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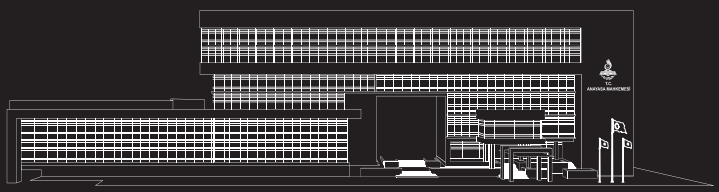
The Constitutional Court of the Republic of Turkey

Constitutional Justice in Asia

"Current Problems in Execution of Judgments: Constitutional Justice"



9th Summer School of the AACC
The Center for Training and Human Resources Development
7-8 September 2021, Ankara (*Online*)

Constitutional Justice in Asia

"Current Problems in Execution of Judgments: Constitutional Justice"

Online 9th Summer School of the Association of
Asian Constitutional Courts and Equivalent Institutions
7-8 September 2021, Ankara

Organised by
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The Constitutional Court of the Republic of Turkey

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Constitutional Justice in Asia

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MESSAGE OF THE PRESIDENT

The Constitutional Court of the Republic of Turkey organized the 9th Summer School Program of the Association of Asian Constitutional Courts and Equivalent Institutions (AACC) under the theme of "Current Problems in Execution of Judgments: Constitutional Justice" on 7-8 September 2021 on an online platform within the scope of the AACC activities.

We are pleased to organize the 9th Summer School of the AACC. We believe that the presentations of the participants throughout the Summer School made significant contributions to the field of comparative constitutional justice and reflected legal experiences and practices of the AACC members.

Summer School Programs of the AACC gather the participants in a sincere atmosphere to share their experiences and studies that would contribute to the constitutional justice and rule of law in the Asian continent. These programs also serve for the expansion and strengthening of cooperation among our institutions. I would like to express my contentment in presenting this publication, which collects the papers and presentations of the participants to the Summer School program for the benefit and use of all the members of the AACC.

Taking this opportunity, on behalf our Court and on my own behalf, I would like to extend my sincere thanks to all jurists and legal experts who contributed to this publication.

I hope this book will serve as a useful resource for all.

Prof. Dr. Zühtü ARSLAN
President of Constitutional Court of
the Republic of Turkey

PREFACE

The Constitutional Court of the Republic of Turkey is a member of the Association of Asian Constitutional Courts and Equivalent Institutions (AACC) since 2012. The Constitutional Court also hosts one of the three Permanent Secretariats of the AACC under the Center for Training and Human Resources Development (CTHRD). The main activity of the Center is to organize academic programs on a yearly basis addressing mid-level judges/lawyers of constitutional/supreme courts/councils.

In this framework, the Center plays a vital role in the achievement of the AACC's objectives by fostering cooperation and exchanges of experiences and information among AACC members by organizing summer schools since 2013. While the first Summer School was attended by a number of courts from Asia, the participants of the program expanded over the years thanks to the growing interest of the member courts/councils of the AACC as well as guest courts from around the world. The last Summer School in 2020 included representatives of twenty-eight courts/councils from Africa, Asia, and Europe.

The Summer School is an academic event focusing on the constitutional justice and human rights law. The theme of each Summer School is determined on contemporary and global issues of constitutional and human rights law drawing particular attention to the debated issues thereof. Academic discussions target to deal with the theoretical framework of the theme as well as the practice in the respective jurisdictions, with a focus on the case-law of the apex courts. In this vein, the Summer School intends for a sincere discussion of timely and significant aspects of constitutional and human rights law.

Various themes discussed in Summer Schools so far include the principle of equality, the right to fair trial, the freedom of expression, the right to privacy, migration and refugee law, the right to liberty, presumption of innocence and restriction of human rights and freedoms in health emergencies. This year, due to its essential nature in the protection of constitutional rights, the 9th Summer School was dedicated to "*Current Problems in the Execution of Judgments: Constitutional Justice.*"

There is no doubt that the most important aspect of the binding nature of the judgments is the proper execution of them. The effectiveness of the constitutional review and individual constitutional complaint depends upon the due respect and execution of the judgments delivered by the Constitutional Court.[1]

The presentations start by providing an overview of their respective constitutional court/supreme court's jurisdiction and the types and effects of the decisions, followed by an analysis of the current situation in the execution of decisions. Related case-law are included as well to further illustrate the issues. More specific information on the legal framework for the execution of judgements and the specific cases presented in the 9th Summer School may be found in this book. Overall, it is shown that there are reasons to be optimistic about the constitutional courts' capacity to meet current and future challenges. However, it should also be underlined that steps need be taken to enhance the capacity to provide better support to national authorities in addressing execution matters. These might also include an enhanced dialogue and sense of shared responsibility between all involved, as they share a common goal of upholding the constitutions.

As was the case with most international events in 2021, the 9th Summer School was also held online. Although we were compelled to do so due to travel restrictions around the globe, the online event provided an opportunity for wider participation. In the 9th Summer School, the apex courts of twenty-seven countries from Asia, Africa and Europe were represented. Just like the previous summer schools, the 9th Summer School was an excellent forum to share knowledge and information thanks to the active contribution of the participants.

We believe that this book will serve as important source on the constitutional and legal matters regarding the execution of judgements.

It is our sincere wish that you find this publication useful!

The CTHRD

1 From the opening remarks of Mr. Zühtü ARSLAN, President of the Constitutional Court of the Republic of Turkey.

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OPENING ADDRESS

by

The President of the Constitutional Court of the Republic of Turkey

7 September 2021, Ankara (video-conference)

Distinguished participants,

Ladies and gentlemen,

It is a great pleasure for me to address you at the opening session of the 9th International Summer School organized online by the Center for Training and Human Resources Development of the AACC.

Unfortunately for the last two years we have been conducting the summer schools through video-conference due to COVID 19 pandemic. I sincerely hope that next year we will have the programme in person at the building of the Turkish Constitutional Court (TCC).

I am very pleased to see that the number of the participants of the summer schools is gradually increasing. This year colleagues from 28 different courts and institutions are joining us. I am sure the enlargement of the summer school programs will contribute to the cooperation among our courts.

The topic of this year's summer school of the AACC is a bit different from the previous years. So far, each year we discussed one of the fundamental rights and liberties.

This time you will share your views and experiences on the issue of execution of judgments with a special reference to the decisions of constitutional/supreme courts.

In this opening speech I would like to say a few words about the conceptual aspect of the topic as well as the practice of the execution of the judgments of the TCC.

Let me start my remarks with the observation on the nature of judicial judgments by citing the famous Federalist Paper number 78.

Hamilton, one of the founding fathers of the US, stated that "*the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution*", simply because it has no control "*over either the sword or the purse*". In other words, it has "*neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments*".[1]

This statement reveals that comparing with the executive and the legislative organs the judiciary is a restrained stakeholder in the power sharing system. That is why the same Federalist paper referred to Montesquieu who said "*Of the three powers…, the judiciary is next to nothing*".[2]

The legal experience since Hamilton has also showed us that judiciary depends not only on the aid of the executive arm but also on the supports of the legislative and even of the fellow judicial arms for the efficacy of its judgments. Now we can easily observe that judiciary is simply nothing without the proper execution of its judgments. Therefore, the execution of judgments by other branches of government is precondition for the efficacy of these judgments.

On the other side of the coin lies the fundamental right to fair trial which requires the execution of court judgments. As already expressed in the judgments of the TCC and European Court of Human Rights, the enforcement of judicial decisions is an indispensable part and parcel of a fair judicial process.

In this regard, the right to a court would be "*illusory, if a … legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party*."[3] Likewise the non-execution of the judgments will render meaningless not only the right to court, but also all substantial rights and liberties such as the right to the property and freedom of expression.

Therefore, judicial judgments must be duly respected and executed in order to uphold the principle of the rule of law and to protect rights and liberties of individuals.

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1 A. Hamilton, J. Madison, J. Jay, *The Federalist Papers*, (New York: Mentor Books, 1964), p. 465.
2 *Ibid*., p. 466.
3 *Horny v. Greece*, no. 18357/91, 19/3/1997, § 40; see also *Kenan Yıldırım and Turan Yıldırım*, no. 2013/711, 3/4/2014, § 42.

Distinguished participants,

After this brief conceptual introduction, I would like to summarize the current situation concerning the issue of execution of constitutional court judgments.

Article 153 of the Turkish Constitution clearly stipulates that decisions and judgments of the TCC shall be binding on the legislative, executive and judicial organs as well as all natural persons and legal entities.

There is no doubt that the most important aspect of the binding nature of the judgments is the proper execution of them. The effectiveness of the constitutional review and individual constitutional complaint depend upon the due respect and execution of the judgments delivered by the Constitutional Court.

I must note that the Law on Constitutional Court lays out the binding force of the TCC and the implementation of judgments in the field of constitutional complaints. According to Article 50 of the Law, upon finding a violation the Court must also rule on the requirements to remove the violation and the consequences thereof.

The TCC has interpreted and applied this provision in a number of judgments. It emphasized that in order to decide on the proper remedy, the Court must first determine the source of the violation. If the violation derives from the judicial decisions the TCC remands the judgment to the relevant court for retrial. Where the violation arises out of an act of the Parliament, the Court calls for the Parliament to alter the law in order to remedy the violation.

The TCC has also the power to order compensation in favour of the applicants for redressing the violation.

The provisions of the Law on Constitutional Court reflect the requirements of a violation judgment which were laid down in the case-law of the European Court of Human Rights. In accordance with Article 46 of the Convention, which imposes an obligation to abide the final judgments of the Court, a violation judgment "*entails the duty of the state to end the violation, to provide redress to the victim and to prevent similar violations from occurring in the future*".[4]

4 Ausra Padskocimaite, "Constitutional Courts and (Non)execution of Judgments of the European Court of Human Rights: A Comparison of Cases from Russia and Lithuania", *ZaöRV* 77 (2017), 651-684, p. 653. www.zaoerv.de Retrieved on 6.9.2021.

Like some other states that adopt the constitutional complaint system, non-execution of violation judgments has inevitably brought about the concerns on the credibility of this system as an effective remedy. In a couple of cases the inferior courts whose decisions caused a violation were reluctant to abide by the judgments of the TCC in the way of reopening the trials of the applicants and remedying the underlying violation.

The reluctance and resistance of the courts to execute the judgments of TCC gave rise to new individual applications. The TCC has swiftly acted to declare more violations of relevant rights and liberties on the ground of non-enforcement of violation judgments, and ordered the courts along with a strong language to abide by the judgments and remedy the violations.[5] In the end the courts executed the judgments of the TCC.

The European Court of Human Rights declared the individual application system in Turkey as an effective remedy by referring to Article 153 of the Turkish Constitution. Despite some problems in terms of implementation, the judgments of the TCC are to be properly executed by the relevant authorities, therefore the individual application remains an effective remedy which must be exhausted before launching a complaint to the Strasbourg Court.

Ladies and gentlemen,

The effectiveness of any legal system depends on the proper execution of the decisions of courts in general and constitutional/ supreme courts in particular. This in turn requires a continuous cooperation and dialogue between state organs.

Therefore, we must discuss the problem of non-execution of judgments and seek for firm solutions to this problem by sincerely exchanging the experiences in respective states.

Before ending my speech, I would like to thank my colleagues at the Turkish Constitutional Court for organizing this online summer school programme.

5 *Kadri Enis Berberoğlu (3)*, [Plenary], no. 2020/32949, 21/1/2021, §§ 101-117. For the press release of this judgment in English *see* URL: https://www.anayasa.gov.tr/en/news/individual-application/press-release-concerning-the-judgment-finding-violations-of-the-right-to-be-elected-and-engage-in-political-activities-and-right-to-personal-liberty-and-security-due-to-the-failure-to-enforce-the-constitutional-court-s-judgment/

I would also like to thank in advance for your valuable contributions. Let me also remind you that the paper and discussions of this meeting will be published in a book.

I wish you every success and a fruitful meeting.

Prof. Dr. Zühtü ARSLAN
President of the Constitutional Court
of the Republic of Turkey

SOLID AND EFFECTIVE: SUPERVISION OF EXECUTION OF JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS BY THE COMMITTEE OF MINISTERS

Szymon Janczarek
Nikita Kolomiets

COUNCIL OF EUROPE

SOLID AND EFFECTIVE: SUPERVISION OF EXECUTION OF JUDGMENTS OF THE EUROPEAN COURT OF HUMAN RIGHTS BY THE COMMITTEE OF MINISTERS

Szymon Janczarek[*]
Nikita Kolomiets[**]

INTRODUCTION

According to a longstanding principle of international law, a State responsible for a wrongful act should, acting in good faith,[1] put an end to a violation, restore its consequences as far as possible, and prevent future violations.[2] Among the mechanisms implementing this principle, the one existing in the Council of Europe is notable.

The Council of Europe is an international organisation which primary goal is promotion of human rights, democracy and rule of law.[3] The European Court of Human Rights (the European Court, the

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The opinions expressed in this paper do not represent the official position of the Council of Europe bodies. Some elements of structure and of contents of this paper are taken from the relevant Council of Europe HELP course in the preparation of which the authors had an honour to participate. See the Council of Europe Programme for Human Rights Education for Legal Professionals (HELP), which aim is to develop and implement online courses on human rights mostly for legal professionals in all Council of Europe member states and beyond, URL: https://www.coe.int/en/web/help/about-help (visited on 3 November 2021).

1 Vienna Convention on the Law of Treaties, 23 May 1969, United Nations, Treaty Series, vol. 1155, p. 331, Article 26.

2 *See, for example,* Articles on Responsibility of States for Internationally Wrongful Acts, Yearbook of the International Law Commission, 2001, vol. II, Part Two, p. 38. The UN General Assembly took note of these Draft Articles in Resolution A/RES/56/83 of 12 December 2001, 53 UN GAOR Supp. (No. 10) p. 43, U.N. Doc. A/56/10 (2001). *See, in particular,* its Part II, Chapter 1 on the general reparation principles, and Chapter 2 on more specific reparation principles. These Articles are cited and applied by the European Court - *see, for example, Ilgar Mammadov v. Azerbaijan*, No. 15172/13, GC judgment of 29 May 2019 (Article 46 § 4), §§ 81-88, 164

3 Values. Human Rights, Democracy, Rule of Law. Council of Europe, URL: http://www.coe.int/en/web/about-us/values (visited on 2 November 2021).

ECtHR) is a body created in accordance with the European Convention for the Protection of Human Rights and Fundamental Freedoms (the European Convention, the ECHR).[4] All the States, which are members of the Council of Europe, must accept its jurisdiction.[5] Any person alleging violation of the Convention can lodge a complaint to the Court.[6] The States must abide by its final judgments in any case to which they are parties.[7]

The body supervising execution of the European Court's judgments by the Member States is the Committee of Ministers of the Council of Europe (the Committee, the CM).[8] By the time of drafting this article (November 2021), the CM continues to supervise 5,629 judgments, of which 1,299 are leading (raising a specific separate problem), and at the same time it closed supervision over 23,155 cases, of which 3,357 were leading (of which some 3,125 standard and 245 under enhanced supervision).[9] This means that 3,357 human rights problems identified by the European Court and then supervised by the CM, no longer exist at the domestic level. Many were very easy to resolve – for example, publication and dissemination were deemed sufficient for the execution of cases concerning incidental, isolated violations.[10] Others were more difficult.[11] In any event, it is logic to suggest that the CM supervision contributed to resolution of at least some of these numerous problems, although it has not yet been measured of how many exactly and to which extent, such precise measurement being difficult. Indeed, while there are now a number of publications dedicated to various aspects of execution of European Court's judgments,[12] the research into

4 Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, Europ.T.S. no. 5; 213 U.N.T.S. 221.

5 Treaty Office. Chart of signatures and ratifications of Treaty 005. Status as of 1 April, 2017. Council of Europe, URL: http://www.coe.int/en/web/conventions/full-list/-/conventions/treaty/005/signatures?p_auth=tTqdudWV (visited on 2 November 2021).

6 *European Convention*, *supra* note 5, Article 34.

7 Id., Article 46 § 1.

8 *Id*., Article 46 § 2.

9 Database HUDOC EXEC, URL: http://hudoc.exec.coe.int/eng (visited on 3 November 2021) (hereinafter: "HUDOC EXEC").

10 *See, among many other examples*, *Larisa Zolotareva v. Russia*, No. 15003/04, Final Resolution No. CM/ResDH(2020)282 of 3 December 2020; *Rahmanova v. Azerbaijan*, No. 34640/02, Final Resolution No. CM/ResDH(2019)71 of 4 April 2019; *Ekholm v. Finland*, No. 68050/01, Final Resolution No. CM/ResDH(2018)324 of 20 September 2018.

11 *See* numerous examples given in this paper, *for example*, *infra* notes 45, 73-97.

12 Among the most deep and notable works are, *for example,* Lambert Abdelgawad E., *The Execution of Judgments of the European Court of Human Rights*, Council of Europe Publishing,

measuring to which extent the CM supervision is effective, is generally still missing.[13] An attempt to contribute to it is made in this paper, which aim is to demonstrate not only that the CM supervision is a solid mechanism, but also that it is effective.

This mechanism is solid, clearly structured and functioning. The most part of this paper is dedicated to demonstrating this. Part I outlines the role of the States, the CM and other actors involved in the execution and its supervision. Part II describes in more detail how the State identifies the measures to execute the judgments, and what these measures can be. Part III describes in more detail the process of supervision of execution by the CM.

This mechanism is effective and brings good results. An attempt to prove this argument is made throughout the paper via various examples. It is also argued in the end of part III that more than 100 major human rights problems in Europe were resolved because of active interference of the CM – in particular, after it made in its decisions specific execution indications to the States. Further research is of course necessary to better measure the scope of such contribution.

I. ACTORS

Before considering the execution process and procedure of its supervision by the CM, it would be useful to outline the roles of the key actors of this process. The list of these actors is open, but primarily it is of course the respondent State and its bodies which execute the

2nd ed. 2008, outlining notably the development of the CM requirements towards execution: for example, the requirement to adopt general measures appears only in early 80s (p. 38).

See also von Staden A., *Strategies of Compliance with the European Court of Human Rights. Rational Choice Within Normative Constraints*, University of Pennsylvania Press, 2018, finding that all governments tend to execute *ad minima* (p. 40) etc.

Gerards J.H. and Fleuren J.W.A. (eds.), *Implementation of the European Convention on Human Rights and of the judgments of the ECtHR in national case law. A comparative analysis*, Intersentia, 2014.

For the sources in French, *see, for example,* Anne-Catherine Fortas, *La surveillance de l'exécution des arrêts et décisions des Cours européenne et interaméricaine des Droits de l'Homme: contribution à l'étude du droit du contentieux international* [Supervision of the Execution of Judgments and Decision of the European and Inter-American Courts of Human Rights: Contribution to a Study of the International Litigation Law], A. Pedone ed., 2015.

13 Among the rare papers specifically dedicated to the CM supervision, see Çali B., Koch A., *Foxes Guarding the Foxes? The Peer Review of Human Rights Judgments by the Committee of Ministers of the Council of Europe,* 14(2) Hum. Rts. L. Rev. 301, p. 323-324 (2014) (discussing advantages and disadvantages of the CM peer review).

judgments. It is also the CM which supervises this execution. It is further the ECtHR, which not only identifies the problem to resolve, but also sometimes gives indication how exactly to resolve it and even, although rarely, assesses the execution progress. The other Council of Europe bodies, as well as NGOs and national human rights institutions can also be considered as actors in the process of execution, because their expert opinions are taken into account.

A. The State

According to the principle of subsidiarity, it is primarily up to the State to organise the execution process.[14] The existence and importance of this principle in Europe was repeatedly underlined by the Member States, including during the high-level inter-governmental conferences, such as the one held in Brussels in 2015.[15] Furthermore, Protocol no. 15 to European Convention, which entered into force on 1 August 2021, introduced the principles of subsidiarity and margin of appreciation in its Preamble.[16] The Preamble covers the Convention as a whole, including the execution of the Court's judgments, referred to in its Article 46.

The obligation to abide by the judgment of the ECtHR is unconditional: a Member State cannot rely on the specificities of its domestic legal system to justify a failure to comply with obligations by which it is bound under the ECHR.[17]

Therefore, a State is responsible for prompt and effective execution of the ECtHR's judgments. Within its institutional structure, specific measures shall be adopted by competent domestic authorities, be it national parliaments, executive, or judiciary (or any combination of these). Sometimes the body responsible for the Convention's violation

14 *See* European Convention, *supra note 5,* Article 46 (according to which the State has to abide by the judgment, and the CM merely supervises the process).

15 High-level Conference, *Implementation of the European Convention on Human Rights, our shared responsibility. Brussels Declaration,* 27 March 2015 (hereinafter: "Brussels Declaration"), URL: https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680593072.

16 Protocol no. 15 amending the Convention for the Protection of Human Rights and Fundamental Freedoms, *opened for signature* June 24, 2013, CETS no. 213. *See details* URL: https://www.coe.int/en/web/conventions/full-list?module=treaty-detail&treatynum=213.

17 *See, for example*, *Ilgar Mammadov v. Azerbaijan*, No. 15172/13, GC judgment of 29 May2019 (Article 46), §§ 87, citing *Articles on Responsibility of States,* Article 32.

is different from the body remedying it.[18] Usually parliaments intervene to change legislation whenever necessary. In some States they also directly monitor the domestic execution process. For example, they require the government to report on execution.[19]

The executive authorities often change regulations or administrative practice or suggest legislative reforms. They also often provide individual redress, for example paying just satisfaction or ensuring adequate detention conditions. In addition, they often coordinate the execution process in general.[20]

Judicial authorities are usually responsible for improving judicial practice. Depending on circumstances, they might also provide individual redress. This can be done for example by reopening impugned proceedings whether to ensure new fair trials in criminal cases or to erase unjust convictions, or by awarding compensation for lost opportunities where reopening is not possible. In some legal systems judiciary also provides indications on new legislative measures needed.[21]

B. Committee of Ministers of the Council of Europe

The CM acts on behalf of the Council of Europe in general.[22] It is composed of the Ministers for Foreign Affairs of the member States or their representatives.[23] It decides on almost all matters relating to the internal organisation of the Council of Europe.[24] In addition, under Article 46 § 2 of the ECHR the CM supervises the execution of the ECtHR judgments in individual cases. Under its Article 39 § 3 and 4 it

18 For example, legislative amendment might be necessary to eliminate doubts appearing in judicial practice due to various ways of its interpretation.

19 The necessity for the Government to submit such report for its examination by the Parliament is for example provided in Belgium, Bulgaria, Croatia, Denmark, Estonia, Germany, France, Montenegro, the Netherlands, Poland, Romania, the United Kingdom or Sweden. See Steering Committee for Human Rights (CDDH), *Guide to Good Practice on the Implementation of the Recommendation (2008)2 of the Committee of Ministers*, CM(2017)92-add3final (15 September 2017), p.41-47, URL: https://rm.coe.int/guide-to-good-practice-on-the-implementation-of-recommendation-2008-2-/16809d3ac3.

20 *Id.,* p.14-18.

21 See for example competences of the Polish Constitutional Court: function under Article 35 of the 2016 Law on the organisation and the functioning of the Constitutional Court.

22 Article 13 of the Statute of the Council of Europe, *opened for signature* on 5 May 1949, Europ.T.S. no. 1 (entered into force 3 August 1949) (hereinafter: "Statute of the Council of Europe").

23 *Id*., Article 14.

24 *Id*., Article 16.

also supervises execution of the terms of friendly settlements.

The work of the CM is thus of a political character as such, but fulfilling its role under Article 46 of the Convention it applies legal rules and has even developed an extensive *acquis* (well-established practice) with hundreds of decisions adopted within its supervision over domestic execution,[25] which allows to characterise its role as quasi-judicial.[26] The political component of its work of course remains, making it capable to recourse to political leverage to deal with cases of non-execution.[27]

Execution of the judgments of ECtHR is only an instance of a more general process of implementation of the Convention.[28] The CM role concerns both. Thus, it has adopted a series of recommendations,[29] some covering implementation of the Convention in general, others covering execution the judgments of the ECtHR in particular.

For example, among the recommendations concerning implementation are those dedicated to: publication and dissemination of the case-law of the ECtHR and other relevant texts,[30] education and training in the field of the Convention,[31] compatibility of laws to the Convention standards,[32] or domestic remedies to prevent violations of the Convention,[33] including remedies against excessive length of proceedings.[34]

Among the recommendations concerning exclusively the execution one can point at those concerning domestic capacity for rapid

25 *Ilgar Mammadov*, *supra note 3,* §§ 161-163.

26 Fortas, *supra* note 13, p. 185-217.

27 *Preface by the Chairs of the Human Rights meetings*, in: Committee of Ministers of the Council of Europe, *Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights,* 14th Annual Report 2020, p.8 (hereinafter CM 2020 Annual Report).

28 *See, however*, different understating of the terms in *van Staden, supra* note 13 (p.17, arguing that "execution" is more directive and precise term than "implementation").

29 Statute of the Council of Europe, Article 15b.

30 CM Recommendation on the publication and dissemination of the European Convention, its case-law and other relevant texts: CM/Rec(2021)4

31 CM Recommendation on the system of the European Convention in **university education and professional training** CM/Rec(2019)5 .

32 CM Recommendation on the **verification of the compatibility** of draft laws, existing laws and administrative practice with standards laid down in the European Convention on Human Rights CM/Rec(2004)5 4.

33 CM Recommendation on the **improvement of domestic remedies** CM/Rec(2004)6.

34 CM Recommendation on **effective remedies for excessive length of proceedings** CM/Rec(2010)3.

execution,[35] or reopening of the domestic proceedings in the framework of execution.[36]

C. Department for the Execution of Judgments

In the process of supervision of the execution of judgments of the ECtHR, the Committee is assisted by the Department for the Execution of Judgments of the European Court of Human Rights (the Department, the DEJ), which is a part of the Directorate General for Human Rights and Rule of Law of the Council of Europe. In the DEJ, the measures to execute the judgments, including major reforms, are being elaborated and even sometimes conceived, taking into account the position of the authorities and other actors. The Department is composed of lawyers having knowledge about the Convention requirements and the relevant CM and State practice. This knowledge is placed at the disposal of the CM through its independent assistance and advice. Only rarely the CM disagrees with the advice of the Department.[37]

Within provision of the assistance and advice,[38] the Department, for example:

- makes proposals to the CM on how to prioritise and classify judgments submitted for the supervision of their execution;
- prepares assessments of documents submitted by States (action plans and reports);
- prepares proposals on which cases to include in the CM's meetings dedicated to the execution, and prepares all the necessary documents for these meetings, including draft decisions and resolutions.

To foster the execution, the Department provides technical advice and support to States through targeted activities, such as legal expertise, round tables, bilateral meetings involving all national actors concerned, or training activities. The DEJ is at the same time in contact

35 CM Recommendation on **efficient domestic capacity for rapid execution of judgments** of the European Court of Human Rights CM/Rec(2008)2

36 CM Recommendation on the **re-examination or reopening** of certain cases at domestic level following judgments of the European Court of Human Rights CM/Rec(2000)2

37 *van Staden*, *supra* note 13, p. 20.

38 For more details of the role of the DEJ, see its mandate summarised on its website, URL: https://www.coe.int/en/web/execution/presentation-of-the-department .

with the injured parties, national institutions for the promotion and protection of human rights, non-governmental organisations working with the execution of judgments, as well as with any other interested organisation.

It is also responsible for running a website dedicated to the execution, the HUDOC-EXEC database, for preparation of country and thematic factsheets on execution, as well as for the elaboration of the draft Annual report of the CM on execution of judgments of the ECtHR.

According to certain authors, possible concerns about the effectiveness of the peer supervision in the CM are mitigated by a strong and independent Department, who is a "guardian of the reliability" of the system.[39]

D. European Court of Human Rights

The European Court may appear in the execution process in various roles. Usually, it issues judgments without any specific reference to the execution, although from the description of the context of a violation it may be clear how a State should execute it.

Further, in response to a CM Resolution of 2004,[40] the Court has developed the practice of indications helping States to identify the underlying problems and the necessary execution measures, including via the pilot judgments procedure.[41] Within this practice, the Court may even assess the progress achieved in the execution of its previous judgments with specific indications.[42]

Furthermore, in some cases the Court can revise/interpret judgments on requests from the applicants or governments, when new facts,

39 *Çali, Koch*, supra note 14, at 25. See also *van Staden*, *supra* note 13, at 19-20.

40 Resolution Res(2004)3, adopted by the Committee of Ministers on 12 May 2004. In it, the CM invited the Court to identify in its judgments "what it considers to be an underlying systemic problem and the source of this problem, in particular when it is likely to give rise to numerous applications, so as to assist states in finding the appropriate solution and the Committee of Ministers in supervising the execution of judgments". https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805dd190

41 *See* Rules of the Court, Rule 61, URL: https://echr.coe.int/Documents/Rules_Court_ENG.pdf. *See also* Sainati T., *Human Rights Class Actions: Rethinking the Pilot-Judgment Procedure at the European Court of Human Rights*, 56 Harv. Int'l L.J. 147, 2015, (discussing this pilot judgments procedure).

42 *See for example* inadmissibility decision in the case of *Stella v. Italy*, No. 49169/09, adopted in the pilot procedure, with the assessment of general measures implemented by the Italian authorities in the case of *Torreggiani and Others v. Italy*, 43517/09

unknown at the time of the judgments, emerge or when the operative provisions lack clarity.[43]

Also, upon a request from the CM, the Court may rule on any question of interpretation of a judgment which hinders its execution (Article 46 § 3 of the ECHR) or on a refusal to abide by a judgement (Article 46 § 4 of the ECHR).[44] The last two possibilities, introduced in Protocol 14 to the Convention according to some authors has led to "judicialisation" of the execution.[45]

Finally, the Court's summaries of some principles related to execution can be very useful.[46]

E. Other Council of Europe bodies

Other Council of Europe bodies although not directly involved in the execution can also provide help in the process. Enhancing synergies was one of the main recommendations to improve the supervision procedure made in the Brussels Declaration.

For example, Parliamentary Assembly of the Council of Europe (PACE), which is a statutory body with the Council of Europe (along with the CM),[47] regularly issues reports on the execution of judgments of the European Court in respect of important problems. These PACE reports lead to PACE resolutions on further actions required from States or national parliaments, as well as recommendations and questions to the Committee of Ministers.[48]

Another example is the Council of Europe Commissioner for Human Rights, who is an independent human rights monitoring

43 *See* Rules of the Court, *supra note* 42, Rules 79 and 80.

44 The first question in accordance with Article 46 § 4 was referred to the ECtHR by the CM in 2017, with a request whether the Republic of Azerbaijan has failed to fulfil its obligation to abide by the judgment in the case of *Ilgar Mammadov*. In 2019 the ECtHR found Azerbaijan to be in breach of Article 46 § 1 of the ECHR by not ensuring unconditional release of the applicant and in this way acting in a manner incompatible with the conclusion and spirit of the first *Mammado*v judgment. The applicant was released soon afterwards.

45 Sicilianos L.-A., *The involvement of the European Court of Human Rights in the implementation of its own judgments: recent developments under Arrticle 46 ECHR*, Netherlands Quarterly of Human Rights, Vol. 32/3. 2014, p.236

46 *See, for example, Ilgar Mammadov, supra note 3, §§ 89-103, 147-171.*

47 Statute of the Council of Europe, Article 10. At the time of issuance of the Statute, PACE was named "Consultative Assembly".

48 See for example the last report of 2021, PACE Recommendation Rec. 2193, reply to this Recommendation and Resolution Res. 2358, available at The implementation of judgments of the European Court of Human Rights (coe.int) (visited 16 November2021)

institution, capable of providing valuable assistance to national authorities and to the Committee in the process of execution and its supervision: for example, in 2020, the Commissioner submitted her first five Rule 9 communications to the CM (see below more on this form of communication with the CM).[49]

Further, reports of expert standard-setting and monitoring Council of Europe bodies can be pertinent to execution of some cases, such as the CPT,[50] the ECRI,[51] the CEPEJ,[52] the Venice Commission,[53] the GRETA,[54] the GREVIO.[55] The Council of Europe may also organise tailor-made responses to specific challenges involving several bodies, which may include cooperation programmes, such as the HELP Programme.[56]

The CM frequently invites the States to take advantage of different cooperation programmes and projects offered by the Council of Europe.[57]

49 Annual Report for 2020, *supra note* 28 at 27.

50 The European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (CPT) provides a non-judicial preventive mechanism to protect people deprived of their liberty against torture and other forms of ill-treatment. This role is played notably through visiting places of detention, adopting reports and issuing general and specific recommendations, URL: https://www.coe.int/en/web/cpt.

51 The European Commission Against Racism and Intolerance (ECRI) is a human rights monitoring body which specialises in questions relating to the fight against racism, discrimination, xenophobia, anti-Semitism and intolerance in Europe, URL: https://www.coe.int/en/web/european-commission-against-racism-and-intolerance.

52 The Council of Europe European Commission for the Efficiency of Justice (CEPEJ). The aim of the CEPEJ is the improvement of the efficiency and functioning of justice systems in the Member States, and the development of the implementation of the instruments adopted by the Council of Europe to this end, URL: https://www.coe.int/en/web/cepej.

53 The European Commission for Democracy through Law (Venice Commission) is a Council of Europe's advisory body on constitutional matters, whose role is to provide legal advice to its member states and, in particular, to help states wishing to bring their legal and institutional structures into line with the European standards and international experience in the fields of democracy, human rights and the rule of law, URL: https://www.venice.coe.int/.

54 The Group of Experts on Action against Trafficking in Human Beings (GRETA) is responsible for monitoring the implementation of the Council of Europe Convention on Action against Trafficking in Human Beings, URL: https://www.coe.int/en/web/anti-human-trafficking/greta.

55 The Group of Experts on Action against Violence against Women and Domestic Violence (GREVIO) is the independent expert body responsible for monitoring the implementation of the Council of Europe Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention), URL: https://www.coe.int/en/web/istanbul-convention/grevio.

56 The Council of Europe Programme for Human Rights Education for Legal Professionals (HELP), URL: https://www.coe.int/en/web/help/about-help (visited on 3 November 2021). By end 2020, the number of HELP users reached 80,000 (Annual Report 2020, *supra* note 28, p. 36).

57 *See* the outline of such programmes in 2020 in Annual Report 2020, *supra* note 28, at 34-35. *See for example* decisions adopted by the CM in December 2019 in *Cestaro group v. Italy*, No. 6884/11

F. Non-Governmental Organisations and National Human Rights Institutions

Non-Governmental Organisations (NGOs) and National Human Rights Institutions (NHRI's) play a particularly important role in the execution process: apart from domestic advocacy to ensure the execution they may also communicate directly with the CM, helping it to perform its supervisory role. In this context, particularly valuable source of information allowing for the identification of necessary measures and the assessment of the progress in the execution constitute submissions under Rule 9 of the Rules on Execution.[58] The catalogue of the entities/persons that may make such a submission is wide.[59] There is also a special procedure of publication of Rules 9 submissions, giving the States time and opportunity to makes comments.[60] Apart from factual information and legal analysis, Rule 9 submissions may contain requests for certain actions on the part of the Committee.[61] The CM takes these communications into consideration and often refers to them in its documents.[62]

In 2020, a record number of communications was received by the

or *Tsintsabadze group v. Georgia*, No. 35403/06.

58 Rules for the supervision of the execution of judgments and of the terms of friendly settlements, URL: https://rm.coe.int/16806eebf0 (hereinafter: "the Execution Rules") (visited on 3 November 2021)

59 Rule 9 submission can make the applicant and his/her/its representative (only in respect of individual measures, including payment of just satisfaction); non-governmental organisations; national institutions for the promotion and protection of human rights; an international intergovernmental organisation or its bodies or agencies whose aims and activities include the protection or the promotion of human rights; institutions or bodies allowed to intervene in the procedure before the Court (either in all cases, like the Council of Europe's Commissioner for Human Rights, or in those in which the Court's authorisation was granted).

60 Any communication received from the applicant or his/her/its representative is immediately brought to the attention of the CM and of the State concerned and published. As to other communications, they are first brought to the attention of the State concerned. When the State responds within five working days, both the communication and the response are together brought to the attention of the CM and made public. If there has been no response within this time limit, the communication is circulated among the delegations in the CM but not yet made public. It is published in five more days, together with a response received within this time limit, if any. A state's response received after these ten working days is circulated and published separately upon receipt.

61 For example, transferring the case from the standard to the enhanced procedure; debating the case at one of its CM-DH meetings; adopting a particular decision or an interim resolution; referring a judgment to the Court for interpretation or initiating an infringement procedure etc. Even when the CM does not publish its reaction to these specific requests, it does not mean that it has not taken them into account, in accordance with Rule 9, §§ 1 and 2 of the Rules on Execution.

62 Notes and analysis prepared for its meetings dedicated to the execution: CM-DH meetings.

Committee from civil society and NHRIs (176 concerning 28 States, compared to 133 in 2019 concerning 24 States).[63]

II. EXECUTION

According to some researchers, "most states do comply fully with most judgments of the European Court".[64] At the same time, there are almost no methodologically well-grounded inquiries into the causal factors producing the observable patterns of implementation and compliance with these judgments.[65] Unfortunately, the constraints of this paper would not allow to go into these extremely interesting and useful matters, which should be a subject of a further research. This paper in its part dedicated to execution will be limited only to what the authorities execute, how they identify the measures necessary for execution, and what these measures can be.

A. Judgments and decisions to be executed

According to Article 46 § 2 of the Convention, "the final judgment of the Court shall be transmitted to the Committee of Ministers, which shall supervise its execution." All the judgments of the Court finding violations of the ECHR have the same binding force and must be executed, whether it is a Committee, a Chamber, or a Grand Chamber judgement. Judgments delivered following individual application are treated in the same manner as inter-state cases.[66] The CM also supervises the execution of the terms of the friendly settlement as set out in the decision of the European Court on the basis of Article 39 § of the ECHR. Such friendly settlements can be with or without specific undertakings. Friendly settlements with undertakings are specific in that apart from the obligation of payments, they also contain commitments to implement other individual or even certain general measures.

63 Annual Report for 2020, supra 28, at 28.

64 Darren Hawkins & Wade Jacoby, *Partial Compliance: A Comparison of the European and Inter-American Courts for Human Rights*, 6 J. Int'l L. & Int'l Rel. 35, 38 (2010); *see also* Gerald L. Neuman, *Bi-Level Remedies for Human Rights Violations*, 55 Harv. Int'l L.J. 323, 355 (2014) (referring to that the European Court is known to achieve a higher rate of compliance than the Inter-American Courts for Human Rights, and citing *Open Society Justice Initiative, From Judgment to Justice: Implementing International and Regional Human Rights Decisions* 36-40 (2011)).

65 See *van Staden*, supra note 13, at 3, making an effort of such an inquiry.

66 Apart from the fact that inter-state cases are automatically regarded as important cases requiring treatment in the enhanced procedure of execution (*see* below).

Only one type of decisions – striking out cases following unilateral declaration made by the respondent State – is executed under direct supervision of the ECtHR, not the CM.[67]

B. Measures to be adopted

To execute the judgments of the ECtHR, the States adopt individual and general measures.[68] *Individual measures* consist not only in paying just satisfaction (if any), but also in ensuring that the violation has ceased and that the injured party is put, as far as possible, in the same situation as if the violation should have not taken place. *General measures* consist in preventing new violations or putting an end to the continuing violations.

The primary task of the State is to identify the individual and general measures to be adopted. The DEJ can provide the assistance in this respect. The State considers the position of the ECtHR and the CM, information from the applicants, from the civil society, as well as expert opinions of the various Council of Europe bodies and other national and international institutions.

In such identification the State acts in line with certain principles, including the principle of subsidiarity mentioned above. The States are therefore free to choose the means whereby they will comply with a judgment in which the ECtHR found a breach of ECHR. This discretion as to the manner of execution of a judgment reflects a freedom of choice attaching to the primary obligation of Member States under the Convention to secure the rights and freedoms guaranteed. This freedom is however limited by the wording of the ECtHR's judgments, notably those indicating specific measures (including pilot judgments – see under the role of the Court, above), and the supervision over the execution performed by the CM.

In addition, according to the principle of direct effect, the findings of the European Court against the specific State are directly applicable at the domestic level of that State, even if they contradict the domestic law. The CM repeatedly referred to this principle.[69] The authorities also

67 Rules of the Court, *supra* note 42, Rule 62A.

68 Execution Rules, *supra* note 59, Rule 6.

69 *See, e.g.*, *Hakkar v. France*, CM Final Resolution No. ResDH(2001)4, 14 February 2001); Lambert Abdelgawad E., *supra note* 13; Thomas Buergenthal, *Centennial Essay: The Evolving International Human Rights System*, 100 A.J.I.L. p.793-794.

take into account non-violation judgments or inadmissibility decisions, as their reasons may also provide for valuable source of information on relevant standards.

Individual measures: providing redress to applicants

a. Just satisfaction

Following the finding of a violation, the ECtHR may award just satisfaction for pecuniary and/or non-pecuniary damage to the applicant based on Article 41 of the ECHR. The purpose of this award is to compensate the harmful consequences of a violation. It is not intended to punish the State.[70]

The ECtHR can award pecuniary damages, non-pecuniary damages, and costs and expenses incurred by the applicant. When it is difficult to evaluate precisely the three elements mentioned above, it may award a global amount.

Payment is usually to be made within three months after a judgment becoming final and binding or after delivery of a decision accepting the terms of a friendly settlement. In case of non-payment, default interest must be paid. Where default interests are concerned, they serve only to maintain the value of just satisfaction and not as a penalty. The payment of just satisfaction may raise many practical questions, for example concerning its modalities, calculation of default interests or seizure of the sums received. The Committee of Minister's practice as to the payment of just satisfaction has been summarised by the DEJ in a memorandum.[71]

b. Other individual measures

Sometimes authorities must not only pay just satisfaction, but also adopt additional individual measures.

The catalogue of individual measures that might be implemented by States is open and their choice depends on the circumstances of the case, for example:

70 See practice directions of the ECtHR concerning just satisfaction, URL: https://www.echr.coe.int/Pages/home.aspx?p=basictexts/rules/practicedirections (visited on 2 November2021).

71 *Monitoring of the payment of sums awarded by way of just satisfaction: an overview of the Committee of Ministers' present practice*. Information document: CM/Inf/DH(2008)7 final, URL: https://search.coe.int/cm/Pages/result_details.aspx?ObjectId=09000016805af4ec (visited on 2 November 2021).

- reopening of the domestic judicial proceedings (see below for details),
- resumption of investigation,[72]
- change of conditions in prison,[73]
- reinstitution in the office,[74]
- restoration of property,[75]
- acceleration or termination of lengthy proceedings,[76]
- family reunification,[77]
- destruction of personal data,[78]
- release of an unlawfully detained person.[79]

72 Usually resumption/reopening/continuation of investigation is necessary to address procedural violations of Article 2 and 3 of the ECHR. *See, for example*, *Jalloh v. Germany,* No. 54810/00, Final Resolution No. CM/ResDH(2010)53; *Wasilewska and Kałucka v. Poland* No. 28975/04, Final Resolution No. CM/ResDH(2016)148, in which investigations were resumed to explain proportionality of the use of force and proper planning of the police operation in which the applicants' relatives have been killed. *See also Rantsev v. Cyprus and Russia,* No. 25965/04, Final Resolution No. CM/ResDH(2017)95, concerning poor investigation of death of the applicant's daughter, in which at the execution stage investigators from Cyprus and Russia examined the circumstances of her alleged recruitment in Russia and employment, confinement and death in Cyprus. Procedural deficiencies of the investigations were remedied by interviewing a missing witness, resolving conflicting testimonies and conflicting autopsy reports and investigating actions of the police officers involved in the events at the material time.

73 *See, for example, Dybeku v. Albania,* No. 41153/06, Final Resolution No. CM/ResDH(2016)273, concerning the inadequacy of the applicant's conditions of detention and inappropriate medical treatment. At the execution stage, the applicant was transferred to a specialised establishment for prisoners suffering from certain mental illnesses where he received daily medical treatment and psychiatric counselling.

74 *See, for example, Mishgjoni v. Albania,* No. 18381/05, Final Resolution No. CM/ResDH(2018)73, concerning a judge's dismissal, in which at the execution stage the applicant was reinstated.

75 *See, for example*, *Akimova v. Azerbaijan,* No. 19853/03, Final Resolution No. CM/ResDH(2019)70, concerning the unlawful occupation of an apartment and a formal indefinite postponement of the eviction enforcement due to misapplication of law by domestic courts; at the execution stage, the apartment was restored to the applicant.

76 *See, for example*, *De Clerck and 3 other cases v. Belgium*, No. 34316/02, Final Resolution No. CM/ResDH(2017)149. In this group of cases concerning excessive length of criminal proceedings in economic and financial matters, the impugned proceedings were accelerated and compensation for State responsibility granted in one case.

77 *See, for example*, *Wallová and Walla v. the Czech Republic,* No. 23848/04, Final Resolution No. CM/ResDH(2013)218, concerning an order to take children into public care solely for socioeconomic reasons, in particular inadequate housing conditions. At the execution stage, the competent authorities initiated long-term close co-operation with the applicant and assisted him in creating conditions that would enable him to assume care of his three children, in particular in terms of securing adequate housing and regular job. See also *Bianchi v. Switzerland,* No. 7548/04 , Final Resolution No. CM/ResDH(2008)58, concerning the inadequacy of measures taken to implement an order for the return of a child under the 1980 Hague Convention on the Civil Aspects of International Child Abduction. At the execution stage, because to the cooperation of various authorities, a father was able to find his child, taken by the child's mother and hidden in Mozambique.

78 *See, for example, L.H. v. Latvia,* No. 52019/07, Final Resolution No. CM/ResDH(2017)64, concerning illegal collection of the applicant's personal medical data by a State authority, at the execution stage the collected data was destroyed.

79 *See, for example, Del Rio Prada v. Spain,* No. 42750/09, Final Resolution No. CM/ResDH(2014)107, the applicant was released from unlawful detention the day after the judgment of the European Court was delivered.

As mentioned above, the ECtHR may sometimes indicate specific measures in its judgments, including regarding the individual measures.[80]

Sometimes, when there is a real risk of irreversible harm, the CM may call upon the respondent State to adopt urgent individual measures. This may happen, for example, in the situation of pending removal to a country in which the applicant would run a real risk to ill-treatment. Identification of such risk by the ECtHR while applying interim measures under Rule 39 of the Rules of the Court may be pertinent.

c. Reopening of judicial proceedings

Although reopening is only one of various individual measures, it is so specific that deserves a more detailed description.

Initially, reopening of domestic judicial proceedings was an exceptional measure, but it has now become a common (in some cases the only) tool to ensure *restitutio in integrum* at the execution stage. In this vein, the CM, in its Recommendation 2000(2),[81] invited the States to ensure that reopening of domestic judicial proceedings is possible under the domestic law.

Not all the cases require such reopening. The reopening of proceedings may be necessary if the applicant continues to suffer serious negative consequences of the ECHR violation, which cannot be adequately remedied by the payment of just satisfaction and can be rectified only by reopening. The violation found by the Court must thus cast serious doubts as regards the outcome of the proceedings (procedural violations, mostly of Article 6 of the Convention), or the impugned domestic decision itself must be contrary to the Convention (violations of substantive Convention rights, mostly of Articles 8-11 of the Convention).

80 *See, among many other examples,* some cases in which the Court indicated that the applicants should be released: *Assanidze v. Georgia,* No. 71503/01 *Fatullayev v. Azerbaijan,* No. 40984/07, *Ilaşcu and Others v. Moldova and Russia,* No. 48787/99.

81 Recommendation No. R (2000)2 of the Committee of Ministers to member states on the re-examination or reopening of certain cases at domestic level following judgements of the European Court of Human Rights, adopted by the Committee of Ministers on 19 January 2000 at the 694th meeting of the Ministers' Deputies, URL: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805e2f06

This means that in criminal cases reopening must lead to quashing of impugned decision in case of violations of substantive Convention rights (obligation of result) and usually to acquittal or discontinuation of proceedings.[82] When procedural violations are concerned reopening may lead to the applicant's acquittal, but it can also result in the confirmation of the conviction. The most important is that the latter complies with all guarantees of the fair trial (obligation of means).[83]

In certain exceptional situations where the reopening of proceedings is either unavailable or did not bring the expected result, the State may be required to adopt other alternative measures to remedy the applicant's situation.[84]

There are often obstacles to reopening in civil cases, such as principle of legal certainty and *bona fide* of third parties. In these cases, reopening may be replaced by award of a sum of money additional to just satisfaction awarded by the Court,[85] or by other alternatives.

Further, the reopening will not be the most appropriate way of redress in continuous situations where the applicant still has a possibility to submit a new request for his situation to be re-examined, without quashing an earlier judicial or administrative decision with a view to adoption of a new one.[86]

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82 *See, among many other examples, Perinçek v. Switzerland*, No. 27510/08, Final Resolution No. CM/ResDH(2016)326, concerning violation of Article 10 (substantive Convention right) on account of a criminal conviction of a Turkish politician and doctor of law for having publicly rejected the legal characterisation as "genocide" of atrocities committed against the Armenian people in the Ottoman Empire in 1915 and after: the domestic courts in the reopened proceedings acquitted the applicant.

83 *See, among many other examples, Daktaras v. Lithuania*, No. 42095/98, Final Resolution No. ResDH(2004)43, in which the domestic court had not been impartial because of objective fears that a superior judge had instructed it on what kind of judgment had to be adopted: the domestic courts in the reopened proceedings reconsidered the case without taking these instructions into account, even though eventually the applicant's cassation petition was rejected.

84 *See, for example, Tymoshenko v. Ukraine*, CM decision No. CM/Del/Dec(2014)1193/25, URL: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805af881. In this case, following the initial failure to provide redress to the applicant by reopening the criminal proceedings, the Ukrainian Parliament adopted a resolution ordering the applicant's release, and she was release on the same day; all her rights were restored by the Parliament several days later.

85 The compensation may be claimed as a part of just satisfaction before the ECHR (*Almeida Dos Santos v. Portugal*, No. 50812/06, impossibility to reopen inheritance proceedings which determined the rights of third parties) or through domestic mechanisms (*Bar-Bau Sp. z.o.o. v. Poland*, No. 11656/08, concerning damage resulting from the applicant company's director' unfair conviction, new compensation claim was lodged against the State Treasury instead of reopening).

86 *See Metropolitan Church of Bessarabia and Others v. Republic of Moldova*, No. 45701/99, Interim

2. General measures: preventing similar violations

a. Overview

Prevention of similar ECHR's violations may be achieved in different ways, depending on the circumstances of the case and the legal system in the respondent State. That is why sometimes the same source of violation of the ECHR can be remedied in a different way in various States.

