Strasbourg, 20 February 2017 **CDL-REF(2017)007**

Opinion No. 827 / 2015 Engl. only

EUROPEAN COMMISSION FOR DEMOCRACY THROUGH LAW

(VENICE COMMISSION)

SPAIN

JUDGMENT 215/2016
ON UNCONSTITUTIONALITY
APPEAL NO. 7466-2015
FILED BY THE GOVERNMENT
OF THE CATALONIAN GENERALITAT

The Plenum 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, Judges, have pronounced

IN THE NAME OF THE KING

the following

J U D GM E N T

In action of unconstitutionality no. 7466-2015, filed by the Government of the Catalonian *Generalitat*, under the legal counsel of Mr. Xavier Castrillo Gutiérrez, Ms. Roser Revilla Ariet and Mr. Ramón Riu Fortuny, Attorneys of the Catalonian *Generalitat*, against Organic Law 15/2015, of 16 October, reforming Organic Law 2/1979, of 3 October, of the Constitutional Court, on the enforcement of Constitutional Court resolutions to guarantee the Rule of Law. The Attorney of the Parliament, Ms. Paloma Martínez Santa María, appeared as party and submitted her pleadings, for and on behalf of the Congress of Deputies, and the State Attorney did the same, on behalf of the Government. The Reporting Judge was Mr. Pedro González-Trevijano Sánchez, who expressed the opinion of the Court.

I. Background

1. By means of a writ received at the General Registry of this Court on 30 December 2015, the Attorneys of the Catalonian *Generalitat*, acting for and on behalf of their Government, filed an action of unconstitutionality against Organic Law 15/2015, of 16 October, reforming Organic Law 2/1979, of 3 October, of the Constitutional Court, on the enforcement of Constitutional Court resolutions to guarantee the Rule of Law.

2. The action is based on the following legal points, succinctly described below:

A) The Organic Law of the Constitutional Court (in Spanish, Ley Orgánica del Tribunal Constitucional, hereinafter LOTC) is one of the laws whose object and content is determined by the Constitution itself, although several articles of Title IX refer to subsequent specifications and implementations, as is specifically the case of Art. 165 Spanish Constitution (in Spanish, Constitución Española, hereinafter CE). However, it is obvious that the legislator's freedom is not absolute, as it is subject to and bound by both the provisions included in Title IX CE and Arts. 53.2, 95 and 163 CE, and other articles of the Constitution overall which, whilst determining the necessary contents of the LOTC, establish negative limits thereon. The Constitutional Court in Judgments (in Spanish, Sentencias Tribunal Constituciónal, hereinafter SSTC, STC for the singular) 66/1985, of 23 May (Ground [in Spanish, Fundamento Jurídico, hereinafter FJ] 4) and 49/2008, of 9 April (FJ 3), referred to the scope of freedom of configuration or the legislator when passing organic laws, its limits and the constitutionality check, of its own Organic Law, and subsequent reforms. Specifically, as regards this last point, it has declared that this check should be strictly limited to constitutionality, rather than timeliness, limiting itself to those cases where the text of the challenged rule contradicts that of the Constitution, as it is the legislator *ex* Art. 165 CE which needs to directly and completely implement Title IX CE (STC 49/2008, FJ 4).

When it passed Organic Law 15/2015, the legislator reformed the LOTC which, despite affecting only four articles, is very important in qualitative terms, as it confers certain rights to the Court that exceed its constitutional limits for the regulation and determination of its powers. Furthermore, some of these articles are not regulated, in an accurate and complete manner, in the minimum required of instruments made available to the Court, and in certain basic issues merely refer to unspecified concepts granting it a margin of discretion that is incompatible with legal certainty and the foreseeability of a jurisdictional Court's actions.

After referring to the articles amended by the challenged Law and reproducing passages of its preamble, the claim states that the quality or timeliness of the reform will not be questioned, or whether, as claimed, the reform has been spuriously used by the Constitutional Court to avoid politically burdening the Government and Senate with having to eventually use the extraordinary device foreseen in Art. 155 CE. First of all, the entire Law is challenged on the grounds that it was processed in a parliamentary procedure that did not fulfil the Regulations of the Congress of Deputies (in Spanish, Reglamento del Congreso de los Diputados, hereinafter RCD). The processing of this Law would have seriously conditioned the Parliament's decision-making and materially limited its members' fundamental right to *ius in officium*. Secondly, some specific provisions are challenged, on

the ground that the very nature of the measures they foresee render them unconstitutional, or on the ground that the entitlement provided is unspecified.

The Constitution, unlike the enforcement of judicial resolutions issued by the ordinary courts (Art. 117.3 CE), does not refer in any case to enforcement of Constitutional Court resolutions; Art. 164 merely states that any judgments that do not merely objectively uphold a right will be effective *erga omnes.* Its various provisions would indicate a very limited configuration of the Constitutional Court's capacity to adopt, alone and without assistance from the Courts and Tribunals, orders to render its own resolutions effective. Rather, Organic Law 15/2015 empowers the Court to ensure that its resolutions are fulfilled, which are not just equivalent, but even exceed and are more intrusive, than the powers entrusted to the Judiciary.

In relation to the jurisdictional task entrusted by the Constitution (Art. 161) and the content of Art. 164.1 CE and Arts. 40.2, 87.1 and 92 LOTC, the Court has inferred that its resolutions are binding and that it is able to adopt the necessary measures to ensure their effectiveness (STC 25/2015, of 19 February, FJ 7; Orders of the Constitutional Court [in Spanish, Autos del Tribunal Constitucional, hereinafter AATC, in singular ATC] 107/2009, of 24 March, FFJJ 2 and 4; and 157/2014, of 28 May, FJ 2). In turn, the original wording of the LOTC included some provisions on the possibility of the Court adopting measures to enforce its resolutions, as well as the duty of all public powers to fulfil what the Court decides (Art. 87.1 LOTC), the possibility of requesting jurisdictional assistance from Courts and Tribunals, and the latter's duty to provide it on a preferential and urgent basis (Art. 87.2 LOTC), as well as its entitlement to establish in its judgments or resolutions, or in subsequent acts, who must enforce these decisions and, where appropriate, settle any enforcement incidents (Art. 92 LOTC). These provisions were backed up with the Court's recognition of the right to declare the nullity of any resolutions in breach of those delivered further to its jurisdiction, when enforcing the latter, after hearing the State Prosecution Service and the delivering body (Art. 91, paragraph two, Organic Law 6/2007, of 24 May).

The new wording given by Organic Law 15/2015 to Art. 92.1 LOTC radically changes the earlier situation and generally imposes a new duty on the Court: to ensure the effective compliance of its resolutions. Consequently, the Court should survey and control the enforcement of all its resolutions and, if these are not fulfilled or do not become duly effective, it should adopt the necessary measures to achieve this effectiveness *vis-à-vis* any citizen, authority or public power. Nevertheless, although the constitutionally stated general obligation to fulfil all Constitutional Court judgments and

its jurisdictional status, as well as the articles cited of the LOTC, indicate that the Court is empowered to enforce its resolutions, it needs to be acknowledged that this executory power must be necessarily adapted according to the object covered by each lawsuit examined in which resolutions are delivered. Consequently, in order to determine the scope of the Court's powers when enforcing its resolutions, the nature and object of the lawsuit in which they are delivered must be examined.

B) The Attorneys of the *Generalitat* Government, as the first grounds of unconstitutionality of Organic Law 15/2015, claim that the parliamentary procedure followed —a direct summary procedure ["*lectura única*"]— has infringed Art. 150 RCD and the fundamental rights held by all deputies by virtue of Art. 23 CE.

The Plenary Session of the Congress of Deputies agreed to use a direct summary procedure for the draft submitted by the Parliamentary Group of the Popular Party, and also decided, pursuant to the provisions established in Arts. 93 and 125.5 RCD, that it be processed on an emergency basis; as a result, the ordinary proceedings timeframes in the Congress are halved (Arts. 93 and 94 RCD) and there is a maximum term of twenty calendar days granted to the Senate to process the draft or bill (Art. 90.3 CE). Thus, in this case, the urgency declared by the Congress of Deputies did not refer to the timeframes for an ordinary legislative procedure, but to those of the summary procedure, reducing already shorter timeframes to half.

The direct summary procedure foreseen in Art. 150 RCD is only appropriate for very short laws, which can be processed as a whole and are not eligible for partial changes or amendments, either because their mandates s are simple or because they are treated as a whole in their formulation and inclusion into the law.

The strict wording of the requirement foreseen in Art. 150 RCD —"*when the nature of the draft or bill in question so advises*"— should exclude the use of a summary procedure for laws of particular constitutional relevance, either because they affect fundamental rights or constitutional values, or the configuration, powers or mutual relations of constitutional bodies. In turn, the "*formulation simplicity*" requirement should exclude from this procedure any drafts or bills that are not brief or are eligible for various parliamentary discussions, focusing on specific rules, where alternatives may be proposed, rather than just the passing or dismissal of the law as a whole, consequently demanding a more thorough debate or higher degree of parliamentary participation.

The *Generalitat* Attorneys acknowledge that interpretation of Art. 150 RCD has resulted in parliamentary practice occasionally allowing the "non-simple" nature of a draft or bill to not prevent the use of a summary procedure, provided that a majority consensus on the content exists from the very start of the enactment process amongst the Parliamentary Groups represented in the Congress, to anticipate that throughout the enactment process very few changes will be proposed. However, in the draft bill passed as Organic Law 15/2015, there was no such consensus, as the proposal was submitted, processed and passed by just one parliamentary Group, and was challenged by the rest.

After reproducing the Court's case-law on MPs' right of participation in the legislative procedures, as a component of their *ius in officium* (SSTC 103/2008, of 11 September, FJ 5; 238/2012, of 13 December, FJ 4; and ATC 118/199, of 10 May, FJ 2), the claim states that the reform introduced by Organic Law 15/2015 has deeply changed the functions of the Constitutional Court. This reform may have multiple impacts on its jurisdictional mission and relations with other public powers. Furthermore, the unprecedented nature of some of the measures foreseen not only advised against shortening parliamentary reflection and discussions, but clearly demanded a form of enactment that enabled the most diverse and consensual participation possible, consequently preventing an enactment as a summary procedure. Although the law was brief, its specifications could be particularly discussed and partly amended in various ways. In fact, different parliamentary Groups submitted many amendments, not only to the entire law, but also to some of its articles, which were then jointly discussed in a single debate in the Plenary Session of Congress, with the haste, unsettlement and confusion reflected in the Daily Sessions Book. In these circumstances, the deputies' right to participate in the processing of this draft bill, which was limited in the absence of longer discussions on the Drafting Committee and Commission, was aggravated by the shorter timeframes resulting from the summary procedure.

Certainly, on that occasion, the particular relevance of a legal or, even, constitutional reform has not been an obstacle for the Congress to process it as a summary procedure (ATC 9/2012, of 13 January; and STC 238/2010). However, these cases referred to different legal texts, processed in likewise very different circumstances to the ones here and which, at the time, were widely supported by the various Parliament groups, which is why the solutions taken then are not applicable now.

Moreover, the processing of a draft bill through a summary procedure collides with its immediate precedent, consisting of the Parliament itself processing through an ordinary procedure the legislative initiative approved as Organic Law 12/2015, of 22 September, amending Organic Law

2/1979, of 3 October, of the Constitutional Court, to establish a prior action of unconstitutionality for Draft Bills in relation to Organic Laws related to or amending Statutes of Autonomy. Without doubt, this initiative was less relevant than the current reform of the LOTC, as the former only amended two articles of the LOTC and merely recovered, with some specifications and a much smaller scope, one of the procedures foreseen in the original LOTC, which remained in force until it was repealed by Organic Law 4/1985, of 7 June. Furthermore, in that case, unlike the one at hand, a report was issued by the Council of State, which provided a very useful study for parliamentary discussion.

Consequently, as the requirements are not met that Art. 150 RCD established for a summary procedure, the processing of a draft bill in this way should render it formally unconstitutional, in breach of the fundamental rights upheld and guaranteed by Art. 23 CE in favour of all deputies.

C) The first material grounds of unconstitutionality are related to Art. 1.3 of Organic Law 15/2015, which reworded Art. 92.4. a) LOTC, entitling the Constitutional Court to impose and order further coercive fines ranging from three thousand to 30,000 €, on authorities, public employees or citizens that did not heed its resolutions. This article, in the opinion of the *Generalitat* Attorneys, infringes the principles of legal certainty (Art. 9.3) and legality (Art. 25), as well as Art. 165 CE, by not establishing any parameter for the scaling of coercive sanctions or the timeframes in which they may be re-ordered.

i) The amount of coercive fines foreseen in Art. 92.1 a) LOTC represents a large increase with respect to the one established in Organic Law 6/2007, of 24 May —from 600 to 3,000 €— and not only changes the measurement in quantitative, but also in qualitative, terms, by becoming a sanctioning measure; the amount set is clearly disconnected and disproportionate with respect to the solvency of the subjects that may be sanctioned, and is totally unrelated to an update of the earlier amounts.

The amount greatly exceeds the fine foreseen in Art. 48.7 a) Contentious-Administrative Jurisdiction Law [in Spanish, Ley de la Jurisdicción Contencioso-administrativa, hereinafter LJCA] —from 300 to 1,200 €—, which may be imposed on the authority or employee responsible for not following the judicial Court's request to forward the administrative file claimed, as well as the coercive fines foreseen in Art. 112 LJCA —from 150 to 1,500€—, which may be imposed on authorities, public employees or agents that fail to fulfil the jurisdictional Court's requests as regards enforcement of the court's ruling. This huge difference between these respective amounts is

particularly evident when the parties fined by the contentious-administrative Courts and Tribunals and by the Constitutional Court are in both cases the same authorities or public employees.

In light of the salaries currently being paid to authorities and public employees for holding office and their positions, the fine amount foreseen in Art. 92.4. a) LOTC is disproportionate and, if applied, would have very serious consequences for those liable for payment, and could even be devastating if the fines are re-ordered.

ii) The unconstitutionality of the challenged article lies not only in the excessive and disproportionate fine amount but also, and mainly, on a total absence, given the new sanctioning nature acquired, of criteria for the scaling of fines and determination of timeframes in which to re-order them, all of which will be freely ascertained by the Constitutional Court. Consequently, the legislator has not fulfilled its duty to define the criteria that the Court should follow to determine the fine amount, which should be adequate and proportional to the circumstances of the case, and the date of which it may be re-ordered; as a result, the imposition of coercive fines lacks the necessary degree of certainty and foreseeability.

The imposition of these fines will be unable to be challenged or checked by any jurisdictional Court of the State. At the very most, further to Art. 93 LOTC, a petition for reconsideration (in Spanish, "*recurso de súplica*") may be lodged before the Constitutional Court itself. This non-existing possibility of review by another jurisdictional Court made it necessary for the legislator to guarantee the exhaustiveness and regulatory predetermination of these sanctions by legally establishing criteria for the scaling of amounts and the timeframe for re-ordered sanctions. Otherwise, as in the case of the challenged article, a constitutional Court jurisdiction is being unconditionally empowered and it is not possible to check whether or not it is acting arbitrarily or in line with the principle of legality.

The legislator should have established parameters and criteria for the scaling of fines such as, for instance, the level of participation of each sanctioned party in the breach, the greater or lesser seriousness of the infringing conduct, the contumacy of the sanctioned party, its solvency or, ultimately, the urgency or immediacy of the situation derived from the breach, so as to guarantee minimum equality in the treatment of all the parties subject to a fine. The foregoing is foreseen: in the Civil Procedure Law (in Spanish, Ley de Enjuiciamiento Civil**,** hereinafterLEC) for coercive fines (Art. 591, in relation to Arts. 589 and 711). In the LJCA, which establishes a timeframe in which

coercive fines may be reordered [Art. 112 a)]. In the Common Administrative Procedure Law which refers to the laws in question for a definition of the situations, manners and amounts in which coercive fines may be imposed or re-ordered (Art. 103). In this regard, when coercive fines are imposed by the European Court of Justice (Art. 260.2 Treaty on the Functioning of the European Union) the Commission has issued various communications, objectivising the calculation of amounts with comprehensive rules, whereby a standard lump sun is first of all multiplied by a seriousness coefficient and duration coefficient, and then by a fixed factor, based on the solvency of the State being fined.

iii) The claim continues by alleging that the coercive fines foreseen in Art. 92.4 a) LOTC may act as a warning, encouraging compliance with a resolution and request issued by the Court, whilst also clearly serving a sanctioning purpose, which is totally evident from the fact that a breach of such resolution constitutes unconstitutional conduct (Arts. 164 CE and 87 LOTC), sanctioned immediately with the fine is ordered. Its sanctioning purpose is likewise disclosed by its high amount and the consequent penalty imposed on the sanctioned parties (payment of the fine).

Certainly, the Constitutional Court has declared that coercive fines imposed by the Administration should not be necessarily classified as sanctions, as they may constitute an independent and compatible device used instrumentally to legally enforce *intuitu personae* obligations, with no sanctioning effects (SSTC 239/1988, of 14 December, FF JJ 2 and 3; and 164/1995, 13 November, FJ 4). However, the Court has also admitted (SSTC 61/1990, of 29 March; 276/2000, of 26 November; 291/2000, of 30 November; 132/2000, of 16 May; 26/2005, of 14 February; and 39/2011, of 31 March) that neither the name legally conferred to a measure that is restrictive of individual rights, nor the legislator's mere wish to exclude a measure from its sanctioning scope, suffices to exclude the imposition of measures that are restrictive of rights from the system of guarantees foreseen in the Constitution for the exercise of sanctioning powers. It is necessary to start off with a material concept of a sanction, examining the true nature, purpose and punitive function of the measure, considering whether it is being imposed due to ascertaining infringing behaviour and the personal and non-objective consequences of such measures for the parties subject to the same (STC 48/2003, 12 March, FJ 9). In each case, pursuant to this constitutional case-law, the very nature of each specific nature needs to be examined, to which effect it is essential to consider the function underlying the same, taking the following two components into account: "(i) if it is of a general nature, protecting the rights and interests of community members and potentially addressed to the entire population, and (ii) whether the purpose of the punishment is simultaneously punitive and dissuasive" (STC 181/2014, of 6 November, FFJJ 5 and 6).

