable: one of their characteristics is that conduct is imposed on the obliged party and the appellant is fully restored in terms of the right infringed. The Constitutional Court's possibilities of enforcement vary depending on the challenged act and its author: if the act is generated by the Administration, enforcement will be addressed against the Administration that produced the act; if it is a judicial resolution, it will be addressed to the jurisdictional body, although the judicial authority may not be replaced as regards the interpretation and determination of the scope of its own pronouncements (STC 1/2009, of 12 January; the situations not allowed include judicial pronouncements contrary to the Constitutional Court's decision and attempts to hinder the legal or material effectiveness of what the former has settled and ordered).

A constitutional judgment has "three angles": (i) it is a procedural act ending a suit; (ii) its activity pursues law-making interpretation and integration; and (iii) it is a political decision or act of power consistent with the other State powers. This is why the legal rules applicable to

constitutional judgments are specific and entail difficulties when extrapolating procedural categories applicable to court judgments, or when transferring, adapting or introducing instruments to enforce the same. Art. 164 CE is aware of these peculiarities and expressly highlights those issues that differ from those of a correlative ordinary process. Administrative doctrine makes a difference between performance of a judgment (the mere material execution of the steps ordered in the ruling), carried out by the parties bound by the same, and its procedural enforcement (to ensure such performance., where appropriate), which is exclusively entrusted to the delivering court. This distinction is applicable to the constitutional order. The new drafting of Art. 92.4 c) ["… collaboration with the National Government in order that it… adopt the necessary measures to ensure the performance of resolutions"] is relevant, in the sense that it somewhat reformulates the former administrative system for the enforcement of judgments foreseen in Art. 103 of the Contentious-Administrative Jurisdiction Act (LJCA); to "ensure the performance", in the terms of this new article, not only involves performance but also enforcement, through the "necessary measures", as a vague concept endowing the Court with a margin of discretion of a size that is incompatible with legal certainty and the foreseeability of a jurisdictional body's actions. Of relevance is the fact that said precept only requires the collaboration of the National Government, given that in many cases it may actually be the party obliged due to the failure to perform a Constitutional Court resolution. The general meaning of Art. 92 LOTC is to turn the Constitutional Court into the "enforcement master of its decisions", a general power to demand that all State bodies and citizens fulfil their obligations in a specific case, without this generic attribution of competence in any case entailing the availability of a mandatory enforcement procedure of it judgments which, equivalent to the one used in ordinary proceedings, may be directly brought against the senior bodies of the State or Autonomous Communities: this would exceed the essence of the Constitution, as an enforcement device is conceivable with respect to citizens, but not with respect to senior constitutional powers.

Naturally assuming that the Constitutional Court's decisions are somewhat political, without prejudice to their jurisdictional nature, we should conclude that the measures introduced by the reform in Arts. 92.4 b) and c) and 92.5 LOTC, which are seemingly legal in formal terms, attempting to render them equivalent to ordinary judicial measures, are in fact political measures, unrelated to any interpretation and application of the Constitution and used to enforce political decisions, clearly exceeding the possibilities offered to the Constitutional Court by Title IX, due to disrupting the balance of powers established in the Constitution itself, eventually placing the Court at a level and in a position it is not entitled to, transforming it from an arbitral body into an enforcement body not bound by the law and wielding strictly political power, i.e. from a "neutral power" to a power that prevails over the rest, dooming it to conflict. All of this exceeds the functions entrusted to the Constitutional Court by Art. 161.1 CE.

In any case, the case-law is practically unanimous and the enforcement of constitutional judgments has not encountered any major obstacles, which is why voluntary compliance is the general rule and the *auctoritas* of the Court and principle of constitutional loyalty are what encourage the other State bodies to accept its decisions unconditionally. Certainly, difficulties have arisen in comparative law (Germany, France and Italy) when enforcing the judgments of constitutional courts, but the issue is not related to procedural enforcement but to institutional conflict, as a more intricate, non-regulated and political issue, which needs to be resolved.

Furthermore, the measure foreseen in Art. 92.4 b) LOTC foresees addressees in the abstract, including both executive and legislative authorities. However, the principle of separation of powers referred to means that, excluding the device foreseen in in Art. 155 CE, a constitutional body is unable to remove a politician from office in an Autonomous Community or the State. Consequently, the measure foreseen in Art. 92.4 b) LOTC is contrary to the principle of division of powers, as it is trying to replace certain constitutional

(and even legislative) bodies in its decisions, and this is impossible in a democratic constitutional system. Likewise, the vague wording of Art. 92.5 LOTC may include measures affecting parliamentary activity. In short, the measures contemplated in the reform affect a truly legislative function.

The democratic principle is a higher value in Spanish law, referred to in Art. 1.1 CE (STC 204/2011, of 25 December, FJ 8); and parliamentary activity is inviolable (Art. 63.3 CE in relation to the National Parliament and Art. 25.4 EAPV as regards the Basque Parliament). The enforcement of judgments declaring the unconstitutionality of a law involves initiatives that may only be adopted by members of parliament, as well as steps that involve various legislative acts and are finally voted upon. A Judgment may not oblige a member of parliament to propose a legislative reform or to vote in its favour. This is a political issue, to be resolved as indicated in STC 42/2014, of 25 March.

c) Principle of criminal legality: breach of Art. 161 CE in relation to Art. 25 CE.

The reform makes it possible for the Court, in certain cases, to adopt "the necessary enforcement measures", including "an order to suspend the functions of authorities or public officials of the Administration responsible for the breach, during the time necessary to ensure that the Court's pronouncements are fulfilled" [Art. 92.4 b)] and "the necessary measures to ensure their due compliance without hearing the parties" as regards "the enforcement of resolutions ordering a suspension of challenged provisions, acts or measures, in situations of particular relevance" (Art. 92.5 LOTC). These measures are not merely coercive, or simple interim measures: they are clearly punitive and are also applied to State powers, altering the balance and fundamental rules of the system's operation. And they do not fulfil the principles governing coercive measures: legality, proportionality, reasoning, instrumentality, need, jurisdictionality, provisionality, petition.

A suspension measure is not a direct consequence of the resolution constituting executory title: if it is brought against authorities and public officials of the Administration responsible for the breach, this will be because these are the ones in charge of enforcing it. But if they are suspended from office, they will no longer be able to carry out any activity towards enforcement of the resolution. Consequently, a suspension from office, departing from the resolution's continuity, is not a measure used to ensure the enforcement of a judicial resolution but, simply, sanctions the conduct of such authority or employee. Consequently, constitutional case-law requirements are not met with respect to the material guarantee of the principle of sanctioning legality, i.e. the need to predetermine by law those conducts that will be punishable and what sanctions will apply (SSTC 38/2003, of 27 February, FJ 8, 104/2009, of 4 May, FJ 2, and 196/2013, of 2 December, FJ 3).

As a result of applying this constitutional doctrine, we may conclude that the illegal conducts foreseen in some of the provisions introduced by the Public General Act ("to notify that it remains unfulfilled", "to order the suspension from office of the authorities or public officials responsible for the breach", "the necessary measures to ensure that resolutions are performed", "circumstances of particular constitutional relevance", "the necessary measures to ensure their due fulfilment") are totally insufficient in terms of the material guarantee resulting from Art. 25.1 CE. The legal provision "has no material boundaries and does not refer to any legal assets justifying the sanction" (STC 13/2013, of 28 January, FJ 4). The Act does not contain a basic definition of the conducts forbidden, nor does it materially define the scope of its punitive rules, nor does it specify its specific aim or identify the parties responsible, or sufficiently describe the objective components of the illegal conducts. The Act includes a broad series of vague legal concepts that do not enable an accurate definition of what is being forbidden and, consequently, of the consequences of their actions. This is why Art. 25.1 CE is breached.

d) Granting of privileges: breach of Arts. 71 and 102 CE and 26.6 and 32 EAPV in relation to Art. 24 CE.

Certain authorities and public officials enjoy a “prerogative”, consisting of a constitutional guarantee to predetermine a legal judge to examine the causes brought against them and further to their office; this guarantee is incorporated into the fundamental right acknowledged in Arts. 23.2 and 24 CE.

The granting of privileges is foreseen for members of the Royal Family, Deputies and Senators, members of the Government, Judges and members of the State Prosecution Service, Judges of the Constitutional Court, members of autonomous parliaments and members of Governing Councils in each Autonomous Community. As the enforcement of Constitutional Court resolutions may be entrusted to any of these authorities (except for the Royal Family), the enforcement measures foreseen, including a suspension from office, due to a total or partial breach, may affect any of the foregoing, expressly including the rights inherent to their office.

Art. 26.6 EAPV provides that, during their term of office, members of the Basque Parliament may not be arrested or detained for criminal acts committed within the territorial scope of the Autonomous Community of the Basque Country, unless they are caught in the act. In any case, the High Court of Justice of the Basque Country will decide on their charges, imprisonment, prosecution and judgment. Outside the territorial scope of the Basque Country, criminal liability will be enforceable in the same terms before the Criminal Chamber of the Supreme Court. These prerogatives, similar to the ones foreseen in Arts. 71 and 102 CE for Deputies, Senators, the President and other members of the State Government, intend to provide extra protection to the freedom, autonomy and independence of autonomous bodies (STC 22/1997, of 11 February, FJ 5). The granting of privileges is an instrument to safeguard the institutional independence of the Government and members of parliament, avoiding the pressure that would otherwise be suffered. Consequently, such parliamentary prerogative is indispensable and inalienable (STC 92/1985), it acts as *ius cogens* and may not be disposed of by its holders; it may only be strictly interpreted in connection to situations expressly foreseen in the Constitution (STC 22/1997). The idea is to protect the body’s independence and exercise of any constitutionally relevant functions inherent to such office: this independence is totally annulled with the measure to suspend functions now foreseen in new Art. 92.4 b) LOTC.

Art. 24.2 CE recognises a right to an ordinary judge predetermined by law: what Art. 102.1 CE precisely does is to predetermine which judge is competent to prosecute criminal causes brought against members of the Government. This would allow, in a similar way as the case of Deputies and Senators by virtue of Art. 71.3 CE, to claim the breach of a fundamental right to this intended criminal examination and prosecution of Government members to be carried out by a jurisdictional body other than the Criminal Chamber of the Supreme Court.

With respect to the subjective scope of this granting of privileges, Art. 102.1 CE does not prevent a rule of non-constitutional rank to establish special privileges- as is the case in practice- when examining the criminal liability of other authorities. Thus, practically all Statutes of Autonomy foresee that the regional High Court of Justice will examine any criminal acts committed by members of the Governing Council in each Autonomous Community, whilst the Criminal Chamber of the Supreme Court will examine those committed outside this territory (Art. 32 EAPV). Furthermore, Art. 102.2 CE provides specific rules if the President or other members of the Government are claimed to be liable by virtue of a charge of treason or other crime against State security in the holding of office: it may only be claimed by a fourth of all Congress members, and endorsed by their absolute majority. Art. 169 RCD implements the provisions of Art. 102.2 CE.

The reform infringes said constitutional and statutory provisions to the extent that, as a measure to ensure the effectiveness of Constitutional Court Judgments and resolutions, it allows the Court to order a suspension from office of authorities or public officials. This measure actually and materially constitutes a punishment detrimental to rights, foreseen in Art. 39 c) of the Criminal Code (CP); suspension from public employment or office is a punishment that prevents or prohibits the holding of such employment or office during the term of the conviction (Art. 43 CP), after which the convicted person may be fully reinstated in his office or employment. Consequently, it is not an administrative sanction but an authentic punishment. And as a result, it is a form of punishment directly imposed by the Constitutional Court in response to a breach of its resolutions, with total oversight of the forum to which said authorities or public official are constitutionally entitled. Ultimately, the measures foreseen in Arts. 92.4 b) and 92.5 LOTC breach Arts. 71 and 102 CE and 26.6 and 32 EAPV.

e) Infringement of Arts. 155 and 2 and 143 CE.

Art. 155 CE does not specify the scope of any constitutional or legal infringements, or a serious attack against Spain's general interest by an Autonomous Community, as foreseen, or what are these coercive measures ("to require … mandatory fulfilment") or protection implemented by the Spanish Government. The reform presented by the Public General Act challenged alters the "checks and balances" system conducted on Autonomous Communities by the State, which the Constitutional Court has forbidden from the very start (STC 4/1981, of 2 February), insofar as generic and undetermined control measures do not conform to the principle of autonomy, placing the Autonomous Communities in a hierarchically subordinated position with respect to the State Administration. STC 76/1983, of 5 August, FJ 12, analysed a legal provision attributing surveillance powers to the Government and the right to issue formal requests, as well as power of control through the device foreseen in Art. 155 CE. The Constitutional Court declared as follows: "… in principle, autonomy demands, in turn, that any steps taken by the autonomous Administration be beyond the State Administration's control; the validity or effectiveness of these measures may only be challenged through constitutionally foreseen devices. This is why surveillance powers may not place Autonomous Communities in a hierarchically dependent position with respect to the State Administration give that, as the Court has pointed out, this situation would be incompatible with the principle of autonomy and with the competences derived therefrom (Judgments 4/1981, of 2 February, and 6/1982, of 22 February").

As a result, the Judgment recognised the possibility of making the necessary official (non-binding) requests in order to remedy any defects disclosed when implementing State legislation through Autonomous Communities. However, this power of control was unconstitutional given that "… if the terms "where appropriate" are not interpreted in such a way as to render the provision superfluous and repetitive of the Constitution, said paragraph would ultimately redefine the cases when Art. 155 of the Constitution is applicable. As indicated in Legal Grounds Four herein, the state legislator is not competent to establish the scope of these situations in the abstract, as is the case here when it generally includes those situations when official requests are unheeded or information repeatedly withheld".

The measures foreseen in Arts. 92.4 b) and c) and 92.5 are, in fact, different forms of control to those constitutionally foreseen or allowed, and are consequently unconstitutional as they cross the dividing line between a constituent power and a constituted power. Specifically, the suspension from office of authorities or public officials of the Administration in breach and adoption of the necessary measures to ensure due compliance at the Government's request are configured as devices equivalent to the one foreseen in Art. 155.2 CE, whereby "the Government may issue instructions to all Autonomous Community authorities", basically constituting direct intervention on their autonomy without being subject to the procedural guarantees foreseen in Art. 155 CE. The factual presumptions foreseen in the Act (basically

"should it be disclosed" that a resolution may not be fulfilled, including those ordering the suspension of challenged provisions, acts or "measures", in cases of particular constitutional relevance) actually become presumptions for the applicability of Art. 155 CE; as a result, the legislator adopts a constituent position, as these situations are not foreseen in Art. 155 CE.

In turn, the measures foreseen (suspension from office, adoption of the necessary measures by the National Government or by the Constitutional Court itself) constitute a subsidiary activity entailing a form of control over the actions of the autonomous Administration; apart from this not being constitutionally foreseen, it is also incompatible with the principle of autonomy (Arts. 2 and 143 CE) and its related competences (STC 118/1998, of 4 June, FJ 26). In other words, if in the event of breach by an Autonomous Community "the competence of the Autonomous Community is replaced", this "replacement would be unconstitutional" (STC 134/2011, of 20 July, FJ 11).

It is not a question of the Act foreseeing the adoption of "mandatory" measures if an Autonomous Community fails to adopt a decision related to a Constitutional Court resolution, or coercive measures intending to "force the wish or conduct" (Diccionario de la Real Academia Española [Official Dictionary of the Spanish Language]) of the Autonomous Community in breach, but, rather, the Court or Spanish Government would directly enforce such resolutions, replacing the Autonomous Community. Consequently, this illegitimate interference is illegal, unnecessary and disproportionate. The measures foreseen by the Act are a result of the provisions established by the Act itself on how the Court will ascertain a failure to follow its resolutions, including an examination of any "circumstances of particular relevance", rather than the breach of any constitutional provision. Art. 164 CE does not refer to the means in which Constitutional Court judgments may be enforced. What triggers the application of measures equivalent to those contained in Art. 155 CE is not a breach of the constitutional obligations foreseen in Art. 164 or what is foreseen in Art. 117.3, but a future unawareness of the effectiveness (not the effects) of such resolutions. The measures foreseen in Art. 92 LOTC have no constitutional grounds in Art. 164 CE or may be justified with Arts. 117.3 or 118 CE, but are based on Art. 155.1 CE. They do not operate as measures aimed at ensuring the effectiveness of Constitutional Court resolutions- for which devices already exist- but as punitive remedies to respond to the failure to follow said resolutions. The foregoing is stated in the Preamble, when it recognises that the reform pursues "the need to adjust to new situations intending to avoid or overlook effectiveness".

This concealed remedy, further to the channels foreseen in Art. 155 CE, entailing a substitute action on behalf of the State, clearly interferes with the political autonomy of Autonomous Communities; this interference is not allowed by the Constitution unless it follows the procedure foreseen in Art. 155 CE. The reform does not meet any of the requirements established by Art. 155 in order for the measures foreseen therein to be adopted.

3. In an order delivered on 2 February 2016, the Plenary Meeting of this Court, further to a proposal from Section Three, agreed to grant leave to proceed to the appeal and to forward the claim and its attached documents- as foreseen in Art. 34 LOTC- to the Congress of Deputies and to the Senate, through its Presidents, and to the Government, through the Ministry of Justice, in order to enable them, within a term of fifteen days, to appear as party to the suit and submit any pleadings deemed appropriate. Likewise, it was agreed to publish commencement of these proceedings in the "Official State Gazette", on 9 February 2016.

4. In a writ registered on 10 February 2016, the President of the Congress of Deputies notified the Resolution adopted by the Chamber Panel to appear as party to the proceedings, exclusively to submit pleadings in relation to the legislative procedure vices reported in the claim, as regards the Congress of Deputies; to entrust the Chamber's representation and defence to the Chief Attorney of the Legal Department, General

Secretariat of the Chamber; to communicate the resolution to the Constitutional Court and to the Senate; and to forward the documentation to the Management of Studies, Analyses and Publications and to the Legal Department of the General Secretariat.

5. The State Attorney, in a document registered on 12 February 2016, appeared as party to the appeal proceedings on behalf of the Government, and requested an extension of the term granted in which to formalise a writ of pleadings, given the number of outstanding cases to be examined by the State Attorney's Office.

In a decision dated 15 February 2016, the Plenary Meeting agreed to attach the writ of the State Attorney to the records, to deem him as party to the suit in the representation held and to grant him an eight-day extension over the term granted in the decision of 2 February 2016, following expiry of the ordinary term.

6. In a document registered on 17 February 2016, the President of the Senate notified the Resolution of the Chamber Panel to appear as party to the proceedings and to collaborate for the purposes of Art. 88.1 LOTC.

7. The Attorney of Parliament, acting for and on behalf of the Congress of Deputies, submitted the following pleadings in a document dated 26 February, after summarising the legislative *iter* completed until then.

a) Constitutional case-law has recognised a "principle of disposal" on behalf of the Chamber, regarding procedural steps and their sequence in time, and a freedom of arrangement, including a competence to not only decide which procedure is applicable but to also settle any incidental issues that may arise (STC 136/2011, FJ 6). Art. 150 RCD establishes two alternative situations where summary legislative proceedings may be used: that the nature of the legislative project make this advisable or if this is possible due to its simplicity.

b) The first situation is not exclusively linked to the second. Irrespective of the simplicity of the project, other various factors may come into play advising the application of said procedure. This type of faster and abbreviated procedure constitutes a legitimate instrument available to the legislator, which it may use according to its legislative priorities, which became particularly important when the end of the legislature was approaching and there was less time available to legislate. Ascertaining an immediate legislative need justifying the application of summary legislative proceedings, which depends on a wide interpretation of a clause, means that it is dominated by a political decision: this political decision, following the rules of the democratic game, will coincide with the opinion of the majority of the Chamber, first on the Panel proposing the application of this procedure, and then by the Plenary Meeting, endorsing it (STC 238/2012, FJ 4). The nature of the project is a broad concept, allowing a much wider margin of interpretation than other legal concepts. As the nature of a draft bill cannot be clarified with sufficient accuracy- given that draft bills are classified further to other criteria- the term will be discretionally applied and, consequently, will only depend on a political opinion.

The Attorney of Parliament dismisses the interpretation made by the appellant, in the sense that the special relevance of this reform prevented its processing through an abridged legislative procedure, as this criterion is not foreseen in Art. 150 RCD. In practice, an abridged legislative procedure has been unrelated to its relevance and this procedure has not been considered to lower the value or importance of a rule in the legal system as a whole: such is the case of a reform of the Constitution or the draft Public General Act, which rendered effective the abdication of His Majesty the King Juan Carlos I de Borbón. The only requirement is for the processing of the matter to be regulated not to be reserved to a specific procedure, in which case an abridged legislative procedure will not be possible (ATC 9/2012): but neither the Constitution nor the Regulations (Arts. 150 and 130 to 132) prevent

public general acts, specifically including the LOTC, from being processed in summary legislative proceedings.

c) As regards the second situation, the interpretation made by the appellant of the term "simplicity" is dismissed. Simplicity should refer to an analysis of the internal structure of the text, if it is comprehensible and intelligible, and structurally simple in terms of drafting. A text will only be complex if, in order to be understood, an intellectual upper-level process is required demanding above-average effort. The plaintiff's references to the vagueness, lack of definition or ambiguity of the new rules would in any case indicate a lack of legal certainty, but does not mean that the challenged sections are complex.

d) The Attorney of Parliament also dismisses the appellant's link between the lack of consensus manifested during the processing of the rule and the Constitutional Court's possible intervention to examine the unconstitutionality of the procedure, upholding STC 129/2013, FJ 10. This consensus has nothing to do with the constitutionality of the procedure followed to process a rule, nor is it a requirement for its application. Nor is there any need for a special majority in order to process a bill through abridged legislative proceedings (STC 238/2012). Furthermore, the control exerted by the Constitutional Court is strictly legal, not political, and it cannot ascertain whether or not consensus was obtained in the processing and endorsement of an Act.

e) Neither the abridged legislative procedure nor an emergency situation has prevented the possibility of deputies discussing and participating in a due process. Each procedure is unique, as otherwise there would be no sense in having separate- ordinary and special- procedures: the *ius in officium* need not have the same content in each procedure, but is shaped differently depending on each procedure's characteristics. This does not mean that the Chamber will have prevented or hindered performance of the rights and powers inherent to office as a parliamentary representative (ATC 118/1999). The opposite is inferred from the processing of this draft Public General Act, confirming that the deputies in question were able to adequately uphold their *ius in officium*: during the procedure, two plenary discussions were held, the first when the bill was taken into consideration and then when it was endorsed; and all deputies were able to submit the amendments deemed appropriate, a total of three amendments to the entire alternative text and thirty-four amendments to its articles, which were upheld and voted upon in the plenary session held on 1 October 2015. The Chamber's decision was adequately made and at no time is it ascertained that its outcome was materially altered; this is the key issue which, according to the Constitutional Court, should be ascertained in order to declare an unconstitutionality vice (STC 136/2011, FJ 10); nor has it affected the principle of democracy (Art. 1 CE).

8. In a document registered on 9 March 2016, the State Attorney, in the legal representation held, submitted the following pleadings:

a) The writ of pleadings begins with a general approach to the nature of the Constitutional Court, a need to guarantee the performance of its resolutions to ensure the effectiveness of its task as guarantor and of Art. 24 CE, and the devices foreseen to that end by the Constitution and LOTC.

The Constitutional Court is a jurisdictional body, not a political body. Its decisions may have political consequences, but this is also inherent to decisions adopted by the Judiciary. The appellant is mixing up the political consequences of judicial resolutions with purely political conflicts not subject to control based on constitutional parameters. If a political conflict exceeds the procedural channels foreseen in the Constitution and affects constitutional rules, it is then when it becomes a legal conflict: this is the scope of jurisdictional bodies, specifically including the Constitutional Court as the supreme interpreter of the Constitution and a guarantor of its effectiveness.

At no time does the Constitution prevent the power to enforce Constitutional Court resolutions to be carried out by the Constitutional Court itself. Unlike the Austrian Constitution, which expressly and exclusively attributes this power- depending on the type of resolution- to the ordinary courts or to the Federal President, the Spanish Constitution leaves the issue open, without excluding it from what may be established in the Constitutional Court Act (Art. 165 CE). Our system is similar to the one foreseen in Germany. The German Constitution, under the section dedicated to jurisdictional bodies, foresees a body like the Constitutional Court (Art. 93) and relegates its composition and operation to a subsequent law (Art. 94), as is the case of Art. 165 CE. The law governing the German Federal Constitutional Court, as in Spain, contains a general enforcement clause: "The Federal Constitutional Court may determine in its decision who will enforce it; in some specific cases, it may establish the manner and form of this enforcement" (Art. 35).

As is the case in Germany, Spain has also gathered specific enforcement situations, along with the general principle laid down in Art. 92.1 LOTC. The original wording of the LOTC already foresaw the possibility of imposing coercive fines (Art. 95.4 LOTC), as is the case of other jurisdictional orders (Arts. 112 LJCA and 591, 701 ff. of the Civil Procedure Act (LEC)). It was then, and it is still, foreseen that deadlines may be ordered for the enforcement of its resolutions, e.g. in negative competence conflicts (Art. 72.3 LOTC).

In short, the Constitution does not exclude the possibility of empowering the Constitutional Court to enforce its own resolutions, as it refers to its regulating law. The Act, since it was enacted, contains as a general principle that the Constitutional Court will determine how its provisions will be enforced and how to settle any enforcement incidents, as well as specific mandatory enforcement situations entrusted to the Court, without prejudice to the possibility of receiving assistance from other powers to render its resolutions effective. However, more complex legislation and the need to adjust to new situations and challenges led to a change in the enforcement functions of the Constitutional Court, ultimately to ensure the effectiveness of the Constitution itself, by guaranteeing the effectiveness of its guarantor's resolutions. The first amendment of the enforcement system foreseen in the LOTC took place in Public General Act 6/2007, which added a specification to Art. 92.1 LOTC and a specific enforcement situation enabling the adoption of specific measures to protect Art. 18.4 CE (Art. 86.3 LOTC). The current reform is following this same path, in order to prevent the Constitution (STC 198/2012, FJ 8) becoming dead letter.