Thus, in some cases, translation and dissemination of a Court's judgment, thanks to its direct effect, would be enough for successful execution, for example for changing judicial practice. In other cases, execution may even require amendments to the Constitution.[87]

The scope of the necessary measures depends on the complexity of the underlying problem. For example, a comprehensive set of measures of different types must be implemented to solve complex issues like for example overcrowding in prisons or excessively lengthy courts' proceedings.

Overall, the general measures may concern changes in legislation,[88] in domestic case-law,[89] in administrative practice,[90]

Resolution No. ResDH(2006)12, concerning refusal to recognise the applicant's religious community. At the execution stage, it was registered by the executive authorities following a new request submitted by the applicant to the registration State body.

87 See *Hornsby v. Greece*, No. 18357/91, Resolution ResDH (2004)81 (in a group of cases concerning a structural problem of non-execution of domestic judicial decisions, the Constitution was amended in order to highlight and reinforce the administration's obligation to comply with all judicial decisions).

88 Discrimination of an "illegitimate" child as regards patrimonial rights: legislative amendments abolished the difference in maternal affiliation and established equality with legitimate children as regards inheritance rights (*Marckx v. Belgium*, No. 6833/74). Disproportionate obligation to join a trade union as condition of employment: an amendment to the Act on protection against dismissal due to association membership ensured that a person's affiliation to or non-membership of a union must not be considered in a recruitment situation or in connection with a dismissal *(Sørensen and Rasmussen v. Denmark,* No. 52562/99).

89 The practice of reopening of unfair criminal proceedings following a judgment of the ECtHR finding a violation has been consolidated through the numerous decisions of the Supreme Court in Albania (*Caka v. Albania*, No. 44023/02). Unjust conviction for defamation of a politician: the case-law of the domestic courts has adapted its interpretation of the crime of defamation accordingly (*Oberschlick v. Austria*, No. 11662/85).

90 Unlawful detention of an asylum-seeker in an airport transit zone: the administrative practice changed prior to the entry into force of respective legislation - a court's revocation of an entry refusal now results in the immediate release of the alien concerned from detention and his transfer to an asylum centre (*Buishvili v. Czech Republic*, No. 30241/11). Adoption of a child without the knowledge or consent of the natural father: a memorandum from the Registrar of the Adoption Board advised adoption agencies to delay the placement where they had indications that the natural father opposed the adoption or had already applied to a court (*Keegan v. Ireland*, No. 28867/03).

awareness-raising,[91] or practical arrangements.[92]

b. Domestic remedies

It is in the first place for the domestic authorities to provide redress of alleged violations of the Convention. This is also important for avoiding repetitive applications before the ECtHR, especially in case of a structural problem. The question of effective remedies is thus raised at the execution stage even without a violation of Article 13 ECHR being found by the ECtHR.

Usually, introduction of domestic remedies requires adoption of new legislation. Sometimes the same aim is achieved without Parliament's intervention. This can be done, for instance, through amendment of domestic judicial practice and adaptation of already existing remedies to new specific challenges.[93]

Several countries have chosen to set up a general remedy capable of responding to all kinds of alleged violations – frequently this is ensured by the right of individual petition before the Constitutional Court.[94] Other countries tailor their responses to specific problems. In those cases, certain domestic remedies address specific situations, such as deprivation of liberty, investigations of complaints concerning the use of deadly force by police or ill-treatment in custody, proceedings against removal of foreign nationals, and non-execution of domestic court decisions.[95] Often the two systems co-exist. In particular areas,

91 Admission of second appeals on points of law overturning final and binding judgments: more precise rules included in the Code of Civil Procedure 2014 were reflected in respective training curricula of the Justice Academy, the Police Academy as well as the Law Institute of the Ministry of Justice (*Amirkhanyan v. Armenia*, No. 22343/08). Ill-treatment by the police: the case was used in the training of members of the Federal and Country Police in order to raise the necessary awareness of human rights issues (*Ribitsch v. Austria*, No. 18896/91).

92 Deficient incapacitation proceedings: the independence of representation of minors and incapacitated persons was ensured by the establishment of the new Center for Special Guardianship (*Ivinovic v. Croatia*, No. 13006/13). Prison overcrowding: changes in the legislation and criminal policy were accompanied by construction and renovation of penitentiary facilities (*Orchowski v. Poland*, No. 17885/04).

93 *See for example* development of the case-law of the Polish Supreme Court concerning the possibility to use a civil action for damages against the State Treasury for violation of personal rights due to the placement in poor prison conditions, including overcrowding, presented in the inadmissibility decision in the case of *Łatak v. Poland*, No 52070/08.

94 *For example*, Czech Republic.

95 Excessive length of domestic proceedings (civil, criminal, administrative): specific remedies have been introduced in the legislation of several states like for example: Austria (*Donner*), Bulgaria (*Finger, Dimitrov and Hamanov*; *Kitov*), Cyprus (*Gregoriou*), Czech Republic (*Borankova and Hartman*), Poland (*Kudla*) or Turkey (*Ormanci and Others v. Turkey*). Excessive length of

for example poor conditions of detention, domestic remedy should be capable of putting an end to the on-going violation (preventive aspect) and if the violation has already ended – should provide compensation for the violation that has already occurred (compensatory aspect).[96]

III. SUPERVISION

Supervision of execution of judgments is governed primarily by Articles 39 and 46 of the European Convention, as well as by the Rules on Execution[97] other rules of procedure of the CM,[98] working methods established in documents endorsed by the CM in 2010,[99] as well as by the Rules of the ECtHR.[100] In 2016, a CM's Rapporteur group summarised these rules and some well-established practice.[101] In 2019, a shorter but very clear summary was made by the Grand Chamber in its Article 46 § 4 judgment.[102]

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proceedings: a compensatory remedy was introduced through changes in the domestic courts' practice (*Martins Castro and Alves Correia de Castro v. Portugal, Vlad and Others v. Romania*). Non-enforcement of domestic judicial decisions: a remedy was introduced in respect of decisions concerning the State's monetary obligations (*Burdov v. Russian Federation (No. 2)*). Appeals against deportation orders: a legislative change of 2012, followed by the adoption in 2016 of the Law on the rights of aliens, created an effective remedy with the automatic suspensive effect ("*référé-liberté*") against a deportation order (*De Souza Ribeiro v. France*). Electoral rights: clear criteria to define the Central Electoral Commission's power to invalidate elections and an effective remedy to challenge its decisions were introduced (*Georgian Labour Party v.*). Conditions of detention: remedies with the preventive and compensatory effects were introduced in the legislation (*Torreggiani v. Italy*). Conditions of detention: a compensatory remedy was introduced through the evolution of the domestic courts' practice (*Orchowski v. Poland*).

96 See for example *Ananyev and Others v. Russia*, No. 42525/07 and Others, judgment of 10 January 2012, §§ 214-231 (indicating the necessity of adoption of such measures).

97 Execution Rules, *supra note* 59.

98 *See iGuide. Committee of Ministers. Procedures and working methods* (summarising various rules of the procedure of the CM), URL: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=090000168058d922

99 *See, among others*, Committee of Ministers of the Council of Europe, *Supervision of the Execution of Judgments and Decisions of the European Court of Human Rights: Implementation of the Interlaken Action Plan – Modalities for a Twin-Track Supervision System, Information Document,* CM/Inf/DH(2010)37 (6 September 2010) (hereinafter: "Information Document No. 37"). *See also* Committee of Ministers of the Council of Europe, *Supervision of the execution of the judgments and decisions of the European Court of Human Rights: implementation of the Interlaken Action Plan - Outstanding Issues Concerning the Practical Modalities of Implementation of the New Twin Track Supervision System, Information Document, CM/Inf/DH(2010)45 (7 December 2010)* (hereinafter Information Document No. 45).

100 Rules of the Court, *supra note* 42.

101 See *Supervision of the execution of judgments of the European Court of Human Rights: procedure and working methods for the Committee of Ministers' Human Rights meetings*, Ministers' Deputies / Rapporteur Groups, Rapporteur Group on Human Rights, GR-H(2016)2-final, 30 March 2016, URL: https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016806303a9 (hereinafter: "the document of the Rapporteur Group on Human Rights of 2016").

102 *Ilgar Mammadov*, *supra* note 3, §§ 89-103, 147-156.

The focal point of supervision are the meetings of the CM dedicated to the execution, or so-called CM-DH meetings.[103] They take place four times a year (in March, June, September, and December) and last for at least three days. During the meetings the Committee reviews the progress in the execution in particular cases and adopts decisions to streamline the process through, for example, expressing its encouragement or concerns or providing the respondent State with specific comments or recommendations. More important decisions take a form of an interim resolution. The CM generally adopts decisions by consensus, but in case of disagreement, decisions may be taken by a qualified majority.[104]

Due to a large number of cases under supervision, the CM takes at its CM-DH meetings only selected, most important, cases requiring particular action.[105] For example, for the September 2021 meeting, there were 44 such cases.[106] In 2020, at four meetings, the CM adopted 131 decisions concerning 28 States.[107] Overall, for 10 last years (2011-2021), the CM adopted 919 decision.[108]

The CM may also deal with cases on an *ad hoc* basis at its ordinary meetings that take place almost weekly, but this option is rather exceptional.[109]

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103 "DH" stands for the French acronym for of *Droit de l'Homme* (human rights).

104 Statute of the Council of Europe, Article 20d.

105 For some criteria for taking the cases for CM-DH meetings, *see the document of the Rapporteur Group on Human Rights of 2016*, supra note 102, which include:

i) Criteria emanating from the organs of the Convention previous decisions of the CM that the case should be taken at a CM-DH meeting once again; existence of a deadline set by the European Court for the adoption of specific measures; need for urgent individual measures).

ii) Criteria based on indicators relating to the respondent State (difficulties in execution, for example, action plans not, or unsatisfactorily, implemented; the need to highlight a significant achievement; differences of opinion between the respondent State and the Secretariat on the scope or relevance of the execution measures.

In accordance with the longstanding practice of the Committee of Ministers and the principle of the equal standing of all member States, any delegation as well as the Secretariat may submit to the Committee a duly motivated proposal for taking a case to a CM-DH meeting.

106 1411th (Human Rights) meeting. Decisions Adopted (16 September 2021), URL: https://search.coe.int/cm/pages/result_details.aspx?objectid=0900001680a3bdb3 (visited on 4 November 2021).

107 Christos Giakoumopoulos, *Overview of major developments by the Director General of the Directorate General of Human Rights and Rule of Law*, In Annual Report 2020, supra note 28, p. 11.

108 HUDOC EXEC, *supra* note 89.

109 Regular examination of the cases at its ordinary meetings has usually been used in most prominent examples of persistent non-execution, for example in the case of *Ilgar Mammadov v. Azerbaijan*.

The most problematic of these cases are debated before adoption of the decision, while less difficult are examined without debate.[110]

The supervision process can be divided into certain stages: classification and prioritisation of new cases (leading or repetitive, standard or enhanced); registration of payments; assessment of the action plan; application, if necessary, of tools to encourage full and timely execution; assessment of the action report in view of notably submissions by the victims and the NGOs; closure of the case. Most of the supervision documents are public.

A. Classification and prioritisation of new cases

At the beginning of the process, based on advice from the DEJ, the CM identifies whether a new case can be considered as leading or as repetitive. Cases revealing new problems are leading. They require adoption of new general measures by the State to prevent similar violations in the future. Cases relating to a problem already raised before the Committee in the context of one or several earlier leading cases are considered as repetitive. Repetitive cases are usually grouped together with one of the leading cases.

The CM may group the cases and deal with them jointly if they are linked to the same structural or systemic problem in a particular State. Such groups of cases usually bear the name of the oldest leading case transmitted for the supervision.

The CM also decides on the classification of the case under one of the so-called twin-track procedures: standard or enhanced. By default, a case is classified under the standard supervision, but it can be classified under the enhanced supervision if this case requires urgent individual measures to remedy a victim's situation; a judgment adopted in this case is a pilot judgment; raises major structural and/or

110 For some criteria for taking the cases with debate, *see the document of the Rapporteur Group on Human Rights of 2016*, supra note 102, Appendix 1, clarifying that in practice a case is taken with debate if the case is the subject of a request for debate from the respondent State or from one or several other delegations; the presence of a Minister is announced by the respondent State for the examination of a case included in the Order of Business; major obstacles encountered in the adoption of necessary individual or general measures; request for debate from the Secretariat due to divergent assessments/views between the Secretariat and the respondent State as regards the measures to be taken or the need for one or more key issues to be decided by the Committee; persisting silence from the respondent State as regards the execution measures required or in the face of Committee decisions; the case is an inter-State case.

complex problems as identified by the Court or by the CM; is an inter-state case.[111]

The type of track, whether it is standard or enhanced, has its important practical consequences. Although the applied principle is that, whether under standard or enhanced procedure, "all cases are technically considered to be on the agenda of every "Human Rights" meeting until their closure",[112] the CM's involvement in the standard procedure is limited. The CM usually intervenes only at the end of the process by closing the case, having shared the DEJ's assessment of the action report received that the measures presented therein are sufficient. This simplification of the procedure is designed to ensure that the Committee`s activity focuses on the most important and most difficult cases.

Enhanced supervision would only concern cases to which the CM gives priority, and which would also entail a more intense involvement of the DEJ. Here the CM plays a more active role in monitoring implementation, including through the examination of selected, most difficult enhanced cases, at its CM-DH meetings and adopting decisions on them.[113]

A case may be transferred from the enhanced to standard supervision, for example, when the Committee of Ministers is satisfied with the action plan presented and/or with its implementation.[114] It can also be transferred from the standard to enhanced supervision because of persistent failure to present an action plan or report, of a disagreement between a State and the Secretariat on the contents of the action plan, or serious problem encountered in the implementation of the measures announced in the action plan.[115]

Currently, the CM continues to supervise 5,629 judgments: 1,299 are leading, of which 342 are under the enhanced supervision.[116]

111 See Information Documents No. 37 and No. 45, *supra note* 100.

112 Information Document No. 37, *supra note* 100, § 7.

113 *See, e.g.*, Compilation of the CM Decisions 2010-2014, *supra* note 63; Compilation of the CM Decisions 2014-2016, *supra note* 63 (containing all the decisions adopted by the CM in 2010-2016; the decision are, as a rule, short documents of not more than one page).

114 Information Document No. 37, *supra note* 100, § 25.

115 *Id.*, §§ 26-30.

116 HUDOC EXEC, *supra note* 10 showing also that of these 342 leading enhanced cases, 54 are against Russia, also 54 are against Ukraine, 38 are against Tukey, 31 are against Romania, 23

Thematically, in 2020 15% of all leading cases in the enhanced supervision procedure concerned ill-treatment by state agents and/or failure to investigate such allegations, making it the highest category pending execution; substandard conditions of detention represented the second highest percentage of enhanced supervision leading cases (10%).[117]

B. Supervision of payment

The payment information submitted by the Respondent States is put online on the Department's website. If an applicant has not made any complaint within two months of the date when the payment was registered by the Department, he or she will be considered to have accepted the payment by the State concerned. However, the CM may, if necessary, reopen the matter if closed pre-maturely. In case an applicant contests the payment, the DEJ discusses the matter with the respondent State.

If no payment information has been received following the expiry of the deadline set by the ECtHR, the CM may adopt a general decision, without debate, asking the State to supply information on the payment. Persistent failure by States to supply information on payments of just satisfaction could lead to a proposal for the CM to consider the matter under the enhanced supervision procedure.

C. Action plan

When the necessary measures are identified, domestic authorities shall submit to the CM an action plan setting out the measures the respondent State intends to take.[118] It is immediately made public.

Action plan should be submitted not later than 6 months after the judgment becomes final.[119] An earlier submission might be necessary in cases requiring urgent individual measures, or in a pilot judgment which itself contains deadlines.

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are against Italy, 21 are against Azerbaijan, 20 are against Bulgaria, 14 are against Hungary, 10 are against Poland and less than 10 for each of the remaining countries.

117 *Annual Report for 2020, supra note 28,* p. 17.

118 *See Guide for the drafting of action plans and reports for the execution of judgments of the European Court of Human Rights*, URL: https://rm.coe.int/guide-drafting-action-plans-reports-en/1680592206.

119 Information Document N. 37, *supra note* 100, § 12.

An action plan is an evolving document. It must be regularly updated throughout the execution process with up-to-date information on developments that have occurred in the adoption of the measures originally planned. An action plan must also be revised if the authorities consider that the measures originally planned need to be revisited in the light of new developments.

The authorities are supposed to implement the measures presented to the CM in an action plan, within the timeframes indicated in that document. When all the measures described therein have been adopted, the final updating of the action plan turns it into an action report.

Often the authorities adopt measures, but they are not sufficient for closure. These measures are also reflected in the action plan. In such cases it is possible to speak about "partial execution", which is notably reflected in the HUDOC-EXEC database. In fact, it appears that many, if not the absolute majority of cases pending execution are partially executed, although an additional research is necessary into the exact numbers. Accordingly, cases pending execution would mean not "non-executed, abandoned cases", but rather "not fully executed cases." Action plans are crucial in understanding which part of a case has been executed.

Sometimes, the authorities adopt all necessary measures even before the judgment of the ECtHR or shortly after. In such a situation submission of an action plan will not be necessary and the authorities can skip this phase submitting to the CM an action report.

D. CM tools to encourage full and timely execution

Sometimes full and timely execution faces obstacles. They may be linked to various causes:

- reluctance of domestic authorities to adopt particular measures;
- technical complexity, for example, owing to a wide range of measures to be implemented or a wide scope of the necessary reform;
- substantive impediments, for example, uncertainty about what the judgment requires;
- financial difficulties, for example, budgetary problems may result in a reluctance to take unpopular political decisions.

The CM uses peer political pressure to respond to eventual problems in the full and timely execution. Such pressure may also be combined with the use of support measures addressed at the respondent State, including the assistance and cooperation activities.

The identification of the most suitable tool to overcome the obstacles depends on their cause. National authorities' reluctance to act might require a response on the political level, and assistance or involvement in a cooperation programme (bilateral meetings with the DEJ, round tables or seminars) may help in solving technical problems.

The CM, within its functions of supervision over execution, may use various tools, depending on the nature of the problems faced and the aim which it wishes to achieve, such as: [120]

- transfer cases from standard supervision to enhanced supervision to allow for an in-depth examination of reasons underlying a possible delayed adoption of an action plan or insufficiently diligent implementation of execution measures required. If the case is already under the enhanced procedure, the CM may:
- examine the case immediately at one of its CM-DH meetings;
- adopt a decision to criticise the lack of progress, set time-limits or provide recommendations and other indications regarding appropriate action;
- ensure more frequent detailed examination of the problematic cases;
- adopt interim resolutions in situations where concerns raised reach a certain level of seriousness;
- invite the Chair of Human Rights meetings or of the CM itself to take action, notably in form of high-level meetings or letters to the government of the respondent State or bring up the matter at a ministerial session of the CM.

Further, to overcome persistent resistance to execute, the CM may:

120 *See, for example*, Steering Committee for Human Rights (CDDH), *Practical Proposals for the Supervision of the Execution of Judgments of the Court in Situations of Slow Execution*, Addendum II to the document no. CDDH (2008)014 (28 November 2008).

- issue a warning that it may consider the State disrespecting its obligations under the Convention where there is clear evidence of lack of any execution;
- conclude, if the situation persists, that the State in question is disrespecting its obligations under the Convention or, if deemed appropriate, start the procedure necessary to engage infringement proceedings before the Court, under Article 46 (4) of the Convention, to obtain a similar conclusion;
- in case disrespect is established, it may ensure that the question of compliance will be raised in the context of the Council of Europe's communication with other organisations and follow up such a conclusion by calls to member States to adopt measures they deem appropriate to ensure execution, for example through diplomatic activity in relevant multilateral or bilateral diplomatic initiatives;
- publicly announce that the situation will have to be examined under Article 8 of the Statute of the Council of Europe.

Regarding widespread problems relevant to several countries, the CM can organise thematic debates. They are good examples of co-operation and experience sharing, encouraged in the Brussels Declaration.[121]

E. Action report

The respondent State is obliged to inform the CM about a successful implementation of all the measures deemed necessary to achieve *restitutio in integrum*, to cease a continuing violation and to prevent similar violations from occurring in the future. The State should therefore submit a report setting out all the measures taken to implement a particular judgment of the ECtHR and evidence of their effectiveness.[122]

121 The CM held its first thematic debate on the topic of detention conditions in the context of its CM-DH meeting in March 2018, URL: https://www.coe.int/en/web/execution/-/thematic-debate-on-conditions-of-detenti-1. It was followed by the debate on the effectiveness of investigations in March 2019, URL: https://www.coe.int/en/web/execution/-/thematic-debate-on-effective-investigations.

122 URL: https://rm.coe.int/guide-drafting-action-plans-reports-en/1680592206.

Effectiveness of implemented measures, demonstrating their adequacy, can be proved for example by a reference to statistics or changes in the case-law of domestic courts. The DEJ should make a final assessment of the action report within 6 months after its submission, and such an assessment is subsequently proposed to the CM for further consideration.[123] The outcome of such assessments could lead to the closure of the supervision (if all the necessary individual and general measures were adopted) or, if needed, to the use of the means of persuasion, for example, to adoption of a decision requiring additional measures from the State.

In assessing the action reports and plans, the DEJ and the CM consider Rule 9 submissions by victims and NGOs (see more information about it above).

F. Closure of the supervision

If in the light of all available information the case may be proposed for closure, the DEJ presents a draft final resolution to the CM for its examination and adoption. Adoption of the final resolution ends the supervision process.

A final resolution is adopted once the CM is satisfied that the respondent State has taken all the necessary measures to give effect to the judgment or when the terms of the friendly settlement have been complied with. A final resolution includes a link to an action report submitted by respondent State. Final resolutions can be found in the HUDOC-EXEC or HUDOC.[124]

Even if all the necessary general measures have not yet been adopted, the CM may close a supervision over the execution of repetitive case on condition that there are no outstanding individual measure. In such situations, the general measures are continued to be examined in the relevant leading case.[125] This allows to close many repetitive cases, to focus on the outstanding general measures in the leading case which remains under the supervision.

123 Information Document 37, *supra note* 100, § 15.

124 URL: https://hudoc.exec.coe.int/ or https://hudoc.echr.coe.int/.

125 *See* George Stafford, *The Implementation of Judgments of the European Court of Human Rights: Worse Than You Think*, Blog of the European Journal of International Law EJIL:Talk!, 8 October 2019 (assessing this relatively new practice).

G. Public character of supervision

Under the Statute of the Council of Europe the CM's deliberations are confidential.[126] The human rights meetings, dedicated to supervision of execution of the ECtHR judgments, are accordingly held behind the closed doors, without victims, NGOs, and other actors. The debates are thus not adversarial, there is no equality of arms: among the participants, only States present their position.[127]

However, there is plenty of public information on the execution of judgments, primarily on the HUDOC-EXEC database. Such information includes submissions in individual cases from States, applicants, NGOs, NHRIs, international organisations. Public can also follow the progress of execution of cases through various documents adopted by the CM, such as indicative list of cases to be examined at the next CM-DH meeting, or agendas of the past meetings together with the decisions adopted.

Further, annual reports of the CM on the supervision of the execution of judgments and decisions of the ECtHR constitute a valuable source of information on most important developments in the execution in a particular year, including comprehensive statistical data. All the annual reports adopted since 2007 are available on the website of the Department for the Execution of Judgments.[128]

H. Effectiveness of supervision

At the outset, it should be bared in mind that States to execute a judgment in a successful manner cannot undertake no matter which measures. In line with already mentioned principle of subsidiarity they choose and propose these measures which they perceive as adequate in the circumstances of particular case to remedy individual violation and eradicate the root of a problem for the future. The measures proposed must however comply with certain qualitative requirements: they must adequately address the source of violation as identified on the basis of the Court's judgment, they must be in line with general case-

126 Statute of the Council of Europe, *supra*, note 19, Article 21.

127 *See generally Çali, Koch*, *supra* note 14.

128 *See* Annual Reports of the Committee of Ministers. Supervision of the execution of judgments and decisions of the European Court of Human Rights. URL : https://www.coe.int/en/web/execution/annual-reports.

law of the Court and, eventually more precise indications contained in the judgment in question and must also be in compliance with the Committee's previous practice in similar cases. Only if these conditions are fulfilled the execution can be assessed by the DEJ and considered by the CM as completed.

Constraints of this paper do not allow to go deep into the exact measurement of effectiveness of such CM supervision. It is indeed difficult to measure in how many cases exactly and to which extent the CM supervision was helpful. Execution as such is difficult to measure,[129] and the extent to which the CM supervision contributes to successful execution is apparently even more so. Further research into this is necessary. However, the existing procedures described above and statistics allow to make preliminary conclusions in this respect, as follows.

It can be reminded here that in the cases under standards supervision, the CM does not interfere much. As explained above, this is not necessary – the problems raised do not call for this. Execution goes effectively even without public interference of the CM. Even though the by-lateral work of the DEJ and the State can be crucial for execution of the standard cases, this is impossible to demonstrate in public. Although currently there are some 3,125 standard leading cases which are closed, it is thus impossible to demonstrate how many of the relevant problems were resolved with the assistance of the DEJ.

This is easier to demonstrate with the case under enhanced supervision, where the CM does interfere publicly (with the constant assistance of the DEJ), although the extent of interference vary (see above). The DEJ works with the States to elaborate the measures to be adopted, including the major reforms when necessary. If all goes as planned, the CM closes such cases. Considering that the final resolutions of the CM are reasonably reliable indicators of compliance with the judgment,[130] the number of closed leading cases under the enhanced supervision should correspond to the number of problems resolved with the help of the CM supervision and its assistants, in particular – the DEJ. The number of such closed cases is currently 243.[131]

129 *van Staden*, supra note 13, at 38.

130 *van Staden*, supra note 13, at 20.

131 *See* HUDOC- EXEC, of which 35 leading enhanced cases were against Turkey, 21 - Republic of Moldova, 21 - Russia, 20 – Italy, 15 – Greece, 14 – Poland, 13 – Bulgaria, 12 – Serbia,

Furthermore, with regard to the cases considered at the CM-DH meetings, such conclusion is even more certain because the active role of the CM is particularly visible. Indeed, in such cases the CM directly indicated the measures to be adopted in its decisions, and closed the cases only when they were complied with.[132] Therefore, the number of closed enhanced leading cases taken at the CM-DH meetings corresponds to the number of problems resolved with the help of the CM supervision. The number of such closed cases is currently 112.[133] More detailed research into these matters is of course a subject for further study, but already at this stage it can preliminarily be concluded that the CM is effective in its role of supervision of execution of judgments.

10 – Romania, etc. URL: https://hudoc.exec.coe.int/eng#{%22EXECDocumentTypeCollection%22:[%22CEC%22],%22EXECLanguage%22:[%22ENG%22],%22EXECClassIndicator%22:[%225%22,%223%22,%221%22,%226%22],%22EXECIsClosed%22:[%22True%22],%22EXECType%22:[%22L%22]} (visited on 8 November 2021).

132 See The lists of closed cases and the reforms adopted; URL: https://www.coe.int/en/web/execution/closed-cases. Exception is closure, with regret, of supervision over the individual measures, when it is not possible adopt any more measures in practice: *see, for instance, Levința group v. Republic of Moldova*, No. 17332/03, decision of 16 September 2021, No. CM/Del/Dec(2021)1411/H46-23, §§ 3 and 4, URL: http://hudoc.exec.coe.int/eng?i=CM/Del/Dec(2021)1411/H46-23E.

133 *See* HUDOC- EXEC, URL: https://hudoc.exec.coe.int/eng#{%22EXECDocumentTypeCollection%22:[%22CMDEC%22],%22EXECLanguage%22:[%22ENG%22],%22EXECClassIndicator%22:[%225%22,%223%22,%221%22,%226%22],%22EXECIsClosed%22:[%22True%22],%22EXECType%22:[%22L%22]} (visited on 8/11/2021). This page returns all decisions adopted by the CM (337 decisions). It is necessary to manually work with this HUDOC-EXEC list to find the number of cases (not decisions) considered (112 cases). Of these 112 cases, 13 were against Italy, 9 – Greece, 9 – Poland, 8 – Republic of Moldova, 7 – Turkey, etc.

THE BINDING FORCE OF CONSTITUTIONAL COURT OF INDONESIA DECISIONS: KEY ISSUES AND FUTURE CHALLENGES

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CONSTITUTIONAL COURT OF THE REPUBLIC OF INDONESIA

THE BINDING FORCE OF CONSTITUTIONAL COURT OF INDONESIA DECISIONS: KEY ISSUES AND FUTURE CHALLENGES

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ABSTRACT

The enforcement of the Constitutional Court's decision greatly influences the characteristics of the Constitutional Court's decision, especially the final and binding nature of the decision. The final nature signifies that there is no legal remedy to examine the Constitutional Court's decision. While the binding nature has consequences, the decision applies to every legal subject in Indonesia, including all citizens, legal entities and state institutions as the binding force of the law. However, in the context of enforcement, non-compliance and deviation of the decisions by state bodies or other stake holders have emerged as very significant obstacles to the effective implementation of decisions. This paper attempts to explain the types of enforcement of the decisions of the Constitutional Court and discuss key issues that arise from the enforcement of decisions. Furthermore, this paper argues that the main issue of binding force is fact that the Constitutional Court doesn't have any special enforcement agency which is in charge of securing the application of final decisions and the decision is highly dependent on the willingness of public authorities outside the Constitutional Court to enforce the final decision. Moreover, based on the doctrine of constitutionalism and the theory of separation of powers, this article will provide several recommendations and an overview of future challenges that will be faced by the Indonesian Constitutional Court regarding the enforcement of the decision.

[Editor's note: Indonesia is conducting the Permanent Secreteriate for Planing and Coordination (PSPC) of the AACC.]

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INTRODUCTION

The Constitutional Court of Indonesia is formed as one of the executors of judiciary authority organizing court proceedings in order to safeguard the supremacy of the 1945 Constitution as well as to enforce the law and justice.[1] Article 24C of the 1945 Constitution has emphasized that the Constitutional Court has the authority to adjudicate at the first and final resort, both to examine laws against the Constitution, disputes over the authority of state institutions whose authority is granted by the Constitution, decide on the dissolution of political parties, as well as decide on disputes regarding the results of the general election. Theoretically and conceptually, the final decision implies that the Constitutional Court's decision is the first resort and the last resort for justice seekers.[2] In other words, decisions that are final must also be binding and cannot be annulled by any institution.[3] Because the Constitutional Court's decision is final and binding, it is the obligation of all elements of the nation and the state to enforce it consistently.

The enforcement of the Constitutional Court's decision greatly influences the characteristics of the Constitutional Court's decision, especially the final and binding nature of the decision. The final nature signifies that there is no legal remedy to examine the Constitutional Court's decision. While the binding nature has consequences, the decision applies to every legal subject in Indonesia, including all citizens, legal entities and state institutions as the binding force of the law (*erga omnes*).[4] Based on the explanation above, the decision of the Constitutional Court should be implemented and enforced consistently by stake holders.

However, in the context of enforcement, non-compliance and deviation of the decisions by state bodies or other stake holders have emerged as very significant obstacles to the effective implementation

1 Jimly Asshiddiqie, *Menuju Negara Hukum yang Demokratis*, (Jakarta: Setjen dan Kepaniteraan MK RI, 2008), p. 39.

2 Bambang Sutiyoso, Hukum Acara Mahkamah Konstitusi Republik Indonesia, (Bandung: PT. Citra Aditya Bakti, 2006), p. 160.

3 Ni'matul Huda, Kekuatan Eksekutorial Putusan Mahkamah Konstitusi (Yogyakarta: FH UII Press, 2018), p. 141.

4 Maruarar Siahaan, "*Peran Mahkamah Konstitusi Dalam Penegakan Hukum Konstitusi*", *Jurnal Hukum,* Volume 16, Nomor 3, Juli 2009, p. 359.

of decisions.[5] The decision of the Constitutional Court Number *34/PUU-IX/2013* states that the provisions of Article 268 paragraph (3) of Law Number 8 of 1981 concerning the Criminal Procedure Code are contrary to the 1945 Constitution and have no binding legal force. Moreover, with the decision of the Constitutional Court, extraordinary legal remedies for criminal cases can be submitted more than once. Meanwhile, the Supreme Court issued a Supreme Court Circular (SEMA) Number 7 of 2014 concerning the Submission of a Criminal Case Review Application which is limited to once. It is indicated that there are deviations and non-compliance by state institutions in enforcing the Constitutional Court's decision.

On the one hand, there are also many decisions of the Constitutional Court that have been well implemented and eforced by lawmakers. Such as the Constitutional Court's decision number *85/PUU-XI/2013* is related to water resources, the Constitutional Court's decision number *35/PUU-X/2012* is related to customary forests, and the Constitutional Court's decision number *20/PUU-XVII/2019* is related to the use of E-KTP in elections.

Basically, court decisions have permanent legal force (*inkracht van gewijsde*) and should be implemented, but in practice, not all decisions could be executed well, including the decision of the Constitutional Court which is often a debate related to the power of the executive. Referring to the provisions of Article 47 of the Constitutional Court Law, it is emphasized that "*The decision of the Constitutional Court has permanent legal force since it has been pronounced in a plenary session which is open to the public*". Overall, it is indicated that since the completion of the decision being pronounced or read out, from then on, the order of the decision must be enforced.[6]

This paper attempts to explain the types of enforcement of the decisions of the Constitutional Court and discuss the key issues that arise from the enforcement of decisions as well as its future challenges.

5 Hasil Penelitian Kerjasama antara Mahkamah Konstitusi dengan Fakultas Hukum Universitas Trisakti, *Constitutional Compliance Atas Putusan Mahkamah Konstitusi Oleh Lembaga-Lembaga Negara*, Pusat Penelitian dan Pengkajian Perkara dan Pengelolaan Perpustakaan Kepaniteraan dan Sekertariat Jenderal Mahkamah Konstitusi, 2019, p. 3.

6 Maruarar Siahaan, Hukum Acara Mahkamah Konstitusi Republik Indonesia (Jakarta: Sinar Grafika, 2012), p. 214.

Furthermore, this paper illustrates several case studies related to both success and failure of the decision's enforcement. Several important cases will be presented to illustrate success and failure of decisions having binding force. Moreover, based on the doctrine of constitutionalism and the theory of separation of powers, this article will provide several recommendations and an overview of future challenges that will be faced by the Indonesian Constitutional Court regarding the enforcement of the decisions.

I. FINAL AND BINDING CHARACTERISTIC IN THE CONSTITUTIONAL COURT DECISIONS

The enforcement of the Constitutional Court decisions is strongly influenced by characteristics of the decisions, especially the final and binding nature. Based on these characteristics, we can fully understand the ideal execution of every Constitutional Court decision.

The authorities of the Constitutional Court are explicitly regulated in Article 24 C paragraph (1) of the 1945 Constitution which states, "*The Constitutional Court has the authorities to adjudicate at the first and final levels which the decisions are final for: (1) To judicial review the law against the Constitution; (2) To decide on disputes over the authority of State institutions whose the authorities are granted by the Constitution; (3) To decide on the dissolution of political party; and (4) To decide disputes regarding the results of the general election."* In addition, Article 24 C paragraph (2) of the 1945 Constitution stipulates, *"The Constitutional Court mandatory to decide on the opinion of the House of Representatives regarding alleged violations by the President and/or Vice President (impeachment) according to the Constitution*".

According to the Court jurisdictions, Jimly Asshidiqie as the first Chief Justice of Constitutional Court of Indonesia said the Court has several functions, including: (1) The guardian of the constitution; (2) The final interpreter of the constitution; (3) The guardian of democracy; (4) the protector of citizens' constitutional rights; and (5) The protector of human rights.[7] Meanwhile, some people also said the Court has a function as (6) The Guardian of the state ideology.

7 Jimly Asshiddiqie, *Konstitusi dan Konstitusionalisme*, (Jakarta: Mahkamah Konstitusi Republik Indonesia dan Pusat Studi Hukum Tata Negara Fakultas Hukum Universitas Indonesia, 2004), p. 187.

The decisions of the Constitutional Court in general are declaratory and constitutive. The "declaratory" means that the decision of the Constitutional Court contains a statement of the law. Meanwhile, the "constitutive" is to nullify the legal situation and create a new legal situation.[8] Especially in the judicial review, the Constitutional Court decision is declaratory because it states that the law of a legal norm is contrary to the 1945 Constitution. At the same time, the decision nullifies the legal norm and sometimes creates a new legal stipulation.

In practice, the decisions of the Constitutional Court can be categorized based on several models, such as: (1) legally null and void; (2) conditionally constitutional; (3) conditionally unconstitutional; (4) limited constitutional/delays the enforcement of the decision; and (5) formulate new norms.[9] The Constitutional Court's decision model is developed because the Court should respond to legal needs in the community, avoiding legal vacuum and ensuring consistency in the implementation of the decisions.

The most fundamental characteristic of the Constitutional Court decisions significantly related to the execution of decisions is the final and binding nature of the decisions. These attributes are expressly regulated in Article 24C paragraph (1) of 1945, "*[t]he Constitutional Court has the authorities to adjudicate at the first and last levels whose decisions are final for […]*". Further explanation regarding this final nature is regulated in Article 10 of Law Number 24 of 2003 as last amended by Law Number 7 of 2020 on the Constitutional Court. Furthermore, in the explanation section of Article 10, it is stated that the decisions of the Constitutional Court immediately obtain permanent binding force from the moment they are pronounced and there is no legal remedy that can be taken. Referring to this rule, we can conclude that the Constitutional Court's decision is final and binding to all legal subjects in general (*erga omnes*). It has binding force from the moment it is pronounced by the justices and is prospectively applicable as law.

8 Mahkamah Konstitusi, *Hukum Acara Mahkamah Konstitusi* (Jakarta: Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi, 2010), p. 55-56.

9 Syukri Asy'ari, Meyrinda Rahmawaty Hilipito, Mohammad Mahrus Ali Mahkamah Konstitusi, "*Model dan Implementasi Putusan Mahkamah Konstitusi dalam Pengujian Undang-Undang*" *Jurnal Konstitusi*, Vol. 10, No. 4, Desember 2013, p. 25.

Furthermore, the meaning of final and binding nature of the Constitutional Court decisions may refer to the rationalization in the Comprehensive Document of 1945 Constitution Amendments,

The Constitutional Court is the first and last level judicial body, or the only judicial body whose decisions are final and binding to adjudicate cases of: judicial review, disputes over state institutions whose authority is granted by the Constitution, dissolution of political parties, and disputes over general election results. Thus, in terms of exercising the authorities, the Court does not recognize any appeal or cassation mechanism.[10]

So, the final and binding nature according to the original intent in the amendment of the 1945 Constitution has similar meaning with the current derived regulation about the Constitutional Court. No other state institution can re-examine the decisions.

In several kinds of literature, many experts have explained the meaning of 'final' in judicial review decision. For instance, Peter Gerangelos said,

The term 'final judgment' will be referred to throughout as one from which there is no further avenue for appeal because a matter has been decided by the highest court in the judicial hierarchy or the time for an appeal has elapsed. As a fundamental and distinctive outcome of the exercise of judicial power, a final judgment is the judiciary's last word on the rights and obligations of the particular parties in a particular suit.[11]

Gerangelos explained that the term of the final decision means that there is no other mechanism to appeal or re-examine the decision because it has been reviewed and decided by the highest court in the hierarchy of the judicial system. Hence, the final decision is the last word by judicial power.

Therefore, based on the nature of finality and binding force of the Constitutional Court decision, no legal mechanism is recognized to

10 Mahkamah Konstitusi, *Naskah Komprehensif Perubahan Undang-Undang Dasar Negara Republik Indonesia Tahun 1945 Buku Ke VI-Kekuasaan Kehakiman* (Sekretariat Jenderal dan Kepaniteraan Mahkamah Konstitusi: Jakarta, 2010), p. 595.

11 Peter Gerangelos, *The Separation of Powers and Legislative Interference in Judicial Process, Constitutional Principles and Limitations* (Oregon: Hart Publishing, 2009), p. 192.

overrule every decision that the Constitutional Court has decided. This final nature has legal consequences that have binding legal force on all legal subjects, such as every state institution, legal entities, and citizens. Ideally, every enforcement or execution of the Constitutional Court's decision must be consistent with the decision to uphold and respect the supremacy of the Constitution.

II. CHALLENGES TO ENFORCE THE CONSTITUTIONAL COURT DECISIONS IN INDONESIA

Even though the Indonesian Constitution and Constitutional Court Act have been recognised, the Constitutional Court decision is final and binding. However, in empirical practice, some implementations still ignore the decision and even literally contradict the decision. This part will explain the problems that arise from the execution of the Constitutional Court.

The occurrence of challenges in execution of the Constitutional Court decisions cannot be separated from the nature of the judicial branch of power. As Robert Dahl states, *"[t]he Court is almost powerless to affect the course of national policy, this is because the court rulings are not self-executing. Enforcement and implementation require the cooperation and coordination of all branches of government*."[12] So, naturally, judicial power faces challenges in the execution of decisions because the Constitutional Court, basically cannot directly execute its own decisions. For this reason, the Constitutional Court, still needs the role and support of other state institutions in enforcing its decisions.

In Indonesia, there are some perceptions that the Constitutional Court decision is not binding because of two things. Firstly, the Constitutional Court does not have an execution unit task or special enforcement agencies guaranteeing the application of final decisions; Secondly, the final decision is highly dependent on the willingness of public authorities outside the Constitutional Court to comply with the final decision.[13] According to Ali Safa'at, the problems to execute the Constitutional Court decisions are because some people think

12 Robert Dahl, "*Decision-Making in a Democracy: The Supreme Courts as National Policy-Makes*" *Journal Public Law*, p. 95.

13 Ahmad Syahrizal, "Problem Implementasi Putusan Mahkamah Konstitusi" Jurnal Konstitusi, Vol. 4 No. 1 (Maret 2007), p. 124.

there is a possibility of errors in decision-making and no power to re-examine the decision. Thus, it leads to raising the assumption that Constitutional Court becomes a super body that the Court decision is absolutely implemented.[14]

The response to the decision of Constitutional Court explained by Tom Ginsburg is in such a way that he states there are four options, other parties to the Court decisions, which are specifically state institutions,

It can comply with the decision and accept the judgment. Alternatively, it can ignore the court decision and hope that whatever powers the court or other institutions have to enforce the decision will not be effective. Thirdly, it can seek to overturn the court interpretation, through amending the constitution, or if such procedures are available, formally refusing to accept the decision. The final and most extreme option is for the party to attack the court as an institution, trying to reduce its jurisdiction or effective power in future cases. These options can be arranged in a simple figure.[15]

From these four categories of responses to the decision of the Constitutional Court, three kinds (Ignore, Overrule/Punish, or Attack) reflect major problems which can occur in execution.

In Indonesia, most Constitutional Court decisions have been consistently obeyed by all legal subjects, especially state institutions. However, we should admit there is some ignorance of several decisions of the Court. One research found that the option to ignore the Constitutional Court decision can be seen explicitly or implicitly. It is explicit when a norm in the new law is identical or similar to the former norm which has been declared unconstitutional by the Court, while it is implicit when a norm in the new law even though it is not identical to unconstitutional norm, but it has similarities and characteristic with the previous norm. Furthermore, the ignorance implementation can be reasonable or unreasonable. It is reasonable when there is a logical and strong rationalization or explanation to override the decision, while it

14 Muchamad Ali Safa'at, "Mahkamah Konstitusi dalam Sistem Checks and Balances", *Konstitusionalisme Demokrasi* (Malang: Intrans Publishing, 2010), p. 4.

15 Tom Ginsburg, *Judicial Review in New Democracies* (Cambridge: Cambridge University Press, 2003), p. 78.

is unreasonable when there is no further explanation or argumentation why the new law or the enforcement by state institutions must ignore the Court decision.[16]

According to one of the Constitutional Court Justices, Maruarar Siahaan shared the factors that influence the enforcement of the Constitutional Court decision: (1) Political factors, legislators with various backgrounds of political conceptions, targets, and different agendas, may have policy choices and preferences which differ from the Constitutional Court; (2) Economic and Financial factors, the implications for financial conditions and the economic situation, causing policymakers sometimes to have difficulty to enforce the decisions; (3) Communication factors, inadequate relationship between state institutions and the Constitutional Court may lead to misunderstandings of the decisions; (4) The Clarity of Formulation factors, the unclear and multi interpretation of decisions, even the conflict between legal norms may greatly affect the implementation of the decision; (5) Checks and Balances factor, the complex implementation of the decision reflects checks and balances separated among the branches of power in legislative, executive, and judicial powers.[17]

Based on the entire explanation above, in general, the execution of the Constitutional Court's decisions in Indonesia has been consistently complied by the decision *addressat*. However, ignorance of decisions is still the future challenge for the Constitutional Court to uphold the supremacy of the Constitution. Next, several important cases will be presented to show some parties that ignore executionof the Constitutional Court's decision.

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16 Muhammad Reza Winata, *Pengujian Konstitusionalitas Undang-Undang: Rigiditas Tindak Lanjut dalam Pembentukan Undang-Undang*, (Depok: Raja Grafindo Persada, 2020), p. 127-131.

17 Maruarar Siahaan, *Implementasi Putusan Mahkamah Konstitusi dalam Pengujian Undang-undang (Studi tentang Mekanisme Checks and Balances)*, Disertasi, Fakultas Hukum Universitas Diponegoro, 2015, p.419-422.

The occurrence of challenges in execution of the Constitutional Court decisions cannot be separated from the nature of the judicial branch of power. As Robert Dahl states, "*[t]he Court is almost powerless to affect the course of national policy, this is because the court rulings are not self-executing. Enforcement and implementation require the cooperation and coordination of all branches of government.*"[18] So, naturally, judicial power faces challenges in the execution of decisions because the Constitutional Court, basically cannot directly execute its own decisions. For this reason, the Constitutional Court, still needs the role and support of other state institutions in enforcing its decisions.

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Furthermore, the response from other state institutions to the decision of the Constitutional Court, according to Conrado Hubner, requires collaboration with other state institutions. So, when the Constitutional Court interprets the text of the Constitution, it must be aware of the implementation by other state institutions. Without collaboration with other branches' power, the Courts will become powerless. No matter how good the Court's interpretation is, it will be in vain when other state institutions are not strong enough to comply with the decision.[21]

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18 Robert Dahl, "*Decision-Making in a Democracy: The Supreme Courts as National Policy-Makes*" *Journal Public Law*, p. 95.

19 Ahmad Syahrizal, "*Problem Implementasi Putusan Mahkamah Konstitusi*" *Jurnal Konstitusi*, Vol. 4 No. 1 (Maret 2007), p. 124.

20 Muchamad Ali Safa'at, "*Mahkamah Konstitusi dalam Sistem Checks and Balances*", *Konstitusionalisme Demokrasi* (Malang: Intrans Publishing, 2010), p. 4.

21 Conrado Hubner Manders, *Constitutional Courts and Deliberative Democracy* (Oxford: Oxford University Press, 2013), p. 208.

The response to the decision of Constitutional Court explained by Tom Ginsburg is in such a way that he states there are four options, other parties to the Court decisions that are specifically state institutions. It can comply with the decision and accept the judgment. Alternatively, it can ignore the court decision and hope that whatever powers the court or other institutions have to enforce the decision will not be effective. Thirdly, it can seek to overturn the court interpretation, through amending the constitution, or if such procedures are available, formally refusing to accept the decision. The final and most extreme option is for the party to attack the court as an institution, trying to reduce its jurisdiction or effective power in future cases. These options can be arranged in a simple figure.[22]

From these four categories of responses to the decision of the Constitutional Court, three kinds (Ignore, Overrule/Punish, or Attack) reflect major problems which can occur in execution.

Another expert reveals in the Indonesian context that the interaction between the constitutional review and legislation has experiences of turbulence between cooperative and confrontational relations. Cooperative relations can be realized when the constitutional mandate to the Legislator and the President is formulated strongly by requiring the lawmakers to make changes, refinements, or forms of new laws accompanied by a time limit for implementation, and there are not only some consequences if the mandate is not implemented, but it also prohibits the legislators from reenacting the unconstitutional norms in the legislation. On the contrary, confrontational relations are reflected in the non-implementation of the decisions.[23]

In Indonesia, most Constitutional Court decisions have been consistently obeyed by all legal subjects, especially state institutions. However, we should admit there is some ignorance of several decisions of the Court. One research found that the option to ignore the Constitutional Court decision can be seen explicitly or implicitly. It is explicit when a norm in the new law is identical or similar to

22 Tom Ginsburg, *Judicial Review in New Democracies* (Cambridge: Cambridge University Press, 2003), p. 78.

23 Fajar Laksono, "*Relasi Antara Mahkamah Konstitusi dengan Dewan Perwakilan Rakyat dan Presiden Selaku Pembentuk Undang-Undang*." Dissertation Doctoral Program at University of Brawijaya, Malang, 2017, p. 655-656.

the former norm which has been declared unconstitutional by the Court, while it is implicit when a norm in the new law even though it is not identical to unconstitutional norm, but it has similarities and characteristic with the previous norm. Furthermore, the ignorance of the implementation can be reasonable or unreasonable. It is reasonable when there is a logical and strong rationalization or explanation to override the decision, while it is unreasonable when there is no further explanation or argumentation why the new law or the enforcement by state institutions must ignore the Court decision.[24]

According to one of the Constitutional Court Justices, Maruarar Siahaan shared the factors that influence the enforcement of Constitutional Court decision: (1) Political factors, legislators with various backgrounds of political conceptions, targets, and different agendas, may have policy choices and preferences which differ from the Constitutional Court; (2) Economic and Financial factors, the implications for financial conditions and the economic situation, causing policymakers sometimes to have difficulty to enforce the decisions; (3) Communication factors, inadequate relationship between state institutions and the Constitutional Court may lead to misunderstandings to the decisions; (4) The Clarity of Formulation factors, the unclear and multi interpretation of decisions, even the conflict between legal norms may greatly affect the implementation of the decision; (5) Checks and Balances factor, the complex implementation of the decision reflects checks and balances separated between branches of power in legislative, executive, and judicial powers.[25]

Other opinions related to the factors that influence the implementation of the decision divide into three categories: *First*, the Constitutional Court: (1) Clarity of Formulation; (2) Form of Decision; (3) Coordination and Communication; *Second*, the Government and the House of Representatives: (4) Political Interest; (5) Budget Capability; (6) Level of Understanding; (7) Negligence; *Third*, the external aspect

24 Muhammad Reza Winata, *Pengujian Konstitusionalitas Undang-Undang: Rigiditas Tindak Lanjut dalam Pembentukan Undang-Undang*, (Depok: RajaGrafindo Persada, 2020), p. 127-131.

25 Maruarar Siahaan, *Implementasi Putusan Mahkamah Konstitusi dalam Pengujian Undang-undang (Studi tentang Mekanisme Checks and Balances)*, Disertasi, Fakultas Hukum Universitas Diponegoro, 2015, p.419-422.

of the state institution: (8) Changes in Community Conditions; (9) Development of Science and Technology; (10) International Framework and Community.[26] These factors can also be challenges in implementation of the Constitutional Court decisions.