In the case at hand, it is undisputed that the first requirement has been met, given that the imposition of fines would have a general effect on the entire population and constitutional system itself, as it would assist in fulfilling Constitutional Court resolutions and, consequently, would guarantee procedural public order. But the second requirement would also be met, given that the coercive fines foreseen in Art. 92.4 a) LOTC have a sanctioning or punishment component, reflecting a prior negative evaluation of a breach of a Constitutional Court resolution, in addition to the accessory breach involved in not following its request within the timeframe granted. Furthermore, the high cost to be paid by those fined is an additional effect; beyond pursuing a re-establishment of legality, this materially configures the fine imposed as a sanction, as it inflicts added harm, affecting the circle of assets held by the party in breach, which is why the legal definition of these fines necessary requires the material and procedural guarantees foreseen in Arts. 25 and 24.2 CE for the imposition of sanctions.

Consequently, the coercive fines foreseen in Art. 92.4 a) LOTC, devoid of any scaling criteria or parameters, contravene the basic guarantees that all sanctioning rules should uphold in favour of citizens and public powers, thereby infringing the principles of legality in sanctioning matters (Art. 25 CE) and of legal certainty (Art. 9.3 CE), as well as the mandate foreseen in Art. 165 CE for the legislator of organic laws, to regulate the Court's operation, the proceedings brought before it and the terms in which to bring action.

D) As the second grounds of material unconstitutionality, the Attorneys of the Catalonian *Generalitat* claim that Art. 1.3, of Organic Law 15/2015, which rewords Art. 92.4 b) LOTC, infringes Arts. 25 and 161.1 CE.

i) Suspension of authorities or public employees, foreseen in the challenged article, is a novel and unprecedented measure in the LOTC, beyond the nature and characteristic functions of the Constitutional Court. It is certainly contemplated in other laws, but in relation to the disciplinary rules applied to public employees or the criminal system in force applied by Judges and Tribunals pertaining to the Judiciary or the General Council of the Judiciary [Arts. 33.2 e), 33.3 c), 39.c), 43 and 56.1.1 Criminal Code; 90, 96 and 98 Basic Statute of Public Employee and 420 of the Organic Law on the Judiciary]. Consequently, all these situations seem to be unrelated to the object of Constitutional Court jurisdiction; the Court is not entitled to act as a criminal judge given that, amongst other reasons, its members are not bound by the incompatibilities affecting Judges. Ultimately, the law has configured the suspension of authorities or public employees as a disciplinary or criminal sanction, or as a provisional measure preceding said sanctions. Furthermore, the Contentious-Administrative

Jurisdiction Law, which applies on an ancillary basis further to Art. 80 LOTC as regards the enforcement of resolution, is no entitlement for the adoption of a measure such as suspension of authorities or public employees in order to enforce judgments delivered in this jurisdictional order.

ii) The measure foreseen in Art. 92.4 b) LOTC is not suitable for the legal enforcement of Court resolutions delivered in lawsuits for which it is competent. In fact, judgments delivered both in proceedings declaring the unconstitutionality of rules enjoying the status of a Law, and in those settling positive competence conflicts or challenges of Title V LOTC, are predominantly declaratory and the usual effect of a declaration of unconstitutionality and nullity of provisions or acts is to not reproduce them or render them ineffective. The same applies to the enforcement of any resolutions adopted by the Constitutional Court during said proceedings. As a result, suspension of authorities or public employees is not a suitable measure to guarantee the enforcement of an adopted resolution. Should the authorities or public employees in question take steps to maintain or reproduce the voided provisions or acts, the enforcement measure that the Court would need to adopt is a declaration of nullity of any resolutions contradicting those delivered when it exercised its jurisdiction (Art. 92.1, paragraph two, LOTC).

If the Court's resolution establishes positive obligations to act, to adopt measures, endow resources or approve provisions, or if they result in *intuitu personae* obligations and the competent authorities or public employees are not adopting or approving the foregoing, the suspension of such authorities or public employees would not seem useful either for the enforcement of resolutions delivered. Based on experience acquired in other jurisdictional orders, it would seem, rather, that an adequate measure in this case would be to impose coercive fines or substitute enforcement.

iii) The suspension of authorities or public employees is an unsuitable and unnecessary measure, not strictly linked to enforcement, as it has merely *ad extra* sanctioning effects, in the event of a breach of Constitutional Court resolutions.

As claimed by the Attorneys of the Catalonian Government, we should also state that the sanctioning powers that could entail a deprivation of a fundamental right to hold public office, acknowledged in Art. 23 CE, is not covered by the provisions of Title IX CE and is not adequate in terms of the constitutional justice model configured. In no case is the Constitutional Court being empowered to examine the constitutional compatibility of personal conducts, determining any ensuing

liability. Consequently, Art. 94.2 b) LOTC is unconstitutional as it exceeds the scope of jurisdiction defined in Art. 161.1 CE, by endowing the Constitutional Court with *ad extra sanctioning powers.*

Furthermore, the measure does not meet the minimum guarantees that should underlie any sanctioning regime, in breach of Art. 25 CE. In effect, a reference to the possibility of suspending authorities or public employee lacks the accuracy and specification required of a rule of this kind, and infringes the principles of legal certainty and foreseeability in the law, given that the conducts able to be subsumed in a factual situation cannot be predicted with a sufficient level of certainty, allowing their adoption and duration. Thus, the article wording allows someone to be suspended who has not been party to the proceedings, or has even directly participated in failing to follow a Court resolution. As a result, sanctions could be imposed on parties not carrying out the sanctioned conduct (strict liability), based on the mere outcome and without taking any personal diligence into account.

In short, when establishing this suspension measure, the legislator has crossed the dividing line between constituent and constituted powers (STC 76/1983, of 5 August, FJ 4); as a result, Art. 92.4 b) LOTC breaches Art. 25 CE and exceeds the scope of jurisdiction of the Constitutional Court, defined in Art. 161.1 CE.

E) In turn, Art. 92.4 c) LOTC, as worded by the Art. 1.3, of Organic Law 15/2015, infringes Arts. 153, 161.1 and 165 CE, by foreseeing that the Court may ask the National Government for collaboration in order to ensure the fulfilment of its resolutions.

i) The regulation of this substitute enforcement in this article departs from the provisions of the LJCA, as it does not distinguish between the enforcement of Constitutional Court resolutions imposing an obligation to do or not to do, or those where an action is totally established, and others that entail a broad margin of discretion, or which measures may be adopted further to this substitute enforcement.

The article only foresees the possibility of the Court requiring collaboration from the State Government, not from other bodies or Administrations. Its wording seems to ignore the fact that the State Government may also be bound by a Court resolution, which it may fail to follow. Furthermore, as the State Government is party to many lawsuits conducted before the Court, the possibility of ordering the other party/parties against it to fulfil the Court's resolutions contradicts the principles of judicial impartiality and equality between the parties, which should underlie any modern

constitutional process. Consequently, insofar as the article entitles the State Government to act against its counterparties in a lawsuit, it infringes the essential principles underlying a jurisdiction, inherent to characterisation of the Constitutional Court.

ii) Paragraph two of Art. 92.4. c) LOTC may be interpreted in two ways: (i) that it expressly empowers the State Government to adopt the necessary measures to ensure effective enforcement, in fact endowing it with full powers of subsidiary enforcement, in a general and excluding manner; or, (ii) that it is the own Constitutional Court, instead of the body or Administration in breach, which takes action to fulfil the resolution delivered, in which case the State Government merely enforces what the Court has provided.

In the first case, total endowment of substitute enforcement powers of the State Government would entail a transfer or assignment thereto to the jurisdictional powers of the Constitutional Court, not foreseen by the Constitution and contrary to Arts. 161.1 and 165 CE.

However, in either case, the rule article is unconstitutional; if it is applied replacing the actions of the legislative Parliaments or of the Courts and Tribunals, this would constitute a blatant infringement of the principles of parliamentary autonomy (Art. 72 CE) and judicial independence (Art. 117.1 CE), as the Government would be upholding rights constitutionally attributed to other State bodies and powers, through channels not foreseen in the Constitution. It is obvious that the Constitutional Court, when exercising its jurisdictional functions, may correct-but not replace-other State powers in their respective decision-making, not even as subsidiary enforcement.

If applied by replacing Autonomous Communities, Art. 92.4 c) LOTC would clearly contradict the autonomy upheld in Arts. 137 ff. of the Constitution and the constitutional system applied for the allocation of competences, given that, in accordance with constant constitutional case-law, beginning with STC 76/1983, FJ 13, the State may not replace Autonomous Communities in their executive functions [this case-law is reiterated in SSTC 227/1988, of 29 November, FJ 20.d); 54/1990, of 28 March, FJ 3; 118/1995, of 17 July, FJ 18; and 36/2005, of 17 February, FJ 2]. Thus, by using substitute enforcement channels, the State would be entitled to intervene over Autonomous Communities, departing from the provisions of Arts. 137, 150, 153 and 155 CE.

F) Finally, the Attorneys of the *Generalitat* Government are challenging Art. 1.3, of Organic Law 15/2015, as worded by Art. 92.5 LOTC, due to breaching Arts. 9.3, 25, 137, 153, 161.1 and 2 and 165 CE.

i) The rule entitles the Court to adopt interim measures to ensure compliance with its resolutions, if it orders the suspension of provisions, acts or measures challenged in the event of "circumstances of particular constitutional relevance". Consequently, the possibility is foreseen of adopting "highly interim" measures.

Art. 92.5 LOTC only entitles the National Government to apply to the Court for such measures to be adopted, consequently excluding the entitlement of Autonomous Communities to make such an application when the challenge covers provisions, measures or acts of the State or other Autonomous Community (Art. 64. Three LOTC). This exclusion, in the appellant's opinion, is an affront to the principle of equality amongst the parties, placing the State Government in an advantageous or procedural priority position over Autonomous Communities, which are not acknowledged or covered by the Constitution, to the detriment of the entitlement granted to Autonomous Communities in Art. 161.1 c) CE and their political autonomy (Art. 137 CE).

ii) The rule also allows the Court to increase the effectiveness of the suspension arising *ex constitutione* further to Art. 161.2 CE. In this way, the legislator has amended the effects of the constitutional check recognised and determined in this constitutional provision, redefining the scope of this power of suspension. In fact, pursuant to Art. 161.2 CE, the Court has no decision-making margin if this power of suspension is put into practice, ordering a suspension of the challenged provision. Only after a five-month term has expired will the Court pronounce itself as to whether to lift or continue with the suspension initially agreed. In other words, in these cases, initial suspension effects are not a consequence of an interim measure adopted by the Court, but arise automatically as an inevitable consequence of upholding this constitutional rule. A resolution or decision granting leave to proceed to a challenge cannot refer in any way to this suspension, nor may the Court prevent or extend its effects.

Interim measures may only be adopted by the Court if the autonomous bodies, authorities or Administrations ascertain inadequate fulfilment of the suspension resulting from Art. 161.2 CE, and after requesting that they report on the matter, pursuant to the current provisions of paragraph one, Art. 92.4 LOTC. But it no way may the Court be empowered to redefine its intervention

in the suspension device foreseen in Art. 161.2 CE, given that the need to abide by the Constitution means that all procedures constitutionally foreseen be openly and directly processed through the channels established, without allowing steps through other channels or on the part of the legislator, or any other State body (STC 103/2008, FJ 4).

Consequently, Art. 92.5 LOTC is unconstitutional as the Court is entrusted with powers that are not conferred to it by Art. 161.2 CE, entitling it to change the suspension effects of this constitutional check.

iii) In turn, Art. 92.5 LOTC does not specify the "circumstances of particular constitutional relevance" entitling the Court to adopt these measures. In the appellant's opinion, this particular constitutional relevance should be inferred from the object of those proceedings that stand out in an extraordinary manner over the rest, due to directly questioning one of the key structural components of the constitutional system. In short, determinations of extraordinary importance for the constitutional system must be at stake. But if this were the case, it would be totally illogical for the legislator to overlook the mandate of Art. 165 CE and leave to the Court's discretion not only the appreciation of these "circumstances of particular constitutional relevance", but also the determination of any measures it may adopt. It is clear that parameters need to be defined in order to evaluate this particular constitutional relevance, as indicated by Art. 50.1 b) LOTC in relation to amparo appeal ("*recurso de amparo*"). Consequently, it is not only illogical and unjustified, but it is also unconstitutional for Art. 92.5 LOTC to unconditionally entitle the Court, in an unlimited manner, to order any type of measures to guarantee the suspension of provisions, acts or challenged measures, and to decide when extraordinary circumstances exist in which these unlimited powers may be claimed.

Consequently, Art. 92.5 LOTC is unconstitutional as it confers to the Court a scope of jurisdiction that exceeds the limits of Art. 161.1 CE, in breach of the mandate established in Art. 165 CE.

The Attorneys of the Government of the Catalonian *Generalitat* end their claim by requesting that the Court grant leave to proceed to their action of unconstitutionality and, after the necessary procedural measures are completed, to deliver Judgment declaring the unconstitutionality and nullity of the rules challenged. Furthermore, they are also requesting that the Court settle this

action of unconstitutionality before the application, in any of the proceedings or procedural incidents that may be pending a resolution, or which may be filed in the future, of any of the measures foreseen in the challenged articles of the LOTC.

3. The Plenum of the Constitutional Court, in a decision dated 2 February 2016, further to a proposal made by Section Three, agreed to grant the action leave to proceed and to forward the claim and documents submitted, as foreseen in Art. 34 LOTC, to the Congress of Deputies and to the Senate, through their respective Presidents, and to the Government, through the Minister of Justice, so that, within a term of fifteen days, they may appear as party to the suit and submit any pleadings deemed appropriate. It was also ordered to publish commencement of these proceedings in the "Official State Gazette".

4. The President of the Congress of Deputies, in a writ registered on 10 February 2016, notified the Bureau Resolution to appear as party to the proceedings, merely to submit pleadings in relation to the vices in the legislative procedure referred to in the claim, insofar as relevant to this Parliament; to entrust its representation and defence to the Chief Counsel of the Legal Department of the General Secretariat; to notify the resolution to the Constitutional Court and the Senate; and, ultimately, to forward the documentation to the Directorate of Studies, Analyses and Publications and to the Legal Department of the General Secretariat.

5. The State Attorney, by means of a writ registered on 12 February 2016, appeared as party to the action on behalf of the Government and requested an extension of the term granted in which to formalise a writ of pleadings, given the current workload of the State Attorney's Office.

The Plenum of the Court, by a decision dated 15 February 2016, incorporated into the records the writ issued by the State Attorney, to deem him as party to the suit, in the representation held, and to grant him an eight-day extension over the term initially granted in a decision dated 2 February 2016, as of the day following expiry of said term.

6. The President of the Senate, in a writ registered on 17 February 2016, notified the Bureau Resolution of the Parliament to appear as party to the suit and to offer its collaboration for the purposes of Art. 88.1 LOTC.

7. The Attorney of Parliament, for and on behalf of the Congress of Deputies, completed the pleadings stage granted in a writ registered on 26 February 2016, the essence of which is summarised below.

a) After describing the legislative journey of the draft bill giving rise to the challenged Law, he states that constitutional case-law has acknowledged a principle of disposal of the Congress, on what he refers to as procedural steps and their sequence in time, and a freedom or arrangement, including competence not only to decide which procedure is applicable, but also to resolve any incidental issues that may arise (STC 136/2011, of 13 September, FJ 6). Art. 150 of the Regulations of the Congress of Deputies (RCD) establishes two alternative situations in which to follow a summary procedure: that the nature of the legislative initiative so advises, or if this is allowed by the simplicity of its wording.

The first situation is not exclusively covered by the second. Irrespective of how simple the wording, other multiple factors may be at stake advising the use of this procedure. This type of speedier and summary procedure is a legitimate instrument in the hands of the legislator, which it may use depending on its legislative priorities, which is particularly evident when the end of the legislature is forthcoming and there is less available time in which to legislate. Appreciation of an immediate legislative need, justifying application of a summary procedure, by depending on the interpretation of a very open clause, means that what will prevail will be how it is evaluated politically: this political valuation, further to the rules of democratic play, will coincide with the opinion of the majority of the Parliament, first on the Bureau , proposing that this procedure apply, and then by the Plenary Session, approving it (STC 238/2012, of 13 December, FJ 4). The nature of the draft or bill is an open concept, allowing a much broader margin of interpretation than for other legal concepts. As its meaning cannot be sufficiently ascertained-given that drafts or bills are classified according to other criteria- the term is discretionally applied and thus depends on a political valuation only.

The representative of the Congress of Deputies has dismissed the interpretation made by the appellant, associating the nature of a draft or bill to its importance or relevance, in order to be processed in a summary procedure, as this criterion is not foreseen in Art. 150 RCD. In practice, a summary procedure has been unrelated to its relevance and the use of this procedure has not been interpreted as demeaning the significance of a rule in the overall legal system: such would be the case of a reform of the Constitution itself or of the draft Organic Law implementing the abdication of His Majesty The King Juan Carlos I de Borbón. The only requirement is for the processing of the subject matter to be

regulated not to be reserved to a certain procedure, in which case a summary procedure will not be possible (ATC 9/2012, of 13 January). But neither the Constitution nor the RCD (Arts. 150 and 130 to 132) exclude the possibility of Organic Laws, to specifically include the LOTC, being processed in a summary procedure.

Nor is anything said about the same law having to always be processed with the same type of procedure, binding *pro futuro*, as the appellant seems to be claiming. Each draft or bill constitutes an initiative that is independent of any earlier or subsequent ones, and each one may follow a different legislative journey due to the range of possibilities offered by the RCD.

As regards the second situation in which Art. 150 RCD may apply, he disagrees with the interpretation of the concept of simplicity included in the claim. Simplicity should refer to an analysis of the internal structure of the text, whether it is comprehensible and intelligible and is straightforward. The text will only be complex if, in order to be understood, a higher intellectual process is necessary involving above-average effort. The plaintiff's references to the vagueness, indeterminacy or ambiguity of the new regulations could in any case be related to legal certainty, but do not render the challenged sections complex.