As regards the appellant's argument as to the absence of a need for reform, given that the constitutional system has other reaction devices (criminal channels and Art. 155 CE), it is claimed on the one hand that judicial resolutions should be rendered effective, guaranteeing Art. 24 CE, also covering Constitutional Court resolutions (for all, ATC 1/2009, FJ 2). The right of performance and effectiveness of Constitutional Court resolutions cannot be solely doomed to a criminal sanction. On the other hand, there is disagreement on the fact that suspension measures or the replacement of autonomous bodies may only be articulated further to Art. 155 CE. Public General Act 4/1981, regulating irregular constitutional states pursuant to Art. 116 CE, as it foresees in the least serious situation- a state of alarm- that the National Government suspend and replace autonomous authorities and employees (Art. 10). A state of alarm may only be declared by the Government, without prejudice to informing Congress. This same step may be taken if Art. 155 CE is triggered, also depending on the Government's appreciation. Following the appellant's arguments, it would be necessary to accept that the effectiveness of Constitutional Court resolutions involving measures to replace or suspend authorities and public officials is a matter left to the exclusive opinion of the Government, as the only body entitled to put the relevant constitutional devices into practice. This would mean recognising that Spanish constitutional law implicitly includes a clause similar to the Austrian version, whereby the effectiveness of Constitutional Court judgments would be left in the hands of the Federal President. This conclusion would also

collide headlong with the principles of autonomy and independence of the Constitutional Court over other constitutional bodies, including the Government (Arts. 1.1 and 73 LOTC). What is relevant is the entitlement allowing the adoption of these measures: in the case of constitutional jurisdiction, suspension and replacement measures are articulated as enforcement devices, and the entitlement is the need to guarantee the effectiveness of Constitutional Court resolution, i.e. Arts. 161 and 165 CE and 1.1 LOTC.

Finally, as regards the constitutionality check of Constitutional Court rules, the State Attorney has pointed out that the case-law is basically taken from SSTC 66/1985 and 49/2008: this control should be of an abstract nature, consequently independent of its potential practical application, the specific precepts challenged and the constitutional rules and principles included in each case in the control parameter; this control is limited to evident and irremediable conflicts with the Constitution; such control cannot take the legislator's intentions into account, its political strategy or ultimate purpose. On the other hand, in the opinion of the State Attorney, the appellant does not provide an abstract criticism of the reform, but of the situations where it considers that suspension and replacement measures would not apply: with respect to the settlement of certain constitutional processes and a specific subject that is obliged to comply. This is not the scope covered by an abstract constitutionality check on a reform of the LOTC. What needs to be examined is whether, in the abstract, irrespective of any possible practical application, the enforcement measures made available to the Constitutional Court by the legislator of public general acts are a valid constitutional option, irrespective of whether other constitutional and valid options exist and of whether its application is possible to all or part of these constitutional processes. When appraising its specific application, the Constitutional Court must decide whether or not it is possible to adopt an enforcement measured, based on the nature of the constitutional process and the obliged party. But this unique appraisal does not fall within the scope of this unconstitutionality appeal.

b) The second set of pleadings dismisses a breach of Arts. 23.1 CE, 150.1 RCD and 129.1 RS, on the grounds of the legislative processing adopted.

On the one hand, it is pointed out that Congress Regulations in no case forbid or prevent the use of summary or emergency legislative proceedings to process a specific type of project or draft bill, or establish provisions in relation to specific or certain material scopes of regulations. Not even is a constitutional reform excluded from summary legislative proceedings (STC 238/2012, of 13 December, FJ 4). Furthermore, the idea of "simplicity" in the text to be summarily processed is a vague legal concept unrelated to any political consensus arising from the bill, its public impact or any intrinsic material complexity involved in its administrative function (STC 129/2013, of 4 June, FJ 10). In any case, the text for reform, approved by Public General Act 15/2015, is brief, clear and concise.

In turn, a detailed description is provided of the processing followed, reaching the conclusion that, insofar as the procedure legally foreseen was observed, all political groups in Congress and the Senate have had the chance to participate in the plenary stage during the taking of consideration and to bring a challenge through their vote, and later when processing the draft and, subsequently, when the legislative proposal was endorsed to reform the Public General Act. Consequently, if the procedure has been followed, it cannot be claimed that "a parliamentary majority was unfairly used", as parliamentary democracy has applied. And if there is no breach of the legality of the procedure, there is no infringement of the *ius in officium* held by members of parliament merely because of a majority decision.

c) A third set of pleadings are aimed at overruling any unconstitutionality whatsoever in Arts. 92.4, b) and c), and 92.5 LOTC.

In relation to Art. 92.4 b) LOTC, two alleged grounds of unconstitutionality are examined. The first is an alleged infringement of the principle of sanctioning legality (Art. 25 CE). The foregoing is dismissed insofar as a suspension from office, foreseen in Art. 92.4 b) LOTC, has sanctioning effects; the case-law is referred to, laid down, amongst others, in STC 48/2003, of 12 March, in relation to a measure to dissolve illegal political parties. A suspension measure is not conceived to sanction a conduct, in a repressive manner, but to avoid the continued non-performance of a resolution. Proof of this is the fact that the measure applies "for the time necessary to ensure the observance of the Court's pronouncements" and is conditional thereon, depending on the intent of the liable party. It is an avoidable suspension, as the Court may only order it after it is ascertained that the addressee's non-fulfilment was intentional, processing an incident and hearing the parties affected. It may only be ordered against the authority or public official responsible for the breach. The purpose of this measure is very specific, and is lifted as soon as the intended non-fulfilment of the responsible party ceases. Consequently, this absence of a sanctioning purpose means that the principle of legality foreseen in Art. 25 CE is not applicable. This notwithstanding, any such suspension still needs to offer guarantees. The writ, in this regard, explains how the principles of proportionality and non-arbitrariness are being upheld, although this argument is not expanded upon in the claim.

Furthermore, there is disagreement with the argument that a suspension from office exceeds the scope of functions attributed to the Constitutional Court. It is not unreasonable to consider a scenario where the Constitutional Court's annulment of a resolution that is contrary to the Court's orders is insufficient for its effectiveness, if the authority or public official in charge of depriving the annulled resolution of any effect does not do so and keeps it in force, ignoring the nullity declaration; or if an authority or public official is ordered to take positive action to remedy the legal irregularity and fails to do so.

The second unconstitutionality examined in relation to Art. 92.4 b) LOTC is the alleged infringement of regulations on the granting of privileges. The State Attorney does not see any connection between the granting of privileges and the measures foreseen in Art. 92.4 b). A suspension measure is not of a criminal nature, which is why it does not involve a criminal (or other) prosecution of the addressees of the measures, who may only be suspended from office and employment until they decide to fulfil the Court's resolution. Consequently, the factual presumption to apply the rules on the granting of privileges is absent.

As regards Art. 92.4 c) LOTC, reference is made to the foregoing general arguments and to other subsequent ones, from the point of view of Art. 155 CE. In any case, it is highlighted that enforcement rules are contained in the Title of the LOTC dedicated to common procedural rules, which is why their application to each constitutional process will depend on the nature and effects of each process, and well as on the party obliged to comply (STC 309/1987). Secondly, it is affirmed that in all processes brought before the Constitutional Court the Government holds a different position, with greater attributions given its status as a constitutional body; this does not mean, given the nature of the processes and the ultimate aim of constitutional guarantees, that the differentiation enshrined both in the Constitution (Arts. 161 and 162) and in the LOTC, implementing the powers granted by Art. 164 CE, or the principle of equality is breached, as the constitutional position of the Government when safeguarding the constitutional system will prevail (Arts. 116, 155, 153 CE, etc.). Thus, given the nature of substitute enforcement, the legislator of public general acts has wished to limit its application to the Spanish Government. Third, with respect to the absence of competence to exercise substitute autonomous powers, it is indicated that the entitlement is not competence-based but consists of the guarantee underlying the Constitutional Court; it is not the Government which discretionally decides to substitute the obliged party, but the

Constitutional Court is the one requesting collaboration from the former (Art. 87.1 LOTC) in order to render its resolutions effective [Art. 92.4 c) LOTC].

As regards Art. 92.5 LOTC, in addition to repeating the allegations on an infringement of the principle of legality and the rules on the granting of privileges, in relation to Art. 92.4 b) LOTC, it is emphasized that the reform introduced by Public General Act 15/2015 is procedural. It involves a type of interim decision ("highly interim" ["*cautelarísimas*"]), adapted by the legislator to the constitutional process, which in no way contradicts the essence of procedural law in line with constitutional principles. This type or equivalent measures are acknowledged in rules governing contentious-administrative proceedings, in charge of examining the steps taken by public powers (Art. 135 LJCA).

The existence of "circumstances of particular constitutional relevance" is something to take into account by the Court in each case, as well as any specific measures to be ordered "*ex officio* or at the Government's request". The Government will only act in the incident as a procedural party.

These "circumstances of particular constitutional relevance" also implicitly refer to the scope or breadth, in terms of constitutional integrity and for application of the Constitution, derived from the fact that an Autonomous Community, whose rules or provisions are subject to interim suspension, continues to act in contempt or fails to observe this need to uphold the suspension of the judicial order or decision decreeing these effects. The purpose behind Art. 92.5 CE is simply that the Constitution be upheld. Its procedural nature is evidenced in the mandatory step following the adoption of interim measures *inaudita parte*, when a hearing is granted to the parties and to the State Prosecution Service in order to endorse, revoke or amend the measures adopted. Consequently, this involves a judicial step taken at an enforcement stage, not an extraordinary or exceptional prerogative granted to the Government.

The Constitutional Court itself has drawn up case-law on these circumstances of particular constitutional relevance (ATC 156/2013, of 11 July, which continued with an initial suspension of Resolution 5/X, of 23 January 2013, of the Catalonian Parliament). This expeditious doctrine, in favour of classifying situations affecting the unity of Spain as circumstances of great constitutional relevance, prevailed in Constitutional Court Decisions (AATC) 182/2015 and 186/2015, both of 3 November. Consequently, new Art. 92.5 LOTC does not infringe the Constitution by creating a prerogative in favour of the Government; nor is Art. 161.2 CE extended by increasing the prerogative to apply for an interim suspension of the autonomous rule challenged, nor is the separation of powers altered. In short, the principle of the need to fulfil judicial judgments and resolutions in general, guaranteed by Art. 118 CE, is the only aspiration behind the legislative reform introduced by Public General Act 15/2015, of 16 October, also as regards Art. 92.5.

d) The last set of pleadings disagrees with the breach claimed of Arts. 155 and 143 CE. The State Attorney indicates that the appellant is misled as to entitlement to measures to enforce judgments, introduced by Public General Act 15/2015, and the measures foreseen in Art. 155 CE: although these measures may coincide, their entitlement is totally different. Measures to ensure the enforcement of Constitutional Court judgments, foreseen in Arts. 92.4 b) and c) and 92.5 LOTC -the only ones challenged- are measures whose entitlement is the fulfilment of judgments delivered by the Constitutional Court to guarantee that the Constitution is upheld and the rule of law. In order for these measures to apply a prior requirement must be met: the non-fulfilment of a resolution delivered by the Constitutional Court; this jurisdictional body will be entitled to act as this is foreseen by the Constitution itself and its regulating Public General Act. On the other hand, the measures foreseen in Art. 155 CE do not necessarily entail the non-fulfilment of a Constitutional Court judgment, but the failure by an Autonomous Community to fulfil mandatory obligations under the

Constitution or other laws, or if it takes action that seriously endangers Spain's general interest. In these infringements, the Spanish Government will be entitled to adopt the necessary measures to oblige the Autonomous Community to fulfil said obligations or to protect the general interest.

In short, the measures introduced by Public General Act 15/2015 are not checks that the State conducts over Autonomous Communities in breach of the principle of autonomy (Art. 143 CE), but are measures that the Constitutional Court adopts when the judgments it delivers are not fulfilled, in order to enforce the constitutional mandate whereby all public powers are bound by the Constitution and the Law (Art. 9.1 CE). There is no hierarchical subordination between the State and Autonomous Community when adopting these measures, as the Constitutional Court may also adopt them in relation to the State.

Certainly, in the case of substitute enforcement of resolutions delivered in constitutional processes, the Court may only request the Spanish Government's cooperation [Art. 92.4 c) LOTC], and, as regards the measures foreseen in Art. 92.5, these may only be adopted *ex officio* or at the request of the Spanish Government. In these cases, the Government holds a different procedural position from that of Autonomous Communities, but this does not entail any control by the Spanish Government over Autonomous Communities, or any hierarchical subordination, as their collaboration in substitute enforcement proceedings will be "in the terms established by the Court" and the situation prior to the measures foreseen in Art. 92.5 should be appraised by the Court, not by the Government, which merely files the incident, as a procedural party only. In any case, the Government's procedural position is different from that of Autonomous Communities, as it enjoys more attributions as a constitutional body: the State's position prevails over that of Autonomous Communities when safeguarding the constitutional system, as inferred from Arts. 116, 155, 153, etc.

Next, the State Attorney examines the judgments referred to by the Basque Government (SSTC 4/1981, 6/1982 and 76/1983) to claim that the enforcement measures introduced by Public General Act 15/2015 interfere with the political independence of Autonomous Communities, and reaches the opposite conclusion based on the entitlement to such measures. Unlike the precept examined in STC 76/1983 (Art. 7.2 of the Public General Act for Harmonization of the Autonomous Process (LOAPA)), none of the precepts challenged here refers to Art. 155 CE. In turn, STC 215/2014, of 18 December, where the Constitutional Court, when questioned whether it was constitutionally legitimate for the Government to propose that the Administration in breach adopt a series of measures, reached the conclusion that a "necessarily positive" reply was appropriate, given that achievement of deficit and indebtedness targets "is of general interest and a matter of extraordinary importance, of which the State is the ultimate guarantor". As regards use of the remedy foreseen in Art. 155 CE, in the rule being examined at the time, the Court stated that "it clearly interfered" with the financial independence of Autonomous Communities, but that this interference was "allowed by the Constitution itself, as the ultimate reaction to a blatant breach of constitutional obligations". Thus, the Constitutional Court has already backed up the use of coercive measures adopted by the Government to achieve compliance by Autonomous Communities in terms of budgetary stability (Art. 135 CE) and use of the devices foreseen in Art. 155 CE with this aim.

9. On 27 October 2016, the President of the Constitutional Court, further to the competences foreseen in Art. 15 of Public General Act 6/2007, of 24 May, of the Constitutional Court, agreed to designate Mr. González-Trevijano Sánchez, as the Reporting Judge of Unconstitutionality Appeal 229-2016, replacing Ms. Asua Batarrita, who declined on that date.

10. By means of an order dated 2 November 2016, it was agreed to schedule 3 November 2016 as the date to discuss and vote upon this Judgment.

II. Legal Grounds

1. Through this appeal, the Basque Government is challenging Public General Act 15/2015, of 16 October, reforming Public General Act 2/1979, of 3 October, of the Constitutional Court, for the enforcement of Constitutional Court resolutions to guarantee the rule of law, on the grounds that it is unconstitutional in procedural and material terms. Such procedural unconstitutionality is claimed to arise from the inadequacy of the legislative procedure followed to pass the challenged Act, due to not meeting the requirements foreseen in Arts. 150 of the Regulations of the Congress of Deputies (RCD) and 129 of the Senate Regulations (RS), as it was processed through summary legislative proceedings, seriously conditioning decision-making in both Chambers, and consequently infringing the *ius in officium* held by its members further to Art. 23.2 CE. The material unconstitutionality grounds claimed against single article, section three, in the new wording given to Arts. 92.4. b) and c) and 92.5 LOTC, are based on the fact that, in the appellant's opinion, they breach Arts. 117.3, 161, 164 and 165 CE, distorting the constitutional jurisdiction model, designed by the Constitution; a breach is also claimed of the principle of criminal legality (Art. 25.1 CE), due to not meeting the requirements inherent to this material guarantee, as well as the constitutional and statutory regime applicable to the granting of privileges (Arts. 24, 71 and 72 CE and 26.2 and 32 of the State of Autonomy of the Basque Country (EAPV)); and, finally, an alleged breach of Arts. 143 and 155 CE, due to the State establishing devices to control Autonomous Communities, contrary to the principle of autonomy.

The Attorney of Parliament, for the reasons succinctly stated in the Background Facts above, has requested that the appeal be dismissed as regards the procedural unconstitutionality claimed, on which her pleadings are based. In her opinion, the parliamentary processing of the challenged Act has followed the rules applicable to summary legislative proceedings, without affecting or restricting the rights of deputies to participate in the legislative procedure, consequently overruling a breach of Art. 23.2 CE.

In turn, the State Attorney, in the terms likewise summarised in the Background Facts above, shares the opinion of the Attorney of Parliament as regards the procedural unconstitutionality vice alleged in the claim, requesting that the appeal be dismissed with respect to the material unconstitutionality grounds brought against the new drafting given by single article, section three, of Public General Act 15/2015 to Arts. 92.4.b) and c) and 92.5 LOTC, as in his opinion it does not breach any of the constitutional and statutory precepts alleged by the appellant.

2. In its preamble, Public General Act 15/2015 refers to one of the main components of any jurisdictional function as "the existence of sufficient instruments to guarantee the effectiveness of any resolutions delivered further to such function", likewise constituting "an essential component for the rule of law to exist". The purpose sought by the reform is to "endow the Court, in constitutional terms, with enforcement instruments", given that it is entrusted with the task of acting as the supreme interpreter and guarantor of the Constitution through its jurisdictional function, "with a bundle of powers to guarantee effective compliance with its resolutions". The legislator has stated in the preamble to the Act that it is suitable to complete the general principles in enforcement matters existing until now in the LOTC, and to implement the "necessary instruments" to ensure an actual guarantee of the effectiveness of such resolutions, due to the "need to adjust to any new situations that aim to avoid or overlook such effectiveness".

The novelties introduced by Public General Act 15/2015 include the ancillary application of the Contentious-Administrative Jurisdiction Act as regards the enforcement of constitutional resolutions (Art. 80 LOTC); the possibility of the Court ordering an individual notification to any authority or public official deemed necessary (Art. 87.1 LOTC); status enjoyed by such notifications as executory title (Art. 87.2 LOTC); the Court's mandate to ensure their effective

fulfilment, with the possibility of including the necessary enforcement measures (Art. 92.1 LOTC), and to ask for assistance from any administrations and public powers to guarantee their effectiveness (Art. 92.2 LOTC).

In relation to this constitutional process, the challenged Act, in the new wording given to Art. 92.4 LOTC, of which sections b) and c) have been challenged, establishes a specific regime for situations where Constitutional Court resolutions are not fulfilled. In these cases, "should it notice that a resolution delivered further to its jurisdiction is not being fulfilled, the Court, *ex officio* or at the request of any of the parties to the suit where judgment was delivered, will issue an official request to the institutions, authorities, public officials or private citizens in charge of its fulfilment so that, within the term established, they may accordingly report on the matter". Upon receipt of the report or upon expiry of the term conferred, "if the Court ascertains that its resolution has not been fulfilled, in whole or in part, it may adopt any of the following measures: a) A coercive fine of between three thousand and thirty-thousand euros, ordered against the authorities, public officials or private citizens not fulfilling the Court's resolutions; said fine may be reiterated until what is ordered is entirely fulfilled; b) To suspend from office the authorities or public officials pertaining to the Administration that is responsible for the non-fulfilment, for the time necessary to ensure that the Court's pronouncements are observed; c) The substitute enforcement of resolutions delivered in constitutional proceedings. In this case, the Court may request the Spanish Government's collaboration so that, in the terms established by the Court, it adopts the necessary measures to guarantee that its resolutions are fulfilled; d) To obtain a statement from private citizens in order to uphold any criminal liability".

Finally, new section 5 of Art. 92 LOTC, also challenged in this appeal, provides that "in the case of enforcing resolutions that have ordered the suspension of challenged provisions, acts or measures, and in circumstances of particular constitutional relevance, the Court, *ex officio* or at the Government's request, will adopt the necessary measures to ensure that these are duly fulfilled, *inaudita parte*. In this same resolution it will schedule a hearing for the parties and the State Prosecution Service, for a common three-day term, after which the Court will issue a resolution lifting, endorsing or changing the measures previously adopted".

3. Before examining the issues raised in this appeal, we should point out its uniqueness, as precepts are being challenged that have reformed the Public General Act of the Constitutional Court; thus, as in the cases where SSTC 49/2008, of 9 April, and 118/2016, of 23 June, were delivered, it is a matter of checking the only law to which we are completely bound (Art. 1.1 LOTC). In STC 49/2008, whose case-law is repeated in STC 118/2016, we referred to the peculiarities inherent to a constitutional review of the Public General Act of the Constitutional Court which now, albeit succinctly, should be referred to.

a) We stated at the time that the legislator of the public general act of the Constitutional Court "enjoys a freedom of configuration, not only derived from the principle of democracy but which is also protected through various reservations in favour of public general acts, foreseen in the Constitution with respect to this institution [Arts. 161.1.d), 162.2 and 165 CE]", whose content, as we indicated in STC 66/1985, of 23 May (FJ 4), may be disposed of by the legislator. This freedom, logically, further to the principle of constitutional supremacy (Art. 9.1 CE), "is not absolute and is subject to material and formal limits, arising not only from such reservations and the other precepts included in Section IX of the Constitution, but also from a systematic interpretation of the Constitution as a whole". In other words, these constitutional limits imposed on the legislator "are not only a consequence of a literal interpretation of the precept upheld in each case, but also of the form adopted by the Constitutional Court, based on a joint interpretation of our Supreme Rule and of its underlying constitutional principles". Consequently, "further to the need to abide by constitutional rules and the Court's independence and function, [the legislator] may make any changes or amendments therein it deems appropriate, without being restricted to those

that are indispensable to avoid any unconstitutionality or to guarantee the achievement of constitutional objectives" [FJ 3; likewise, STC 118/2016, FJ 3 a)].

b) The legislator needs to uphold the material and formal limits set by the Constitution, and this Court should check, as its supreme interpreter, that these limits are fulfilled. Otherwise, as we stated in STC 49/2008, "not only would an area arise, immune from constitutional review, but this would also entail negligence in our task in such a decisive matter for the very supremacy of the Constitution as the Court's jurisdiction". Consequently, "to leave in the hands of the legislator of public general acts a specification [of the constitutional model of our jurisdiction] and to waive any control thereof would in fact depart from the constituent's wish to create a body to supervise constitutionality, with broad competences, and to ensure its efficacy". This two-fold subjection by the Constitutional Court to the Constitution and to its Public General Act "cannot be interpreted so as to prevent a constitutionality check on our own regulating law, given that this would mean dismissing the applicability of the principle of constitutional supremacy at the legal creative stage, i.e. with respect to the legislator" (FJ 3).

c) Nevertheless, certain particularities exist with respect to the scope of this constitutionality check over our Public General Act. Thus, irrespective of the limits in the specific process followed, we need to "enhance any institutional and functional considerations always inherent to control over the democratic legislator"; obviously, in the first place, "our examination is exclusively constitutional, not political, nor is it based on timeliness or technical quality"; we should limit ourselves to checking "in the abstract and, consequently, irrespective of their possible practical application, the specific precepts challenged and the constitutional rules and principles included in this control parameter". Secondly, as regards the democratic legislator, "we cannot lose sight of the fact that a constitutionality presumption is overriding when exercising this control, and the appellant is not only obliged to trigger it by upholding its entitlement, but must also specify the grounds of such alleged unconstitutionality and collaborate with the constitutional jurisdiction". Third, as a matter of principle, we should take into account that "the legislator should not just enforce the Constitution, but is also constitutionally entitled to adopt any measures which, in the current scenario of political pluralism, do not exceed the limits derived from the Fundamental Rule" (FJ 4; likewise, STC 118/2016, FJ 1).

And, finally, as regards the possible outcome of this constitutionality check, we have been able to evidence that insofar as the subjection of this Court to its public general act underlies the very legitimacy of the Court, "any check of the Court's Public General Act should be limited to those cases involving an evident and irremediable conflict between the Act and the Constitution". To complete "more thorough control- we should repeat now- would not only weaken the constitutionality presumption enjoyed by any rule approved by the democratic legislator, but would also put the Court in a position unrelated to the role played by the reservation contained in Art. 165 CE, in order for the legislator, through the Public General Act of the Constitutional Court, to directly implement and complete Title IX CE, to which the Court is completely bound" (FJ 4).

4. This said, our examination should begin with the alleged procedural constitutionality, as it is claimed against, and would consequently affect, all of Public General Act 15/2015.

The Attorneys of the Basque Country, after describing the time sequence in the passing of the Act, since it was filed as a draft bill and until it was enacted, consider that the use of summary legislative proceedings has infringed the Regulations of the Congress of Deputies (Art. 150 RCD) and the Senate Regulations (Art. 129 RS), seriously conditioning decision-making in the Chambers, in breach of the fundamental right held by all deputies and senators to the *ius in officium* guaranteed by Art. 23 CE. Pursuant to said provisions in both parliamentary regulations, an abridged legislative procedure may only be used to pass laws "when this is advisable due to the nature of the project or draft bill taken into consideration or

this is possible due to its simplicity". However, in this case, in their opinion, neither requirement would be met given that the reform made by Public General Act 15/2015 of the LOTC has clear constitutional relevance, as it affects first-rank constitutional principles and values and essential matters related to a constitutional body, affecting its relations with other constitutional bodies. Furthermore, it is clear that the amendments introduced into the LOTC by the challenged law are far removed from the simplicity required from these regulatory provisions, as they are technically complex and involve an analysis of the institutional position of the Constitutional Court and of the nature of constitutional jurisdiction. Their pleadings end by stating the lack of consensus amongst parliamentary groups when processing the draft bill, which was filed, processed and approved with the votes of just one group, and was challenged and dismissed by all the rest.