Based on the entire explanation above, in general, the execution of the Constitutional Court's decisions in Indonesia has been consistently complied by the decision *addressat*. However, the ignorance of decisions is still the future challenge for the Constitutional Court to uphold the supremacy of the Constitution. Next, several important cases will be presented to show some parties ignore execution of the Constitutional Court's decision.

A. Case Studies on Enforcement of The Constitutional Court Decisions: the Enforcement of Decisions Number *30/Puu-Xvi/2018*

The Supreme Court and the Constitutional Court have different powers, especially in this case regarding the review of laws and regulations. Pursuant to Article 24C of the 1945 Constitution of the Republic of Indonesia, the Constitutional Court has the authority to judge at the first and final level to examine laws against the Constitution whose decisions are final. Meanwhile, Article 24A of the 1945 Constitution of the Republic of Indonesia states that the Supreme Court has the authority to examine the legislation under the law against the law. In the implementation of their duties and authorities, it turns out that there is a conflict of authority as previously described which can lead to legal uncertainty. As in the case of Oesman Sapta, where until now there is no legal certainty regarding his status as a candidate for DPD member.

The Constitutional Court Decision Number *30/PUU- XVI/2018* expands the meaning of the phrase "other work" in Article 182 letter l of Law Number 7 of 2017 concerning Elections, which reads:

> *"[W]illing not to practice as a public accountant, advocate, notary, land deed official, and/or not to do the work of providing goods and services related to state finances and other work, which may cause a conflict of interest with the duties, authorities and rights as DPD members in accordance with the provisions of the legislation".*

26 Muhammad Reza Winata, *op. cit.*, hlm. 134-135.

This decision basically states that the phrase "other work" in Article 182 letter I of Law Number 7 of 2017 concerning General Elections is contrary to the 1945 Constitution and does not have conditionally binding legal force as long as it is not interpreted to include administrators (functionaries) of political parties.

Thus, this decision prohibits administrators (functionaries) of political parties from becoming candidates for members of the DPD RI. In other words, prospective DPD members who are still serving as administrators of political parties are obliged to resign from their political party positions. Oesman Sapta, a candidate for DPD member who feels aggrieved by the issuance of the PKPU, submitted a request for a judicial review of PKPU Number 26 of 2018 concerning the Second Amendment to PKPU Number 14 of 2018 concerning the Nomination of Individual Participants in the General Election for Members of the Regional Representatives Council to the Supreme Court and a lawsuit to the Administrative Court for the decision issued by the Commission. The request was granted by the Supreme Court and the Administrative Court Judge, who canceled PKPU Number 26 of 2018 and KPU Decision Number *1130 / PL.01.4 – Kpt / 06 / KPU / IX / 2018*. It is as if Supreme Court Judges and Administrative Court Judges ignore Constitutional Court Decision *30/PUU-XVI/2018*, so that legal uncertainty arises regarding Oesman Sapta's current status.[27]

The decision of the Constitutional Court Number *30/PUU-XVI/2018* has juridical implications for the provisions for the nomination of DPD members in the 2019 general election. Then what is of concern and debate is that the Constitutional Court's decision was pronounced after the process of closing the registration of candidates for DPD members. However, the decision is directly binding on prospective DPD members who serve as political party administrators who have previously been declared to have passed verification before the phrase 'other work' was expanded by the Constitutional Court. The Constitutional Court also requires candidates for DPD members who serve as administrators of political parties to submit their resignation in writing from their positions as administrators of political parties.[28]

27 Ayuk Hardani and Lita Tyesta Addy Listiya Wardhani, *Implementasi Putusan Mahkamah Konstitusi Nomor: 30/PUU-XVI/2018 Menurut Sistem Hukum di Indonesia, Jurnal Pembangunan Hukum Indonesia*, Volume 1, Number 2, Year 2019, p. 184.

28 *Ibid*, p. 190

The problems that arise in the implementation of the Constitutional Court Decision Number *30/PUU-XVI/2018* are regarding the enactment of the decision. The Supreme Court which partially granted the petition for judicial review of PKPU Number 26 of 2018 is of the opinion that the decision of the Constitutional Court should not be retroactive to prospective DPD members who have gone through the verification stage.

Although normatively, this decision has been complied with by the KPU with the issuance of General Election Commission Regulation Number 26 of 2018 concerning the Second Amendment to KPU Regulation Number 14 of 2018 concerning the Nomination of Individual Election Contestants for Members of the Regional Representative Council, where the material for the a quo PKPU amendment accommodates the Constitutional Court's decision. However, practically the Constitutional Court's decision was not obeyed, it was proven that the Supreme Court's Decision Number *65 P/HUM/2018* actually canceled PKPU No. 26/2018 it. Thus, the form of non-compliance is manifested in practice in the court process or decision.

B. The Enforcement of Decisions Number *85/PUU-XI/2013*

The Constitutional Court as the body guarding the 1945 Constitution on February 18, 2015 has made a history of overseeing the privatization of water that has been carried out since 2004. The Constitutional Court has read out the decision on case Number *85/PUU-XI/2013* which essentially annuls all contents in the Law. Number 7 of 2004 concerning Water Resources. The Court also decided that Law Number 11 of 1974 concerning irrigation was reinstated.

Management of Water Resources before the cancellation of Law Number 7 of 200 concerning Water Resources by the Constitutional Court through the decision Number *85/PUU-XI/2013*, of course, sourced from the Natural Resources Law. Namely the use of usufructuary rights, usufructuary rights and customary rights. Cultivation rights granted are not only related to the issue of business licenses but also control of water. Through this right-of-use approach that controls water sources, the private sector can explore water as long as the

permit is granted. [29] It is as if water resources are not controlled by the state anymore but are shifted to be controlled by the private sector and government control is not on what they are used for, but only whether the permit is still valid or not. The state no longer has the authority to regulate its exploitation as long as the permit is still valid. The state alone cannot regulate it, especially for people who do not have a legal form reference after the right of use permit is granted to the private sector.[30]

The cancellation of the SDAir Law has resulted in various consequences for the existence of the laws and regulations under it, especially the implementing regulations, namely Government Regulations (PP).[31] In Decision No. *85/PUU-XI/2013* The Court stated that 6 (six) of the 8 (eight) Government Regulations did not meet the 6 (six) basic principles of water resource management restrictions. Of the eight PP PP No. 37 of 2010 concerning Dams and PP No. 69 of 2014 concerning Water Use Rights are those that are not included in the PP which are declared not to meet the basic principles of limiting the management of water resources.

The Court stated in consideration of the a quo decision that on September 12, 2014 the Government had stipulated PP No. 69 of 2014 concerning the Right to Use Water as the implementation of Article 10 of the Water Resources Law, long after the Court ended the trial in the a quo case on March 18, 2014 so that it did not participate, which wasconsidered in the decision. [32]

It considered that because the Natural Resources Law is declared contrary to the 1945 Constitution and in order to prevent a vacuum in the regulation of water resources, while waiting for the formation of a new law which takes into account the decision of the Court by the legislators, Law Number 11 of 1974 concerning Irrigation is enacted to return. On October 15, 2019, the government and the DPR passed Law

29 Muhammad Azil Maskur, *Water Management Policy After the Constitutional Court Decision on Water Resources Law, Jurnal Konstitusi*, Volume 16, Nomor 3, September 2019, p. 520.

30 Constitutional Court of The Republic of Indonesia Decision Number: *85/PUU-XI/2013h*. 143.

31 Santi Puspitasari dan Utari Nindyaningrum, Implikasi Putusan Mahkamah Konstitusi Nomor *85/PUU-XI/2013* Terhadap Sistem Penyediaan Air Minum, Jurnal Penelitian Hukum Volume 2, Nomor 1, Maret 2015, p. 46.

32 Constitutional Court of The Republic of Indonesia Decision Number: *85/PUU-XI/2013* h. 143-144.

Number 17 of 2019 concerning Water Resources which revoked Law Number 11 of 1974 concerning Irrigation.

The Law on Irrigation which has been re-enacted still has many shortcomings and has not been able to comprehensively regulate the Management of Water Resources in accordance with current developments and legal needs of the community, so it needs to be replaced. Arrangements regarding Water Resources are made so that Water Resources Management is carried out based on the principles of public benefit, affordability, justice, balance, independence, local wisdom, environmental insight, sustainability, integration and harmony, as well as transparency and accountability.

The regulation of Water Resources aims to provide protection and guarantee the fulfillment of the people's right to water; ensure the sustainability of the availability of Water and Water Resources in order to provide fair benefits to the community; ensure the preservation of the function of Water and Water Resources to support sustainable development; ensure the creation of legal certainty for the implementation of community participation in the supervision of the utilization of Water Resources starting from planning, implementation, and evaluation of utilization; ensure the protection and empowerment of the community, including Indigenous Peoples in efforts to conserve Water Resources, and utilize Water Resources; and controlling Water Damage. [33]

In addition to the enactment of a new law, after the Constitutional Court's Decision Number *85/PUU-XI/2013* for the smooth development of the drinking water supply system, the Government finally issued a Circular Letter of the Minister of Public Works and Public Housing Number: 04/SE/2015 concerning Permits to Use Resources Water and Public-Private Cooperation Contracts in the Piped Drinking Water Supply System after the Constitutional Court Decision Number *85/PUU-XI/2013* and using Presidential Regulation Number 38 of 2015 concerning Government Cooperation with Business Entities in Infrastructure Provision to provide legal certainty for government cooperation with agencies business.[34] Based on this description, the

33 General explanation, Law Number 17 Year 2019 on Water Resources.
34 Santi Puspitasari dan Utari Nindyaningrum, Implikasi Putusan Mahkamah Konstitusi Nomor

relevant institutions, namely the President and the DPR, have followed up on the Constitutional Court's decision normatively, namely by making laws and regulations under the law in accordance with the Constitutional Court's decision.

C. The Enforcement of Decision Number *67/PUU-XI/2013*

The essence of the decision is that if the company goes bankrupt, the payment of wages owed to workers takes precedence over all types of creditors, including claims for separatist creditors, claims for state rights, auction offices, and public bodies established by the government. Furthermore, it was also decided that the rights of other workers should be paid in advance of all claims including the claims for state rights, auction offices, and public bodies established by the government, except for claims from separatist creditors.

The Constitutional Court's decision has a wide impact because it not only affects the implementation of the Manpower Act but also a number of laws and regulations, including Law Number 37 of 2004 concerning Bankruptcy and Debt Payment Delay (Bankruptcy Law); The Civil Code (KUH Perdata), Law Number 28 of 2007 concerning General Provisions and Tax Procedures (KUP), and Law Number 4 of 1996 concerning Mortgage Rights on Land and Objects Related to Land (Act on Mortgage Rights).

Its influence can be seen from the variety of judges' decisions related to the Constitutional Court's decision, including the decisions of the commercial court judges. The Constitutional Court's decision Number *67/PUU-XI/2013* has changed the order of payment of creditors in bankruptcy, shifting from the former separatist creditors to preference and finally to concurrent wages to workers/laborers, then to separatist creditors, after which is according to preference. Against the preferred creditors, the Constitutional Court's decision also prioritizes the payment of the rights of other workers/labourers and then the rights of the state, the auction office, and public bodies established by the government.

85/PUU-XI/2013 Terhadap Sistem Penyediaan Air Minum, Jurnal Penelitian Hukum Volume 2, Nomor 1, Maret 2015, p. 60.

III. RECOMMENDATIONS ON ENFORCEMENT OF THE CONSTITUTIONAL COURT

A. Judicial deferral by formulating the time limit for enforcement of the Constitutional Court's decision.

The implementation and legal consequences of the Constitutional Court's decision should arise and be binding since the decision is pronounced. The nature of the Court's decision, which is final and de facto binding, sometimes takes time to enforce. Therefore, sometimes, the Court may practice delaying the binding force and enforceability of the decision. The practice of delaying a decision is actually considered effective because the institution addressing the decision has time to prepare a follow-up procedure for the decision. However, the postponement must of course provide a time limit for a norm that has been cancelled, until when it will remain valid for later action by the legislators. [35]

The certainty of the time limit must be explained explicitly in decisions that contain delays in the validity of the decision, for example the implementation of the presidential threshold which must be used in the 2019 general election is contained in the Constitutional Court Decision Number *4/PUU-XI/2013*. Therefore, prior to the implementation of the 2019 election, the legislators made the decision as the basis for the content of Law Number 7 of 2017 concerning General Elections. Another example is Decision *22/PUU-XV/2017* which applies a delay in the validity of the decision. In his ruling, the Court ordered the legislators to make changes to Law Number 1 of 1974 concerning Marriage in particular with regard to the minimum age for marriage for women within a maximum period of 3 (three) years.

The time limit on the validity of the decision is also practiced by the Supreme Court in its judicial review decisions. The Supreme Court has the authority to examine regulations under the law against laws that impose a time limit on the validity of the decision for 90 (ninety) days after the decision of the Supreme Court is sent to the State

35 Hasil Penelitian Kerjasama antara Mahkamah Konstitusi dengan Fakultas Hukum Universitas Trisakti, *Constitutional Compliance Atas Putusan Mahkamah Konstitusi Oleh Lembaga-Lembaga Negara*, Pusat Penelitian dan Pengkajian Perkara dan Pengelolaan Perpustakaan Kepaniteraan dan Sekertariat Jenderal Mahkamah Konstitusi, 2019, p. 99.

Administration Agency or Official that issued the Legislation. It turns out that the official in question does not carry out his obligations, by law the relevant statutory regulations do not have legal force.[36]

B. Strengthening Coordination and Collective Awareness Among State Institutions

Every decision of the Constitutional Court has binding force to every state institution in Indonesia, so basically, it is obligatory for the state institutions to comply with the decisions as a manifestation of constitutional supremacy within the framework of the rule of law principles. Unfortunately, based on regulations, the Indonesian Constitutional Court does not have a special institution to implement its own decisions. Therefore, the execution of decisions depends on actions by other state institutions, especially the *addressat* or legal subject referred in the decision. For this reason, it is very important to develop collective understanding among state institutions to consistently comply to the Constitutional Court decisions.

Recently, the Indonesian Constitutional Court has a program to monitor and evaluate the implementation of decisions by assigning the Legal Bureau of the Constitutional Court to coordinate with several other state institutions through Focus Group Discussions. This routine activity involves various stakeholders, that is the Ministry of Law and Human Rights, and also invite academics from universities to provide advice and recommendations in decision implementation. In the future, the Indonesian Constitutional Court will also strengthen and broaden the process of monitoring the implementation of decisions to other state institutions such as the House of Representatives and Supreme Court, as well as other state institutions.

Even though we should acknowledge the results of this coordination program are still limited by only giving notation of decisions not implemented or executed while some decisions continue to be contradicted, or we can say this program could not be a constraint to force other state institutions to comply with the decisions. However, at least based on current practice in Indonesia, other state institutions such as the Ministry of Law and Human Rights respond positively to this monitoring process, even committed to comply with the decision.

36 *Ibid*., P. 103. Article 8 Supreme Court Regulation Number 1 Year 2011 Judicial Review.

C. Dissemination of Urgency to Comply with Decisions to the Community

The Constitutional Court decisions aregenerally implemented by other state institutions. However, essentially, the decision not only has binding force to state institutions, but also to every legal subject in Indonesia including every person. So, citizen compliance is also the key factor to implementing the decisions which can affect the compliance of authorized state institutions.

The community support is actually the most important element in execution of the decision because people are the original owner of the people's sovereignty as guaranteed in the Constitution. Community involvement is an important thing to do because with the support from citizens, the people can participate in demanding and encouraging other state institutions constantly to comply with the decisions of Constitutional Court. Therefore, the decisions will be more enforceable, especially when there is neglect in the implementation of the decisions.

Education to community through socialization will increase the citizens' understanding of the urgency of implementation of the Constitutional Court decisions because it will raise public awareness to defend their constitutional rights. When there is a violation of the decision at the practical level, the community can also play a role as a partner of the Constitutional Court to monitor and report the violation of the decision to the Constitutional Court.

D. Expanding Community Involvement Supports Compliance with Decisions especially academics and NGOs.

The enforcement to the Constitutional Court's decision is a function that requires collaborative and coordinated action so that the process of realizing the constitutional rules is expected to be comprehensively realized. In addition to collaboration with other state institutions, the implementation of the Constitutional Court's decision requires collaborative action between the Constitutional Court and academics, scholars, and activists in NGOs. The Constitutional Court periodically conducts focus group discussions and monitors and evaluates the implementation of the Constitutional Court's decisions. There is a collaborative discussion and research forum with academics and universities.

The Constitutional Court periodically holds focus group discussions related to monitoring and evaluating the implementation of the Constitutional Court's decisions in collaboration with several universities, the Ministry of Law and Human Rights and the Ministry of National Development Planning (Bappenas). In the FGD, monitoring indicators or criteria for implementing the Constitutional Court's decision will be formulated. FGD is an instrument to see how far the decision of the Constitutional Court has been enforced. The Court is interested in knowing the extent of the implementation of the decision. The results of the FGD will be recorded by the Constitutional Court and will be compiled in the form of a report related to monitoring and evaluating the implementation of the Constitutional Court's decision. The views and thoughts of the experts as resource persons for the FGD became input for the Constitutional Court. Thus, the Constitutional Court can design the form of strategy for implementing the Constitutional Court's decision that needs to be carried out.

Monitoring and evaluation of the implementation of the Constitutional Court's Decision is one of the instruments to see the effectiveness of the Constitutional Court's Decision. The results of monitoring and evaluation of follow-up decisions can be used as material for the Court in coordinating with other institutions such as the Directorate of Legislation, the Ministry of Law and Human Rights and the Directorate of Law and Regulation of Bappenas. The FGD will periodically discuss the law which will be divided into working groups (pokja). The results of this monev will be compiled into a single concept of monev by the Constitutional Court. The decisions that are monitored are decisions that are granted by the Constitutional Court as well as decisions that are rejected and declared unacceptable which contain a constitutional message. In general, the material for monitoring and evaluation is the decision that is granted.

CONCLUSION

The fundamental characteristic of the Constitutional Court decisions significantly related to the execution of decisions is the nature of final and binding decisions. However, the enforcement of decisions faces multiple challenges. Firstly, the Constitutional Court does not have an execution unit task or special enforcement agencies guaranteeing

the application of final decisions. Secondly, the final decision is highly dependent on the willingness of public authorities outside the Constitutional Court to comply with the final decision.

One research found that the option to ignore the Constitutional Court decision can be seen explicitly or implicitly. It is explicit when a norm in the new law is identical or similar to the former norm which has been declared unconstitutional by the Court, while it is implicit when a norm in the new law even though it is not identical to the unconstitutional norm, but it has similarities and characteristic with the previous norm. Furthermore, the ignorance of the implementation can be reasonable or unreasonable. It is reasonable when there is a logical and strong rationalization or explanation to override the decision, while it is unreasonable when there is no further explanation or argumentation why the new law or the enforcement by state institutions must ignore the Court decision.

Several factors influence the implementation of the decision divide into three categories: First, the Constitutional Court: (1) Clarity of Formulation; (2) Form of Decision; (3) Coordination and Communication; *Second*, the Government and the House of Representatives: (4) Political Interest; (5) Budget Capability; (6) Level of Understanding; (7) Negligence; *Third*, the external aspect of the state institution: (8) Changes in Community Conditions; (9) Development of Science and Technology; (10) International Framework and Community. Moreover, Constitutional Court has implemented several recommendations to address the related decisions' enforcement issues, namely, judicial deferral by formulating the time limit for enforcement of the Constitutional Court's decision, strengthening coordination and collective awareness among state institutions, dissemination of urgency to comply with the decisions to the community, and expanding the community involvement to support compliance with the decisions, especially to the academics and NGOs.

EXECUTION OF DECISIONS RENDERED BY THE CONSTITUTIONAL COURT OF KOREA: ISSUES IN EXECUTION OF MODIFIED DECISIONS

Jean Lee
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CONSTITUTIONAL COURT OF KOREA

EXECUTION OF DECISIONS RENDERED BY THE CONSTITUTIONAL COURT OF KOREA – ISSUES IN EXECUTION OF MODIFIED DECISIONS –

*Jean Lee**
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ABSTRACT

Unconstitutionality Decisions of the Constitutional Court of the Republic of Korea that strike down unconstitutional statutes immediately nullify the statutes in question and are granted binding force upon all state agencies under the Constitutional Court Act. Such explicit legal grounds guarantee the execution of the Constitutional Court's decisions and help prevent problems of execution in most cases.

However, throughout its 30-year history, the Constitutional Court has developed modified types of decisions with regard to judicial review of legislation that were previously unanticipated under the Constitutional Court Act, including 'nonconformity to the Constitution' decisions and 'conditional unconstitutionality' decisions, etc. These modified decisions aim to preserve legal stability and separation of powers while protecting individual basic rights under the Constitution. Unlike simple unconstitutionality decisions, the full execution of these modified decisions is dependent on future action by the legislature and ordinary courts, and cooperation of these institutions sometimes prove unsatisfactory for various reasons.

This paper focuses on these execution issues regarding nonconformity decisions and conditional unconstitutionality decisions. It starts by providing an overview of the Constitutional Court's jurisdiction and the types and effects of its decisions, followed by an analysis of major issues that occur with relation to the execution of modified decisions. Specific cases are also reviewed to further illustrate these issues. As a conclusion, the authors suggest that

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mutual trust and cooperation between state institutions stemming from clear legal reasoning of the Constitutional Court decisions should help insure execution of the court's decisions regardless of their form, as all institutions shall acknowledge a common goal of upholding the Constitution.

INTRODUCTION

Decisions of the Constitutional Court of the Republic of Korea (hereinafter: "the Constitutional Court") that strike down unconstitutional statutes and that uphold constitutional complaints are granted binding force upon all state agencies according to the Constitutional Court Act. Such explicit provisions are generally sufficient to guarantee the execution of the Constitutional Court's decisions and prevent problems of execution.

However, throughout its 30-year history, the Constitutional Court has developed modified types of decisions that were previously unanticipated under the Constitutional Court Act. These modified decisions taking the form of 'conditional unconstitutionality' decisions and 'nonconformity to the Constitution' decisions, etc. aim to preserve legal stability and separation of powers while protecting individual basic rights under the Constitution. However, the full execution of these modified decisions is dependent on future action by the ordinary courts and legislature, and cooperation of such institutions sometimes prove unsatisfactory for various reasons.

This paper provides an overview of the Constitutional Court's jurisdiction and the types and effects of its decisions, followed by an analysis of issues and specific cases regarding problems that occur with relation to the execution of modified decisions. It concludes with some assessments and emphasizes the need for clear legal reasoning within the Constitutional Court decisions that can serve as a basis of mutual trust and cooperation between state institutions which share a common goal of upholding the Constitution.

I. THE CONSTITUTIONAL COURT'S DECISIONS AND THEIR EFFECTS

A. Jurisdiction of the Constitutional Court of Korea

The Constitution of the Republic of Korea (hereinafter: the "Constitution") defines the jurisdiction of the Constitutional Court as follows in Article 111 of the Constitution:

1. The constitutionality of a law upon the request of the courts;

2. Impeachment;

3. Dissolution of a political party;

4. Competence disputes between State agencies, between State agencies and local governments, and between local governments; and

5. Constitutional complaint as prescribed by Act

The specific scope of the Constitutional Court's jurisdiction is further prescribed in the Constitutional Court Act. Among the five jurisdictions, adjudications of the constitutionality of statutes and constitutional complaints are the primary jurisdictions of the Constitutional Court as these cases account for the majority of the Court's caseload (*See* Table 1 below).

1. Judicial Review of Legislation

Article 41 of the Constitutional Court Act establishes a system of concrete review. According to this clause, review of the constitutionality of statutes by the Constitutional Court may be requested by an ordinary court ex officio or upon the request of the parties concerned, in case the unconstitutionality of a statute may affect the outcome of a pending case in the ordinary court.

If the ordinary court rejects a party's request to refer statutory review to the Constitutional Court, such party may directly file for constitutional review in the form of constitutional complaint under Article 68 paragraph (2) of the Constitutional Court Act as further described below.

2. Constitutional Complaints

Grounds for request of constitutional complaints are categorized into two types under Article 68 of the Constitutional Court Act:

1. In case of unconstitutional act or omission on the part of a governmental power (Article 68 paragraph (1));
2. In case the constitutionality of a statute is a precondition of the judgment of a case, and a motion to refer its review to the Constitutional Court is denied by the ordinary court (Article 68 paragraph (2)).

An Article 68 paragraph (1) petition seeks to vindicate individual rights infringed upon by the state. It is available after all other legal remedies are exhausted. Decisions of ordinary courts are not eligible for the petition (Constitutional Court Act Article 68 paragraph (1)), but legislative acts that directly infringe upon individual rights (by their very enactment) may be challenged through such constitutional

compliant. Constitutional complaints challenging the constitutionality of statutes comprise the majority of major constitutional complaints heard by the Court under Article 68 paragraph (1) of the Constitutional Court Act.[1]

The Constitutional Court also acknowledges constitutional complaints regarding legislative omissions. Such complaints may be filed when the legislature fails to enact statutes that are expressly mandated under the Constitution, or when such obligation can be specifically construed under the Constitution.[2]

Article 68 paragraph (2) relates to statutes whose constitutionality is at issue in a court proceeding (concrete review). In case the unconstitutionality of a statute may affect the outcome of a pending case in the ordinary court, a party of the case may request the court to refer the review to the Constitutional Court (Article 41 of the Constitutional Court Act). In case such referral is rejected by the ordinary court, the party may directly file a petition to the Constitutional Court seeking a ruling on the constitutionality of the statute under Article 68 paragraph (2) of the Constitutional Court Act.

As the statistics in Table 1 show, around 97% of the cases filed in the Court are constitutional complaints.

	Judicial Review upon Court Request	Impeachment	Party Dissolution	Competence Dispute	Constitutional Complaint			Total
					§68(1)	§68(2)	Sum	
Number of Cases[3]	1,029	3	2	117	33,183	8,677	41,860	43,011
Ratio (%)	2.39	0.01	0.00	0.27	77.15	20.17	97.32	100

(1988. 9. 1 - 2021. 6. 30.)

Table 1. Number of Cases Filed in the Constitutional Court of Korea

1 According to statistics provided by the Constitutional Court, during the period September 1, 1988 – July 31, 2021, a total of 33,385 cases were filed with the court under Article 68 paragraph (1) of the Constitutional Court Act, and among them, 5,527 cases argued Legislative Acts, 3,584 cases argued Executive Acts, and 1,074 cases argued Administrative rules. Among the rest of the cases, a bulk of 15,473 cases argued decisions not to prosecute by the Prosecutors Office, and 2,965 cases were inadmissible challenges against decisions of the ordinary court.

2 Constitutional Court decision on 90Hun-Ma209, November 25, 1993.

3 URL: https://english.ccourt.go.kr/site/eng/jurisdiction/caseLoadstatic.do

B. Effects of the Constitutional Court's Decisions

1. General Binding Force

The decisions of the Constitutional Court, as judicial decisions, bind all parties to the case. Furthermore, as the special status of the Constitutional Court offers it the final authority to all constitutional disputes, its decisions of unconstitutionality are also binding upon all state agencies.

The Constitutional Court Act explicitly grants expanded binding force to decisions of unconstitutionality of a statute (Constitutional Court Act Article 47 paragraph (1)[4], Article 75 paragraph (6)[5]), decisions on competence disputes between state agencies and local governments, etc. (Constitutional Court Act Article 67 paragraph (1)[6]) and decisions upholding constitutional complaints (Constitutional Court Act Article 75 paragraph (1)[7]). Hence, all state agencies exercising state power, including the legislature, the executive, the judiciary and local governments are directly obligated to observe these Constitutional Court decisions.[8]

Meanwhile, decisions confirming constitutionality of statutes do not acquire general binding force against state authorities. The National Assembly may amend or repeal statutes found constitutional by the Constitutional Court, as necessary in order to improve relevant statutes.[9]

The types and effects of unconstitutionality decisions are further discussed in detail below.

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4 Constitutional Court Act Article 47 (Effect of Decision of Unconstitutionality). (1) Any decision that a statute is unconstitutional shall bind ordinary courts, other State agencies, and local governments.

5 Constitutional Court Act Article 75 (Decision of Upholding). (6) In cases referred to in paragraph (5) and where a constitutional complaint prescribed in Article 68 (2) is upheld, Articles 45 and 47 shall apply *mutatis mutandis*.

6 Constitutional Court Act Article 67 (Effect of Decision). (1) The decision on competence dispute by the Constitutional Court shall bind all State agencies and local governments.

7 Constitutional Court Act Article 75 (Decision of Upholding). (1) A decision to uphold a constitutional complaint shall bind all the State agencies and the local governments.

8 Such binding force is granted only to the types of decisions stated above. Other types of decisions (e.g. decision to impeach; decision to dissolve a political party) do not bind state agencies that are not parties of the case. (Wan Jung Heo, *"Binding Force of Constitutional Court Decisions", Studies on Constitutional Cases*, Vol. 13, 2012, p. 317).

9 Wan Jung Heo, *"Binding Force of Constitutional Court Decisions". Studies on Constitutional Cases*, Vol. 13, 2012, p. 339.

2. Decision of Unconstitutionality

A decision of unconstitutionality of a statute nullifies the relevant provision, taking effect from the date on which the decision is made (Constitutional Court Act Article 47 paragraph (2)). Thus, in principle, unconstitutionality decisions apply only prospectively, with the following exceptions.

One exception is that a decision of unconstitutionality relating to criminal punishment loses its effect retroactively. If the Constitutional Court has previously declared the same provision constitutional in an earlier decision (previous constitutionality decision) and is changing its position with a later unconstitutionality decision (later unconstitutionality decision), the provision shall lose its effect according to the later unconstitutionality decision only starting from the day following the date of the previous constitutionality decision (Constitutional Court Act Article 47 paragraph (3)).

Another exception recognized by the Constitutional Court is intended to guarantee relief of the parties related to concrete review. The Constitutional Court takes the position that although in principle decisions of unconstitutionality of statutes only have prospective effects starting from the date of the decision, such decision will retroactively apply to (i) the "instant case" that provided the Constitutional Court with the ground of constitutionality review; (ii) "similar cases" on the same issue, that were filed with the Constitutional Court or requested referral to ordinary courts prior to the unconstitutionality decision of the Constitutional Court; and (iii) "pending cases" at the ordinary courts, where the constitutionality of the same statue is a precondition of judgment.[10] The ordinary courts also acknowledge the retroactive effect of the Constitutional Court's unconstitutionality decisions in the aforementioned cases, and relevant parties are afforded relief accordingly.

3. Modified Decisions

Since the early years of its foundation, the Constitutional Court has established certain forms of modified unconstitutionality decisions,

10 Constitutional Court decision on 92Hun-Ka10, etc., May 13, 1993.

including 'nonconformity' decisions, 'conditional constitutionality' decisions and 'conditional unconstitutionality' decisions.

These modified decisions and their effects are further explained in detail as follows.

a. Decisions Finding a Provision Not Conforming to the Constitution

In case the Constitutional Court finds a statutory provision unconstitutional, but decides that the immediate invalidation of the provision may cause a legal vacuum or confusion, or if it sees that the legislature should be able to decide among various possible ways of amending the provision to eliminate the unconstitutional aspects, the Constitutional Court declares the provision at issue 'nonconforming to the Constitution' instead of declaring it 'unconstitutional.'

The Constitutional Court observes that given the complex social reality which law seeks to regulate, a rigid either/or approach of unconstitutionality or constitutionality may undermine legal stability and unduly restrict the powers of the legislature. While utilizing 'nonconformity' decisions to address these practical issues, the Constitutional Court also maintains that nonconformity decisions are a form of unconstitutionality decision that are granted binding force on all other state agencies under Article 47 paragraph (1) of the Constitutional Court Act.[11]

A holding of a nonconformity decision may take one of the following forms: (i) simply specifying that the provision at issue is nonconforming to the Constitution, (ii) declaring it nonconforming to the Constitution and ordering the immediate suspension of its application, or (iii) declaring it nonconforming to the Constitution and ordering its continued application until the legislation is amended. In the last case, the Constitutional Court may also specify a certain deadline for amendment, and if the legislature fails to revise the statue by that date the provision is automatically invalidated thereafter.[12] There are no strict standards for choosing a form of the holding and the most appropriate form is selected on a case-by-case basis.

11 Constitutional Court decision on 96Hun-Ma172, etc., December 24, 1997.

12 For example, *see* the holding below from the case on the crimes of abortion (2017Hun-Ba127, April 11, 2019): "*Both Article 269 Section 1 and the part concerning "doctor" in Article 270 Section 1 of the Criminal Act (amended by Act No, 5057 on December 29, 1995) are nonconforming to the Constitution. These provisions are to be applied until the legislature amends them by December 31, 2020.*"

A nonconformity decision also maintains the original text of the statute in question, and requires the legislature to amend it according to the Constitutional Court's judgement. Thus, the execution of a nonconformity decision depends on the legislature's actions. The legislature is sometimes tardy in fulfilling its role, causing execution problems as further illustrated below.

b. Conditional Constitutionality and Conditional Unconstitutionality Decisions

As another type of modified decision, the Constitutional Court utilizes 'conditionally constitutional' or 'conditionally unconstitutional' decisions in its review of legislation, where the statute under review can be interpreted in more than one way, and the Constitutional Court finds that only a particular form of interpretation would result in the provision being constitutional or unconstitutional. A 'conditional constitutionality' decision uses the expression *"[statute A] is not unconstitutional as long as it is interpreted to mean […]."* and a 'conditionally unconstitutional' decision states that *"[statute B] is unconstitutional as long as it is interpreted to mean […]."* Both instances are intended to outlaw a particular 'interpretation' of the statute from the scope of its application, thus the Constitutional Court takes the position that decisions of conditional constitutionality and conditional unconstitutionality are all binding decisions of unconstitutionality. The Constitutional Court grounds the necessity of this type of modified decision in the principle of separation of powers and respect for the legislature's formative powers.

'Conditionally constitutional' or 'conditionally unconstitutional' decisions are unconstitutionality decisions that maintain the original text of the statutes in question while limiting possible interpretations of the text. Thus, execution of such decisions hinge on the appropriate interpretation by the ordinary courts in line with the Constitutional Court's ruling, when applying the statutes to a specific case. However, there have been times that the ordinary courts did not agree with the limited interpretation of the Constitutional Court, causing defects in execution of these decisions. This issue is explored in more detail below.

The total number of unconstitutionality decisions made by the Constitutional Court since its inception, broken down by type of decision is shown in Table 2.

Type of case	Unconstitutional	Nonconformity	Conditionally Unconstitutional	Conditionally Constitutional	Total
Constitutionality of Statutes Article 41	298	84	18	7	1,029
Ratio (%)	28.96	8.16	1.75	0.68	100
Constitutional Compliant under Article 68(2)	248	106	32	21	8,677
Ratio (%)	2.86	1.22	0.37	0.24	100

(1988. 9. 1 - 2021. 6. 30.)

Table 2. Number of Decisions Accepting Unconstitutionality[13]

II. EXECUTION ISSUES REGARDING MODIFIED DECISIONS

Unlike decisions of simple unconstitutionality, there is no explicit provision that stipulates the binding force of modified decisions, and thus execution issues sometimes arise with regard to other state agencies.

As mentioned above, nonconformity decisions are dependent on the legislature for full execution, i.e., amendment of statutes according to the Constitutional Court's decision. Also, conditional constitutionality and conditional unconstitutionality decisions require the ordinary court to interpret the relevant provisions in line with the Constitutional Court's rulings.

The following section illustrates problems in execution of modified decisions with relation to the legislature and ordinary court.

A. Issues of Execution through Legislative Amendment by the National Assembly

Decisions of nonconformity obligate the legislature to amend the relevant provision to eliminate its unconstitutional aspects in

13 As for the number of cases, *see* URL: https://english.ccourt.go.kr/site/eng/jurisdiction/caseLoadstatic.do

accordance with the Constitutional Court's decision. The legislature maintains discretion as to the specific contents of the amended provision as long as it omits the unconstitutionality. Thus, in most cases, the legislature is also free to decide whether to apply the revised statute only to events that occurred after its enforcement or also to those that occurred beforehand.

From September 1988 to December 2020, the number of statutes that the Constitutional Court found unconstitutional and required legislative amendment is shown as below. Among the 209 nonconformity decisions[14], 190 statutes were amended in accordance with the decisions and 19 statutes have yet to be revised.

	Decisions	Amended	Not Amended
Unconstitutional	541	525	16
Nonconformity	**209**	**190**	**19**
Conditionally Unconstitutional	58	48	10
Conditionally Constitutional	34	31	3

(1988. 9. - 2020. 12.)

Table 3. Number of Amended Statutes[15]

As for nonconformity decisions that specified a deadline for legislative amendment during the same period, the deadline set in 66 decisions has lapsed as of December 2020. Among them, 57 statutes have been amended and 9 have yet to be revised.[16]

The following introduces some examples of amendments made according to the Constitutional Court's nonconformity decisions and other cases where the legislature failed to timely amend the statutes in question.

14 The number of nonconformity decisions in Table 3 is higher than that of Table 2 because Table 3 includes nonconformity decisions held regarding constitutional complaints filed under Article 68(1) of the Constitutional Court Act.

15 Constitutional Court of Korea, *Annual Report on the Execution of Decisions*, 2020, p. 117.

16 *Ibid*.

1. Cases Resulting in Legislative Amendment

a. Case on Conscientious Objectors (*2011Hun-Ba379* and 27 other cases consolidated)

Previously, the Military Service Act provision that defined the categories of mandatory military service only provided for types of military service that required military training. The lack of alternative services forced conscientious objectors to violate their military obligations.

The Constitutional Court found that this provision infringed the objectors' freedom of conscience, finding that it would be feasible to establish an alternative service program for conscientious objectors that would not undermine the objective of mandatory military service, namely national security and fairness in the allocation of military duties.

However, considering that a simple unconstitutionality decision that would nullify the provision on the types of military service as a whole, and result in an immediate absence of legal grounds to enforce military duties, the Constitutional Court rendered a nonconformity decision ordering the legislature to amend the provision by December 31, 2019. This form of decision also guaranteed the legislature room for discretion in deciding the specific aspects of alternative services.

The decision triggered active discussions both within the legislature and throughout society at large over what would be an appropriate alternative service system for conscientious objectors. The provision was finally amended on December 31, 2019, to include alternative service as one of the types of military service, and the legislature also enacted a new statute titled 'Act on Enlistment and Service for Alternative Service' to regulate the specific terms and conditions of alternative service, allowing conscientious objectors to serve in correctional facilities as assistants for procurement, facility management, etc. The provision before and after amendment is shown in the table below.

Before Amendment	After Amendment
Article 5 (Categories of Military Service) (1) The military service shall be classified into active, reserve, recruit, the first militia and the second militia services as follows: 1. Active service: service rendered by men enlisted in the army by conscription or application (. . .) 2. Reserve service: service rendered by those who have completed active service, (. . .) 3. Recruit service: service rendered by those who are judged capable of being in active service as a result of the draft physical, but not determined as those to be enlisted in active service due to the circumstances of the supply and demand of the armed forces, (. . .) 4. First militia service: service rendered by those who are under obligation to serve in the military, but are not in the active, reserve, recruit or second militia service; and 5. Second militia service: service rendered by those who are judged incapable of being in the active or recruit service as a result of the draft physical or the physical examination, (. . .)	Article 5 (Categories of Military Service) (1) The military service shall be classified as follows: 1-5. (maintained as before) 6. Alternative service: service rendered by those who are under obligation to serve in the military, and are enlisted for alternative service as regulated by Act on Enlistment and Service for Alternative Service, in lieu of active, reserve, or recruit service, in protection of their freedom of conscience under the Constitution.

b. Ban on Outdoor Assemblies within 100m of the National Assembly Building (*2013Hun-Ba322*, etc., May 31, 2018)

The Assembly and Demonstration Act prohibited outdoor assemblies and demonstrations within a 100-meter radius of the National Assembly building. The complainant filed a constitutional complaint under Article 68 paragraph (2) of the Constitutional Court Act, alleging that this provision infringed his freedom of assembly.

The Constitutional Court found that while the legislative purpose of protecting the functions of the National Assembly may be legitimate, it is unconstitutional to impose a blanket ban on assemblies that are not likely to directly obstruct the functions of the National Assembly, such as small-scale assemblies and assemblies held on holidays when the National Assembly is in recess. However, since prohibitions of certain assemblies such as violent ones should be maintained and the specific exceptions should be further deliberated by the legislators, the Constitutional Court rendered a decision of nonconformity to the

Constitution instead of declaring it unconstitutional, and ordered its temporary application until amendment with a deadline of December 31, 2019.

In this case, the provision at issue was amended six months past its deadline on June 9, 2020 and the amended provision took effect on the same day. The amended provision prohibits outdoor assemblies or demonstrations within a 100-meter radius from the boundary of the National Assembly building while allowing exceptions in cases where it would pose no threat of infringing the functions of the National assembly such as where (i) the assembly or demonstration would not obstruct the activities of the National Assembly and (ii) the assembly or demonstration would not escalate into a large-scale assembly or demonstration. In this case, although the legislature failed to meet the stated deadline, the statute was soon revised in accordance with the Constitutional Court's ruling. The provision before and after the amendment is shown in the table below.

Before Amendment	**After Amendment**
Article 11 (Places Prohibited for Outdoor Assembly and Demonstration)	Article 11 (Places Prohibited for Outdoor Assembly and Demonstration)
No person may hold any outdoor assembly or stage any demonstration anywhere within a 100-meter radius from the boundary of the following office buildings or residences:	No person may hold any outdoor assembly or stage any demonstration anywhere within a 100-meter radius from the boundary of the following office buildings or residences:
1. The National Assembly building (. . .)	1. The National Assembly building: <u>Provided that this shall not apply where such assembly or demonstration which falls under any of the following items is acknowledged to pose no threat of infringing the functions and peace of the National Assembly:</u> <u>(a) the assembly or demonstration would not obstruct the activities of the National Assembly</u> <u>(b) the assembly would not escalate into a large-scale assembly or demonstration</u>

2. Cases Still Pending Legislative Amendment

a. Case on the Crimes of Abortion (*2017Hun-Ba127*, April 11, 2019)

The Constitutional Court's recent decision on the criminalization of abortion is a prominent example where the Court utilized a nonconformity decision to address a controversial issue. Previously, the Criminal Act punished a woman who procures her own miscarriage through the use of drugs or other means and a doctor who procures the miscarriage upon her request with imprisonment or a fine. In its nonconformity decision rendered in 2019, the Constitutional Court acknowledged that the provision unconstitutionally restricts the right to self-determination as it punishes all kinds of abortions without consideration of a woman's physical, psychological, social, economic circumstances, or the status of the fetus (whether it passed the point of viability at around 22 weeks of gestation), resulting in punishments of justifiable abortions. Nevertheless, the Court found it inappropriate to simply strike down the provision as unconstitutional because that would create an unacceptable legal vacuum in which all abortions would be permitted, and also because it is necessary to allow the legislature to decide the specific scope of exceptions. Thus, the Court rendered a nonconformity decision ordering the legislature to amend the provision by December 31, 2020. Unfortunately, the legislature failed to amend the provision by the specified date, and the provision has been nullified as of January 1, 2021.

b. Ban on Nighttime Outdoor Assembly (*2008Hun-Ka25*, September 24, 2009)

In this case, the legislators have yet to amend the relevant legislation although more than 10 years since the deadline stated in the Constitutional Court's decision has passed.

The Assembly and Demonstration Act had a provision that banned outdoor assemblies scheduled before sunrise and after sunset with the exception that a district police chief may permit one upon reviewing the nature of the assembly in advance. Violation of this provision also triggered a penalty provision. During a trial for violation of this clause, a district court made a request to the Constitutional Court for constitutional review of the statute upon a motion to request by the accused.

While the Justices of the Constitutional Court were divided on their specific reasoning, the majority found that the provisions in question had unconstitutional elements. Out of the total nine Justices, five Justices found that the requirement of prior review and permission by the district police chief amounted to unconstitutional censorship.

Two other Justices considered that the legislative purpose of maintaining public order could be achieved by preventing late night outdoor assemblies, but the excessive prohibition covering sunset to sunrise violated the Constitution. They took the position that it should be left to lawmakers to decide on the time frame of what constitutes 'late night' and thus, the decision in this case should be a decision of nonconformity to the Constitution rather than a decision of unconstitutionality.

As a simple unconstitutionality decision requires a vote of six or more Justices, the Court delivered a decision of nonconformity to the Constitution and ordered continued application of the provisions until amendment, with a deadline of June 30, 2010.

After the above decision, a number of amendment bills were submitted. Some of the proposals included limiting the time frame of banning outdoor assemblies from midnight to 6 a.m., deleting the provision providing for the time frame, and designating a person in charge of maintaining the public order from midnight to 7 a.m. Although many parties including the police and the Seoul metropolitan government actively expressed their opinions, they have yet to reach a concrete agreement and the legislation has yet to be amended. As the amendment deadline has lapsed, the provisions were nullified and currently there is no legal ground for punishment for organizing an outdoor assembly at nighttime.

B. Execution Issues Regarding the Application of Conditional Unconstitutionality Decisions

The Constitutional Court of Korea maintains that conditional constitutionality and conditional unconstitutionality decisions are modified forms of unconstitutionality decisions, therefore are binding upon all state agencies.[17] However, contrary to the Constitutional

17 Constitutional Court decision on *96Hun-Ma172*, etc., December 24, 1997.

Court's stance, the Supreme Court of Korea has taken the position that in case of a conditional unconstitutionality ruling, since the original text of the provision in question stays intact, the Constitutional Court's decision should only be inferred as the Constitutional Court's interpretation of the law. Accordingly, the Supreme Court has taken the stance that it is not bound by the Constitutional Court's interpretation, since it is originally vested with the authority to interpret statutes with regards to a specific case at hand. To this extent, the Supreme Court does not acknowledge that the Constitutional Court's decision shall affect its own interpretation of the law.[18]

There are only a few cases where actual conflict between the Constitutional Court and the Supreme Court has arisen. However, the conflict in those few cases has a severe impact on the parties related, as contradictory rulings are issued by the two institutions, and an infringement of basic rights acknowledged by the Constitutional Court is not relieved by the Supreme Court.

The following are example cases where the Supreme Court failed to apply conditional unconstitutionality decisions of the Constitutional Court.

1. Capital Gains Tax case (*94Hun-Ba40*, etc., November 30, 1995)

One example is the Constitutional Court's decision regarding calculation of capital gains tax under Article 23 Section 4 of the former Income Tax Act, decided on November 1995. The Constitutional Court ruled that the relevant provision is unconstitutional to the extent that it is interpreted to apply capital gains tax calculated on the basis of actual prices when the result is greater than the tax calculated on the basis of tax standard values.

The Supreme Court disagreed with this interpretation and went on to deny its binding force. As a result, the individual who filed the constitutional complaint failed to acquire relief from the Supreme Court, despite having obtained a favorable decision from the Constitutional Court.[19] This case was ultimately resolved after another constitutional complaint was filed by the same party and the

18 Supreme Court decision on *95Nu11405*, April 9, 1996.

19 Constitutional Court decision on *94Hun-Ba40*, etc., November 30, 1995; Supreme Court decision on *95Nu11405*, April 9, 1996.

Constitutional Court rendered a subsequent decision cancelling the above Supreme Court decision as well as the original tax levy.[20] The Supreme Court maintained its position but the tax office returned the tax amount in question.

2. Bribery of Public Official Case (*2011Hun-Ba117*, December 27, 2012)

Article 129 paragraph (1) of Criminal Act punishes a public official who receives, demands or promises to accept a bribe in connection with his or her duties. The complainant of this case was a professor who served as an external advisor for a municipal government. He argued that his position as an external advisor should not be included as a 'public official' regulated by the above clause.

The Constitutional Court ruled that the provision is unconstitutional to the extent that the word 'public official' is interpreted to include an external advisor such as the complainant, because such interpretation amounts to an undue extension of criminal liability to those who are not clearly specified in the provision as liable. However, the Supreme Court had already ruled against the complainant on September 29, 2011[21], which is about a year before the decision of the Constitutional Court. The complainant later filed a motion to modify the 2011 judgment, but the appellate court denied the motion, mentioning that conditional unconstitutionality decisions of the Constitutional Court do not bind ordinary courts.[22]

CONCLUSION

Modified decisions of the Constitutional Court are formulated in accordance with Constitutional principles in order to better serve the public interest. A decision of nonconformity to the Constitution is meaningful in that it is a unique form of decision which seeks to omit the unconstitutional aspects of a statutory provision while maintaining the stability of the existing legal order and guaranteeing the legislature's formative powers to the extent possible. Rendering a decision of nonconformity instead of a decision of simple unconstitutionality seeks to ensure a balance between the legislature and the Constitutional

20 Constitutional Court decision on *96Hun-Ma172*, December 24, 1997.
21 Supreme Court decision on *2011Do6347*, September 29, 2011.
22 Gwangju High Court decision on *2013Jae-no2*, November 25, 2013.

Court, and it allows the legislature to take a deliberative approach in amending the legislation, applying extensive research and expertise and reaching social consensus.

Most of the statutes that the Constitutional Court declared nonconforming to the Constitution have been amended in due time. However, as mentioned above, there are several cases where the necessary amendment has long been delayed. Such a delay cannot be anticipated by the Constitutional Court at the time of a ruling, and is sometimes inevitable in order to reflect social consensus. The legislature still is encouraged to pursue timely amendment by raising awareness and providing consistent opportunities for the public to discuss the issue, in order to resolve the unconstitutional status as soon as possible. The Constitutional Court can also help facilitate this process by providing clear legal reasoning in its decisions that sufficiently elicits timely cooperation of the legislature and guides necessary discussions on the issue.

Conditional constitutionality decisions are also intended to protect fundamental rights while upholding the public will reflected through the legislature. The full execution of a conditional constitutionality decision hinges on the cooperation of the ordinary court and risks failure of execution in case the ordinary courts disagree with the Constitutional Court's decision.

However, considering the structure of the Korean constitutional adjudication system which authorizes the Constitutional Court with a specialized central role, and that a conditional constitutionality decision may be comprehended as a partial exercise of its authority to strike down an entire provision, the Supreme Court's power to interpret rules and regulations when applying them to specific cases should not deviate from the Constitutional Court's explicit decisions. Potential conflicts may be prevented again by decisions with clear legal reasoning acceptable to all relevant institutions, as well as a mutual understanding between the Constitutional Court and the ordinary courts that constitutionality review of statutes is ultimately for the protection of fundamental rights and constitutional principles.