We need to insist, when analysing this simplicity, that it does not mean that the text in question should be wide, concise or brief, as a bill could be brief but incomprehensible. Nor is the appellant's interpretation correct when it claims that a summary procedure may only be used for initiatives not subject to amendment, only allowing an approval or dismissal of the text overall, without allowing the possibility of initiatives on specific rules that may be eligible for a partial amendment. Unlike the regulations of other Parliaments (STC 27/2000, of 31 January), the RCD, in a summary procedure, allows the possibility of submitting amendments, which is incompatible with the affirmation that this procedure may not be used to make partial legislative amendments. And, ultimately, a final and overall approval, required by Art. 150.3 RCD, means that this type of vote, whether on the original content or which previously introduced amendments, is held after voting on any amendments, to the overall resulting text.

b) The Attorney of Parliament has also dismissed the link claimed by the appellant, between the lack of consensus manifested during processing of the rule and the possibility of the Constitutional Court's intervention to examine the unconstitutionality of the procedure (STC 129/2013, of 4 June, FJ

10). Consensus is totally unrelated to the constitutionality of the procedure followed to process a rule, nor is it a requirement for it to apply. Nor is there any requirement on a special majority in order to process an initiative in a summary procedure (STC 238/2012). Consequently, the check completed by the Constitutional Court is strictly legal, not political, which is why there is no evaluation as to whether or not there was consensus when processing and passing a Law.

c) The action does not dispute the urgency declaration made by the Bureau of the Congress, as Arts. 93 and 94 RCD are not claimed as infringed; the declaration is only used as additional arguments related to a summary procedure being used for this legislative initiative, to highlight and insist on the shorter timeframes.

In any case, the Attorney of Parliament claims in this regard that a difference should be made, on the one hand, a longer processing being in principle more desirable, and the urgency *per se* entailing an unconstitutionality vice. This is a valid procedural option (STC 119/2011, of 5 July, FJ 11) foreseen as such in RCD (art. 93).

d) Neither the use of a summary procedure nor its urgency has prevented the deputies from debating and participating, in a due process. Each procedure is unique; otherwise, it would make no sense to have different procedures: ordinary and special; the *ius in officium* need not have the same content in each one, but is shaped differently, according to each procedure's characteristics. This does not mean that the Congress has prevented or hindered performance of the rights and powers inherent to the core of parliamentary representation (ATC 118/1999, of 10 May). An analysis of the processing of the draft Organic Law proves otherwise, and merely corroborates that the deputies were able to adequately exercise their *ius in officium:* the procedure held up to two plenary debates, the first when the bill was taken into consideration, and then when it was passed; and all deputies were able to make the amendments they deemed appropriate, a total of three amendments to the entire alternative text and thirty-four to the articles, which were endorsed and voted upon in a plenary session. The Parliament's will was adequately composed and there is no indication of its result being materially altered at any time; this is the key component which, according to the Constitutional Court, needs to be ascertained in order to confirm an unconstitutionality vice (STC 136/2011, FJ 10); nor has the democratic principle been affected (Art. 1 CE).

The Parlamentary Counsel ends her writ of pleadings requesting that the Court deliver Judgment, dismissing the action of unconstitutionality .

8. The State Attorney completed the pleadings stage in a writ registered by the Court on 9 March 2016, the essence of which is summarised below.

A) She begins by making a series of considerations on the nature of the Constitutional Court, the need to guarantee the enforcement of its resolutions, to render its task effective as the supreme interpreter of the Constitution, and the devices foreseen to that end in the Constitution and the LOTC. In this regard, she states that the Court is a jurisdictional body, the only one in its order, rather than a political body. Another matter is the fact that its decisions have political consequences, but these consequences do not just arise from Constitutional Court decisions. This is in fact where the appellant is misled: it mistakes the political consequences of judicial resolutions with purely political conflicts, not subject to a constitutionality check, as long as the players are following adequate procedural channels. A different matter is if a political conflict exceeds this scope and affects constitutional rules through a breach, whereupon it becomes a legal conflict with political consequences; this scope is in fact entrusted to the jurisdictional bodies and, specifically, to this Court, as the supreme interpreter of the Constitution and guarantor of its effectiveness.

The Constitution does not exclude the possibility of the power of enforcement of Constitutional Court resolutions being exerted by the Court itself. This possibility has been excluded in other legal systems, but is not the case in Spain. Consequently, the Constitution has left the path open to what is determined in its implementing regulations (Art. 165 CE), in a similar way to the model foreseen in Germany.

The LOTC has also included in Spanish law specific enforcements on the part of the Constitutional Court, in addition to the general provision of Art. 92.1 LOTC. Already in its original version, the LOTC foresaw the possibility of using a standard device of legal enforcement, i.e. coercive fines (Art. 95.4 LOTC), as well as deadlines to be met when enforcing resolution delivered in negative competence conflicts (Art. 72.3 LOTC).

We may thus conclude, says the State Attorney, that the Constitution does not prevent the Constitutional Court from exerting its resolution enforcement power, as it refers to its implementing regulations, which include as a general principle since its enactment that it is the Court itself which will determine how to enforce these resolutions and will resolve any enforcement incidents, as well as

the legal enforcement situations entrusted to the Court, without prejudice to requesting assistance from other public powers.

Next, reference is made to the amendment that Organic Law 6/2007, of 24 May, has made in the enforcement system initially foreseen in the LOTC, to claim that the current reform merely wishes to move along in this path in order to preserve the effectiveness of the Constitution and guarantee the efficacy of Constitutional Court resolutions, in light of the new challenges we are now facing (STC 198/2012, of 6 November, FJ 8). A general principle is the need to render judicial resolutions effective in order to guarantee Art. 24 CE, covering Constitutional Court resolutions (ATC 1/2009, of 12 January, FJ 2). Consequently, the aim of the current reform of the LOTC is to uphold the right to have Constitutional Court resolutions followed and effectively performed, a matter that cannot be exclusively relegated to a penalty.

Furthermore, in the Spanish constitutional systems measures of suspension or substitution of autonomous body are not just covered by the Art. 155 CE device. Thus, for example, Organic Law 4/1981, of 1 June, when regulating constitutional and exceptional states in its implementation of Art. 116 CE, already stated that in a state of alarm the Government could suspend and substitute autonomous authorities and employees (Art. 10). It is clear that the factual situations where Arts. 116 and 155 CE differ, which however is no reason why the same measures may be taken to replace or suspend authorities or public employees, as the National Government is entitled in either case. Following the appellant's theory, we would need to admit that the effectiveness of Constitutional Court resolutions- if this requires the suspension or replacement of authorities or public employees public employees- will be exclusively ascertained by the National Government, as the only party entitled to activate constitutional devices to enable this. This conclusion is unconstitutional, in the State Attorney's opinion, as it is not foreseen in the Constitution and collides headlong with the principles of autonomy and independence of the Constitutional Court over other constitutional bodies (Arts. 1.1 and 73 LOTC).

In short, what is relevant is to determine the entitlement allowing the adoption and application of enforcement measures, made available to the Constitutional Court. And this rests on the need to guarantee the effectiveness of its resolutions, in other words, its task as the guarantor of the Constitution, which is why these rules are covered by Arts. 161 and 165 CE and 1.1 LOTC.

B) The State Attorney then refers to the scope of the constitutionality check of Constitutional Court regulations, in light of the appellant's highly specific allegations on factual situations where enforcement measures could apply, based on which he claims their total unconstitutionality.

After citing the criteria laid down in SSTC 66/1985, of 23 May (FJ 4) and 49/2008, of 9 April (FF JJ 3 and 4), he points out that the claim does not criticize the reform in the abstract, but is trying to define situations where the appellant considers that suspension and substitution measures would not apply with respect to resolutions in certain constitutional proceedings, by the party bound by such resolutions. However, the State Attorney warns that this is not the scope of an abstract constitutionality check on the reform of the LOTC (ATC 309/1987, of 12 March, FJ 2). What is being examined here is where, in the abstract, "irrespective of their possible practical application", the enforcement measures made available to the Constitutional Court by the legislator are a constitutionally valid option, without prejudice to other constitutional and valid options existing, and whether they can be applied in all or part of such constitutional proceedings. When evaluating their specific application in each case, the Court will ascertain whether or not it is possible to adopt one enforcement measure or another, based on the nature of the proceedings and the party bound by the decision. But this specific assessment is outside the realm of this action of unconstitutionality.

C) The State Attorney disagrees with the alleged infringement of Art. 23.1 CE, as a result of the procedure followed when processing the draft bill.

The parliamentary procedure chosen by the competent body has been followed, thereby overruling any "abuse of majorities", as stated in the claim. The role- not abuse- of majorities is, in essence, the core of democracy, particularly in the people's representative bodies, i.e. the Congress of Deputies and the Senate. Parliament decides whether to follow a certain procedure in accordance with its Regulations, ultimately deciding between the alternatives offered by parliamentary rules (STC 129/2013, of 4 June, FJ 10). Thus, the fact that a parliamentary majority imposes its decisions on the minority, within the same legislative Parliament, following the steps and *quora* legally foreseen, is not and cannot constitute an "abuse of majorities".

In this case, there was no regulatory infraction when processing the draft bill resulting in Organic Law 15/2015. Art. 150 of the Regulations of the Congress of Deputies (RCD), when establishing a condition for use of the summary procedure, that "the nature of the draft or bill taken

into consideration so advise" is not excluding any subject matter from this procedure, as not even a constitutional reform is excluded (STC 238/2012, of 13 December; ATC 9/2012, of 13 January).

On the other hand, the need for "simplicity in the wording" of the draft or bill refers to a type of regular text which, when worded, is not technically complex, lengthy or highly interrelated or connected as regards their material rules. In other words, no text that could even require specialised assistance to ensure a total understanding, from a technical point of view, of its regulatory scope (STC 247/2000, of 15 November, FJ 5). In this case, the few sections of the four articles of the LOTC, amended by Organic Law 15/2015, are brief, clear and totally comprehensible, both in terms of wording and the legislative purpose sought. This circumstance, along with the Parliament's legitimate right of discretion or political timing, in which to adopt the procedure, without prejudice in any case to observing the established rules, leads to the conclusion that the procedure foreseen in Art. 150 RCD was totally justified in material law terms.

We also disagree with the appellant's objection, to the extent that a summary procedure could not be used because the text had deep legal and social impact, involving a variety of technical and political criteria, rather than a generalised consensus. These circumstances cannot constitute grounds or a reason to prevent the application of Art. 150 RCD (SSTC 238/2012; 219/2013, of 19 December). The concept of "simple wording" required of a draft or bill, to be processed in each case in a summary procedure, will basically depend on the simplicity and clarity of the text. This characteristic will lead to an analysis and easier assessment of its content, and may also be used to speed up legislative procedures, irrespective of the political or social impact that the future law may have or the controversy it may trigger. In short, the fact that we are dealing with a brief, clear and concise text- containing the reform approved by Organic Law 15/2015- constitutes sufficient grounds for this text to be processed through this procedure. Consequently, there has been no change in the way in which the Parliament has reached its decision and, consequently, there is no infringement of the right of political participation held by parliamentary Groups and guaranteed by Art. 23 CE.

As regards the processing of the draft bill through a summary procedure, the State Attorney, based on the case-law laid down in ATC 9/2012, affirms that Art. 93 RCD grants the Parliament's governing body a margin of discretion or political timeliness, which it may follow when deciding, at a given moment and in light of the circumstances, to process a certain draft or bill through this procedure. In this way, the Bureau Parliament was entitled to use a summary procedure, irrespective of the fact that the alternative chosen in this case was or was not shared from other legal or political

points of view. This declaration does not prevent parliamentary Groups or their members from upholding the rights they hold in a legislative procedure.

In turn, the fact that the legislative initiative giving rise to Organic Law 12/2015, also reforming the LOTC, was processed in an ordinary legislative procedure, merely evidences the margin of appreciation underlying a discretionary power to order the processing of a draft or bill through a certain parliamentary procedure which, ultimately, is relegated to the opinion of the decision-making body, insofar as no other applicable rules are infringed. The Parliament Regulations, except for specific cases, does not require that the same procedure be always followed in a predetermined manner, let alone that the Parliament be legally bound to its precedents, i.e. that if on an earlier occasion or occasions parliamentary processing has followed a certain procedure, within the possible alternatives foreseen, it be thereinafter constrained to use that same procedure.

Given that the summary procedure *per se* is not excluded from any material regulatory scope, and the absence in this case of any regulatory infraction when it was adopted or processed, there has been no breach of Art. 23.1 CE as a result of using this procedure to process the draft bill.

D) As regards the unconstitutionality defects claimed in relation to the coercive fines foreseen in Art. 92.4 a) LOTC, as worded by Art. 1.3, of Organic Law 15/2015, the State Attorney begins his allegations by referring to the Report issued by the Statutory Guarantees Council, where it did not advise the *Generalitat* Government to challenge the article.

i) The ordering of coercive fines to enable the fulfilment of Court resolutions had already been included in the original version of the LOTC (Art. 95.4), differentiating them from pecuniary sanctions (Art. 95.3 LOTC). The increased amount of coercive fines established in Art. 92.4 a) LOTC does not change the nature of the measure, as its purpose continues to be the same, and the ordering of such fines may in no case be rendered equivalent to the punitive powers of the State. The Constitutional Court has already pronounced itself in this regard, clearly establishing a difference between administrative sanctions and coercive fines, and the inapplicability of the principle of legality in relation to the latter (STC 239/1988, of 14 December, FJ 2).

Furthermore, when compared with the original wording of the LOTC, the reform conducted by Organic Law 15/2015 offers greater guarantees both in the configuration and ordering of coercive fines; current regulations are more detailed and, consequently, more secure than the former rules.

The ordering of coercive fines is foreseen in the clear context of the duty to fulfil Court resolutions and to ensure their effective compliance. Section 4 of Art. 92 LOTC regulates an *ad hoc* procedure prior to the fine, whereby if a resolution delivered further to its jurisdictional functions may seem to be infringed, the Court (through a hearing) will demand that all institutions, authorities, public employees or citizens bound by the resolution to report on the matter, within the timeframe established. Only then, if the Court ascertains a total or partial non-fulfilment of the resolution, may it adopt the challenged measure, i.e. a coercive fine of three thousand to thirty thousand euros, against the authorities, public employees or citizens failing to follow the Court's resolutions, reordering the fine until the resolution is completely fulfilled. Thus, as opposed to what is stated in the claim, the fines are not ordered in the absence of a procedure. Nor are they imposed indefinitely or repeatedly over time; the fines stop as soon as the resolution has been totally fulfilled.

It is crystal-clear that a coercive fine is not a sanction, because its purpose is not to punish due to infringing a rule, but to ensure that a Court resolution is fulfilled. The measure tries to avoid a Court resolution from not being enforced, changing the conduct of the person who is reluctant to fulfil the same.

ii) Certainly, the amount of coercive fines has increase. But this is not *per se* unconstitutional, as it is a legitimate choice made by the legislator due to the importance of fulfilling Constitutional Court resolutions. In fact, it is not a case of not fulfilling any type of administrative or judicial resolution, but Constitutional Court resolutions which, due to their relevance, refer to a breach of the Constitution, the basic rule of Spain's democratic State. A reluctance to fulfil the Constitution means that measures should be instrumented to ensure its effective compliance, and this explains why the economic amount of coercive fines actually constitute a dissuasive measure, to guarantee this efficacy.

It would be prejudicial to consider that the Court will impose these fines in a disproportionate amount to the detriment of personal assets. There is no lack of proportionality when a coercive fine entirely depends on the free will of the person to whom the measure is addressed, who may avoid the fine by just adjusting his conduct to what the Court has ordered.

In order to back up the arguments that a coercive fine is not of a sanctioning nature, the State Attorney refers to the constitutional case-law laid down in SSTC 48/2003, of 12 March, FJ 9 and

132/2001, of 8 June, FJ 3, respectively dismissing the sanctioning nature of a legal measure to wind up illegal political parties and to provisionally suspend a taxi licence.

Furthermore, the ordering of coercive fines is also covered by the jurisdictional functions of the Court, given that, as is the case of different ordinary jurisdictional orders, it constitutes adequate means to guarantee compliance with its resolutions.

iii) The alleged infringement of the principle of arbitrariness or proportionality, according to the State Attorney, has been insufficiently discussed in the claim, lacking sufficient arguments to back this up. Nevertheless, on this point he refers to the later considerations made in relation to the proportionality of the measure to suspend authorities and public employees.

E) For the State Attorney, this measure to suspend authorities or public employees, ascribed to the Administration responsible for the breach, foreseen in the new wording given by Art. 1.3, of Organic Law 15/2015 to Art. 92.4 b) LOTC, is not of a sanctioning kind.

i) After referring to the arguments given on this sanctioning nature in relation to the coercive fines of Art. 92.4. a) LOTC and the constitutional case-law alleged, to include STC 48/2003 in particular, he considers that the measure now challenged is not of a sanctioning kind because it is not designed to sanction a conduct, with repressive consequences, but to avoid persistently failing to fulfil a resolution. Proof of this is the term in which the measure is effective, i.e. “for the necessary time to ensure that the Court’s pronouncements are observed”; it is also avoidable, as it may only be imposed once it is ascertained that the addressee is wilfully failing to comply, after completing the incident when the affected persons are heard. It may only be ordered against the authority or state employee responsible for the breach, and so may not be imposed on persons unrelated to the outstanding resolution; ultimately, says the State Attorney, such measure should be lifted as soon as the person responsible is no longer intent on not fulfilling the measure. The non-sanctioning nature of the measure excludes the consequent application of the principle of legality gathered in Art. 25 CE.

In turn, the measure is in fact part of the Court’s jurisdictional scope, given that it is directly aimed at safeguarding the function entrusted to it by Art. 161.1 CE, as an instrument that may be necessary to ensure the fulfilment of the Court’s judgments in proceedings within its competence.

ii) After recognising that this argument is not expanded upon in the claim and is only succinctly referred to, he affirms that both coercive fines [Art. 92.4 a) LOTC] and the measure to suspend authorities or public employees [Art. 92.4 b) LOTC] fulfil the principle of proportionality and are not arbitrary.

Certainly, a suspension measure may interfere with the rights of Art. 23 CE held by authorities or public employees entitled to hold office, but this interference is legitimate and consequently constitutional. Next, the State Attorney refers to the requirements of the principle of proportionality in those measures that may potentially interfere with a fundamental right, reproducing the case-law laid down in STC 50/1995, of 23 February, FJ 7, citing the decisions of the European Court of Human Rights, to affirm that in order to this constitutional case-law the so-called proportionality test involves "a check of the adequacy or suitability of the measure being examined (means/end), an examination of its need (absence of a less burdensome alternative) and a proportionality check in strict terms, based on its consequences (gauging the interests affected and in conflict to ascertain whether there is more or less to gain than to lose)".