On the other hand, the Attorney of Parliament considers that the decision to use these summary legislative proceedings was validly adopted by the competent bodies, pursuant to the provisions of the Chamber Regulations. The requirements imposed by Art. 150 RCD are alternative and not cumulative; consequently, it suffices for just one to be met. A verification of the "nature" of the project or draft bill is an open concept, granting parliamentary bodies a broad margin of interpretation, without in any case excluding summary legislative proceedings based on the special relevance of the law in question, as confirmed by the fact that a constitutional reform and draft public general act, implementing the abdication of His Majesty the King Juan Carlos I de Borbón were processed through this procedure. In turn, the idea of "simplicity" refers to an analysis of the internal structure of the text, whether it is comprehensible and intelligible and structurally simple, which is totally unrelated to its legal effects. In this case, the reforms made to the LOTC are not particularly complex or suffer syntactic defects, or use unintelligible language; rather, it suffices to merely read the amended articles in order to understand their scope. And the absence of consensus does not invalidate a decision adopted by parties that are entitled to do so by law and enjoyed sufficient majority. In short, the Parliamentary Attorney reaches the conclusion that the deputies were not limited or restricted as regards their possible participation in the legislative process, which followed what was foreseen in the regulations and consequently did not breach Art. 23.2 CE.

The State Attorney has also requested that these unconstitutionality grounds be dismissed in the absence of any infraction of parliamentary regulations in the processing and passing of the challenged law. There is no topic excluded from summary legislative proceedings, to the point that not even a proposed constitutional reform is excluded (ATC 9/2012, of 13 January). In turn, the "simplicity" requirement of the legislative text, foreseen in Art. 150 RCD, refers to laws that are not technically complex, long or highly interrelated or intrinsic in material terms. In this case, the shortness, concision and clarity of the text of the challenged Act all entitle it to be processed through summary proceedings, without any infraction or failure to complete any steps being ascertained in said procedure; consequently, the right to participate in politics, held by the parliamentary groups further to Art. 23 CE, has not been harmed.

5. Before examining these unconstitutionality grounds, certain specifications must be made to exactly determine their true scope.

a) Although the Attorneys of the Basque Government refer in their pleadings to a breach both of the Regulations of the Congress of Deputies and of the Senate Regulations, regulating summary legislative proceedings, in fact the draft public general act giving rise to Public General Act 15/2015 was only processed as such in the Congress of Deputies, not in the Senate. Thus, these unconstitutionality grounds should be restricted to a potential breach of the *ius in officium* of deputies further to Art. 23.2 CE, as the draft bill was processed summarily in the Lower Chamber; the claim does not contain any reproach or

reasoning whatsoever in relation to summary proceedings being completed in both Chambers.

Secondly, the Attorneys of the Basque Government are not questioning the fact that the summary legislative proceedings completed in the Congress of Deputies were proposed and decided by the competent bodies, as has been the case, or that during the procedure any of its steps was overlooked or the deputies or parliamentary groups were deprived of their regulatory rights, which is not the case. The unconstitutionality grounds are exclusively based on the fact that, in their opinion, for the reasons explained, neither of the requirements foreseen in Art. 150 RCD was met for the summary processing of a draft bill, i.e. when "its nature … makes this advisable or this is allowed by its simplicity". This is the specific issue involved in the unconstitutionality alleged in the claim, for procedural reasons, which is why our examination should be strictly limited to the same.

b) According to repeated case-law laid down by this Court, although Art. 28.1 LOTC does not include parliamentary regulations amongst the rules which, if breached, could entail the unconstitutionality of a law, it is likely that, both due to the immunity enjoyed by such procedural laws against the legislator's action, and, particularly, due to the instrumental nature they enjoy with respect to one of the higher values of Spanish law- political pluralism (Art. 1.1 CE)-, a failure to fulfil the provisions governing this legislative process could render a law unconstitutional, if this non-fulfilment substantially alters the decision-making process in the Chambers [STC 99/1987, of 11 June, FJ 1 a); this doctrine is reiterated, amongst others, in STC 103/2008, of 11 September, FJ 5].

This doctrine should be reconciled with constitutional case-law, whereby "parliamentary autonomy, guaranteed by the Constitution (Art. 72 CE), and the very nature of Art. 23.2 CE as a legally configured right, means that Parliament and its governing bodies in particular are given a margin of discretion when interpreting parliamentary legality, which this Court may not ignore". Specifically, in relation to parliamentary decisions regarding the shortening of steps and timeframes in a legislative procedure- either further to a declaration that emergency processing is necessary, or through summary legislative proceedings, or because exceptional causes exist, or due a mere breach of regulatory timeframes- the Court has declared that: "(i) no abridged legislative procedure is foreseen in the Constitution for the processing of emergency regulatory projects, excluding a time rule for the processing in the Senate of projects declared as urgent by the Government or Congress of Deputies (Art. 90.3 CE), which is why said rules in this case are entrusted to the Chambers' regulations [STC 136/2011, of 13 September, FJ 10 e)]; (ii) a shorter processing time does not deprive the Chambers of their legislative function, as it only affects its sequence in time; nor does it necessarily have to harm any constitutional principle underlying a legislative procedure as a decision-making process of the body in question (STC 234/2000, of 3 October, FJ 13); (iii) a decision of this kind should be applied in such a way as to equally affect all political forces represented in parliament, thus avoiding any unequal or discriminatory treatment (ATC 35/2001, of 23 February, FJ 5); and (iv) a shorter processing time may only have constitutional relevance if its scope is such as to have materially altered the decision-making process in a Chamber, consequently affecting the exercise of representative functions inherent to members of parliament [SSTC 136/2011, of 13 September, FJ 10 e); and 44/2015, of 5 March, FJ 2]" (STC 143/2016, of 19 September, FJ 3).

c) Going from the general to the specific, Art. 150 RCD establishes as requirements for the processing of a project or draft bill through summary legislative proceedings that its "nature" render this advisable or that its "simplicity" make this permissible. As the Attorney of Parliament has pointed out, both requirements are defined in clauses or open concepts, granting parliamentary bodies a broad margin of appreciation or interpretation. Consequently, when examining the suitability of resorting to this type of procedure, as well as the existence of simplicity in a regulatory text or that its nature justifies the parliamentary

processing of a project or draft bill as summary legislative proceedings, this is a decision to be adopted by the Plenary Meeting of the Congress of Deputies, further to a proposal from the Chamber's Panel, after hearing the Board of Spokespersons (STC 238/2012, of 13 December, FJ 4). In this case, the Plenary Meeting of the Congress of Deputies decided by majority to process the draft bill as summary legislative proceedings, thereby manifesting its opinion that at least one of the presumptions was met, to which the Chamber's Regulations condition the use of this parliamentary procedure.

In terms of the control we need to make over such parliamentary decisions, we should dismiss the alleged infraction of Art. 150 RCD, as this Court, which needs to uphold the independence of the Chambers as regards any parliamentary procedures (STC 49/2008, FJ 15), is not entitled to substitute the wish and timeliness decided by the Panel of the Congress of Deputies, by proposing that the draft bill be processed in summary legislative proceedings, or the Plenary Meeting's adoption of this decision. In fact, the special relevance or constitutional impact of a legal text, in light of said regulatory provision, is not incompatible with its processing through summary legislative proceedings, or sufficient *per se*, as claimed by the Attorneys of the Basque Government, to exclude the use of this parliamentary procedure, which is open to any topic, including constitutional reform (STC 238/2012, FJ 4, reproducing the doctrine laid down in ATC 9/2012, of 13 January).

Furthermore, as the Attorney of Parliament and the State Attorney have manifested in their pleadings, it is not arbitrary to consider that the simplicity of a draft bill- not to be mistaken with its material relevance or constitutional impact- could justify in this case its processing through summary legislative proceedings, based on its structure, content and language. Certainly, as disclosed from a reading thereof, the draft bill consists of a single article with four sections, and a final provision amending or rewording, in part, four articles of the LOTC, using structure and language, from the point of view of a reasonable observer (ATC 141/2016, of 19 July FJ 6), that are comprehensible, simple and intelligible without prejudice to affecting a matter of clear constitutional relevance.

In short, a lack of consensus amongst parliamentary groups when processing a draft bill through summary legislative proceedings does not affect the constitutionality of this process either, as the decision was adopted by the competent body- something that it not disputed by the Attorneys of the Basque Government at any time-, following a proposal from the bodies that are so entitled, by the majority established by law. The political consensus that could arise from the project or draft bill is totally unrelated to the meeting of simplicity or nature of the regulatory text requirements, allowing or advising its processing through summary legislative proceedings (STC 129/2013, of 4 June, FJ 9). In other words, the decision to resort to this parliamentary procedure should be adopted by a simple majority, not unanimously or with any qualified majority, as inferred from the provisions of Art. 79 CE and the Court's interpretation of the majority system described in the Constitution, when it acknowledges that the rule usually followed in parliamentary procedures is a simple majority, subject to the exception of a qualified majority if greater consensus is necessary in order to more effectively protect the rights and interests of minorities, or for other reasonable objectives (SSTC 179/1989, of 2 November, FJ 7; 238/2012, FJ 4).

Further to the foregoing, we should consequently dismiss the alleged infringement of Art. 23 CE and, consequently, the procedural unconstitutional vice of which the challenged Act is accused.

6. The first set of material grounds on which the Basque Government bases the unconstitutionality of single article, section three, of Public General Act 15/2015, as per the new wording given to Art. 92. 4.b) and c) and 5 LOTC, rests on an infringement of Arts. 161, 164 and 165, in relation to Art. 117.3 CE.

In a lengthy pleading, which makes many generic considerations, the Attorneys of the Basque Government jointly challenge Art. 92.4 b) and c) and 92. 5 LOTC on the grounds, on the one hand, that the legislator of public general acts has acted ultra vires with respect to Art. 165 CE; and, on the other hand, that the measures introduced entail a qualitative change in the nature, position and functions of the Constitutional Court, seriously altering the balance of State powers, consequently entailing, rather than the infraction of one or several provisions of the Constitution, the failure to take into account its essential clauses and the setting up of a constitutional justice system that is contrary to the one designed in Title IX CE. Thus, what is being questioned in this case- they argue- is the attribution of certain enforcement powers to the Constitutional Court, altering its position and functions, as it no longer acts as a "body participating in the political management of the State" and, instead, holds a prevalent position to which other constitutional bodies are subordinated, in such a way that the Court is able to interfere with their activity and may even replace them in their decision-making powers.

The Attorneys of the Basque Government continue with their pleading by affirming that the meaning of Art. 92 LOTC is to turn the Constitutional Court into "the enforcement master of its decisions", generally empowering it to demand performance from all State bodies and citizens. However, in their opinion, this generic attribution of competence cannot mean that the Court is provided with a mandatory enforcement procedure that may be brought against senior bodies of the State or Autonomous Communities, as this would exceed the "essence of the Constitution", and this enforcement apparatus is only conceivable with respect to individual citizens. Thus, under a formally legal appearance, Art. 92.4 b) and c) and 92.5 LOTC introduces "political measures aimed at enforcing political decisions", clearly exceeding the possibilities conferred to the Constitutional Court under Title IX CE. The Court may adopt the relevant decision in constitutional conflicts, thereby culminating its task as the maximum interpreter of the Constitution, in such a way that the execution, application and consummation of said decision cannot depend and be subject to the Court's own exercise of the measures introduced by the challenged law. In short, the measures foreseen in Art. 92.4.b) and c) and 92.5 LOTC exceed the functions reserved by Art. 161.1 CE to the Court, and are also not suitable to achieve the purpose they claim to pursue.

The Attorneys of the Basque Government conclude their lengthy pleading with respect to these grounds for unconstitutionality with an equally generic reproach, specifically addressed to each one of the measures foreseen in Art. 92.4. b) and c) and 92.5 LOTC. Thus, with respect to the suspension from office of authorities or public officials responsible for the breach [Art. 92.4 b) LOTC], they claim that this measure may affect both executive and legislative authorities and that the principle of division of powers, unless the device foreseen in Art. 155 CE is used, prevents a constitutional body from suspending a politician in an Autonomous Community or the State from office. The measures foreseen in Art. 92.4 c) [substitute enforcement, with the possibility of collaboration from the National Government] and Art. 5 LOTC [adoption of the necessary measures to guarantee the enforcement of resolutions ordering a suspension of challenged provisions, acts or steps] are also contrary to the principle of division of powers, given that substitute decision-making in certain constitutional bodies is not possible within a democratic constitutional system; the foregoing could even ultimately affect the parliamentary activity conducted in each Chamber, protected by the prerogative of inviolability.

The State Attorney, in light of the considerations made in the claim, begins his pleadings by highlighting that the Constitutional Court is a jurisdictional body, the only constitutionally jurisdictional body in Spain, not a political body. Next, he states that the Constitution does not prevent the power to enforce Constitutional Court resolutions being entrusted to the Court itself, as this is an issue that the constituent left open and subject to further implementation in a public general act, foreseen in Art. 165 CE. After referring to the legal evolution of the LOTC in constitutional resolution enforcement matters, the State Attorney

affirms that the title to be upheld with the reform implemented by Public General Act 15/2015 is the general principle of rendering judicial resolutions effective, guaranteeing Art. 24 CE, also consequently covering Constitutional Court resolutions (ATC 1/2009, of 12 January, FJ2). Consequently, what is pursued is to uphold the right of performance and effectiveness of Constitutional Court resolutions, which cannot be doomed to criminal punishment. Specifically, the entitlement behind the measures of Art. 92.4. b) and c) and 5 LOTC is their articulation and regulation as enforcement and application channels, to guarantee the effectiveness of Constitutional Court resolutions, i.e. its task as the guarantor of the Constitution and, consequently, Arts. 161 and 165 CE entitle it to act in this way.

7. What is stated in the claim as regards this first set of material grounds of unconstitutionality and the pleadings made against it, require a series of comments to adequately determine the object and scope of our examination.

a) Once again, let us recall that our control is exclusively constitutional-based; it is not legal, or political, or based on timeliness, or technical quality, or suitability. Consequently, the intentions of the legislator, its political strategy or ultimate purpose obviously do not constitute the object of our examination, which should be limited to contrasting the specific precepts challenged and the constitutional rules and principles inherent to each control parameter, without any legitimate criticism or political difference becoming a constitutionality argument [SSTC 49/2008, FF JJ 4 and 5; 197/2014, of 4 December, FJ 1; 118/2016, FJ 4 a); 128/2016, of 7 July, FJ 5 A) a)].

b) Secondly, we should also point out that the Court, in an unconstitutionality appeal, the procedure through which a challenge has been brought against the provision of Public General Act 15/2015 examined in this case, “guarantees the primacy of the Constitution and checks whether or not any challenged laws, provisions or acts conform to the same” (Art. 27.1 LOTC). The check entrusted to the Constitutional Court in this type of procedure is abstract control over the challenged rule, unrelated to any specific consideration on its application to a specific factual situation. In other words, a review of constitutionality of our Act in this case has used an unconstitutionality appeal, which is why our pronouncement should be unrelated to any possible or hypothetical application of the precept; we should limit ourselves to contrasting the challenged precept in the abstract, as well as the constitutional rules and principles claimed to be infringed [SSTC 49/2008, FF JJ 3 and 4; 128/2016, of 7 July, FJ 5 A) a)].

This reminder is necessary on the type of control inherent to an unconstitutionality appeal, given the broad considerations made in the claim on the scope of a hypothetical enforcement by the Court of any possible pronouncements delivered in various constitutional processes. The question, here and now, is to examine whether or not there is a contradiction in the challenged measures or instruments, which the legislator has provided to the Court to guarantee the performance and effectiveness of its resolution, consequently leaving outside the application of the constitutional precepts alleged to specific cases and the possibility of their adoption in various constitutional processes. It will be when specific measures are sought or requested in a certain constitutional process, for the enforcement of any resolutions delivered, that their viability will be examined, as well as their constitutionality during such constitutional process, as it is clear that the enforcement powers of the Constitutional Court should be shaped, within the instruments or measures made available by the legislator, according to the type of procedure and content of the ruling.

c) In short, given the generality of the pleadings on which the first material grounds of unconstitutionality are based, included in the claim, we must repeat that it does not suffice, when questioning the constitutionality of a legal provision, to accuse it of one infringement or another; it is essential to examine the effectiveness of the infringement alleged. When what is at stake is an interpretation of the law, the appellants bear the burden not only of filing the

necessary channels to allow the Court's pronouncement, but also to collaborate with the Court's justice through a detailed analysis of the serious issues raised. It is consequently fair to speak of a burden on the appellant which, if not fulfilled, could entail the absence of procedural diligence, such as providing the reasoning that may be reasonably expected [SSTC 44/2015, of 5 March, FJ 4; 118/2016, FJ 3 g)]. In short, the presumption of constitutionality of rules with the status of an act cannot be distorted without sufficient reasoning; a global challenge, lacking any justification on the part of the challenging party, is not admissible [STC 101/2013, of 23 April, FJ 11; likewise, see SSTC 204/2011, of 15 December, FJ 2 b), and 100/2013, of 23 April, FJ 2 c)].

8. Under the 1978 Constitution, the Constitutional Court, specifically assigned Title IX, is configured as a jurisdictional body exclusively entrusted with exercising constitutional jurisdiction. The precepts included in this Title, along with other complementary provisions, design the core of a constitutional jurisdictional model which "the constituent did not intend to be closed […], petrified and frozen over time, incompatible with the evolutionary nature of the Law; instead, it entrusted the legislator of public general acts with its ultimate definition". In this regard, we have stated that "it suffices to resort to Arts. 161.1 d), 162.2 and 165 CE in order to ascertain that the legislator of public general acts is broadly entitled to establish its subsequent configuration" [STC 118/2016, FJ 4 d)].

The open-ended nature of the constitutional jurisdiction model, basically designed under Title IX CE, is practically ascertained with respect to each one of its defining items. Thus, in relation to the appointment of the Judges belonging to the Court, we have declared that "a detailed regulation of the election of Constitutional Court members", contained in Art. 159.1 CE "does not at all prevent the possibility of other rules implementing constitutional regulations which, amongst others, is silent on the procedure to follow in each election process". Consequently, "no constitutional obstacle exists in order for constitutional regulations to be implemented and specified following the formal and material requirements foreseen in the Constitution" [STC 49/2008, FJ 7 a)].

The same conclusion has been reached in relation to the rules governing the President of the Constitutional Court, contained in Art. 160 CE. In our Judgment, we stated that "in comparative terms, these rules are more extensive that in most neighbouring countries, giving rise to a Presidency and Constitutional Court model with organic independence that is certainly relevant, given that the Presidency not only should rest on one of its members, but the only reason behind its choice is the decision of all the Court Judges". However, as per our reasoning, "neither Art. 160 CE nor this organizational model indicate an exhaustive constitutional regulation of the Presidency of the Constitutional Court" given that, without further ado, "there is no constitutional definition of their functions or specific competences or the way in which to exercise the same, issues which are implemented in the Public General Act of the Constitutional Court and its implementing rules" (STC 49/2008, FJ 18).

Nor may any closed constitutional jurisdiction be inferred from the processes followed by the Court. Thus, Arts. 53.2, 95.2, 161 and 163 CE do not include "an exhaustive list of constitutional processes that may be examined by this Constitutional Court". Rather, Arts. 161.1.d) and 165 CE "entitle the legislator of public general acts to define what other "matters"" may be entrusted to the Court's study and jurisdiction, as rightly evidenced by the attribution to date of constitutional processes not expressly foreseen in the Constitution [STC 118/2016, FJ 4 d)].

Furthermore, by virtue of the reservations in favour of public general acts, foreseen in Arts. 162.2 and 165 CE, the legislator in charge of fulfilling them is entitled to determine, beyond the specific entitlements recognised in said constitutional precepts, which persons and bodies are entitled to address the Constitutional Court in various constitutional processes.

After the requirement in Art. 164 CE that Court Judgments be published, to include any particular votes, declaring the *res iudicata* nature of such decisions, and determining their effects- issues that have also been implemented by the legislator in the Public General Act of the Constitutional Court (Arts. 38 to 40 and 86 LOTC)-, Art. 165 ends off Title IX CE by providing that "a public general act will regulate the operation of the Constitutional Court, its members' statute, the proceedings examined by the same and the terms in which to exercise its actions".

This reservation in favour of public general acts, clearly indicates the open-ended or non-petrified nature of the constitutional jurisdiction model designed by the constituent, whose breadth and completeness have been referred to as a manifestation of the closeness between the Supreme Rule and the Public General Act of the Constitutional Court. In this regard, the Court has declared that "the terms in which this specific reservation is formulated ("a public general act…"), the breadth of the topics ("operation of the Constitutional Court, its members' statute, any proceedings examined by the same and the terms in which to exercise its actions"), the fact that it closes off Title IX and the fact that it involves a body such as the Constitutional Court mean that completeness is pursued, which is why a restrictive interpretation of such matters will be dismissed". Although we have not excluded the possibility of other public general acts affecting the scope of constitutional jurisdiction, endowing it with new competences [Art. 161.1.d) CE], we have overruled a transfer to the Public General Act of the Constitutional Court of our doctrine on the strict nature of public general act reservations, as this is an entirely different matter, given that "these reservations may be strictly or even restrictively interpreted because the law foresees another instrument (ordinary acts) to regulate matters excluded from public general acts"; this is not the case of "the reservation foreseen in Art. 165 CE, as it is only the Public General Act of the Constitutional Court, and no other law, which may develop the Constitutional Court as an institution in all related matters, either because this is imposed by the Constitution or because it is not constitutionally forbidden" [STC 49/2008, FF JJ 3 and 16; likewise, see STC 118/2016, FJ4 d)].

9. The Constitution does not contain any provision whatsoever as regards the enforcement of Constitutional Court resolutions. However, it is clear that this absence may not be interpreted, in the constitutional jurisdiction model designed by the constituent in the aforementioned terms, as depriving the Constitutional Court of its power to enforce and ensure the compliance of its resolutions. The Constitutional Court has been configured in the Constitution as an authentic jurisdictional body exclusively entrusted with exercising constitutional jurisdiction, which is why, as a quality inherent to the administration of (constitutional) justice, the Court also holds one of the powers making up the exercise of this competence: the enforcement of its resolutions, given that the judge should also be able to ensure that its decisions are performed. Otherwise the Court, the only one of its kind, would lack one of the essential characteristics of its jurisdictional function and, consequently, the necessary power to guarantee the supremacy of the Constitution (Art. 9.1 CE), as its supreme interpreter and ultimate guarantor (Art. 1.1 LOTC).

A different matter to the power to enforce its own resolutions is the way or manner in which this enforcement is articulated; for the sake of effectiveness or timeliness, even, assistance may eventually be claimed from other public bodies, as well as instruments or measures made available to guarantee the fulfilment and effectiveness of its resolutions. As pointed out by the State Attorney in his pleadings, these are issues that the constituent has entrusted to the legislator of the Public General Act of the Constitutional Court ex Art. 165 CE. Thus, in principle, without prejudice to any reproaches that may or should be made to its specific provisions or the unique instruments or measures in place to guarantee the effectiveness of Constitutional Court resolutions, the regulation of enforcement of its resolutions is a matter covered by the reservation made to public general acts, in Art. 165 CE, the broadness and intended completeness of which we have already referred to.

The original wording of LOTC, Title VII, under the heading “Common procedural provisions”, an issue expressly included in the scope of the reservation in favour of public general acts, further to Art. 165 CE, contained three precepts related to the enforcement of Constitutional Court resolutions. The first, in numerical order, reproduced in current Art. 87.1 and 2 LOTC, already proclaimed that all public powers are obliged “to perform whatsoever the Constitutional Court decides”, and also established that Judges and Tribunals had to provide “on a preferential and urgent basis, to the Constitutional Court, any jurisdictional assistance it may need” (Art. 87 LOTC). Strictly in enforcement matters, Art. 92 LOTC provided that “the Court may establish in its judgment or resolution, or in subsequent acts, who should perform it and, where appropriate, settle any enforcement incidents”. The content of this precept is gathered in the current wording of section one of Art. 92.1 LOTC, adding that “the Constitutional Court will ensure that its resolutions are effectively performed”, and may adopt “the necessary enforcement measures”. Finally, the possibility was left open of imposing coercive fines “on any person, whether or not a public power, failing to meet the Court’s requests within the timeframes established and to repeat said fines until the request is totally fulfilled, without prejudice to any other liability that may arise” (Art. 95.4 LOTC).

Public General Act 6/2007, of 24 May, reforming Public General Act 2/1979, of 3 October, of the Constitutional Court, in addition to changing the amount of coercive fines foreseen in Art. 95.4 LOTC (Art. 29), introduced a second paragraph in Art. 92 LOTC, reproduced in current Art. 92.1 LOTC, which, consistent with the new wording it gave to the final section of Art. 4.1 LOTC, entitled the Court to “declare the nullity of any resolutions in breach of those delivered further to its jurisdiction, as a result of their enforcement, after hearing the State Prosecution Service and the delivering body” (Art. 28).

The reform of Public General Act 15/2015, whose single article section three, is being challenged in this appeal based on the new wording given to Art. 92.4.b) and c) and 92.5 LOTC, is aimed, as explained in the preamble and already pointed out, at introducing “in constitutional matters, enforcement instruments endowing the Court with a bundle of powers in order to guarantee effective compliance of its resolutions”. Specifically, Art. 92.4 b) [suspension from office of the authorities or public officials responsible for the breach] and c) LOTC [substitute enforcement, with the possibility of requesting the National Government’s assistance], gather various measures that are part of the range foreseen in said Art. 92.4 LOTC, which the Constitutional Court after completing the hearing foreseen by law, may adopt if its resolutions are not performed. The literal and comprehensive content of this range of measures was already stated in Legal Ground 2.