THE BINDING EFFECT OF THE JUDGMENTS OF THE TURKISH CONSTITUTIONAL COURT AND THEIR EXECUTION

Özcan Altay

CONSTITUTIONAL COURT OF THE REPUBLIC OF TURKEY

THE BINDING EFFECT OF THE JUDGMENTS OF THE TURKISH CONSTITUTIONAL COURT AND THEIR EXECUTION

*Özcan Altay**

I. THEORETICAL FRAMEWORK OF THE EXECUTION OF COURT JUDGEMENTS

Pursuant to the principle of the rule of law, all state organs are bound with the law that the state itself instituted. That indespensible principle in modern democracies can only be realized and maintained by judicial review of state actions. However, the judicial review becomes meaningful only if the court judgments are binding and operative for both parties of the trial. A sound legal system that guarantees the execution of court judgements empowers the notion of judicial independence. Therefore, the Turkish Constitution underlies the fact that the *"legislative and executive organs and the administration shall comply with court decisions"* in the article stipulating the independence of courts (Article 138 of the Constitution). The same article also asserts that the court decisions cannot be altered in any respect and their execution should not be delayed.

The Turkish legal system offers execution mechanisms and norms for all jurisdictions with certain differences. In the criminal justice, the judgments are referred to the offices of public prosecutors for their execution.

In the civil jurisdiction, enforcement offices manage the execution process and relevant objections are lodged to the courts of enforcement.

However, in administrative law and jurisdiction, there is no separate organ to deal with the enforcement of court decisions. The relevant

[Editor's note: Turkey is conducting the Center for Training and Human Resources Development (CTHRD) of the AACC.]

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law stipulates that the respondent administrative bodies shall enforce the decisions of administrative courts in 30 days upon the official notification. In case the judgments are not executed properly, the parties of the trial may sue the State for pecuniary and non-pecuniary damages.

The execution system of court judgments in general ought to ensure precise and expeditious implementation of judicial decisions. As it is reiterated in the judgments of the Constitutional Court of the Republic of Turkey (hereinafter: "Turkish Constitutional Court" – "TCC") and the European Court of Human Rights (hereinafter: "ECHR"), the execution of judicial decisions is an integral part of a fair judicial process. ECHR openly considers the right to a court as *"illusory, if a legal system allowed a final, binding judicial decision to remain inoperative to the detriment of one party."*[1] In a similar vein, TCC asserts that the prevention of the execution of court decisions by any means renders the right to access to a court ineffective. However, in its recent judgements TCC examines the interventions concerning the execution of court judgements under the title of "right to enforcement of a judgement".

II. THE EXECUTION OF THE JUDGEMENTS OF THE TCC

In accordance with the general principles described above, the Turkish legal system offers execution mechanisms in civil, criminal and administrative jurisdictions. Yet, the implementation of constitutional justice, differing from other jurisdictions, is based mainly on the constitutional guarantees such as the rule of law and the judicial independence rather than normative and technical execution tools. However, the Article 153 of the Constitution and the Article 66(1) of the Law on Establishment and Rules of Procedures of the Constitutional Court (hereinafter: "Law on TCC") offer that the judgments of the TCC "*shall be binding on the legislative, executive, and judicial organs, on the administrative authorities, and on natural persons and legal entities*". The so-called provisions are valid for all types of decisions of the TCC with no exception for the decisions taken within the procedure of individual application.

1 *Hornsby v. Greece*, no. 18357/91, 19/3/1997, § 40; *Kenan Yıldırım and Turan Yıldırım*, no. 2013/711, 3/4/2014, §§ 41-43.

As the adjudication of the TCC had been mostly limited to constitutionality review before the initiation of individual application process, a substantial issue of non-execution did not exist in the past.

The leading motive of the Turkish legislature was to set up an effective filtrage mechanism to diminish the number of applications lodged to the ECHR, while instituting the procedure of individual application. Therefore, from the very beginning the individual application is destined to be an effective remedy for meaningful protection of human rights and freedoms under the aegis of the TCC.

Apart from its mission of infiltration to prevent further applications to the ECHR, the individual application procedure should create a hub of precedents granted by the TCC to be followed by other state organs involved in the protection of human rights to inhibit repetitive violations and cases.

For those reasons, the binding force of TCC judgements should rest on a functional system of enforcement similar to other judicial decisions. As a former judge of German Federal Constitutional Court judge Siegfried Bross rightfully recalled[2], the execution of the judgments of constitutional courts is even more crucial owing to their noticeable effect on the public and society beyond the parties of the trial. Considering this impact of the procedure, the ECHR recognized the individual application to the TCC as an effective domestic remedy by its *Hasan Uzun v. Turkey* decision in 2013.

In order to continue this effectiveness, the individual application procedure entails due respect for the judgments of the TCC by the other constitutional organs. This respect can be ensured by sound legal reasoning laid down in the judgements and more importantly by strong cooperation and dialogue between state organs. In a constitutional democracy, trust and dialogue between legitimate state authorities empower the legitimacy of judgements of a constitutional court and as a result, this respectful stance safeguards the timely and adequate execution of judgements. In addition, "*[i]mplementation of decisions to great extent depends on a Court's image in society, its authority and respect*

2 "*Reflections on the Execution of Constitutional Court Decisions in a Democratic State under the Rule of Law on the Basis of the Constitutional Law Situation in the Federal Republic of Germany*", Venice Commission: Council of Europe, URL: https://www.venice.coe.int/webforms/documents/?pdf=CDL-JU(2009)001-e (visited on 18 August 2021).

demonstrated by other institutions and authorities. As more society knows about the Court, as more it follows the Court's decisions and will not tolerate the inactivity by the executive in the implementation of decisions."[3]

III. TURKISH EXPERIENCE AND THE NEW INSTITUTIONAL FOLLOW-UP SYSTEM OF EXECUTION

In the Turkish case, setting an institutional body within the Constitutional Court which is chiefly responsible for following up the execution of its own decisions aims to provide the effectiveness of the decisions on relevant public authorities of the TCC both in theory and practice. Secondly, it strives to preserve the individual application procedure as an effective domestic remedy and finally, to determine the structural problems concerning fundemantal rights and freedoms. It is expected that as a part of functioning of the individual application process, expeditious and precise enforcement of decisions would also decrease the number of applications to the ECHR, as it stregthens the effect of court's decisions over the other state organs.

TCC took steps in this regard and with an amendment in Regulation on the Duties, Working Procedures and Principles of the Units of the Constitutional Court by the approval of the Court President on 1 April 2020, a new unit entitled "Directorate of Judgments" was established based on a former decision of the Plenary of the Court. The formation of this department has a legal basis emanating from the Law on TCC. In the Article 23(3)(d) of the Law on TCC, "to follow-up the implementation of the decisions of the Court and to inform the General Assembly on this matter" is counted among the duties of the Secretariat General.

In Additional Article 1(1), the duty of the new unit is described as monitoring the execution of the TCC judgments and carrying out the necessary studies in order to ensure fulfilment of the duty of informing the General Assembly on this matter in a qualified, effective and efficient manner. The newly-established Directorate is responsible for monitoring both judgments of constitutionality review and individual application with separate sub-units for each task.

3 Gunars Kūtris (Former President of the Constitutional Court of Latvia, "*Authority of The Constıtutıonal Court As The Precondition Of Execution Of The Decisions*", URL: 2008-COE-Symposium on Execution of Cons.court Decisions.pdf (visited on 18 August 2021).

The monitoring procedure which has a basis in the Law on TCC is not a judicial means, rather it is an internal body whose main target is to provide information to the Plenary of the Court annualy through the Genel Secreteriat about the outcomes of the follow-up process concerning the execution of judgements. Besides, the department drafts action plans comprising general measures to resolve systematic and structural problems, prepares in-house education programmes and communicates with other public authorities to arrange meetings concerning the issues adressed in action plans.

The department obtains all the information as regards the execution of the judgments as a result of correspondence with the judicial authorities responsible for retrial or reinvestigation and administrative authorities which are responsible for remedying the violations, through UYAP and the DYS. In the light of the information obtained, as a result of the acts made and the decisions taken, it is evaluated whether the violation and its consequence have been remedied for each application.

In addition, the department began to monitor the execution of the judgments through an execution tab embedded in UYAP and to obtain the statistical data that will be subject to the reports through this tab by the end of 2021. With the activation of this system, it became possible to associate the retrial and reinvestigation files, so that the process can be monitored without the need for correspondence with the judicial authorities, and faster data flow is provided.

Ultimately, no judicial decision or administrative action is taken by the TCC for a judgment not executed during the monitoring procedure. In case the TCC judgments are not executedit's possible to make an individual application to the TCC again. The Court has found violations in some of the cases in which the leading complaint was the non-execution of former TCC judgments.

IV. MAIN STATISTICAL OUTPUTS AND THEIR BRIEF ASSESSMENT

As stated above, considering that retrials and investigations can only be completed within a certain period of time, it has been evaluated that reliable statistics on whether the judgments of the TCC have been executed can only be obtained after one year behind, and therefore

the data provided below were limited to 2013-2019. After examining the decisions and administrative actions taken and sent to us by responsible organs, we classify the cases in 3 follow-up categories:

1) Needs to be monitored (includes pending retrials and re-investigations as well as rejected retrials and investigations according to the general procedural laws of the concerned jurisdiction. Also, the cases in which final decisions are not complied with the Constitutional Court decisions fall into this category)

2) Finalization needs to be monitored (retrial processed in line with the TCC decision but waiting a final decision)

3) No need to monitor (legal remedies are fully ensured and the decisions are finalized)

All the data are gathered from the responsible authorities (namely the courts of instance and other administrative organ) through a digital system called UYAP that is used in the admistration of justice nationwide. We regularly ask for the outcomes of the retrials, reinvestigations and other indications we made. The replies are assessed by the Director in collaboration with rapporteaur judges within the Court and the General Secretary.

As regards retrials, among 1214 decisions of retrial rendered between 2013 and 2019, 52.97% of the judgments seem fully executed, in 25.62% of them finalization needs to be monitored and 21.41% of them are still to be executed by the relevant authorities. Among the decisions, those with the highest ratio of non-execution are respectively prohibition of torture and ill treatment (48%), right to legal assistance (47.06%), right to life (42.11%), right to property (36.91%), right to have adequate time and facilities for the preparation of defence (33.33%), right to be tried within a reasonable time (33.33%) and right to liberty and security (30%).

In total, 21.42% (260 violations) of the judgments resulted with a retrial decision still await to be executed. However, in 233 decisions (89.62%), retrial started in accordance with the procedure but is currently pending. On the other hand, in 22 decisions, retrial requests by the applicants were denied or retrials were not initiated on the grounds that the applicants did not have a request. In only five cases retrials

were duly finalized, yet the violations and their consequences were not remedied. One of the main reasons for this fact is the conceptual confusion of the retrial. Unlike other codes of procedure, the Law on TCC does not give the courts of instance any discretionary power in this matter which means that the retrials are mandatory in case of the TCC judgments. Pursuant to the information provided, it is seen that the retrial process takes an average of 432 days. Although the courts of first instance remedied the violations in line with the judgments of the TCC, it is observed that persistently appealing of judgments of the former by the prosecution offices and the relevant administrations extended the retrial processes.

The situation appears to be much worse for re-investigations. Among 77 cases, 48 (62.34%) of them are still to be executed. It appears to be largely stemmed from the prosecution offices' failure to conclude the reinvestigations within a reasonable time. Therefore, it is observed that the prosecution offices do not act in a reasonable time to correct the deficiencies indicated in the violation decisions, especially in the reinvestigations made on the violation of the right to life, torture and ill-treatment cases.

As to decisions of payment of a compensation to the applicants, a vast majority of the violations (2081 in 2199, 94.64%) have been remedied.

Another heading in the report of the TCC is the execution of the judgments regarding the non-execution of the judgments rendered by the courts of instance. These cases are related with the right to access to a court and the right to property and the ratio of compliance with those judgments is 53% (26 in 49). Even though the payment of non-pecuniary damages and trial expenses were paid to the applicants, the administrative bodies refrain from implementing the remaining part of the judgments, namely the original judgment of the courts of instance that was subject to an individual application.

In conclusion, from the figures provided by the TCC within the scope of the monitoring procedure established in 2019 as described below, the details of which are touched upon above and that basically cover the judgments with a violation ruled between 2013 and 2019, it has been revealed that the total number of the violations which were not remedied by the public authorities is 33 out of 1346.

CONCLUSION

As we have portrayed above, the real issue on the enforcement of TCC judgments is the decisions taken within the individual application process.

The individual application mechanism is relatively a new phenomenon in the judicial system of Turkey. Thus, it is understandable to some extent that relevant public authorities and the courts of instance have some concerns and uncertainties in applying the decisions.

However, it must be ensured that the misinterpretations of courts and administrative bodies should not become prevalent and the effectiveness of the individual application must be preserved.

According to our most recent annual report, the typical problems we examined in our monitoring activities can be summarized as such:

A. Uncertainties over the legal effect and the enforcement procedure of individual application judgments

Particularly, some courts of instance tend to reduce the effect of a judgment to mere declaration of a violation and stay inhesitant to put an end or repair the violation. In fact, the nature of the individual application as an effective remedy requires a maximum possible reparation of the violation which must be ensured by the state authorities (including the courts). The so-called *restitution in integrum* principle dictates an obligation to restore the situation which existed before the violation to the respondent public authorities. In this respect, the Law on TCC stipulates that: *"[i]n cases where a decision of violation has been made, the Court shall determine on what is required to lift the violation and the consequences thereof. If the determined violation arises out of a court decision, the file shall be sent to the relevant court for holding the retrial in order for the violation and the consequences thereof to be removed. […] "*

In line with these provisions, the sections and the Plenary of the Constitutional Court have a legal ground to indicate the individual measures to restore the situation before the violation exists, as well as the general measures to prevent similar violations in the future.

Apart from these legal provisions, the TCC has set certain standards concerning the procedure of retrials and reinvestigations that have

to be held in line with the decisions of violation. The structure of a standard individual application decision has a separate section (Section C.) which is solely dedicated to the enforcement of the judgment. In this section, the Court desribes how the violation concerned can be remedied. In particular cases, the Court may find it useful or even necessary to indicate to the responsible courts and administrations the type of specific measures that might or should be taken to put an end to the violation, as it did in the publicly-known application of Kadri Enis Berberoğlu[4], a Member of Parliament.

The TCC in its decisions regarding enforcement clearly states that the procedure for retrials and reinvestigations based on the judgements of the TCC is distinct from the retrial or reinvestigation procedures foreseen by the procedural norms enacted for criminal, civil or administrative jurisdictions. Accordingly, unlike the general procedures of retrial in other jurisdictions, the court of instances have no choice but to open new proceedings upon receiving the notification from the TCC. In this respect, the applicants are not obliged to apply to the courts for retrial, the authorized courts shall reopen the proceedings *ex officio*.

B. Lengthy proceedings

The second biggest issue is the considerable amount of pending retrials and reinvestigations. I regret to conclude that the issue of excessive lengthy proceedings is not only a problem before the individual application process but also a problem that continues after the decisions of violation.

Therefore, I firmly believe that the so-called target time application (which offers a certain time period for specific cases) monitored by the Ministry of Justice should extend to the retrial proceedings which are renewed after the decisions of the Constitutional Court.

C. Recommendations

- The existing legal framework of enforcement procedures and the duties and responsibilities of the parties might be better regulated and clarified.

4 *Kadri Enis Berberoğlu (3)* [Plennary], no. 2020/32949, 21/1/2021.

- The diaologue between the TCC and other stakeholders (the Court of Appeals the Council of State, the lower courts and the other state authorities) should increase through thematic round-table meetings and seminars. Also, in-house education programmes (held within the TCC) given to the judges and prosecutors must be continued with regular intervals.
- The education programme for candidate judges and prosecutors in the Justice Academy of Turkey should involve the procedures for the reparation of human rights violations.
- The links with the Turkish Parliament especially with the Committee on the Inquiry of Human Rights must be strengthened and similar monitoring agencies might be instituted within the Ministry of Justice or the Grand National Assembly of Turkey.

THE EXECUTION OF THE DECISIONS OF THE CONSTITUTIONAL COURT OF ALBANIA

Ela Elezi

CONSTITUTIONAL COURT OF THE REPUBLIC OF ALBANIA

THE EXECUTION OF THE DECISIONS OF THE CONSTITUTIONAL COURT OF ALBANIA

*Ela Elezi**

INTRODUCTION

The Constitutional Court of the Republic of Albania was established in 1992. The new Constitution of the Republic of Albania took effect on 28 November 1998 and on 15 July 1998, the Parliament of Albania passed Law no. 8373, "On the Organisation and Function of the Constitutional Court of the Republic of Albania," which provided the legal basis for the functioning of the Constitutional Court. The legal base sanctioned the important position of the Constitutional Court. In 2016, Albania underwent a Justice Reform that amended the Constitution and different organic laws, among which the Law on the Constitutional Court. Article 124 of the Constitution provides that: "*The Constitutional Court guarantees the observance of the Constitution and makes its final interpretation*."

This special position points out the specific character of its decision; they are mandatory for execution. The execution of Constitutional Court decisions is secured by the Council of Ministers through the respective organs of the state administration. The Constitutional Court, depending on the type of decision and where appropriate, may specify in the ordering provision the body charged with the execution of the decision, as well as the manner of execution, setting concrete deadlines, the relevant manner and procedure of execution. Failure or obstruction of execution of the Constitutional Court decision shall be punishable in accordance with the relevant provisions of the Criminal Code. (Article 81 of the Law)

Before the justice reform in 2016, the President of the Court had the right to give a fine to organs which did not execute the decisions of the

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Court. This provision was never implemented even in cases where the decision of the Court was not executed.

In recent years, the decisions of the Court have been executed, contrary to the beginning where in different occasions the state organs objected to these decisions. There has been no resistance regarding the execution of decisions that repeal laws or other normative acts. The decisions of the Court enter into force on the day of their publication in the Official Gazette, unless otherwise provided by the law. Where the decision brings about consequences for the constitutional rights of the individual, the Constitutional Court may decide for it to enter into effect on the day of its announcement. In this case, the decision shall be associated with a summarized reasoning, while the fully reasoned decision shall be published within 30 days. The Constitutional Court may make an order that its decision, by which it has examined the act, yields its effects on another date.

A. THE EXECUTION OF THE DECISIONS BY THE PARLIAMENT

Constitutional guarantees of separation of powers and the independence of the judiciary allow judges to protect the rights and freedoms of the individual provided by law. However, these constitutional guarantees and legal protection lose their relevance if court decisions are not enforced. Over time, ineffective enforcement of decisions can undermine the credibility of the legal system and the rule of law. In several occasions, there have been cases where the decision of the Constitutional Court has not been implemented; like in the case of non-fulfilment of the legal gap by the Parliament after the abrogation as unconstitutional by the Constitutional Court of normative acts.

- In an early decision[1], the Court decided on the unconstitutionality of a law that amended the Criminal Code, which provided fixed sanctions because it contradicted a number of principles and it would create the possibility of a significant disproportion between the sentence and the dangerousness of the offense and the person, thus violating the constitutional guarantee of a fair trial. At the end of the decision, the Court stated that it was up to the Parliament to make the legal regulation for the sanctions of these new norms in order to adapt

1 Decision no.13 dated 29.05.1997.

them to the constitutional requirements. After the entry into force of the decision of the Constitutional Court, the Assembly approved a new law in order to comply with this decision. However, Articles 109 paragraph 3, 109 / b paragraph 3, 221 paragraph 2 and article 334 of the Criminal Code still provide for a fixed sentence (life imprisonment).

- In another decision,[2] the Constitutional Court repealed the fifth and sixth paragraphs of Article 278 of the Criminal Code, which provided as a criminal offense the possession of weapons, bombs or mines, or explosives in vehicles or any other motor vehicle, in public places, based on the disproportionality of this offence. The article distinguished between the possession of weapons in dwellings and public places. The repeal created a legal gap and it was expected that the parliament would adopt a new law, which would again provide as a criminal offense the possession of weapons in public, but with a proportionate sentence that would be consistent with the decision of the Constitutional Court. Despite the fact that the decision of the Constitutional Court was published in the Official Gazette on 29.02.2016, the Parliament managed to adopt the new law only on 25.7.2016, thus leaving a period of almost 5 months, during which the ordinary courts raised dilemmas over how to implement the provision.[3]

- In 2010,[4] the Constitutional Court considered incompatible with the Constitution the phrase "*[...] whose decision is final*", in Article 202 of "Road Code of R.A". The Constitutional Court has stated that: *"[...]the Court considers that the immediate repeal of the part of the provision of Article 202 of the Road Code of the Republic of Albania "[...] whose decision is final" would create a legal gap and would bring effects not only to the additional administrative measure of confiscation, but also to other administrative measures provided by the Road Code, the inadmissibility of the appeal of which may not be in conflict with the Constitution. On the other hand, this legal gap can have an impact on the constitutional rights and freedoms of citizens. Confirming its previous jurisprudence that the task of this Court is not the role of a positive legislator, but to check whether the solution given by the legislator is in accordance with the provisions of the Constitution*

2 Decision no. 9, dated 26.02.2016.

3 URL:https://www.academia.edu/24004435/Arm%C3%ABmbajtja_pa_leje_pas_shfuqizimit_nga_Gjykata_Kushtetuese.

4 Decision no. 12, dated 14.04.2010.

and, in order for the legislature to have sufficient time to make the necessary legal adjustments related to the right to appeal for all administrative measures provided in Article 202 of the Road Code, the Constitutional Court, pursuant to Article 132 of the Constitution decided that this decision enter into force six months after its publication in the Official Gazette."

The Parliament enacted a new law on 5.12.2011 amending the Road Code. In this law, Article 202 was not amended or added, nor the other provisions of the Code which provide for the right of appeal under Article 202. Thus, we can say the decision of the Court was not executed until another law was enacted, specifically the law no. 49/2012 "On the Organization and Functioning of Administrative Courts and Adjudication of Administrative Disputes". According to this law (Article 7), the administrative courts are competent for: *"a) Disputes arising from individual administrative acts, normative bylaws and public administrative contracts, issued during the exercise of administrative activity by the public body; b) disputes arising due to illegal interference or inaction of a public body; […]"*.

This law provided that the administrative violations foreseen by the Road Code are reviewed by the administrative court.

- With its decision no. 1 dated 16.01.2017, the Constitutional Court abrogated Article 6, points 3 and 5, of law no. 133/2015 "On the Treatment of Property and the Completion of the Process of Property Compensation". The Council of Ministers approved a decision that provided for the rules and procedures for the evaluation and distribution of the financial and physical fund for the compensation of properties, which has been challenged in the Constitutional Court.

With decision no. 4 dated 15.02.2021, the Court noted that after its decision no. 1/2017 there was no legislative initiative to adopt new provisions in law no. 133/2015 and according to the interested subjects, this was not considered necessary as the repeal of points 3 and 5 of article 6 did not bring a legal gap or ambiguity in the implementation of the law. According to them, it was deemed necessary to intervene with a decision of the Council of Ministers in order to further clarify the procedure of property assessment and compensation, as well as to unify the decision-making procedure for claims under review with those handled by the ATP. The court stated that such adjustments, in

the sense of Articles 41 and 17 of the Constitution, are made only by law and not by other normative acts (decisions of CM).

B. THE EXECUTION OF DECISIONS REGARDING THE DISMISSAL OF HIGH FUNCTIONARIES

There have been a few decisions of the Constitutional Court regarding the dismissal of high functionaries from the Parliament and the Council of Ministers.

- The Constitutional Court was petitioned by the General Prosecutor, who claimed that the decision of the Assembly and the decree of the President of the Republic for his dismissal from office were based on unconstitutional grounds. The appellant claimed the decision of the Assembly and the decree of the President of the Republic had been adopted as a consequence of an unfair court trial.[5] The Court underlined that Parliament was not hindered from adopting constitutional or legal rules establishing a procedure which respects the constitutional principle of due process for the dismissal from office of the General Prosecutor. Even the President of the Republic concurred with these violations because he signed the decree of the decision of dismissal. The Constitutional Court ascertained the alleged unconstitutionality of the discharging procedures, and asked the Parliament to re-examine the case in conformity with the constitutional principles of due process of law.

After this decision, the Head of Assembly resigned from office because he was against this decision of the Court.

The non-execution of this decision created the general opinion that there were political reasons that did not allow the execution of this decision to reopen the concrete procedure of hearing the General Prosecutor due to the irregular legal process implemented by the Parliament during the procedure of his dismissal. Moreover, after the issuance of the decision of the Constitutional Court, instead of implementing the above-mentioned decision, the Parliament proceeded with the appointment of the new General Prosecutor.

5 Decision no. 76, dated 25.04.2002.

- In another case,[6] the Mayor of a city petitioned the Constitutional Court because of his dismissal from duty by the Council of Ministers.

The Constitutional Court stated that it was not established that the claimed violations were committed by the applicant nor with his knowledge, therefore it cannot be accepted that he has committed such violations to be considered serious in the meaning of Article 115 of the Constitution. The Court decided to the abrogate the decision on the dismissal of the Mayor, deeming it as incompatible with the Constitution. Even this decision of the Constitutional Court is not considered to have been executed as this decision did not produce consequences for the Mayor, because he did not return to work.

C. THE EXECUTION OF THE DECISIONS BY THE COURTS

The execution of Constitutional Court decisions related to the abrogation of court decisions challenged by individuals for violation of their constitutional rights to a due process of law has created debate in the past.

- In an early case[7],the Constitutional Court decided to repeal as unconstitutional of Decision no.386, dated 29.07.1999 of the Joint Colleges of the High Court and sent the case for review to the Joint Colleges of the High Court. The Joint Colleges of the High Court, instead of changing the case law on the concrete problem, with decision no. 371, dated 21.10.2000, expressed the fact that they were not obliged to implement the decision of the Constitutional Court because the latter had acted outside its jurisdiction.

Subsequently, after the repeated request, the Constitutional Court with another decision repealed again the decision no. 371, dated 4.10.2000 of the Joint Colleges of the High Court.

- The Constitutional Court decided in 2010 to declare the incompetence and direct the applicant to the High Court, as the only institution responsible and competent to fulfil the obligations arising from a decision of the European Court of Human Rights (hereinafter: "the ECHR"), namely the review of the previous final court decisions against the applicant. The Penal College of the High Court, in the

6 Decision no 37, dated 29.12.2005.
7 Decision no. 17, dated 17.04.2000

Counselling College decided to reject the request of the applicant on the grounds that the referral does not contain the conditions provided by Article 450 of Code of Criminal Procedure, which sets as a precondition for the review of a criminal decision, the difference between the facts on which the decision is based, the appellant and the facts proved in another court decision.

The Constitutional Court stated that the rejection of the request for review of decisions by the Criminal College, in the conditions when a decision of the Constitutional Court has designated the High Court as the appropriate body for the correction of the consequences that have come from the abrogation of a decision of a lower court, also raises problems related to the violation of the binding force of the decisions of the Court. In its jurisprudence, this Court has assessed that the mandatory implementation of its decisions is guaranteed by the Constitution, which in its Articles 132 and 145 explicitly sanctions this constitutional concept. The decisions of the Court have general binding force and are final. They constitute constitutional jurisprudence and, consequently, have the effects of the force of law.

- The Constitutional Court had repealed a decision of the High Court. After re-examining the case, the Hight Court decided to reject again the complaint in the selective chamber and not the plenary session, without taking account of the reasoning of the decision of the Constitutional Court.

The Constitutional Court concluded that the High Court had not sufficiently fulfilled the obligations deriving from decision no. 42 dated 07.07.2014 to conduct a due process during the retrial of the case in the same court. In these circumstances, taking into account the binding effect of the decisions of the Constitutional Court, the Court considered that the claim of the applicant for violation of the right of access is grounded and that the decision of the Civil College of the High Court should be repealed. [8]

8 Decision no 44 dated 29.06.2015

D. ECHR'S CASE-LAW

The European Court of Human Rights in its case law, has addressed the position of the Albanian Constitutional Court, providing interpretation for the constitutional review and decision-making process of this court. In particular, the aspect of execution of the decisions of the Constitutional Court has been treated.

Regarding requests for non-adjudication within a reasonable time, the Constitutional Court has taken a few decisions even when the process in ordinary courts was unfinished, declaring the unreasonable length of the proceedings, but without giving the applicant monetary compensation for the delay or without ordering the courts to take action to expedite the trial. These decisions of the Court were considered ineffective by the ECHR.

In a decision[9], the latter stated that: "*80. The Court further observes that, even assuming that the Constitutional Court could in theory offer adequate redress in respect of the excessive length claims, the Government failed to produce any case in which the Constitutional Court ruled on a complaint about the length of proceedings. While it is not for the Court to give a ruling on an issue of domestic law that is as yet unsettled (see, mutatis mutandis, De Jong, Baljet and Van den Brink v. the Netherlands, judgment of 22 May 1984, Series A no. 77, p. 19, § 39, and Horvat v. Croatia, no. 51585/99, § 44, ECHR 2001-VIII), the absence of any case-law does indicate the uncertainty of this remedy in practice*."

In the case *Gjyli v. Albania*,[10] ECHR repeated the same statement: "*58. The Court notes that the Constitutional Court judgments (see paragraphs 21–27 above) recognised that there had been a violation of the appellants' right of access to court on account of the non-enforcement of domestic courts' judgments. However, their findings were declaratory so that the Constitutional Court did not offer any adequate redress. In particular, it did not make any awards of pecuniary and/or non-pecuniary damage, nor could it offer a clear perspective to prevent the alleged violation or its continuation*.

9 Case *Gjonboçari v. Albania*, dated 31 March 2008.
10 Case *Gjyli v. Albania*, 9 September 2009.

Even in its decision *Memishaj v. Albania*[11], ECHR recalled that there was no effective domestic remedy regarding the delayed enforcement or the non-enforcement of a final court judgment. In its judgments in the cases of *Gjyli* (cited above, §§ 55-60) and *Puto and Others v. Albania* (no. 609/07, §§ 33-35, 20 July 2010), the Court held that the Constitutional Court's declaratory findings about a breach of an appellant's right of access to court on account of the non-enforcement of a final court judgment did not offer any adequate redress. In particular, the Constitutional Court was not in a position to make any awards of pecuniary and/or non-pecuniary damage, nor could it offer a clear perspective to prevent the alleged violation or its continuation (*see* also paragraphs 9 and 28 above). Consequently, there has been a breach of Article 13 in conjunction with Article 6 § 1 of the Convention.

In the framework of the justice reform approved in 2016 and onwards, some important changes have been made in the Civil Procedure Code, regarding the delay of procedures in ordinary courts. Specifically, Articles 399/1 - 399/11 provide for the review of the request for ascertainment of the length of procedure together with the request for monetary compensation and the acceleration of court proceedings. These requests are reviewed by the higher court from where the case is for trial. In this case, the court reviewing the request for acceleration of the process and compensation decides on each of these requests. Based on this specific legal regulation, the Constitutional Court will only review cases where according to the new article 71/ç of law no. 8577/2000 for delays in the constitutional process. The provision of the possibility for monetary compensation of the applicant in cases when an unjustified exceeding of the deadline of more than one year is ascertained makes this tool effective, in accordance with the jurisprudence of the ECHR.

CONCLUSION

After almost 30 years of the existence of the Constitutional Court of Albania, we can say that we have an institution respected by all state organs. The Court has emphasized that the mandatory implementation of its decisions is guaranteed by the Constitution. The indisputable influence of the decisions of the Constitutional Court is such that

11 Case *Memishaj v. Albania*, 25 March 2014.

it imposes on all state bodies the binding power of reasoning of its decision. The reasoning used by the Constitutional Court in its decisions has the force of law, which stems from the authority of this body to have the final say in matters on which others have already spoken. Any contrary position creates a dangerous precedent in institutional relations. In the constitutional jurisprudence, it is emphasized that the Constitutional Court itself cannot make an exception from the standard of the obligation to implement the constitutional decision-making.

SOME PROBLEMS OF THE EXECUTION OF THE CONSTITUTIONAL COURT DECISIONS OF THE REPUBLIC OF AZERBAIJAN

Orkhan Rzayev

CONSTITUTIONAL COURT OF THE REPUBLIC OF AZERBAIJAN

SOME PROBLEMS OF THE EXECUTION OF THE CONSTITUTIONAL COURT DECISIONS OF THE REPUBLIC OF AZERBAIJAN

Orkhan Rzayev[*]

ABSTRACT

The issues on the validity of the Constitutional Court acts are paid attention in the article, the special legal status of this body in the system of state bodies and its position within the judiciary are noted. Based on the analysis of the legislation of the Republic, actual material, literature and sources, the expediency of adopting new legal norms or amending the existing norms taking into consideration the recommendations of the Constitutional Court of the Republic of Azerbaijan are substantiated in the article. The need to improve the practice of making decisions of the Constitutional Court are emphasized taking into consideration the international agreements in the field of the protection of human rights and freedoms, as well as the development trends in law, including the case law. The adoption of decisions of the Constitutional Court as a source of law, the precedent or prejudicial significance of the decisions are also issues directly connected with the execution problems of the decisions of the Constitutional Court.

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The validity of acts of the Constitutional Court is determined by the legislation, the special legal status of this body and its position in the system of both state bodies and the judiciary. The main feature of the decisions of the Constitutional Court is its resolution and obligation. According to Part IX of Article 130 of the Constitution of the Republic of Azerbaijan, the decisions of the Constitutional Court are obligatory in the territory of the Republic of Azerbaijan. The feature of compulsion means first of all, an act considered unconstitutional by a relevant decision cannot already be executed, applied or realized in any way, and cannot be the basis for the adoption of any other normative legal act in the future. At the same time, the decisions of the Constitutional Court create completely different legal consequences for different subjects of the constitutional-legal relations. As a rule, there is no need for anybody to adopt an additional act to repeal a normative act declared unconstitutional by the Constitutional Court, and the act of the Constitutional Court enters into force directly. It embodies the high legal status of the Constitutional Court. The resolute feature of the acts of the Constitutional Court is related to their execution.

Providing the execution of the Constitutional Court decisions and their implementation remains one of the most serious problems in a number of countries, especially in the new democracies. Thus, there is no body that monitors the implementation of the Constitutional Court decisions. The Constitutional Court itself does not have the power to actively monitor and interfere in the implementation of its decisions. One of the control mechanisms of the Constitutional Court over its decisions is to re-dispute the relevant issue in the order of constitutional proceedings. This mechanism may be more characteristic for the institution of individual complaints. Thus, if an act considered incompatible with the Constitution and (or) laws and repealed by this body, is appealed in one form or another, or the violation of the law defined by judicial acts is not remedied, the applicant may re-dispute the constitutionality of the act through all the procedures required by law.

It should be noted that such situations have already been in the experience of the Constitutional Court of the Republic of Azerbaijan. Thus, the judicial acts adopted on the claim of the applicant S. Mammadova were considered invalid by the decision of the Plenum of

the Constitutional Court dated October 27, 2004 due to non-compliance with the Constitution and laws of the Republic of Azerbaijan and it was decided to reconsider the case in accordance with the procedure established by the civil procedural legislation of the Republic of Azerbaijan. In her repeated appeal to the Constitutional Court, S. Mammadova stated that Articles 431-4.2.1 of the Civil Procedural Code, which should not have been applied in the decision of the Plenum of the Supreme Court dated March 3, 2005, had been applied, but Articles 13.7, 431-4.2.2 and 431-3.3, 431-4.1 of this Code had not been applied, however, she stated that her constitutional rights had been violated indicating that the requirements of Part IX of Article 130 of the Constitution had not been complied with and asked to check the compliance of the decision with the Constitution and laws. In connection with the complaint, the Plenum of the Constitutional Court of the Republic of Azerbaijan noted that according to the Part IX of Article 130 of the Constitution, the decision of the Constitutional Court of the Republic of Azerbaijan is obligatory in the territory of the Republic of Azerbaijan. According to Article 63.4 of the Law of the Republic of Azerbaijan "On the Constitutional Court", decisions adopted by the Plenum of the Constitutional Court are resolute, they could not be revoked, changed or officially interpreted by anybody or person. According to Article 66.2 of this Law, decisions of the Constitutional Court must be unconditionally executed after their entry into force, and officials who do not follow the decisions of the Constitutional Court shall be liable in accordance with the legislation of the Republic of Azerbaijan.

The Constitution and other legislative acts defining the powers and rules of procedure of the Constitutional Court do not take into consideration the existence of anybody, including the judiciary, which has the authority to execute the decisions of this court and give them a legal assessment. The Plenum of the Supreme Court does not consider the case on the main points in the proceedings on new cases of violation of rights and freedoms, it simply acts as a body that provides a transitional stage between the Constitutional Court and the instance in which the proceedings on the case shall be resumed. According to the Constitutional Court, the Plenum of the Supreme Court violated the requirements of Part IX of Article 130 of the Constitution of the

Republic of Azerbaijan and Article 431.4.2 of the Civil Procedural Code by making a decision inconsistent with the decision of the Plenum of the Constitutional Court on the disputed case, dated October 27, 2004. In view of the above, the Plenum of the Constitutional Court considered invalid the decision of the Plenum of the Supreme Court adopted on June 28, 2005 in the procedure of proceedings on new cases of violation of rights and freedoms due to its incompatibility with the Constitution and laws. The main difficulty of this mechanism is connected with the requirement for the applicant whose rights have been violated as a result of non-execution of the decision to re-transfer the means provided by the legislation. Another problem arises when an act considered unconstitutional is re-adopted, any request, appeal or complaint is not submitted about that act by any subject. It should be considered that the Constitutional Court does not have the right to initiate the verification of the constitutionality of any act. This, in the end, may lead to the continuation in one form or another of an act that has already been assessed as unconstitutional by the Constitutional Court.

According to Article 66.2 of the Law of the Republic of Azerbaijan "On the Constitutional Court", non-execution of decisions of the Constitutional Court creates liability provided by the legislation. If we consider that these decisions are usually addressed to the highest authorities, it may be observed it is difficult to bring such bodies to justice. Although liability for non-execution of decisions of the Constitutional Court is intended, the mechanism of its application is not properly regulated by the legislation. In this regard, Article 66.2 of the Law on the Constitutional Court states that the decisions of the Constitutional Court must be executed unconditionally after their entry into force.

The mechanism of execution of the Constitutional Court decisions can be activated as a result of joint efforts of many state bodies. These bodies must implement the regulation arising from the decision of the Constitutional Court. As a rule, such regulation is carried out in the form of the adoption of a new act, additions or amendments to the existing acts, or the annulment of judicial acts and the reconsideration of relevant cases in accordance with the legal positions of the Constitutional Court. Normative bodies shall also be guided by the

legal positions in the relevant decision of the Constitutional Court in their normative activity when adopting or amending any act related to the execution of the decision of the Constitutional Court.

The activity of the Constitutional Court also makes it necessary to refer to certain procedures, which, if necessary, cover the measures that need to be taken later. The recommendations addressed to the competent state bodies on the need to implement legislative regulations in order to ensure more complete constitutional norms, can be cited as an example. Thus, with strict adherence to the principle of separation of powers, sometimes the law-making powers of the normative bodies are limited to certain limits, and sometimes by defining the contours of the future normative, the competent authorities are encouraged to take specific law-making activities. Of course, the efficiency of the procedures and their desired effectiveness significantly depend on the active support of other branches of the government. Of course, the failure of the adequate response to the legal positions of the Constitutional Court, as well as the recommendations arising from these positions by the competent authorities, allows problems to remain in the regulation of legal relations that form the object of constitutional proceedings. On the other hand, it is known that the recommendations should be executed within the legal positions in the decision of the Constitutional Court. The implementation of legal regulation that contradicts or goes beyond legal positions should be assessed as improper execution of recommendations. In any case, in our opinion, it is very important to reflect this issue in the legislation in order to ensure the proper and timely execution of the recommendations of the Constitutional Court. Based on all these things, we consider it expedient to consider the recommendations aimed at eliminating the gaps in the legal regulation of the legislation regulating the activity of the Constitutional Court as a mandatory basis for the adoption of a new act or necessary amendments and (or) additions to the existing act. In this case, the Constitution of the Republic of Azerbaijan must be applied directly by law enforcement agencies before the adoption of new legal regulations.

Also, the relevant department in the Office of the Constitutional Court monitors the execution of decisions, the implementation of recommendations made to the relevant authorities and makes generalizations.

Judicial authorities have a special place in providing the obligatory legal force and effective execution of decisions of the Constitutional Court. From the point of view of their constitutional-legal purpose, courts should take into consideration the positions reflected in the decisions of the Constitutional Court and try to stabilize the legal system and increase its efficiency. In particular, this issue is more relevant as the main part of the decisions of the Constitutional Court is related to the verification of the constitutionality of decisions made at the courts of general jurisdiction. This issue is reflected in Article 66.4 of the Law on "the Constitutional Court". In accordance with this norm, judicial acts considered inconsistent with the Constitution and laws by the decision of the Constitutional Court shall not be executed and the relevant court cases shall be reconsidered in accordance with the procedure established by the procedural legislation of the Azerbaijan Republic.

In conclusion, I would like to note that the execution of the decisions of the constitutional review bodies plays an important role for each state. Non-execution of decisions of constitutional courts may put under question the effectiveness of the entire justice system. Therefore, the legal approach of the institution that ensures the supremacy of the constitution, along with determining the status of individual citizens, is undoubtedly a decisive factor for the legal development of the whole society and, ultimately, to make the country a full member of the union of civilized and democratic states.

EXECUTION OF JUDGMENT ON CONSTITUTIONAL RIGHTS AND JUSTICE IN BANGLADESH: A BRIEF ANALYSIS

Md. Rabiul Alam
Al Asad Md. Mahmudul Islam

SUPREME COURT OF BANGLADESH

EXECUTION OF JUDGMENT ON CONSTITUTIONAL RIGHTS AND JUSTICE IN BANGLADESH: A BRIEF ANALYSIS

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ABSTRACT

The Constitution of the People's Republic of Bangladesh is the supreme law of the land and it guarantees fundamental human rights, justice and equality for all. It outlines the basic structure of the state and the system of governance to maintain the principles of democracy, justice and the rule of law in the society. Judiciary, as one of the three organs of the state, is authorized to safeguard the constitutional rights and vanguard pillars of constitutional goals. The Supreme Court of Bangladesh with its two chambers, namely, the High Court Division and the Appellate Division, is the higher echelon of the Justice System that has power to enforce fundamental rights of the citizens and to interpret the constitution and the laws made by the Parliament. It does not only function as the higher judiciary to exercise its original, appellate and supervisory jurisdiction over the Subordinate judiciary to dispense justice as per law, but also performs the function of the Constitutional Court to enforce constitutional rights and justice. All executive and judicial authorities are made duty bound to act in aid with the Supreme Court. Nonetheless, with the emergence of modern complexities of governments, political system, operation of multi-national business enterprises, corporations and development projects, the Judiciary often faces difficulties and intricacies in executing its judgments on constitutional justice. Therefore, this article attempts to briefly analyze the constitutional rights and their enforcement mechanism under the Constitution of Bangladesh and critically appraise the execution process of few notable judgments of the Supreme Court to identify the challenge in execution of its judgments on constitutional justice.

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INTRODUCTION

Bangladesh emerged as a nation state in 1971 through a historic struggle for national liberation that culminated in a bloody war of independence under the leadership of Bangabandhu Sheikh Mujibur Rahman, the father of the nation. More than three million people sacrificed their lives and one hundred and fifty thousand women lost their chastity during the war of independence in defending their right to self-determination against the Pakistani Army. As a matter of fact, the Constitution of Bangladesh (hereinafter: "the Constitution"), which came into being on 16 December, 1972, rightly embodies the national uprising against tyranny, autocracy and exploitation to manifest the national commitment against subordination of human life, liberty, freedom and justice. The Constitution also declares itself as the expression of the will of the people and affirms that the people are supreme and sovereign in governing themselves through a democratic process and means. It envisions Bangladesh as a modern democracy that strives to establish the rule of law, fundamental human rights and freedoms, equality and justice for all citizens.[1]1

The spirit and essence of the Constitution is more precisely articulated in Article 7 of the Constitution, which is regarded as the pole star of the Constitution. It says-

(1) All powers in the Republic belong to the people, and their exercise on behalf of the people shall be effective only under, and by the authority of, this Constitution.

(2) This Constitution is, as the solemn expression of the will of the people, the supreme law of the Republic, and if any other law is inconsistent with this constitution that other law shall, to the extent of the inconsistency, be void.

Therefore, in the context of separation of state power, no particular organ or functionaries of the State is supreme but the Constitution. However, the Constitution places Judiciary as its guardian to safeguard the supremacy of the Constitution by handing down the authority to enforce the fundamental rights guaranteed in Part III of the Constitution and to interpret the constitution itself while reviewing the

1 Preamble of the Constitution of the People's Republic of Bangladesh.

executive actions and legislative enactments including constitutional amendments under Article 102 of the Constitution.[2]

In this article, an attempt has been made to briefly analyze the matters of constitutional rights and justice as envisaged in the Constitution of Bangladesh and their enforcement mechanism by the Supreme Court of Bangladesh, which serves not only as the highest forum for seeking justice and redressing the breach of any constitutional and legal rights, but also as the Constitutional Court to determine all the matters involving constitutional importance. Therefore, Part I of this article briefly discusses matters of constitutional rights and justice under the constitutional framework of Bangladesh, Part II focuses on the enforcement mechanism of the constitutional rights and justice, Part III emphasizes on the achievement of the Supreme Court of Bangladesh in light of few notable judgments on constitutional rights and justice, Part IV analyses the challenges of execution of judgments on constitutional rights and justice. The article is concluded with few suggestions to enhance the execution process through undertaking necessary judicial, administrative and legislative initiatives.

I. MATTERS OF CONSTITUTIONAL RIGHTS AND JUSTICE IN BANGLADESH

The constitution places highest importance on the respect for human dignity and worth and, therefore, entrenched a justiciable set of rights covering a wide spectrum of 'Fundamental Rights' in Part III (Article 26 to 47A). The 'Fundamental Rights' are mainly civil and political rights for all citizens and human persons to be mandatorily fulfilled and realized in all time, except during the state of emergency, by the State.

Article 26 enjoins the State not to enact any law in derogation of fundamental rights. Article 27 talks about the right to equality and equal protection before law. Article 28 prohibits discrimination on ground of religion, race, sex, marital status or place of birth etc. Article 31 provides for the protection of the right to life, liberty, body, reputation and property of every human individual. Article 32 prohibits any deprivation of the right to life and liberty without due process

2 *Anwar Hossain Chowdhury vs. Bangladesh*, 1989 BLD (Spl.) 1 (the Eighth Amendment Case).

of law. Article 33 contains safeguards against arbitrary arrest and detention, Article 34 proscribes forced labour, Article 35 categorically states several rights in respect of trial and punishment, Article 36 talks about the freedom of movement, Article 37-39 speaks of the freedom of assembly, association as well as thought, conscience and speech. Article 40 prescribes for the freedom of profession or occupation, Article 41 expresses the freedom of religion, Article 42 states about the right to property and Article 43 guarantees the protection of home and correspondence. Article 44 is the gateway to enforce the fundamental rights through directly resorting to the High Court Division under Article 102(1) of the Constitution.

It may be mentioned here that the Constitution kept a conundrum as to the legal implications of the Fundamental Principles of State Policy as mentioned in PART II (Article 8-25) of the Constitution by declaring them guiding principles and judicially unenforceable.[3] Nonetheless, a deeper inspection of these directive principles suggests that they can be an effective tool to initiate public interest litigation to realize the pledges of economic and social change and to interpret the Constitution and other laws.[4]

II. ENFORCEMENT MECHANISM OF THE CONSTITUTIONAL RIGHTS AND JUSTICE

The Constitution uniquely places the Judiciary as guardian of the Constitution. The Supreme Court of Bangladesh with its two chambers, namely, the High Court Division and the Appellate Division, is the higher echelon of the justice System that has power to enforce fundamental rights of the citizens and to interpret the Constitution and the laws made by the Parliament.[5]

Article 94(4) makes the Chief Justice and other Judges of the Supreme Court independent in the exercise of their judicial functions. Article 96 provides that a judge of the Supreme Court can be removed from the service only if he has ceased to be capable of properly performing

3 Ridwanul Haque, *Judicial Activism in Bangladesh: A Golden Mean Approach, Cambridge Scholars Publishing 2011,* 98.

4 *ibid.*

5 Article 94, 102 of the Constitution of the People's Republic of Bangladesh (hereinafter: "the Constitution").

the functions of his office by reason of physical or mental incapacity or he is guilty of gross misconduct. The Supreme Court means full court meaning the Judges of the High Court Division and Appellate Division.

Appellate Division hears appeal and review from the judgments and orders of the High Court Division.[6] The Appellate Division has power under Article 104 of the Constitution to issue such directions, orders, decrees or writs as may be necessary for doing complete justice in any cause or matter pending before it. It can review its own judgment.[7] It has advisory jurisdiction also by which the government may request its advice on any particular matter having legal and constitutional importance.[8]

The Supreme Court may declare any law passed by the Parliament null and void when they are found inconsistent with any of the provisions of the Constitution.[9] The High Court Division may issue even a *suo moto* rule to prevent the breach of any law and rights of any person and enforce the same by invoking its writ jurisdiction.[10]

Article 111 of the Constitution establishes precedent value for the judgment of the Supreme Court. The law declared by the Appellate Division shall be binding on the High Court Division and the law declared by either Division of the Supreme Court shall be binding on all Courts subordinate to it. As per Article 112, all authorities, executive and judicial, in the Republic shall act in aid of the Supreme Court.

The Supreme Court is a Court of record with the powers of making its own rule.[11] If anybody or any authority refuses to follow its order or acts in derogation of such order, it may initiate contempt proceeding against such person or organization and may hold such person or organization accountable before it.[12]

Therefore, it is crystal clear that the Supreme Court of Bangladesh not only functions as the higher judiciary to exercise its original, appellate and supervisory jurisdiction over the Subordinate Judiciary

6 Article 103 of the Constitution.
7 Article 105 of the Constitution.
8 Article 106 of the Constitution.
9 Article 7, 26, 44, 102 of the Constitution.
10 *State vs. Deputy Commissioner*, Sathkhira 1993 45 DLR (HCD) 643.
11 Article 107, 108 of the Constitution.
12 Article 101, 102, 103, 104 of the Constitution.

for dispensing justice as per law, but also performs the functions of the Constitutional Court to promote constitutional goods and justice for the common people.[13]

III. ACHIEVEMENT IN LIGHT OF FEW LANDMARK JUDGMENTS ON CONSTITUTIONAL RIGHTS AND JUSTICE

The Supreme Court of Bangladesh, as the Constitutional Court of the State, has been playing a crucial role to uphold constitutional justice and human rights of the citizens and thereby facilitating the government to lead the country towards economic, social and political development. Under the direct control and supervision of the Supreme Court, the Subordinate Judiciary, i.e., the District Judiciary has also been playing a vital role to deliver justice at the district level and to make necessary judicial interventions for protecting the constitutional and legal rights of the people.