After pointing out that in this case, involving an abstract control of the law, the Court's auditing task should uphold the legislator's legitimate freedom of configuration (STC 60/2010, of 7 October, FJ 7), the State Attorney considers that the measure to suspend authorities or public employees has been adopted in an Organic Law and is suitable to fulfil the end pursued, i.e. due compliance with Constitutional Court resolutions. In fact, the measure avoids an obstacle consisting of a reluctance to fulfil what the Constitutional Court has ordered, as a provisional removal of a person, ascribed to an organisation, who is willingly preventing a jurisdictional resolution from being fulfilled, allows the resolution to be duly enforced. Furthermore, the measure is necessary in those cases where, for legal or material reasons, the failure to fulfil a Court resolution by an authority or public employee, who may hold various positions within the organisation, makes it impossible to act further to what was agreed. It is also proportionate in strict terms over other alternatives that are more restrictive of rights, such as a permanent disbarment or criminal measures, which clearly constitute a greater interference than suspension.

As regards the suitability of the measure, the State Attorney claims that it is not unreasonable to consider the hypothetical annulment by the Constitutional Court of a resolution that contradicts its orders, not being sufficient to guarantee the enforcement of its decision, if the authority or public

employee in charge of cancelling the annulled resolution does not do so and keeps it in force. Or the case where positive action is required of an authority or public employee in order to restore legal order, and this does not take place. All these cases fall within the scope of the Court's task to ensure the fulfilment of its resolutions in various constitutional proceedings.

iii) An analysis of a suspension measure from the angle of non-arbitrariness (Art. 9.3 CE) leads the State Attorney to claim that in this case there is no "evident useless waste of coercion, rendering the rule arbitrary in breach of the fundamental principles of justice inherent to personal dignity and the Rule of Law" (STC 55/1996, of 28 March, FJ 8) or a "public arbitrary activity that does not respect personal dignity" (STC 55/1996, FJ 9) and, consequently, a person's fundamental rights and freedoms. The claim does not adequately refer to constant constitutional case-law — represented by STC 197/2014, of 4 December— whereby anyone examining the legislator's arbitrariness should justify it in detail, with grounds that are in principle convincing to overrule the presumption of constitutionality of the challenged law, as an apodictic affirmation that the law is "not suitable" or unnecessary does not constitute any grounds whatsoever.

F) In relation to the substitute enforcement measure foreseen in Art. 92.4 c) LOTC, as worded by Art. 1.3, of Organic Law 15/2015, the State Attorney begins by pointing out that the appellant is not claiming its unconstitutionality as a measure to enforce Constitutional Court resolutions, but is only questioning the possible substitution entrusted to the National Government.

After analysing the different reasons for the challenge, he also notes that LOTC enforcement measures are common to all proceedings, which is why the Court when specifically applying them will take into account the nature and effects of each constitutional process, as well as the party obliged to fulfil the decision. In other words, it is a matter now of checking the constitutionality of the reform in the abstract, rather than analysing each process and situation in detail where the measures or may not apply, something that is beyond the scope of this action.

i) In relation to the alleged infringement of the principles of impartiality and procedural equality of the parties, the State Attorney affirms that the appellant has not provided any arguments on the matter. In any case, he claims that the position of the National Government in constitutional processes is not equivalent, to a certain extent, to that of other parties, as evidenced by its status as a constitutional body, something that is absent from Autonomous Communities and their governing bodies; as such, it appoints part of the members of the Constitutional Court; its standing to bring certain

constitutional processes, not held by Autonomous Communities (prior constitutionality check of international treaties; challenges of Art. 161.2 CE; examination of negative competence conflicts; examination of conflicts amongst State constitutional bodies); and, ultimately, the right to apply for an automatic suspension of legal or lower-ranking provisions. The different position held by the Government, enshrined both in the Constitution (Arts. 161 and 162) and in the LOTC, does not infringe the principle of procedural equality. Furthermore, its constitutional position generally prevails over that of Autonomous Communities, in order to uphold the constitutional system, as inferred from Arts. 116, 153 and 155 CE. Consequently, given the nature of substitute enforcement measures, the legislator has intended to limit its application to the National Government.

ii) In turn, the Government is not the one discretionally deciding to substitute the obliged party when adopting the necessary measures; the Constitutional Court is the one requesting the Government's collaboration in order to render its resolutions effective. Entitlement of the measure is not a competence of the State, but rests on the need to guarantee the effectiveness of Constitutional Court resolutions; in other words, the Government will act if this is requested by the Constitutional Court, and in the manner determined by the same, in order to enforce its resolutions. Entitlement of the measure is therefore found in Arts. 161 and 165 CE and 1.1 LOTC.

The claim makes this same mistake when it mixes up substitute enforcement measures with a device to control Autonomous Communities, not foreseen in Arts. 150, 153 and 155 CE. This enforcement measure, as shown, is covered by Arts. 161 and 165 CE and the steps taken by the legislator for enforcement of Constitutional Court resolutions. In no event does it constitute a device to control Autonomous Communities, but is a measure to enforce Constitutional Court resolutions. The Government is not empowered to exert such control, as this enforcement check will be verified by the Constitutional Court, of which the Government is a mere collaborator. Ultimately, it is the Court which establishes the way in which the Government should implement this substitution. Any other interpretation would be contrary to the Constitutional Court's independence with respect to other constitutional bodies.

G) Finally, in relation to the challenge of Art. 1.3, of Organic Law 15/2015, in the wording given to Art. 92.5 LOTC, the State Attorney, first of all, refers to the procedural nature of the measure.

i) He argues in this respect that, based on its purpose, it may only be classified as a measure affecting procedural matters and deploying its effects within the special constitutional jurisdiction.

The Court should ascertain whether or not there are "circumstances of particular constitutional relevance", and should also decide on any specific measures to be adopted. Thus, the prior situation should be examined by the Court, and as such jurisdictional body it is the only one entitled to adopt the pertinent measures, dismissing or accepting any that may be proposed. This examination task is completed by the Court at the decision enforcement stage. The Government is only entitled to file an incident.

This category of interim decision does not conflict with the essence of a procedural right, in line with constitutional principles. In fact, the possibility of this type of measure or other similar one has been acknowledged in other jurisdictional orders (Art. 135 LJCA). Thus, the LOTC configures this type of interim measure by adjusting to the constitutional process the possibility of the Court adopting "highly interim" measures to, in turn, guarantee the binding effects of its own resolutions already adopted, in cases that the legislator has considered particularly urgent or deserving of special jurisdictional protection.

These "circumstances of particular constitutional relevance" implicitly refer to the scope or dimension which, in relation to constitutional integrity and the application of the Constitution, may arise if an Autonomous Community, whose rules or provisions have been provisionally suspended, acts in contempt and infringes this obligation to uphold the suspensive effects of the judicial order or decision decreeing this. Consequently, the purpose of Art. 92.5 LOTC is merely an aspired fulfilment of the Constitution, avoiding any resolutions of the jurisdictional body in charge of safeguarding it, to be subject to the whim of a party that is openly in contempt as a public power in relation to its general duty to enforce decisions and resolutions of the Constitutional Court (Art. 164 CE), in addition to acting with total disregard thereof, clearly to the detriment of legal efficiency and unity.

Although enforcement measures may be adopted *ex officio* by the Court, through the channels of Art. 92.5 LOTC, in circumstances of particular constitutional relevance, it is also true that the Government, and it alone, as the body of the central Administration directly entitled by the Constitution to automatically suspend a challenged rule, may do so as an interested procedural party. However, these circumstances should in any case be previously assessed by the Court, deciding whether or not they exist, which must also decide whether the measures requested are adequate or not and, where appropriate, adopt them with the scope and publicity decided, continuing to supervise them throughout their enforcement and being able to revoke them if this is deemed pertinent based on the circumstances existing at the time.

The procedural nature of the measure foreseen in Art. 92.5 LOTC, respectful of the fundamental right established in Art. 24 CE, is also reflected in the mandatory step that must be taken after interim measures are adopted *inaudita parte*, hearing the parties and the Public Prosecution Service, in order to confirm or revoke or, even, modify, the measures adopted.

The foregoing therefore amounts to a judicial step taken at an enforcement stage, not in any way related to a hypothetical extraordinary or exceptional prerogative of the Government. It is a procedural measure that conforms to the Constitution, given that the jurisdictional body is entrusted with decision-making powers to guarantee the enforcement of its own resolutions.

ii) For the State Attorney, Art. 92.5 LOTC does not amend the Constitution, as alleged by the other side in the claim. In his opinion, it is a back-up measure that precisely exists to guarantee the suspensive effects foreseen in Art. 161.2 CE. There is a need to ensure the legal, enforceable and binding efficacy of any interim suspension resolutions against autonomous laws and provisions. As already indicated, the Court should decisively ascertain whether or not "circumstances of special constitutional relevance" exist, taking into account issues such as the impact of the autonomous rule on the constitutional system, the degree or scope of the confrontation or challenge to the Constitution, a potential disregard for the values and principles specifically underlying the constitutional system, such as democracy, the form adopted by the State or Government, fundamental human rights, etc. In this regard, the State Attorney refers to the constitutional case-law contained in AATC 156/2013, of 11 July, and 182 and 186/2015, of 3 November.

The measure foreseen in Art. 92.5 LOTC does not consequently contravene Art. 161.2 CE; rather, it reinforces its procedural efficacy. It does not "amend" the Constitution, extending a prerogative only acknowledged in favour of the Government, to apply for the interim suspension of a challenged autonomous rule. The rule simply foresees a possible enforcement incident if the judicial resolution not fulfilled is precisely one that already formally declared, pursuant to Art. 161.2 CE, the suspension or continued suspension of the rule challenged at the time. In other words, the rule has not changed the legal system foreseen in Art. 161.2 CE; rather, the legislative amendment has been instrumented in order to guarantee, to a greater extent, the enforceability and efficacy of judicial resolutions to provisionally suspend provisions, always as part of a constitutional process and once the Constitutional Court has previously ascertained, *ex officio* or at the Government's request, whether circumstances of particular constitutional relevance exist.

The State Attorney concludes his writ of pleading by requesting that the action of unconstitutionality be dismissed.

9. On 5 December 2016, the President of the Constitutional Court, further to the competences conferred by Art. 15 LOTC, appointed Mr. González-Trevijano Sánchez as Judge Rapporteur of the action of incostitutionality no. 7466-2015, replacing Mr. Valdés Dal-Ré, who had declined.

10. In a decision dated 13 December 2016, it was agreed to schedule 15 December 2016 to discuss and vote on this Judgment.

II. Grounds

1. With this action, the Government of the Catalonian *Generalitat* is challenging Organic Law 15/2015, of 16 October, reforming Organic Law 2/1979, of 3 October, of the Constitutional Court (in Spanish, Ley Org, for the enforcement of Constitutional Court resolutions to guarantee the Rule of Law, on the grounds of procedural and substantive unconstitutionality vices. The alleged procedural unconstitutionality rests on the inadequacy of the legislative procedure followed to draw up the challenged Law, by not meeting the requirements established in Art. 150 of the Regulations of the Congress of Deputies (RCD), due to using a summary procedure, the timeframes of which have also been shortened to half as a result of the declaration of urgency, seriously conditioning the Parliament's decision-making and consequently in breach of its members' right to *ius in officium* recognised in Art. 23 CE.

Material unconstitutionality vices are alleged with respect to the Article 1. 3, in the new wording given to Arts. 92.4 a), b) and c) and 92.5 LOTC. In the appellant's opinion, for the reasons reflected in the Background Facts above, which will be referred to below in further detail when examining each article, Art. 92.4 a) LOTC, entitling the Court to order coercive fines, infringes Arts. 9.3, 25 and 165 CE, by not establishing any parameters to scale the fines or the timeframes in which these may be reordered. In turn, the measure to suspend authorities or public employees, gathered in Art. 92.4 b) LOTC, is contrary to Arts. 25 and 161.1 CE, due to not meeting the principle of criminal legality and exceeding the scope of constitutional jurisdiction. Art. 92.4 c) LOTC, which foresees that the Court may request the National Government's collaboration for the substitute enforcement of its

resolutions, infringes Arts. 137, 153, 161 and 165 CE, by allowing the exercise of powers that are constitutionally entrusted to other bodies. And, finally, Art. 92.5 LOTC, empowering the Court to adopt the necessary measures to ensure adequately compliance of any resolutions ordering the suspension of challenged provisions, acts or measures, is in breach of Arts. 161 and 165 CE, as it is granted jurisdictional powers that exceed the limits set by said constitutional provisions.

The Parliamentary Counsel, based on the arguments also reflected in the Background Facts above, is requesting a dismissal of the action as regards the procedural unconstitutionality claimed, on which her pleadings are based. In her opinion, the parliamentary processing of the challenged law has conformed to the regulatory provisions governing summary and urgent procedures, and the deputies' rights of participation in the legislative process have not been harmed or restricted, which is why there is no breach of Art. 23 CE.

In turn, the State Attorney, in the terms likewise summarised in the Background Facts above, agrees with the Parliamentary Counsel as to the procedural unconstitutionality vice alleged in the claim, requesting that the action be dismissed with respect to the material unconstitutionality grounds brought against the new wording given by Art. 1.3, of Organic Law 15/2015, to Art. 92.4. a), b) and c) and 92.5 LOTC, by not infringing, in his opinion, any of the constitutional articles referred to by the appellant.

2. Once the object of this action of unconstitutionality is defined, in the terms described, it is clear that it has similarities to the action of unconstitutionality brought by the Basque Government against Organic Law 15/2015, in which STC 185/2016, of 3 November, was delivered- although in this case Art. 92.4 a) LOTC is also being challenged, which is why this resolution will inevitably and frequently refer to and reproduce the case-law and pronouncements established in said Judgment. These similarities were already ascertained at the time when the Court granted the action leave to proceed; further to a proposal made by the Reporting Judges, assigned by roster, in both appeals, the Court deemed it appropriate, when organising the discussions, that the Basque Government action, despite being filed at a subsequent date, be resolved before the *Generalitat* Government action, given that the former claimed, as the first and determining grounds of unconstitutionality, based on an overall consideration of the articles challenged, denaturalisation of the constitutional jurisdiction model designed by the constituent, whereas the Catalonian Government's action does not involve such a generic approach, and instead focuses on a specific challenge against each challenged article.

In order to contextualise the LOTC reform carried out by Organic Law 15/2015, and the specific articles challenged, please note that the latter's preamble establishes, as one of the main components of any jurisdictional function, "the existence of sufficient instruments to guarantee the effectiveness of resolutions delivered further to such function", which also constitutes "an essential component of the Rule of Law". The purpose sought by the reform is to introduce "in constitutional matters, enforcement instruments empowering the Court", which is entrusted to act as the supreme interpreter and guarantor of the Constitution by exercising its jurisdictional duties, "with a set of rights to guarantee the effective enforcement of its resolutions". The legislator, in the preamble of the law, has stated the adequacy of completing the general enforcement principles contained until now in the LOTC, implementing "the necessary instruments" in order to actually guarantee the effectiveness of such resolutions, "in order to overcome new situations that are trying to avoid or evade such effectiveness".

For the purposes of this constitutional process, the challenged Law, in the new wording given to Art. 92.4 LOTC, whose sections a), b) and c) have been challenged, foresees specific rules in the event of a breach of Constitutional Court resolutions. In these cases, "if it is ascertained that a resolution delivered further to its jurisdiction may not be followed, the Court, *ex officio* or at the request of any parties to the suit where the decision was delivered, will demand that the institutions, authorities, public employees or citizens obliged to enforce the resolution to report on the matter, within the timeframe established". Upon receipt of this report or expiry of the timeframe conferred, "if the Court ascertains that its resolution is not being followed, in whole or in part, it may adopt any of the following measures: a) To order a coercive fine of between three thousand and thirty thousand euros, against any authorities, public employees or citizens failing to follow the Court's resolutions, reordering this fine until what is ordered is entirely fulfilled; b) To suspend the authorities or public employees of the Administration in breach, during the time necessary to ensure that the Court's pronouncements are fulfilled; c) The substitute enforcement of resolutions delivered in constitutional proceedings. In this case, the Court may request that the State Government collaborate in order to, in the terms established by the Court, adopt the necessary measures to ensure compliance with its resolutions; d) Obtain a statement from the citizens involved, in order to ascertain any potential criminal liability".

And, finally, new Art. 92.5 LOTC, also challenged in this process, provides that "for the enforcement of resolutions ordering the suspension of provisions, acts or measures challenged, in circumstances of particular constitutional relevance, the Court, *ex officio* or at the State Government's request, will adopt the necessary measures to ensure their due compliance, without hearing the parties.

This same resolution will grant a hearing to the parties and State Prosecution Service, for a common three-day term, following which the Court will issue a resolution, lifting, confirming or changing the previously adopted measures".

3. Before examining the issues raised in this action, we will first refer, as we did in STC 185/2016 (FJ 3), reproducing the case-law of SSTC 49/2008, of 9 April (FFJJ 3 and 4) and 118/2016, of 23 June (FFJJ 1 and 3), to the scope of the constitutionality check of the Organic Law of the Constitutional Court.

a) The legislator of this Law "enjoys freedom of configuration, not only derived from the principle of democracy, but which is also protected by various reservations in favour of organic laws, foreseen in the Constitution in this regard [Arts. 161.1.d), 162.2 and 165 CE]", the content of which, as we pointed out in STC 66/1985, of 23 May (FJ 4), may be freely established by the legislator. Logically, this freedom, due 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 these reservations and other articles of Title IX of the Constitution, but also from a systematic interpretation of the entire Constitution". Consequently, "whilst respecting constitutional rules and the Court's independence and mission, [the legislator] may make any changes or amendments thereto it deems appropriate, without having to limit itself to those that are indispensable to avoid unconstitutionality or to ensure the achievement of constitutional objectives" [STC 49/2008, FJ 3; along the same lines, STC 118/2016, FJ 3 a)].