Likewise in Legal Ground 2, we have reproduced the content of Art. 92.5 LOTC, also covered by this constitutional process, empowering the Constitutional Court, ex officio or at the Government’s request, to adopt “the necessary measures perform” resolutions ordering a suspension of challenged provisions, acts or steps.

10. At this point, we refer to the pleadings whereby the Attorneys of the Basque Government justify their joint challenge of Art. 92.4 b) and c) and 92. 5 LOTC, the alleged distortion of the constitutional jurisdiction model designed by the Constitution, consequently altering the position and functions of the Court, from which they infer an infringement of Arts. 161, 164 and 165, in relation to Art. 117.3 CE.

a) As already indicated, the constituent has not wished this constitutional jurisdiction to be closed or set in stone, entitling the legislator of a public general act of the Constitutional Court [Arts. 161.1.d), 162.2 and 165 CE] in a broad manner, in the terms described, to ultimately determine its various configuring components. The reservation made in favour of public general acts by Art. 165 CE, the breadth and intended completeness of whish mean that its material scope may not be restrictively interpreted, generally include rules on the

enforcement of Constitutional Court resolutions and, in particular, the measures foreseen to guarantee their performance and effectiveness. The specific measures foreseen in Art. 92.4 b) and c) and 92.5 LOTC constitute, like the rest, instruments or powers made available to the Court by the legislator in order to guarantee a due and effective compliance of its judgments and other resolutions, binding all public powers, including the legislative Chambers (ATC 170/2016, of 6 October, FJ 2). The purpose sought, as is the case now with the measures challenged, is constitutionally justified by the need to "defend the institutional position of the Constitutional Court and the effectiveness of its judgments and resolutions, protecting its jurisdictional scope from any subsequent interference by a public power that could be detrimental" (*ibidem*); in other words, to preserve the supremacy of the Constitution, to which all public powers are subordinated (Art. 9.1 CE), and whose supreme interpreter and ultimate guarantor is this Court, further to its jurisdictional function.

Thus, without prejudice to any considerations that may eventually be made on other potential constitutional infringements alleged in the appeal, we disagree with the fact that the legislator of the public general act of the Constitutional Court, by introducing the measures foreseen in Art. 92.4.b) and c) and 92.5 LOTC has acted *ultra vires*, for the reasons claimed by the plaintiff in these unconstitutionality grounds, with respect to the entitlement conferred by the constituent in the reservation made in favour of public general acts by Art. 165 CE; it is precisely this constitutional precept which has justified such measures.

Likewise, it cannot be affirmed that these measures made available to the Court by the legislator, further to its freedom of configuration, in the challenged precept, in the event that its resolutions are not fulfilled, in itself after the Constitutional Court's functions, based on the reasoning included in the first set of unconstitutionality grounds, given that the Court continues to exclusively exercise the jurisdictional function entrusted *ex costitutione* by examining constitutional processes attributed either by the constituent (Arts. 53.2, 95.2, 161.1 and 2 and 163 CE), or by the legislator of public general acts ex Arts. 161.1.d) and 165 CE; consequently, the institutional position of the Constitutional Court has not been altered either. It is precisely further to this jurisdictional function, through the relevant constitutional processes, of which enforcement powers are an essential component, where the Court, upholding the requirements and guarantees established by the legislator, may eventually adopt the measures foreseen by law, including those contemplated in said Art. 92.4.a) and b) and 92.5 LOTC, to guarantee the effectiveness and fulfilment of its resolutions, in such a way as to not alter its functions or institutional position.

b) In turn, no constitutional precept explicitly prevents, nor may such prohibition be inferred from the underlying principles of our constitutional jurisdiction model, the legislator of public general acts *ex* Art. 165 CE being able to establish an incident process to safeguard the effectiveness and performance of the Court resolutions, providing it with instruments or measures with this aim, as well as the process being directed and that such instruments or measures be hypothetically adopted in relation to senior bodies of the State and Autonomous Communities, if they are the addressees of this resolution enforcement.

On this point, we should state, with respect to the approach taken in the claim, that the Court, as already indicated, is not only entitled to settle any dispute arising in constitutional proceedings filed before the same, but also, as an essential component of the jurisdictional function attributed *ex costitutione*, it is empowered to enforce its own resolutions, ensuring that they are performed and effective, without which its jurisdictional function would become vacuous. Finally, we will end our examination of the pleadings made by the Attorneys of the Basque Government, used to justify their joint challenge of Art. 92.4 b) and c) and 5 LOTC, by once again insisting on the fact that all public powers- and ultimately their holders- are obliged to duly perform the Court's resolutions (Art. 87.1 CE), as a consequence of being bound by the Constitution (Art. 9.1 CE) [AATC 141/2016, FJ 2; 170/2016, FF JJ 2 and 8]; the content of any provisions, resolutions or acts issued by public powers may not hinder the

integrity of the competences entrusted by the Constitution to this Court, which it will accordingly exercise (ATC 170 /2016, FJ 8, citing AATC 189/2015, of 5 November, FJ 3 and 141/2016, FJ 7).

c) The Attorneys of the Basque Government end this first set of unconstitutionality grounds claiming with respect to each one of the measures of Art. 92.4.b) [suspension from office of authorities or employees of the Administration responsible for the breach], c) [substitute enforcement, with the possibility of requesting cooperation from the National Government] and 5 LOTC [adoption of the necessary measures to ensure the fulfilment of resolutions ordering a suspension of challenged provisions, acts or steps, in circumstances of particular constitutional relevance] that they breach the principle of separation of powers; furthermore, in relation to the measures foreseen in Art. 92.4.c) and 92.5 LOTC, they claim that they may eventually affect the activity of the parliamentary Chambers, which enjoy a prerogative of inviolability.

Right away, we should dismiss any potential infringement of the Constitutional that is based on generic accusations, like the ones in the claim, supposedly contrary to constitutional principles, such as the principle of division of powers in this case, as a generic reference to these principles may not be used in an unconstitutionality appeal to request that the Court invalidate rules enjoying the status of an act [STC 238/2012, FJ 6 a) and the case-law cited therein]. With respect to the hypothetical impact on the activity of the parliamentary Chambers by the measures which, based on Art. 92.4.c) and 92.5 LOTC, may eventually be adopted in order to ensure due compliance with Constitutional Court resolutions, we should repeat that the constitutional check entrusted to us in this process is abstract, exclusively aimed at contrasting the precepts challenged, which include measures that the legislator has made available to the Court in order to generally guarantee the effectiveness of its resolutions, with the constitutional mandates and principles supposedly infringed, and, consequently, irrespective of their application to specific cases and the viability of any possible measures that may eventually be adopted in different constitutional processes. This viability will be examined when specifically applying one or several of these measures, in order to ensure effective fulfilment of the resolution delivered in a certain constitutional process.

Nevertheless, without intending to make any preventive pronouncement on the hypothetical application of the precepts challenged which, further to consolidated constitutional doctrine, we should and may not carry out (STC 85/2016, of 28 April, FJ 4), it is relevant here to refer to the fact that this Court has declared that “parliamentary autonomy cannot be used as an excuse to evade the fulfilment of Constitutional Court resolutions”; a warning advising that its resolutions must be fulfilled “in no way illegitimately restricts” this autonomy “or compromises the exercise of a right of participation of political representatives, guaranteed by Art. 23 CE”, as the “required need for all public powers to be bound by the Constitution” (Art. 9.1 CE)”. In this regard, we have also pointed out that the interpretation of Chamber regulations, which cannot contradict the prevailing Constitution as the supreme rule, should be consistent with due compliance of Constitutional Court resolutions, binding all public powers (Art. 87.1 LOTC), in such a way that this interpretation does not conflict with Constitutional Court pronouncements (ATC 170/2016, FF JJ 6, 7 and 8).

Further to this reasoning, we disagree with the alleged distortion of the constitutional jurisdiction model designed in the Constitution and, consequently, the related infringement of Arts. 161 and 165 CE. The same applies to a violation of Art. 164 CE given that, in addition to lacking any arguments, this precept does not include any provision on the enforcement of Constitutional Court resolutions; and, finally, an infraction of Art. 117.3 CE, whose provisions refer to the scope of the jurisdictional function of Judiciary bodies, excluding the former, as promptly and repeatedly laid down in constitutional doctrine and the Constitution itself (ATC 83/1980, of 5 May, FJ 2).

11. The second set of material unconstitutionality grounds referred to by the Attorneys of the Basque Government claim a breach by single article, section three, of Public General Act 15/2015, in the wording given to Art. 92.4 b) and c) and 92.5 LOTC, of the principle of criminal legality (Art. 25.1 CE), as well as of the constitutional and statutory regime on the granting of privileges (Arts. 24, 71 and 72 CE and 26.2 and 32 EAPV). In this regard, the claim alleges that the measures contemplated in Art. 92.4 b) and c) and 92.5 LOTC are not just coercive or interim measures, but constitute actual punishment. The foregoing particularly refers to the suspension from office of authorities or public officials of the Administration responsible for the breach [Art. 92.4 b) LOTC], which is clearly an ineffective measure, insofar as suspension *per se* prevents the authority or public official suspended from office to act in any way in order to enforce the judicial resolution; this, in turn, indicates that it is in fact a measure aimed at punishing or sanctioning the conduct of the authority or public official in question. Given the sanctioning nature of the measures foreseen in Art. 92.4. b) and c) and 92.5 LOTC, the precept does not meet the requirements of foreseeability when defining conducts and sanctions, inherent to the material guarantee of the principle of criminal legality (Art. 25.1 CE). Furthermore, a suspension from office also constitutes a punishment that is restrictive of rights (Arts. 39 and 43 CP), which may be ordered by the Constitutional Court in response to the non-fulfilment of its resolutions, consequently totally overlooking the guaranteed privileges to which authorities and public officials may be entitled.

The State Attorney has challenged this set of unconstitutionality grounds because he considers that the suspension from office foreseen in Art. 92.4 b) LOTC is not a sanctioning measure, given that it is not conceived as a repressive sanction of a conduct but to avoid continued non-fulfilment of a Constitutional Court resolution. This suspension is avoidable, as the Court may only order it after ascertaining, through an incident granting a hearing to the affected parties, the intended non-fulfilment of the addressee, and only affects the authority or public official responsible for the non-fulfilment. The fact that the measure is not of a sanctioning type means that, according to the State Attorney, the principle of legality (Art. 25 CE) does not apply and that constitutional and statutory rules do not come into play as regards the granting of privileges, given that the sanction does not entail any criminal prosecution of its addressees.

12. The unconstitutionality grounds that need to be examined now are exclusively based on the punitive nature of the measures foreseen in Art. 92.4 b) and c) and 92.5 LOTC, indicating a breach of material guarantees inherent to the principle of criminal legality (Art. 25.1 CE), as well as an infraction of the constitutional and statutory provisions regulating the granting of privileges.

However, the Attorneys of the Basque Government have only explained the punitive nature of the measure to suspension from office the authorities or public officials involved (Art. 92.4 b) LOTC), without referring to those foreseen in Art. 92.4 c) and 92.5 LOTC; consequently, only the first measure need be examined following the unconstitutionality grounds alleged, given that the claim, as stated in consolidated constitutional case-law already referred to, has not fulfilled the burden of providing sufficient reasoning on the potential breach by the other measures of the constitutional and statutory provisions upheld; and global challenges lacking any back-yup reasoning are inadmissible.

13. The Constitutional Court has repeatedly stated in its decisions that the guarantees foreseen in the Constitution for punitive acts are not, per se, restrictive of rights (SSTC 34/2003, of 25 February, FJ 2; 181/2014, of 6 November, FJ 5). Thus, in relation to the principle of legality in criminal matters, the Court has declared that “the statements made in Art. 25 CE cannot apply to matters other than those specified in each criminal or administrative offence, and may not be extensively or analogously […] applied to different

cases or to acts that are merely restrictive of rights, if they do not entail an effective *ius puniendi* on the part of the State or truly have a sanctioning purpose" (STC 48/2003, of 12 March, FJ 9 and doctrine cited therein).

As we stated in this latter Judgment, in order to determine whether or not a legal consequence is punitive we need to above all consider the task entrusted to it in the legal system. Consequently, if it has a repressive purpose and thereby restricts rights as a result of an offence, a punishment or sanction will be ascertained in material terms; however, if instead of being repressive there are other justifying purposes, no punishment will exist, no matter how serious the consequence. Thus, we have dismissed the possibility of intended retribution, as the measures challenged were aimed at limiting the provision of a service or fulfilment of a specific obligation (STC 239/1988, of 14 December, FJ 2), they simply sought application of the law by the competent Administration (STC 181/1990, of 14 November, FJ 4) or ultimately, were only aimed at restoring the legality infringed (STC 119/1991, of 3 June, FJ 3). Consequently, it does not suffice to simply force a party to fulfil a legal duty (as is the case with coercive fines) or to restore the legality infringed on the part of someone acting without following the conditions foreseen by law to carry out a certain activity. In an autonomous manner and at the same time as these purposes, the damage caused must have a retribution purpose, i.e. the generation of added evil to the one represented by the mandatory need to fulfil an obligation that has already become due, or the impossibility of continuing with an activity one was not entitled to. In short, the criminal or administrative sanctioning response of the law only appears when, irrespective of the wish to repair, added damage is inflicted on the offender within the scope of the assets and rights it was illegally enjoying (STC 48/2003, FJ 9; likewise, see SSTC 331/2006, of 20 November, FJ 4; 121/2010, of 29 November, FJ 7; 39/2011, of 31 March, FF JJ 2 and 3; 17/2013, of 31 January, FJ 12).

We need to therefore examine the real nature of the measure to suspend from office the authorities or public officials in question, foreseen in Art. 92.4.b) LOTC, in order to confirm or dismiss its punitive nature; for this, it will be determining, pursuant to said constitutional doctrine, to examine the task or purpose pursued with such measure [STC, for all, 181/2014, FJ 6; Decisions of the European Court of Human Rights (SSTEDH) of 21 February 1984, *Öztürk*, case, series A, no. 73 (53 and 70); of 22 May 1990, *Weber* case, series A, no. 177 (31-33) and of 27 August 1991, *Demicoli* case, series A, no. 210 (33)].

14. The reasoning on which the Attorneys of the Basque Country base the punitive nature of the measure to suspend from office are not conclusive to ascertain its nature. The fact that its adoption prevents the enforcement of a jurisdictional resolution by the authority or public official suspended from office, responsible for the breach, says nothing about the punitive nature of the measure. The Court's confirmation of a deliberate and persistent wish by the authority or public official to not fulfil the resolution is the legal presumption on which application of the measure is based, used in fact, not to again demand its fulfilment by such authority or public official, but to remove the obstacle represented by its manifestly intended non-fulfilment for the effectiveness of the resolution, i.e. the fact that the authority or public official suspended from office may not carry it out does not indicate its punitive nature. Nor is it determining that it be foreseen as a sanction in disciplinary laws applicable to civil servants, or as a punishment in the Criminal Code, as precisely it is a matter of deciding whether the specific measure to suspend from office, which the legislator of public general acts has made available to the Court, as configured in Art. 92.4.b) LOTC, is or not punitive. In other words, what we have to examine is its questioned constitutional viability as a power conferred to the Court to guarantee the enforcement of its resolutions. It seems clear that, in principle, we cannot overrule the possibility of the same institution or measure being used to cover different purposes with a consequently different legal nature.

The measure that is disputed here is part of the range of instruments that the legislator of public general acts has made available to the Court in Art. 92.4 LOTC in the event that its resolutions are not fulfilled. These measures include suspension from office, and may only be adopted, as indicated, once it is ascertained that a resolution delivered by the Court further to its jurisdiction may not be fulfilled, and after a hearing is held, regulated therein. In other words, if this non-fulfilment is ascertained, the Court, *ex officio* or at the request of one of the parties to the suit in which the resolution was delivered, "will summon the institutions, authorities, public officials or citizens in charge of fulfilling the resolution in order to report on the matter within the timeframe established". If, once the report is received or this term has elapsed, "the Court ascertains that its resolution has not been fulfilled, in whole or in part, it may adopt any of the measures" foreseen in Art. 92.4 LOTC, to include suspension from office of the authorities or public officials pertaining to the Administration responsible for the breach [b)].

This measure of suspension from office, as explained in the preamble of the Act and inferred from its systematic interpretation, may only be ordered against the authorities or public officials responsible for not fulfilling the resolution delivered by the Court further to its jurisdiction, after this non-fulfilment is confirmed and if, once a hearing is held further to Art. 92.4 LOTC, the Court ascertains that it has not been fulfilled in whole or in part, in light of the report received from the authorities or public officials in charge of fulfilling the resolution, or upon expiry of the timeframe set without such report being issued. Clearly, it may only apply whenever the scope of action of the authority or public official in question includes fulfilment of the resolution and a deliberate and persistent wish to not fulfil it has been confirmed. Thus, the subjective scope of application of the measure is exclusively that of the authorities or public officials responsible for the breach, and may not be extended to authorities, public officials or other persons outside this scope of responsibility.

Furthermore, as inferred from the final section of Art. 92.4.b) LOTC, suspension from office may only be ordered "during the time necessary to ensure the fulfilment of the Court's pronouncements"; consequently, the duration in time of the measure is necessarily limited to this period, and may not be extended or prolonged thereafter; likewise, insofar as feasible, the functions directly related to enforcement of the judgment must be followed.

And, finally, given that the measure is aimed at "ensuring the fulfilment of the Court's pronouncements", we should necessarily conclude that it need not only uphold the subjective and time limits already indicated, but that, also, it may only be ordered when it is suitable for the purpose foreseen by the legislator, i.e. to guarantee the effectiveness and fulfilment of the resolutions delivered by the Court further to its jurisdiction. This means that it will be limited to exercising those attributions which need to be suspended in order to ensure enforcement of the resolution delivered. Furthermore, as indicated by the State Attorney in his writ of pleadings, the measure must be lifted as soon as the intended non-fulfilment ceases on the part of the authority or public official responsible for fulfilling the resolution.

15. A measure to suspend authorities or public officials from office, foreseen in Art. 92.4.b) LOTC, is, certainly, a serious legal consequence for the authority or public official in question, but does not automatically turn it into a punitive measure, as otherwise "any negative legal consequence […] will entail a sanctioning component" (STC 48/2003, FJ 9).

The purpose of the measure is not to inflict punishment in light of illegal or illicit conduct, as would be the failure to fulfil the duty binding all public powers and citizens to fulfil Constitutional Court resolutions, as a consequence of all of them being bound to the Constitution and to other laws (Art. 9.1 CE). In order to claim the criminal liability that could arise from the failure to fulfil such obligation, the legislator has foreseen another type of measure: obtaining a statement from private citizens [Art. 92.4.d) LOTC], which the

preamble of Public General Act 15/2015, manifesting the legislator's intent, refers to as a separate measure from the one we are now examining.

The legislator of the public general act of the Constitutional Court, further to the broad entitlement conferred by the reservation in favour of laws, foreseen in Art. 165 CE, has configured in Art. 92.4 b) LOTC a measure to suspend authorities or public officials from office, as a measure to ensure the full enforcement of Constitutional Court resolutions, by removing the party that is hindering their due observance, i.e. the authority or public official in charge of fulfilling the resolution that, however, is reluctant to do so and persists in this attitude. This necessary removal to stop the hindered fulfilment of the resolution will allow the Court to adopt the necessary and pertinent measures in each case to guarantee its effectiveness. Thus, no matter how serious the consequence of the suspension measure in dispute, for the authority or public official subject to the same, for the time necessary to ensure that the Court's pronouncement is observed, the purpose is not strictly of repression, retribution or punishment- characteristics of punitive measures- but respond to the need to guarantee the effectiveness and fulfilment of Constitutional Court resolutions, binding all public powers and citizens.

Consequently, there is no punitive component whatsoever in the measure to suspend from office authorities or public officials, foreseen in Art. 92.4.b) LOTC. Rather, it is a measure that the legislator has conceived, further to its freedom of configuration, as directly linked to the effective enforcement of Constitutional Court resolutions, consequently guaranteeing one of the basic components of its jurisdictional function, which may only be adopted after meeting the requirements and conditions foreseen in said Art. 92.4 b) LOTC. Irrespective of this explanatory purpose, the configuration given by the legislator of public general acts to the measure to suspend from office the authorities or public officials foreseen in Art. 92.4.b) LOTC may not be conceived as a wish to cause added damage to their circle of assets and rights due to an alleged illegality.

Once we have overruled the punitive nature of the measure to suspend from office, foreseen in Art. 92.4.b) LOTC, we need to dismiss the alleged infractions of Art. 25.1 CE and of the constitutional and statutory provisions regulating the granting of privileges.

16. The last grounds of material unconstitutionality on which the Attorneys of the Basque Country base their challenge of single article, section three, of Public General Act 15/2015, in the new wording given to Art. 92.4 b) and c) and 92.5 LOTC, consists of an infraction of Arts. 143 and 155 CE. They claim that Public General Act 15/2015 alters the "checks and balances" system conducted on Autonomous Communities by the State, forbidden by the Constitutional Court, insofar as the principle of autonomy is not fulfilled when generic and unspecified checks are established placing Autonomous Communities in a hierarchically subordinated position with respect to the State Administration (STC 76/1983, of 5 August, FJ 12). Specifically, the measures foreseen in Art. 92.4 b) and 92.5 LOTC are configured as devices equivalent to the one foreseen in Art. 155.2 CE, i.e. they materialise should this constitutional precept apply. In turn, the measure foreseen in Art. 92.4 c) LOTC is an ancillary action, entailing a check over the actions of an autonomous Administration that is incompatible with the principle of autonomy, as the Autonomous Community in question is replaced in its competences.

The State Attorney has also opposed these unconstitutionality grounds, as he considers that the measures gathered in Art. 92.4. b) and c) and 92.5 LOTC are not checks carried out by the State on Autonomous Communities, in breach of the principle of autonomy (Art. 143 CE), but are measures adopted by the Constitutional Court itself if its resolutions are not fulfilled, in order to comply with the constitutional mandate binding all public powers to the Constitution and all other laws (Art. 9.1 CE). This hierarchical subordination between the

State and Autonomous Communities does not arise if these measures are adopted, as the Court may also order them against the State.

17. An examination of this alleged unconstitutionality involves distinguishing, on the one hand, the joint reproach made against the measures of Art. 92.4. b) and c) and 92.5 LOTC due to a possible alteration of the State's checks over Autonomous Communities, to particularly include the device foreseen in Art. 155 CE; and, on the other hand, the complaint made in relation to Art. 92.4 c) LOTC, insofar as the State may substitute an Autonomous Community when exercising its competences.

a) The Attorneys of the Basque Government start off with the presumption of considering as equivalent the new enforcement measures made available by the legislator to the Constitutional Court, specifically those foreseen in Art. 92.4.b) and c) and 92.5 LOTC, and the device established in Art. 155 CE. However, those measures and this device rest upon different entitlements, without prejudice to the possible coincidence of any measures that may be adopted in one case or the other.

As we have already pointed out, the reservation in favour of public general acts contained in Art. 165 CE will generally include rules on the enforcement of Constitutional Court resolutions, to particularly include the measures challenged in this constitutional process, the purpose of which is no other than to guarantee the due and effective fulfilment of Constitutional Court resolutions, binding all the public powers (ATC 170/2016, FJ 6), protecting its institutional position and jurisdictional scope. The Constitutional Court itself, holding this power of enforcement, is the one to adopt, if its resolutions are not fulfilled and following the hearing foreseen in Art. 92.4 LOTC, the measures made available to it by the legislator which, if constitutionally suitable or viable given the circumstances existing in each case, it deems appropriate in order to guarantee effective fulfilment of its pronouncements.

In turn, the entitlement to adopt the "necessary measures" referred to in Art. 155 CE is the breach by an Autonomous Community of "the obligations binding it under the Constitution or other laws" or its conduct "in such a way as to seriously threaten Spain's general interest". It is the National Government, following a request from the President of the Autonomous Community, if unheeded and with the approval of the absolute majority of the Senate, which needs to adopt "the necessary measures to force the Autonomous Community to fulfil said obligations or to protect Spain's general interest".

It is consequently a case of measures with a different entitlement and which, consequently, contrary to what the Attorneys of the Basque Government are apodictically upholding, are therefore not equivalent. Those foreseen in Art. 92.4 b) and c) and 92.5 LOTC, which may also be adopted in relation to the State, the purpose and constitutionally legitimate reason for we have already referred to, in no way constitute devices for the State to control Autonomous Communities, and are exclusively aimed at guaranteeing the effectiveness and fulfilment of Constitutional Court resolutions, binding all public powers, we must repeat. In other words, Art. 155 CE regulates a specific means of direct coercion to fulfil constitutional and legal obligations and to protect Spain's general interest, clearly different from the enforcement measures available to the Constitutional Court in order to ensure the effectiveness of its resolution, covered by the reservation in favour of public general acts foreseen in Art. 165 CE.

b) Art. 92.4.c) LOTC gathers substitute enforcement as a measure that the Court may adopt to request the fulfilment of resolutions delivered in constitutional processes. In this case, the provision contemplates the possibility of the Court requesting the National Government's collaboration in order that it adopts the necessary measures, in the terms set by the Court, to guarantee that its resolutions are fulfilled.