It is indeed a difficult task to mention few landmark judgments of the Supreme Court among hundreds of such cases in which the Supreme Court upheld the constitutional rights and justice vis-à-vis the enforcement of Fundamental Rights and realization of the Fundamental Principles of State Policy in relevant national laws, policies and executive initiatives.

To begin with, we would like to refer the case of *Dr. Mohiuddin Farooque vs. Bangladesh*[14] where the petitioner challenged the implementation of Flood Action Plan of the government. Question arose as to the *locus standi* of the petitioner on the ground that he was not a person aggrieved. His lordship Justice Mustafa Kamal took resort to the Fundamental Principle mentioned in Article 8 of our constitution to justify the *locus standi* of the appellant in the following language:

> *"The preamble and Article 8 also proclaim principles of absolute trust and faith in Almighty Allah as a Fundamental Principles of State Policy. Absolute trust and faith in the Almighty Allah necessarily mean the duty to protect his creation, and environment. The Appellant is aggrieved because Allah's creations and environment are in the mortal danger of extinction and degradation."*

13 Ridwanul Haque (n 5) 102.
14 49 DLR (AD) 1.

In the case *Kudrat-E-Elahi Panir and Others vs. Bangladesh*[15] the Court made it clear that from a combined reading of the Preamble, Articles 7, 11, 59 and 60 of the Constitution, it is clear that the makers of the Constitution devised a scheme of total democracy, both at the centre and at the level of local government.

In the case of *Anwar Hossain Chowdhury vs. Bangladesh*[16], the 8th amendment of the Constitution was declared illegal by the Appellate Division on the ground that the unitary character of the Supreme Court of Bangladesh is a basic feature of the Constitution and through this amendment the basic structure of the Constitution was affected.

Similarly, in the judgment of *Bangladesh Italian Marble Works Ltd vs. Government of Bangladesh and others*[17] (popularly known as Moon Cinema Case), the Appellate Division of the Supreme Court of Bangladesh declared the taking of power by the Military Rulers illegal and the 5th amendment to the Constitution as *ultra vires* to the Constitution. In the same stance, the 7th amendment to the Constitution was also declared illegal.[18] The Supreme Court came up with its two consecutive verdicts declaring both the previous Martial Laws and martial law regimes unconstitutional with some strong cautions for future perpetrators and suggestions to bring perpetrators under trial.[19] There is no doubt that these judgments have heralded a new echo in judicial activism against military intervention into politics and it is also likely that this judgment may work as a red signal for future perpetrators from within the military.[20]

In the case of *Idrisur Rahaman vs. Scretary, Ministry of Law*[21], the Court came out with some specific guidelines regarding the recommendations of the Chief Justice on the matter of appointment of the judges in the Supreme Court and its acceptance by the President. Not only in appointing additional Judges but also in all other

15 44 DLR (AD) 319.

16 1989 Bangladesh Legal Decisions (BLD) (Spl) 1.

17 2006 (Spl) BLT (HCD) 1.

18 *Siddique Ahmed vs. Government of Bangladesh and Others*, Counsel Law Reports: 2013 CLR (Spl) 1 (popularly known as "The 7th Amendment Judgment").

19 Md. Abdul Halim, *The 7th Amendment Judgment by the Appellate Division: Judicial Politics or Judicial Activism, 2013, The Counsel Law Journal 19.*

20 *ibid.*

21 61 DLR (HCD) 531.

appointments in the High Court Division and Appellate Division, the primacy of the Judiciary's opinion was held to be a cornerstone of judicial independence.

The Supreme Court of Bangladesh took a bold step in separating the Subordinate Judiciary from the Executive organ of the State in its judgment in *Secretary, Ministry of Finance vs. Masder Hossain and others*[22], (popularly known as *Masder Hossain* case**)**. In compliance with the said judgment, the Subordinate Judiciary was separated from the Executive organ on 1 November, 2007 and it was placed under the active supervision and management of the Supreme Court. However, there are still some issues to comply with the judgment in *toto* and thus, the Supreme Court is in constant vigilance to enforce the directives of the said judgment for complete separation of the subordinate judiciary and to enhance the functionality of the justice system in rendering effective judicial service to the litigant people.

IV. CHALLENGES IN EXECUTION OF THE JUDGMENTS ON CONSTITUTIONAL MATTERS

In this new era of smart governments and collaborative justice system, it is expected that the orders and judgments of both the higher and subordinate judiciary should be executed rapidly to meet the constitutional goals of maintaining democracy, the rule of law, equality and justice in the society. However, with the emergence of modern complexities of governments, operation of multi-national business enterprises, corporations and development projects, the Judiciary often faces difficulties and intricacies in executing its judgments on constitutional justice.

If any executive or judicial authority does not act in aid of the Supreme Court or comply with the orders of the Supreme Court, both the High Court Division and the Appellate Division may initiate contempt proceeding for such non-compliance and may take other necessary legal and judicial actions to hold such person or authority accountable before it.[23] Nonetheless, we sometimes find lack of willingness and dilatory tactics on the part of the Executive to carry

22 58 DLR (AD) 82.
23 The Constitution (n 14).

out the judgments and orders of the Supreme Court, particularly on constitutional matters.

If we consider the enforcement process of the Masdar Hossain's case[24], the Appellate Division drew contempt proceeding against the 5 Secretaries to the Government of Bangladesh including Finance Secretary, Establishment Secretary and Law Secretary. During the time of Caretaker Government, the Subordinate Judiciary was separated from the Executive in 2007. Subsequently, the elected political government, i.e., the then government led by the Prime Minister Sheikh Hasina (the present ruling party *(Editor's note: September 2021)*) showed positiveness in approving the separation by passing necessary laws and enhancing necessary support to the judiciary. However, the magistracy is bifurcated into two and executive personnel are vested with some judicial powers under the Code of Criminal Procedure, 1898 and the Mobile Court Act, 2009. Later on, the High Court Division declared the Mobile Court administered by executive personnel illegal and observed that *"by investing the executive magistrates and the district magistrates with judicial power of the Republic by Sections 5, 6(1), 6(2), 6(4), 7, 8(1), 9, 10, 11 and 13 of the Ain No 59 of 2009, the Legislature has contravened the constitution and this contravention is a frontal attack on the independence of the judiciary and is violative of the theory of separation of powers*".[25] The government has preferred appeal against this judgment which is now pending before the Appellate Division.

As per Article 95, the Chief Justice is appointed by the President, and the other judges are appointed by the President after consultation with the Chief Justice. In this regard, the High Court Division made some recommendations in the judgment of *Idrisur Rhaman vs. Secretary, Ministry of Law*[26], for appointing judges in High Court Division and Appellate Divisions. But the recommendations are yet to be followed by the Executive.

It is frequently argued that true Separation of Judiciary is yet to come on the scene due to executive passivity. Resultantly, no law is seen to be passed by the Parliament or rule has been framed by the

24 The *Masder Hossain*'s case (n 24).

25 The Mobile Court Case. (Writ no. 8437 and 10482 of 2011, and 4879 of 2012) 2017. Retrieved from URL: www.supremecourt.gov.bd/resources/documents/382548_WP8437of2011.pdf .

26 61 DLR (HCD) 531.

President to appoint the Judges of the High Court on qualitative and competitive basis and no separate secretariat has been established under the Supreme Court for its internal administration to realize the complete separation of the judiciary from the Executive organ.

In the case of *BLAST vs. Bangladesh*[27] the High Court Division issued some directives regarding arrest and detention by the law enforcing agencies. The government has preferred appeal against the said verdict which is now pending in the Appellate Division. Although the effect of the said judgment has not been stayed, the trawling newspaper reports will invariably lead one to surmise that those directives remain either unheeded or badly maintained.

CONCLUSION

If we consider the execution process of the abovementioned landmark judgments on constitutional rights and justice, we find that the Supreme Court of Bangladesh maintains the spirit of Separation of Powers as it has been envisaged in the Constitution while making its move to enforce the judgments and orders on the constitutional rights and justice. Despite that, we often find the absence of willingness to execute the judgment through necessary executive and legislative action.[28] Sometimes the executions are bypassed by framing new laws or policies which contravenes the earlier judgments.[29] It is also evident that in some cases, the executive machineries are also unwilling to comply with the judgments in excuse of their lack of authority or inability to mobilize necessary resources.[30]

It goes without saying that the rule of law cannot be truly established unless the actors in the political scene have faith and conviction in the utility and effectiveness of the rule of law and constitutionalism. Political will is a must to ensure judicial independence and enhance the rule of law, justice equality and fairness in the society. Therefore, political consensus among the political parties for empowering the Supreme Court of Bangladesh and abiding by its orders and verdicts is very essential in this regard. The Supreme Court may also establish a

27 55 DLR (HCD) 363.
28 *ibid.*
29 The Mobile Court Case (n 27).
30 The *Masder Hossain*'s case (n 24).

Judicial Committee and administrative wing to monitor the execution and implementation of its judgments in a specific time frame. The Supreme Court may also attach personal liability to the person concerned for the disobedience of its order and make the necessary provision to award compensation to those who suffer for the delayed execution of the judgments.

ENFORCEMENT OF DECISIONS OF THE CONSTITUTIONAL COURT OF BOSNIA AND HERZEGOVINA

Marijana Sladoje

CONSTITUTIONAL COURT OF BOSNIA AND HERZEGOVINA

ENFORCEMENT OF DECISIONS OF THE CONSTITUTIONAL COURT OF BOSNIA AND HERZEGOVINA

*Marijana Sladoje**

INTRODUCTION

In the period from 7 to 8 September 2021, the Constitutional Court of the Republic of Turkey will hold the 9th Summer School on the topic "Current Issues related to the Enforcement of Judgments of the Constitutional Judiciary", in which the Constitutional Court of Bosnia and Herzegovina will also take part (hereinafter: "The Constitutional Court").

In view of the above, it is necessary to say that the Constitutional Court, as a constitutional category and as an institution the competencies of which, inter alia, are regulated by the Constitution of Bosnia and Herzegovina (hereinafter: "The Constitution"), adopts its decisions in the exercise of these competencies and in accordance with the procedure prescribed by the Rules of the Constitutional Court (hereinafter: "The Rules").

The Constitutional Court is not competent to enforce its decisions, but those decisions as final and binding should be complied with and enforced in the manner and within the time limits as decided in each individual case, i.e. in each decision adopted by the Constitutional Court.

In this presentation, the author will give a brief overview of the following issues: which regulations regulate or prescribe the legal nature and legal effect of decisions of the Constitutional Court, and what consequences the relevant regulations provide in case of non-enforcement of decisions of the Constitutional Court. The author

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will also clarify the proceedings before the Constitutional Court and provide an abstract of the Constitutional Court's case law in connection with the topic of the Summer School.

I. REGULATIONS

A. Constitution of Bosnia and Herzegovina

The provisions of Article VI of the Constitution regulate the composition of the Constitutional Court, the procedure before that court (the Constitution stipulates that the Constitutional Court shall adopt its rules of procedure) and the jurisdiction of the Constitutional Court.

The provisions of Article VI (4) stipulate that the decisions of the Constitutional Court are final (they cannot be challenged before domestic authorities) and binding (every natural and legal person is obliged to comply with them).

B. Rules of the Constitutional Court

"Chapter III.

ENFORCEMENT OF DECISIONS

(Binding Nature, Manner of Enforcement and Time-limit for Enforcement)

Article 72

(1) The decisions of the Constitutional Court shall be final and binding. Every physical and legal person shall be obligated to comply with them.

(2) All bodies shall be obligated to enforce the decisions of the Constitutional Court within their competences established by the Constitution and law.

(3) Every person who has a legal interest may seek enforcement of a decision of the Constitutional Court.

(4) The Constitutional Court may specify in its decision the manner of and time limit for the enforcement of the decision of the Constitutional Court.

(5) Within the time limit referred to in paragraph 4 of this Article, the body obligated to enforce the decision of the Constitutional Court shall be obligated to submit information about the measures taken to enforce the decision of the Constitutional Court, as required by the decision.

(6) In the event of a failure to enforce a decision, or a delay in enforcement or in giving information to the Constitutional Court about the measures taken, the Constitutional Court shall render a ruling in which it shall establish that its decision has not been enforced and it may determine the manner of enforcement of the decision. This ruling shall be transmitted to the competent prosecutor or another body competent to enforce the decision, as designated by the Constitutional Court.

Article 74

(Compensation for Non-Pecuniary Damage)

(1) In a decision granting an appeal, the Constitutional Court may award compensation for non-pecuniary damages.

(2) If the Constitutional Court considers that compensation for pecuniary damage is necessary, it shall award it on equitable basis, taking into account the standards set forth in the case law of the Constitutional Court."

C. Criminal Code of Bosnia and Herzegovina[1]

"Failure to Enforce the Decisions of the Constitutional Court of Bosnia and Herzegovina, Court of Bosnia and Herzegovina, Human Rights Chamber or the European Court of Human Rights

Article 239

An official person in the institutions of Bosnia and Herzegovina, institutions of the entities and institutions of the Brčko District of Bosnia and Herzegovina, who refuses to enforce the final and enforceable

1 Official Gazette of Bosnia and Herzegovina Nos. 3/03, 32/03, 37/03, 54/04, 61/04, 30/05, 53/06, 55/06, 32/07, 8/10, 47/14, 22/15, 40/15.

decision of the Constitutional Court of Bosnia and Herzegovina, Court of Bosnia and Herzegovina or Human Rights Chamber or the European Court of Human Rights, or if he prevents enforcement of such a decision, or if he prevents the enforcement of the decision in some other way, shall be punished by imprisonment for a term between six months and five years."

II. PROCEEDINGS BEFORE THE CONSTITUTIONAL COURT

As stated above, Chapter III, Articles 72 to 74 of the Rules prescribe the enforcement of decisions of the Constitutional Court. Thus, the provisions of Article 72 of the Rules (which provide for an obligation of enforcement, manner and deadline of enforcement of decisions) prescribe that the decisions of the Constitutional Court are final and binding and that every natural and legal person is obliged to comply with them, and that all authorities are obliged, within their competencies determined by the Constitution and the law, to enforce the decisions of the Constitutional Court (paragraphs (1) and (2)). The finality of the decisions of the Constitutional Court means that they cannot be challenged, since there is no legal remedy against the decisions of the Constitutional Court before domestic courts.

The Rules further stipulate that the Constitutional Court in its decision may determine the manner and deadline for enforcement of the decision of the Constitutional Court (Article 72, paragraph (4)). In its decision, the Constitutional Court therefore determines the manner and time frame for enforcement of its decision, which further means that the Constitutional Court may issue any specific order for enforcement of its decision, and this fact certainly affects the enforcement of the Constitutional Court's decisions (since the Constitutional Court appoints a specific body and determines what exactly that body is obliged to do: to take a specific measure, to render a decision and/or to pay compensation for non-pecuniary damage). Furthermore, the provisions of Article 72, paragraph (5) of the Rules stipulate that within the period referred to in paragraph (4) of that Article, the body obliged to enforce the decision of the Constitutional Court shall submit a notification on measures taken to enforce the decision of the Constitutional Court, as indicated in the decision. In this regard, it should be noted that in the vast majority of cases, the

authorities inform the Constitutional Court of the measures they have taken regarding the decisions of the Constitutional Court.

However, if the competent body does not act in accordance with its previously stated obligation (and the number of such cases is very small compared to the number of decisions of the Constitutional Court), the Constitutional Court, pursuant to Article 72 paragraph (6) of the Rules, renders a ruling to establish that the decision of the Constitutional Court has not been enforced, that is, it can determine the manner in which the decision is to be enforced. This ruling shall be submitted to the competent prosecutor, i.e. to another body competent for enforcement determined by the Constitutional Court. Bearing in mind the fact that the provisions of Article 239 of the Criminal Code of Bosnia and Herzegovina (hereinafter: the CC BiH) prescribe that non-enforcement of a decision of the Constitutional Court is a criminal offense (and that the said article of the CC BiH precluded imprisonment for a term of six months to five years for criminal offense in question), pursuant to the aforementioned paragraph of Article 72 of the Rules, the Constitutional Court shall submit a ruling on non-enforcement of its decision to the competent Prosecutor's Office of Bosnia and Herzegovina (hereinafter: the Prosecutor's Office of BiH), (since this Prosecutor's Office is competent to act before the Court of Bosnia and Herzegovina in cases of criminal offenses prescribed, inter alia, by the CC BiH).

Thus, the Constitutional Court in each of its decisions determines the manner and time frame for enforcement of its decision, as well as which body should enforce the decision, but the enforcement of the Constitutional Court's decisions is not within the jurisdiction of that court, nor does the Constitutional Court have an "enforcement department". It is important to note that the decisions of the Constitutional Court are not enforced within the regular judicial enforcement procedure (in a manner in which the decisions of ordinary courts are enforced). However, as it follows from the aforementioned regulations, the CC BiH stipulates that non-enforcement of a decision of the Constitutional Court is a criminal offense punishable by imprisonment for a term of six months to five years. Therefore, the ruling on non-enforcement of the decision of the Constitutional Court (for each such specific case) shall be submitted to the Prosecutor's Office of BiH for action.

III. CASE LAW OF THE CONSTITUTIONAL COURT

The Constitutional Court has so far issued 113 rulings on non-enforcement. However, this statistic does not mean that to date 113 decisions of the Constitutional Court have remained unenforced after the adoption of ruling on non-enforcement. However, it certainly indicates that in 113 cases the decisions of the Constitutional Court have not been enforced in a timely manner (within the time limit and in the manner as specified by the decision of the Constitutional Court in which regard the ruling on enforcement was issued). A significant number of these decisions were enforced after issuance of rulings on non-enforcement.

When it comes to decisions that have not been enforced to date, there is a very small number (less than ten) of unenforced decisions in connection with which specific orders were given to the Parliamentary Assembly of Bosnia and Herzegovina and the Parliament of the Federation of Bosnia and Herzegovina. Furthermore, there is a number of cases in which the competent authorities and courts acted in accordance with the order from the relevant decisions of the Constitutional Court, but no compensation for non-pecuniary damage has been paid yet, or there are cases in which compensation for non-pecuniary damage has been paid but the courts have not acted in full in accordance with the order. It is also evident that in a number of cases concerning the execution of budget funds of entities, cantons, cities and municipalities, the appellants have not yet collected their claims. (In such cases, the appeals have been filed due to non-enforcement of the decision of the competent court establishing the obligation to make payment at the expense of some of the stated budgets, and where that obligation was not fulfilled due to insufficient budget funds). Also, in a number of unenforced decisions (to date), it is a matter of taking systemic measures to eliminate violations of the right to a fair trial within a reasonable time. However, it is evident that certain actions were taken in accordance with orders from the decisions in question, although the systemic violation of the right to a trial within a reasonable time and the right to an effective remedy in conjunction with the right to a trial within a reasonable time has not been removed yet). In the end, a number of decisions related to

the so-called "military apartments" were not enforced (apartments of military personnel with occupancy right granted before 1992). In this regard, a violation of the right to property under Article II (3)(k) of the Constitution and Article 1 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: the European Convention) was established. The Government of the Federation of Bosnia and Herzegovina was ordered to ensure the rights of appellants in accordance with the standards of the Decision of the Constitutional Court of Bosnia and Herzegovina no. AP 15/11 of 30 March 2012). The previously mentioned is precisely because the decision of the Constitutional Court no. U-15/11 of 30 March 2012 was not enforced. (The said decision established that the provision of Article 39e paragraphs 3 and 4 of the Law on the Sale of Apartments with Occupancy Rights, part related to the determination of compensation, is not in accordance with Article II (3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms. The Parliament of the Federation of Bosnia and Herzegovina was ordered to harmonize the said provision, in part related to the determination of compensation, with Article II (3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms).

CONCLUSION

The Constitution of Bosnia and Herzegovina stipulates that the decisions of the Constitutional Court are final and binding. The Constitutional Court, in accordance with the Rules, determines in each individual decision the manner and deadline for enforcement of its decisions. If the competent body does not act in accordance with its previously stated obligation (and the number of such cases is very small compared to the number of decisions of the Constitutional Court), the Constitutional Court, pursuant to the Rules, after the procedure before that court, issues a ruling on non-enforcement.

Such a ruling, within the meaning the relevant provisions of the CC BiH, which stipulates that non-enforcement of the decision of the

Constitutional Court is a criminal offense punishable by imprisonment for a term of six months to five years, and pursuant to Article 72 of the Rules, shall be submitted to the Prosecutor's Office of BiH for action.

The decisions of the Constitutional Court are not enforced within the regular judicial enforcement procedure, and in addition, the Constitutional Court does not have an "enforcement department" in its composition. Therefore, the enforcement of decisions of the Constitutional Court is not within the jurisdiction of ordinary courts, nor is it within the jurisdiction of that (Constitutional) Court.

LEGAL EFFECTS OF THE JUDGMENTS OF THE CONSTITUTIONAL COURT OF BULGARIA - STRIKING A BALANCE BETWEEN THE SUPREMACY OF THE CONSTITUTION AND LEGAL CERTAINTY

Anna-Maria Atanasova

CONSTITUTIONAL COURT OF BULGARIA

LEGAL EFFECTS OF THE JUDGMENTS OF THE CONSTITUTIONAL COURT OF BULGARIA

STRIKING A BALANCE BETWEEN THE SUPREMACY OF THE CONSTITUTION AND LEGAL CERTAINTY

*Anna-Maria Atanasova**

The question of the implementation of the judgments of the Bulgarian Constitutional Court is predetermined by their legal nature and effects. First, in Bulgaria there is still neither a direct individual complaint to the Constitutional Court, nor a special procedure under which the citizens can address it indirectly. The power to seize the Court is reserved only to the highest-standing state authorities such as at least one-fifth of all Members of the National Assembly, the President, the Council of Ministers, the Supreme Court of Cassation, the Supreme Administrative Court or the Chief Prosecutor, the ombudsperson and the Supreme Bar Council when a law affects fundamental rights (Article 150 of the Constitution).

The main task of the Constitutional Court is to ensure the correct interpretation and the supremacy of the Constitution through binding interpretations of the Constitution, assessing the constitutionality of the laws, ruling on the compatibility between the Constitution and the international treaties prior to their ratification, and on the compatibility of domestic laws with the universally recognized norms of international law, on the impeachment of the President or the eligibility of high state officials, etc. Any act found to be unconstitutional or unconventional ceases to apply from the date on which the ruling comes into force (*ex nunc*) whereas the interpretation of a norm of the Constitution is considered to have become an integral part thereof from the moment of its adoption, i.e. *ex tunc*. The judgments of the Constitutional Court

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are final and legally binding for all legal subjects – all courts, state institutions and citizens, not only those who have referred the matter.

Based on the foregoing, it is visible that the judgments of the Constitutional Court differ from the ones of the judiciary. Since the latter apply the law in the relations between private parties and/or the state, their execution is much more dependent on the will of the parties. This raises the issue of potential non-compliance and the need to introduce mechanisms for enforcement. On the other hand, the Bulgarian Constitutional Court does not solve individual disputes (with the exception of the rare situations of impeachment of the President or eligibility of certain state officials) but its main task is to safeguard the supremacy of the Constitution and to ensure the unity of the legal system. The judgments of the Constitutional Court create public policy by upholding or striking down certain laws or giving an interpretation of the Constitution. Their binding nature guarantees that the acts that have been declared unconstitutional will cease to apply and the Constitution will be interpreted in the correct way. The control for the proper application of those judgments is conferred on the ordinary courts under the general framework.

Therefore, what constitutes an issue of interest in the Bulgarian legal system is not the execution of the judgments of the Constitutional Court itself but the effect of those judgments and the difficulties that ordinary courts face when applying them. Therefore, I have chosen to present a ruling of the Constitutional Court which treats some interesting issues related to the legal effects of those judgments, and in particular - their temporal applicability.

The legal dispute in case 5/2019 concerns the immovable property that belonged to the former Bulgarian royal family. In 1944 when the communists came to power, the young king Simeon Saxcoburggotski who was 5 years old at the time was dethroned and banished from the country. Consequently, he fled to Spain. All the real estate that the royal family owned at that time was nationalized with a special law with no legal justification, i.e. no proven public need and without any prior compensation. It is important to note here that this law is a particular one – it is not of general and continuous application as traditional laws but is very similar to an individual act, applying to a specified group of persons, its legal effect manifests only once and then stops applying.

In 1998, or 9 years after the fall of the communist government (1989), the Constitutional Court enacted a judgment declaring this law unconstitutional as it was contrary to the right to private property.

As a result, legal action was taken by the members of the former royal family to enforce the judgment of the Constitutional Court and to obtain *de jure* and *de facto* restitution of their property. However, several legal issues arose in the context of these lawsuits. Firstly, there were still doubts on whether all the property that was listed in the law that was declared unconstitutional belonged to the royal family at the time or if it was owned by the state and the royal family was only a tenant. In that case, no restitution would be possible if the property had not belonged to the royal family in the first place. It is important to note that all the buildings were built with public funds and not funds of the royal family. This is, however, a factual question that is up to the ordinary courts to examine and not the Constitutional Court. The latter was seized with an important question concerning the legal effect of its judgments.

As I already mentioned, it is stated in the Constitution and it is settled case law that the judgments of the Constitutional court apply *ex nunc*, for the future and not retroactively. However, this solution seems difficult to apply to laws the legal effect of which manifests only once such as the one with which the property of the royal family was nationalized. In that case, if the judgment of the constitutional court which declares its unconstitutionality applies only for the future, it would not be capable to fully remedy the unconstitutional effects of the law. We would allow a situation in which the unconstitutional law will have been applied for years. If the law ceases to apply for the future, does it mean that the property is automatically restored from the date of the entry into force of the judgment, or a special law has to be adopted for that purpose?

Therefore, the Supreme Courts wanted to know what the legal force of the judgments of the Constitutional Court is when it comes to laws which apply for a limited time – retroactive or *ex nunc*?

In that regard, the Constitutional Court made clear that it is unacceptable in a state governed by the rule of law to deprive the judgments of the Constitutional Court of their *effet utile*, and thus compromise the supremacy of the Constitution. The Court held that the

ex nunc application of the judgments of the Constitutional Court makes full sense only in relation to the normative legal acts, which produce legal consequences repeatedly and continuously in time. Concerning the laws that produce legal effects only once, the principles of the rule of law, of the supremacy of the Constitution and of the effectiveness of the judgments of the Constitutional Court require that these judgments apply retroactively.

The Court added that the main goal of the control for constitutionality is to ensure the supremacy of the Constitution. And the two possibilities for guaranteeing the supremacy of the Constitution in case of its violation by a normative legal act are a projection of the two distinct aspects of the principle of the rule of law. An action forward of the decision on unconstitutionality (*ex nunc*) is a projection of the understanding of legal certainty (the rule of law in the formal sense), while the reverse action (*ex tunc*) brings the legal consequences of such a decision closer to the rule of justice (the rule of law in the material sense). In the case at hand, there is no collision between the two aspects of the principle of the rule of law because there is only one solution which ensures the supremacy of the Constitution as an ultimate purpose of constitutional justice – and this is the retroactive action of the judgments in question. Therefore, the only possible solution is to give the ruling of the Constitutional Court a retroactive action. Besides, retroactivity will not endanger legal certainty because the law applies only once and then stops producing legal consequences, so there will be nothing to remedy in case of retroactivity.

The Court also applied a historic interpretation of the protocols of the discussions in the Great National Assembly prior to the adoption of the Constitution. They imply that the article governing the *ex nunc* applicability of the judgments of the Constitutional Court concern the laws in the traditional meaning of the word, i.e. – the ones with general and continuous application.

The Constitutional Court also upheld another exception from the principle of *ex nunc* applicability of its judgments concerning the applicability of a law which has been declared unconstitutional in pending proceedings. In this case, the Court held that a law which is declared unconstitutional, cannot apply in proceedings that have

started before the entry into force of the judgment. Although the acts that were based on this law were technically valid at the time of their adoption, if the procedure is still pending when the law was declared unconstitutional, the judgment of the Constitutional Court must be taken into account by the ordinary courts. The Court's reasoning relies on the fact that the Constitution requires from the Courts which refer a matter to stay the proceedings. Therefore, the intention of the legislator was to prevent the application of an unconstitutional law in the pending proceedings. The opposite would contradict the principles of the rule of law, of supremacy of the Constitution and of effective judicial protection.

Seemingly, the Constitutional Court interpreted the Constitution *contra legem* because there is an explicit provision that says that the judgments of the Constitutional Court apply *ex nunc*. In reality, the Court applied other Constitutional provisions in this case which were also relevant – the principles of the rule of law, supremacy of the Constitution and effectiveness of its judgments. In that way, the Constitutional Court expanded its case law on the execution of its judgments in order to adapt it to the dynamic legal realities. In that way, it upheld the supremacy of the Constitution and the *effet utile* of its judgments. In addition, the Court answered a very topical question with practical importance concerning the enforcement of its judgments. However, it left unanswered one aspect of the question which was discussed in the doctrine and the case law concerning the restorative effect of its judgments. In particular, the Court did not address the issue of whether the judgment proclaiming the law that nationalized the property of the royal family as unconstitutional has the power to restore the right to property automatically or a new law must be enacted by the National Assembly. It is worth noting that the second option is preferred for all other property that was taken away during communist times and then returned to the original owners after 1989 for the sake of clarity and legal certainty.

In the end of my presentation, I would like to briefly present to you another case of public interest, currently pending before the Court which also raises the question of the temporal application of the judgments of the Constitutional Court and the necessary balance between the supremacy of the Constitution and legal certainty.

The lawsuit is against the current minister of economy who was accused of not being eligible for the post because he has a double nationality – Bulgarian and Canadian. The Bulgarian Constitution requires from the Ministers, the MPs and the President to have only Bulgarian citizenship at the time when they run for the position or are appointed. The current minister renounced his Canadian citizenship before being appointed to the post but the official certificate from the Canadian authorities was issued after he entered office. Under the Canadian law, the refusal from citizenship is final and valid from the date of the issuance of the certificate. The case law of the Bulgarian Constitutional Court also requires that the candidate must have only Bulgarian citizenship at the time of registering for elections or being appointed and that there must be an official confirmation from the authorities of the third state by that time.

In that situation, if the ineligibility of the Minister is confirmed, interesting legal issues arise. What will happen with the acts of the Minister that were adopted in the meantime if he turns out to be ineligible and is released from office? If the judgment of the Constitutional Court applies *ex nunc*, then his acts should remain in force even if he is released from office. This solution is in favour of legal certainty. However, if we follow the abovementioned case law, it might seem that the judgment should apply retroactively, and all his acts would be invalid. In addition, one of the grounds for nullity of administrative acts is lack of competence and if the Minister was ineligible in the first place, then this could be a ground to challenge these acts. However, this would create a situation of confusion and chaos which is undesirable in a state governed by the rule of law.

CURRENT PROBLEMS IN THE EXECUTION OF JUDGMENTS: CONSTITUTIONAL JUSTICE

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Penkwang Yvonne Doh
Nana Sylviane Nickaise
Kongfon Linda Mangah

CONSTITUTIONAL COUNCIL OF THE REPUBLIC OF CAMEROON

CURRENT PROBLEMS IN THE EXECUTION OF JUDGMENTS: CONSTITUTIONAL JUSTICE

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ABSTRACT

The present presentation attempts to identify the various impediments that obstruct the execution of Constitutional Justice in Cameroon. Globally, the concept of Constitutional Justice in Cameroon is multifaceted and brings on board Judges of the Judicial Order, the Administrative Order and the Constitutional Order. These various Judges in their respective capacities render decisions with a direct effect on constitutional justice.

Justice is only attained when these decisions/orders are fully executed. In Cameroon, they are enforced in the field by many agents other than the judges. Unfortunately, the enforcement of constitutional justice's judgements is hampered by a number of difficulties such as the failure of compliance by administrative authorities, absence of an independent mechanism for the execution of judgements, corruption, Covid-19 lockdowns and the non-digitalization of courts. If these problems are checked, only the rule of law will prevail and boasts confidence between government and the governed for greater development.

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INTRODUCTION

The rule of law and fundamental rights are indivisible concepts which have an intrinsic relationship. They both dwell on legality and entail that the government and its citizens act in accordance with the dictates of the law. Dispensing constitutional justice is a fundamental mission of the modern State because of its tremendous impact on the levers of development such as democracy and the rule of law.

However, in Cameroon like in many countries around the world, individuals as well as government agencies, do not always observe principles related to the rule of law and human rights and freedoms, though they are duly enshrined in the Universal Declaration of Human Rights, detailed in many international charters/treaties and reiterated in the legislative and regulatory instruments of member States. Many difficulties account for this behaviour.

Before expatiating on the problems obstructing the enforcement of judgements in constitutional justice, may we first present constitutional justice as practised in Cameroon.

I. DISPENSING CONSTITUTIONAL JUSTICE IN CAMEROON

Constitutional justice implies a variety of institutions with the responsibility to protect the legal order of the State, through the sacralisation of the constitution and its preamble. It is the embodiment of the entire legal system residing in the principles and concepts underlying the administration of justice, actors involved, the institutions, and the way the legal rules and regulations as well as court judgments are enforced. In the dispensation of constitutional justice, actors' judgements are based on the respect of the principles of neutrality, impartiality and independence. The Judge's final pronouncement on law or judgement is an act of the Court settling a dispute on the rights and obligations of parties, pending before it, stating clearly the successful party and the remedies awarded thereto.

Our understanding of constitutional justice in Cameroon resides on the role of the judges giving the orders and the agents implementing them in the field.

A Jurisdictions/Judges Dispensing Constitutional Justice in Cameroon

Several judges at varying degrees participate in the delivery of Constitutional Justice in Cameroon.

1. The Constitutional Council: Judge par Excellence in Matters of Constitutional Justice.

At the apex of the pyramid of these institutions is the Constitutional Council established by the Constitution[1] and organized by Law N° 2004/004 of 21 April 2004, laying down the organization and functioning of the Constitutional Council of Cameroon (CCC). Before the coming into existence of the Constitutional Council, her role was assumed by the Supreme Court as provided for by section 67 (2) of the Constitution. The Council comprises eleven (11) members designated for a six years renewable term, and can valuably sit with a quorum of nine (09).

The competences of this Council are both adjudicatory and advisory. To this effect, she gives advisory opinions on all matters referred to her and final rulings on the:

- Constitutionality of laws, Treaties and International Agreements;
- Constitutionality of the Standing Orders of the National Assembly and the Senate prior to their implementation;
- Conflict of powers between State institutions, between the State and the Regions, and between the Regions;
- Regularity of national elections (Presidential, Parliamentary) and referenda and proclaims the results.

The Constitutional Judge also ascertains the vacancy of the President of the Republic as per section 6 sub 4 of the Constitution.

The procedure before the Council starts with a referral brought either by the President of the Republic, Presidents of the lower and upper Houses of Parliament, one-third of the members of either House or the President of the Regional Executives whenever the interest of his/her

1 Law N° 96/06 of 18 January 1996 to amend the Constitution of 2nd June 1972 amended and supplemented by law n° 2008/001 of 14 April 2008, Articles 46 to 52.

Region is at stake.[2] Candidates and/or political parties taking part in any national election (parliamentary, senatorial and presidential) can also seize the Council for any irregularity in his/her disfavor.

Pursuant to Article 49 of the Constitution the Council has a time-limit of fifteen (15) days within which she delivers her judgements or final rulings. According to section 14 of law N° 2004/004 on judicial organisation, the rulings and opinions of the Council contains citations of law, practical and legal facts of the matter, the grounds and proviso thereof. The proviso must state the solution adopted and in terms of Section 4 (1) of the same Law, all rulings and opinions of the Council shall be reasoned. These rulings, in conformity with section (2), (3) and (4) of this same law, are notified to parties concerned upon pronouncement, published in the official Gazette in English and French and enforced forthwith. Section 50 (2) of the Constitution stipulates that any provision of law declared unconstitutional by the Council may not be enacted or implemented.

The supremacy of the judgements of the Council is not in question. They are binding on all public, administrative, military and judicial authorities as well as on all-natural persons and corporate bodies, and are not subject to any appeal whatsoever (Cf section 50 of the Constitution).

Apart from the Constitutional Judge, other judges involved in dispensing constitutional justice in Cameroon include the Administrative, Civil and Penal Judges as per Law N° 2006/015 of 25 December 2006 on judicial organization in Cameroon.[3] They sit in the Supreme Court, Administrative Courts, Courts of Appeal, High Courts, Courts of First Instance, Special Criminal Court and the Military Tribunal.

2. Other Judges Dispensing Constitutional Justice in Cameroon

The competence of the Civil and Penal Judges in the domain of constitutional justice is essentially repressive of acts that infringe on individual and collective freedoms of citizens, while that of the Administrative Judge weighs on nullity and illegality of acts and

2 The Constitution of Cameroon, Article 47 (2) and (2) and Law N° 2004/004 of 21 April 2004 precited, Art. 19.

3 Law N° 2006/015 of 25 December 2006 on judicial organization of Cameroon, Article 2 (2).

decisions emanating from the Administration causing prejudice to citizens.

The Civil Judge: As per section 15 (1) b and 18 (1) b of the Law on judicial organisation, the civil Judge hears matters pertaining to the status of persons, civil status, marriage, divorce, filiation, adoption and inheritance. He also hears cases of recovery of debts with claims exceeding ten million, all unquestionable liquid and due commercial claims where damage claimed exceeds one hundred million. The civil Judge is found at all ordinary law Courts and all appellate jurisdictions, except in the Military tribunals.

Judgments arising from civil claims sets out the reasons upon which they are based in fact and in law as stipulated by section 7 of the Law on Judicial Organisation. They can be appealed in the Court of Appeal and in the Supreme Court.

The Penal Judge: The Penal Judge hears matters of felonies, misdemeanours as well as applications for *habeas corpus,* in accordance with the law on judicial organisation, sections 15 and 18**.** He/she is found at all original jurisdictions and appellate jurisdictions with the exception of customary law Courts. His functions in consolidating constitutional justice are mostly repressive. The Judge administers justice in public and renders reasoned judgements based on facts and law as grounded in sections 6 (1) and 7 of the law on Judicial Organisation**.** Section 10 of this law states that his judgements are enforceable throughout the national territory**.**

These judgements from lower jurisdictions are susceptible to appeal before the Courts of Appeal and the Supreme Court thereafter.

The Administrative Judge: The Administrative Judge is competent to handle all administrative litigations concerning decentralised public authorities and local administrative authorities[4]. In effect, section 2 of the 2006 Law on the organization of Administrative Courts spells out the duties of the Administrative Judge to hear petitions for quashing of all ultra vires acts of the Administration, civil matter acts made without lawful authority, claims for damages for loss caused by administrative acts and disputes relating to the maintenance of Law and order.

4 Sections 40 of the Constitution and 14 (2) of Law N° 2006/22 of 29 December 2006 to lay down the organization and functioning of Administrative Courts.

Furthermore, in accordance with section 38 (b) and (c) of Law N° 2006/016 of 29 December 2006 bearing on the organisation and functioning of the Supreme Court, the Administrative Bench of the said court entertains appeal cases on administrative litigations from Regional Administrative Courts and rules on them on final resort.

Constitutional justice is consolidated via legality and annulment of acts on abuse of powers by the Administration, hampering the protection of fundamental rights of citizens.

All pronouncements by levers of Constitutional Justice are enforced forthwith following outlined procedure and by well-defined actors as elaborated below. When all these judgements are executed, justice is done and seen to be done. Therefore, the effectiveness of judgements taken in constitutional justice only yield dividends when they are fully enforced. Thus, justice is not achieved, when final and enforceable decisions of the Courts are not executed or delayed for execution.

B. Execution Agents of Judgements in Constitutional Justice

Before a look at the execution agents of judgements in constitutional justice per se, it is worthwhile presenting when and how they are executed.

1. Regulation of Execution of Judgements

Enforcement of judgements is regulated by law n° 92/008 of 14 August 1992 relating to the enforcements of Court judgments[5]. When one talks of enforceable judgements, one means those decisions that are final or pronounced enforceable by the Judge. However, a judgment which has not yet become final, or certain aspects thereof, may still be executory provisionally or immediately as in the case of injunctions, provisional or interlocutory judgments or stay of execution.

The execution of any judgement is subjected to the presence of a writ of execution or a final and/or a provisional enforceable judgement. Once the executory formula is apposed on a final judgement, all parties to that case law are obliged to execute that judgement.

Albeit the fact that courts hand down judgments, they do not

5 Law N° 92/008 of 14 August 1992 amended and supplemented by Law N° 97/018 of 7 August 1997 on Execution of Judgments in Cameroon.

proceed to enforce them on behalf of the successful party or judgment creditor without further action. In certain cases, the unsuccessful party may voluntarily enforce the judgment after which the successful party may have no need to take any further action. Where things do not play out this way, the successful party will have no other option than to resort to initiating a compulsory or forceful enforcement measure to get his rights as entitled to under the judgment.

In the course of compulsory or forceful enforcement of judgments, difficulties may arise as a result of violation by the judgment creditor of the rights of the judgment debtor or by persons intervening in enforcement or by law enforcement officers. The debtor could equally obstruct or frustrate enforcement. In this case, procedures enabling the judgment creditor to enforce his judgment are many and varied and generally entail among others, sequestration, conservatory/protective measures, seizure-awards and sale of assets as enacted by law.

Violation of procedural rules of compulsory or forceful enforcement of judgments may render null and void the enforcement procedure initiated by the judgment creditor. The nullity of such procedures may be pronounced solely by the judge who is competent to entertain disputes relating to the enforcement of judgments who may be seized by any aggrieved party.

It should be noted that section 181 of the Penal Code punishes with imprisonment terms of 1 (one) to 5 (five) years whoever refuses to enforce a court judgement, or obstructs the enforcement of a court judgement that has become final without referring to the judge in charge of enforcing court judgements.

2. Executing Agents of Judgements

The state is required to lend its assistance in the enforcement of judgments and other writs of execution, specifying that the executory clause shall entail a direct requisition of the forces of law and order. In other words, the apposition of the executory formula on a judgment is the only formality that the law requires of a judgment creditor for the State to imperatively lend him its assistance.

Section 11 of the Law on judicial organisation requires that bailiffs, process servers, public prosecutors and all commanders and officers of

the armed forces lend their assistance and support in the enforcement of judgements when so required by law. These agents of enforcement include the following and play the following roles:

- ***The public prosecutor****:* As per section 29 (1) of the law on judicial organisation, he ensures enforcement of all laws and regulations;
- ***Bailiffs and process servers:***[6] Decree N° 85/ 238 of 22 February 1985 organising and regulating the activities of bailiffs', entrusts the enforcement of all court processes and court judgements on these ministerial officers. They cause the parties to respect the orders given in the judgements and can either take recourse to forceful execution or engage action against judgments debtors - obstructors of execution.
- ***Commanders and Officers of the armed forces***: Their role is to lend a helping hand in the process of enforcement according to section 29(1)[7] of the above-mentioned law on judicial organisation.
- ***Public and Traditional Administrative Authorities***: Administrative authorities at all levels are call open to enforce or assist by all means in the implementation of court decisions. For no reason should they assist or collaborate with those who are in disrespect of the judgement or law.

Despite the numerous solutions provided by law to ease the execution of judgments, problems are encountered by jurisdictions which render constitutional justice in the enforcement of their judgments except for the Constitutional Council. The execution or enforcement of a judgment which follows the logical pronunciation of the same by the judge or magistrate must therefore be taken seriously as it is one of the most important aspects of the administration of justice in any society where the rule of law thrives. However, the party against whom the judgment of the court is pronounced may refuse or fail to comply with what he or she is ordered to do or not to do therein. The successful party will then resort to initiating a compulsory

6 - Decree N° 85/238 of 22 February 1985 organising and regulating the activities of bailiffs in Cameroon.

7 -Section 29 (1) of the Law 2006/015 of 29 December 2006 on judicial organisation states: « the Legal Department shall ensure the enforcement of Laws, regulations and judgments and may, in the interest of the Law, make any request it considers necessary before any Court".

or forceful enforcement action and that is where problems of execution of judgments are witnessed.

II. CURRENT PROBLEMS IN EXECUTION OF JUDGEMENTS IN CAMEROON

In Cameroon, a matter generally becomes res judicata when the judgments are successfully enforced within a stipulated deadline and without parties concerned challenging it. Once the executory formula is apposed on the final judgement, all parties to the case are obliged to execute the said judgement. When unsuccessful party fails to comply, the successful party then resorts to initiating a compulsory or forceful enforcement action. That is where problems of execution of judgments are often witnessed. Recourse to forceful execution is given through a writ of execution or a final or provisional judgment writ to the unsuccessful party.

As far as the Constitutional Council is concerned, its rulings are binding on the administrative, military and judicial authorities as well as on all physical persons and corporate bodies. They are not subject to appeal as grounded in Article 50 of the Constitution[8]. Again, its judgements are enforced immediately they are pronounced and published in the official Gazette in English and French. With this, **no major problem has been encountered since 2018** – the year the Constitutional Council became operational; except for the delays in the translation process and failure to publish some Orders in the official Gazette on time.

However, the following problems hinder the execution of judgements pronounced by other jurisdictions in matters of Constitutional Justice:

A. The Absence of an Independent Machinery for the Execution of Judgements

There is no independent body for the enforcement of court decisions. There is rather a multiplicity of agents intervening in the process of execution of court judgements as consecrated by Section 11

8 Article 50(1) and (2) of the Constitution States « (l) Rulings of the Constitutional Council shall not be subject to appeal. They shall be binding on all public, administrative, military and judicial authorities, as well as on all-natural persons and corporate bodies. (2) A provision that has been declared unconstitutional may not be enacted or implemented".

of the 2006 Law on judicial organization. Their respective intervention complicates, lengthens and slows down the process of execution as they are under the control of the Executive and they depend on police force to discharge their duties. Even the prescription of sanction to persons found guilty of refusal to enforce final or enforceable judgements as per section 181 paragraph 1 of the Penal Code as earlier cited does not suffice to ensure full execution.

B. Failure of Compliance by Some Administrative Authorities

The preponderant role of the administration on agents charged with the execution of judgements helps some of these authorities to undermine court judgements rendered in their disfavour by a simple stay of execution. This unlawful conduct constitutes one of the greatest obstacles and bottlenecks to the enforcement of judgments and orders made by the court.[9]

C. Existence of Corrupt Practices

The ills of corruption affect constitutional justice and the enforcement of judgements. In effect, some judges and actors of execution of court orders have thrown the judicial tradition of equitable justice to the wind by engaging in corrupt practices including but not limited to interest peddling, bribery and favouritism.

D. Covid-19 Lockdowns

The Covid-19 pandemic which hits the world now for more than a year, greatly disrupted the functioning of State institutions including the Constitutional Council and other constitutional justice jurisdictions as well as enforcement officers who observed short term lockdowns and breaks in their service delivery. The execution of judgements was

9 *Cf. case between the Cameroon Music Corporation (CMC) and the Minister of Arts and Culture wherein the latter refused to execute an order of the Administrative Bench of the Supreme Court of 17 December 2008 cancelling a series of decisions taken by the said Minister to withdraw the licence of the CMC and appoint an ad hoc committee to administer the CMC. On the 23 July 2014, a final judgment was then passed by a panel of joint divisions of the aforementioned jurisdiction permanently annulling all the above-mentioned decisions of the Minister of Arts and Culture. The case between SOCAM (Société Civile Camerounaise de l'Art Musical) and the same Minister of Arts and Culture is almost a repeat of the CMC scenario as the Minister abstained from executing the judgment of the Supreme Court) giving SOCAM right of operation. The Administrative authority rather designated different persons under a new organ to run the affairs of the music and arts industry*

simply forgotten in favour of sit-ins and/or non-action on the part of those who were supposed to implement them.

E. The Non-Digitalization of Courts or Inexistence of E-Courts

Digitalization of courts is now a global phenomenon which greatly enhances and improves efficiency of courts. Some countries have opted for court digitalization to observe physical distancing in rendering services during this period of the Covid-19 pandemic without interrupting justice. Video conferencing for court trials is being introduced so justice is not delayed. In Cameroon, this practice of E-Court is absent and the delays in judgement aggravates the problems of non-compliance in dispensing justice.

CONCLUSION

Having identified some observable lacunas in the relevant laws and probable impediments to a successful enforcement of judgments, it is therefore necessary to make some valuable recommendations on the need to enact appropriate legislations or review of existing ones to favour full enforcement of judgements in general and those based on constitutional rights and freedoms.

There is need for the institution of an independent machinery for the translation, publication and execution of judgements. More so, officials appointed therein must be of good morality and have a good mastery of the law and practises related to the execution of judgments.

Improved remuneration and funding. Concerted efforts must continuously be made to ensure that there is financial independence for the Judiciary to make room for improvement on the working environment and facilities. It also remains to be stated that where staff are well paid, they would maximally perform and corrupt practises as well as instances of lapses noticed in execution process would drastically reduce.

Judges themselves must endeavour to ensure that their judgments/ orders are clear That is, not ambiguous as to allow room for those in charge of enforcement to give it a meaning other than what it ought to be, this would make them easier for execution and reduce unnecessary litigations.

In a nutshell, the need for successful enforcement of court judgments cannot be overemphasized. Therefore, the primary function of an agent of execution does not start or end in preparing the execution of judgments, but includes the enforcement of judgments or orders made by the court. The onus therefore, lies on all stakeholders to be diligent and vigilant and be accountable in the discharge of their respective duties. Judgments delivered by the courts of competent jurisdiction must be enforced to the later, irrespective of persons, group of persons or juristic persons, as the case may be. Justice, according to the popular maxim, must not only be done but manifestly be seen to have been done. On the whole, these identified challenges and recommendations in form of solutions are not exhaustive, it is hoped that they would go a long way in assisting us attain excellence in dispensing constitutional justice. However, the debate in a bid to have an ideal situation for the execution of judgements continues and more research would, one day, lead us to this situation.

LEGAL EFFECTS AND EXECUTION OF THE JUDGMENTS OF THE CONSTITUTIONAL COURT OF GEORGIA

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CONSTITUTIONAL COURT OF GEORGIA

LEGAL EFFECTS AND EXECUTION OF THE JUDGMENTS OF THE CONSTITUTIONAL COURT OF GEORGIA

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*Tamar Baramashvili***

I. INTRODUCTION

According to the Article 60 (5) of the Constitution of Georgia,[1] a judgment of the Constitutional Court shall be final. An act or a part thereof that has been recognised as unconstitutional shall cease to have legal effect as soon as the respective judgment of the Constitutional Court is made public, unless the relevant judgment envisages a later time frame for invalidating the act or a part thereof. An act or a part thereof that has been recognized as unconstitutional shall cease to have legal effect as soon as the respective judgment of the Constitutional Court is made public, unless the relevant judgment envisages a later time frame for invalidating the act or a part thereof.