It is relevant here to mention that the Court has referred to the legislator's freedom of configuration in relation to other constitutional bodies too, as was recently the case with the General Council of the Judiciary (STC 191/2016, of 15 November); when acknowledging such freedom, we stated that Art. 122 of the Constitution "has regulated this constitutional body in a scattered manner, which is why not all its features or components may be inferred from this partial structuring of the Constitution" [FJ 3 B)]. Ultimately, as a more general statement in this Judgment, "in no case may it be claimed that the Constitution's structuring of constitutional bodies is always exhaustive, in all respects, and, as such, exclusive of any margin of configuration and integration by lower-ranking rules" [FJ 8 D)].

b) The legislator must uphold the material and formal limits of the Constitution, and the Constitutional Court, as its supreme interpreter, should check that these limits are met. Otherwise,

“not only would there be matters beyond constitutional control, both the Court would also be overlooking its task in a decisive matter for the Constitution’s supremacy, i.e. the Court’s jurisdiction”. Consequently, “to leave in the hands of the legislator of organic laws the specification of [the constitutional model covered by our jurisdiction] and to waive its control would not in fact reflect the constituent’s aim to create a constitutionality supervisory body with broad competences and to guarantee its effectiveness". This fact that the Constitutional Court is bound, in a two-fold manner, to the Constitution and to its Organic Law, “cannot be interpreted so as to prevent a constitutionality check of our regulating law, as this would mean overriding the principle of constitutional supremacy at the creative stage of Law, i.e. with respect to the legislator" [STC 49/2008, FJ 3; its case-law is reproduced in STC 185 /2016, FJ 3 b)].

c) As regards the scope of this check, we should “increase any institutional and functional considerations always inherent to the supervision of our democratic legislator”; it is clear, in the first place, “that our examination is constitutional only, not political or based on timeliness or technical quality”; we should merely examine the case “in an abstract manner and, consequently, irrespective of the potential practical application of the specific articles challenged and the constitutional rules and principles included in this control parameter in each case”. Secondly, “we cannot lose sight of the fact that a constitutionality presumption enjoys a high position when exercising this control; the appellant should not only trigger it with its entitlement, but should also specify the grounds of the alleged unconstitutionality and collaborate with the constitutional jurisdiction”. Third, as a matter of principle, “the legislator should not just implement the Constitution; it is also constitutionally entitled to adopt any measures which, in a scenario of political pluralism, do not exceed the limits foreseen by the Constitution” [SSTC 49/2008, FJ 4; 118/2016, FJ 1; and 185/2016, FJ 3 b)].

Finally, as regards the examination involved in this process, and as we pointed out in STC 191/2016, “the constitutionality check over the law, carried out by this Court, involves recognising and respecting the broad margin or freedom of configuration entrusted to the legislator in order to process its political options, which […] are not previously programmed in the Constitution once and for all, as if the only thing left to do thereafter would be to implement this prior plan (STC 11/1981, of 8 April, FJ 7)". In this Judgment, we continued by asserting, as a basic principle for constitutional interpretation, “that the legislator does not execute the Constitution, but freely issues Laws within the scope provided […]; it may be obviously inferred that, when checking the law, the Court will not act as the legislator itself […], limiting its freedom of enactment to the point where the

Constitution does not unequivocally do so". The legislator is not subject to any more limits than those arising from the Constitution which is why, as we concluded then and repeat now, "it may be said that the law is bound to the Constitution in a negative manner, here too, excluding any constitutional infringement but not imposing a single configuration of the Court, finished in all respects" [FJ 3 B)].

The foregoing is and has been our case-law in relation to the scope of the constitutionality check to be completed by the Court over its Organic Law. Consequently, as the supreme interpreter of the Constitution, the Court should check that the legislator of organic laws is upholding the constitutional limits that condition its mission and task, in the terms described.

4. Our examination should begin with the alleged grounds of procedural unconstitutionality, as Organic Law 15/2015 as a whole is being charged and may consequently be affected.

The Attorneys of the Government of Catalonia consider that, as the requirements are not met foreseen in Art. 150 RCD to use a summary procedure, the processing of the draft bill in this way determines its formal unconstitutionality, as well as a breach of the deputies' fundamental right to *ius in officium* guaranteed by Art. 23 CE. Such parliamentary procedure would therefore exclude inherent nature to the legislative initiative- both rules of special constitutional relevance and texts for which alternatives exist, rather than just an overall approval or dismissal. Furthermore, the deputies' right of participation has been aggravated further by the declaration of urgency, reducing to half the timeframes that were already short. After declaring the absence of consensus amongst the parliamentary Groups, the Attorneys of the Government of Catalonia, as an immediate precedent in relation to use of the summary procedure, refer to the processing by means of an ordinary procedure of the legislative initiative passed as Organic Law 12/2015, of 22 September, likewise amending Organic Law 2/1979, of 3 October, of the Constitutional Court, where the deputies were provided with a report issued by the Council of State, unlike the case here.

On the other hand, the Parliamentary Counsel considers that the decision to use a summary procedure has been validly adopted by the competent bodies pursuant to the provisions of the Parliament Regulations. Appreciation of the "nature" of a draft or bill is an open concept, granting the Parliament bodies a broad margin of interpretation, but in no case excludes the summary procedure based on the particular relevance of the law in question. In turn, the "simplicity in its wording" concept involves an analysis of the internal structure of the text- whether it is comprehensive and intelligible

and simple in structural terms, as is the case here- and is totally unrelated to its legal impact. The Parliamentary Counsel also disagrees that the declaration of urgency, with respect to which no infraction is being claimed of the RCD, has entailed an unconstitutionality vice, as this is a valid procedural option. In short, she concludes, the deputies' possibilities of participation in the law enactment process have not been limited or restricted, as the process followed what was foreseen in the regulations, without breaching Art. 23.2 CE.

The State Attorney is also requesting that these unconstitutionality grounds be dismissed in the absence of any regulatory infraction in the processing and passing of the law. There is no subject matter that cannot be enacted through a summary procedure. In turn, the "simplicity in the wording" of the legislative text, foreseen in Art. 150 RCD refers to regulatory texts, as is the case here, what are not technically complex, lengthy or highly interrelated or connected in terms of material regulation. As regards the declaration of urgency, the Parliament Bureau is entitled to adopt this decision, which does not prevent parliamentary Groups or their members from exercising the rights they hold in the legislative procedure. In short, the State Attorney considers that as no regulatory infraction whatsoever has been ascertained in the processing of the draft bill, there is no violation of Art. 23 CE.

5. These first grounds of unconstitutionality are evidently similar to the procedural vice of which the challenged Law was accused in the unconstitutionality action resolved by STC 185/2016, of 3 November (FF JJ 4 and 5), with reasoning and pronouncements that are applicable and should be referred to.

a) When determining exactly the terms of the scope of these grounds of unconstitutionality, we need to point out that the Attorneys of the *Generalitat* of Catalonia are not questioning the processing of the draft bill through a summary procedure, or that the declaration of urgency was proposed and decided by the competent parties and bodies- as has been the case- or that during the legislative procedure any steps were overlooked or the deputies or parliamentary groups were deprived of their regulatory rights. The grounds of unconstitutionality are based on the fact that, in their opinion, for the reasons explained, none of the requirements foreseen in Art. 150 RCD were present in order to process the draft bill through a summary procedure.

b) In said STC 185/2016, repeating preceding constitutional case-law, it was stated that "although Art. 28.1 LOTC does not include parliamentary regulations amongst those rules which,

if infringed, could render a law unconstitutional, it is clear that, both due to the inviolability of said procedural laws against the legislator's action, and, above all, due to their instrumental nature with respect to a higher value in Spanish law- political pluralism (Art. 1.1 CE)- a failure to observe the articles regulating the legislative process could render a law unconstitutional, if this oversight materially affects the decision-making process in Parliament" [FJ 5 b); citing SSTC 99/1987, of 11 June, FJ 1 a), and 103/2008, of 11 September, FJ 5].

Nevertheless, we pointed out then that this case-law should be compatible with constitutional case-law, whereby "parliamentary autonomy, constitutionally guaranteed (Art. 72 CE), and the very nature of Art- 23.2 CE, as a right of legal configuration, also mean that it is necessary to grant the Parliament- and its governing bodies in particular- a margin of application when interpreting parliamentary legality, which this Court cannot overlook". And, specifically, in relation to parliamentary decisions related to a shortening of the steps and timeframes involved in a legislative procedure- either as a result of a declaration of urgency, or the use of a summary procedure, or the existence of exceptional causes, or merely due to failing to meet the timeframes established in the regulations- we said then that the Court had declared that: "(i) no summary legislative procedure has been constitutionalised for the processing of regulatory bills that are characteristically urgent, except for a time limit in the processing by the Senate of drafts declared as urgent by the State Government or the Congress of Deputies (Art. 90.3 CE), which is why said regulation is entrusted to the regulations of Parliament [STC 136/2011, of 13 September, FJ 10 e)]; (ii) a shorter processing time does not deprive Parliament of its legislative function, as it only affects the time sequence, and need not infringe any of the constitutional principles underlying the legislative process, in which the body makes its decision (STC 234/2000, of 3 October, FJ 13); (iii) a decision of these characteristics should be applied in such a way as to equally affect all political forces represented in Parliament, avoiding an unequal or discriminatory treatment (ATC 35/2001, of 23 February, FJ 5); and (iv) this shorter processing time could only become constitutionally relevant if its size is of such an extent as to materially alter decision-making in a Parliament, consequently affecting its representative function, inherent to the parliamentary statute [SSTC 136/2011, of 13 September, FJ 10 e); and 44/2015, of 5 March, FJ 2]" *(ibidem;* citing STC 143/2016, of 19 September, FJ 3).

c) Art. 150 RCD, as requirements for the processing of a draft or bill in a summary procedure, foresees that its "nature" so advise or that this be possible due to the "simplicity of its wording". Both requirement are defined "in clauses or open concepts granting the Parliament bodies a broad margin of appreciation or interpretation when applying the same. Consequently a decision on

the timeliness when resorting to this type of procedure, and the existence of simplicity in the regulatory text or other characteristic justifying the parliamentary processing of a draft or bill in a summary procedure, should be made by the Plenary Session of the Congress of Deputies, further to a proposal from the Parliament Bureau, after hearing the Spokespersons (STC 238/2012, of 13 December, FJ 4). In this case, the Plenary Session of the Congress of Deputies has decided by majority to process the draft in a summary procedure, thus manifesting its opinion that at least one of the requirements was met, which the Parliament Regulations imposes on the use of this parliamentary procedure" [STC 185/2016, FJ 5 d)].

In terms of supervising such parliamentary decisions, as was the case- and for the same reasons- of said STC 185/2016, we should now dismiss the alleged infraction of Art. 150 RCD, "as the Court is not entitled, due to the need to uphold Parliament autonomy in its internal proceedings (STC 49/2008, FJ 15), to replace the will and timeliness decision of the Bureau of the Congress of Deputies, by proposing a processing of a draft bill in a summary procedure, or the Plenary Session's decision. In effect, the particular constitutional relevance of a regulatory text, in light of said regulation article, is not incompatible with its processing in a summary procedure, or is sufficient *per se* […] to exclude the use of this parliamentary procedure, from which no matter is excluded, including constitutional reform (STC 238/2012, FJ 4, reproducing the case-law of ATC 9/2012, of 13 January)" *[ibidem],*

Moreover, it is not arbitrary to consider that the simple wording of the draft bill, which is likewise not affected by its material relevance or constitutional importance, or the existence of a variety of technical and political criteria, "may justify in this case- as we added to the preceding arguments in STC 185/2016-, processing of a bill in a summary procedure, based on its structure, content and language. Certainly the draft bill, when read, consists of a single article, with four sections. and a final provision amending or partly rewording four articles of the LOTC, whose structure and language, from the point of view of any reasonable observer (ATC 141/2016, of 19 July FJ 6), are comprehensible, simple and intelligible, without prejudice to affecting a matter of huge constitutional impact" *(ibidem).*

Nor is there any regulatory requirements demanding that the Congress of Deputies follow its precedents in relation to decisions on procedures to process legislative initiatives, i.e. any proposed reform of the same law should be processed through the same type of parliamentary procedure, as the appellant seems to be claiming. What is relevant here, once again, is the Parliament's

freedom of choice on the procedure to follow within the range of possibilities offered by its Regulations. Furthermore, draft bills submitted by Parliament, unlike draft laws ["*proyectos de ley*"], do not require the issue of previous reports, which is why a report is not necessary from the Council of State.

d) As regards the declaration of urgency, there is no alleged infraction of the provisions of the Parliament Regulations (Arts. 93 and 94 RCD) governing the matter; a declaration is used as complementary arguments to the unsuitability of a summary procedure to process a draft bill, with a consequent shortening of timeframes.

A declaration of urgency, adopted by the competent body further to a proposal from one of the parties entitled to do so, is a procedurally valid option which *per se* does not entail an unconstitutionality vice in the legislative process, as shorter processing time for a legislative initiative as a result of such declaration "need not be detrimental to any of the constitutional principles underlying the legislative process in terms of the body's decision-making" (STC 234/2000, FJ 13; this case-law is reiterated in ATC 9/2012, FJ 4). In this case, the Attorneys of the *Generalitat* Government do not specify or confirm in any way that the shorter processing timeframes have prevented, hindered or limited the rights held by deputies and the parliamentary groups to which they belong in the legislative process, affecting the core of their *ius in officium; nor has such shortening materially altered the Parliament's decision-making process* (STC 143/2016, of 19 September, FF JJ 3 and 6).

e) Finally, "the absence of consensus amongst parliamentary groups on the processing of the draft bill does not affect its constitutionality either" [STC 185/2016, FJ 5 c)], as decisions have been adopted by the competent bodies, following a proposal from the parties or bodies entitled to do so, and by the majorities foreseen in the regulations, a point at no time disputed by the *Generalitat* Attorneys. The political consensus connected to a draft or bill is unrelated to meeting the requirements allowing it to be processed in a summary procedure (STC 129/2013, of 4 June, FJ 9) and a declaration of urgency. In other words, the decision to resort to these parliamentary procedures should be adopted by simple majority, not unanimously or by a qualified majority, as inferred from the provisions of Art. 79 CE and the Court's interpretation of the majority game described in the Constitution, by recognising that the rule generally followed in parliamentary procedures is a simple majority; qualified majorities are foreseen as an exception, in order to obtain greater consensus and thus more effectively protect the rights and interests of minorities, or other reasonably purposes (SSTC 179/1989, of 2 November, FJ 7; and 238/2012, FJ 4).

Further to the foregoing, the alleged breach of Art. 23 CE should be dismissed and, consequently, the procedural unconstitutional vice of which the challenged Law is accused.

6. In order to examine the material unconstitutional grounds attributed to Arts. 92.4 a), b) and c) 92.5 LOTC, as worded by Organic Law 15/2015, we need to first refer, on the points of interest here, the case-law laid down in STC 185/2016, on the enforcement of Constitutional Court resolutions.

a) We recalled in said Judgment, with respect to the constitutional jurisdiction model designed in the Constitution, after confirming the Constitutional Court's configuration as a jurisdictional body exclusively entrusted with constitutional jurisdiction powers, that "the constituent did not intend [it to be] a closed model […] petrified and frozen in time, and incompatible with the evolutionary nature of the Law; rather, it entrusted the legislator with its ultimate determination in an organic law", it being sufficient to "resort to Arts. 161.1.d), 162.2 and 165 CE, in order to ascertain that the legislator of organic laws has been broadly entitled for its subsequent configuration [STC 118/2016, FJ 4 d)]" (FJ 8).

This open-ended or non-petrified nature of the constitutional jurisdiction model designed by the constituent is practically ascertained with respect to each one of its defining components; also illustrative is the reservation to organic laws foreseen in Art. 165 CE, "the scope and comprehensiveness of which we have indicated as a manifestation of the close relationship existing between the Constitution and the Organic Law of the Constitutional Court". In this regard, when referring to preceding constitutional case-law [SSTC 49/2008, FF JJ 3 and 16; and 118/2016, FJ 4 d)], we pointed out that "the terms in which this specific reservation is formulated [...], the broad range of matters […], its closing off of Title IX, and the fact that it is projected over a body such as the Constitutional Court, all suggest that it was intended to provide completeness, which is why a restrictive interpretation thereof will be dismissed" *(ibidem)*.

b) In turn, the fact that the Constitution does not contain any provision on the enforcement of Constitutional Court resolutions cannot be interpreted- as we said- "as a deprivation of powers entrusted to the Constitutional Court to enforce and ensure the fulfilment of its resolutions". In effect, "[t]he Constitutional Court has been configured in the Constitution as a true jurisdictional court, exclusively entrusted with constitutional jurisdiction powers; consequently, as a quality inherent to the constitutional justice management task, the Court actually holds one of the powers related to this

jurisdiction, i.e. the enforcement of its resolutions, given that a judge should be entitled to ensure the fulfilment of its decisions". We ended this reasoning with the comment that "[otherwise], the Court, the only one in its order, would lack one of the essential characteristics of this jurisdictional function and, consequently, the necessary power to guarantee the supremacy of the Constitution (Art. 9.1 CE), as its supreme interpreter and guarantor (Art 1.1 LOTC)" (FJ 9).

The manner or way in which enforcement of Constitutional Court resolutions may be articulated, and the measures or instruments provided to it in order to ensure the fulfilment and effectiveness of its resolutions, are matters that "the constituent has left to the decision of the legislator passing an Organic Law of the Constitutional Court, *ex* Art. 165 CE". Consequently, "the regulation of enforcement of its resolutions is a matter covered by the reservation made in favour of organic laws further to Art. 165 CE" *(ibidem)*.

Going from the general to the specific, and setting aside the considerations made below on the specific measures- or some of their aspects- challenged by the appellant, and any criticism the may eventually deserve, we hereby also declare that enforcement measures "constitute […] instruments or powers made available to the Court by the legislator in order to guarantee due and effective compliance with its judgments and other resolutions, binding all the public powers, including the legislative Courts (ATC 170/2016, of 6 October, FJ 2). The purpose sought […] has legitimate constitutional grounds, i.e. "to guarantee the institutional position of the Constitutional Court and the effectiveness of its resolutions, protecting its jurisdictional scope from any subsequent interference by a public power that could be detrimental *(ibidem),* in other words, to uphold the supremacy of the Constitution, to which all public powers are subordinated (Art. 9.1 CE), of which the Court is ultimately its supreme interpreter and guarantor, when exercising its jurisdictional function" [FJ 10 a)].