Further to the foregoing, it is the Court which, amongst the range of measures made available by the legislator to handle any infringements of its resolutions, may decide, following the hearing foreseen in Art. 92.4 LOTC, to apply substitute enforcement of the resolution in question and, if this measure is decided, it may ask the National Government for its collaboration, to be provided in the terms set by the Court itself. Consequently, the Government does not discretionally decide to participate in this substitute enforcement, nor does it decide which specific measures are involved in the enforcement. The entitlement of this enforcement measure is not, as the claim seems to indicate, an alleged competence title held by the State but, as in the other measures foreseen in Art. 92.4 LOTC, the need to guarantee the effectiveness and fulfilment of Constitutional Court resolutions. Thus, no constitutionality-based reproach may be made against the legislator of public general acts due to the LOTC having expressly gather substitute enforcement as a means to enforce jurisdictional resolutions of the Constitutional Court, with a constitutionally legitimate purpose and which only be adopted ex Art. 92.4 LOTC once it is ascertained that the obliged party has a deliberate and persistent wish to not fulfil the binding resolution.

Finally, from the wording of the challenged precept we cannot infer that substitute enforcement necessarily means, as claimed by the Attorneys of the Basque Government, that the State is replacing an Autonomous Community in the exercise of its competences, consequently infringing the principle of autonomy. When overruling this pleading we will first take into account that substitute enforcement may be used if it is a suitable enforcement measure to fulfil the Court's resolutions, which the Court must appraise in each specific case based on existing circumstances; on the other hand, the application of this measure, in the same way as other enforcement instruments foreseen in Art. 92.4 LOTC, should be consistent with and always uphold constitutional provisions, in no event altering the institutional position of the State and Autonomous Communities, pursuant to the Constitution and Statutes of Autonomy, but merely the circumstantial adoption of the necessary measures, which are therefore proportionate for enforcement of the ruling; lastly, as already oft-repeated above, this Court is not entitled to pronounce itself in this constitutional process on the hypothetical application of the legal precept challenged, and should merely contrast its content with the constitutional precepts claimed to be infringed.

Consequently, based on the foregoing reasons, this last set of unconstitutionality grounds should also be dismissed.

R U L I N G

In light of the foregoing, the Spanish Constitutional Court, FURTHER TO THE AUTHORITY CONFERRED UPON IT BY THE CONSTITUTION OF THE SPANISH NATION,

Has decided

To dismiss this unconstitutionality appeal.

May this Judgment be published in the "Official State Gazette".

Issued in Madrid, on the third of November two thousand and sixteen.

DISSENTING OPINION submitted by Judge Adela Asua Batarrita regarding the Judgment passed in connection with appeal on grounds of unconstitutionality number 229-2016

In the exercise of the powers conferred upon me by art. 90.2 of the Public General Act of the Constitutional Court (LOTC), and while fully respecting the majority opinion of the Court, I hereby submit a dissenting opinion regarding both the grounds for and ruling in this judgment.

To summarise my basic objection to this judgment I have to say that, in my opinion, what we have here is a lamentable "abdication" in the exercise of constitutional jurisdiction. The Court majority which upholds the judgment has avoided delving deeper into various issues concerning which the appeal on the grounds of unconstitutionality obliged it to make pronouncement (1). Sterile attempts have been made to remedy the frivolousness of the argumentation offered by means of observations that are restrictive upon the literal sense of the legal rule being challenged and some general reminders of the subjective and temporal requisites envisaged therein (2). And when, in one or two cases, it broached the challenges formulated, the analysis of the judgment barely went beyond apodeictic or general statements (3).

1. The judgment with which I disagree scales down the breadth and seriousness of the flaws of unconstitutionality which the appeal on grounds of unconstitutionality alleges by means of a threefold strategy of avoidance of constitutional issues:

a) The first strategy consists of repeatedly assigning a "generic" nature to the defects alleged by the procedural representative of the appellant. In principle there should be nothing extraordinary about the criticisms of unconstitutionality which motivate abstract control of constitutionality by this Court being "of a generic nature", as "generic" means "common" and is in contrast to what is "special" or "exclusive". The judgment nonetheless seems to employ the expression in another sense, as a synonym of "not argued". One or two of the defects may not have been sufficiently expanded on in the brief guiding this proceeding; but in general, whether or not one agrees with them, the grounds for challenge are fully argued. The seriousness of them and the legal position occupied by the rule being challenged in the constitutional code obliged this Court to treat them with a due sense of responsibility.

b) The second strategy consists of considering "extremely ample" the scope for configuration of the law which the legislator of public general acts has when they legislate on the Constitutional Court and, correspondingly, inferring a virtual absence of limitations on their being able to avail themself of the content of the reservation regarding public general act which the Constitution establishes on this subject. This having been settled, the next step leads to the categorical statement that art. 165 of the Spanish Constitution (CE) offers cover, not just for general regulation of the Court's powers of enforcement (Legal Basis 9), but also for the inclusion of the specific measures provided for in Public General Act 15/2015 (Legal Basis 10).

This second strategy prompts two objections. On the one hand the most authorised of doctrine already warned some years ago against converting the above-mentioned freedom of configuration on the part of the legislator into some kind of "interpretative macro-criterion" as it runs the risk of confusing the object of the constitutionality case with the result of it. This is what happens in this case. Freedom of configuration on the part of the legislator of public general acts, the scope of which is precisely the object of the opinion on constitutionality that is being sought of the Constitutional Court, is being wielded by the latter as the interpretative criterion that determines the *ratio decidendi* of its decision, thereby confusing the object of control with the potential outcome of its opinion on constitutionality.

On the other hand, in all its argumentation the judgment seems to forget that the legislator of public general acts (also) has their constitutional limit. As with the other authorities set up under the Constitution the legislature derives its existence, its configuration and duties from the constitutional rule and is only legitimate when it is exercised in terms established thereby. As was said in Constitutional Court Judgment (STC) 49/2008 (Legal Basis, or LB, 3) and repeated in LB 3 of the judgment with which I disagree (although without drawing the appropriate consequences from it here), the freedom of the legislator of public general acts "is not absolute, but has substantive and procedural limits that originate not only from these constraints and the other precepts that make up heading IX of the Constitution, but in a systematic interpretation of the whole constitutional text. [...] their constitutional limits do not merely derive from a literal interpretation of the precept cited in each case, but from the *Constitutional Court model that is derived from both a joint interpretation of our Supreme Rule (the Constitution) and the constitutional principles that are projected upon it"* (emphasis added). As a result, it becomes "necessary to be watchful that the legislator of public general acts respects *the constitutional model of our jurisdiction*, since to a great extent the effectiveness of the constitutional order in all domains depends on this. Leaving the specification of this model in the hands of the legislator of public general acts and forsaking control of it would indeed not square with the intention of the constitutional convention to create a body to oversee constitutionality with ample jurisdiction and to guarantee its effectiveness" (emphasis added). STC 118/2016 of 23 June, LB 3, also appealed to the "model of constitutional jurisdiction designed by the constitutional convention".

The importance of the constitutional convention does not run out of steam at the time when the Constitution is published or when the Public General Act on the Constitutional Court (LOTC) is passed. Let us recall the words of STC 76/1983 of 5 August, LB 3: "The distinction between the authority framing the Constitution and authorities set up under it does not only operate at the time when the Constitution is established; the intention and rationality of the constitutional convention objectified in the Constitution do not only establish at source, but provide a permanent basis for, the legal and state order, and represent a limitation on the authority of the legislator. The role of the Constitutional Court, in its function of supreme interpreter of the Constitution (art. 1 of the LOTC) is to safeguard the permanent distinction between the objectification of the framers of the Constitution and the actions of the authorities under the Constitution, which can never exceed the limits and jurisdiction established by the former".

Accordingly the judgment does not contain any elaboration on the constitutional limits of the legislator of public general acts, or on the "constitutional model of our jurisdiction" either, which was left objectified in the constitutional text and which only the Constitutional Court can interpret, because it is only up to the latter to specify what the intention and rationality of the constitutional convention is in those cases that require interpretation.

This is not the place to expand on the characteristics of our model of constitutional jurisdiction. Yet it is not pointless to recall that it moves away from other European models of concentrated constitutional jurisdiction, as well as from the historical precedent that was represented by the Court of Constitutional Guarantees of the Second Republic. Thus, unlike what is considered in other constitutions, there is no provision in ours for specific jurisdiction of the Constitutional Court, for criminal prosecution, for example, or for constitutional or legal contravention in relation to the incumbents in constitutional bodies and higher bodies in the regional autonomies; neither is there for the banning of legal parties; nor to decide on the stripping of fundamental rights from those who abuse them in their activities against the constitutional system. Neither, for example, is there recognition for an action on the grounds of unconstitutionality that can be brought by citizens against the law (STC 137/2010 of 16 December, LB 3), as procedural legitimisation for filing an appeal on the grounds of unconstitutionality that is regulated in art. 162.1 a CE rejects this. The absence of jurisdiction regarding these matters referred to or lawsuits is not accidental, but rather a conscious and

deliberate decision by our constitutional convention who, bearing in mind the precedent in 1931 and the Italian and German constitutional models, opted for a certain constitutional model of jurisdiction which, just as it includes the essential areas of authority of constitutional jurisdiction as regards control of international rules and treaties, conflict resolution and guaranteeing fundamental rights, at the same time it excludes others.

The Constitution does actually, via "public general acts", allow the list for ordinary or principal jurisdiction to be extended [art. 161.1 d CE]. These public general acts may be the Public General Act regulating the Constitutional Court (LOTC) itself or later amendments thereof, as other public general acts. The limit on any broadening of jurisdiction of this kind is none other than respect for the Constitution itself, for which reason such public general acts cannot assign to the Court jurisdiction that implies an invasion of the jurisdictional scope that is attributed by the Constitution to other bodies, or else which impairs the distinctive character of the Court or distorts the jurisdiction provided for under the Constitution.

Instead of considering the limits of the legislator of public general acts, throughout the judgment it is repeated like a mantra that the constitutional convention did not wish it to be "a closed model [...], petrified and frozen in time and incompatible with the evolving nature of law", which argument is advanced unnecessarily in STC 118/2016 [unnecessarily because, as has been stated, the grounds for the admissibility of wider jurisdiction of the Constitutional Court are to be found solely and exclusively in art. 161.1 d CE, and not an open model of constitutional jurisdiction as claimed] and is now promoted to interpretative guideline status and extensively developed in LB 8. Even if this were correct, which, in my opinion, it is not, the statement about the "open" nature of the Spanish model of constitutional jurisdiction would be irrelevant in resolving the problem raised, since "open" is not the same as "unlimited". The judgment with which I disagree confuses the non-exhaustive character of constitutional regulation concerning the Constitutional Court with a nature that is supposed to be open of the objectified model in the Constitution.

The only thing that the judgment says regarding the Spanish model of constitutional jurisdiction is contained in a few expressions to be found at the beginning of LB 9, which concern the jurisdictional nature of the Constitutional Court and the power of enforcement as an "inherent quality" of the role of administering justice "as well as of constitutional justice". This is a serious conceptual error to start with which I understand that the judgment makes, as I had the opportunity to state during the plenary debate. *The enforcement of constitutional judgments is by no means a duty that is inherent to the list of spheres of jurisdiction of a Constitutional Court*, but rather a decision that the constitutional convention can take and, failing this, if the latter permits this, the legislator of public general acts, as is evident in the case of Italy (where no powers of enforcement of constitutional judgments have been provided for), Austria (where the Constitution commends enforcement to the President of the Republic or, when it is a matter of heritage, directly to the ordinary courts) and Germany (the Weimar Constitution commended enforcement to the President of the Republic); on the other hand as regards the Fundamental Law ratified in Bonn the constitution said nothing and this function was entrusted to the Constitutional Court itself after much discussion before and after enactment of the Law regulating the Constitutional Court; in fact the original bill for the law regulating the German Federal Constitutional Court was assigned to the President of the Republic and the enforcement of decisions of the constitutional courts in not only a few Länder is still assigned to the executives of these). If we examine the three States around us that have been referred to, which have the oldest and longest-standing concentrated control of constitutionality, it is clear that caution should be exercised when making "essentialist" statements. The afore-mentioned conceptual error was, apart from this, avoidable, because State Attorney had already noted the correct way to look at this: the Constitution does not exclude the possibility of having the power to enforce the decisions of the Constitutional Court being assigned to the Court itself. The constitutional problem therefore does not lie in whether the Constitutional Court can have the power to enforce its decisions, but instead in

whether the measures with which the new art. 92.4 LOTC seeks to guarantee enforcement actually respect the constitutional order.

c) The third strategy, which seems the most unsettling looking ahead, consists of restricting the scope of the control of constitutionality which it falls to the Constitutional Court to exercise. This is done by means of two lines of discourse that coincide in their intention to constrain.

The first line of discourse is based on the statement (LB 3) on certain alleged specificities of the LOTC as the object of the control of constitutionality, with the result that the singular nature of the object would mean less forceful control which it falls to this Court to exercise. In this sense it is claimed that “the control of the LOTC should be limited to cases where there is a clear and insurmountable conflict between the latter and the constitutional text” LB 3). Indeed this quote is from the already-mentioned STC 49/2008. Nonetheless, it would be an erroneous approach if we were to understand it as though a degree of contradiction or incompatibility with the Constitution were required to declare a rule of the LOTC unconstitutional which is greater than that which is needed to declare any other provision of legal standing unconstitutional. In contrast to what the judgment seems to insinuate, there are not two norms or strengths of control of constitutionality, one of which is stricter for the LOTC and another which is more lax for other laws and rules of legal status. Rather than this, one could justifiably defend the opposite view: that, because of the constitutional role of the LOTC and the institutional position of the Constitutional Court, control of unconstitutionality regarding the regulating law itself should be even more demanding, not less, even avoiding interpretative judgments, given that those whom it is directed at would not be ordinary appliers of law, but rather, as in this case, the very person responsible for the interpretation. The Constitutional Court was deservedly set up as the principal guarantee of the Constitution in relation to the legislator. The existence of the Constitutional Court as a special body charged with guaranteeing the supremacy of the Constitution with respect to the legislator is incompatible with an extremely deferential performance. A Constitutional Court is not established to invalidate laws only when their unconstitutionality is “evident”, because if a law were really “evidently” unconstitutional, one would have to suppose that any ordinary judge would be capable of noticing this, without the need for a separate constitutional jurisdiction to be set up.

The second line of discourse consists of repeatedly proclaiming the abstract quality of the control which the Court should carry out, the decision of which “must be outside any possible or hypothetical act of enforcement of the precept, and we should confine ourselves to abstractly verifying the precept appealed and the constitutional rules and principles that are thought to have been contravened” LB 7). The view in the judgment is explicitly repeated in LBs 7 and 10: “It shall be in connection with the specific measures that are sought or requested to be taken in a particular constitutional procedure for enforcement of the decisions vested in the latter, when it shall be appropriate to examine the viability thereof and, where appropriate, the constitutionality of their enforcement in said constitutional procedure [...]”; “It shall be in connection with specific enforcement of one or other of these measures to ensure the effective fulfilment of the decision vested in a certain constitutional procedure when it shall be appropriate to then examine the viability thereof”. The insistence on this argument seems to be designed to justify resistance to tackling the examination of a key aspect of the challenge: the potential impact of the measures contested on the activity and institutional position of the authorities that make up our constitutional State and, in particular, on the activity of the chambers of parliament. Put another way, the judgment insinuates that the challenge of the reform of the LOTC is preventive to the extent that it raises the possibility of a scenario where there is hypothetical application of the new enforcement measures to the authorities in general or certain authorities in particular. By employing this simple subterfuge it side-steps broaching discussion of whether the suspension from their duties of a President of Parliament or some other figure of authority is

compatible or not with the fundamental right to the exercise of public office (art. 23.2 CE) and with parliamentary immunity (art. 66.3 CE and the corresponding precepts in the various Statutes of Autonomy).

Firstly, the argumentation wielded by the judgment distorts the content of the Public General Act to the point of making it superfluous: neither the specific content of the enforcement measures being challenged nor the importance or nature of the position of public official or authority of the potential target of these measures appear to be relevant; the addressing of the problems of unconstitutionality is postponed to the moment when they are enforced. In the "abstract", nothing could be subject to assessment according to the judgment.

Secondly, and this is more serious, the meaning of abstract control of unconstitutionality is also distorted. The conflict between abstraction and specification of the control of constitutionality has been used (also by the Constitutional Court) to outline the distinctive meaning of the appeal on grounds of unconstitutionality and the issue of unconstitutionality. The interpretation expressed in the brief of an appeal on grounds of unconstitutionality is inescapably an abstract interpretation, as is befitting of an exposition that is separated from any clash of constitutional and legal statements with specific cases or situations. As regards the legal precepts that are challenged in this proceeding, the abstraction is virtually total and this may endow the direct action of unconstitutionality with a certain preventive nature: the legal regulation, which was enacted and published a year ago, still has not been enforced and all of the elements have to be identified by appellants in an almost hypothetical manner, as interpretative "proposals" or "suggestions" before the Constitutional Court. This is thus the peculiar sense of the appeal on grounds of unconstitutionality, and if these terms are not accepted and with this scope, then both the constitutional provision of an appeal on grounds of unconstitutionality and the subsequent assignment of the hearing thereof to this Court become superfluous. Not even a budget law, nor a criminal reform, or a law which regulates voluntary interruption of birth would be able to be the subject of a fully-fledged abstract control of constitutionality. One thing is that the abstract control of constitutionality cannot envisage and address all the hypotheses for application of the legislative programme of a legal provision (as that is what the issue of unconstitutionality is there for), and another thing is that this Court cannot control a legal regulation that has been recently published and enacted in its fullest sense by means of the appeal on grounds of unconstitutionality. If we focus on the case of this proceeding, in contrast to what the judgment suggests, the appellant entity is not presenting specific situations that are not considered in law, nor formulating obscure hypotheses involving clashes of rules and regulations, but instead is raising a constitutional issue of great importance which is immediately prompted by interpretation of the precept being challenged: whether the new authority assigned to this Court to suspend "from their duties the public authorities or employees of the arm of government responsible for non-fulfilment" pursuant to the new art. 92.4 b LOTC, and therefore the higher arms of State and the regional autonomies, including the parliamentary authorities thereof, is incompatible with certain constitutional precepts. The constitutional judge has all the necessary information to be able to decide about the constitutionality of the regulation being challenged. The response by the Constitutional Court to this challenge, something akin to "we'll cross that bridge when we come to it", is therefore highly unusual.

The judgment, to summarise, defers the opinion on constitutionality regarding the controversial enforcement measures to future acts of this kind, yet does not clarify how the Constitutional Court might pronounce on the constitutional issues involved in the phase of enforcing the law. In fact the only level of jurisdiction that can adopt the disputed enforcement measures is the Constitutional Court itself, for which reason it is not possible to discern what the constitutional procedure would be that might allow a fully-fledged control of constitutionality for the acts of enforcement and, through this, of the very regulation being questioned: both the issue of constitutionality and the appeal on grounds of unconstitutionality are *prima facie* discarded. As a result, it would only be possible for those

concerned to allege the potential unconstitutionality thereof in the context of the collateral enforcement issue itself, which is an accessory procedure the constitutional role of which is not to refine the legal system, or, alternatively, after its adoption, via a potential petition for reconsideration to the court against the decision that adopts the measure of a suspension from duties or substituting enforcement. Thus none of the channels mentioned offers an appropriate course for satisfying due process of law for the affected party in relation to enforcement of a law that is considered unconstitutional, for which reason the outcome of the abdication by the Constitutional Court as regards the full exercise of its jurisdiction will be that Public General Act 15/2015 is left improperly immune from a constitutional point of view.

2. The majority that backs the judgment cannot have failed to notice that the content of the enforcement measures being contested is of a delicate nature. Yet, instead of fully and squarely facing up to the judgment as the complaint required of it, it makes do with slipping in criteria that are restrictive and corrective in the literal vein of legal regulation and with offering reminders of the legal requirements, all with the intention of "ironing out" some of the problems with this and "softening" future enforcement of it, at least apparently so. Thus, on the one hand, it underscores the need to respect the subjective and time limits established in art. 924 b LOTC, which appears to be something that is self-evident that contributes nothing to the job of passing judgment on constitutionality which is what this Court is supposed to do. On the other hand, it says that "it is obvious that the Constitutional Court's authority for enforcement shall have to be modulated, within the range of instruments or measures provided for this by the legislator, according to the type of proceeding and the content of the ruling" (LB 7), without going into detail on either the source of this obviousness or the form and extent of the resulting modulation. It also adduces that the measure of a suspension from duties "may only be decided when it is suited to the purpose for which it has been envisaged by the legislator" (LB 14; and in similar terms with respect to substituting enforcement, LB 15), which criterion of suitability (once again) contributes nothing to a proceeding about constitutionality. One thing is for the enforcer of the law to interpret the law teleologically so as to avoid an absurd outcome, and another thing is the opinion on constitutionality regarding the legislative option as such which is required of the Constitutional Court and which does not boil down to an interpretation that merely readjusts the law in terms of its scope for enforcement. A Constitutional Court cannot hold back from going into constitutional issues by resorting to arguments that interpret ordinary lawfulness.

The following aspects can deploy greater power of restriction on future use of the measures in dispute: the requirement that the intention to fail to comply which triggers the measures provided for in letters "b" and "c" of art. 92.4 LOTC should be "deliberate" and "persistent" (LBs 14 and 17); and the factor whereby the measure of a suspension from duties shall have to "solely refer to the exercise of those duties the suspension from which is essential to ensure enforcement of the decision ruled" (LB 14). Nonetheless, these requirements are not envisaged in the actual legal precept being challenged, and neither may they be inferred from a systematic interpretation. In fact the insistence on the subjective and much repeated aspect of intention not to comply sits more easily with the typical description of an infringement (for example the crime of being in contempt of court) than the grounds for pursuing an enforcement measure: indeed, why could the constitutional court only pursue an enforcement measure given the existence of deliberate and persistent intent? Why should the supremacy of the Constitution only be guaranteed in such circumstances?

The only way for the Constitutional Court to have been able to impose these interpretative conditions would have to have been by employing the technique of conforming interpretation, the logical premise of which is, to be precise, the prior confirmation of a direct and head-on contradiction between at least part of the legal formulation and the Constitution. Only having confirmed the existence of a contradiction of this nature can one go on to get around it on a second occasion, if possible, by means of a conforming interpretation that narrows down the scheme of rules and regulations that is linked to the legal precept being

challenged in such a way that the resulting legal rule is not discarded from the code of laws. Thus, what the judgment accomplishes cannot be considered as an “interpretative judgment” in a pure sense that establishes the interpretative conditions under which a legal precept can remain within the legal system; in all circumstances this would be a “pretend” conforming interpretation, which does not identify itself as such, or is even taken through to the ruling. Such a “pretend” conforming interpretation cannot make up for the lack of examination into the constitutional issue which the law raises and which the appellant explicitly called for in the brief of its complaint.

3. When, by way of an exception, the judgment with which I disagree broaches examination of the seriously unconstitutional defects that are alleged in the appeal on grounds of unconstitutionality, it deals with them using superficial and apodeictic statements. This is the case with the challenge directed against the specific enforcement measures envisaged in letters “b” and “c” of art. 92.4 LOTC.

The controversial nature of the suspension from duties is analysed in LBs 12-15. The judgment *exclusively* resorts to the criterion of purpose or function to differentiate the penalty measures from others that entail limitations on rights. The analysis it conducts of the punitive nature or otherwise of the suspension from duties appears vey rudimentary: everything is reduced to attributing a non-punitive function to the suspension in an apodeictic and reiterative manner. There are no convincing arguments, at least as far as the signatory to this dissenting opinion is concerned. In my opinion the suspension from duties which is envisaged in letter “b” of art. 92.4 LOTC ought to have been declared unconstitutional and null and void because, given that it is not in keeping with enforcement measures while it is in fact consistent with punitive measures, it oversteps the authority conferred upon the legislator of public general acts by art. 165 CE. I will now go on to argue my position.

a) I must begin by pointing out that, in my opinion, vesting the Constitutional Court with powers of a materially punitive nature in relation to public authorities and employees, even if they relate to forms of conduct that concern failure to comply with the decisions of the Court, violates the very nature of the Constitutional Court as a jurisdictional body, the authority of which extends to the control of rules, conflict resolution and guaranteeing fundamental rights. Unlike what is laid down in the constitutions of other states, this Court does not have jurisdiction to try the incumbents in constitutional bodies, higher organs of the regional autonomies or other public authorities and employees punitively, or for constitutional or legal infringements. As I alluded to in reference to the Spanish model of constitutional jurisdiction, the authority of this Court consists of analysing the constitutional validity of rules with the standing of law, declaring who has jurisdiction which is disputed in relation to actions, decisions or provisions and to safeguard fundamental rights. It is not the duty of the Constitutional Court to conduct a thorough inquiry into the unlawful acts which might have been committed by the party in relation to whom a conflict of jurisdiction arises, nor to fit the legal system onto what has been determined in a constitutional judgment (Constitutional Court Decision, ATC, 726/1986 of 18 September, LB 2). Most particularly, it is not the duty of the Constitutional Court to pass judgment on whether personal actions conform with the Constitution and to impose suitable corrective measures for this, because these are duties that are precisely those that are proper to the bodies which the judiciary comprises. All of this is without forgetting the delicate constitutional implications that the suspension would have of authorities whose legitimacy derives directly or indirectly from the ballot box.

b) Having established the above, the decisive question is whether the measure of a suspension from duties that can be imposed on public authorities and employees of the arm of government responsible for failure to comply is of a punitive nature. This matter is far more complex than what the judgment suggests or would like to accept.

Constitutional jurisprudence regarding the punitive nature of measures that place restrictions on rights is relatively abundant. For this reason it is not acceptable that, given the gravity of a measure such as that of the suspension from duties of a government authority or employee, which implies interference with the realm of the fundamental right that is recognised in art. 23.2 CE, the analysis which is employed in the judgment is so poor.