In general, judgments of the Constitutional Court regarding the unconstitutionality of a normative act are self-executing and therefore, an act that has been declared unconstitutional shall cease to have legal effect as soon as the respective judgment of the Court is made public. But in cases when the Constitutional Court indicates that the problems identified in judgments have to be eliminated in the entire legal system or when the announcement of invalidity of an unconstitutional norm has been delayed, it is especially important that bodies of government undertake certain measures, make systematic and structural changes in order to secure proper execution of judgments of the Court.

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1 Article 60, paragraph 5, Constitution of Georgia, August 24, 1995, Gazette of Parliament of Georgia, 31-33, 24/08/1995.

Therefore, the process of execution of judgments depends on trust between the state authorities. Throughout the years, the Constitutional Court of Georgia established good communication with the executive and legislative branches of the government regarding the ongoing problems of execution of judgments. Yet there are still the cases where the responsible state organs have failed to implement the judgments of the Constitutional Court of Georgia.

II. THE EFFECT OF THE CONSTITUTIONAL COURT DECISION

The Organic law of Georgia on the Constitutional Court of Georgia and Civil Procedure Code of Georgia defines the moment of declaring the disputed norm invalid and determines the effects of the judgments of the court. Namely, The Article 23 (1) of the Organic law of Georgia on the Constitutional Court of Georgia[2] indicates, that: confirmation of the unconstitutionality of a normative act or its part in the cases identified in paragraph shall result in a declaration of the normative act or its part as void from the promulgation of a relevant judgement of the Constitutional Court. The paragraph 10 of the same article stipulates that, if the Constitutional Court determines at its executive session that a disputed normative act or its part contains the same standards that have already been declared unconstitutional by the Constitutional Court, it shall deliver a ruling on the inadmissibility of the case for consideration on the merits and on the recognition as void of a disputed act or its part. The ruling shall become void from the promulgation of a relevant ruling of the Constitutional Court. Besides, paragraph 1 of Article 423 of the Civil Procedure Code of Georgia[3] determines the grounds for reopening proceedings on final court decisions (*res judicata*) and does not include judgments of the Constitutional court of Georgia as a ground for reopening. The provision applies to both civil and administrative law cases.

Therefore, the legal order provides for an *ex nunc effect* of the Constitutional Court's decisions, the only exception is criminal cases where retroactive effects apply. In criminal cases, typically retroactive

2 Article 23, paragraph 1, Organic law of Georgia on the Constitutional Court of Georgia, January 31, 1996, Gazette of Parliament of Georgia, 001, 27/02/1996.

3 Article 423, paragraph 1, Civil Procedure Code of Georgia, November 14, 1997, Gazette of Parliament of Georgia, 47-48, 31/12/1997.

effects apply and a criminal case that is based on a provision that was found unconstitutional by the constitutional court will be reopened by the ordinary courts. The Article 310 of the Criminal Procedure Code of Georgia[4] describes grounds for reviewing a judgement due to newly found circumstances: A judgement shall be reviewed due to newly found circumstances if there exists a decision of the Constitutional Court of Georgia that has found that a criminal law applied in that case is unconstitutional**.**

At present the case pending before the Constitutional Court of Georgia on the constitutionality of the above mentioned provisions of the Organic law of Georgia on the Constitutional Court of Georgia and Civil Procedure Code of Georgia.[5] The claimants argue that the judgment of the court should constitute an effective remedy for the protection of human rights and the court must have discretion to decide on a case-by-case basis from which date an unconstitutional normative act becomes invalid and to determine that its judgment has retrospective effect. The claimants further argue that the judgment of the Constitutional court of Georgia should be recognised as being a legal ground for the reopening of final court decisions (*res judicata*) in civil and administrative matters based on the norm declared unconstitutional by a judgment of the court. Based on the arguments provided above, the claimants emphasise that disputed norms diminish the effectiveness of the Constitutional Court and, therefore, are incompatible with the right to a fair trial.[6]

As Constitutional courts indicated, the case raises the question: What should the effect of the judgment of the Constitutional Court of Georgia be on an on-going legal dispute in which a general court has to decide on civil/administrative law transactions/cases which have been closed before the promulgation of the Constitutional Court judgment? What should the effect of the judgment of the CCG be on final decisions of general courts? Should the judgment of the Constitutional Court

4 Article 310, Criminal Procedure code of Georgia, October 9, 2009, Gazette of Parliament of Georgia, 31, 03/11/2009.

5 *See* Constitutional Complaint №678 and №719.

6 European Commission for Democracy Through Law (Venice Commission), Opinion No. 923 / 2018, *DRAFT AMICUS CURIAE BRIEF FOR THE CONSTITUTIONAL COURT OF GEORGIA ON THE EFFECTS OF CONSTITUTIONAL COURT DECISIONS ON FINAL JUDGMENTS IN CIVIL AND ADMINISTRATIVE CASES*; URL: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL(2018)019-e (visited on 7 October 2021).

become grounds for reopening a final court decision (res judicata) which is based on an unconstitutional provision?

The Commission mentioned that, the Georgian legislation does not seem to explicitly give the power to the Constitutional Court to decide on the effects of its decision but again, in the absence of an explicit rule, it will be for the Constitutional Court to decide on that matter.[7]

III. EXECUTION OF THE JUDGMENTS (CASE EXAMPLES)

A. THE NEED FOR SYSTEMATIC LEGISLATIVE CHANGES

In 2019 Constitutional Court of Georgia adopted the judgment №1/6/770 in the case of "Public Defender of Georgia v. the Parliament of Georgia".[8] In this case, the Court established important constitutional standards with respect to prescribing imprisonment as a form of punishment for illegal production, purchase, storage, and/or use of narcotic drugs. The Constitutional Court found that the possibility of using imprisonment was unconstitutional when the case was concerning the use or production, purchase, storage in the amount sufficient for use of such drugs, which did not cause addiction rapidly and/or aggressive behaviour. The Parliament of Georgia has not undertaken necessary legislative changes in this regard. It is important for the Parliament to introduce a systemic reform and regulate the issue in compliance with the criteria established by the judgment of the Constitutional Court.

B. POSTPONING INVALIDATION OF DISPUTED NORMS

If the Court notes that invalidating an unconstitutional norm upon publication of the judgment might harm private and public interests, the relevant judgment envisages a later time frame for invalidating the disputed act. In such cases, the court shall annul the normative act not immediately after the publication of the judgment, but from the date specified in the judgment. The purpose of postponing the invalidity of the disputed norm is not to leave public relations without regulation, which requires a legal framework at any time.[9]

7 *ibid* Paragraph 78.

8 Judgment of the Constitutional Court №1/6/770 dated 2 August 2019 in the case of "*Public Defender of Georgia v. The Parliament of Georgia*".

9 Information on Constitutional Justice in Georgia, CONSTITUTIONAL COURT OF GEORGIA,

1. Cases Regarding Which No Legislative Changes Have Been Enacted

a. Judgment of the Constitutional Court of Georgia *"SKS" Ltd v. the Parliament of Georgia"*, 18 April 2019, №1/1/655

On April 18, 2019, the First Board of the Constitutional Court of Georgia rendered a decision on the case of "SKS Ltd v. the Parliament of Georgia" (constitutional complaint № 655).[10] The court considered the norm of the law of Georgia "On Public Procurement". Pursuant to the disputed regulation, it was established that the Law of Georgia "On Public Procurement" may not apply to the public procurement by a contracting authority of postal and courier services of the "Georgian Post Ltd".

The court found that the disputed regulation put "Georgian Post Ltd" in an advantageous market position compared to other economic agents. According to the Court, the disputed law (a) did not clearly define the obligation of "Georgian Post Ltd" to provide affordable postal and courier services on the whole territory of the country; (b) did not set transparent and objective parameters for calculating affordable postal and courier services throughout the country; and (c) there was no rule that would prevent the possibility of granting "Georgian Post Ltd" more benefits than would be necessary to reimburse the relevant economic costs and reasonable profits. As a result, the disputed norm was declared unconstitutional.

The annulment of the disputed norm was postponed until May 1, 2020, in order not to endanger the process of providing postal and courier services at affordable prices throughout the country by "Georgian Post Ltd" and not to adversely affect the interests of postal and courier service recipients. Despite the expiration of the deadline set by the Constitutional Court, no relevant changes have been made in the legislation. The new disorder of the issue may also be perceived in such a way that the Parliament of Georgia considered it expedient to extend the validity of the law of Georgia "On Public Procurement" to the mentioned legal relationship.

2019, p.85; URL: https://constcourt.ge/files/4/Report%202019%20ENG.pdf (visited on 7 October 2021).

10 Judgment of the Constitutional Court of Georgia №1/1/655 dated 18 April 2019 in the case of "*Ltd. 'SKS' v. The Parliament of Georgia*".

b. Judgment of the Constitutional Court of Georgia "*N(N) LE Media Development Foundation and N(N)LE Institute For Development of Freedom of Information v. the Parliament of Georgia*", 7 June 2019, №1/4/693,857

On 7 June 2019, the First Board of the Constitutional Court of Georgia adopted the judgment in the case of "*N(N)LE Media Development Foundation" and "N(N)LE Institute For Development of Freedom of Information" v. The Parliament of Georgia* (constitutional complaints N693 and N857).[11] The Court declared the norms of the Administrative Code of Georgia and the Law of Georgia "On Personal Data Protection" unconstitutional, which restricted the release of public information containing personal data.

According to the Constitutional Court, it was virtually impossible to obtain the full text of a court decision under the existing system, including when personal data subjects had no interest in protecting the privacy of personal information. In addition, even in the absence of the consent of the personal data subject, the balance between two constitutionally protected rights was almost unconditionally in favour of the protection of personal data. According to the Court, the initial balance established in favour of personal data is not compatible with the order of values recognized by the Constitution of Georgia.

The Constitutional Court pointed out that if the disputed norms were declared invalid immediately, there would be no reason to refuse to disclose public acts of the court in order to protect personal data, thus violating the right to privacy. Therefore, the Constitutional Court postponed the declaration of the disputed norms until May 1, 2020. It should be noted that the term set by the Constitutional Court for the Parliament of Georgia has expired, although the Parliament of Georgia has not made the relevant legislative changes in this case either.

11 Judgment of the Constitutional Court №1/4/693,857 dated 7 June 2019 in the case of "*N(N)LE 'Media Development Foundation' and N(N)LE 'Institute For Development of Freedom of Information' v. The Parliament of Georgia*".

c. 3. Judgment of the Constitutional Court of Georgia *"Citizen of Georgia Davit Dzotsenidze v. the Parliament of Georgia"*, 7 December 2018, №2/8/765[12]

On 7 December 2018, the Constitutional Court of Georgia rendered its judgment regarding the case of "*Citizen of Georgia Davit Dzotsenidze v. The Parliament of Georgia*" (constitutional complaint №765) and declared unconstitutional norm of the Civil Procedure Code of Georgia, which envisaged the possibility of annulling a final judgment of the Court under Article 423 clause 1 (f) of the Civil Procedure Code. The Court ruled that the said provision was incompatible with the right to a fair trial.

The Court noted that under the impugned provision, without exception, in all cases where a motion filed under newly discovered circumstances was substantiated, final judgments having entered into force were becoming entirely void. The court found that the newly discovered evidence and circumstances may indicate not only the need to review all the legal effects of the judgment but only part of it. The court found that a less restrictive measure would be to allow the judge to invalidate the decision on a case-by-case basis while balancing the interests of the parties to the case.

In addition, the Constitutional Court noted that in case of invalidation of the disputed norm upon publication of the judgment, no legal bases for nullification of the judgment might have existed. At the same time, the Court noted that in cases of newly discovered circumstances, the annulment of the final decision might be a requirement of the right to a fair trial. Accordingly, the annulment of the disputed provision immediately after the publication of the decision of the Constitutional Court may lead to a violation of the right to a fair trial. Therefore, the proclamation of the unconstitutional norm was postponed until April 30, 2019.

Regardless of expiration of the date set for the Parliament by the Constitutional Court, the former has not enacted respective legislative changes. Inaction of the Parliament in cases where the Court explicitly states that such an inaction can result in violation of the right to a fair trial, and is to be considered highly problematic.

12 Judgment of the Constitutional Court №2/8/765 dated 7 December 2018 in the case of "*Citizen of Georgia Davit Dzotsenidze v. the Parliament of Georgia*".

2. Cases regarding Which Legislative Changes Were Enacted after Expiration of the Deadline Set by the Constitutional Court

a. Judgment of the Constitutional Court of Georgia *"Citizen of Georgia Davit Malania v. the Parliament of Georgia"*, 19 October 2018, №2/7/779

On 19 October 2018, the Constitutional Court rendered its judgment in the case of "*Citizen of Georgia Davit Malania v. The Parliament of Georgia*" (constitutional complaint №779)[13] and declared unconstitutional norms of the Code of Administrative Offences, which prescribed that decisions of the first instance court on certain cases were final and were not subjected to an appeal.

According to the Constitutional Court, under the disputed norms, the possibility of a dispute in the Court of Appeals was excluded in the case of liability for serious offenses, including administrative offenses for which administrative detention was provided as a penalty, among other sanctions. According to the standard set by the court, a person liable for a serious offense should have the opportunity to appeal the decision to the Court of Appeals, regardless of whether a severe sanction has been applied to him. The Constitutional Court also found the restriction of the right to appeal to the Court of Appeals unconstitutional in the case of any administrative offense where the practice of the courts is inconsistent. According to the Court, the inadmissibility of an appeal in a situation where the courts of one instance interpret the norms differently poses a significant threat to legal certainty.

According to the Constitutional Court, the disputed norms served the most important legitimate purpose of protecting the court from overload. The immediate repeal of the impugned norms may have resulted in a reset of the appellate courts. Accordingly, the notice of invalidity of the disputed norms was postponed until March 31, 2019.

The Parliament of Georgia adopted the relevant legislative changes based on which, the preconditions for admissibility of an appeal in the Court of Appeals were determined. The named legislative change

13 Judgment of the Constitutional Court №2/7/779 dated 19 October 2018 in the case of "*Citizen of Georgia Davit Malania v. the Parliament of Georgia*".

came into force on 28 May 2020. It should be noted that in this case the legislative changes were made after the expiration of the term set by the Constitutional Court (March 31, 2019).

b. Judgment of the Constitutional Court of Georgia *"LLC. Gigant Security' and LLC 'Security Company Tigonis' v. the Parliament of Georgia and the Minister of Internal Affairs of Georgia"*, 14 December 2018, №2/11/747

On 14 December 2018, the Constitutional Court partially upheld constitutional complaint №747 - LLC 'Gigant Security' and LLC '*Security Company Tigonis' v. the Parliament of Georgia and the Minister of Internal Affairs of Georgia*".[14]

The Constitutional Court noted that by virtue of being a monitoring body, the Security Police Department had an unlimited access to information regarding activities of private security companies. This was to equip the former with major powers in the market and involved a high risk of restricting free competition. The court found that the legislature is obliged to establish a mechanism that excludes the possibility of a private individual having access to commercial information of its competitors. Therefore, the court declared the disputed norms unconstitutional.

In addition, the Constitutional Court noted that the invalidation of the disputed norms upon publication of the decision may have a negative impact on private security market as well as on its consumers. Thus, in order to adopt regulations compatible with the Constitution, annulment of the unconstitutional norms were postponed until June 30, 2019.

On December 19, 2019, the Parliament of Georgia adopted legislative changes, according to which, Public Safety Management Center "112" has been appointed as a body exercising oversight of the security sector. These legislative changes came into force on December 31, 2019. It should be noted that the changes came into force after the expiration of the term Deadline set by the court (June 30, 2019).

14 Judgment of the Constitutional Court №2/11/747 dated 14 December 2018 in the case of "*LLC. Gigant Security' and LLC 'Security Company Tigonis' v. the Parliament of Georgia and the Minister of Internal Affairs of Georgia*".

c. Judgment of the Constitutional Court of Georgia "*Citizen of Georgia Irakli Khvedelidze v. the Parliament of Georgia*", 18 April 2019, №1/3/1263

On April 18, 2019 the Constitutional Court of Georgia rendered the judgment on the case "*Irakli Khvedelidze v. the Parliament of Georgia*" (constitutional complaint № 1263).[15] The Court declared unconstitutional the norm according to which, the time for appealing a ruling of the court rendered on administrative case started to run from the moment when it was rendered. The unconstitutional norm was declared invalid from July 1, 2019.

In this case, relevant legislative changes were also made after the expiration of the term determined by the Constitutional Court. In particular, on October 16, 2019, the Parliament of Georgia adopted the aforementioned law which came into force on October 23, 2019.

IV. IMPLEMENTATION OF CONSTITUTIONAL STANDARDS BY COMMON COURTS

The Constitutional Court of Georgia has developed an important approach regarding the execution of its judgments. According to the case-law of the Court, one particular provision of law may have several different meanings when applied by common courts. Interpretation of ordinary law and determining its content is the exclusive competence of the common courts and the Constitutional Court does not intervene in this matter until the common courts give the law such interpretation that might be unconstitutional. In such a case, the court assesses the constitutionality of the particular interpretation given to the norm by the common courts. And if the norm as such does not have a problem of constitutionality in general, but its particular normative content is unconstitutional, the court does not repeal the norm completely, but only its specific normative content and the court indicates in its judgment that this interpretation, given by the common courts, is unconstitutional. In such a case, the unconstitutional normative content is directly reflected in the Legislative Herald and, as a result, the enforcement of the decision no longer requires additional legislative

15 Judgment of the Constitutional Court of Georgia №1/3/1263 dated 18 April 2019 in the case of "*Irakli Khvedelidze v. The Parliament of Georgia*".

changes by the Parliament. However, in such a case the common courts must take full consideration of the standards of the Constitutional Court.

Analysis of the last years' practice indicates that judges of the common courts have not been using norms and normative contents declared unconstitutional by the Constitutional Court. At the same time, judges of common courts frequently use constitutional standards outlined in judgments of the Constitutional Court while reasoning judgments or interpreting separate legal provisions. In addition, judges of common courts have referred to the Constitutional Court with constitutional referrals in a number of cases in order to examine the constitutionality of normative acts.

Yet, there are cases where challenges remain regarding the execution of constitutional court judgments. For example, in one case the Constitutional Court postponed the declaration of the disputed provision void until the concrete date. However, the Parliament of Georgia has not enacted legislative changes within this timeframe whereas the disputed provision has ceased to have legal effects.[16] And after that, because of the absence of regulation, the Supreme Court of Georgia used the unconstitutional norm that had ceased to have legal effects.[17]

V. CONCLUSION

Accordingly, leaving the matter without appropriate regulation might have a negative impact on the protection of human rights and liberties. Hence, the Parliament of Georgia and other relevant authorities must enact respective legislative changes within the timeframe set by the Constitutional Court so that the relations are not left without proper regulation and so that common courts encounter no obstacles in the process of effective implementation of standards established by the Constitutional Court.

16 Judgment of the Constitutional Court of Georgia "*Citizen of Georgia Davit Dzotsenidze v. the Parliament of Georgia*", 7 December 2018, №2/8/765.

17 *See* e.g. Ruling of the Criminal Chamber of the Supreme Court of Georgia *№ს-1225-ს-3-2019* dated 7 May 2019; Ruling of the Criminal Chamber of the Supreme Court of Georgia *№ს-1378-ს-4-2019* dated 1 July 2019.

EXECUTION OF JUDGEMENTS BY THE SUPREME COURT OF INDIA: ISSUES AND PROSPECTS

D. Nagarjun
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SUPREME COURT OF INDIA

EXECUTION OF JUDGEMENTS BY THE SUPREME COURT OF INDIA: ISSUES AND PROSPECTS

*Dr. D. Nagarjun**
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ABSTRACT

The enforcement and execution of judgments is at the core of the potential functioning of the judicial system in India. Indian Judiciary follows a hierarchical system with the Supreme Court of India at the Apex level, High Courts at the State level and District Courts at District level respectively. The Lower courts largely depend upon the Code of Civil Procedure, 1908 (CPC) for execution of judgments, orders and decrees while the Supreme Court of India and the High Courts are governed by its own procedural rules. The Supreme Court of India follows Supreme Court Rules, 2013 along with other specific provisions of the CPC for execution of its orders. The Supreme Court of India also has the power to punish for its Contempt under the Contempt of Courts Act, 1971 either for not executing the Orders or violating the orders passed by the Supreme Court. Furthermore, the Supreme Court of India has multifaceted jurisdictional powers which empower the Court to entertain various kinds of matters. Consequently, the execution of various judgments, orders or decrees also varies in procedure and substance depending upon the kind of jurisdiction invoked. In this vein, it is pertinent to mention that, the process of execution of various judgments, orders or decrees by the Supreme Court of India is "procedure driven" and at times becomes challenging. Timely justice lies at the fulcrum of the judicial system in India and problems and delays in execution of judgments not only jeopardizes Constitutional Justice but also denies justice to the people. In this contextual backdrop, the presentation would highlight the various potent prospects and issues

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while discussing the execution of judgments (including decrees/orders etc.) delivered by the Supreme Court of India. The presentation also highlights the recent Rahul Shah Judgment (2021) of the Supreme Court which has made a move in streamlining the execution of decrees across India.

I. MEANING AND SIGNIFICANCE OF EXECUTION OF JUDGEMENTS

The expression 'execution' means enforcement or implementation of the order or judgment passed by the Court. To explain it further, for example, A Decree (which is a formal expression of an adjudication and which conclusively determines the rights of the parties with regard to all or any of the matter in controversy in the suit) is complete when the decree-holder gets satisfied as to its enforcement against the judgment-debtor i.e. receiving of the awarded amount or property, as the case may be. It is the medium by which a decree-holder compels the judgment-debtor to carry out the mandate of the Decree. To take the benefit of a decree, execution proceedings - an Application under Order XXI of the Code of Civil Procedure, 1908 (hereinafter: "CPC") have to be filed before the appropriate court/authority within 12 years from the date of Decree.

From the above example, it is clear that Execution lies at the core of a dispute resolution system as even though the determination of rights/ duties of the parties to the suit or proceeding etc. has been done by the court, it would be of no use if the determination does not see the light of the day. The process of Execution of different type of judgements, orders or decrees, etc. varies in procedure and substance depending upon the kind of jurisdiction invoked. The Lower courts in India at district level largely depend upon the Code of Civil Procedure, 1908 for execution of judgements, orders and decrees while the Supreme Court of India and the various High Courts are governed by its own procedural rules including the Supreme Court Rules, 2013 and various High Court Rules respectively along with other specific provisions of the CPC. The Supreme Court of India and the High Court's also have the power to punish for its Contempt under the Contempt of Courts Act, 1971. The Supreme Court of India has multifaceted jurisdictional powers which empower the Court to entertain various kinds of matters. Hence, it is pertinent to look into the various jurisdictions of the Supreme Court of India.

II. THE MULTIFACETED JURISDICTION OF THE SUPREME COURT OF INDIA

The jurisdiction of the Supreme Court can be broadly categorised as under:

A. Appellate Jurisdiction

(i) Appeals permitted under Articles 132, 133 and 134 of the Constitution read with Orders XIX and XX;

(ii) Appeals arising out of Statutes or any other law for the time being in force (refer to Orders XIX, XX, XXI, XXII, XXIII and XXIV of the Rules);

(iii) Appeals under Section 2 of the Supreme Court (Enlargement of Criminal Appellate Jurisdiction) Act, 1970; and read with Order XX of the Rules;

(iv) Appeals, upon grant of special leave to appeal, under Article 136 of the Constitution read with Orders XXI and XXII of the Rules.

B. Extra-ordinary Appellate Jurisdiction

Petitions for special leave to appeal under Article 136 of the Constitution read with Orders XXI and XXII of the Rules.

C. Original Jurisdiction

(i) Petitions under Article 32 of the Constitution read with Order XXXVIII of the Rules for issue of directions or orders or writs, including the writs in the nature of *habeas corpus*, *mandamus*, *prohibition*, *quo warranto* and *certiorari* for enforcement of the fundamental rights;

(ii) Original suits under Article 131 of the Constitution read with Part III (A) Orders XXV to XXXVII of the Rules;

(iii) Petitions under Article 139A(1) of the Constitution read with Order XL of the Rules seeking transfer of cases involving the same or substantial questions of law pending before the Supreme Court and one or more High Courts or before two or more High Courts;

(iv) Petitions under Article 139A(2) of the Constitution read with Order XLI of the Rules seeking transfer of any case, appeal or other proceedings pending before any High Court to any other High Court;

(v) Petitions under Section 25 of the Code of Civil Procedure, 1908 read with Order XLI of the Rules, seeking transfer of any suit, appeal or other proceeding from a High Court or other civil court in one State to a High Court or other civil court in any other State;

(vi) Petitions under Section 406 of the Code of Criminal Procedure, 1973 read with Order XXXIX of the Rules, seeking transfer of any particular case or appeal from one High Court to another High Court or from a criminal court subordinate to one High Court to another criminal court of equal or superior jurisdiction, subordinate to another High Court;

(vii) Petition under Part III of the Presidential and Vice-Presidential Elections Act, 1952 (31 of 1952) read with Article 71 of the Constitution and Order XLVI of the Rules relating to doubts and disputes in relation to the election of a President or Vice President;

(viii) Petition under Section 11(5) of the Arbitration and Conciliation Act, 1996, read with Appointment of Arbitrators by the Chief Justice of India Scheme, 1996, relating to appointment of an Arbitrator.

D. Extra-ordinary Original Jurisdiction

(i) Petitions under Article 32 of the Constitution read with Part III(B) Order XXXVIII of the Rules in the nature of public interest litigation seeking redressal of public injury, enforcement of a public duty or vindicating interest of public nature;

(ii) Petitions under Article 32 of the Constitution seeking transfer of cases involving the State of Jammu and Kashmir.

E. Advisory Jurisdiction

(i) Reference by the President under Article 143(1) of the Constitution read with Order XLII of the Rules on a question of law or fact of public importance;

(ii) Reference by the President under Article 143(2) of the Constitution read with Order XLII of the Rules of a dispute of the kind mentioned in the proviso to Article 131 of the Constitution;

(iii) Reference by the President under Article 317(1) of the Constitution read with Order XLIII of the Rules in relation to an inquiry

for removal of the Chairman or any other Member of a Public Service Commission from his office on the ground of misbehaviour;

(iv) Reference by the President under Section 14(1) of the Right to Information Act, 2005 read with Order XLIII of the Rules;

(v) Reference by the Governor under Section 17(1) of the Right to Information Act, 2005, or any Statute under Order XLIII of the Rules;

(vi) Reference under Order XLIV of the Rules by the Central Government or Statutory Tribunals under the Statutes;

(vii) Reference under Section 257 of the Income Tax Act, 1961 read with Order XLV of the Rules, by the Income Tax Appellate Tribunal through its President.

F. Inherent and Plenary Jurisdiction

(i) Petitions under Section 3 of the Rules to Regulate Proceedings for Contempt of the Supreme Court, 1975, read with Articles 129 and 142 of the Constitution;

(ii) Applications for review under Article 137 of the Constitution read with Order XLVII of the Rules;

(iii) Curative petitions under Order XLVIII of the Rules as per law laid down in the case of *Rupa Ashok Hurra vs. Ashok Hurra and Anr. [2002 (4) SCC 388]* to prevent abuse of the process of the Court and cure gross miscarriage of justice;

(iv) Applications under Section 2 of the Supreme Court (Decrees and Orders) Enforcement Order, 1954.

III. EXECUTION OF JUDGEMENTS OF THE SUPREME COURT IN ITS JURISDICTION: VARIOUS MODALITIES

A. For Judgements/Decrees/Orders (Order XII of the Supreme Court Rules, 2013)

Order XII of the Supreme Court Rules, 2013 contains provisions for the execution of every decree passed or order made (generally and in appeal) along with provision for execution of decree passed in all other proceedings as produced below:

"1. The Court, after the case has been heard, shall pronounce judgment in open Court, either at once or on some future day, of which due notice shall be given to the parties or their advocates on record, and the decree or order shall be drawn up in accordance therewith.

2. A member of the Court may read a judgment prepared by another member of the Court.

3. Subject to the provisions contained in Order XLVII of these rules, a judgment pronounced by the Court or by a majority of the Court or by a dissenting Judge in open Court shall not afterwards be altered or added to, save for the purpose of correcting a clerical or arithmetical mistake or an error arising from any accidental slip or omission.

4. Certified copies of the judgment, decree or order shall be furnished to the parties on requisition made for the purpose, and at their expense.

5. ***Every decree passed or order made by the Court shall be drawn up in the Registry and be signed by the Registrar, the Additional Registrar or Deputy Registrar and sealed with the seal of the Court and shall bear the same date as the judgment in the suit or appeal.***

6. ***The decree passed or order made by the Court in every appeal, and any order for costs in connection with the proceedings therein, shall be transmitted by the Registrar to the Court or Tribunal from which the appeal was brought, and steps for the enforcement of such decree or order shall be taken in that Court or Tribunal in the way prescribed by law.***

7. Orders made by the Court in other proceedings shall be transmitted by the Registrar to the judicial or other authority concerned to whom such orders are directed, and any party may apply to the Judge in Chambers that any such order, including an order for payment of costs, be transmitted to any other appropriate Court or other authority for enforcement.

8. In cases of doubt or difficulty with regard to a decree or order made by the Court, the Registrar, the Additional Registrar or the Deputy Registrar shall, before issuing the draft, submit the same to the Court.

9. *Where the Registrar, the Additional Registrar or the Deputy Registrar considers it necessary that the draft of any decree or order should be settled in the presence of the parties or where the parties, require it to be settled, in their presence, the Registrar, the Additional Registrar or the Deputy Registrar shall, by notice in writing, appoint a time for settling the same and the parties shall attend the appointment and produce the briefs and such other documents as may be necessary to enable the draft to be settled.*

10. ***Where any party is dissatisfied with the decree or order as settled by the Registrar, the Registrar shall not proceed to complete the decree or order without allowing that party sufficient time to apply by motion to the Court, which shall not exceed 90 days from date of order of the Registrar failing which the Registrar will proceed to settle the decree****."*

B. Miscellaneous Rules for Execution (Order XVII of the Supreme Court Rules, 2013)

The relevant provision relating to execution under the Miscellaneous Rules contained in Order XVII of the Supreme Court Rules, 2013 has been reproduced below:

"1. The filing of a special leave petition or an appeal shall not prevent execution of the decree or order appealed against but the Court, may, subject to such terms and conditions as it may think fit to impose, order a stay of execution of the decree or order, or order a stay of proceedings, in any case under appeal to the Court."

This provision clearly indicates that execution of a decree or an order passed by the Supreme Court of India does not get automatically prevented just because a Special Leave Petition or an Appeal is filed against the said Decree or order. The discretionary power to stay the execution of the Decree vests in the Hon'ble Supreme Court of India.

C. Power to Dispense and Inherent Powers of the Supreme Court (Order LV of the Supreme Court Rules, 2013)

Order LV of the Supreme Court Rules, 2013 gives extraordinary inherent power to the Supreme Court of India to make such orders or give such directions which it considers essential to meet the ends

of justice. These rules also apply for execution of any decree, order, judgement of the Hon'ble Court.

"1. The Court may, for sufficient cause shown, excuse the parties from compliance with any of the requirements of these rules, and may give such directions in matters of practice and procedure as it may consider just and expedient.

[…]

6. Nothing in these rules shall be deemed to limit or otherwise affect the inherent powers of the Court to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court."

D. Supreme Court's Power to Punish for its Contempt

Even though the Constitution of India does not define the expression "contempt of court", as per the Contempt of Courts Act 1971, "contempt" can be defined as an offence of showing disrespect to the dignity or authority of a court. The act further continues to classify contempt into two broad categories namely civil contempt and criminal contempt. Civil contempt can be defined as the wilful disobedience to any judgment, direction, decree, writ, order or other processes of a court or the wilful breach of an undertaking that is given to the court. Criminal contempt, on the other hand, is a publication which may result in scandalizing the court by lowering its authority, interference in the due course of any judicial proceeding or an obstruction in the administration of justice. However, certain things such as fair and reasonable criticism of judicial acts and commentary on the administrative side of the judiciary or innocent publication and distribution of a certain matter do not constitute contempt of court. In India, the contempt law is mainly governed by the Contempt of Courts Act, 1971 as it empowers the court to punish acts of contempt because of which the Supreme Court and High Courts, by the virtue of being courts of record, hold inherent jurisdiction to punish for contempt of court.

The Supreme Court holds constitutional powers under Article 129 read with Article 142 (2) of the Constitution of India and subsequently, the High Courts also have powers vested in them under Article 215 of the Constitution to punish for contempt. The same was relied upon

by the Supreme Court in the case of *Bar Association vs. Union of India & Anr*.[1] In this particular case, the apex court examined the powers and further remarked that the inherent jurisdiction of the court of record to punish for contempt cannot be taken away by any act of Parliament.

Very recently also, in *Suraj India Trust vs. Union of India*[2], the Supreme Court observed that;

> *"A bare reading of Article 129 clearly shows that this Court being a Court of Record shall have all the powers of such a Court of Record including the power to punish for contempt of itself. This is a constitutional power which cannot be taken away or in any manner abridged by statute... In the context of the aforesaid it was opined that the comparison of the two provisions show that whereas the founding fathers felt that the powers under clause (2) of Article 142 could be subject to any law made by the Parliament, there is no such restriction as far as Article 129 is concerned. The power to punish for contempt is a constitutional power vested in this Court which cannot be abridged or taken away even by legislative enactment."*

IV. THE 'RAHUL SHAH JUDGEMENT': LOOKING FORWARD

Execution of decree is marred with substantial delay in India has its fair share of criticism while some stating it as the second stage of litigation. A decree is precisely the trophy that a claimant litigant eyes at the time of approaching a court of law. However, as it has rightly been pointed out at several occasions, obtaining a decree only proves to be less than half the battle won. The Supreme Court time and again has held that unreasonable delays in the execution of decrees just leaves the decree-holder devoid of its efforts, which are put in for attaining a decree. The Supreme Court in this regard held that *"[…] We strongly feel that there should not be unreasonable delay in execution of a decree because if the decree holder is unable to enjoy the fruits of his success by getting the decree executed, the entire effort of successful litigant would be in vain […]"*[3]

To address the issues pertaining to execution the Hon'ble Supreme Court of India in its recent judgement of *Rahul Shah v. Jitendar Kumar*

1 (1998) 4 SCC 409.
2 Writ Petition (c) No. 880 of 2016.
3 *Satyawati vs. Rajinder Singh*, (2013) 9 SCC 491.

Gandhi and Ors.,[4] outlined many issues relating to the execution of Decrees and Judgements in India but also issued some pertinent mandatory directions to be followed by the executing Courts. Before coming to the directions, it is pertinent to highlight the various issues pointed out by the Hon'ble Court. At the very outset, the Hon'ble Court observed in relation to the case at hand that;

> "*The course of the litigation highlights the malaise of constant abuse of procedural provisions which defeats justice, i.e. frivolous attempts by unsuccessful litigants to putting up spurious objections and setting up third parties, to object, delay and obstruct the execution of a decree.*"

The Court is subsequent paragraphs after discussing the arguments has outlined the various issues relating to execution as below:

> "*23. This court has repeatedly observed that remedies provided for preventing injustice are actually being misused to cause injustice, by preventing a timely implementation of orders and execution of decrees... This Court made a similar observation in Shub Karan Bubna and Shub Karan Prasad Bubna vs. Sita Saran Bubna,* wherein *it recommended that the Law Commission and the Parliament should bestow their attention to provisions that enable frustrating successful execution. The Court opined that the Law Commission or the Parliament must give effect to appropriate recommendations to ensure such amendments in the Code of Civil Procedure, 1908, governing the adjudication of a suit, so as to ensure that the process of adjudication of a suit be continuous from the stage of initiation to the stage of securing relief after execution proceedings. The execution proceedings which are supposed to be handmaid of justice and sub-serve the cause of justice are, in effect, becoming tools which are being easily misused to obstruct justice [...]*"
> (Paragraph 23 of the Judgement)

> "*25. These provisions contemplate that for execution of decrees, Executing Court must not go beyond the decree. However, there is steady rise of proceedings akin to a re-trial at the time of execution causing failure of realisation of fruits of decree and relief which the party seeks from the courts despite there being a decree in their favour. Experience has shown that various objections are filed before the Executing Court*

4 CIVIL APPEAL NOS. 1659-1660 of 2021.

and the decree holder is deprived of the fruits of the litigation and the judgment debtor, in abuse of process of law, is allowed to benefit from the subject matter which he is otherwise not entitled to." (Paragraph 25 of the Judgement)

"26. The general practice prevailing in the subordinate courts is that invariably in all execution applications, the Courts first issue show cause notice asking the judgment debtor as to why the decree should not be executed as is given under Order XXI Rule 22 for certain class of cases. However, this is often misconstrued as the beginning of a new trial. For example, the judgement debtor sometimes misuses the provisions of Order XXI Rule 2 and Order XXI Rule 11 to set up an oral plea, which invariably leaves no option with the Court but to record oral evidence which may be frivolous. This drags the execution proceedings indefinitely." (Paragraph 26 of the Judgement)

Similarly, the Hon'ble Court pointed out many other issues peculiar to specific civil proceedings under the Civil Procedure Code, 1908. It ultimately noted:

"35. Having considered the above mentioned legal complexities, the large pendency of execution proceedings and the large number of instances of abuse of process of execution, we are of the opinion that to avoid controversies and multiple issues of a very vexed question emanating from the rights claimed by third parties, the Court must play an active role in deciding all such related issues to the subject matter during adjudication of the suit itself and ensure that a clear, unambiguous, and executable decree is passed in any suit." (Paragraph 35 of the Judgement)

The Hon'ble Court in Paragraph no 42 of the Judgement, gave mandatory directions to all the executing courts of the country as below:

"1. In suits relating to delivery of possession, the court must examine the parties to the suit under Order X in relation to third party interest and further exercise the power under Order XI Rule 14 asking parties to disclose and produce documents, upon oath, which are in possession of the parties including declaration pertaining to third party interest in such properties.

2. In appropriate cases, where the possession is not in dispute and not a question of fact for adjudication before the Court, the Court may appoint Commissioner to assess the accurate description and status of the property.

3. After examination of parties under Order X or production of documents under Order XI or receipt of commission report, the Court must add all necessary or proper parties to the suit, so as to avoid multiplicity of proceedings and also make such joinder of cause of action in the same suit.

4. Under Order XL Rule 1 of CPC, a Court Receiver can be appointed to monitor the status of the property in question as 'custodia legis' for proper adjudication of the matter.

5. The Court must, before passing the decree, pertaining to delivery of possession of a property ensure that the decree is unambiguous so as to not only contain clear description of the property but also having regard to the status of the property.

6. In a money suit, the Court must invariably resort to Order XXI Rule 11, ensuring immediate execution of decree for payment of money on oral application.

7. In a suit for payment of money, before settlement of issues, the defendant may be required to disclose his assets on oath, to the extent that he is being made liable in a suit. The Court may further, at any stage, in appropriate cases during the pendency of suit, using powers under Section 151 CPC, demand security to ensure satisfaction of any decree.

8. The Court exercising jurisdiction under Section 47 or under Order XXI of CPC, must not issue notice on an application of third-party claiming rights in a mechanical manner. Further, the Court should refrain from entertaining any such application(s) that has already been considered by the Court while adjudicating the suit or which raises any such issue which otherwise could have been raised and determined during adjudication of suit if due diligence was exercised by the applicant.

9. The Court should allow taking of evidence during the execution proceedings only in exceptional and rare cases where the question of fact could not be decided by resorting to any other expeditious method

like appointment of Commissioner or calling for electronic materials including photographs or video with affidavits.

10. The Court must in appropriate cases where it finds the objection or resistance or claim to be frivolous or mala fide, resort to Sub-rule (2) of Rule 98 of Order XXI as well as grant compensatory costs in accordance with Section 35A.

11. Under section 60 of CPC the term "…in name of the judgment-debtor or by another person in trust for him or on his behalf" should be read liberally to incorporate any other person from whom he may have the ability to derive share, profit or property.

12. The Executing Court must dispose of the Execution Proceedings within six months from the date of filing, which may be extended only by recording reasons in writing for such delay.

13. The Executing Court may, on satisfaction of the fact that it is not possible to execute the decree without police assistance, direct the concerned Police Station to provide police assistance to such officials who are working towards execution of the decree. Further, in case an offence against the public servant while discharging his duties is brought to the knowledge of the Court, the same must be dealt stringently in accordance with law.

14. The Judicial Academies must prepare manuals and ensure continuous training through appropriate mediums to the Court personnel/staff executing the warrants, carrying out attachment and sale and any other official duties for executing orders issued by the Executing Courts.

The Court lastly noted that;

"43. We further direct all the High Courts to reconsider and update all the Rules relating to Execution of Decrees, made under exercise of its powers under Article 227 of the Constitution of India and Section 122 of CPC, within one year of the date of this Order. The High Courts must ensure that the Rules are in consonance with CPC and the above directions, with an endeavour to expedite the process of execution with the use of Information Technology tools. Until such time these Rules are brought into existence, the above directions shall remain enforceable."
(Para 43 of the Judgement)

EXECUTION OF THE CONSTITUTIONAL COURT'S DECISIONS: EXPERIENCE OF THE CONSTITUTIONAL COUNCIL OF THE REPUBLIC OF KAZAKHSTAN

Yuliya Verchenko

CONSTITUTIONAL COUNCIL OF THE REPUBLIC OF KAZAKHSTAN

EXECUTION OF THE CONSTITUTIONAL COURT'S DECISIONS: EXPERIENCE OF THE CONSTITUTIONAL COUNCIL OF THE REPUBLIC OF KAZAKHSTAN

*Yuliya Verchenko**

ABSTRACT

The article considers experience of the Constitutional Council of the Republic of Kazakhstan in the issues of the execution of judgments. After briefly describing the role and impact of the Council's decisions, the paper deals with the execution mechanism of the decisions of the Kazakhstan's constitutional review body. It identifies ways for its improvement. The author concludes that execution of the judgments of constitutional courts is a cornerstone of the process of implementation of constitutional justice. The Constitutional Council of Kazakhstan, has managed to emerge as a strong institution of constitutional justice, constantly improving and developing its working mechanism aimed at harmonizing the State's legal system and maintaining its constitutional and legal balance.

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INTRODUCTION

In modern conditions, the execution of constitutional court's decisions is a multi-faceted issue. This is a subject of unquestionable interest with regard to contemporary constitutional justice.

In a democratic state under the rule of law, the Constitution is the main regulator of the system of socio-economic, political and other relations. The activities of constitutional justice bodies are aimed at ensuring the supremacy of the Basic Law. This mission predetermines the importance of decisions of constitutional courts, which, in fact, are a continuation of the Constitution and have supreme legal force[1]. Thus, in a State which has committed itself to be governed by the rule of law, the execution of constitutional court decisions is of far-reaching importance, due to its special place and role in the formation of the legal system, democracy and protection of human rights. It is true that constitutional courts shape democracies because they are the interpreters of the principles and norms enshrined in the constitution and provide guidance in their application. That is their role: providing a reference that allows all state bodies to understand and apply the constitution.

In this way, constitutional courts ensure a stable interpretation of the constitution that provides clear guidance on its application, respecting the rule of law.

Constitutional courts also have an important role to play in furthering and strengthening the democratic process, in which the constitution serves as a main pillar.

In order to be able to achieve this, constitutional courts need independence as well as authority. However, as a result of the specific feature and role of constitutional courts, this calls for an authority that is reinforced and an unchallenged independence. It is only under these conditions that a constitutional court will be effective.[2] In this regard, to a large extent, the quality of the state's legislation depends on the execution of the constitutional review body's decisions and its realization has an exceptional importance for strengthening the constitutionalism in the state.

1 Kairat Mami, Opening speech at the International online Seminar of 25 June, 2021
2 Gianni Buquicchio, Opening speech at the International online Seminar of 25 June, 2021

At the same time, the current situation shows that increasing the efficiency of the execution of the Constitutional Court's decisions, strengthening the legal basis of constitutional review activities is an extremely complex and multifaceted tasks. This fact enhances the importance of solving problems of the execution of judgments, which includes mechanism for implementation of the decisions, as well as the role and place of the competent state bodies and officials in this process.

I.THE ROLE AND IMPACT OF THE CONSTITUTIONAL COUNCIL'S DECISIONS

Considering the experience of Kazakhstan on the issue under discussion, it should be noted first that Section Six of the Constitution of the Republic of Kazakhstan contains the fundamental norms establishing constitutional review in the Republic, the implementation of which is entrusted to the Constitutional Council.

It is not included in the judicial system, being an independent state body that ensures the supremacy of the Constitution of the Republic as the Basic Law throughout the territory of Kazakhstan. Constitutional Council's decisions are intended to serve as a correct interpretation of the principles and norms of the Constitution by various subjects of public relations, which is a guarantee of sustainable and stable development of the State. The legal positions of the Constitutional Council play an important role not only in restoring constitutionality in the relevant legal relations, but also in guiding the development of current legislation and the development of law enforcement practice.

It is important to add that decisions of the Constitutional Council come into force on the day of their adoption, are generally binding throughout the territory of the Republic, are final and not subject to appeal (paragraph 3 of Article 74 of the Constitution). From this it follows that a prompt and correct execution of legal positions and recommendations of the Constitutional Council's final decisions on improving laws and other regulatory legal acts, as well as the practice of applying legislation is a necessary condition to be observed for ensuring constitutional legality in the Republic.

Chapter V of the Constitutional Law "On the Constitutional Council of the Republic of Kazakhstan" is devoted to the decisions of the Constitutional Council, according to which the decision of the Constitutional Council is any act adopted at its session.

Decisions of the Constitutional Council are made in the form of resolutions, including normative resolutions, which are an integral part of the current law of the Republic of Kazakhstan, as well as conclusions and annual addresses.

Annual address on the constitutional legality in the Republic is among core competence of the Constitutional Council. In this document, the Constitutional Council, based on the results of the considered appeals, analyzes the current legislation and the practice of its application from the standpoint of their compliance with the norms of the Constitution, thus drawing the attention of the relevant state bodies to the existing shortcomings, including in the field of execution of the Constitutional Council's decisions.

II. THE EXECUTION MECHANISM OF THE CONSTITUTIONAL COUNCIL'S DECISIONS

Analyzing the mechanism for the executions of Council's decisions, the first thing to be noted is that Constitution of the Republic does not itself determine the procedure for the implementation of decisions of the Constitutional Council. However, according to Article 40 of the aforementioned Constitutional Law, the Constitutional Council may determine the order and timeframe for execution of its decisions. In 2008, this Article was amended to strengthen the mechanisms for the execution of decisions of the Constitutional Council. According to the amendments, the recommendations and suggestions for improvement of legislation contained in the Constitutional Council's decisions are subject to mandatory review by the state authorities and officials with mandatory notification to the Constitutional Council.

Furthermore, paragraph 3 of the Article 40 of the Constitutional Law stipulates that the state bodies and officials within the deadlines established by the Constitutional Council shall notify the Constitutional Council on the measures adopted to execute its decisions. If the decision of the Constitutional Council requires an increase in state expenditures

or a reduction in state revenues, the Constitutional Council determines the terms of execution of its decisions in consultation with the Government of the Republic of Kazakhstan.

Looking back at the activities of the Kazakhstan's constitutional review body over the years, it should be noted that the Constitutional Council adopted more than 145 normative resolutions. Many decisions have been taken in this period to realize the potential of the Basic Law, which, however, became a catalyst and pillar for the formation of separate conceptual directions of modern national constitutional policy.

The execution of Constitutional Council decisions is given a positive impetus by the annual discussion of this issue at the meeting of the consultative and advisory body - Legal Policy Council under the President of the Republic of Kazakhstan, identifying the responsible State bodies and giving specific instructions. Every year, in accordance with the Plan of Action of the Legal Policy Council, meetings provides the information on the implementation and measures taken for executions of the Constitutional Council's decisions.

All of this points to the conclusion that the mechanism for the implementation of the decisions of the Constitutional Council works quite well. Over the years, state bodies and officials have adopted a number of legislative, organizational and other measures aimed at implementing specific final decisions of the Constitutional Council and strengthening the legal mechanisms for executing decisions of the Constitutional Council.

At the same time, constitutional review serves as an incentive for continuous improvement of the national legal system and harmonization of constantly changing social relations. More practical mechanisms for the supervision of the execution of decisions as well as legal consequences for non-compliance with their requirements seem to be necessary.

In this regard, the Constitutional Council is currently working on proposals for amendments and additions to the Constitutional Law "On the Constitutional Council of the Republic of Kazakhstan". Moreover, it has developed Concept Paper for improving the legal framework of the Constitutional Council. These initiatives are focused on the

improving the working methods of the Council and the procedure for the execution of its decisions.

Firstly, in order to ensure legal certainty and balance of interests, it is proposed that Article 39 of the Constitutional Act should be supplemented by a provision providing that decisions of law enforcement bodies based on an unconstitutional law are not only not enforced, but also subject to review in accordance with the established procedure.

However, in the light of the circumstances of a particular appeal, the Constitutional Council, in accordance with paragraph 1 of Article 40 of the Constitutional Law, is entitled to determine a special procedure for the execution of its decision, which may include, in particular, the exclusion of the need to review previously issued legal acts. This was the case, for example, in the normative decree of January 21, 2020, in which the Constitutional Council indicated that the normative decree had no retroactive effect, which means that there is no obligation to review and cancel previously issued and executed court decisions on eviction from housing.

Secondly, it is proposed to establish a six-month deadline for submitting a draft law to Mazhilis, which is aimed at effective execution of the Constitutional Council's decisions. In other words, if legislative measures must be taken, then the authorized state bodies, no later than six months after the publication of the decision of the Constitutional Council, shall ensure the submission of a draft law to the Mazhilis of Parliament or the adoption of other legal acts. Until the adoption of a new legal act, the Constitution of the Republic of Kazakhstan and the decision of the Constitutional Council shall be directly applied. This concerns the implementation of the binding legal positions of the Constitutional Council.

It is important to note this experience exists in several countries. It relates not only to laws but also to by-laws. For example, in the Russian Federation, if the Constitutional Court's decision has found a normative act to be unconstitutional or if there is a need to eliminate a gap or contradiction in the legal regulation, the Government submits a draft law to the State Duma no later than six months. This requirement

also applies when the law or some of its provisions are found to be in conformity with the Constitution in the Constitutional Court's interpretation.

Undoubtedly, the rules on the execution of judgments, where such rules exist, differ for every constitutional court. However, the Venice Commission in its opinion on the above-mentioned Concept Paper notices that the execution of constitutional court judgments is an essential requirement of the rule of law. Leaving the choice of whether to follow the judgments of the Constitutional Court to Parliament does not live up to this requirement.[3]

CONCLUSION

What conclusions can be drawn from all this?