7. The first of the material unconstitutionality grounds used by the *Generalitat* Government to justify its action are addressed against the the article 1.3 of Organic Law 15/2015, in the wording given to Art. 92.4. a) LOTC, which foresees that the Constitutional Court may order coercive fines of three to thirty thousand euros against authorities, public employees or citizens in breach of its resolutions, reordering the fine until what is ordered has been entirely fulfilled. In the appellant's opinion, the article infringes the principles of legal certainty (Art. 9.3 CE) and legality in sanctioning matters (Art. 25.1 CE), given that the coercive fines foreseen, due to their excessive and disproportionate amount, entail a sanctioning or punishment component as a result of a prior negative evaluation of the failure to fulfil a Constitutional Court resolution (Arts. 164 CE and 87 LOTC); the

legislator, in breach of the essential guarantees that should be provided by all sanctioning rules, has not defined any parameter which to scale the fines or the timeframes with , which is why the article lacks the constitutional certainty and foreseeability expected of this type of rule.

The State Attorney would like these unconstitutionality grounds to be dismissed. He considers that the amount of the coercive fines set in Art. 92.4 a) LOTC does not change the nature of the measure as its purpose remains the same: not to impose a penalty for infringing a rule, but to ensure that a Constitutional Court resolution is fulfilled, by changing the conduct of the person who is reluctant to do so. These fines are not a manifestation of the State's punitive powers, which is why the absence of this sanctioning effect means that there is no infringement of Art. 25 CE. After pointing out that the LOTC regulates an *ad hoc* procedure for the ordering of these fines, and that the legislator is legitimately entitled to increase their amount, he claims that this measure is not unrelated to the Court's jurisdictional duties, as it constitutes an adequate instrument to ensure the fulfilment of its resolutions.

8. Since it was originally drafted, the LOTC authorises the Constitutional Court to impose coercive fines "on any person, whether or not invested with public powers, who fails to meet the Court's requirements by the deadlines provided, and to reorder these fines until total fulfilment is achieved, without prejudice to any other liability that may apply" (Art. 95.4 LOTC). The range of the fine amount had been established in Organic Law 6/2007, of 24 May, between 600 and 3000 €. Organic Law 15/2015, when regulating the enforcement of Constitutional Court resolutions more completely, in order to endow it with "sufficient measures to guarantee the effectiveness of any resolutions delivered in its jurisdiction", as indicated in the preamble, includes coercive fines amongst the measures that may be adopted if its resolutions are unheeded, configured in a basically similar way to the former wording of the LOTC (on this point, see ATC 170/2016, of 6 October, FJ 2), although the range is set at between three thousand and thirty thousand euros.

The *Generalitat* Government rests its challenge of the sanctioning article- in its opinion- represented by the coercive fines foreseen in the new wording of Art. 92.4 a) LOTC, on the consequent violation of the principle of legality in sanctioning matters (Art. 25 CE), which in this case subsumes the principle of legal certainty (Art. 9.3 CE); a breach of them both is claimed due to the absence of regulatory predetermination of the fine scaling criteria and the timeframes in which they may be reordered.

a) The guarantees that the Constitution foresees for punitive acts —let us recall STC 185/2016 (FJ 13)— are not just required, in accordance with constant constitutional case-law, of acts that restrict rights (SSTC 34/2003, of 25 February, FJ 2; 181/2014, of 6 November, FJ 5). In fact, the Court has declared in relation to the principle of criminal legality that "the provisions of Art. 25 CE are not applicable to matters not characteristic of the criminal or administrative offence; they may not be extensively or analogously applied […] to different situations or to acts which, albeit restricting rights, do not represent an effective exercise of the State's *ius puniendi* or lack authentic sanctioning effects" (STC 48/2003, of 12 March, FJ 9 and the case-law cited therein).

For the purposes of the case at hand, STC 185/2016 synthetized said constitutional case-law in the terms reproduced below:

> «[...] in order to determine whether a legal consequence is or is not punitive, of relevance above all will be the function it is entrusted in the legal system. Consequently, if the function is repressive and it restricts rights as a result of an offence, it will be inferred that it is a penalty or sanction in material terms; but if, instead of repression, there are other justifying purposes, no penalty will exist, no matter how burdensome the consequence. Thus, we have dismissed a retributive function when the measures challenged were aimed at preventing the provision of a service or fulfilling a specific obligation (STC 239/1988, of 14 December, FJ 2), merely pursued application of the law by the competent Administration (STC 181/1990, of 14 November, FJ 4) or, ultimately, were only directed at restoring the legality disturbed (STC 119/1991, of 3 June, FJ 3). It is therefore insufficient to merely intend to force compliance with a legal duty […] or to re-establish the legality disturbed, against the party acting without meeting the conditions foreseen by law to execute a certain activity. It is necessary, alone or in conjunction with these aims, for the damage caused to have retributive significance, entailing the suffering of added harm to that already ensuing from forcible compliance with an obligation already due, or the impossibility of continuing with an activity the party was not entitled to. Ultimately, the criminal or administrative sanctioning nature of the legal system's reaction only appears when, irrespective of a aim to repair, added harm is inflicted, affecting the offender in its legal enjoyment of rights and assets (STC 48/2003, FJ 9; along these lines, 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)» (FJ 13).

b) We should therefore, find out the true nature of the coercive fines foreseen in Art. 92.4 a) LOTC in order to confirm or dismiss their punitive nature; to do this, what is determining, as gathered in STC 185/2016, is "the function or purpose pursued by the measure [STC, all decisions represented by, 181/2014, FJ 6; Decisions of the European Court of Human Rights, of 21 February 1984, *Oztürk 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)]" *(ibidem).*

Some external features of coercive fines may grant them a somewhat sanctioning appearance. Thus, insofar as they impose a payment obligation on the person response for not fulfilling the Court's resolution, they negatively affect its assets, in such a way that, in the same way as pecuniary sanctions, the measure may entail the restriction of a right. However, this circumstance *per se* does not suffice to uphold its sanctioning nature, as it is not sufficient for these purposes that the State's reaction in the event of a breach of a legal obligation involve an act that is restrictive of rights (STC 276/2000, of 16 November, FJ 3, citing STC 239/1988, FJ 2 and ATC 323/1996, of 11 November, FJ 6). This sanctioning appearance may also be confirmed by its aim to dissuade a breach of Constitutional Court resolutions, but this does not determine its sanctioning nature either. It is one thing, as we have already had the chance to declare, "that sanctions, amongst other purposes, act as a dissuasion, and quite another thing is for any measure to dissuade certain conducts to constitute a sanction [...], as it is clear that the dissuasive function of a legal figure does not automatically turn it into a sanction" (STC 164/1995, FJ 4; in the same lines, STC 276/2000, FJ 4).

The sanctioning nature of a restrictive measure, of the characteristics being examined here, depends, in addition to the purpose sought through its ordering, if it has a "repressive, retributive or punishment purpose", which we have been highlighting as a feature of all sanctions; therefore, if a measure lacks this repressive function, it will not be an authentic sanction (SSTC 164/1995, FJ 4; 276/2000, FF JJ 3 and 4 and the case-law cited there).

However, the Court has been generally dismissing that measures will have a retributive function, characteristic of sanctions, if, amongst others, they intend to obtain "the provision of a service or the fulfilment of a specific obligation" (STC 239/1988, FJ 2; its case-law has been referred to, amongst others, in SSTC 164/1995, FJ 4; 276/2000, FJ 4; 48/2003, FJ 9; and 185/2016, FJ 13). Thus, as specifically regards coercive fines in administrative matters, it has declared that "[i]n this type of fines […] the payment obligation does not have a repressive or retributive purpose due to a conduct

that is considered administratively illegal, whose regulatory provisions in terms of the necessary constitutional right to legality in sanctioning matters may be questioned, but instead involves an economic obligation measure adopted prior to a warning, reiterated at intervals in time and aimed at adjusting the addressee's reluctance to what is provided in a prior administrative decision. Consequently- the Court continues by saying- they are not part of the Administration's sanctioning powers, but are related to its executory self-protection [....], excluded from the two-fold reason for sanctioning legality, foreseen in Art. 25.1 CE [...], i.e. freedom (the general rule of legality of what is not forbidden) and legal certainty (to know what to expect), given that, as said, conduct is not being punished because it is contrary to law, but the aim is to forcibly ensure a service or the fulfilment of a specific obligation, previously determined by the administrative act to be enforced, with the necessary notice or warning" (STC 239/1988, FJ 2).

The aforementioned case-law, due to the material identity because one measure and the other, is applicable to the coercive fines foreseen in Art. 92.4 a) LOTC, which also have a coercive or dissuasive function, or to stimulate the obligation of all citizens and public powers to fulfil Constitutional Court resolutions (Arts. 9.1 CE and 87.1 LOTC), aimed at modifying the conduct of a party failing to follow a Constitutional Court resolution, when it is bound to do so. Consequently, it is not a sanctioning measure in strict terms, as it does not have a repressive or retributive purpose due to an illegal conduct, but acts as coercion or encouragement to fulfil a legal duty, in other words, to dissuade its non-fulfilment. Thus, no matter how burdensome the consequence of the disputed measure for the person ordered to fulfil it, it does not follow a strictly repressive, retributive or punishment purpose, the defining features of punitive measures, but aims at guaranteeing the effectiveness and fulfilment of Constitutional Court resolutions.

The conclusion reached on the non-sanctioning nature of coercive fines is not affected by the appellant's opinion, which considers the increased amount excessive and disproportionate. Without prejudice to our comments below on the claimed lack of proportion in the fines that the Court may imposed, in terms of amount, this subjective appreciation is insufficient *per se* to uphold, in this case, that the magnitudes falling within the range of coercive fines, set by the legislator when it freely configured the law given the importance, in its opinion, inherent to the obligation to fulfil Constitutional Court resolutions, should, in the abstract, change the legal nature of the measure. The underlying purpose thus remains unchanged and is the same, and its imposition does not constitute a manifestation of the exercise of sanctioning powers.

As the coercive fines foreseen in Art. 92.4 a) LOTC are not punitive or of a sanctioning nature, the alleged infraction of Art. 25 CE should be dismissed (which subsumes, as indicated, the alleged breach of Art. 9.3 CE).

c) At this point, it is relevant to point out, as opposed to what may be inferred from the claim, that the imposition of coercive fines should necessary follow the procedure established by the legislator, guaranteeing a hearing of the authorities, public employees or citizens obliged to fulfil the Court's resolution.

In fact, coercive fines, in the same way as the other measures foreseen in Art. 92.4 LOTC, may only be ordered once it is ascertained that a resolution delivered by the Court further to its jurisdiction could be left unheeded, and following the hearing foreseen in this rule. In other words, if such breach needs to be remedied, the Court, *ex officio* or at the request of one of the parties to the suit where the resolution was delivered, "will summon the institutions, authorities, public employees or citizens bound to fulfil the resolution to report on the matter within the timeframe established". If, upon receipt of the report or expiry of the term established, "the Court considers that its resolution has not been followed in whole or in part, it may adopt any of the measures" gathered in Art. 92.4 LOTC, to include coercive fines [a)].

In turn, the fact that resolutions delivered by the Constitutional Court further to its jurisdictional function, imposing coercive fines, are not eligible for challenge or review before another internal court, is but a consequence of the constitutional jurisdiction model designed by the constituent, configuring the Constitutional Court as one of a kind. By virtue of its institutional position, any resolutions delivered by the Constitutional Court further to its jurisdiction cannot be reviewed by another State court (Arts. 164.1 CE and 4.1 and 93 LOTC) [STC 133/2013, of 2 July, FJ 6].

d) In the opinion of the *Generalitat* Attorneys, the range of amounts established by the legislator for the coercive fines foreseen in Art. 92.4 a) LOTC is disproportionate in relation to the solvency of the fined parties; specifically, given the salaries currently paid to authorities or public employees, and also greatly exceeds other fines established in the LJCA [Arts. 48.7 a) and 112].

When referring to proportionality in generic terms, this principle is not an independent canon of constitutionality in Spanish law, which may only be alleged separately with respect to other constitutional articles. In other words, it is a principle to be inferred from certain constitutional articles,

and is particularly and usually applicable in relation to fundamental human rights and, as such, is an interpretative criterion used to examine potential infringements of specific constitutional rules. Thus, from a constitutionality check point of view, the principle of proportionality cannot be alleged independently and separately; nor is it possible to analyse in the abstract whether the conduct of a certain public power or a regulatory requirement is or not disproportionate. If a lack of proportion is ascertained, it should first be claimed and then examined to what extent it affects the content of the constitutional articles upheld: only when this lack of proportion infringes the latter will unconstitutionality be declared (SSTC 55/1996, of 28 March, FJ 3; 136/1999, of 20 July, FJ 22; and 60/2010, of 7 October, FJ 7).

However, the action does not link its alleged disproportionate amount of coercive fines to the infraction of any constitutional article whatsoever; consequently, its existence is alleged separately and independently, and the Court is being asked to conduct an abstract analysis of the challenged article; this, in accordance with the case-law just cited, means that it should be automatically dismissed. Moreover, the reasons claimed by the appellant are insufficient to render the range disproportionate given that, on the one hand, its subjective scope of application is not limited to authorities or public employees, but also covers any citizens failing to follow the Court's resolutions; consequently, based on the salary of public employees, it cannot be affirmed in principle that the amounts set are always, irresistibly and necessarily, disproportionate. On the other hand, the fact that these amounts exceed the ones established for certain fines in the LJCA says nothing about the constitutionality of the article challenged, in the matter at hand, as it is clear that said legal provision cannot be used as a criteria for the scrutiny of the LOTC.

In short, from the constitutional point of view entrusted to us, the legislator cannot be found guilty when, further to its freedom of configuration, it has established a high amount in the range of coercive fines, given the relevance of the legal duty it is trying to guarantee with this measure; in turn, the foregoing needs to be sufficiently high to actually dissuade a breach. When the Court, following the law, decides to impose coercive fines on the parties not fulfilling its resolutions, it will then determine, given the specific circumstances of the case, the specific amount of the fines which, obviously, must uphold the principle of proportionality.

e) And, ultimately, as a measure that the legislator has made available to the Court to enforce its resolutions, coercive fines, as the other measures foreseen to ensure their compliance and

effectiveness, are covered by the reservation in favour of organic laws, foreseen in Art. 165 CE [STC 185/2016, FJ 10 a)].

Based on the foregoing reasons, these unconstitutionality grounds should be dismissed.

9. As the second materials ground of unconstitutionality, the *Generalitat* Attorneys are accusing Art. 1.3, of Organic Law 15/2015, in the wording given to Art. 92.4. b) LOTC, of infringing the principle of criminal legality (Art. 25.1 CE) and the scope of constitutional jurisdiction (Art. 161.1 CE). They claim that suspending authorities or public employees is a novel measure, unrelated to the nature and functions of the Constitutional Court, configured in Spanish law as a disciplinary or criminal sanction. In their opinion, the measure is not suitable to enforce Constitutional Court resolutions, as it is unrelated and materially endowed with sanctioning effects *ad extra* due to a breach of such resolutions. The article does not meet the minimum guarantees of Art. 25.1 CE, as it lacks the accuracy and determination expected of a sanctioning rule, not enabling an anticipation, with a certain degree of certainty, of conducts able to incur the factual event entailing its application, and the length of such suspension. Furthermore, endowing the Court with this sanctioning power, which could entail a deprivation of the fundamental right to hold public office (Art. 23 CE), is not covered by Title IX CE, exceeding the scope of constitutional jurisdiction defined in Art. 161.1 CE.

The State Attorney is against allowing these unconstitutionality grounds, because he considers that the suspension foreseen in Art. 92.4 b) LOTC is not a sanctioning measure, as it is not designed to sanction a certain conduct with repressive effects, but to avoid the persistent breach of a Constitutional Court resolution. This suspension is avoidable, as it may only be ordered once it is ascertained, after completing an incident granting a hearing to the affected parties, that the address intended to disregard the decision, only affecting the authority or public employee responsible for the breach. The absence of the measure's sanctioning effects, affirms the State Attorney, means that the principle of legality (Art. 25 CE) is inapplicable. In turn, the measure does in fact fall within the Court's jurisdiction, as it is directly addressed to safeguarding the task entrusted to it by Art. 161.1 CE, as an instrument that may be necessary for the achievement of its resolutions.

10. Before examining these unconstitutionality grounds, we need to exactly determine their actual scope.

a) The appellant bases the unconstitutionality of the measure to suspend authorities or public employees, foreseen in Art. 92.4 b) LOTC, on its sanctioning nature alone. A deprivation of the right to hold public office (Art. 23 CE), referred to as a possibility but which at no time is claimed as infringed, is merely instrumental in relation to the sanctioning nature of the measure and the scope of constitutional jurisdiction *ex* Art. 161.1 CE; consequently, the claim is devoid of the slightest reasoning or arguments on a violation of such fundamental right and, where appropriate, of the reasons why the disputed measure is allegedly unconstitutional. As the burden has not been fulfilled, required by constant constitutional case-law, to provide sufficient arguments in order to justify a potential infringement of Art. 23 CE, for which global challenges are inadmissible, lacking any detailed reasoning backing them up [SSTC 185/2016, FJ 12; 191/2016, FJ 2 A)], the disputed measure may only be examined by the Court on the grounds of an alleged unconstitutionality due to infringing Arts. 25 and 161.1 CE, by not meeting the material guarantees required further to the principle of criminal legality and exceeding the scope of the Court's jurisdiction.

Nevertheless, we should stress the fact that the check carried out in this process is exclusively aimed at matching the challenged articles, including the measures that the legislator has made available to the Court to generally guarantee the effectiveness of its resolutions, against the allegedly infringed constitutional mandates and principles, without prejudice to their application to specific cases and the viability or unfeasibility of the potential measures that may eventually be adopted in various constitutional processes. At the time one or several of these measures needs to be applied, in order to effectively fulfil the resolution delivered in a certain constitutional process, it will be then ascertained whether they are viable [STC 185/2016, FJ 10 c)]. In other words, we should now examine the disputed measure irrespective of its application to specific cases and its suitability given the range of constitutional processes, the content of the resolutions to be enforced and those bound by the same, without an examination of the measure requiring right now any further determination on the scope of its subjective scope. These are issues to be taken up, in the existing circumstances, when applied to each case.

b) STC 185/2016 gave our opinion on the punitive nature of a measure to suspend an authority/public official, foreseen in Art. 92.4 b) LOTC, where we overruled its nature as a sanction in disciplinary laws on the holding of public office or its configuration as a punishment in the Criminal Code, "given that precisely what we now need to do is to clarify whether the specific measure to suspend an authority/public employee, which the legislator of organic laws has made available to the Court, as configured in Art. 92.4 b) LOTC, is or not punitive"; i.e. "what we need to examine is its

disputed constitutional viability as a right conferred to the Court to guarantee that its resolutions are enforced". On this point, we stated that "in principle, it cannot be overruled that the same institution or measure may obey or cover different purposes, and may consequently adopt a different legal form" (FJ 14).