Constitutional jurisprudence has not just settled with the function or purpose of the measure being the exclusive criterion for delineating the boundaries between sanctions and other measures that place restrictions on rights. It is aware that quite often more than one function overlaps in the context of a single measure. In the past, the Constitutional Court has devoted reams of pages to determining whether, for example, certain extra tax charges are punitive by nature and, whether they can therefore be subject to application of the guarantees in arts. 24.2 and 25 CE (please see, in an affirmative sense regarding such a punitive nature, SSTC 276/2000 of 16 November and 291/2000 of 30 November in connection with extra charges of 50% and 100% respectively). Tax surcharges are also in principle aimed at taxpayers meeting their tax obligations, but the Constitutional Court held that, beyond a certain level, such extra charges take on a punitive nature. according to STC 291/2000 (LB 10), the fact that a measure is aimed at the performance of an obligation does not preclude it from being punitive: “the main thing when we pronounce on the legal character of the surcharge is to check on whether it satisfies the purpose of punishing, as the fact that it might satisfy ends other than punitive ones does not rule out such a function just like that”. To be specific, therein it was stated, with respect to a surcharge of 100%, that “neither can it be considered that this performs a function of a positive stimulus that might exclude it from having a punitive character, and neither is this a means to force the performance of an obligation, nor, of course, is it tax-related in nature”. It is surprising that, in the eyes of this Constitutional Court, an apparently modest measure such as a 50% tax surcharge is of a punitive character and thus gives rise t6o application of the procedural and substantive guarantees that are described in arts. 24.2 and 25 CE and that, on the other hand, it completely rules out the punitive nature of the measure of suspension from duties, whether this be of a government employee or even an authority, that directly interferes with the exercise of a fundamental right that is potentially eligible for protection under the Constitution (art. 23 CE).

Furthermore, the jurisprudence of the ECtHR (which the judgment seeks to evoke by quoting from two of its pronouncements) is far more sophisticated than the judgment seems to think. To gain some idea of the complexity of the matter at hand it is enough to read through the pages which an outstanding work such as that of Christoph Grabenwarter entitled *European convention on Human Rights*. Commentary (Munich 2014) devotes to it (pages 108-113). As is well-known in the context of the ECHR determination of the “punitive” nature of a measure leads to application of the guarantees established in art. 6 of the ECHR. Besides the formal criterion (how state law categorises the measure at issue, which criterion is not useful when the nature of the measure is in dispute, as is the case here), the ECtHR’s so-called “Engel doctrine” definitely seeks recourse in the purpose (*nature of the offence, nature de l’infraction*). But the third criterion in Strasbourg’s jurisprudence is the nature and seriousness of the measure itself, in other words the prejudicial consequences that arise for the individual. Even though the satisfaction of any of the three criteria is sufficient, it is held that the second and third criteria are inter-related. In the jurisprudence of the European Court it is clear that certain measures entail application of art. 6 ECHR: for example the measures on the deprivation of freedom. Further problems of delimitation are raised by disciplinary measures and fines. Jurisprudence pays attention to the criteria of whether this adversely affects the individual: thus a fine of over 400 euros is considered to trigger application of art. 6 ECHR.

There is certainly no case in Strasbourg’s jurisprudence on a par with that examined here. The closest thing would be that dealt with in the judgment for *Le Compte, van Leuven and de Meyere vs. Belgium* of 23 June 1981: this was a disciplinary measure of temporary

suspension (three months in one case and fifteen days in another) from exercising a profession. The ECtHR approached the applicability of art. 6 ECHR from the "civil" standpoint rather than the "criminal" in that it was a "dispute" over "civil rights and obligations" (the consequences, as regards the applicability of the guarantees in art. 6 ECHR are similar). According to the Court, "Unlike certain other disciplinary sanctions that might have been imposed on the applicants (warning, censure and reprimand [...]), *the suspension of which they complained undoubtedly constituted a direct and material interference with the right to exercise the medical profession*. The fact that the suspension was temporary did not prevent its impairing that right [...]" (§ 4, emphasis has been added).

As a result, neither in the light of constitutional jurisprudence nor from the point of view of Strasbourg's jurisprudence could the alleged punitive nature of the measure of suspension be rejected in such an expeditious way. I will go on to set out what I consider should have been the criteria to bear in mind when analysing this matter.

c) The suspension from duties of government authorities or employees does not represent a personal provisional measure here, as jurisdictional authority to suspend, as with all provisional measures, comes in response to the need to ensure the effectiveness of any future pronouncement by the jurisdictional body (re all see STC 238/1992 of 17 December, LB 3); whereas, with regard to the measure analysed, pronouncement has already taken place. Moreover, it is not appropriate to order provisional measures that produce consequences that could never be derived from the final decision; this criterion, which was claimed by this Court in connection with ordinary jurisdiction in STC 39/1995 of 13 February, LB 4, is also directed at our own jurisdiction.

This cannot be considered to be an enforcement measure either, as it is not immediately and directly aimed at making effective the content of the ruling in a judgment. In strict terms, this is instead a corrective reaction of an individualised nature to a case of failure to comply with a jurisdictional decision, which, on the basis of its characteristics, is aimed at an end that is other than that typical of enforcement. Anyone who comes to be suspended from the post they are in ceases to be in a position to meet the obligations that derive from their post, or therefore to comply with the pronouncement contained in the ruling of a decision by the Constitutional Court. Thus the logic in suspension from duties does not lie here, in imposing the fulfilment of obligations deriving from jurisdictional decisions, but instead in the "repressive, retributory or punitive end" which is a characteristic of sanction measures (re all see STC 164/1995 of 13 November, LB 4) for refusing to comply or not producing compliance of a certain type. The repressive end translates into an extra element with respect to the obligation where it is added to non-compliance therewith: the extra element in the measure envisaged in art. 92.4 b LOTC is precisely the deprivation of entitlement to exercise a fundamental right (art. 23 CE) that it brings with it.

No obstacle to this is the understanding that, in a broad sense, as with the potential opening of a penal procedure [a measure envisaged in letter "d" of the same art. 92.4], this measure can also produce indirect and coercive effectiveness directed at compliance. Any penal or administrative sanction reinforces the effectiveness of an obligation, but the mere preventive and indirect effect that derives, firstly from legal provision thereof which is of a general nature and secondly from the warning of the potential imposition of it in the specific case, does not convert it into a means of enforcement of the relevant obligation in the legal and procedural sense. With respect to the measure of a suspension from duties, the words of STC 291/2000 (LB 10) apply: "neither can it be considered that this performs a function of a positive stimulus that might exclude it from having a punitive character, and neither is this a means to force the performance of an obligation". For this reason it can, in my opinion, be concluded that the measure envisaged in art. 92.4 b LOTC substantively represents a sanction, a punitive measure that is additional to failure to comply with the content of a

decision by the Constitutional Court. A sanctioning measure that must respect the procedural and substantive guarantees contemplated in the Constitution.

d) The conclusion on the punitive nature of the suspension from duties that was brought in by the Public General Act reform is corroborated via three considerations. Firstly, in the Spanish legal system there is no measure of suspension from duties, called by whatever name that it may be, which is not of a punitive (disciplinary) or penal nature. Secondly, the measure of suspension from duties is unknown as a means of enforcement in our procedural legislation. In the provisions which it devotes to the enforcement of judgments in its jurisdictional system, the Law regulating disputes under administrative law does not consider the measure of a suspension from duties of the public authority or employee of the arm of government that is responsible for non-compliance as a means of enforcement. Thirdly, and last of all, as far as I have been able to gather none of the systems of laws in the states around us that feature constitutional jurisdiction have generally envisaged (and nor have they ever adopted it according to general clauses assigning enforcement powers) the suspension from duties of government authorities and employees as an instrument for compliance with constitutional decisions.

e) The conclusion on the punitive nature of the suspension measure that is provided for in art. 92.4 b LOTC is not weakened by the characteristic of being limited time-wise and instrumental in its duration ("for the time needed to ensure observance of the pronouncements of the Court"). On the one hand, suspensions from work or duties that are covered in our legislation as disciplinary measures can have an objectively limited time aspect too (several days) if, for example, they are imposed for mild disciplinary misdemeanours. On the other hand, the suspension from duties envisaged in art. 92.4 b LOTC is not so much limited as undefined: its duration is not limited in advance as termination of it depends on the behaviour of third persons outside the control of the person suspended who are in a position and willing to comply with the pronouncements of the Court, which may mean a short while or drag on for a considerable period of days or months. Unlike what State Attorney adduces, the measure would not be lifted as soon as the intention not to comply of the person responsible ends, but instead as soon as the person complies who, given the scope of their authority, has the power to comply (at least if the order of assignment of authority envisages or enables a changing of who wields or exercises authority either in general or for such a case, which cannot always be assumed): if the person responsible for the failure to comply is suspended from their duties, they can no longer perform the activity that is required to comply with the pronouncement by the constitutional Court, irrespective of whether they cease to have the intention not to comply at some later time.

From the reasoning thusfar one can therefore infer that art. 92.4 b LOTC assigns powers to the Constitutional Court which are substantively punitive with respect to public authorities and employees for failing to comply with its decisions. These powers go beyond the punitive powers of an intra-procedural nature which are envisaged in the Public General Act itself (directly, in art. 95, sections 3 and 4, and by reference to what is provided for in relation to courtroom policing in the Public General Act on the Judiciary and in the Code of Civil Procedure, in art. 80), as the government authorities and employees that can be suspended do not necessarily have to be the same as the parties in the proceeding.

4. To sum up, in my opinion this Constitutional Court judgment has abdicated its essential task, which is to safeguard the Constitution, in the face of implicit "urgencies of State". Using argumentation that appears very deferential towards the legislator of public general act's freedom to configure, a ruling has been made which appears extremely "self-restricting" in relation to the Constitutional Court's jurisdiction, but which, in the final analysis and paradoxically, enormously increases its power of action in connection with the other constitutional authorities.

My disagreement is accompanied by a note of bitterness at it not having been possible to pass a judgment that might have been endorsed by all of the justices, given that priority, above all other considerations, was accorded to haste in approving a judgment of dismissal of appeal.

Madrid, this third of November, Two Thousand and Sixteen.

DISSENTING OPINION submitted by Judge Mr. Fernando Valdés Dal-Ré regarding the judgment passed in connection with appeal on grounds of unconstitutionality number 229-2016

I. As I had the opportunity to state during the sessions to deliberate on this constitutional proceeding, I beg to differ from the decision finally made, although I also wish to state that I distance myself in equal degree from the reasoning behind the decision itself. Within the context of the mandatory respect towards the majority opinion of my colleagues and for reasons that shall be set out below, my understanding is that the judgment that rules on the aforementioned appeal on grounds of unconstitutionality should have declared letters "b" and "c" of art. 92.4 of Act 15/2015 of 16 October on reform of Public General Act 2/1979 of 3 October (LOTC, or *Public General Act of the Constitutional Court*) unconstitutional and null and void for the passing of decisions by the Constitutional Court to guarantee the rule of law.

II. 1. Before setting out the reasons for such two-fold disagreement, I feel obliged to draw attention, even though the assertion might be described as unnecessary so obvious is it, to the exceptional importance of issues directly raised in the appeal on grounds of unconstitutionality that was brought by the Basque Government, which importance is very readily appreciable from a dual and combined standpoint. In immediate terms and from a micro aspect, this proceeding goes to the very core of the Constitutional Court's legal framework, as it entails a powerful and extensive broadening of its authority. Yet the great significance of it does not merely derive from this internal standpoint, to which are naturally wed a whole host of external consequences, given the extent of the powers which the Spanish Constitution (CE) confers upon it. There is also a second angle on top of this which, without any shroud of pomp at all, affects the very foundations of the democratic model of State which art. 1.1 CE proclaims, and which the articles thereof see to expanding on in their several, yet indivisible, facets.

The appellant has not only not side-stepped the angle above, but rather done the opposite: they have intended it to go on record right from the opening pages of their appellate brief (which are those that are given over to identifying the "object and aim" of the law being challenged) and they state that the reform of the Public General Act on the Constitutional Court seeks to be part of "the framework of rules that enshrine the principles and values of the legal and political organisation of the State", thereby giving rise to a "serious disruption of the system of a balance of powers" and affecting the "model of a State of Autonomic Regions that is configured on the principle of political autonomy and a separation of powers" (p.3).

This was not the methodological premise wielded by the majority opinion, however, which upholds the judgment that I distance myself from and bases its argumentation on an autistic approach worthy of criticism. Whatever the case, in my opinion this decision to keep the reasoning within the internal orbit of the Constitutional Court without the slightest concession to opening up transversal dialogue is due to intended evasion; in other words the intention is to avoid a situation where the introduction of problems associated with the constitutional model of State into the constitutional examination of the alleged complaints manages to jeopardise, or at least, shake the judgment that the law challenged is a proper one. Aside from the observations which immediately need to be made, the constant and repeated allegation that the judgment makes abstract control the mandatory norm for passing judgment on the constitutionality of those precepts in the LOTC that are the subject of appeal represents sound evidence of the reasoning that lies behind the controversial methodological approach taken, which, in this aspect ends up producing erroneous and frivolous argumentative support for the ruling.

2. The entire basis for my decision to disagree runs through three broad central thematic strands which, despite their diverse nature — one is procedural and the other two are

substantive — interact with and complement each other. They are: the lack of, or in the best case scenario, the insufficient argumentation which the brief of the appeal on grounds of unconstitutionality suffers from with respect to certain alleged contraventions; the decision by the constitutional convention to refer the elements that form the framework of the Constitutional Court to an extremely free legislative hand on the part of legislator of public general acts, and finally — and this is a central theme which has already been referred to — the parameter of constitutionality that it seems is obligatory to use in this proceeding, which is little else than an abstract control that acts with a dual scope: in a negative sense it serves to prohibit any ruling on specific applications of the legal precepts being appealed, while in a positive sense it calls for checking the content of these precepts against the passages in the Constitution the contravention of which is being invoked.

3. The first of the central themes supporting the legal reasoning is, as has been pointed out, the lack of argumentation, or inadequate or defective argumentation in the appeal brief. This is the case, for example, in Legal Basis (FJ) 7 c), where, having referred to "the general nature of the allegations" with regard to the first of the substantive grounds for unconstitutionality (arts. 161, 164 and 165 in relation to art. 117.3, all in the Spanish Constitution), there is a reminder (which is backed up by citing an abundance of Constitutional Court judgments) of established constitutional jurisprudence on the need of the appellant to argue with regard to the factual validity of the alleged contravention. A similar argument is put forward in Legal Basis 10, where "based on the general nature of allegations" submitted, "the alleged adulteration of the constitutional model of jurisdiction designed by the Constitution (...)" is rejected. A similar affirmation is brought up again in paragraph two of Legal Basis 10 c) with the intention of rejecting the contravention of the principle of a separation of powers on account of the precepts in the LOTC that are being challenged "on the basis of the allegations being general". The final paragraph of the same Legal Basis persists in rejecting the idea of the constitutional model of justice being affected ex art. 164 CE because the allegation "lacks any line of argument at all". Anyway, without seeking to allude to all of the occasions on which this shortcoming is cited, Legal Basis 12 repeatedly makes the point that the appellant "fails to provide sufficient argumentation" for the grounds under scrutiny.

Regardless of whether the various complaints against the reform of the LOTC are consistent to a greater or lesser degree with the constitution, I do not agree with this incessant criticism of the appeal at hand. This is compounded by the very lengthiness of the appellate brief which, apart from its introductory section, runs to over fifty pages in providing the requisite argumentation for the five grounds of unconstitutionality which it develops, where one is procedural and the other four are substantive. But, above all, this is reinforced by the lengthy submission by State Attorney that does not make even the slightest reference, either direct or indirect, to any such objection, which, to the latter's credit, is not normally ignored when it does actually arise.

This first central theme is, in my opinion, actually part and parcel of the methodological premise which, as I have already stated, informs the entire reasoning behind the judgment. The references to "general allegations" suggest this.

Against this backdrop, and apart from this, it remains surprising that the judgment which I disagree with incurs in the same failing that it attributes to the appellants on several occasions. Legal Basis 12 provides a good example of such a contradiction. This Legal Basis actually claims to tackle the constitutionality of the measures envisaged in arts. 92.4, letters b) and c), and 92.5 which the appellant ascribes with a punitive character with the subsequent contravention of art. 25.1 CE. Having stated the object for consideration the judgment says that "the lawyers for the Basque Government only argue that the measure of suspension in their duties of public authorities and government officials is punitive and say nothing in this regard in connection with those measures envisaged in art. art. 92.4 c) and

92.5, which means that only that measure can be the object of our ruling (...)". Nonetheless, the majority opinion in this decision fails to notice that the alleged contravention of the principle of punitive legality is confined by the appellant themself to Arts. 92.4.b) and 92.5 LOTC, as may be inferred without any room for doubt from the title and content of section six of the brief for the appeal on grounds of unconstitutionality. Furthermore, the fact is that the judgment approaches what the brief referred to describes as two separate grounds as only one ground for unconstitutionality, where the second is the one that relates to the contravention of arts. 71 and 103 CE in connection with Art. 24 CE, which is invoked by Art. 92.4.c) LOTC.

What appears even more surprising is the manner of approaching and deciding on this last complaint, involving Arts. 71 and 103 CE, which is resolved by the technique of merely referring to the arguments wielded to reject the contravention by Art. 92.4.b) LOTC of Arts. 161 and 25.1 CE. To use the terse phrasing employed in the judgment "having rejected the punitive nature of the measure of suspension of duties in art. 92.4.b) LOTC, the claimed contraventions of art. 25.1 CE and of the constitutional and statutory precepts that regulate the legal concept of immunity must be dismissed" (final paragraph of Legal Basis 15). The niggardliness and frivolousness of such reasoning contrasts sharply with the lengthy argumentation used by both the appellant as a basis for their criticism (pp 51-62) and by State Attorney to reject the contravention claimed (pp 40-50). Yet, it is, above all, evidence of a double and unfair standard in dealing with consistency of argumentation: whereas the absence thereof in the appellate brief is adjudged with notable severity ("overly general allegations", "apodeictic argumentation" or a lack of "argumentative force"), such a lack in the context of the judgment is assumed to be in accordance with the circumstances of the case being examined.

4. The second of the central themes that form the backbone of the reasoning in the sentence with which I disagree, this time of a substantive nature, affirms a value judgment regarding the choice of policy on law that is used by the constitutional convention in regulating the structural and structuring elements of the Constitutional Court and, to be precise and as regards what might be useful to highlight here, the enforcement of the decisions it makes.

There can obviously be no objection to the summary of the jurisprudence regarding this matter in Legal Basis 3 a), which could be boiled down to two basic manifestations, which might in passing be understood to be applicable to several other institutions, agencies or bodies covered by the constitution. The first of these lies in the freedom to configure which is enjoyed by the organic legislator when establishing the legal framework for the Constitutional Court. This is a kind of freedom though (and this is the second manifestation of this jurisprudence) that cannot be described as absolute, it is instead the opposite, and, owing to the requirements of constitutional supremacy, it has various procedural and substantive limits that derive not only from the means of protection established in Art. 53 and in the other precepts in Title IX of the CE, but also "those determined via systemic interpretation of the whole text of the Constitution".

Having thus stated the essential components of the constitutional doctrine which delimits the Constitutional Court's legislative powers of prescription, the judgment with which I disagree either fails to keep to, or, if one prefers to couch the notion in other terms, interprets, this doctrine in an especially lax manner when it sets about analysing the new legal system for carrying out the decisions that are made by the ultimate interpreter of the Constitution.

A blatant example of the laxity with which the judgment interprets the scope attributed by the Constitution to the legislative power of the legislator of public general act is appreciable in Legal Basis 9 where, after declaring (in a statement that cannot but be agreed with) that the silence on the part of the CE as regards enforcement cannot be understood as stripping the Constitutional Court of its powers of enforcement and watching over compliance with its

decisions, it says, without any kind of restriction or limitation at all, that “the way or manner in which such enforcement may be expressed (...), as well as the enforcement of the means or measures made available to it to ensure compliance with and the effectiveness of such decisions” is a matter that “the constitutional convention has left at the disposition of the legislator of public general act of the Constitutional Court ex art. 165 CE”.

This is a theme that is repeated, with even more vehemence and looseness in Legal Basis 10 a), where, after maintaining that Arts. 161.1.d., 162.2 and 165 CE confer upon the Constitutional Court’s legislator of public general act “extensive authority to ultimately determine the various different elements that configure it”, it affirms that “in the reservation regarding Public General Act in Art. 165 CE, *the extent and leaning towards completeness of which prevents restrictive interpretation of its substantive scope*” (my italics) generally covers “regulation of the enforcement of Constitutional Court decisions and, in particular, the measures envisaged to ensure the compliance with and effectiveness thereof”. Moreover, with the obvious intention of dispelling any doubt about the huge liberty of legal configuration for the matter under controversy, the judgment closes the argumentation above in the following manner: “The specific measures considered in art. 92.4.b) and c) and 92.5 of the LOTC represent, as do the others, instruments or powers placed at the disposition of the Court by the legislator to guarantee proper and effective compliance with all of its judgments and other decisions”. To conclude this reasoning, the decision with which I do not agree will not hesitate to resort to a circular argument: the measures being challenged are constitutional given that their aim, which is “to guarantee the institutional position of the Constitutional Court and the effectiveness” of its decisions, “has a constitutionally legitimate basis”.

Aside from this, Legal Basis 10 b) takes care of removing any shred of doubt about the scope of the contention being defended, and confirms that “no constitutional precept explicitly prevents (nor may any prohibition of such kind be inferred from the principles of our model of constitutional jurisdiction) the legislator of public general act ex art. 165 CE from being able to establish any ancillary proceeding that is intended to watch over the effectiveness of, and compliance with, the resolutions of the Court or from being able to place at the disposition of the latter any instruments or measures that are aimed at such an end, or impedes any proceeding from being able to be directed at, *or such instruments or measures theoretically from being taken in relation to, higher organs of State and the regional autonomies when they are the object of compliance with such decisions*” (my italics). While the first part of such transcribed confirmation does not require any further factual grounding, the second part is invoked using apodeictic language, where it appears debatable whether the conformity of the second part with the constitution can be derived mechanically from the precision of the first part, even if one accepts the hypothetical scenario evoked dialectically. In this aspect the consequences of the methodological premise behind the reasoning in the judgment again come to the fore, in particular those which originate from the refusal to make a systematic interpretation of the precepts challenged using the precepts that define the democratic model of State.

5. The third and last of the central themes which frame and support the entire argumentation in the sentence with which I disagree is the norm for passing judgment that applies to the appeal on grounds of unconstitutionality being examined here, which consists of an abstract control; i.e. one that is “dissociated from any specific consideration regarding the application thereof to a specific factual circumstance” (Legal Basis 7 b). This so often mentioned norm for passing judgment consists, as is expressed in the recently cited Legal Basis and is repeated on several occasions, of verifying the fit between the precepts contravened “and the constitutional mandates and principles allegedly contravened outside the application of these to specific cases” (Legal Basis 10 c).

Naturally, resorting to this norm for constitutionality to substantiate this proceeding is not debatable as it emerges as part of the mandatory parameter for constitutionality in order to confirm, within the context of appeals on grounds of unconstitutionality, the regularity or fit of unique legal rules that have been established by provisions that rank as laws with legislative propositions mentioned in the CE. The fact that I distance myself from the majority opinion that supports this decision does not therefore derive from the format or type of the norm for passing judgment but rather, and this is something quite different, from the specific application made thereof.

The decision which the judgment makes regarding the alleged contravention by art. 92.4.b) of the LOTC of a whole host of constitutional principles and precepts provides a good example of the deflective use which the judgment makes of abstract control. The judgment indeed considers the LOTC precept referred to as constitutional, refusing, under cover of the type of control imposed, to verify the constitutionality of the whole regulatory statement of the enforcement measure established therein. The doubts over constitutionality do not arise from the authority conferred upon the Constitutional Court to abstractly order a suspension measure but, in equally abstract manner, from that bestowed to adopt a specific suspension measure in the exercise of its duties which applies to the authorities who are attributed with non-fulfilment of an exceptional decision.

It is within this legislative context where recourse to the norm of constitutionality being examined should have brought into play “the constitutional principles” that are alleged to have been contravened; and to be precise and to invoke those which are most relevant, the principle of separation of powers, parliamentary immunity and autonomy, the political autonomy of the regional autonomies or, anyway, the institutional position of the Constitutional Court within the structure of the democratic model of State. It is not a question of looking at whether, in the hypothetical situation where at some particular time the Constitutional Court should find itself in circumstances of suspending one of the highest constitutional bodies from exercising its duties, the measure might turn out to be constitutional or not.

Yet, with this ruled out, the judgment’s use of a parameter for constitutionality of the predicable nature of abstract control might have forced a judgment to be made on the sphere of application, both subjective and objective (where such a judgment would have had to be equally abstract), of the notion of authority *ex* art. 92.4.b and as a result and by reason of such verification, whether this conforms with the constitution.

For these reasons the insistent claims in the decision with which I disagree that it will be “in connection with the specific enforcement of some or other of the measures” subject to dispute “when it will be right to then examine the feasibility thereof” (for example Legal Basis 10 b) appear, in the context wherein the reasoning takes place, clearly erroneous, which arises from using a partial and incomplete conceptual approach.

III. The criticism of the way of approaching judgment of Art.92.4.b) LOTC having been set out, the reasons which to my understanding support this precept being unconstitutional insofar that it regulates the enforcement measure that involves the suspension from duties of the public authorities or officials of the government body responsible for failure to comply are those which are described in the dissenting opinion framed by Judge Adela Asua Batarrita, which I officially second as regards this point.