Execution of the judgments of constitutional courts is a cornerstone of the process of implementation of constitutional justice. The legal positions of constitutional review bodies should be reflected in the legislation and its application. Consequently, a clear mechanism for their execution is needed. The execution of the court's decisions depends on many factors. However, there is no doubt timely and full implementation of such decisions is an essential condition for the establishment of the rule of law. Therefore, failure to implement their decisions calls into question the entire machinery for implementing the Constitution. The Constitutional Council of Kazakhstan, has managed to emerge as a strong institution of constitutional justice, constantly improving and developing its working mechanism aimed at harmonizing the State's legal system and maintaining its constitutional and legal balance.

3 Venice Commission, CDL-AD(2021)010, Opinion on the Concept Paper for Improving the Legal Framework of the Constitutional Council, Strasbourg, 23 March 2021

CHALLENGES OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO IN THE ENFORCEMENT OF ITS JUDGMENTS

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Kreshnik Jonuzi

CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO

CHALLENGES OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF KOSOVO IN THE ENFORCEMENT OF ITS JUDGMENTS

Nexhat Kelmendi[*]
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INTRODUCTION

The Constitutional Court of the Republic Kosovo (hereinafter: "CCRK") was established in January 2009. The CCRK is the final authority in the Republic of Kosovo for the interpretation of the Constitution and the compliance of laws with the Constitution.[1] It ensures the functionality of the institutions of the country in accordance with the Constitution and guarantees the protection of individual rights and freedoms guaranteed by the Constitution.[2] The role and responsibilities of the CCRK are defined in the Constitution of the Republic of Kosovo and in the Law on the Constitutional Court. Its internal organization is regulated by the Rules of Procedure of the CCRK. Like many other counterpart courts, the CCRK can review and decide on a specific case only after submission of the referral by the authorized parties based on the Constitution.[3] According to Article 113, paragraph 1, of the Constitution of the Republic of Kosovo, the CCRK decides only on cases brought before it legally by an authorized party.

With regard to the aforementioned topic, we shall elaborate the following subtopics pertinent to: I. Legal effect of the CCRK decisions; II. Legal mechanisms for the enforcement of the CCRK judgments; III. Monitoring the enforcement of the CCRK judgments, and IV. Challenges of the CCRK in the enforcement of its judgments.

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1 Article 112.1 of the Constitution of the Republic of Kosovo.
2 Chapter II of the Constitution of the Republic of Kosovo.
3 Article 113.1 of the Constitution of the Republic of Kosovo.

I. LEGAL EFFECT OF THE CCRK DECISIONS

Decisions of the Constitutional Court of the Republic of Kosovo are final and of binding character on the judiciary and all persons and institutions of the Republic of Kosovo.[4] In cases where a referral has been submitted to the CCRK, regarding the challenge of the constitutionality of a law, it *ex officio* suspends (stays) all procedures for the implementation of that law until the Court renders final decision if it considers that the application of the contested law may result in unrecoverable damages.[5] If the CCRK finds that the contested law or its norm is contrary to the provisions of the Constitution then it repeals that law or that norm of law. The judgment on the abrogation of the law or the norm of that law, as unconstitutional, is effective on the day of the publication of the judgment, unless otherwise provided in the enacting clause of the judgment of the CCRK.[6]

Procedures regarding the enforcement of the CCRK judgments have been further regulated by the Rules of Procedure of the CCRK. The issuance and approval of the Rules of Procedure derives from Article 115 of the Constitution of the Republic of Kosovo.[7] In the hierarchy of legal acts, Rules of Procedure have the force of law, same as the Rules of Procedure of the Assembly of the Republic of Kosovo. Based on this Regulation, the CCRK in the enacting clause of its judgments may specify the manner and time-limit within which its judgment must be enforced by the relevant institution.[8] The setting of deadlines for the implementation of CCRK judgments depends on the type of the submitted referral. In cases where the Applicants are individuals, the CCRK mainly assigns to regular courts or other public authorities a time limit of three (3) to six (6) months.[9] Whereas in cases when the referrals are submitted by the state bodies, such as the President, the Assembly, the Government, the deputies and the Ombudsperson, where a law or public act is contested, the effect of the entry into force

4 Article 116.1 of the Constitution of the Republic of Kosovo.
5 Article 116.2 of the Constitution of the Republic of Kosovo.
6 Article 116.3 of the Constitution of the Republic of Kosovo and Article 20, (paragraphs 4 and 5) of Law No. 03/L-121 on the CCRK.
7 Article 115 of the Constitution of the Republic of Kosovo.
8 Rule 66 (4) of the Rules of Procedure No. 01/2018 of the CCRK.
9 Judgment *KI187/13*, of the CCRK, of 16 April 2014, part of the enacting clause, point VI.

of the Judgment of the CCRK is the moment of its publication in the Official Gazette of the Republic of Kosovo.[10]

II. LEGAL MECHANISMS FOR THE ENFORCEMENT OF THE CCRK JUDGMENTS.

Based on the Rules of Procedure of the CCRK, all institutions responsible for the execution of judgments of the Court, are obliged by an order specified in the enacting clause of the judgment, to submit to the CCRK, the information regarding the measures, which have been undertaken to enforce the decision of the Court.[11] In the event of a failure to inform on time and according to the order given in the judgment, the CCRK through its mechanisms addresses the relevant institution to act in accordance with its order set out in the judgment. Whereas in case of non-execution of the judgment of the CCRK, by the relevant institution, which is directly responsible for the execution of the judgment, the CCRK may issue a decision on non-execution, in which it will be noted, among other things, that the judgment in the case KIxx/KOxx has not been executed by the relevant institution. The decision on non-execution of the judgment of the CCRK is approved by the Court and then published on the website of the CCRK and in the Official Gazette of the Republic of Kosovo.[12]

At a later stage, regarding the non-execution of its judgment, the CCRK notifies the State Prosecutor, from whom it expressly requests to undertake all actions against the institution that has not yet executed the judgment of the CCRK.[13] In addition to the reference to Article 116.1 of the Constitution and Rule 66 (7) of the Rules of Procedure, the CCRK also refers to Article 394 of the Criminal Code of the Republic of Kosovo, which stipulates that non-execution of court decisions by official persons constitutes a criminal offense punishable by effective imprisonment of up to 5 (five) years.[14]

10 Judgment *KO219/19*, of the CCRK, of 9 July 2020, part of the enacting clause.
11 Rule 66 (5) of the Rules of Procedure of the CCRK.
12 Rule 66 (6) of the Rules of Procedure of the CCRK.
13 Rule 66 (7) of the Rules of Procedure of the CCRK.
14 Criminal Code of the Republic of Kosovo No. 06/L-074 of 14 January 2019, Article 394.

III. MONITORING THE ENFORCEMENT OF THE CCRK JUDGMENTS

On 18 June 2013, the CCRK being seriously committed to the enforcement of its judgments, by Decision KK127/13 established a monitoring group, which exclusively takes care of the enforcement of Court's judgments. Based on the abovementioned decision, the members of the monitoring group perform the following tasks; 1) monitor the enforcement of judgments of the CCRK; 2) communicate with the institutions responsible for enforcement, and 3) prepare reports on monthly and annual basis, which are approved in the following administrative session by all judges of the CCRK. The monitoring team of the CCRK consists of at least two judges, the Secretary General, two members of the Legal Unit and two officials from the Secretariat of the CCRK.

Since its establishment, the CCRK has issued 1839 decisions so far, 102 of which are judgments with violations of constitutional provisions and 33 of which have been declared judgments without violation of constitutional provisions. From 1839 decisions, 1715 with individual applicants (natural and legal persons), known by the CCRK as KI referrals (Individual referral). While 117 of the decisions issued by the court have been submitted by state bodies, which are identified with the initials KO. Based on the latest updates by the monitoring group, it results that 99% of the judgments of the CCRK have been enforced, with the exception of some judgments, where the Applicants are natural and legal persons and where the execution procedures have required taking some other steps, such as acquiring of additional budget funds from the Government of the Republic of Kosovo, or other procedures such as mediation.[15] Regarding the KO Judgments, where the Applicants were state bodies, it results that only one Judgment of the CCRK has not yet been executed by the responsible institution.[16]

IV. CHALLENGES OF THE CCRK IN THE ENFORCEMENT OF ITS JUDGMENTS

As mentioned above, the CCRK does not possess any other mechanism by which it would oblige the public institutions of the Republic of Kosovo to enforce its judgments, except for the actions provided by Rule 66 of the Rules of Procedure of the CCRK and the

15 Judgment of the CCRK, case *KI187/13*, of 16 April 2014.
16 Judgment of the CCRK, case *KI56/09*, of 22 December 2010.

Criminal Code of the Republic of Kosovo and this poses a continuous challenge for the CCRK. The CCRK is aware that in some countries such as Austria, for example, the enforcement of the judgments of the Austrian Constitutional Court is directly taken care of by the President of Austria or as in the case of Albania, where the enforcement of the judgments of the Albanian Constitutional Court is taken care of by the Council of Ministers, at the state level.

Beyond the challenges that the CCRK has had with state institutions in the enforcement of its judgments, from the very beginning a challenge for itself has also been the misinterpretation of the CCRK judgments by the regular courts, mainly by the Supreme Court of the Republic of Kosovo, which argued that the regular courts are restricted by law in handling allegations and submissions submitted by the parties only on the basis of legality, thereby leaving aside and not elaborating on the assessment of constitutional aspects of the submissions and allegations, as required by the Constitution.[17] However, these challenges have been overcome after a certain period, with the initiative of the CCRK, through the organization of joint professional seminars and roundtables. Among others, as a challenge for the CCRK was also the approach of media, independent analysts, interest groups, and political entities, towards judgments of the CCRK, by ascribing them the legal power of an advisory and recommendatory nature, which created an impression on the public that the enforcement of the judgments of the CCRK depends on the will of the relevant institutions to do so and they are not binding to execution. In relation to this concern, the CCRK, in addition to various conferences, has also spoken through its judgments, making clear to state actors, certain entities and citizens, the character of decisions and the effect of the legal force of its judgments, according to Article 112 and 116 of the Constitution.

The CCRK has so far undertaken the measures set out in its Rules of Procedure with respect to the Judgments: (i) in Case *KO01/09*, of 18 March 2010, Applicant *Qemail Kurtishi*, by issuing the Order for enforcement of the Judgment for a period of three months; (ii) in Case KI08/09 of 17 December 2010, Applicant *The Independent Union of Workers of IMK Steel Factory*, in Ferizaj, by issuing a Decision on non-

17 Articles 53 and 102 (3) of the Constitution of the Republic of Kosovo

execution and notifying the State Prosecutor; (iii) in Case *KI112/12* of 5 July 2013, Applicant *Adem Meta*, notifying the State Prosecutor of its non-execution and addressing a letter to the President of the Basic Court in Mitrovica; and (iv) in Case KI187/13 of 1 April 2014, by issuing an Updated Information regarding Judgment No. *KI187-13* as well by notifying the State Prosecutor on the non-execution of Judgment *KI187/13*. As a result of the aforementioned actions, the Judgment in Case *KI187/13* has been enforced so far, and in the meantime, there are 3 judgments of the CCRK that have not been enforced yet.

CONCLUSION

Therefore, we consider that due to the lack of other state mechanisms, the entire burden to take care of the enforcement of its judgments falls on the CCRK itself. All that the CCRK can do, in such circumstances, is that through important state events, organization of its judicial year, to appeal on the relevant state authorities, such as the President of the Republic, the Assembly, the Government, and even the Mayors of the respective municipalities of the Republic of Kosovo, to act in accordance with Article 116.1 of the Constitution and to execute all the judgments of the Court, without wasting time and without causing material and non-material damages to the parties who expect benefits from the execution of judgments. In such cases, state actors are reminded that the non-execution of a court judgment violates a series of constitutional principles, such as that of an adjudicated matter (*res judicata*), legal certainty and the rule of law, emphasizing the maxim, that the rule of law is achieved only when all judgments of the CCRK are executed by the relevant responsible institutions.

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IMPLEMENTATION OF THE DECISIONS MADE BY THE CONSTITUTIONAL REVIEW BODY IN THE LIGHT OF THE CONSTITUTIONAL REFORM IN THE KYRGYZ REPUBLIC

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CONSTITUTIONAL COURT OF THE KYRGYZ REPUBLIC

IMPLEMENTATION OF THE DECISIONS MADE BY THE CONSTITUTIONAL REVIEW BODY IN THE LIGHT OF THE CONSTITUTIONAL REFORM IN THE KYRGYZ REPUBLIC

*Bermet Myrzakanova**
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ABSTRACT

Effective implementation of court decisions is one of the basic elements of the rule of law. Only a direct legal mechanism for implementing the decisions of the constitutional justice body is necessary, but also an indirect mechanism involving the active, proactive participation of state bodies and officials. The decision-makers in implementing the acts of the constitutional review body must understand their responsibility while realizing that they are not implementing the whim of any institution of power, but are implementing the constitutional values and principles in life. It should be taken into account that the effectiveness of the implementation of the decisions of the constitutional justice body has a special and essential role, which consists in forming the best way to achieve stability not only of the Constitution but also of the entire legal system of the state.

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INTRODUCTION

Effective implementation of court decisions is one of the basic elements of the rule of law. Therefore, we believe that further progressive development of constitutional review in the Kyrgyz Republic, as the most important element on the way to achieve the rule of law, will be difficult without the study and implementation of the best foreign experience in this area. Such interest in this topic is caused, first of all, by the importance of constitutional court decisions for the maintenance of constitutional legality in the country.

I. REFORMING THE CONSTITUTIONAL CONTROL BODY IN THE KYRGYZ REPUBLIC

The Kyrgyz Republic has carried out a constitutional reform, which resulted in a restated Constitution, which entered into force on May 5, 2021. Kyrgyzstan switched from a parliamentary-presidential republic to a presidential one at the current stage and remains committed to building a democratic and rule-of-law state.

A special role in the successful implementation of democratic and legal reforms in society also depends on the judicial power, including the constitutional review body, as a mechanism intended to ensure the implementation of tasks and functions of the rule-of-law state, as well as to ensure the supremacy of the Constitution. Therefore, the supremacy of the Constitution is the top priority for guaranteeing a clear distribution of powers, the rule of law, and the establishment of a truly rule-of-law state. The constitutional review body has the important task of protecting and correctly applying the provisions of the Basic Law of the state.

The regular Summer School is held in a special, one might say, unique period for us, when the constitutional review body is in the border zone – the transformation of the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic into the Constitutional Court when it is undergoing changes of institutional and procedural order.

According to the restated Constitution, the Constitutional Chamber of the Supreme Court was transformed into the Constitutional Court of the Kyrgyz Republic and it was given new powers. Along with the powers exercised by the Constitutional Chamber, such as

resolving cases on the compliance of laws and other regulatory legal acts of the Kyrgyz Republic with the Constitution, giving opinions on the constitutionality of international treaties to which the Kyrgyz Republic is a party, that have not entered into force, as well as giving opinions on a draft law on amendments and changes to the Constitution, the Constitutional Court will from now on deal with the official interpretation of the Constitution, resolution of disputes on competence between the branches of state power, and giving an opinion on compliance with the established procedure for bringing charges against the President.

According to experts, the most positive aspect of the restated Constitution was the transformation of the Constitutional Chamber of the Supreme Court into the Constitutional Court and giving it additional powers.

The Constitutional Court is currently on a standby mode for the adoption of the Constitutional Law "On the Constitutional Court", which has been submitted to the country's Parliament, and we hope that it will be passed in the near future.

For information, we would also like to inform you that according to the Law on the enactment of the restated Constitution of the Kyrgyz Republic, acting judges of the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic shall be recognized as judges of the Constitutional Court of the Kyrgyz Republic and shall retain their powers for the entire term of their election.

This is very briefly about the current state of affairs regarding novelties in the constitutional justice system after the constitutional reform.

II. THE PROCEDURE FOR THE EXECUTION OF DECISIONS OF THE CONSTITUTIONAL CONTROL BODY IN THE KYRGYZ REPUBLIC

The peculiarity of our situation is also the fact that our report will focus on the practice of implementation of the decisions of the Constitutional Chamber before its transformation into the Constitutional Court. Since the Constitutional Court is its legal successor, it will further monitor the implementation of the decisions made by the Constitutional Chamber.

As a Constitutional Chamber, from its formation (2013) to the present, it has passed in total 117 decisions and 1 opinion, including:

- decisions on recognition of regulatory legal acts not contradicting the Constitution – 72;
- decisions on recognition of contested regulatory legal acts as contradicting or partially contradicting the Constitution – 45

An analysis of the information provided by the lawmaking bodies whose acts were the subject of review by the Constitutional Chamber shows that out of 64 decisions, the content of which results in the need to amend legislation, 21 decisions of the Constitutional Chamber remain unimplemented.

At the same time, according to 21 decisions of the Constitutional Chamber, 11 draft laws have been approved by the relevant decisions of the Cabinet of Ministers of the Kyrgyz Republic and submitted to the Parliament for consideration; 2 draft laws are under consideration of the Cabinet of Ministers of the Kyrgyz Republic, 8 draft laws are under development by the Ministry of Justice of the Kyrgyz Republic.

In general, the results of the implementation of decisions made by the Constitutional Chamber are satisfactory. This positive trend has developed after the introduction in 2017 of relevant amendments to legislative acts to optimize the implementation of its decisions.

It should be noted that in the Constitutional Law "On the Constitutional Chamber of the Supreme Court of the Kyrgyz Republic" until 2017 the legislator has not stipulated specific mechanisms for the implementation of decisions of the constitutional review body. In this regard, in the implementation of the decisions made by the Constitutional Chamber, there were mishaps, when the state authorities shifted the implementation of its decisions to each other. As a result, lawmaking bodies unreasonably delayed the implementation of its decisions.

Thus, on June 22, 2017, to overcome this situation, the Parliament of the country introduced legal mechanisms for the implementation of the decisions made by the Constitutional Chamber. According to these amendments, the website of the Constitutional Chamber was recognized as the official source of publication of its decisions. This was

done to ensure the timeliness of the implementation of its decisions because the amendments stipulated certain timeframes for the elaboration of draft laws for subsequent submission to Parliament for consideration; the timeframes for the implementation of decisions were calculated from the date of publication of the act of the Constitutional Chamber on its official website. In addition, specific timeframes for implementing the decisions of the Constitutional Chamber were set. For example, if the decision of the Constitutional Chamber recognizes a constitutional law, code, or law as contradicting the Constitution in whole or in part, or the need to eliminate gaps in legal regulation arises from the decision of the Constitutional Chamber, the Government of the Kyrgyz Republic, within four months after the publication of the decision of the Constitutional Chamber on its official website, submitted a relevant draft law to the Parliament. At the same time, these draft laws were to be considered by the Parliament in extraordinary order. Members of Parliament could also initiate such draft laws. In this case, these draft laws were subject to parliamentary consideration only with the opinion of the Government of the Kyrgyz Republic.

A three-month timeframe was set for rule-making bodies, whose acts were the subject of constitutional review, to bring subordinate laws in line with the decision of the Constitutional Chamber and the Constitution of the Kyrgyz Republic.

For the implementation of the above amendments to the legislation, the Government of the Kyrgyz Republic also adopted a resolution (No. 588 dated September 18, 2017), where the Ministry of Justice of the Kyrgyz Republic is defined as the executive body for the development of draft regulatory legal acts arising from the decisions of the Constitutional Chamber.

Within the framework of making amendments on the implementation of decisions of the Constitutional Chamber, there were also envisaged amendments to the Law of Kyrgyz Republic "On the Rules of the *Jogorku Kenesh* (Parliament) of the Kyrgyz Republic" to the effect that draft constitutional laws and laws arising from the decisions of the Constitutional Chamber must contain provisions arising exclusively from the meaning and content of its decision; to the Law of KR "On regulatory legal acts of the Kyrgyz Republic" that draft regulatory legal

acts developed to implement decisions of the Constitutional Chamber are not subject to public hearings.

These amendments were introduced to exclude the introduction of certain amendments distorting the meaning of the draft law, developed to implement the decision of the Constitutional Chamber by the Government of Kyrgyz Republic during its discussion and adoption by the Parliament, as well as to ensure the timely implementation of decisions of the Constitutional Chamber, since the regulatory legal act has already passed constitutional review and cannot be subject to public hearings, but is subject to mandatory implementation.

It is also a positive trend that the new draft law "On the Constitutional Court" has the same legal mechanisms for implementing a decision of the Constitutional Court. The only difference lies in the fact that it is proposed to reduce the timeframes for the preparation of draft laws and their submission by the Cabinet of Ministers to the Parliament of the country and adoption of by-laws, in implementation of the decisions of the Constitutional Court by three and two months respectively.

I would like to note that we need not only a direct legal mechanism for the execution of decisions of the constitutional justice body, but also indirect ones, involving the active, proactive participation of state bodies and officials. The decision-makers in implementing the acts of the constitutional review body must understand their responsibility while realizing that they are not implementing the whim of any institution of power, but are implementing the constitutional values and principles in life. It should be taken into account that the effectiveness of the implementation of the decisions of the constitutional justice body has a special and essential role, which consists in forming the best way to achieve stability not only of the Constitution but also of the entire legal system of the state.

Unfortunately, there are still facts when courts of general jurisdiction continue to apply the provision recognized unconstitutional, up to its actual cancellation, which is also an example of abuse of right.

The implementation of Constitutional Court decisions also depends on the attitude of society toward its decisions. If the trust of civil society in the Constitutional Court is high, the level of implementation will

be equally high. Therefore, the decisions of constitutional courts must have their authority, which is responded to by the positive attitude of the public.

CONCLUSION

In the context of the constitutional reform, we also want to note that today there is the issue of unimplemented decisions of the Constitutional Chamber. Our position is that, even though the name changes and the constitutional review body gets powers, the decisions of the previous body should be implemented in the part that does not contradict the restated Constitution.

In general, effective enforcement of court decisions is one of the main elements of the rule of law principle. Therefore, we believe that the further progressive development of constitutional control in the Kyrgyz Republic, as an essential element on the way to achieving the rule of law, will be difficult without studying and implementing the best foreign experience in this area. Such interest in this topic is caused, first of all, by the importance that the decisions of the constitutional courts have for maintaining constitutional legality in the country.

CURRENT PROBLEMS IN EXECUTION OF JUDGMENTS: CONSTITUTIONAL JUSTICE (MALAYSIA)

Sohaini binti Alias
Wan Aima Nadzihah binti Wan Sulaiman
Teoh Shu Yee

FEDERAL COURT OF MALAYSIA

CURRENT PROBLEMS IN EXECUTION OF JUDGMENTS: CONSTITUTIONAL JUSTICE (MALAYSIA)

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ABSTRACT

The Malaysian Judiciary is the third organ of the Government, the other two being the Legislature and the Executive. The Judiciary enjoys the same constitutional standing as the other two organs of the Government. The Judiciary's role in maintaining law and order according to the Constitution is crucial in the functioning of a democratic system of Government. When interpreting the Constitution, the Court has a duty to interpret it in light of its historical and philosophical context, as well as its fundamental underlying principles. It is pertinent to emphasize that Malaysia upholds the doctrine of constitutional supremacy and the Court may struck down any law that is inconsistent with the Constitution. This is as enunciated in Article 4(1) of the Federal Constitution of Malaysia. The Courts in Malaysia are independent against any interference of either the Executive or the Legislature, for the purpose of preserving the separation of powers between the three organs of the Government; which is a hallmark of a modern democratic State. Therefore, our Judiciary is exclusively vested with judicial review power with the underlying principle of rule of law that requires every power authorized must be subject to legal limits and answerable to the protection of the fundamental rights provided under the Federal Constitution.

The Malaysian Judiciary does not have any specific constitutional court hence the objective of this paper is to discuss the challenge or problem in the

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execution of court judgment or its impact to other branches of the Government. The methodology is conducted by case study analysis to demonstrate the legal issue by setting out the challenge in the context of the execution of the said judgment. It is imperative that stakeholders uphold and respect the Court's decision and take the necessary steps to achieve the intended outcome guided by the decision as pronounced by the Court.

INTRODUCTION

As one of the arms of the Government, the Judiciary or the courts have a constitutional function to perform and they are the guardian of the Constitution. What the Malaysian Federal Constitution can do is to successfully form a social covenant among the citizens in Malaysia, which is celebrated as an independent multi-ethnic nation, embodied with liberal values and democratic norms (Fernando Joseph M, The Making of the Malayan Constitution (MBRAS Monograph No.31) (Malaysian Branch of the Royal Asiatic Society, Kuala Lumpur, 2002) 132.). We are guided by our former Lord President Suffian's remark in *Ah Thian v. Goverment of Malaysia [1976] 2 MLJ 112* as following; "*The doctrine of the supremacy of Parliament does not apply in Malaysia. Here, we have a written constitution. The power of Parliament and of State Legislatures in Malaysia is limited by the Constitution, and they cannot make any law they please*".

Against this backdrop, we also lend our utmost deference to the principle as enunciated by our former Lord President, Tun Salleh Abas on the role of courts vis-à-vis the Constitution, and I quote:

> "*The courts have a constitutional function to perform and they are the guardian of the Constitution within the terms and structure of the Constitution itself; they not only have the power of construction and interpretation of legislation but also the power of judicial review — a concept that pumps through the arteries of every constitutional adjudication and which does not imply the superiority of judges over legislators but of the Constitution over both. The courts are the final arbiter between the individual and the State and between individuals inter se, and in performing their constitutional role they must of necessity and strictly in accordance with the Constitution and the law be the ultimate bulwark against unconstitutional legislation or excesses in administrative action. If that role of the judiciary is appreciated then it will be seen that the courts have a duty to perform in accordance with the oath taken by judges to uphold the Constitution and act within the provisions of and in accordance with the law." (Lim Kit Siang v. Dato Seri Dr Mahathir Mohamad [1987] 1 MLJ 383 (SC)). [Emphasis added]*

In countries which practice a democratic form of government, the judiciary has been looked upon as the defender of any encroachment to the rule of law. This duty to uphold the rule of law is not only imposed on the judiciary but also on the executive and the legislature by recognizing that they can never be above the law; by giving an unstinting support for the courts which administer the law; and, in constructing the law, to give an honest account of what is practical and not merely a rhetorical account of what is desirable (*His Royal Highness Sultan Azlan Shah, The Judiciary: The Role of Judges)*.

It is imprinted in Malaysia that judges are servants of the law and no one else in discharging their judicial functions and every member of the judiciary must possess qualities of integrity, competency and efficiency while always keeping in mind that the judges are not beholden to anybody or anything but the law. The topic "Current Problems in Execution of Judgments: Constitutional Justice" is discussed at length through some recent decided cases in Malaysia that are confronted with execution problems or challenges.

I. CASE-LAW EXAMPLES

A. First case: *Tan Sri Musa bin Hj Aman v. Tun Datuk Seri Hj Panglima Hj Juhar Hj Mahiruffin and Anor [2020] 12 MLJ 121; [2020] 9 CLJ 44*

The results of the 14th General Election (hereinafter: "GE-14") in Malaysia in May 2018 saw two major political coalitions winning 29 seats each for the 60-member Sabah State Legislative Assembly (hereinafter: "SSLA") while the remaining two seats were won by a political party named STAR which was not aligned to either of the two factions.

The two major coalitions were led by, respectively, Tan Sri Musa bin Hj Aman and Datuk Seri Shafie bin Hj Apdal (hereinafter: "Datuk Seri Shafie"). The 29-seat tie between the two factions meant that neither side could put forth a candidate who commanded the confidence of the majority of the members of the SSLA to become the Chief Minister (hereinafter: "CM") of Sabah.

Two days after GE-14, Tan Sri Musa and his Cabinet were sworn into office before the Yang di-Pertua Negeri of Sabah, Tun Datuk

Seri Panglima Hj Juhar Hj Mahiruddin (hereinafter: "the TYT"). The following day, the TYT received statutory declarations (hereinafter: "SD") from six elected assemblymen in Tan Sri Musa's faction, pledging their support for Datuk Seri Shafie to be the CM. In view of this development, the TYT called on Tan Sri Musa to resign as CM but he refused to do so. The TYT nevertheless went ahead to swear in Datuk Seri Shafie as the new CM of Sabah pursuant to Article 6(3) read with Article 10(2)(a) of the Sabah Constitution.

Tan Sri Musa was then informed by the TYT by letter that he had ceased to command the confidence of the majority members of the SSLA to remain as CM. Dissatisfied with the TYT's decision, Tan Sri Musa filed an originating summons (hereinafter: "OS') in the High Court challenging the decision and seeking a declaration that he was still the lawful CM of Sabah.

Currently, it is at the stage of Tan Sri Musa's filing for leave to appeal against the decision of the Court of Appeal dismissing their claims following its decision to uphold the respondents' preliminary objection that their appeals were not competent because the appeals had become academic.

1. Issue:

As the guardian of the Constitution, the court should answer questions which not only concern the circumvention of the constitutional process by the TYT in the dismissal of the applicant but also pertaining to the legality of the appointment of the second respondent and correspondingly the legitimacy of his government.

It was alleged that, Tan Sri Musa was denied the opportunity to request for a dissolution of the State Legislative Assembly, which he was constitutionally entitled to under Article 7(1) of the Sabah Constitution. His dismissal was therefore premature and/or ultra vires the Sabah Constitution.

2. Decision:

By majority, it is clear that leave of this court is required but the provision contains no restriction on leave questions when the matter relates to the effect of any provision of the constitution. For this reason,

the Court is of the view that leave under section 96(b) of the CJA will be granted where the issues raised are of public importance which ought to be finally settled by this court to provide certainty on the application of the Federal or State Constitutions and not limited only to matters relating to the Federal Constitution.

The Court needs to stress the point that the constitutional questions that Tan Sri Musa posed for the determination of this Court are of great public importance and cannot be dismissed on the basis that they are, allegedly, academic. It is of paramount importance that issues relating to the constitutionality of the TYT's exercise of power to remove a sitting Chief Minister must be decided once and for all by this Court.

3. Challenge:

Any interest previously generated regarding the appointment of the applicant as the CM has become academic by virtue of the dissolution of the Sabah State Legislative Assembly. The supervening events had overtaken the matter after the judgment delivered by the High Court (that dismissed Tan Sri Musa's challenge over dismissal from office).

B. Second case: ***Rosliza bt Ibrahim v. State of Selangor & Anor [2021] 2 MLJ 181; [2021] 3 CLJ 301***

Rosliza had applied to the High Court under section 41 of the Specific Relief Act 1950 for the following declarations, amongst others that she was born illegitimate to a Chinese-Buddhist mother named Yap Ah Mooi (hereinafter: "Yap") and she was not a person professing the religion of Islam, and that on 8 October 2008, four months before Yap died, Yap affirmed a statutory declaration stating that at the time Rosliza was born, she and one Ibrahim were not married and that Rosliza was never brought up as a Muslim.

There was the affidavit of one Chan Sew Fan (hereinafter: "Chan") who affirmed that she was Rosliza's and Yap's neighbour and had known Rosliza since the latter was four years old. Chan stated that Yap was a Buddhist and that Rosliza was raised in the Buddhist faith and never as a Muslim.

Reliance was placed on the letters from the Islamic Affairs Departments of the various states in Peninsular Malaysia ('the religious authorities' letters') confirming that they had no record of the marriage between the said Ibrahim and Yap.

Based on all the documentary evidence, Rosliza contended that as she was never raised as a Muslim nor professed the religion of Islam she could not be deemed to be a Muslim.

The High Court dismissed Rosliza's application after finding that the religious authorities' letters were not conclusive proof that Yap and Ibrahim were never married; and she was a Muslim by virtue of her father being one; and it was possible that during the first four years following Rosliza's birth (during which time Ibrahim lived with them) that Ibrahim might have raised her as a Muslim.

The High Court concluded that because Rosliza was a Muslim, her application to court was in effect for a declaration that she was no longer a Muslim and that she had renounced Islam as her religion and that being so, the civil High Court had no jurisdiction over the subject-matter of the application which was solely within the jurisdiction of the Syariah Court pursuant to Article 121(1A) of the Federal Constitution.

The Court of Appeal (hereinafter: "COA") agreed with the High Court's findings and dismissed Rosliza's appeal.

1. Issue:

Rosliza was granted leave to appeal to the Federal Court against the COA's decision on the following question of law, amongst others, whether on a proper interpretation of Article 121 and Item 1 of the State List of the Federal Constitution, the question 'whether a person is or is not a Muslim under the law' as opposed to 'whether a person is no longer a Muslim' was solely within the jurisdiction of the Civil High Court to hear and determine.

2. Decision:

In this respect the civil courts appear to make a distinction between conversions out of Islam by those who were Muslims by original faith and those who were non-Muslims by original faith. In the former,

premised on their original faith, they were subject to the jurisdiction of the Syariah Courts and require a renunciation in the Syariah Court to confirm their non-Muslim status. As for the latter, it is on the premise that they were non-Muslims to begin with and therefore not subject to the jurisdiction of the Syariah Courts, that no such renunciation of Islam was required for any supposed renunciation of their Islamic 'faith'.

In ab initio cases, the issue before the court is not one of faith. It is a question of one's identity under the FC. In contrast, renunciation cases concern persons who despite being Muslims, no longer have faith or believe in the religion. To assume that Ibrahim may have raised the plaintiff as a Muslim without proof, with respect, is merely a conjecture.

The natural conclusion one is compelled to draw is that the plaintiff is not, as a matter of fact, a person 'professing the religion of Islam' as per Item 1 of the State List. This is because there is no proof that she is a Muslim by original faith. This is an ab initio case and not a renunciation case. Rosliza has made out her claim on a balance of probabilities

3. Challenge:

The issue of conflict of jurisdiction between the civil and Syariah Courts frequently happens in recent years. On such occasions, the jurisdictional problems which bring obvious challenges in turn, raise the delicate issues involving the application of clause (1A) of Article 121 of the Federal Constitution (hereinafter: "the FC") and the interpretation of the laws of the state passed by the State Legislature.

An important event took place in 1998. A new clause was added to the FC. The new clause (1A) of Article 121 of the FC, with effect from 10 June 1988, provides that the civil courts shall have no jurisdiction with respect to matters within the jurisdiction of the Syariah Courts. The new clause has taken away the jurisdiction of the civil courts in respect of matters within the jurisdiction of the Syariah Courts. If a matter falls within the jurisdiction of the Syariah Court, the civil court has no jurisdiction over it.

It should be mentioned that; the key point of this case is whether Rosliza was a Muslim at birth. This key question encompasses legal and religious consequence in challenge. This question, as Azahar

Mohamed CJ Malaya sees it, requires the civil court to decide on a question on Islamic law. Rosliza is an illegitimate child born to a Buddhist mother and her putative father is a person who professes the religion of Islam. It is significant to note that with regard to the term nasab (family line), both the Kamus Dewan and the 2003 Fatwa made no reference of the religious status of the illegitimate child.

In taking this recourse, when a civil court hears a claim for an order (and the order that is applied for did not fall within the jurisdiction of the Syariah Court to issue), the civil court should hear the claim and if, in the course of such hearing, a question regarding 'hukum syarak' should arise the parties involved may call in experts in the religion of Islam to give evidence at the hearing. For example, in this case, considerably the opinion of the Fatwa Committee should first be obtained pertaining to the question whether or not the appellant was a Muslim at the time of birth.

C. Third case: ***National Registration Department v. a Child [2020] 4 CLJ 731***

The First Respondent (hereinafter: "the Child") is the son of MEMK (the Second Respondent) and NAW (the Third Respondent). MEMK and NAW are both Muslims. The Child was born in Johor on 17.04.2010 which was 5 months and 24 days (5 months and 27 days according to the Islamic Qamariah calendar) from the date of the marriage of MEMK with NAW, which took place on 24.10.2009. According to Muslim law, a child is illegitimate if he is born less than 6 Qamariah months from the date of his parents' marriage. It is therefore undisputed that the Child is an illegitimate child under Muslim law. The Child's birth was registered late being two years after his birth. It was a late application made. At the time of making the application the parents jointly applied for MEMK's name to be entered in the Birth Register as the father of the Child.

The Director General of National Registration (hereinafter: "DGNR") issued the Respondent Child's Birth Certificate on 06.03.2012. In that Birth Certificate the DGNR, entered the name of MEMK in the column on particulars of the father. However, the Child's full name was given as "bin Abdullah", instead of "bin MEMK". The Child's Birth Certificate

also contained a notation which was an explicit acknowledgement that the application for the registration of birth, is for an illegitimate child.

About 3 years later, on 02.02.2015 MEMK applied under section 27(3) of the Births and Deaths Registration Act 1957 (hereinafter: "BDRA"), to correct the Child's name from "bin Abdullah" to that of his name, MEMK. The application was rejected by the DGNR vide a letter dated 08.05.2015 on the basis that the Child being an illegitimate Muslim child cannot be ascribed to the name of his biological father, MEMK. And the Child was to be named "bin Abdullah" in line of the fatwa issued on the subject.

The High Court had on 04.08.2016, ruled the legal issue by holding that the DGNR had such power, but it was reversed by the Court of Appeal on 25.05.2017. On the decision of the Court of Appeal, this Court granted the DGNR's leave to appeal on question of law, whether the DGNR possess the authority, under the to ascribe "bin Abdullah" instead of the biological father to the name of an illegitimate Muslim child in registering the birth of that child.

1. Issue:

Whether the entry of "bin Abdullah" and the notation "the relevant application to register child's birth" in the Child's Birth Certificate infringed the Child's fundamental liberties under articles 5, 8, 10 and 12 of the Federal Constitution.

2. Decision

The Federal Court observed that, a surname refers to a family, hereditary and inherited name, distinct from a personal name. In the present case, MEMK is obviously not a family name or hereditary name or inherited name commonly shared by, for example, the wife and all members of the family. Instead, it is merely his personal name. This is clear when MEMK and the Third Respondent at the time of making the application, applied for MEMK to be entered in the Birth Register as the father of the Child.

The Federal Court is of the view that the Court of Appeal failed to appreciate that there is a difference between a personal name and

a surname. It is difficult to appreciate how the personal name of the father may also be a surname at the same time.

The Federal Court agrees with the argument in support of the Appellants, put forth by Majlis Agama Islam Selangor as "Amicus curiae", that if a Malay child's surname is that of the father's personal name, section 13A(2) of BDRA would not allow MEMK to insert his own personal name after the child's name. Since section 13A(2) says "the surname of that person" which by this argument would refer to MEMK's father or his family name.

This Court finds the DGNR was correct in law not to allow the application to name the First Respondent as "bin MEMK". That part of the DGNR's decision does not call for judicial interference. The intention of the framers of the Federal Constitution that Muslims in this country shall be governed by Islamic personal and family law is therefore clearly embedded in the Federal Constitution. This was expressed by the then Supreme Court *in Mohamed Habibullah bin Mahmood v. Faridah bte Dato' Talib [1992] 2 MLJ 793.*

In the present case, both MEMK and NAW are Muslims and were married under Islamic law, and the birth of the Child occurred in Johor. Thus, they are subjected to Islamic law as found in the State of Johore.

The next issue confronting the Court is therefore whether the DGNR, in deciding as he did, had taken into account irrelevant matters, when he ascribed the Child's name to "bin Abdullah". As no fatwa on how to name an illegitimate child is gazetted in Johor, the Court ruled that the DGNR cannot unnecessarily impose the fatwa of the National Fatwa Committee on the Respondents. Since the Fatwa Committee of Johor had not adopted this fatwa of the National Fatwa Committee, it is not for the DGNR decide that the fatwa of the National Fatwa Committee is the one applicable to the Respondents.

So, the DGNR has no basis in law to impose the naming of "bin Abdullah". Further, if the Birth Certificate is purely a record of birth, and not an evidence or determination of legitimacy nor a determination of the status of a child - in that same token when it registers the true fact of birth it cannot be argued to be discriminatory.

Hence, this Court finds the notation stating it as an application pursuant to section 13 is a true reflection of the fact surrounding the registration of birth of the Child and that notation cannot be held to be discriminating when it only gives a true reflection of the surrounding fact. In the result, this Court make a consequential order for the DGNR to remove "bin Abdullah" from the Birth Certificate of the child. The name of the child without "bin Abdullah" shall so remain.

3. Challenge

This case presented the challenge on holding that DGNR's statutory duty whether, is to merely register births and deaths in the states of Peninsular Malaysia, without more. The challenge was also on the application of fatwa where the DGNR cannot impose the fatwa of the National Fatwa Committee on the Respondents. Since the Fatwa Committee of Johor had not adopted this fatwa of the National Fatwa Committee, it is not for the DGNR decide that the fatwa of the National Fatwa Committee is the one applicable to the Respondents.

D. Fourth case: ***Maria Chin Abdullah v. Director General of Immigration Department & Anor [2021] 2 CLJ 579***

Maria Chin was the chairperson of a non-governmental organization (hereinafter: "NGO") known as 'Bersih 2.0' and a holder of a valid Malaysian passport. On 15 May 2016, after collecting her boarding pass at the Kuala Lumpur International Airport (hereinafter: "KLIA") for a flight to South Korea, she was stopped by the immigration authorities and was told that there was a travel ban imposed on her and that she could not leave the country. No reason was given to Maria Chin for the travel ban, before or after the incident.

In gist, Maria Chin was blacklisted from leaving the country for a period of up to 3 years starting from 6 January 2016 based on a circular titled 'Pekeliling Imigresen Malaysia Terhad Bil'. 3 Tahun 2015'. The blacklisting, on the ground that Maria Chin had disparaged the Government of Malaysia at different forums and illegal assemblies, and the travel ban, were however lifted by the respondents on 17 May 2016, i.e., two days after the appellant was stopped at the KLIA.

The inevitable consequence of the appellant's travel ban was to interfere with her freedom of speech guaranteed by Article 10(1) of the Federal Constitution (hereinafter: "FC"), in particular, her freedom to speak at an event in South Korea to receive a human rights prize in her capacity as a member of an NGO.

1. Issue:

Maria Chin's application for judicial review of the impugned decision was on the grounds, inter alia, that the impugned decision was baseless, unreasonable, irrational and completely unfair; and that the Immigration authority erred in law when they, amongst others, acted ultra vires and in excess of jurisdiction because there is no provision under the Immigration Act and/or other relevant statutes to bar a citizen from travelling overseas in similar circumstances; and acted in breach of her fundamental right to travel abroad which right stems from the right to life under Article 5(1) of the FC.

2. Decision:

The High Court dismissed Maria Chin's application for judicial review, essentially on the ground that since there was no constitutional right for a citizen to travel abroad, the government has the power to stop a citizen from leaving the country.

Maria Chin appealed to the Court of Appeal was dismissed on the ground that it was rendered academic and hypothetical as the travel ban had been lifted.

Then, Maria Chin obtained leave to appeal on the question of law, amongst other, whether section 3(2) of the Immigration Act empowers the Director General of Immigration ('DG') the unfettered discretion to impose a travel ban. In particular, could the DG impose a travel ban for reasons that impinge on the democratic rights of citizens such as criticizing the government.

Section 3(2) is clear and unambiguous and confers on the DG a broad power over 'all matters relating to immigration'. The provision is presumed to be constitutionally valid. The fact that the respondents gave a wrong and invalid reason for imposing the travel ban on the

appellant did not, in any way, alter the fact that, in law, they have no duty to provide reasons. Thus, even if the DG was wrong in relying on a departmental circular which did not have any force of law to impose the travel ban, that did not turn his decision into a wrongful act if otherwise the decision was permitted by law, which is not subject to a right of hearing under section 59 and not subject to judicial review under section 59A of the Immigration Act.

The circular gave no indication of its source of enabling power; whether it be pursuant to the Immigration Act or the Passports Act 1966 (hereinafter: "Passports Act"). Since the appellant's departure was hindered or barred by reason that her document of travel, that is, her international passport had been blacklisted, the Immigration Act thus has no application. The relevant law on passports is the Passports Act.

This Court, by majority observed that, even if the right to travel or leave the country is regarded as falling within Article 9 of the FC or Article 5, that right is not absolute. The right may be curtailed by reasonable means and on reasonable grounds. Those grounds were not met in this appeal and since the respondents did not possess any power or authority whatsoever to police the offence of disparaging the government, the respondents could not bar Maria Chin from leaving the country.

The decision to ban Maria Chin from leaving the country was always subject to scrutiny of the court and section 59A implicitly recognized that.

Another aspect to section 59A is that it prescribes the remedy or cause of action that the affected persons including citizens may take in the event they wish to challenge any action or decision taken by the respondents under the Immigration Act. This is consistent with the right of the appellant, as a citizen, to have access to justice and in fact, is entitled to the equal protection of the law. There was nothing unconstitutional or invalid in section 59A.

3. Challenge

The circular issued is invalid as it gives no indication of its source of enabling power; whether it be pursuant to Act 155 or Act 150. Neither legislation empowers the respondent, in particular the first

respondent from issuing such circulars and at best, such circulars are only administrative and for internal use with no force of law at all.

E. Fifth case: Semenyih Jaya Sdn Bhd v. Land Administrator of District Hulu Langat and Anor

The appellant was the registered proprietor of a piece of land. The appellant commenced construction works on part of the land to build a total of 128 units of factory lots and three pieces of vacant land to be sold separately as industrial plots. However, part of the appellant's land was subjected to acquisition under the Land Acquisition Act 1960 (hereinafter: "LLA") for the purpose of constructing the Kajang-Seremban Highway.

The Land Administrator conducted an enquiry pursuant to section 12 of the LAA to determine the amount of compensation payable to the appellant arising from the said acquisition. The appellant was awarded compensation in the sum of RM20,862,281.75 for the value of the land acquired and compensation for the loss suffered from the termination of the project.

The appellant objected to the amount of compensation awarded by the Land Administrator by filing Form N requesting the Land Administrator to refer the matter to the court for its determination pursuant to section 38 of the LAA. The High Court Judge hearing the land reference sat with two assessors to determine the adequacy of the compensation payable to the appellant. After hearing the evidence and submissions of parties, the Land Reference Court agreed with the award of the Land Administrator in respect of the valuation of part of the land acquired by the State.

However, the High Court was of the view that the appellant was also entitled to receive compensation for severance and injurious affection in the sum of RM1,160,020 in view of the remaining part of the land which had become less valuable due to the acquisition and the construction and use of the acquired land by the authority. The other claims for compensation were dismissed by the High Court. The appellant appealed to the Court of Appeal against the order of the High Court on the ground that the High Court erred in failing to decide or consider the 'other claims' of the appellant.

The Court of Appeal dismissed the appellant's appeal. Hence, this appeal.

1. Issue:

Whether the amended section 40D is constitutionally valid in providing for a conclusive determination by the assessors (as opposed to the judge) as to the amount of compensation in the face of Article 121 of the FC that contemplates that the judicial power of the courts should be exercised by judges only.

2. Decision:

This is a landmark decision which declared section 40D of the 1960 Act to be unconstitutional. Under Article 121(1) of the Constitution, the judicial power of the court resides in the Judiciary and no other.

The act of determining the amount of compensation payable arising out of land acquisition cases involves judicial assessments. Hence, the power to award compensation in land reference proceedings is a judicial power that should rightly be exercised by a judge and no other. Therefore, a non-judicial personage (i.e., a non-member of the judicature) has no right to exercise judicial power. The discharge of judicial power by non-qualified persons or non-judicial personages renders the said exercise ultra vires Article 121 of the Constitution.

Section 40D of the LAA provides that 'the amount of compensation to be awarded shall be the amount decided upon by the two assessors' and thus, imposes on the judge a duty to adopt the opinion of the two assessors or elect to concur with the decision of either of them if their decisions differ from each other in respect of the amount of reasonable compensation arising out of the acquisition. A High Court Judge cannot come to a valuation different from that of the assessors or different from either one of them. Section 40D of the LAA, therefore, effectively usurps the power of the court in allowing persons other than the judge to decide on the reference before it.

This case makes it clear that the assessors are merely the advisors whose role is to give an opinion on the valuation, namely it is used to designate a person who by virtue of some special skills, knowledge or experience he possesses, sits with a judge during judicial proceedings

in order to answer any question which might be put to him by the judge on the subject in which he is an expert, to assist the judge in making a determination on adequate compensation.

The role and functions of assessors in land reference proceedings are predicated on matters of opinion and experience. Their appointment is governed by subsection 40A(2) of the Act._Therefore, the judge shall not be bound to conform to the opinions of the assessors. In the event of any disagreement between the assessors with regard to the amount of compensation, the judge may elect to consider which of the two opinions in his view is appropriate in the circumstances of the case. The judge is also at liberty to depart from the opinion of either of the assessors and decide on the reasonable amount of compensation to be awarded to the appellant by giving reasons for so doing.

3. Challenge:

Section 40D of LAA has yet to be amended as a result of this Court Judgment.

However, the Judiciary took note of this judgment and had thereby issued a practice direction on how land reference proceedings are to be conducted thereon (Arahan Amalan Hakim Besar Malaya Bil 1 Tahun 2017).

Another challenge that arises is to the former landowners where it is not possible for similar cases to be reopened. This judgment only brings prospective impact.

II. MALAYSIAN POSITION: CONSTITUTIONAL ADJUDICATION

It is noteworthy to observe that the High Court in Malaysia is a forum for constitutional questions to be heard and determined at first instance, whereby Federal Court acts as a court final appeal or last resort to the constitutional adjudication (*DSAI v. Government of Malaysia & Ors [2020] 4 MLJ 133*). That said, Federal Court is not a constitutional court but as the final court of appeal in all questions of law.

CONCLUSION

It is to highlight that Raja Azlan Shah CJ (as his Royal Highness then was) in the case of *Pengarah Tanah dan Galian, Wilayah Persekutuan v. Sri*

Lempah Enterprise Sdn Bhd [1979] 1 MLJ 135 (Federal Court) expressed that: -

> *"[…] Unfettered discretion is a contradiction in terms. Every legal power must have legal limits, otherwise there is dictatorship. In particular, it is a stringent requirement that a discretion should be exercised for a proper purpose, and that it should not be exercised unreasonably. In other words, every discretion cannot be free from legal restraint, where it is wrongly exercised, it becomes the duty of the court [2018] 1 MLJ 545 at 564to intervene.* ***The courts are the only defense of the liberty of the subject against departmental aggression*** *[…]" (Emphasis added.)*

It is the duty of all stakeholders to uphold the Constitution and it is also imperative that all stakeholders uphold and respect the Court's decision and take the necessary steps to achieve the intended outcome guided by the decision as pronounced by the Court.

The Malaysian Courts have a constitutional function to perform by being an institution to protect the citizen's constitutional rights and aimed as a form of a mutual check and balance upon each other in the branches of power to control the abuse of government and maintain rule of law (*Bato Bagi & Ors v. State of Sarawak and another appeal [2011] 6 MLJ 297*).