As regards its subjective scope, we stated that "it will only affect the authorities or public official responsible for not fulfilling a resolution delivered by the Court further to its jurisdiction, after ascertaining such breach and if, after completing the hearing foreseen in Art. 92.4 LOTC, the Court decides whether it has been unheeded in whole or in part, in light of the report received from the authorities or public employees in charge of fulfilling the resolution, or upon expiry of the term established without such report being issued". Again, we insist, "it may only apply when it falls within the scope of action of the authority or public employees obliged to fulfil the resolution in question, and once it is ascertained that they deliberately and persistently failed to follow it […] without extending it to authorities, public employees or other persons outside this scope of responsibility" *(ibidem)*.

Regarding the time limit of the measure, in light of the wording of the final section of Art. 92.4 b) LOTC, we stated that "it is necessarily limited" to "the time necessary to ensure the fulfilment of the Court's pronouncement", "not being extended or prolonged beyond this period of time" *(ibidem)*.

And, ultimately, we conclude that "when adopting the measure not only the subjective and time limits indicated should be upheld but, also, it may only be ordered if 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", meaning that "it will be limited to exercising the attributions suspended, which are essential to ensure the enforcement of the resolution delivered"; the measure will be lifted "as soon as the authority or public employee responsible for fulfilling the resolution is no longer unwilling to comply" *(ibidem)*.

c) Although the measure in question constitutes a burdensome legal consequence for the authority or public employee to whom it applies, we do not think it is of a sanctioning kind and we hereby confirm that it is directly linked to the Court's resolution, based on the following grounds literally reproduced below:

"The purpose of the measure is not to inflict punishment against illegal or illicit conduct, such as overlooking the obligation binding all public powers and citizens to fulfil Constitutional Court resolutions, as a result of being governed by the Constitution and the rest of the law (Art. 9.1 CE). In order to claim criminal liability as a result of infringing said obligation, the legislator has foreseen another measure: obtaining a statement from the citizens involved [Art. 92.4.d) LOTC], which the preamble of Organic Law 15/2015, manifesting the legislator's will, refers to as a different measure from the one at hand.

The legislator of the Organic Law of the Constitutional Court, further to the broad entitlement conferred by the reservation foreseen in Art. 165 CE, has configured in Art. 92.4 b) LOTC a measure to suspend authorities or public employees, in order to facilitate total enforcement of Constitutional Court resolutions, by removing the person hindering due observance, i.e. the authority or public employees obliged to fulfil and who, nonetheless, is reluctant and persists in this attitude. This removal is necessary to cease hired compliance of the resolution, entitling the Court to adopt necessary and pertinent measures in each case to guarantee its effectiveness. Thus, no matter how burdensome the consequence of the disputed suspension for the authority or public employee, imposed during the time necessary to guarantee an observance of the Court's pronouncements, the purpose is not actually repressive or retributive, or constitutes a punish, all characteristic of punitive measures; rather, the purpose is to guarantee the effectiveness and fulfilment of Constitutional Court resolutions, binding all public powers and citizens.

Consequently, there is no punitive component in the measure to suspend authorities or public employees, foreseen in Art. 92.4.b) LOTC. Instead, it is a measure conceived by the legislator, further to its freedom of configuration, directly related to the effective enforcement of Constitutional Court resolutions, consequently guaranteeing each one of the basic components of its jurisdictional function, which may only be adopted after meeting the requirements and conditions foreseen in Art. 92.4 b) LOTC. Without prejudice to the justifying purpose indicated, the configuration used by the legislator of the Organic Law in the measure to suspend authorities or public employees, foreseen in Art. 92.4.b) LOTC, is not intended to cause added harm to their rights and assets as a result of their allegedly illicit conduct" (FJ 15).

The foregoing reasoning, based on which we have excluded the punitive nature of the measure to suspend and authority/ public employees (Art. 92.4.b) LOTC) and affirmed its direct connection to the enforcement of Constitutional Court resolutions, lead us to dismiss the alleged infractions of Arts. 25 and 161.1 CE.

11. The *Generalitat* Attorneys are challenging Art. 92.4 c) LOTC, in the wording given to the Art. 1.3, of Organic Law 15/2015, due to infringing Arts. 137, 153, 161.1 and 164 CE, by foreseeing that the Court may request collaboration from the State Government to guarantee that its resolutions are fulfilled, through substitute enforcement. The article only contemplates the possibility of requesting the involvement of the State Government, not of other bodies or public administrations, entitling them to intervene if they may be party to the constitutional process, which could potentially infringe the principles of a judge's impartiality and procedural equality, inherent to the definition of the Constitutional Court as a court and the jurisdictional proceedings it is assigned (Arts. 161 and 165 CE). The *Generalitat* Attorneys consider that it is unconstitutional, given that if it replaces the activity of Parliament or of the Courts and Tribunals, it would contradict the principles of parliamentary autonomy (Art. 72 CE) and judicial independence (Art. 117.1 CE), as the Government would be exercising powers constitutionally conferred to other bodies and powers of the State, through channels not foreseen in the Constitution; and if it substitutes Autonomous Communities, it would be contrary to the autonomy acknowledged in Art. 137 CE and the constitutional system for the allocation of competences, as the State would be entitled to intervene to the detriment of Autonomous Communities.

The State Attorney is also against upholding these grounds of unconstitutionality. He states that the LOTC enforcement measures are common to all procedures, which is why the Court, when specifically applying them, should take into account the nature and effects of each constitutional process, as well as the party obliged to fulfil the decision. In his opinion, although the appellant does not provide any arguments in relation to the alleged infraction of the principles of an impartial judge and procedural equality, the Government's position in constitutional processes is not equivalent to that of the other parties, as evidenced by its status as a constitutional body and its prevalent position when safeguarding the constitutional system (Arts. 116, 153 and 155 CE). The entitlement of this measure is not a competence of the State, but the need to guarantee the effectiveness of Constitutional Court resolutions. In short, the measure is covered by Arts. 161 and 165 CE and in no case constitutes a check of the Government over Autonomous Communities, but an instrument to enforce Constitutional Court resolutions that the legislator has made available to it.

12. Art. 92.4 c) LOTC gathers substitute enforcement as a measure that the Court may use to demand fulfilment of any resolutions delivered in constitutional processes. If this enforcement instrument is chosen, the article foresees the possibility of the Court requesting the State Government's collaboration in order to, in the terms established by the former, it may adopt the necessary measures to ensure that its resolutions are fulfilled.

a) First of all, we disagree with one of the possible interpretations of the article referred to by the *Generalitat* Attorneys, whereby the measure would entirely assign to the Government these substitute enforcement powers.

In fact, according to the wording of the article and as declared in STC 185/2016, "it is the Court which, amongst the range of measures made available by the legislator to handle potential infringements of its resolutions, may decide, following the hearing foreseen in Art. 92.4 LOTC, on the substitute enforcement of the resolution in question; if this measure is adopted, it may request the State Government's collaboration, to be provided in the terms determined by the Court itself. Consequently, it is not the Government which discretionally decides to intervene in substitute enforcement, or which decides what specific measures are involved in such enforcement" [FJ 17 b)]. In other words, the Government will act if it is so requested by the Court, in the manner and with the scope determined by the latter in order to guarantee the effectiveness of its resolutions; consequently, supervision of enforcement is entrusted to the Constitutional Court, with the Government acting as a mere collaborator in this case.

We also pointed out in the Judgment that "[t]he entitlement of this enforcement measure is not […] an alleged competence of the State; rather, as in the case of the other measures foreseen in Art. 92.4 LOTC, to guarantee the effectiveness and fulfilment of Constitutional Court resolutions. Thus- we concluded on this point- the legislator of the Organic Law cannot be accused of any unconstitutionality due to explicitly including in the LOTC substitute enforcement as a mere way to enforce Constitutional Court resolutions, responding to a constitutionally legitimate purpose that may only be adopted *ex* Art. 92.4 LOTC once it is ascertained that there is a deliberate and persistent aim to not follow a resolution, by the party obliged to fulfil it" *(ibidem)*.

b) Certainly, Art. 92.4 c) LOTC only expressly foresees the possibility of requesting the National Government's collaboration, a circumstance that the appellant links to an infraction of the principles of judicial impartiality and procedural equality.

However, the article does not prevent the Court from requesting the collaboration of other bodies or public administrations, if it decides on substitute enforcement as an enforcement measure, if resolutions are not fulfilled delivered further to its jurisdiction. This possible extension of the different bodies that may collaborate with the Court is covered by Art. 92.2 LOTC, entitling it in general to "ask for assistance from any administrations and public powers in order to guarantee the effectiveness of its resolutions, providing this assistance as a priority and urgently". A systematic interpretation of the two sections of Art. 92 LOTC, examined here, suggests that this express reference to the National Government in Art. 92.4 c) LOTC does not necessarily exclude the possibility of the Constitutional Court requesting, if it deems this necessary, the collaboration of other powers or public administrations, in the case of a substitute enforcement of its resolutions.

This said, we hereby dismiss the alleged violation of the principles of judicial impartiality and procedural equality. In any case, it is not even possible, and no arguments are provided on the matter in the claim, to conceive how requesting the Government's collaboration for the substitute enforcement of the Court's resolutions may be detrimental to its impartiality, i.e. infringing the guarantee that jurisdictional decisions comply with the law and be adopted by a third party unrelated to the litigated interests and the right holders. Furthermore, it is not feasible, and is also devoid of arguments in the action, to ascertain an infringement of the principle of procedural equality of the parties, as such request, if any, need not *per se* break the equilibrium in their respective positions in the procedure when upholding their rights and interests, according to the structure established by law, consequently treating one of the parties better than another. Furthermore, as this Court has declared, "enforcement incidents are used to execute what has been decided when resolving a prior conflicting debate, taking place in a lawsuit, without introducing any new interests than those already present in the debate" (ATC 107/2009, of 24 March, FJ 7).

c) It cannot be inferred from the wording of the challenged article that substitute enforcement will necessarily mean, as claimed by the *Generalitat* Attorneys, that the State is replacing an Autonomous Community in the exercise of its competences, consequently infringing the principle of autonomy, or that the Government may eventually be entrusted with powers constitutionally conferred to other bodies or powers, as already declared in STC 185/2006, [FJ 17 b)], when examining a substantially identical complaint.

In fact, in order to dismiss this pleading, we should first of all take into account "that substitute enforcement may only be used if it is a suitable and relevant enforcement measure to fulfil the Court's resolutions, which the Court will ascertain in each specific case in light of the existing circumstances".

Second of all, application of a substitute enforcement measure, as in the case of other enforcement instruments foreseen in Art. 92.4 LOTC, "should be consistent with and should always uphold constitutional provisions, never altering the institutional position of the State and Autonomous Communities, according to the Constitution and Statutes of Autonomy, only responding to the circumstantial adoption of the necessary measures, which are consequently proportional for enforcement of the ruling". This pronouncement is totally transferable and applicable, due to the same *ratio decidendi*, to the pleading related to the Government potentially exercising powers constitutionally conferred to other bodies or powers given that, as already indicated, substitute enforcement may not alter their institutional position, in the terms described.

And, finally, we should recall that this Court is not entitled to pronounce itself in this constitutional process on hypothetical applications of the legal article challenged. When the substitute enforcement measure is eventually adopted and it is decided to ask for the Government's collaboration in a certain constitutional process, to enforce resolutions delivered therein, its feasibility will then be examined, as well as whether its application in the process is constitutional, as it is clear that the Constitutional Court's enforcement rights will be modulated, according to the type of procedure, content of the ruling and party obliged to fulfil it.

13. The last material unconstitutional grounds are brought against Art. 92.5 LOTC, in the wording given by the Article 1.3., of Organic Law 15/2015, due to infringing Arts. 161 and 165 CE. The *Generalitat* Attorneys are claiming that the article only recognises that the Government is entitled to ask that the Constitutional Court adopt the measures foreseen therein, excluding Autonomous Communities, if provisions or acts are being suspended that are issued by the State or another Autonomous Community, consequently infringing the principle of procedural equality and also harming the standing to which the latter are entitled further to Art. 161.1. c) CE, as well as their political autonomy. The article also increases the effects of a suspension ordered *ex constitutione* pursuant to Art. 161.2 CE, entrusting the Court with powers not foreseen in the article and entitling it to change the suspension effects foreseen therein. Ultimately, the *Generalitat* Attorneys conclude that the legislator is ignoring the mandate of Art. 165 CE by entitling the Court unconditionally and in an

unlimited manner to order any type of measure to guarantee the suspension of the challenged provisions, acts or measures, and to decide when extraordinary circumstances exist in which this right may be conferred.

The State Attorney is requesting that these unconstitutionality grounds be dismissed. He considers, based on the purpose of the article, that it contemplates a procedural jurisdictional activity at the enforcement stage, not to be confused with a hypothetical extraordinary or exceptional prerogative of the Government, conforming to the Constitution, given that, although the latter may request the adoption of the measures foreseen in Art. 95.2 LOTC, the Court is the one entrusted with decision-making powers to guarantee the enforcement of its own resolutions, as it should ascertain whether or not there are "circumstances of particular constitutional relevance", deciding which specific measures to adopt. Thus, the article does not amend the Constitution, as it does not later the legal rules foreseen in Art. 161.2 CE, but grants greater enforceability and efficacy to resolutions delivered by the Court further to constitutional proceedings ordering an interim suspension of the challenged provisions, measures or acts, in the presumption that it has ascertained, *ex officio* or at the Government's request, the existence of circumstances of particular constitutional relevance.

14. Art. 92.5 LOTC entitles the Court to adopt, *ex officio* or at the request of the Government, without hearing the parties and in circumstances of particular constitutional relevance, the necessary measures to ensure due compliance with resolutions ordering a suspension of the challenged provisions, acts or measures. Its final section foresees that the same resolution ordering these measures will summon the parties and Public Prosecution Office to a hearing, over a common three-day period, following which the Court will deliver a resolution, confirming or amending the measures previously adopted.

a) This specific provision is foreseen for a likewise unique situation when a certain type of Court resolution is not fulfilled- suspending the challenged provisions, acts or measures- and the adoption of measures to guarantee their enforcement depends on existing circumstances of particular constitutional relevance. As inferred from the wording of the article, the Court is exclusively entitled both to ascertain whether or not these circumstances exist, which the legislator has established as a condition for the applicability of Art. 92.5 LOTC, and to decide, where appropriate, on the necessary measures to guarantee the fulfilment of these resolutions. The Government is only entitled to request the Court to act if it considers that it is not fulfilling resolutions ordering the suspension of challenged provisions, acts or measures; in its request, it will logically describe the circumstances of particular

constitutional relevance which, in its opinion, exist and justify the Court's intervention, and may also propose, within a mere proposal, the measures it deems pertinent to ensure fulfilment of said resolutions; in no case is the Government granted decision-making powers. Evidently, as could not be otherwise, it is the Constitutional Court, alone, which, further to its jurisdictional function, if resolutions are not fulfilled ordering the suspension of provisions, acts or measures, should decide whether or not there are circumstances of particular constitutional relevance and, if so, who must decide and adopt the necessary measures to guarantee the enforcement of its suspension resolutions. The purpose of Art. 92.5 LOTC is clearly to ensure and guarantee the effectiveness of Court resolutions, referred to therein, in situations of particular constitutional relevance.

As this is the case, contrary to what is being claimed, there is no extension of the scope and effects of the powers of suspension held by the Constitutional Court, which continue to have the same extension and scope, given that the article merely responds to the need to ensure the enforcement of the Court's resolutions, pursuant to the provisions of the CE and LOTC, when exercising said powers, without increasing the effectiveness of its suspensions, as it is precisely intent on guaranteeing due compliance with these decisions, in their own terms. Nor may we infer any strengthening of the prerogative conferred to the Government by Art. 161.2 CE, which continues to hold the same nature and scope, in such a way that its effects are determined *ex constitutione,* i.e. an interim suspension from the start of the process of the challenged provisions or resolutions issued by the Autonomous Communities, which the Court should ratify or lift within a maximum of five months. In short, what the legislator intended with Art. 92.5 LOTC, as indicated by the State Attorney, was to make available to the Court, in the terms and conditions described, an instrument to increase the certainty of compliance, effectiveness and enforceability of resolutions delivered during constitutional processes, ordering the suspension of challenged provisions, acts or measures, without entrusting any new powers that could alter or modify the suspension effects foreseen in the Constitution.

The measure foreseen in Art. 92.5 LOTC is therefore covered, in the same way as the other measures challenged in this process, by Art. 165 CE, and its purpose is no other, furthermore, than to guarantee the due and effective compliance of the Court's resolutions, binding all citizens and public powers [STC 185/2016, FJ 17 a); ATC 170/2016, FJ 6]; in this case, those ordering a suspension of the challenged provisions, acts and measures, delivered by the Constitutional Court further to its jurisdictional attributions (AATC 107/2009, of 24 March, FJ 3; and 177/2012, of 2 October, FJ 2).

b) The legislator has chosen to grant the Court a margin of appreciation, both when ascertaining "circumstances of particular constitutional relevance", the condition for application of the article, and when determining the "necessary measures" to ensure due compliance with the suspension resolutions referred to in Art. 92.5 LOTC.

In addition to the fact that the Constitution does not forbid the use of unspecified legal concepts (SSTC 227/1994, of 18 July, FJ 5; and 92/2000, of 2 October), in this case the general nature of enforcement rules for the Court's resolutions, covering all constitutional processes, the many different factual situations imaginable and the various and changing situations that may arise, reasonably justify, amongst other reasons, why the legislator has decided to grant the Court a margin of appreciation, resulting from the article, in order to ascertain the existence of "circumstances of particular constitutional relevance" and the adoption, where appropriate, of the "necessary measures" to guarantee the effectiveness of its resolutions. It is constitutionally inadmissible that the legislator in this case, instead of applying the generality of the law, should have entrusted the Court with a case-by-case decision of whether or not these circumstances exist, as well as the circumstantial decision of the "necessary measures" to be adopted.