IV. 1. At the same time I disagree with the majority opinion in the judgment of the constitutionality of Art. 92.4.c) LOTC, which rejects the appeal on the basis of argumentation that above all hinges on the different legitimising basis for this mechanism of enforcement by substitution measures and which is described in Art. 155 CE. Particularly striking here is the already mentioned general inadequacy of argumentation in the judgment when looking at a

matter that is extremely delicate since it affects the balance of the constitutional architecture and the very place occupied by the Court within this. All the doctrine reminds us of the extraordinary importance of the clause to be found in Art. 155 CE, and from this we have been told that it brings together the whole constitution as regards the relationship between the central and peripheral powers of State and that it contains the most important political decision of all those envisaged in our Constitution.

Without at any time abandoning the abstract control that typifies the appeal on the grounds of unconstitutionality, yet without forgetting that this control does not exclude but instead, on the contrary, obliges a systematic interpretation of the Constitution, for that compelling reason alone the Court should have gone into an in-depth analysis in its full context of the underlying constitutional problem which this precept poses in the reform of the LOTC.

2. Had they done this like that, with all due rigour, those aspects present in regulation of the substituting enforcement measure that could not be considered to be compatible with the Constitution would have emerged, or which, would at least have to be considered inapplicable bearing in mind the nature of the proceedings assigned to the Constitutional Court.

a) First I will pause to consider the subjective aspects. The substituting enforcement measure might affect all kinds of “institutions, authorities, government officials or private individuals” to whom the prior order is addressed according to the first paragraph of Art. 92.4 LOTC. Nonetheless, such a universal focus is only apparently or partially unconstitutional if one notices the substantive limits that arise from a systematic interpretation of the whole set of issues in constitutionality.

The circle comprising the institutions and authorities that are part of the Spanish Parliament, such as the Judiciary, cannot be affected at all by the substituting enforcement measure without transgressing a first constitutional limitation. All the powers of State emanate from the people of Spain (Art. 1.2 CE) and their constitutional authority cannot be tampered with or diminished via the substituting enforcement measure entrusted to the executive, because this implies questioning the principles of parliamentary immunity and autonomy (Arts. 66.3 and 72 CE) and judicial independence and irremovability (Art. 117.1 CE).

The position of the autonomic parliaments is safeguarded in similar terms in the Statutes of Autonomy (to cite only those which are directly affected by this appeal, arts. 25.2 and 27 EAPV, the *Basque Country Statutes of Autonomy*). These rules form part of the corpus of constitutionality and in particular are not open to amendment by any other means than that envisaged in the Statutes themselves as a result of the covenanted nature of the drafting and reform thereof, which endows them with a unique rigidity which is established to guarantee the right to autonomy (STC 247/2007 of 12 December, Legal Basis 6).

Within the sphere of the executive, the mention of “authorities” and “government officials” also presents one or two imprecisions or ambiguities. Government officials are subject to “the Constitution and the rest of the legal system” (art. 9.1 CE), but they also act subject to the principle of hierarchy (art. 103.1 CE). It is therefore hard to conceive of a government official autonomously failing to comply with a constitutional judgment without the “authority” which they are under initiating disciplinary proceedings and/or taking the appropriate steps to remedy such an anomaly. Otherwise the top level identified as “authority” would be that which would ultimately appear as the party responsible for non-compliance.

The mention of “private individuals” appears superfluous here and embedded in the legal precept with a deliberate focus on converting a private subjective orbit of such a description into something universal. Quite frankly it is hard to imagine a case where the substituting

enforcement measure that is regulated in art. 94.2.c) of the LOTC could be applied to private individuals.

This exercise of successively boiling down the apparent broadness of scope of those to whom the substituting enforcement measure is directed thus leads one to understand that the measure in fact has a far more limited subjective scope: the “institutions” or “authorities” who are not part of the legislature or the judiciary. And here it is appropriate to add a further nuance: that these do not fall within the orbit of “The Government of the Nation”, given that this is the exact body destined, according to Art. 92.4.c) LOTC, to collaborate with the Constitutional Court in ensuring compliance with its decisions. The subjective scope of the measure is thus confined to the institutions or authorities that belong to the regional autonomies or local entities.

Nonetheless and in the light of the provisions of local legislation, specifically the exceptional mechanisms that are regulated in arts. 60, 61 and 67 of Act 7/1985 of 2 April Regulating the Bases for the Local Regime, it also seems reasonable to rule out the local authorities being the real object of the enforcement measure since the legal system already has sufficient mechanisms to ensure regular compliance with the legal system as a whole, including the dissolution of bodies at local corporations “in the case of management that seriously damages the general interests and which involves failure to comply with their constitutional obligations” (Art. 61.1).

Thus stripped of their fictitiously broad extent, one can only conclude that in an initial adjustment of constitutionality those who are the object of the substituting enforcement measure can be nobody other than the institutions or authorities that belong to the regional autonomies, with the unavoidable exception of the legislative assemblies out of respect for the principles of parliamentary immunity and autonomy.

b) Determining the objective scope of substituting enforcement with any degree of accuracy would have called for an interpretative exercise akin to the previous one above.

Substituting enforcement has no place as a measure to remedy non-compliance with the judgments that rest on proceedings involving the declaration of unconstitutionality which are regulated in Title II LOTC (appeal on grounds of unconstitutionality and matters of unconstitutionality), since allowing the latter entails the declaration as unconstitutional and null and void of “laws, legislative provisions, or acts with force of law” (Art. 31 LOTC) or “a rule which ranks as a law” (Art. 35.1 LOTC). This brings about the expulsion from the legal system of the rule that is held to be unconstitutional; any action carried out to apply it would be radically null and void and open to control by general court jurisdiction. The existence of cases of deferred nullity, which are exceptional, does not contradict this contention. Some recent judgments (from STC, 164/2013 of 26 September) have, in view of the attendant circumstances, additionally set a deadline for the legislator, after which the declaration of nullity will come into effect.

“Indirect routes” have not been successful either, when there have been jurisdictional disputes arising from enforcement of a judgment passed in an appeal on grounds of unconstitutionality. This is highlighted in judgments after STC 150/2012 of 5 June where admission was refused of both the negative conflicts of jurisdiction and the ancillary enforcement proceeding that were brought up by State Attorney. In the refusal of admission for the negative conflict of jurisdiction, Constitutional Court Decision (ATC) 207/2014 of 22 July recalled that “all conflicts of jurisdiction share in common the fact that there is a jurisdictional dispute, but not any disagreement between the State and the regional autonomies, but rather only those which concern the interpretation that should be given to constitutional or statutory rules or those which demarcate jurisdiction between the State and the regional autonomies, as it is only in this case that they are of constitutional relevance (...)

whether the issue at hand involves ownership itself of jurisdiction or the way in which it has been exercised or not even come to be exercised, there must be a discrepancy over the interpretation of the rules attributing jurisdiction in the constitutional corpus (...). This is intended to prevent the access to the Constitutional Court of claims that have not been addressed for reasons outside jurisdiction or on account of disputes that, though of a jurisdictional nature, nonetheless do not belong to the jurisdiction of the Constitutional Court. Therefore the mere presence of issues that are strictly factual or even legal and in some way linked to the system for allocating jurisdiction, but where the solution does not require an interpretation of jurisdictional rules, does not make it possible for an apparent jurisdictional dispute to become transformed into a genuine jurisdictional dispute (...). In other words, there is no place in such disputes for those controversies that are over substantive or even legal issues which are in some way linked to the system for allocating jurisdiction but where the solution does not require an interpretation of the jurisdictional rules in the constitutional corpus" (Legal Basis 1). On the other hand, ATC 120/2015 of 7 July which refuses admission of the ancillary enforcement proceeding in STC 150/2012 recalls that the pronouncement of unconstitutionality is of a merely declaratory nature and does not affect the specific situation that makes up the substrate of the constitutional proceeding in question.

Reviewing petitions for constitutional relief, the ancillary proceeding in Art. 92 LOTC is also dominated by the essential requirements of subsidiarity of the jurisdiction of amparo (the protection of constitutional rights), as is recalled by ATC 65/2015 of 13 April. It is on repeated occasions constitutional doctrine (ATC 1/2009 of 12 January, Legal Basis 3, among several others) that "the sphere of the hearing for the ancillary enforcement proceeding envisaged in Art. 92 LOTC 'is exclusively confined to determining whether the Constitutional Court judgment passed on the occasion of a petition for constitutional relief has been correctly enforced, and it may not in any way be extended to any other claims maintained by the appellant before the ordinary court system' (AATC 52/2004 of 23 February, Legal Basis 2 and 323/2008 of 20 October, Legal Basis 2)". At any event, in the case of decisions that have granted court protection with respect to other decisions by judges and courts (Art. 54 LOTC), the substituting enforcement measure could not be applied, out of consideration for the already mentioned irreconcilable limitation of judicial independence and irremovability (Art. 117.1 CE).

With regard to enforcement of a positive conflict of jurisdiction, the Court has already pronounced its position with the reform of the LOTC already in effect. It is worth reproducing the key parts of this opinion due to its proximity to the heart of the constitutional problem raised by art. 92.4.c) LOTC. STC 95/2016 of 12 May states that as a general rule "decisions that put an end to positive conflicts of jurisdiction do not require enforcement measures. As we stated in STC 110/1983 of 25 November, Legal Basis 2, the aims in a positive conflict of jurisdiction are twofold: 'to determine the constitutional legitimacy or illegitimacy of the specific provision or decision in question', and on the other hand, 'to interpret and establish the order of jurisdiction and in determining what jurisdiction belongs to what parties and thereby go beyond merely resolving the specific case that has originated the conflict or dispute'. For this reason Art. 66 LOTC envisages two sides to the constitutional judgment in the event of a conflict. The judgment must 'decide, where applicable, to void the provision, decision or acts which originated the conflict to the extent that they might be flawed as regards their jurisdiction'; and it must, moreover, make more general pronouncement in relation to the order of jurisdiction, since, as the same article states in paragraph one thereof, 'the judgment shall declare to whom the jurisdiction in dispute belongs'. The decision that puts an end to the positive conflict of jurisdiction shall be binding on all of the public authorities and shall be fully effective in relation to all of them, as is indicated in Arts. 164.1 CE and 61.3 LOTC. According to the doctrine of this Court, the special binding force which judgments by this Court have with regard to all the public authorities is not limited to the content of the ruling, but instead extends to the related legal grounds, in particular to

those which contain the criteria that lead to the *ratio decidendi* (STC 158/2004 of 21 September, Legal Basis 4). As a result, as the reasoning stated in the aforementioned STC 110/1983, 'once there has been a declaration of to whom the jurisdiction in question belongs, its controversial nature disappears, for which reason the exercise of such jurisdiction shall, both with regard to the provision which gave rise to the conflict and on subsequent occasions when the jurisdiction might be exercised, be left assigned to and reserved for the holder thereof as indicated by the judgment according to the interpretation which the court makes of the rules that regulate how jurisdiction is distributed' " [Legal Basis 8.a)].

c) Limitations that supplement those above arise from the very nature of the thing. Firstly, and to be found to lend itself to possible substituting enforcement, the ruling in the judgment would have to contain an affirmative duty, which is an area that is characteristic of such a measure in ordinary procedural legislation.

Secondly, the decision that triggers application of Art. 92.4.c) LOTC would have to constitute non-fulfilment that went beyond those situations that might be described as ordinary: the anomalies or delays detected in certain conflicts of jurisdiction where, despite the extremely long delays in enforcing some of its judgments that it has been possible to note, the Court has called upon the parties to settle their differences without delay, yet it has rejected assuming direction of the enforcement through recourse to the courts. A good example of this is the already cited STC 95/2016: "On occasions when it has faced the persistence of anomalous situations of non-conformity with the Constitution, this Court has declared that the public authorities have a duty to be faithful to the Constitution (in STC 247/2007 of 12 December, Legal Basis 4, such a duty was stated to be "a mainstay of the functioning of the autonomic State", and in STC 42/2014 of 25 March, Legal Basis 4, it was singled out in relation to the Legislative Assemblies of the Regional Autonomies) or it has declared the principle of loyalty to the Constitution which is binding on the public authorities (in SSTC 209/1990 of 20 December, Legal Basis 4; 158/2004 of 21 September, Legal Basis 7, and 245/2012 of 18 December, Legal Basis 26, where this was highlighted in connection with the central institutions of State). More specifically, in STC 208/1999 of 11 November, Legal Basis 8, we stated "the necessity that, for the sake of a comprehensive order of jurisdiction that can be concluded from the Constitution and the Statutes of Autonomy, the persistence of anomalous situations should be avoided where jurisdiction is still being exercised by the State that is not within its remit", since we understood that "the State of Autonomies that is configured by our Constitution shall not, as regards this matter, come to be the finished article to the extent that the order of jurisdiction that can be concluded from the Constitution and the Statutes fails to achieve full materialisation". The words are fully valid and sufficient to respond to the claim brought by the regional autonomy instigating the conflict" [Legal Basis 8.b)].

3. Having set out the successive subjective and objective reductions which, for various different reasons, should be applied to the theoretical scope of the substituting enforcement measure in art. 94.2.c) LOTC, or, put differently, having stripped the measure of its fictitious abstract and general character, its unacceptable overlapping with the provisions of art. 155 CE becomes clear.

Indeed the true core sphere of application of art. 94.2.c) LOTC, this time stated in a positive way, would reveal its naked purpose without beating about the bush: its aim is to replace the institutions or authorities in the executive of the regional autonomies (i) which fail to fulfil an affirmative duty which is contained in the ruling of a decision by the Constitutional Court that concerns a conflict of jurisdiction or a challenging of Title V LOTC, (ii) it should go beyond the normal limits of disputes settled in the Court (or if one prefers, it should mask characteristics that are of a particular seriousness or importance in terms of the Constitution) and (iii) in terms used in the judgment with which I disagree, it should not give rise to

"disruption of the institutional position of the State and the regional autonomies" [Legal Basis 17.b)]. In other words it should not imply the exercise of authority or jurisdiction which the constitutional corpus has exclusively assigned to the regional autonomies out of consideration for their institutional position within the territorial organisation of the State.

The unconstitutional overlapping of substituting enforcement thus conceived with Art. 155 CE can be inferred from the checking of it against the essential elements of the mechanism designed by the constitutional convention: (i) there is no doubt that the general expression *regional autonomy* which identifies the scope of art. 155 CE also takes in the "institutions" and "authorities" of the autonomic executive; (ii) non-fulfilment of the obligations imposed by the Constitution or other laws, which is the first motive for enforcing the constitutional precept, *per se* evidently comprises that of Constitutional Court decisions; (iii) the second grounds, which is acting "in a manner that is seriously harmful to Spain's general interest", even though it seems to be expressed in terms that are alternative to the preceding one, appears hard to imagine without any link to "the obligations imposed by the Constitution or other laws". Given that among the obligations imposed by the Constitution, constitutional jurisprudence has included implied or inherent aspects such as the duty to loyalty or the duty of collaborating, the connection between both statements in Art. 155 CE affords little doubt.

For the same reason it is also hard to imagine that such situations might not have been preceded by one or more declarations of unconstitutionality in the charge of the Court in its capacity as supreme interpreter of the Constitution (Art. 1.1 LOTC). And I have already mentioned that non-fulfilment of the decisions of the Court that can be subjected to substituting enforcement via the LOTC should, reasonably according to logic, be confined to those cases that go beyond the ordinary scope of jurisdictional disputes and thus exhibit characteristics that are especially serious or important as regards the Constitution.

In STC 41/2016 of 3 March, after describing substitution in the exercise of jurisdiction on account of non-fulfilment as "an administrative control in a technical sense", the Court issued an opinion which, lamentably, has not been ratified by this judgment: "in our constitutional system there are no other administrative controls of this kind than those which are envisaged in art. 155 CE (to deal with extremely categorised cases of non-compliance with the constitution) and as regards budgetary stability and financial sustainability (in the case of failure to meet the targets of a balance and budgetary sustainability)" (Legal Basis 16). Without forgetting to bring up, as regards the latter, the dissenting opinions formulated with regard to SSTC 215/2014 of 18 December and 101/2016 of 25 of May, what concerns me now is to point out that this prior consideration also helps to appreciate the practically identical nature of the motive behind the measures regulated in both contrasting rules.

4. To summarise. The substituting enforcement in art. 94.2.c) LOTC reaches us in the guise of a jurisdictional enforcement measure which is neutral in strength, technical and backed by the precedent of ordinary procedural legislation, and with a legally fictitious leaning towards sterile generality. Yet if the judgment had delved beyond the merely procedural panorama and into a substantive, systematic and teleological analysis, it would have necessarily had to notice the unusually high level of coincidence or overlap between the real nub of the substituting enforcement measure in Art. 94.2.c) LOTC and the powers of state coercion which the constitutional convention included in art. 155 CE, which, in its parliamentary beginnings was left configured as a discretionary political control in the sole hands of the government and the senate, given that the proposals put forward via the participation of the Constitutional Court had been rejected in one or other of the phases thereof. This duplicity, which is produced by the irruption of the Court into a realm reserved by the Constitution for other constitutional bodies, is that which calls into question the constitutionality of the aforementioned precept in the 2015 reform of the LOTC.

The invocation of the fundamental STC 76/1983 can therefore come as no surprise, which, among other considerations of unique importance for this legal procedure, devotes Legal Basis 4 thereof to the intrinsic limitations on the State legislature, stating: "... the Spanish Parliament, as holder of "the legislative authority of State" (Art. 66.2 of the Constitution), can in principle legislate on any matter without having to have specific title to do so, but such authority has its limits, which stem from the Constitution itself, and, in any event, what the Spanish parliament cannot do is position itself in the same plane as the constitutional convention by performing acts that are proper to the latter, save in the case where the Constitution itself attributes some Constitution-framing function to it. The distinction between the constitutional convention and authorities set up under the Constitution is not just operative at the time when the Constitution is established; the intention and rationality of the constitutional convention objectified in the Constitution do not only establish at source but provide a permanent basis for the legal and state order, and represent a limitation on the authority of the legislator. The role of the Constitutional Court, in its function of supreme interpreter of the Constitution (Art. 1 of the LOTC) is to safeguard the permanent distinction between the objectification of constitutional convention and the actions of the authorities under the Constitution, which can never exceed the limits and jurisdiction established by the former".

As Manuel García-Pelayo, the first president of the Constitutional Court set up by the Constitution of 1978 said, in reality all the jurisdictions of the Court are aimed at safeguarding this primary division of the separation powers. In my opinion, and this brings me to an end, it is to be regretted that, in a matter of such importance, the judgment with which I disagree has failed to achieve this aim as it should do, which it is no exaggeration to state is one that legitimises the very existence of the Constitutional Court.

V. To close, I would like to second and reproduce here the conclusion of the dissenting opinion as regards this judgment that was entered by the lady vice-president and original drafter of this appeal on grounds of unconstitutionality and which reads as follows: "My disagreement is accompanied by a note of bitterness at it not having been possible to pass a judgment that might have been endorsed by all of the justices, given that priority, above all other considerations, was accorded to haste in approving a judgment of dismissal of appeal".

Thus do I frame this dissenting opinion.

Madrid, this third of November, Two Thousand and Sixteen.

Dissenting opinion issued by the Judge Mr. Juan Antonio Xiol Ríos in the Judgment delivered in unconstitutionality appeal no. 229-2016.

With the utmost respect for the majority opinion of my colleagues in the Plenary Meeting, on which the judgment is based, I would like to hereby manifest my disagreement on its legal grounds and ruling. In my opinion, the appeal should have been upheld in relation to the challenge brought against Article 92.4.b) and c) LOTC, as worded by Public General Act 15/2015, of 16 October.

Approach

1. The object of this unconstitutionality appeal is to determine whether the reform implemented by Public General Act 15/2015, of 16 October, of certain precepts of the LOTC, with the aim of strengthening its enforcement possibilities if its resolutions are eventually not followed, infringes certain constitutional provisions. The majority opinion on which the judgment is based gives a negative answer to this issue and, consequently, has dismissed this appeal in its entirety.

My difference in opinion is related to the following general issues: (I) the limits imposed on configuration by the legislator of public general acts when regulating the Constitutional Court, and the correlative scope and intensity of the constitutional check entrusted to the Court itself in the event that the LOTC is the challenged rule; and (II) the decision to postpone an analysis of the unconstitutionality appeal brought by the Generalitat of Catalonia in relation to these same regulations, consequently decontextualizing an examination of this appeal.

I also disagree in relation to the following specific issues: (III) the materially sanctioning configuration given to the suspension from office of authorities or public officials in Art. 92.4.b) LOTC; and (IV) the conflict between the substitute enforcement rules foreseen in Art. 92.4.c) LOTC and the constitutional review model contained in Art. 155 CE, which should have led to a declaration of unconstitutionality and nullity of both precepts.

I. *The limits imposed on configuration by the legislator of public general acts when regulating the Constitutional Court, and the correlative scope and intensity of the constitutional check entrusted to the Court itself in the event that the LOTC is the challenged rule*

2. The majority opinion on which the judgment is based has adopted, as a two-fold premise for the constitutional control involved in this appeal, the ideas already described in STC 49/2008, of 9 April, on the fact that when the Constitutional Court needs to analyse the constitutionality of the LOTC, as the one law to which it is entirely subject in accordance with Art. 1.1 LOTC, it should take into account that (i) the legislator of public general acts enjoys a freedom of configuration, subject to the material and formal limits foreseen in the reservations and content of Title IX of the Constitution and its systematic interpretation; and (ii) any review to be conducted should be limited to those cases where there is an evident and irremediable conflict between the rules of the LOTC examined and the Constitution, in order to avoid placing the Court in a situation not covered by the role inherent to the reservation of Art. 165 CE, i.e. that the legislator, through the Public General Act of the Constitutional Court, directly implement Title IX CE, with intended completeness ("*complitud*"). Furthermore, (iii) an evasive attitude has been incurred to reduce the intensity of this constitutionality check, maximising the abstract nature of this control and the required burden of reasoning resting on the appellants.

The dissenting opinions made by the Vice President of the Court and by the Magistrate Mr. Fernando Valdés Dal-Ré, in my opinion, have excessively but justifiably criticised this double premise and the evasive attitude involved, which I share in basic terms. I hereby refer

to and uphold both criticisms. In any case, I think it is necessary to emphasize certain aspects of my disagreement with the majority opinion on which the judgment is based, further to the doctrine established in STC 49/2008 and which I consider should have either been expressly reconsidered by the Plenary Meeting of this Court or else, as is the case in other frequent occasions with Court resolutions, relegated to case-law left in oblivion due to non-use ["*desuetudo*"], upholding the definition provided by A. Bickel.

3. There are no reasonable arguments to consider that the legislator of public general acts, when establishing Constitutional Court regulations, has a greater freedom of configuration than in any other regulatory implementation. The legislator of public general acts, as expressly requested by Art. 165 CE, is obliged to regulate the operation of the Constitutional Court, its members' statute, any proceedings examined by the same and the terms in which to bring action, with the same limits as when regulating any other constitutional body or other institution: the need to respect the Constitution. Within this limit, it has the freedom to configure the Constitutional Court as any other institution. Consequently, the Constitutional Court, whether when judging its own Act or other laws, should apply a constitutionality check in the same terms, not with weaker parameters.

The fact that the Court is only bound to the Constitution and its Public General Act is not a reason to conclude that the Court's control over the constitutionality of its own Act should be less intense than the one exerted in relation to other laws. This position would correlatively entitle the legislator of public general acts to weaken its subjection to the Constitution when regulating the Constitutional Court. This entitlement is not inferred from the reservation in favour of laws, foreseen in Art. 165 CE, nor is it compatible with the constitutional configuration of the Constitutional Court.

Rather, I consider that the alleged freedom of configuration of the Legislative should be the object of unique scrutiny by the Constitutional Court if regulations involve issues or aspects already configured by the Constituent Power, as is the case, paradigmatically, of constitutional bodies. To this effect, we should recall that very early on the Court's case-law contemplated this situation and advised as to the special control function to be carried out in such cases, affirming that *"[…] Parliament, as the holder of "the State's legislative power" (Art. 66.2 of the Constitution), may in principle legislate on any matter without having to be specifically entitled; however, this power is subject to limits, derived from the Constitution itself; in any case, what the Courts cannot do is to adopt the same position as the constituent power, completing acts inherent thereto, unless the Constitution itself entrusts them with constituent powers. A distinction between a constituent power and constituted powers is not only applicable at the date the Constitution was passed; the wish and rationale of the constituent power, objectivised in the Constitution, not only justify the legal and state order from its inception but thereinafter on a permanent basis, representing a limit on the legislator's power. The Constitutional Court, as the supreme interpreter of the Constitution (Art. 1 LOTC), should safeguard a permanent distinction between an objectivised constituent power and the actions of constituted powers, which may never exceed the limits and competences established by the Court"* (STC 76/1983, of 5 August, FJ 4).

4. Likewise, and although this argument has not been expressly used by STC 49/2008 or by the majority opinion on which the judgment is based, the fact that the Constitutional Court has to subject itself to examination as regards respect for its constitutional configuration by the Legislative does not justify its weaker constitutional control either.

It may be suggestive to uphold the premise that in this type of proceedings the Constitutional Court would act both as judge and party, consequently suggesting that it is somehow subject to the decisions of the Legislative due to its questioned impartiality.

However, I do not share this view. As constitutional case-law has recognised in cases where acts of the own Court needed to be examined or a recusal examined of a large part or all of its Magistrates, the unique nature of the Constitutional Court and the need to not reach illogical or seriously disturbing results, preventing it from fulfilling the tasks it is constitutionally assigned, could mean that in certain circumstances a strict interpretation of the principle of jurisdictional impartiality should be sacrificed (see SSTC 47/2011, of 12 April, FJ 3; and ATC 351/2008, of 4 November, FJ 1). However, this sacrifice does not mean that the Legislative has greater freedom, as regards its strict submission to the Constitution, to regulate another body instituted by the constituent power whose task, precisely, amongst others, is to uphold the Constitution during its legislative task. And vice versa: if so recognised, we would incur the defect denigrated by Dworkin when he complained about the populist positions in favour of the Legislative holding a predominant position in judicial review matters: those wielding political power are asked to be the exclusive judges of their own decisions, deciding whether or not they are entitled to do what they have decided they want to do.

5. In close connection with the foregoing reflection on the unique control that the Constitutional Court will carry out in these cases, I also disagree with what may be classified as an evasive attitude on the part of the majority opinion on which the judgment is based in order to reduce the intensity of its constitutionality control.

This elusive attitude has involved: (i) insisting on the fact that the control exerted by the Court over the LOTC is exclusively an abstract unconstitutionality control, rather than political or based on timeliness or technical quality, consequently again accepting an idea already present in STC 49/2008; and (ii) abusively arguing that one cannot judge what is not argued, to avoid analysing issues at the heart of the constitutional objections made to the new regulation of the powers granted to the Constitutional Court in order to enforce its solutions if not fulfilled.

6. In general, this abstract constitutionality control should be carried out in relation to any examination, and is not specifically inherent to a constitutionality control of the LOTC. This said, the problem is that the majority opinion on which the judgment is based has used this idea of the “abstract” to avoid having to face various and “specific” interpretative issues raised by these new powers of enforcement assigned by the Legislative to the Constitutional Court. The abstraction of the constitutionality check entrusted to the Court in any proceedings involving conflicting rules means, as opposed to the task involved when granting constitutional protection, that its analysis is independent from a specific act of application. Likewise, the idea that constitutionality control is not based on timeliness, politics or technical accuracy is fully endorsed by the fact that the Legislative has a broad margin in which to exercise its powers in the constitutional framework.

None of these characteristics of constitutionality control, particularly its abstraction, prevent the Constitutional Court from having to analyse all those interpretative issues raised by those entitled to constitutionally challenge the disputed rule. Nor may these interpretative issues be postponed until their future application in specific cases. In fact, very often there are cases where the Court, like other Constitutional Courts, holds abstract control precisely in relation to the various interpretations and applications that may arise, in order to possibly exclude those that are unconstitutional. Furthermore, there are unique situations, such as the present one, which require an articulation of a particularly extensive and intense analysis in this abstract control framework with respect to the interpretation and application possibilities of the challenged law. The reasons for this are based in this case not only on basic matters of legal certainty, but on the fact that the application of a specific enforcement measure pro futuro hinders jurisdictional control of this future decision, as it is restrictive of any affected rights. In this circumstance, it is particularly difficult to imagine a scenario where the Court is entrusted with a new type of constitutionality review that requires an unconstitutionality issue

on the Act, raised by the Constitutional Court before this same court (in Court jargon, an "internal issue"). However, this is what seems to be suggested by the majority opinion on which the judgment is based, by deferring interpretative issues *ad futurum*.

In fact, this unconstitutionality appeal involves the power granted to the Constitutional Court to adopt measures in order to guarantee the enforceability of its decisions in a possible non-fulfilment. Some of these measures, *per se*, affect relevant issues in the sphere of rights and interests held by authorities and public officials. The fact that these measures should be precisely adopted by the Constitutional Court, further to its jurisdictional functions, means that their control is legally impossible- except for international instances- by any other body, pursuant to the Court's constitutional position and the provisions established in Article 4 LOTC. Consequently, if the application of these measures is not able to be judicially controlled in any way, not even through appeals for constitutional protection, it is hardly conceivable how constitutionality control through an unconstitutionality issue would be possible in the future.

We cannot overlook the fact that, as explained in the majority opinion on which the judgment is based, these enforcement measures should be adopted as part of a procedure- usually further to an enforcement incident- and that in such incident the Constitutional Court may, either at one of the party's request or *ex officio*, raise an internal unconstitutionality issue. However, once the rule is declared constitutional, the possibilities of refuting its constitutionality may hardly be linked to the nature of such measures, given that constitutionality judgments enjoy the appearance of a final decision, which weakens, to almost a fallacy, the hypothesis upheld by the majority opinion in the judgment. In turn, as these powers have been legally configured as powers of the Constitutional Court, an incident may not be used either to decide not to exercise them for timeliness reasons. Once the existence of non-fulfilment is ascertained, the Constitutional Court has no chance of eluding the adoption of such a measure. The only margin of discretion it enjoys, as part of the proportionality judgment required, is to select the enforcement measure to be adopted. It would be seriously misleading to think that the Court, once its powers of enforcement attributed in the Act are recognised, "may or may not" exercise them; the truth is that it "should" exercise these powers if the necessary requirements are met. I will not recall the theory on power as a right-duty to exercise, foreseen by law and of a binding nature.

7. To conclude, we need to avoid the risk of an argumentative fallacy. The majority opinion on which the judgment is based, under the appearance of a neutral application of the case-law whereby constitutionality control may not be extended, due to its abstract nature, to all interpretation and application cases, claims that an exhaust valve is left open if it is possible in the future to effectively apply such measures. But what it actually does is to make these powers totally ironclad with the pragmatic effect that they may never again be the object of abstract control. If, furthermore, as is in fact the case, this control is weakened, avoiding an examination of essential issues of the constitutional challenge of the rule with formal arguments about a breach and the burden of reasoning resting on the appellant, the reasons will become clear of why I advocated and made an effort during the discussion- as much as I could, but unsuccessfully- to encourage a more thorough study of the matter which perhaps- I am convinced- could have generated a consensus on such a vitally important matter. I believe it is necessary to make this observation, based more on feeling than on reason, when the Vice President of the Court, from her senior institutional position, refers in her dissenting opinion to "*the bitterness in not being able to convince the rest of the relevance, also in this case, of delivering a judgment able to be endorsed by all the magistrates; over other considerations, priority was given to passing a Judgment of dismissal*".

II. *The decision to postpone an analysis of the unconstitutionality appeal brought by the Generalitat of Catalonia in relation to Public General Act 15/2015, of 16 October, consequently decontextualizing an examination of this appeal.*

8. Public General Act 15/2015, of 16 October, reforming the LOTC, has been the object of two unconstitutionality appeals. The first, processed under no. 7466-2015, was raised by the *Generalitat* of Catalonia and entered this Court on 30 December 2015. The second, processed under no. 299-2016, was raised by the Government of the Basque Country and entered the Court on 15 January 2016, giving rise to this decision I am now rebutting. In general, without prejudice to a cautious margin of discretion when ordering the appeals to be examined, it seems reasonable that, if there are several unconstitutionality appeals brought against the same law, they should either be chronologically arranged or, at least, included in an aggregate or simultaneous study. This has not been the case of Public General Act 15/2015, where it was decided to first of all analyse the last appeal raised- on the part of the Government of the Basque country-, to the detriment of the first- the one brought by the *Generalitat* of Catalonia.

Still further to my disagreement with the general approach taken to this appeal, I think that not only for reasons of priority in time but, particularly, due to its uniqueness, the Court's analysis should have started with the appeal raised by the Generalitat of Catalonia. Otherwise, I think that, at least, a lack of argumentative grounds of the appeal should not have been used to avoid an analysis of the valuable information that may and should be contributed by the contextualisation of a rule whose constitutionality was being examined in this appeal.

9. The Preamble to Public General Act 15/2015, in an attempt to provide an aseptic description of the reasons behind the passing of the law, merely states that "*although the current regulations of the Constitutional Court contain general principles to guarantee the effectiveness of its resolutions, the need to adjust to new situations that attempt to avoid or ignore this effectiveness means that the necessary instruments should be implemented in order for effectiveness to be actually guaranteed*". However, it may be readily inferred that these new situations intending to avoid or ignore the effectiveness of Constitutional Court resolutions are directly related to various decisions adopted by the Generalitat, to particularly include the Catalonian Parliament.

Nor has the majority opinion on which the judgment is based expressly connected the challenged rule to the current situation in Catalonia. The need, often repeated by this same majority opinion, to project an abstract analysis on the issues raised in the appeal is no reason why the Constitutional Court should have recognised the purpose sought with the rule, contextualising the same. Subjective and teleological interpretations are highly important principles to examine the rule. In this case, as will be evidenced below, if both principles are not taken into account highly relevant information is left unexamined, such as the materially sanctioning nature of the new suspension measure contained in Art. 92.4.c) LOTC; or how the new substitute enforcement regulations foreseen in Art. 92.4.c) LOTC have deeply altered the counterweights designed by the Constitution.

10. A Constitutional Court's task cannot be performed by eluding the social and political background of the laws which, to be constitutional, need to make the necessary examinations thereof. There is no doubt that the purpose underlying legislation is the abstraction of its provisions and its projection and survival over time. The senior task entrusted to the constitutional jurisdictional is hardly favoured by an obsession for formality, if in its enforcement the vitality of the law and its permeability to social issues and problems of all kinds are ignored. To hide the context that backs up a specific rule does not help resolve its potential constitutionality. To presume that a rule, as soon as it comes into force, is free of any original sin in its conception is to ignore the fact that such a defect is often a part of its very essence and accompanies it as a shadow or light during its validity. This is the reason why in various cases- I will only cite as an example the control exerted over the

so-called entitlement for the passing of decree-laws- constitutional case-law resorts to parliamentary proceedings, seeking information and arguments to back up its position.

In this case, it is unfortunate that the majority opinion in the judgment did not act in this way. However, this is not a reason why my dissenting opinion should not stress the issue, given its relevance when specifically analysing certain enforcement measures challenged.

11. Public General Act 5/2015 was born from a draft bill proposed by the Parliamentary Group of the Popular party, during the X Legislature. The Parliamentary Group's defence of this draft bill, at the consideration stage before the Congress of Deputies, and the entire debate that subsequently took place in the session (Sessions Diary of the Congress of Deputies- Plenary Meeting and Standing Deputation- no. 306, of 16 September 2015, pages 102 to 134) evidences that this legislative reform is clearly linked to the "constituent process in Catalonia" ["*procés constituent a Catalunya*"], exclusively aimed at endowing the Constitutional Court with the necessary instruments to face what it considers Catalonia's defiance in refusing to follow its resolutions.

The intervention made by the representative of the Parliamentary Group, behind this legislative initiative, is unequivocal. He states that "*actual facts have evidenced that the level of non-fulfilment and defiance of [Constitutional Court] resolutions has been gradually increasing; and it is obvious that this situation has arisen nearly at the same time as the secessionist movement in Catalonia, exclusively aimed at destroying Spain". Along with this, he affirms that there are many evident cases of non-fulfilment, evidencing "first of all, the judgment on the Catalonian Statute of Autonomy, paradigmatic in relation to a predominant use of Catalonian and the exclusion of Castilian Spanish as a vehicular language in the field of education, leading many parents to waiving their right to educate their children in Castilian Spanish, due to the pressure exerted each day by the excluding and virulent nationality of which we have today shamelessly become aware in some newspapers. Other examples are the Catalonian Veguerías Act, a suspension of the referendum called by the Generalitat on 9 September 2014 or the challenge brought by the National Transition Commissioner* [Comisionado para la Transición Nacional]. *Likewise, last 11 June the Constitutional Court declared the unconstitutionality of the so-called citizen participation process, and this same week the Constitutional Court has ordered a suspension of the resources foreseen by the Generalitat for the Catalonian Tax Agency [ ]. In all these cases, the Catalonian Generalitat has evidenced and is still evidencing a single position: non-fulfilment as its response; defiance as its conduct; and institutional disloyalty as a flagship. And all of this to endorse an alleged national affirmation based on its immoral conduct as a falsely injured victim".* No other non-fulfilment, whether by the State or any other Autonomous Community, is given as a reason for this reform.

Let me insist that in a scenario so highly linked to Catalonia, such as the one involving the challenged rule, it would have been recommendable, not only due to its priority in time, either to not postpone an analysis of the unconstitutionality appeal brought by the Catalonian *Generalitat* against Public General Act 15/2015, of 16 October, or else to not ignore the necessary contextualisation of the challenged law.

III. *The materially sanctioning configuration given to the suspension from office of authorities or public officials in Art. 92.4.b) LOTC*

12. The Government of the Basque Country has disputed in its appeal the materially sanctioning nature of the measure to suspend authorities or public officials from office, introduced into Art. 92.4.b) LOTC by the challenged rule. The majority opinion backing up the judgment has rejected this approach, insisting on the fact that this measure is exclusively aimed at removing the obstacle to a resolution's effectiveness, consisting of a manifest and

wilful intent by the authority or public official to not follow it, and is consequently limited to the time required to ensure that the Court's pronouncements are fulfilled.

The dissenting opinion made by the Vice President of the Court has expanded comprehensively on this point; after explaining both the doctrine laid down by the European Court of Human Rights and the European Court of Justice- the so-called Engel rules- and the criteria laid down in constitutional case-law on the matter, she explains why this specific measure constitutes a material sanction. I hereby refer to and endorse her opinion. Nevertheless, I should add the following arguments.

13. Art. 92.4.b) LOTC provides that the Constitutional Court, after ascertaining that its resolution had not been fulfilled, in whole or in part, may agree, amongst others, to "*order a suspension from office of the authorities or public officials pertaining to the Administration responsible for the non-fulfilment, for the time necessary to ensure that the Court's pronouncements are fulfilled".* In the absence of more specific legislative implementation as to the specific cases of entitlement and exact subjective, objective and time limits applied to a suspension measure, in my opinion this does not neutralise the risk of materially considering that this measure constitutes a sanction and that, as such, it may be used by the Constitutional Court if an authority or public official fails to follow its resolutions.

The first idea on which I base this opinion is how the rule itself was born. Parliamentary discussions leave no doubt as to the wish to render these measures materially sanctioning, and also endorse this. Again, I transcribe part of the intervention of the spokesman for the Parliamentary Group proposing the initiative which, with no amendment, has given rise to the regulations now being examined, to uphold the following: *"in this way, when the Constitutional Court, your Lordships, requests in a ruling that positive action be taken by a public power and its response is conscious inactivity, a non-fulfilment arises as well as defiance, due to an explicit refusal to fulfil what was ordered, whether through a wilful omission of what was ordered or simply refusing to repeal the law or autonomous acts questioned by the Constitutional Court".* The use of terms such as "defiance" or "wilful omission" suggests illegal conducts and directly leads to the idea of a criminal offence. If this is the framework in which the authors of the parliamentary initiative have proposed this new law, I think that all caution is justified with respect to the sanctioning purpose that these measures seem to entail from their conception.

Also of importance is the fact that if the wish was to transfer to the Court's jurisdictional tasks the enforcement measures foreseen in procedural regulations, as a result of which Art. 80 LOTC has also been amended to provide that in resolution enforcement matters the Contentious-Administrative Jurisdiction Act will apply on an ancillary basis, a possible suspension from office is not conceived as a potential enforcement measure in said law. Rather, this type of suspension measure, when legally foreseen, is a consequence of administrative disciplinary regulations and, certainly, as a criminal sanction when offences are committed by authorities and public officials. This is another inevitable issue when examining the possible sanctioning nature of these measures.

14. Secondly, despite the effort made by the majority opinion on which the judgment is based to define this measure in order to minimise the risk of it being identified with a materially sanctioning consequence, a highly worrying distortion in its application has been achieved, and even introduced, when trying to clarify its legal profiles, evidencing that the purpose is mere repression.

In fact, the majority opinion on which the judgment is based states that *"[…] the measure should be lifted as soon as the intended non-fulfilment of the authority or public official ceases, responsible for fulfilling the resolution".* An express reference to cessation of the intended non-fulfilment of the authority or public official as one of the reasons for lifting the

measure evidences that for the majority opinion the purpose of this suspension measure is not just to remove an obstacle for enforcing the non-fulfilled resolution, by provisionally suspending the authority or public official in breach and replacing it with another that is able to enforce the constitutional resolution, but to try and break this intended non-fulfilment. This objective, again, affects issues that depart from a mere enforcement measure, bringing it closer to sanctioning measures where what is relevant is not to guarantee enforcement of the resolution not fulfilled, but to adopt a legal consequence to repress a persistent failure to fulfil a resolution. Furthermore, it would also allow, further to this repressive effect, the suspension measure to be provisionally unlimited, as it would be linked not to definitive enforcement of the resolution not fulfilled, but to the need for the authority or public official to cease its intended non-fulfilment. Ultimately, the majority opinion on which the judgment is based would allow such a measure to be adopted as a device to break the will of the authority or public official in breach, by suspending it from office.

15. Beyond the foregoing thoughts, I think that if the law had been more accurately defined or, at least, that the Court had adopted a more demanding and forceful position when establishing clear limits on its application, doubts would have been cleared as to its authentic nature as an enforcement measure. This option would have been possible had the applicability of this measure been at least conditioned to the following: (i) that the non-fulfilment affect an obligation to do; (ii) that its exclusive purpose be to allow a substitute to be able to adopt the necessary decisions to enforce the constitutional resolution that was not being fulfilled; and, as a result, (iii) that suspension be ordered exclusively in relation to this specific task for which substitution was necessary; and (iv) for the time that is strictly necessary to allow the substitute to complete the task.

Nevertheless, even with these limitations, I think it is very difficult to sever this measure from its sanctioning halo. A remedy to the suspension from office as an enforcement measure is disproportionate. Even if the measure were limited to just obligations to do, the Court's enforcement capacity in the event of non-fulfilment could always be guaranteed with the possibility of delivering a jurisdictional resolution with enforcement effects, as is already the case in ordinary jurisdiction in relation to the breach by a mayor of his positive obligation to call a Plenary Meeting of the City Council in order to discuss the vote of no confidence brought against him. This precedent demonstrates that a measure such as the one at hand is unnecessary and disproportionate insofar as a mere enforcement measure and that, consequently, it always permanently triggers an underlying sanctioning component that is hard to sever.

IV. *An alteration of the constitutional control model foreseen in Art. 155 CE as a result of the substitute enforcement rules established in Art. 92.4.c) LOTC*

16. The Government of the Basque Country has also disputed in its appeal the substitute enforcement rules established in Art. 92.4.c) CE, on the grounds that they alter the constitutional model to supervise the fulfilment by Autonomous Communities of the obligations imposed by the Constitution or other laws, foreseen in Art. 155 CE. The majority opinion on which the judgment is based has dismissed this approach, highlighting that entitlement for the State's intervention foreseen in Art. 155 CE and the substitute enforcement device foreseen in the LOTC are different.

The dissenting opinion made by the Magistrate Mr. Fernando Valdés Dal-Ré has involved complex arguments on the issue, highlighting not only the overlap between substitute enforcement measures and the measures foreseen in Art. 155 CE, but also the practical inapplicability of Art. 155 CE following the new rules implemented by Art. 92.4.c) LOTC. I hereby refer to and endorse his arguments. Nevertheless, I need to make some additional comments.

17. Art. 92.4.c) LOTC provides that the Constitutional Court, once it has ascertained a total or partial non-fulfilment of its resolution, may, amongst others, decide on the substitute enforcement of its resolutions, with the possibility of requesting "*assistance from the National Government in order to adopt the necessary measures, in the terms set by the Court, to ensure the fulfilment of its resolutions".* In turn, Art. 155.1 CE provides that *"if an Autonomous Community fails to fulfil the obligations binding it under the Constitution or other laws […], the Government, after officially summoning the President of the Autonomous Community in question and, if unheeded, with approval from the absolute majority of the Senate, may adopt the necessary measures to force the Autonomous Community to fulfil its obligations […]".*

It is hard to imagine the possibility of articulating the device foreseen in Art. 155 CE without a confirmed breach of the Constitution by an Autonomous Community through Constitutional Court resolutions evidencing it, by suspending or annulling autonomous acts (amongst other reasons, because the Government is empowered to trigger the Court's automatic suspension of the autonomous provisions challenged). Based on the foregoing, both precepts establish different ways to intervene if constitutional obligations are breached by an Autonomous Community. Either one is acceptable in material terms. But this is not the point. What is being disputed is whether the model developed by the legislator of public general acts further to the LOTC alters the model designed by the CE in such a way as to render it incompatible. In this case, it would be clear that the legislator of public general acts has placed itself on the same level as the constituent power to carry out the latter's powers, by changing the will and rationale of the constituent power, objectivised in the Constitution and in specific rules governing this type of conflict.

18. The model established in Art. 92.4.c) LOTC is incompatible with the one designed by the constituent power. The main difference between the two- and the one I wish to focus on in this dissenting opinion- is that the model in Art. 155 CE is based on the idea that a conflict should be *prima facie* settled by political instances; on the other hand, the model established by the legislator in the LOTC is presided by the idea of "jurisdictionalising" the state's reaction through the Constitutional Court.

The constituent power is the one entrusted to establish the constituted powers, their functions, guaranteed development, and the devices to settle any potential conflicts that may arise between them, to particularly include amongst constitutional bodies. In terms of the State's territorial organisation, the constituent power decided to objectivise the future breach of constitutional obligations by an Autonomous Communities by entrusting its resolution, perhaps in light of the basically political nature of the conflict, through political- not jurisdictional- devices. As a result, Art. 155 CE gives total protagonism to the political institutions involved, entrusting them with the initiative and, even, the final decision on whether to adopt any such measure.

In the constitutional layout, the State Government, as a constitutional body, foremost and on a priority basis, acts as the guarantor of compliance by the Autonomous Communities of their constitutional obligations- to certainly include any arising as a result of not fulfilling Constitutional Court resolutions, also acting from this point of view as a constitutional body-. This same constitutional layout establishes the devices through which the State Government should act as guarantor, indicating that it is the one entitled to take the initiative, staggering its response by previously summoning the President of the Autonomous Community in breach and, if unheeded, gathering the authorisation of an absolute majority of the Senate, as the State's Chamber of territorial representation, in order to adopt substitute enforcement measures to guarantee the forced compliance of constitutional obligations by the Autonomous Community in breach.

Only at a second stage could the Constitutional Court subject said measures to constitutional control through the jurisdictional procedures foreseen in Art. 161 CE and the LOTC. In other words, the constitutional model allows the Constitutional Court to keep an arbitral position in all conflicts between the State and Autonomous Communities, including the cases when measures are adopted under Art. 155 CE, enabling their participation on a second plane, so as not to compromise its constitutional position.

19. The configuration of the LOTC that is now challenged materially alters this constitutional layout and the balances procured by the constituent power amongst the various constitutional bodies, when facing this type of conflict. First of all, it places the Constitutional Court on a prevailing plane, entitling it to decide on (i) the existence of a breach; (ii) the measures to be adopted; and (iii) summoning the Government and directing its action in order to ensure that the Autonomous Community in breach duly fulfils its constitutional obligations. But, secondly, paradoxically, it also places the Constitutional Court on a subordinated plane with respect to the Government, given the initiative possibilities it holds further to constitutional procedures and enforcement incidents which, as already explained, are measures configured as powers of the Court that it cannot ignore or avoid for timeliness- let alone political- reasons.

This relocation of the Constitutional Court's protagonism in the procedure to settle this type of conflict, also prevents it, at least on this specific point, from subsequently carrying out constitutionality control over the way in which the substitute enforcement measures were developed. Consequently, it also alters the guarantor function that the Constitution reserves to the Constitutional Court and, essentially, seriously distorts its role as a constitutional guarantee.

20. A scenario such as the one described should have led to the conclusion that a mutation in the original constitutional layout by the disputed rule determined its unconstitutionality, not only because the Constitutional Court is granted functions that go beyond those recognised in the Constitution, but also because it deprives another constituted power- the Government- of these powers, when in fact this is recognised in the Constitution.

The short time available in which to draft this opinion has prevented me from reasoning, as would have been my wish, how an examination of the situation in comparative law highlights the fact that when enforcing the decisions of constitutional courts legislative powers are particularly careful to uphold the constitutional role entrusted to the various constitutional bodies and their mutual balance; for example, in some cases, the President of the Republic is made responsible for enforcing their judgments.

However, I do think it is appropriate to point out that the origin of constitutionality control of the law, in a bold and legendary judgment delivered in a difficult situation for the Court, is linked to the unconstitutionality of certain enforcement measures that the legislature intended to assign to the U.S. Supreme Court by law, without this being foreseen in the Constitution. As any specialist will have presumed, I am referring to the Judgment issued by the U.S. Supreme Court in *Marbury v. Madison (1803) 5 US (1 Cranch) 137*. In this Judgment, although it is known for having established the possibility of constitutional control of the law, the unconstitutionality was declared of a legal rule with enforcement powers granted to the U.S. Supreme Court, departing from the original competences held by this Court further to the Constitution. In the *Marbury v. Madison* case, the issue was that President Adams, in the final days of his mandate, had proposed Marbury's appointment as Justice of the Peace in the District of Columbia, and this was endorsed by the Senate. The appointment was not eventually notified through the necessary credentials issued by the State Secretary. Then, under Jefferson's presidency, Madbury requested his appointment from the new Secretary of State, Madison, and the new government refused to do so on the grounds that it was illegal. As a result, Madbury appealed to the Supreme Court requesting

that the Secretary of State, Madison, be ordered to issue his appointment in a writ of mandamus. The Supreme Court eventually dismissed this request on the grounds that although the 1789 Judiciary Act authorised the U.S. Supreme Court to order writs of mandamus, in the cases permitted by legal usage and principles, to all Courts or authorities, such law was unconstitutional. This unconstitutionality declaration was justified on the grounds that (i) the original competences attributed by the Constitution to the Supreme Court only included those related to ambassadors, other public ministers and consuls, and those to which a State was part; jurisdiction of appeal was applicable in all other cases; (ii) the possibility of issuing a writ of mandamus, as requested by Madbury, was a matter reserved to the original courts; which was why (iii) competence to deliver writs of mandamus against civil servants, granted by jurisdictional laws to the Supreme Court, was unconstitutional because it was not foreseen in the Constitution.

In the present case, in my opinion, a similar ultra vires effect has arisen as regards the capacity of the legislator (of public general acts) to legally configure the competences of the Constitutional Court, granting it powers that the constituent power had reserved to another constitutional body: the Government.

Madrid, on the third of November two thousand and sixteen.