Nevertheless, please note that there is no margin of appreciation here that may be confused with arbitrariness, forbidden by the Constitution. Thus, as a mere example, the preamble of the Law refers to "obvious infringements" that may be subsumed in the notion of "circumstances of particular constitutional relevance". The Court, in recent decisions, has also classified as "matters of huge constitutional significance", for instance, a declaration of sovereignty and the right of self-determination of the people of an Autonomous Community (ATC 156/2013, of 11 July, FJ 2), or the need to uphold the integrity of the Constitution or, ultimately, commencing a constitutional reform process (AATC 182/2015, of 3 November, FJ 4; 186/2015, of 3 November, FJ 3). In turn, given the purpose of Art. 92.5 LOTC, the words "necessary measures" may only be interpreted as meaning that the measures adopted should be suitable to guarantee the effectiveness and enforcement of suspension resolutions. And, ultimately, the Public Prosecution Office and the parties to the suit may, during the hearing, make any pleadings deemed appropriate, as to whether or not there are "circumstances of special constitutional relevance", initially ascertained by the Court *inaudita parte*, as well as whether or not the measures adopted were necessary, and the Court may maintain, modify or revoke its decision.

In short, from a constitutional perspective, no reproach may be made to the margin of appreciation that the legislator has granted to the Constitutional Court in the challenged article, in the terms provided.

c) Finally, the right granted to the Government to ask the Court, with the aforementioned scope, to adopt the necessary measures to guarantee the enforcement of resolutions ordering a suspension of challenged provisions, acts or measures, is covered and justified, by the prerogative held by the Government, and it alone, under Art. 161.2 CE, to apply for an automatic suspension, by filing a constitutional process, of the provisions or resolutions adopted by Autonomous Communities, which is implemented by the LOTC in relation to different constitutional processes (Arts. 30, 62, 64.2 and 77).

In any case, said right does not indicate any breach of the principle of procedural equality of the parties, as claimed by the appellant, but which it fails to justify, as it need *per se* entail a rupture of the equilibrium of their respective positions in accordance with the rules of the constitutional process in question; Autonomous Communities may also intervene, as party to the enforcement incident.

Finally, Autonomous Communities are in no way harmed by the challenged article, as stated in the claim, as regards the standing granted to them in Art. 161.1 c) CE to file competence conflicts.

Consequently, based on the foregoing reasons, these final unconstitutionality grounds will also be dismissed.

R U L I N G

Further to the foregoing, the Constitutional Court, FURTHER TO THE AUTHORITY CONFERRED BY THE CONSTITUTION,

Has decided

To dismiss this action of unconstitutionality.

May this Judgment be published in the “Official State Gazette”.

Issued in Madrid, on the fifteenth of December two thousand and sixteen.

Dissenting Opinion made by the Judge Ms. Adela Asua Batarrita to the Judgment delivered in action of unconstitutionality no. 7466-2015.

Further to the power vested on me by Art. 90.2 of the Organic Law of the Constitutional Court, and with the utmost respect for the Court's majority opinion, I would like to make a Dissenting Opinion, disagreeing with both the reasoning and ruling of this Judgment as regards Art. 92.4 b) LOTC, as worded by Organic Law 15/2015.

This action of unconstitutionality has been dismissed basically due to the arguments described in STC 185/2016, of 3 November, which settled unconstitutionality appeal no. 229-2016 filed by the Government of the Basque Country also against Organic Law 15/2015, of 16 October, reforming Organic Law 2/1979, of 3 October, of the Constitutional Court, on the enforcement of Constitutional Court resolutions to guarantee the Rule of Law. In the Dissenting Opinion I submitted in that Judgment I thoroughly explained why I disagreed with the way in which the challenge had been approached, as well as the doctrine drawn up and applied in said Resolution. Consequently, I hereby refer to said Opinion and to the reasons therein, explaining why I consider that this action should have been upheld with respect to Art. 92.4 b) LOTC, as worded by Organic Law 15/2015.

Madrid, on 15thember2016.

DISSENTING OPINION issued by the Judge Mr. Fernando Valdés Dal-Ré in the Judgment delivered in action of unconstitutionality no. 7466-2015

Further to the power vested in me by Art. 90.2 LOTC, and with total respect for the Court's majority opinion, I hereby present my Dissenting Opinion both with respect to the reasoning and the ruling of this Judgment.

As I explained in my Dissenting Opinion against STC 185/2016, of 3 November, to which I hereby refer to avoid unnecessary repetitions, I think that this unconstitutionality appeal should have been upheld as regards a) and b) of Art. 92.4 LOTC, as worded by Organic Law 15/2015, of 16 October, reforming Organic Law 2/1979, of 3 October, of the Constitutional Court, for the enforcement of Constitutional Court resolutions to guarantee the Rule of Law.

Madrid, on 15th December2016.

Dissenting opinion submitted by the Judge Mr. Juan Antonio Xiol Ríos, to the Judgment delivered in action of unconstitutionality no. 7466-2015.

With my utmost respect for the majority opinion of my Court colleagues, on which the Judgment is based, I would like to hereby disagree with part of its legal grounds and ruling. I consider that the action should have been upheld in relation to the challenge of Article 92.4.b) and c) LOTC, as worded by Organic Law 15/2015, of 16 October, entitling the Constitutional Court to suspend authorities or public employees from office and requesting the State Government's collaboration for a substitute enforcement of its resolutions, respectively. On the other hand, I do not object to dismissing the action in relation to the challenge of Articles 92.4.a) and 92.5 LOTC, as worded by Organic Law 15/2015, of 16 October, entitling the Constitutional Court to order coercive fines and to adopt the necessary measures to ensure the fulfilment of any resolutions ordering a suspension of challenged provisions, acts or steps, respectively.

Approach.

1. The majority opinion on which the judgment is based justifies the constitutionality of Article 92.4 b) and c) LOTC on the case-law laid down in STC 185/2016, of 3 November, resolving action of unconstitutionality no. 229-2016 filed by the Government of the Basque Country against these same regulations.

The reasons for my difference with this doctrine were explained in the dissenting opinion I submitted against said judgment. In this dissenting opinion, after showing my disagreement with the majority position adopted on (I) the limits on the legislator of organic laws when configuring Constitutional Court rules and the correlative scope and intensity of the constitutionality check that should be carried out if the challenged rule is the Organic Law of the Constitutional Court; and (II) the decision to postpone an analysis of this action of unconstitutionality brought by the *Generalitat de Catalunya* against Organic Law 15/2015, of 16 October, to the one subsequently filed by the Government of the Basque Country, and to not contextualise the challenged regulations; where I declared to be in favour of the unconstitutionality (III) of suspending authorities or public employees from office, foreseen in Art. 92.4.b) LOTC, given its materially sanctioning nature, and (IV) of the substitute enforcement rules foreseen in Art. 92.4.c) LOTC, due to altering the constitutional control model foreseen in Art. 155 CE.

I will return to these ideas in this dissenting opinion. However, I think it is necessary to stress, first of all, that the majority opinion on which the judgment is based has been the source of certain objections described in the dissenting opinions brought against STC 185/2016, given that (I) it has not insisted on repeating the jurisprudence of STC 49/2008, of 9 April, on the weakening of the constitutionality check that needs to be completed when the challenged rule is the Organic Law of the Constitutional Court; and (II) has deemed it relevant to explain why an analysis of the unconstitutionality action raised by the *Generalitat de Catalunya* has been postponed over the one filed by the Government of the Basque Country. Next, I will reproduce sections III and IV of the dissenting opinion submitted against said STC 185/2016, in order to confirm the reasons for my disagreement with the decision to not declare the unconstitutionality of Art. 92.4 b) and c) LOTC, as worded by Organic Law 15/2015, of 16 October, entitling the Constitutional Court to suspend authorities or public employees from office and to request the State Government's collaboration for the substitute enforcement of its resolutions, respectively.

I. Are we facing the beginning of disuse of the case-law established in STC 49/2008, FJ 4, on the weakening of the constitutionality check that should be conducted on the Organic Law of the Constitutional Court?

2. The majority opinion on which STC 185/2016 is based, includes the following in final paragraph, c), FJ 3, citing STC 49/2008: "[…] as regards the potential outcome of this constitutionality check, we have pointed out that insofar as the Court's link to its Organic Law is projected over its own standing, "control over the Organic Law should be limited to cases where there is a clear and unavoidable conflict between the Law and the Constitution". To carry out "further control- we reiterate- would not only weaken the presumed constitutionality of any rule approved by the democratic legislator, but would place the Court in a position that does not follow the role given to the reservation contained in Art. 165 CE so that the legislator, through the Organic Law of the Constitutional Court, may directly implement regulations, endowing completeness to Title IX CE, to which this court is fully bound" (FJ 4).

The dissenting opinions submitted by the Vice President of the Court, Ms. Adela Asua Batarrita, Judge Mr. Fernando Valdés Dal-Ré and myself in STC 185/2016 all shared a disagreement with the majority opinion on which the judgment was based, by taking as a double

basic premise of this constitutional check, to be completed if the Organic Law of the Constitutional Court is being challenged, the ideas described in STC 49/2008, of 9 April: (i) the legislator of organic laws enjoys a freedom of configuration, subject to the material and formal limits established in the reservations and content of Title IX of the Constitution and a systematic interpretation of the entire Constitution; and (ii) this check should be limited to those cases where there is a clear and unavoidable conflict between the rules established in the Organic Law of the Constitutional Court, being examined, and the Constitution, in order to prevent placing the Court in a position that does not follow the role assigned to the reservation of Art. 165 CE, i.e. that the legislator, through the Organic Law of the Constitutional Court, directly implement Title IX CE, completing the same.

As I then explained in my dissenting opinion, I consider that this STC 49/2008 case-law should have been either expressly reconsidered by the Plenum of this Court or else, as has often been the case in other Court resolutions, relegated to memory due to disuse, further to the concept proposed by A. Bickel. Succinctly, I upheld in that dissenting opinion that there are no reasonable grounds to consider that the legislator of the Organic Law of the Constitutional Court, has greater freedom of configuration that in any other regulatory implementation, as this would mean correlatively entitling such legislator to weaken its subjection to the Constitution when legislating on the Constitutional Court; the foregoing is not inferred from the reservation to the law, contained in Art. 165 CE, or is compatible with the constitutional configuration of the Constitutional Court. Instead, I pointed out that said freedom of configuration of the Legislative should be specifically scrutinised by the Constitutional Court in cases where these regulations affect issues or aspects on matters already previously configured by the Constituent Power, as is paradigmatically the case of constitutional bodies give that, as indicated in STC 76/1983, of 5 August, FJ 4, "the Constitutional Court, as the supreme interpreter of the Constitution (Art. 1 LOTC), is entrusted with permanently maintaining a distinction between the objectification of the constituent power and the actions of constituted powers, which may never exceed the former’s limits and competences".

3. I would like to manifest my satisfaction with the fact that the majority opinion on which the judgment is based has welcomed the objections raised at the time. At least, I would like point out that the majority opinion on which the judgment is based, despite reproducing FJ 3 of STC 185/2016, in its practical entirety, has omitted the disturbing citation of FJ 4 of STC 49/2008 as regards the weakening of the constitutionality check that should be completed if the challenged rule is the Organic Law of the Constitutional Court. Instead, a citation has been made to STC 191/2016,

of 15 November, FJ 3.B), emphasizing the broad margin enjoyed by the legislator for its regulatory implementation within the constitutional framework.

I agree with the idea that this "recantation"- or, at least, no longer reiterating constitutional case-law, which I consider highly disruptive- may mark the beginning of the "disuse" that I upheld as necessary in my dissenting opinion to STC 186/2016. In any case, what it does do is back up my decision to always make express differences, through dissenting opinions, if I disagree with the majority position upheld in the Court's resolutions, further to the power vested in me by Art. 90.2 LOTC, as a way of encouraging reflection (addressed not only to the "universal auditorium", referred to by Perelman, but also to my current or future Court colleagues) and, even, future case-law changes.

II. On the decision to postpone an analysis of this unconstitutionality action, filed by Generalitat de Catalunya against Organic Law 15/2015, of 16 October, to the one subsequently filed by the Government of the Basque Country, and do not contextualise the challenged regulations.

4. Organic Law 15/2015, of 16 October, reforming the Organic Law of the Constitutional Court, has been the object of two actions of unconstitutionality action. The first, processed under no. 7466-2015, which is settled in this resolution, was filed by *Generalitat de Catalunya* and registered at this Court on 30 December 2015. The second, filed under no. 299-2016, which was settled in said STC 185/2016, was lodged by the Government of the Basque Country and registered at this Court on 15 January 2016. As I then explained in my dissenting opinion to STC 185/2016, generally speaking and without prejudice to a cautious margin of discretion when examining judicial resources, it is reasonable given the many different actions of unconstitutionality brought against the same rule to be either arranged in a time sequence or, at least, to be joined together or, ultimately, simultaneously examined. This has not been the case of Organic Law 15/2015, where it was decided to first of all analyse the second action filed- the one of the Government of the Basque Government- to the detriment of the first action- filed by *Generalitat de Catalunya*.

I would like to repeat what I already affirmed in my dissenting opinion to STC 185/2016, in the sense that not only due to priority in time but, also, because the analysis is unique, this action filed by *Generalitat de Catalunya* should have been examined first. In any case, I must recall that the majority opinion on which the judgment is based has considered it appropriate to include an

explanation, justifying this unique order. The resolution I am now dissenting from states in FJ2 that the similarities between both actions "[...] were already ascertained at the time when the Court granted the action leave to proceed; further to a proposal made by the Reporting Judges, assigned by roster, in both actions, the Court deemed it appropriate, when organising the discussions, that the Basque Government action, despite being filed at a subsequent date, be resolved before the *Generalitat* Government action, given that the former claimed, as the first and determining grounds of unconstitutionality, based on an overall consideration of the article challenged, denaturalisation of the constitutional jurisdiction model designed by the constituent, whereas the Catalonian Government's action does not involve such a generic approach, and instead focuses on a specific challenge against each challenged article".

I am grateful that, in order to procure the necessary transparency when carrying out the Constitutional Court's highly relevant task, reasons have been given why certain, albeit justified, decisions have been adopted, which may not respond to objective criteria, in order to dispel any suggested arbitrariness or external instrumentation when exercising the relevant competences. Without prejudice to the justifying value of such explanation, in the present case, however, the reasons given to grant priority to the action filed by the Government of the Basque Country over the one filed by *Generalitat de Catalunya* are not particularly convincing. First of all, the action lodged by *Generalitat de Catalunya* was not only earlier in time but, also, was broader than the one formulated by the Government of the Basque Country given that, aside from procedural issues shared by both actions, the action of the Government of the Basque Country was challenging Arts. 92.4.b) and c) y 95.2 LOTC and the one filed by *Generalitat de Catalunya* was also challenging Art. 92.4.a) LOTC. Secondly, the arguments based on the fact that the action of the Government of the Basque Country, based on a joint consideration of the challenged articles, entailed a denaturalisation of the constitutional jurisdiction model designed by the constituent over the one formulated by *Generalitat de Catalunya*, focusing on a more specific challenge of each disputed article, is not very persuasive either. Furthermore, the elusive attitude with which the majority opinion of STC 185/2016 analysed the action filed by the Basque Government caused, as was duly criticised in the various dissenting opinions made in the judgment, that this alleged greater perspective not match the broader analysis made in the judgment I am now dissenting from.

Irrespective of the foregoing, on an *ex post facto* basis, it is clear that this alleged methodological suitability in anticipating the action of the Government of the Basque Country lacks

any solid grounds. Rather, an objection remains, which is gathered in my dissenting opinion in STC 185/2016, that this postponement could cause, as has been evidenced to be the case, overlooking in an analysis of the regulatory challenge the valuable information that could and should have contextualised the rule, whose constitutionality was being examined in this action and which is inextricably linked to recent events in Catalonia.

In this regard, I think it is necessary to reproduce sections 9 to 11 of the dissenting opinion I made to STC 185/2016, which stated as follows:

"9. The Preamble to Organic Law 15/2015, in an attempt to provide an aseptic description of the reasons behind the passing of the law, merely states that "[a]lthough 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 action is no reason why the Constitutional Court should not 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 unconstitutionality. 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. Organic Law 5/2015 was born from a draft bill proposed by the Parliamentary Group of Partido Popular, 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 Session 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 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 have 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 Law, 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 action of unconstitutionality brought by the Catalonian *Generalitat* against Organic Law 15/2015, of 16 October, or else to not ignore the necessary contextualisation of the challenged law".

III. On the materially sanctioning nature of suspending authorities or public employees from office, foreseen in Art. 92.4.b) LOTC.

5. In the dissenting opinion I made to STC 185/2016 I thoroughly explained the reasons why I considered that the Constitutional Court's power to suspend authorities or public employees from office, foreseen in Art. 92.4.b) LOTC, should have been declared unconstitutional due to its materially sanctioning nature. The reasons I gave then are equally applicable to this action, which is why I will now reproduce sections 12 to 15 of said dissenting opinion, which stated as follows:

"12. The Government of the Basque Country has disputed in its action the materially sanctioning nature of the measure to suspend authorities or public officials from office, introduced into Art. 92.4.b) 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 case-law 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: "[i]n 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" suggest illegal conducts and directly lead 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 pretention 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 Law 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 public authority 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 public 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 public authority 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 Session 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. On the alteration of the constitutional check model foreseen in Art. 155 CE, due to regulating the substitute enforcement foreseen in Art. 92.4 c) LOTC.

6. In my dissenting opinion to STC 185/2016 I thoroughly explained the reasons why I considered that the power vested on this Constitutional Court to request the State Government's collaboration for the substitute enforcement of its resolutions, foreseen in Art. 92.4.c) LOTC, should have been declared unconstitutional. The reasons I gave then are equally applicable to this action, which is why I will now reproduce sections 16 to 20 of said dissenting opinion, which stated as follows:

"16. The Government of the Basque Country has also disputed in its action 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 State 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 "[i]f 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 organic laws 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 organic laws 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 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, Marbury 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, Marbury actioned 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 Law 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 action 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 organic laws) 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 15 December 2016.