With that, we end our presentation by quoting an excerpt from The Right Honorable the Chief Justice, Tun Tengku Maimun's speech at Opening of the Legal Year 2020, Putrajaya International Convention Centre, 10.1.2020, which is:

> ***"****In a plural society such as Malaysia with its cultural and religious diversity, justice and the law are of paramount significance****. Our social architecture is founded and governed by our Federal Constitution, which is the supreme arbiter and guide for the institutional pillars of the nation as well as every citizen of our country."*** *(Emphasis added)*

ISSUES IN THE IMPLEMENTATION OF THE DECISIONS OF THE CONSTITUTIONAL COURT (TSETS) OF MONGOLIA

Tsatsral Erdenebat
Gantuya Dulaanjargal

CONSTITUTIONAL COURT OF MONGOLIA

ISSUES IN THE IMPLEMENTATION OF THE DECISIONS OF THE CONSTITUTIONAL COURT (TSETS) OF MONGOLIA

*Tsatsral Erdenebat**
*Gantuya Dulaanjargal***

ABSTRACT

It has been twenty-nine years since Mongolia adopted its first democratic Constitution in 1992 and established the Constitutional Court (Tsets) of Mongolia with the supreme power to supervise the enforcement of the Constitution.

During this time, the Constitutional Court has faced significant political challenges in the implementation of its decisions. For instance, the State Great Khural (Parliament) has failed to review the judgment of the Constitutional Court within the time period stated in the law, or the legislators have reinstated the contents of a law annulled by the decision from the Constitutional Court by way of adopting new legislations.

This paper will discuss the impact and implementation of the decisions of the Constitutional Court of Mongolia. For this purpose, the process for the implementation of the decisions of the Court, and some cases of the decisions will be analysed in the paper.

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I. DECISIONS OF THE CONSTITUTIONAL COURT (TSETS) OF MONGOLIA

The Constitution of Mongolia is the supreme written act with the highest legal effect, and is subject to be respected and cherished throughout the whole territory of the country.[1]

The first democratic Constitution of 1992 created the foundation for the establishment of a constitutional review system which is separate from ordinary courts and has the power to review the constitutionality of legislations.

The Constitutional Court is the only organ exercising supreme supervision over the implementation of the Constitution, making judgment of the violation of its provisions, and resolving constitutional disputes, and is the guarantor for the Constitution to be strictly observed.[2]

One of the factors to be considered as a court is that its decisions are final and legally binding. This is one of the biggest distinguishing criteria of judicial power from legislative and executive powers.[3] According to Article 67 of the Constitution, it states that the decisions of the Constitution Court shall become effective and enter into force immediately upon its commencement. The decision of the Constitutional Court is legally binding and final, and enters into force immediately. Moreover, it is legally effective as legislation.

The Constitutional Court examines and settles constitutional disputes at the request of the Parliament, the President, the Prime Minister, the Supreme Court, and the Prosecutor General, or on its own initiative on the basis of petitions and information received from citizens.[4] Decisions of the Tsets are delivered in the form of a judgment, resolution or certification.[5] The Constitutional Court considers and delivers a judgment on the following disputes regarding the constitutionality of:

1 S. Narangerel, '*Legal system of Mongolia and the World*', Ulaanbaatar, 2001, 113.

2 Section 1 of Article 64 of the Constitution of Mongolia. Available in English at the URL: https://www.legalinfo.mn/law/details/16660?lawid=16660

3 Ts. Sarantuya, '*Enhancing the legal efficiency of the decisions of the Constitutional Court*', International Conference on Formation of constitutionalism and its future tendencies' Ulaanbaatar, 152.

4 Section 1 of Article 66 of the Constitution.

5 Section 1 of Article 31 of the Law on Constitutional Court Procedure. Available in English at the URL: https://www.conscourt.gov.mn/?page_id=851&lang=en

"1/ law and other decision of the State Great Khural, decrees and other decisions of the President of Mongolia, decisions of the government, international treaties to which Mongolia is a signatory party;

2/ decisions of the Central electoral body on referendums, and elections of the State Great Khural, its members, and the President."

In addition, the Court shall consider and deliver a judgment on acts of non-compliance with the Constitution of the following officials:

"3/ the President of Mongolia, the Chairman of the State Great Khural, a member of the State Great Khural, the Prime Minister, a member of the Government, the Chief Justice of the Supreme Court, the Prosecutor General;

and shall deliver judgment on the existence of grounds for the resignation or withdrawal of the following officials:

4 / the President of Mongolia, the Chairman of the State Great Khural, the Prime Minister, and a member of the State Great Khural."

One of the distinguishing characteristics of the Constitutional Court of Mongolia is that after rendering the judgment, the Constitutional Court of Mongolia should submit the judgment to the State Great Khural for discussion. The adoption of this provision was influenced by the social and political situation of Mongolia in 1990s, and the mentality of the society during the transition period from a totalitarian into a democratic system, and by the notion saying that 'it would be more democratic and wiser to discuss the issues by majority'. As such, after the adoption of this provision, the Constitutional Court of Mongolia must submit its judgment to the State Great Khural.[6]

Submitting the judgment or a review of the judgment by the State Great Khural does not constitute the consequence of making the State Great Khural an appellate court, but it gives the State Great Khural a chance to review its own decisions, and for revision of the decisions of the President, Government, and Central electoral body.

The State Great Khural has the duty to discuss the judgment of the Constitutional Court within 15 days upon its receipt and make a resolution on whether to acknowledge the judgment.[7]

6 Ts. Sarantuya, (n3) 153.

7 Section 2 of Article 36 of the Constitutional Court Procedure of Mongolia.

In the event that the State Great Khural makes a resolution acknowledging the judgment, the judgment of the Constitutional Court shall become final. However, if the judgment of the Constitutional Court is rejected by the resolution of the State Great Khural, the Constitutional Court shall re-examine the entire dispute from the outset by full bench session, and if the grounds for the rejection are not confirmed by its full bench session, then the Tsets will issue a resolution (final decision) annulling the resolution of the State Great Khural. If the laws, decrees and decisions of the State Great Khural, the President, the Government, and international treaties to which Mongolia is a signatory party are pronounced unconstitutional by the final decision of the Tsets then it shall be invalided upon the issuance of its resolution.

II. IMPLEMENTATION OF DECISIONS OF THE TSETS

Since its establishment the Constitutional Court of Mongolia has received 3403 petitions, complaints, and has rendered 2650 (numbers are overlapping) decisions, among which 1818 resolutions are from members of the Parliament.

There have been few instances when the State Great Khural has caused more disputes when reviewing the conclusions, rather than rendering decisions and resolving issues.

It is important to note that the State Great Khural at times has not nulled provisions of similar laws as the decisions of the Constitutional Court which has already annulled and voided a law. In addition, the State Great Khural has reinstated already annulled laws. Furthermore, the State Great Khural has occasionally exceeded the time limit to settle a decision from the Court.

The State Great Khural has 15 days to settle and to issue a resolution of the Court's decision. But in reality, the State Great Khural has exceeded the time limit, or either has not issued a final conclusion, or created a situation where they have decided not to render a conclusion. The following are resolutions made after 15 days[8]:

8 P.Ochirbat, "The Constitution of Mongolia: Implementation, Monitoring and Research" 2017, p.359. (The information in this book is from 1992 to 2006.).

TIME DURATION (AFTER THE INITIAL 15 DAYS)	NUMBER OF RESOLUTIONS
Less than 7 days	10
Less than 15 days	6
15 days to one month	8
1 to 2 months	6
2 to 3 months	4
3 to 4 months	3
5 to 6 months	1[9]
Over 6 months	1[10]
Over 4 years	1[11]
No decision has been made	5[12]

From practice, it should be noted that the State Great Khural has made more decisions of non-compliance with Constitution by exceeding the time limit than decisions of compliance with the Constitution.[13]

According to section 2.4 of Article 66 of the Constitution, the Constitutional Court makes a conclusion whether there is justification for the resignation of the Prime Minister and submits it to the State Great Khural. But the State Great Khural has to be given the chance to implement this constitutional provision. However, the State Great Khural does not give the opportunity to the Constitutional Court, in all cases where the Prime Minister was dismissed from duty, the State Great Khural has breached the law by making decisions without the Constitutional Court.

9 Tsets conclusion No. 1 (1995.01.04) "Whether provisions of Law on State Great Khural have breached the Constitution".

10 Tsets conclusion No. 6 (1997.07.05) "Whether Presidential Decree No.71 has breached the Constitution".

11 Tsets conclusion No. 1 (2001.03.23) "Dispute resolution whether the reading of the State Great Khural has breached some provisions of the Constitution".

12 Tsets conclusion No. 3 (2000.03.15) "Dispute resolution whether the reading of the State Great Khural has breached some provisions of the Constitution". Conclusion No. 10 (2008.12.17) Whether Section 24.7, Article 24 *"[…] the conclusion made unanimously […]"* of the Law on State Great Khural has breached the relevant provisions of the Constitution".

13 E. Lkhagvasuren p. 265

For example, the Constitutional Court's conclusion No.1 (2001) whether the commentary of State Great Khural on the Constitution has breached the Constitution still has not been reviewed.

III. CASE STUDY

Here we would like to give an example Conclusion No.3 of the Constitutional Court of Mongolia on date of 21st October, 2011.

The Middle bench of the Constitutional Court reviewed and resolved the dispute regarding whether a section 6.9.1 of Article 6 of the Law on State Great Khural of Mongolia that states *"the Prosecutor General submitted to the State Great Khural a proposal to suspend a member of the State Great Khural's mandate due to his/her arrest during the course of his/her guilty act, or at a crime scene with physical evidence*" breaches a section 3 of Article 29 of the Constitution of Mongolia which states that *"if a question arises that a member of the State Great Khural is involved in a crime it shall be considered by a session of the State Great Khural and decided whether to suspend his/her mandate. If a court finds the member in question to be guilty of crime, the state Great Khural shall terminate his/her membership in the legislature"*, section 1 of Article 14 of the Constitution of Mongolia that states "*all persons are equal before the law and the court*", and section 2 of Article 14 of the Constitution of Mongolia that states "*No person shall be discriminated against on the basis of […] occupation and post […]*".

But on 12 January 2021 the State Great Khural has discussed and annulled the judgment of Resolution No.5 of the Constitutional Court. On behalf of the Constitution, Constitutional Court has discussed by its Middle bench of 21 October, 2011 and Grand bench of 15 February 2012 and decided that aforementioned provisions breached the Constitution.

However, Article 36.4 of the Law on Constitutional Procedure provides that "A law pronounced unconstitutional by the final decision of the Tsets shall be invalided upon the issuance of its resolution", the State Great Khural adopted amendment on 17 January 2013, the words "in the course of a crime" were changed to "while committing a crime" and the words "arrested at the crime scene with physical evidence" were replaced by "arrested at the crime scene with evidence", but the content was not changed.

Therefore, there are grounds that the provisions of the Law on the State Great Khural of Mongolia, which were repealed by the Resolution No.2 of the Constitutional Court of Mongolia in 2012, have been revived by the State Great Khural in more detail not only in content but also in wording.

By reinstating the content of the law, which was repealed by a resolution of the Constitutional Tsets, the State Great Khural itself breached Article 1.2 of the Constitution of Mongolia that states, "The fundamental purpose of state activity is ensure the democracy, justice, freedom, equality, and national unity and respect of law".

CONCLUSION

The judgement of the Constitutional Court shall be binding throughout the territory of Mongolia.

By not discussing the Constitutional Court judgment the State Great Khural has failed to fulfil its duty prescribed in the law "rule of law, full compliance with the Constitution". By disrupting the dispute resolution process in the Court, distortion of the Constitution due to the narrow interests of one political party with majority seat in the Parliament, and whether they will discuss resolutions from the Constitutional Court is becoming a matter of their choice, the State Great Khural is setting a negative standard for the future[14].

This situation will continue to have consequences in the future if the State Great Khural is late in enforcing the Court's decision, or there will be no accountability system for not issuing a resolution.

Therefore, if the State Great Khural does not issue a resolution within the timeframe specified by law, there is a need for a legal regulation where the conclusion of the Constitutional Tsets can come into force immediately.

With the full implementation of the decision of the Constitutional Tsets, constitutionalism and the rule of law will be strengthened.

14 E. Lkhagvasuren, "*Constitutional Review Mechanism*", *Constitutional Court of Mongolia / compilation of articles and reports / 2007*, page 265.

EXECUTION OF DECISIONS OF THE CONSTITUTIONAL COURT OF MONTENEGRO ADOPTED IN PROCEEDINGS OF ABSTRACT CONTROL OF CONSTITUTIONALITY AND LEGALITY

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EXECUTION OF DECISIONS OF THE CONSTITUTIONAL COURT OF MONTENEGRO ADOPTED IN PROCEEDINGS OF ABSTRACT CONTROL OF CONSTITUTIONALITY AND LEGALITY

Ivan Radojičić[*]
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ABSTRACT

In this analysis, we examined the normative framework related to the enforcement of decisions of the Constitutional Court of Montenegro (hereinafter: "the Constitutional Court") and its practice in that segment, where we focused on the examples concerning the enforcement of decisions rendered in normative control proceedings, in particular proceedings for the assessment of constitutionality of laws. In addition, our analysis covered how the Constitutional Court, acting within its constitutional and legal competences, "handled" the matter of generality of the constitutional and legislative framework in this field, i.e. the matter of its "incompleteness"

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INTRODUCTION

The competence of the Constitutional Court is, in overall, a constitutional matter (*materiae constitutionis*), and the highest legal act of the Montenegrin legal system provides an itemized list of all the proceedings decided by the Constitutional Court. According to the Constitution, a decision of the Constitutional Court has a repealing (cassatory) effect and it finalizes the constitutional legal dispute, i.e. eliminates an unconstitutional regulation from the legal system etc.

Enforceability of a decision of the Constitutional Court is reflected in the obligation of State and other authorities to enforce, within their rights and duties, the decision of the Constitutional Court. The matter of enforcement of decisions rendered by the "guardian of the Constitution" is much more complex in relation to the matter of enforcement of decisions rendered by ordinary courts, in particular having in mind the specific role, position and powers of the Constitutional Court, which is, according to the Constitution, outside the "power triangle", i.e. the legislative, executive and judicial power, and which controls these three branches of power in terms of constitutional control. A decision of the Constitutional Court, enforced in an efficient manner, contributes to the creation of the sense of legal certainty.

I. NORMATIVE FRAMEWORK

A. Constitution of Montenegro

The matter of enforcement of the Constitutional Court's decisions is regulated under the Constitution in a general manner. Namely, in accordance with the Constitution of Montenegro, a decision rendered by the Constitutional Court is binding and enforceable and its enforcement is, when required, secured by the Government (Article 151, paragraphs 3 and 4).

B. Law on the Constitutional Court of Montenegro

By regulating in more detail, the constitutional aspect of the enforcement of the Constitutional Court's decisions, under the provisions of Article 52 of the Law on the Constitutional Court[1], the legislator set forth that:

1 "Official Gazette of Montenegro", number 11/15.

"(1) State authorities, public administration bodies, local self-government and local government bodies, legal persons and other entities exercising public powers shall, within their jurisdiction, enforce the decisions of the Constitutional Court, and their enforcement shall, where necessary, be secured by the Government of Montenegro.

(2) In a decision, the Constitutional Court may determine the deadline and manner of enforcement of the decision, as well as the authority that is required to enforce it.

(3) Following the expiry of the deadline referred to in paragraph 2 of this Article, the authority that is required to enforce a decision of the Constitutional Court shall submit a report on enforcement of the decision of the Constitutional Court to the Constitutional Court."

C. Rules of Procedure of the Constitutional Court of Montenegro

Although the Montenegrin legislator regulated the matter of enforcement of the Constitutional Court's decisions in more detail by the Law on the Constitutional Court, there was a need to elaborate this matter in a by-law as well. The reason for this was that the legislator did not, primarily, provide an answer to the question regarding the measures to be undertaken in case of failure to enforce decisions rendered by the Constitutional Court, but also to other questions, such as, for example, the issue of legal consequences of failure to enforce a decision of the Constitutional Court. Therefore, the Constitutional Court of Montenegro, acting within its constitutional and legal powers, regulated in more detail the matter of "*Undertaking measures in case of failure to enforce a decision of the Constitutional Court*" in its Rules of Procedure[2] (provisions of Article 86), setting forth as follows:

"(1) If the Constitutional Court's decision orders the period of time, manner or the authority that has to enforce the decision thereof, in compliance with Article 52, paragraph 3 of the Law, and if its orders are not executed, the Constitutional Court shall pass a statement declaring that the orders from the decision of the Constitutional Court have not been executed.

(2) The statement referred to in paragraph 1 of this Article is submitted to the Government of Montenegro and published in the Official Gazette of Montenegro and on the web page of the Constitutional Court.

2 "Official Gazette of Montenegro", number 7/16.

(3) If the decision stating the unexecuted orders of the Constitutional Court has not been published beforehand in the Official Gazette of Montenegro, the statement referred to in paragraph 1 of this Article shall be published with that decision attached."

D. Other Normative Frameworks

Finally, to the part of the normative framework in this field, we would like to add that the matter of "*undertaking measures*" for the purpose of enforcement of decisions of the Constitutional Court is also regulated under the Rules of Procedure of the Government of Montenegro[3], setting forth that: *"materials to be discussed and decided upon at the Government sessions are submitted in the form of proposals for measures to be undertaken for the enforcement of decisions of the Constitutional Court of Montenegro"* (Article 34 paragraph 1 item 7).

II. CONSTITUTIONAL COURT PRACTICE IN ENFORCEMENT OF THE CONSTITUTIONAL COURT'S DECISIONS

A. Law on Amendments to the Law on Social and Child Protection, case U-I no. 6/16, of 19 April 2017

In the normative control of constitutionality of the provisions of Article 4 of the Law on Amendments to the Law on Social and Child Protection which recognized, for women *"who have given birth to three or more children"* and met other requirements set forth under that Law *("are not in employment relationship or terminate their employment relationship"* etc.), the right to lifelong monetary benefit, the Constitutional Court rendered the Decision[4] repealing those provisions of the Law. In that case, the Constitutional Court found violations of various principles safeguarded under the Constitution and the Convention, including the violation of the principle of prohibition of discrimination, on any grounds (Article 8 paragraph 1 of the Constitution, Article 14 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: "ECHR") and Article 1 of Protocol 12 to the ECHR).

3 "Official Gazette of Montenegro", no. 3/12, 31/15, 48/17 and 62/18.
4 "Official Gazette of Montenegro", number 31/17.

The Constitutional Court also found that the conditions referred to in the provision of Article 52 paragraph 2 of the Law on the Constitutional Court were met for the Constitutional Court to set the deadline and the manner of enforcement of this Decision, and the authority that has to enforce it:

> *"[…] The Constitutional Court determines that the enforcement of this decision includes regulating of the legal situation, resulting from the termination of the unconstitutional provisions of Article 4 […] of the Law, […] whereby the Government of Montenegro is required to submit to the Parliament of Montenegro, within three months from the date of publication of this decision of the Constitutional Court in the Official Gazette of Montenegro, the proposal for the law enforcing this decision, in order to bring the legal status of the beneficiaries entitled to the benefit based on the birth of three or more children, granted to them on the basis of the unconstitutional provisions of Article 4 […] of the Law on Amendments to the Law on Social and Child Protection, in accord with the Constitution, in line with the legal positions of the Constitutional Court, stated in this decision." (Item III of the enacting terms of the Decision)*

B. Execution of the Decision

Enforcing the decision of the Constitutional Court, the Government of Montenegro, in its *Conclusion number 07-17944*, of 12 June 2017, within the deadline settled, adopted the *Proposal for the Law Enforcing Decision of the Constitutional Court of Montenegro U-I number 6/16, of 19 April 2017*[5] , submitted to the Parliament of Montenegro, on 13 June 2017, with the proposal "*to enact that law in summary procedure*".

On 29 June 2017, the Parliament of Montenegro passed the *Law Enforcing Decision of the Constitutional Court of Montenegro U-I no. 6/16, of 19 April 2017*[6] (hereinafter: "the Law Enforcing the Decision of the Constitutional Court"), as *lex specialis* enforcing the decision of the Constitutional Court. The Law Enforcing the Decision of the Constitutional Court regulated the legal status of the beneficiaries entitled to the benefit recognized on the basis of the provisions of

5 "Official Gazette of Montenegro", number 31/17.
6 "Official Gazette of Montenegro" number 31/17.

Article 4 of the Law on Amendments to the Law on Social and Child Protection, which were repealed.

However, after reviewing the constitutionality of certain provisions of the Law Enforcing the Decision of the Constitutional Court, in cases *U-I no. 22/17, 24/17, 25/17* and *30/17*, of 19. January and 26. February 2018, the Constitutional Court found that the legislator violated several constitutional principles, inter alia, the principles of the rule of law and the unity of legal order (Article 1 paragraph 2 and Article 145 of the Constitution), by recognizing entitlement to the benefit only to the beneficiaries who terminated their employment relationship *"of indefinite duration"* in order to exercise this right. In this regard, the Constitutional Court determined that, in the enforcement of its decision, regulating of the legal status of the mentioned beneficiaries of the social benefit, and the elimination of harmful effects, in normative regard, implies the obligation of the legislator to regulate this status for the same group of addressees covered by the repealed provisions of the law (beneficiaries who terminated their employment relationship "*of indefinite duration*" in order to exercise that right, and the ones that terminated their "*fixed-term*" employment relationship for that reason) and that the right of these addressees "*may not be derogated, i.e. no such restrictions may be imposed which abolish the substance of that guaranteed right […]".*

Therefore, the procedure of enforcement of the decision of the Constitutional Court in this case did not result, for example, by a law not being passed in repeated procedure within the deadline set by the Constitutional Court, which might have been as well the case due to shortcomings of normative framework we have highlighted (failure to stipulate legal consequences for non-enforcement of a decision of the Constitutional Court). In this specific case, in addition to its constitutional and legal power to determine itself the method of enforcement of its decision, the Constitutional Court also had to use its powers of "negative legislator" so that its decision would, ultimately, be enforced in a constitutionally and legally acceptable manner.

CONCLUSION

On the basis of the above-mentioned normative framework, we may conclude that the Constitutional Court does not have its own mechanism for the enforcement of decisions it renders, but has "broad" powers in terms of passing an act to determine the manner of

enforcement of decisions it has rendered in various proceedings, and thus including the proceedings for abstract control of constitutionality. However, as opposed to those powers, there are restrictions, primarily those concerning the requirement that the enforcement of a decision of the Constitutional Court must have a simple, purposeful and effective manner. It is also conditional upon observance of the constitutional principle of separation of powers, and the constitutional position and competences of *"entities exercising public authority"* that are tasked with that enforcement and, of course, by the position of the Constitutional Court itself in the constitutional legal order. The Constitutional Court must take due care of these restrictions in each individual case. Finally, although this analysis did not cover the aspects related to the enforcement of decisions rendered by the Constitutional Court in other proceedings it decided (upon constitutional appeals for violations of human rights and freedoms guaranteed by the Constitution etc.), a sufficient conclusion would be that all relevant social factors of the domestic legal order should focus on improving the situation in this field and improving the existing normative framework.

EXECUTION OF JUDGMENTS OF THE CONSTITUTIONAL TRIBUNAL OF MYANMAR

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EXECUTION OF JUDGMENTS OF THE CONSTITUTIONAL TRIBUNAL OF MYANMAR

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ABSTRACT

Constitutional justice is preserving the constitutional principles and provisions by controlling the legislation and executive acts in compliance with the constitutional law. The tasks of constitutional justice are carried out by conferring the power to the Supreme Court or by establishing the separate court. Myanmar has exercised the centralized constitutional review model under Section 46 of the 2008 Constitution. The Constitutional Tribunal of Myanmar was established not only to interpret the Constitution and scrutinize the laws inconsistent with the Constitution, but also to check and balance the constitutional disputes among the different levels of Government. Since its establishment, the Constitutional Tribunal decided a small number of cases. The Constitutional Tribunal accepted and decided the 17 cases until 2020. The Constitutional Tribunal had experienced in some cases of implementation. Furthermore, the Constitutional Tribunal had referred to the precedent judgments of the Tribunal reflecting the established case- law. In 2012, the Constitutional Tribunal faced a rare incident. This incident has arisen from a political conflict between the President and the Legislature. But all types of decisions of unconstitutionality have erga omnes effect.

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INTRODUCTION

Constitutional justice is preserving the constitutional principles and provisions by controlling the legislation and executive acts in compliance with the constitutional law. In other words, constitutional justice is reviewing the constitutional matters. According to the constitutional doctrine and the theory of Hans Kelsen, it is meant for the "Constitutional review". Constitutional review is the Constitutional Court's power to review the constitutionality of acts of the legislative and executive powers; or is the Court's power to invalidate legislative and executive actions as being unconstitutional. Judiciary and constitutional review play an important striking role of today's legal and judicial system in the world. It shall operate as a guarantor or to guarantee the supremacy of the Constitution in order to determine for the constitutionality of law.

I. ORIGIN OF CONSTITUTIONAL JUSTICE AND MYANMAR

The tasks of constitutional justice are carried out by conferring the power to the Supreme Court or establishing a separate court. Constitutional justice was firstly adjudicated by the Supreme Court of the United States in *Marbury vs. Madison*[1] case. In this case, the chief justice decided that the Court's duty was to apply the Constitution as paramount law and the legislation declared inconsistent with the Constitution was null and void. That's why, this case was significant. The Supreme Court of the United States is the decentralized constitutional justice and the American model of constitutional review.

Later, the specialized Constitutional Court was established by Austria as a separate court, according to the constitutional doctrine of Hans Kelsen because the functions of the judiciary would be dangerous to the political rights of the Constitution. And then the ordinary courts that reviewed the legislative and executive actions is inappropriate. Germany and France also adopted the pure theory of the separation of powers in its constitutional law. The three branches of Government have different powers and do not intervene with each other by maintaining the separation of powers. So, this created a mechanism of check and balance between the branches of the Government. Therefore, the

1 5US (1 Cranch) 137 (1803).

separate or independent Constitutional Courts have been granted the jurisdictions to examine the constitutional complaints. It is also called the centralized judicial review or the European model of constitutional review.

Both models of constitutionality control of laws aim for the same goal in the context of the increasing activities of constitutional jurisdiction. The constitutional justice is achieved by Constitutional Courts, equivalent institutions or by judicial bodies with attributions also concerning the constitutionality goals.

In Myanmar, the constitutional justice was decided by the Supreme Court after the promulgation of the 1947 Constitution. When the 1974 Constitution was enacted, only the House of Representatives was authorized to interpret the Constitution. Between 1947 and 1974, the constitutional justice of Myanmar was not carried out by a separate court. After that, the current 2008 Constitution was ratified by referendum on the 10th of May 2008 and promulgated on 29th of May 2008. It entered into force on the 31st of January 2011. That was the first day of the first meeting of the Union Parliament. Myanmar has been exercising the centralized constitutional review model under the Section 46 of the 2008 Constitution. According this Section, the Constitutional Tribunal shall be set up to interpreted the provisions of the Constitution, vet the conformity of laws enacted by the legislative bodies with the Constitution, vet the conformity of actions of the executive authorizes with the Constitution, decide the constitutional disputes and perform other duties prescribed in the Constitution.

In accordance with the Section 46 of the Constitution, the Constitutional Tribunal was established in 2011 when the Constitution entered into force on 31 January, 2011. That's why, the Constitutional Tribunal of Myanmar was established not only to interpret the constitution and scrutinize the laws inconsistent with the constitution, but also to check and balance the constitutional disputes among the different levels of Government.

A. Jurisdictions of the Tribunal

According to Section 322 of the Constitution and Section 12 of the Constitutional Tribunal Law, the following functions and duties of the

Constitutional Tribunal of the Union are:

(a) interpreting the provision of the Constitution;

(b) vetting or scrutinizing the conformity of laws promulgated by the legislative bodies with the constitution;

(c) vetting or scrutinizing the conformity of measures of the executive authorities with the constitution;

(d) deciding the Constitutional disputes between different levels of the Government.

Furthermore, Section 323 of the Constitution prescribes that "*during a hearing of a case before a court, if there arises a dispute on whether the provisions contained in any law contradict or is conform to the Constitution, and if no resolution has been previously made by the Constitutional Tribunal of the Union on the said dispute, the said court shall stay the trial and submit its opinion to the Constitutional Tribunal of the Union in accordance with the prescribed procedures and shall obtain a resolution. In respect of the said dispute, the resolution of the Constitutional Tribunal of the Union shall be applied to all cases.*"

The Constitutional Tribunal does not have the jurisdiction to examine the constitutional complaints for the protection of the basic rights and freedoms of citizens because the Constitutional Tribunal exercises the judicial control within the extent and permission of the Constitution and all other existing laws. But the constitutional complaints concerning for example individual rights can be applied through the Supreme Court under Section 323 of the Constitution and Section 17 of the Tribunal Law. Therefore, the Tribunal upholds the principles of the Constitution, protection of constitutional rights and the fundamental rights of citizens within the framework of its competency.

When the submission is presented by the persons mentioned in Section 325 and 326 of the 2008 Constitution, the Constitutional Tribunal accepts the submission. The submission shall be proceeded in accordance with the Law and Procedures of the Tribunal.

The main legal basis is the Constitution of the Republic of the Union of Myanmar, the Tribunal's Law and any other relevant law.

The Tribunal may apply the relevant provisions of the Code of Civil Procedure, the Code of Criminal Procedure and the Evidence Act whenever it is deemed to be relevant and appropriate with an aimed to settle disputes, under the Section 37(a) of the Law of the Constitutional Tribunal. It should also be pointed out that the Tribunal applies the principle of mutatis mutandis.

B. Execution of Judgments of the Constitutional Tribunal

Since its establishment, the Constitutional Tribunal decided a small number of cases. The Constitutional Tribunal accepted and decided 17 cases until 2020. The Constitutional Tribunal's experiences in some cases concerning the implementation issue are as follows:

In submission No. 1 of 2011

The Chief Justice of the Union Supreme Court communicated the submission to the Constitutional Tribunal questioning the legality of conferring the first class judicial power to the sub-township administrative officers as requested by the Ministry of Home Affairs. The Constitutional Tribunal examined whether it is constitutional or not to confer the power of criminal jurisdiction to the sub-township administrative officers of the General Administration Department of the Ministry of Home Affairs by the Supreme Court of the Union.

The Constitutional Tribunal considered that the provisions of the 2008 Constitution clearly stipulate that the legislative power, the executive power and the judicial power of the Union shall be separately exercised. The judicial power entitled to the courts and judges are clearly prescribed in the Constitution. Therefore, the exercise of the judicial power is permitted only to those judges who are empowered by the Constitution.

So, the Constitutional Tribunal held that the conferring of the judicial power to administrative officers of the General Administration Department of the Ministry of Home Affairs is not in conformity with the Constitution.

After deciding the submission No.1 of 2011, the Supreme Court repealed the empowering the sub – township administrative officers of the General Administration, Ministry of Home Affairs with the power

of criminal jurisdiction by the Notification No. 232/ 2011, in order to be in conformity with the 2008 Constitution and the decision of the Constitutional Tribunal of the Union.

In submission No. 2 of 2011

Dr. Aye Maung and 22 MPs of the *Amyotha Hluttaw* (National Parliament) presented a submission questioning whether the term "Minister of the National Races Affairs" used in Section 5 of the Law of Emoluments, Allowances and Insignia for Representatives of the Region or State, is excluded from the "Ministers of the Region or State". The exclusion of Minister of the National Races Affairs' among the Ministers of the Region or State under Section 4 (c) of the Law is in conformity with the Constitution or not. It is also questioning whether Section 2(f), 3(a), 4(c) and 48 of the Region or State Government Law are in conformity with the Constitution or not.

The Constitutional Tribunal examined whether the status of Ministers of the National Races Affairs is equal to that of the Ministers of the Region or State concerned; or whether they are entitled to the emoluments, allowances and insignia of office as Ministers of the Region or State.

The Constitutional Tribunal considered that Section 262(a) (iv) and 262(e) of the Constitution defines the "Minister of the National Races Affairs" as the concerned "Minister of the Region or State". Consequently Section 262(g) (ii) of the Constitution allows the President to assign duties to the *Hluttaw* representatives who are the Ministers of the Region or State, to perform the affairs of concerned National Races.

These provisions clearly give the Minister of the National Races Affairs and the other Ministers of the Region or State an equal status without any discrimination.

The executive power of the President of the Union is not only limited to the appointment of Ministers of the Region or State but authorizes also to designate the responsible Ministers. The President of the Union shall assign duties to the Ministers of the Region or State in order to perform the affairs of their respective national races under Section 262 (g) (ii) of the Constitution.

By using this authorization, the President issued Order No. 23/2011 and designates Ministers of the National Races Affairs of the Region or State, under Section 262(e) and (f) of the Constitution and Section 19(c) of the Law of the Union Government.

The Tribunal examines the basic principles of the Constitution and any other laws.

As pointed out under Section 15 of the said Law, that representatives of the national races are allowed to participate in the process of legislation of the Region or State. Similarly, Section 17(c) of the Constitution provides that representatives of the national races in the legislation of concerned Region or State may participate in the process of executive so as to undertake national races affairs.

With reference to the basic principle of the Constitution, the President shall assign duties to the Ministers of the National Races Affairs of the Regions or States to an equal status with the Ministers of the Regions or State. Therefore, they shall be entitled to the emolument, allowances and insignia of office as Ministers of the Region or State.

According to the above-mentioned stipulation of status, there is no reason to dispute the treatment of Minister of the Regions or States as Deputy Ministers. Therefore, Ministers of the National Races Affairs of the Region or State are entitled to the emolument, allowances and insignia of office with the same status as Ministers of the Region or State in accordance with the Constitution.

Therefore, the submission of 23 representatives of the *Amyotha Hluttaw* including Dr. Aye Maung, have been allowed. It has been decided and interpreted that since the Ministers of National Races Affairs of the Regions or States are the concerned Ministers of the Regions or States, they are the persons defined by Section 4 (c) of the Law of Emoluments, Allowances and Insignia of Office for Representatives of the Regions or States. Hence, Section 5 and Section 17 of the said Law are of unconstitutional.

As a result, the Tribunal declared that Sections 5 and 17 of the Law of Emoluments, Allowances and Insignia of Office for Representatives of the Region or State is not in conformity with Section 262 of the Constitution of the Republic of the Union of Myanmar.

After passing the judgment, according to which the above-mentioned Law was incompatible with the Constitution, the *Pyidaungsu Hluttaw* (Union Parliament) amended the Law on 8 March, 2013. Following this amendment, the Minister of the National Races Affairs and the other Ministers of the Region or State possess an equal status without any discrimination.

In submission No. 1 of 2015

Dr. Aye Maung and 23 MPs from *Amyotha* (National) Parliament brought a submission to the Tribunal, requesting to examine the constitutionality of the Bill of the Referendum Law for amending the Constitution. They questioned one of the provisions of the Referendum Law, most specifically Section 11(a) that provides the holders of Temporary Identity Cards the right to vote in the Referendum.

Pursuant to all these provisions, the Tribunal noted that the expression "*constitutional right to vote*" includes every citizen who has attained the age of 18 years on the day the election commences and every person who get this right by Law.

However, in the case of those persons who have the right to vote enacted by Law, it is imperative that this Law must be in accord with the Basic Principles enshrined in the Constitution. The Tribunal had given further consideration to a notable point, that although priority shall be given to required qualifications prescribed for citizens, close attention shall also be given to other requirements if the right to vote is prescribed by the Law.

In this connection, reference is made to the 1982 Union Citizenship Law. This Citizenship Law provides an authority the process and steps to become an associated citizen and naturalized citizen.

After given attention to all these facts, it is to be noted that persons holding Temporary Identity Cards referred in the Referendum Law are meant to be the holders of the Temporary Identity Cards (White Cards) under Rule 2 (e) of 1951 Residents of Burma Registration Rules. Under 1951 Rules, holding this Temporary Identity Card is only allowed for a fixed period of time and is issued in lieu of the National Identity Cards.

The Immigration and Manpower Ministry presented that under 1951 Residents of Burma Registration Rules, the Temporary Identity

Cards are issued to (a) those who reside in the territory of the Republic of the Union of Myanmar without any identification or Identity Card; (b) those who remain to be scrutinized as citizens by law; (c) those who remain to be scrutinized as citizens due to lack of holding of any supportive or relevant documents; (d) those who are not entitled to hold Foreigner Registration Cards under 1948 Foreigners Registration Rules.

These Temporary Identity Cards are issued solely to certify that they reside in the territory of the Union of Myanmar.

By a notification issued on 11th February 2015, the President has ordered the expiration of Temporary Identity Cards. According to that notification, Temporary Identity Cards of those who were residing in Myanmar under 1948 Residents of Burma Registration Act, will be expired on 31st March 2015. Therefore, holders of the Temporary Identity Cards were obliged to deliver their Cards by 31st May 2015 for further review.

Therefore, it is noteworthy that under the Presidential Notification, validity of the cast votes under Referendum Law is not in accord with the Constitution, particularly with regard to Section 38 (a), Section 391(a) and Section 391(b). Therefore, the Tribunal ordered that Section 11 (a) of the Bill of the Referendum Law for amending the Constitution (2008), which permits holders of the Temporary Identity Cards, are not in accordance with the Constitution.

After passing the judgment, according to which the above-mentioned Law was incompatible with the Constitution, the *Pyidaungsu Hluttaw* (Union Parliament) amended the Law on 25 June 2015. Following this amendment, Sub-section (a) of Section 11 of the Law Amending the Referendum Law for the Approval of the Draft Constitution of the Republic of the Union of Myanmar, (2008) shall be substituted as follows:

> *"(a) Each of every citizen, associate citizen and naturalized citizen who has completed the age of eighteen years on the day of referendum shall have the right to vote at the referendum. Such each and every person who is entitled to vote shall be mentioned in the voting roll."*

Furthermore, the Constitutional Tribunal had referred to the precedent judgments of the Tribunal reflecting the established case-law. Some cases of execution can be cited as follow;

In submission No. 1 of 2019

25 Representatives of *Amyotha Hluttaw* (National Parliament), including Daw Nan Ni Ni Aye, submitted a request to interpret under Section 322 (a) of the Constitution that the Bill amending the 2008 Constitution of the Republic of the Union of Myanmar, the Bill submitted methodically in accord with the Chapter 12 of the Constitution, should be accepted and discussed at the *Pyidaungsu Hluttaw* (Union Parliament) in align with the provision of Section 435 of the Constitution since the provision contained in Section 435 of the Constitution is the special provision.

The Constitutional Tribunal considered that the following facts should be decided with regard to the submission;

(a) whether the submission clearly put forth the necessary ground to interpret the provision of Section 435 of the Constitution;

(b) whether the facts contained in the submission fall within the jurisdiction of the Tribunal;

(c) whether Section 435 of the Constitution needs to be interpreted or not.

According to above-mentioned issues, the Constitutional Tribunal considered whether the Tribunal has the jurisdiction to examine or not on the actions of the *Pyidaungsu Hluttaw* (Union Parliament), although the interpretation of Section 435 of the Constitution is the main issue.

So, the question of "whether the facts contained in the submission fall within the jurisdiction of the Tribunal or not" was decided by the Tribunal with the reference of 23 Representatives of *Amyotha Hluttaw*, including U Sai Than Naing"[2]. In this case, it directed that *"[t]he Tribunal can legally scrutinize not only the constitutionality of laws promulgated by the legislative bodies but also the constitutionality of the activities of the executive authorities. But the activities of the legislative bodies cannot not be scrutinized by the Tribunal. Concerning, as that power is not entitled to the Constitutional Tribunal."*

Therefore, the Constitutional Tribunal concluded that this issue does not fall within the jurisdiction of the Tribunal. Although this

2 Submission No. 1/2016.

issue is not subject matter, the decision expressed the execution of the judgment of the Tribunal.

Relating to the main issue, the 2008 Constitution provided the Section 435 as follows:

> *"If twenty percent of the total numbers of the Pyidaungsu Hluttaw representatives submit a Bill to amend the Constitution, it shall be considered by the Pyidaungsu Hluttaw."*

Section 435 set forth the procedural provision and the orthography of that section is unambiguous and does not necessitate further interpretation of the Tribunal. It does not include any complicated and indecisive fact either grammatically or terminologically. The Tribunal considered that it is not necessary to interpret these provisions.

In submission No. 2 of 2019

Dr. Sai Sei Kyauk Sam, Representative of *Amyotha Hluttaw* (National Parliament) from Shan State constituency 6, and 24 others submitted a submission through the Speaker of *Amyotha Hluttaw* in accordance with Section 15 (d) of the Constitutional Tribunal Law in order to obtain the opinion of the Tribunal on the urgent proposal "to form a Joint Committee on Amending the Constitution", submitted by *Pyidaungsu Hluttaw* representative U Aung Kyi Nyunt from Magway Region constituency 4 to be discussed, and consider if forming a Joint Committee on Amending the Constitution by the *Pyidaungsu Hluttaw* was consistent with the provisions contained in Chapter 12 of the Constitution or not.

According to the submission and preliminary statement, the Tribunal have to decide firstly the legal issue of "whether the matter described in the submission falls within its jurisdiction".

The Tribunal cited the precedents of 26 Representatives of *Amyotha Hluttaw* including U Aung Kyi Nyunt[3] and 23 Representatives of *Amyotha Hluttaw* including U Sai Than Naing[4]. The Tribunal has the power to check the constitutionality of the law enacted by the legislature and the actions or measures of executive authorities. The authority to conduct

3 Submission No. 5/ 2014.
4 Submission No. 1/2016.

the constitutional review over the action or measures of legislature is not vested. The Tribunal decided that the actions and decisions of the Union Parliament are not within the competence of the Tribunal.

Therefore, the Tribunal dismissed the submission.

C. Incident of the Judgments of the Constitutional Tribunal

There are 17 cases that were decided by the Constitutional Tribunal. Among them, the Constitutional Tribunal faced a rare incident in 2012. In submission No 1 of 2012, the Attorney-General, on behalf of the President, presented the submission questioning the constitutionality of the interpretation of term the "Committees, Commissions and Bodies formed by each *Hluttaw*" should be regarded as "Union Level Organizations."

Taking into consideration the preceding discussions and also the interpretation on the Chapter IV of the Constitution under the heading of Legislature, "any of the Union Level Organizations formed under the Constitution" and "Organizations or Persons representing any of the Union Level Organization formed under the Constitution" shall be defined as "the Union Level Organizations or persons appointed by the President with the approval of the *Pyidaungsu Hluttaw* (Union Parliament). But Committees, Commissions and Bodies formed by each *Hluttaw* shall be regarded only as organizations of *Hluttaw*.

Therefore, it may be interpreted that "any of the Union Level Organizations formed under the Constitution" and "Organizations or Persons representing any of the Union Level Organization formed under the Constitution" are the Union Level Organizations or Persons appointed by the President with the approval of the Pyidaungsu Hluttaw.

For all these reasons, the submission of the President is granted and *"[t]he status granted to Committees, Commissions and Bodies formed by each Hluttaw as Union Level Organizations is unconstitutional*".

Although the Union Level institution are established on the necessity of the concerned department, some institutions are established under the Constitution and some are established by relevant institutional laws. These are similar Union level institutions but their rights and

duties are different. The effected bodies disapproved the decision of Tribunal made the difference between institutions established by the Constitution and institutions established by relevant law and initiated impeachment of all nine members of the Constitutional Tribunal. This incident has arisen from a political conflict between the President and the legislature. The Parliament used the means of impeachment against the Tribunal Members' unsatisfying decision.

And then, the Parliament amended the Law of Constitutional Tribunal in 2013 firstly. One of the amendments of the Tribunal Law concerned Section 25, which stated that "*the decisions of the Tribunal shall have an effect on the relevant Government departments, organizations, and persons or the respective region"*, was deleted in favor of the provision stating that "*only those cases sent from the ordinary courts shall be applicable to all cases*". Later, the Law of Constitutional Tribunal was secondly amended in 2015.

CONCLUSION

Section 324 of the Constitution and Section 24 of the Law of the Constitutional Tribunal provide that the decision of the Constitutional Tribunal shall be final and conclusive. The decision rendered on the submission presented by a court under Section 12, Sub-Section (g) of the Constitutional Tribunal of the Union Law shall be applicable in all similar cases. It signifies that the right to appeal or the right for revision by the parties is not allowed.

Section 35 of the Law of the Constitutional Tribunal provides that the judgments passed by the Constitutional Tribunal shall be declared in the State Gazette. Judgments shall be bound and published for reference and kept as precedent cases.

All types of decisions of unconstitutionality have *erga omnes* effect. Generally, the decisions of unconstitutionality have prospective effect and an unconstitutional statute or provision shall automatically lose its effect from the date on which the decision is made.

There is no doubt that an important role in execution of decisions is played by the image of the Court. By showing respect to the Court and the judicial power, the executor of the decisions shall also respect the viewpoint of the Court.

ENFORCEMENT OF THE DECISIONS OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF NORTH MACEDONIA

Alexandar Lazov

CONSTITUTIONAL COURT OF THE REPUBLIC OF NORTH MACEDONIA

ENFORCEMENT OF THE DECISIONS OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF NORTH MACEDONIA

Alexandar Lazov[*]

INTRODUCTION

Enforcement of the decisions of the constitutional courts is essential for the realization of their role in the protection of the constitutionality, legality and freedoms and rights of man and the citizen. Decisions and views expressed in those decisions must be respected and state bodies and other holders of public authority are obliged to take appropriate actions or to stop actions that have been found to violate constitutional freedoms and rights.

It is also important for the rule of law, because respecting and acting upon a decision that establishes that a certain provision is contrary to the Constitution and/or to a law or that there is a violation of freedoms and rights is equally important as respecting the Constitution and laws.

The above is recognized in the practice of our Constitutional Court. In its Decision U.No.193/2005 of 12.07.2006, after the Court established that the Assembly adopted a legal provision with identical content as the provision that was previously repealed due to non-compliance with the Constitution, as one of the reasons for its decision stated: "*The legislator did not act in accordance with the decisions of the Constitutional Court which are final and enforceable" and "the further existence of the disputed law violates the principle of finality and enforceability of the decisions of the Constitutional Court, because such setting does not allow their interpretation, prolongation or preventing their execution*."

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Characteristic of the enforcement of the decisions of the Constitutional Court is the complexity in terms of defining its essence and content, then the issue which legal entities are obliged to enforce and the ways in which the decision should be enforced, the legal framework that regulates and ways of legal regulation, and other questions that will be discussed in this text.

I. LEGAL FRAME

a) Pursuant to Article 112 paragraph 3 of our Constitution, the decisions of the Constitutional Court are final and enforceable. Through this, with the highest legal norm, the decisions of the Court, in addition to their finality which means the impossibility of further reconsideration by another or higher instance, are also granted the capacity of enforcement which has several consequences.

First, this establishes an obligation to enforce the decisions of the Constitutional Court. Second, it ensures respect for the decisions of the Court by all state bodies and institutions whose basic task is to act in accordance with the Constitution and the laws. And thirdly, this is a legal basis for the lower normative level to provide mechanisms for the implementation of the decisions of the Constitutional Court.

It must be pointed out that there is no constitutional provision that explicitly stipulates whose competence is to ensure the enforcement of these decisions, as is the case with other constitutional norms that apply to certain bodies of state power. For example, Article 91 indent 1 of the Constitution stipulates that the Government of the Republic of North Macedonia determines the policy of execution of the laws and other regulations of the Assembly and is responsible for their execution.

Undoubtedly, the logical answer would be that this should be within the jurisdiction of the Constitutional Court. However, the competencies of the Court are determined by the Constitution in accordance with the method of regulation-*numerus clausus*, which means that the competencies are determined by the so-called closed list, without providing for the competence to ensure the execution of their own decisions.

b) On the other hand, the Rules of Procedure of the Constitutional Court, adopted in 1992, contain a separate Chapter XII entitled "Enforcement of the decisions of the Constitutional Court of the Republic of North Macedonia", (Articles 86 and 87), which partially regulates these problems.

The assumption is that the logic for such legal regulation and filling certain legal gaps is the interpretation of Article 113 of the Constitution, according to which the manner of work and the procedure before the Constitutional Court are regulated by an act of the Court (in this case the Rules of Procedure) and the enforcement of the decisions of the Court is treated as a matter in the field of the manner of work and the procedure before it and hence such regulation from which it follows that ensuring the execution of its decisions is in the competence of the Constitutional Court.

Support for this can be found in the position of the Constitutional Court expressed in the Decision *U.no.131 / 2000* of 21 March 2001, which repealed Articles 37 and 38 of the Law on the Government of the Republic of Macedonia ("Official Gazette of the Republic of Macedonia", No. 59/2000).

Namely, Article 37 of this Law provided that the Government ensures the enforcement of the decisions of the Constitutional Court of the Republic of Macedonia in cases when the competent bodies for execution of these decisions did not execute the decision of the Court. According to Article 38 of the same law, depending on the nature of the subject of enforcement, as well as by the body that in the sense of Article 37 of this Law was directly competent and obliged to execute the decision, unless otherwise provided by another law, the Government shall adopt a conclusion which determines in more detail the manner of providing execution.

In the explanation of its decision, the Court first refers to Article 112 paragraph 3 and Article 113 of the Constitution, and concludes that "the Constitution is categorical in determining that the decisions of the Constitutional Court are final and enforceable", starting from the categoricalness of this constitutional determination and "*determinations of the manner of execution of decisions which is within the competence of the*

Court itself", "*and having in mind that the disputed provisions may violate the principle of finality and enforceability of the decisions of the Constitutional Court, that is, they contain elements that allow the Government of the Republic of Macedonia to interpret the decisions of the Constitutional Court, to prolong and prevent their execution*", assessed that Articles 37 and 38 of the Law on the Government of the Republic of Macedonia were not in accordance with the provisions of Article 112 paragraph 3 and Article 113 of the Constitution.

A second feature of the Rules of Procedure for the execution of the decisions of the Constitutional Court is that the circle of executors of the decisions is determined only in two of its competencies: (1) the procedure for assessing the constitutionality and legality; and (2) the protection of the freedoms and rights referred to in Article 110, line 3 of the Constitution (Article 86, paragraphs 1 and 2). In the first, it is the enactor of the law, other regulation or general act that is annulled or repealed by a decision of the Court, while in the second, it is the body or organization that adopted the individual act that is annulled by a decision of the Court, i.e. the body or an organization that has taken action that the Constitutional Court has banned by decision.

Third is that Article 87 of this act gives the Constitutional Court the authority to monitor the execution of its decisions, which was discussed above and if it assesses, to ask the Government to ensure the execution, which practically means that the Rules of Procedure provide obligation for this body of state power.

Finally, fourthly, there are other provisions in the enforcement of Constitutional Court decisions, systematized outside the above-mentioned chapter. Namely, Article 96 line 4 of this act stipulates that the Secretary of the Court monitors the execution of the decisions and conclusions of the Constitutional Court and informs the Court about that.

c) When talking about this topic, it must be pointed out that the execution of the decisions of the Constitutional Court also provides for criminal legal protection. Thus, Article 377 paragraph 3 of the Criminal Code provides for a separate crime - non-execution of a decision of the Constitutional Court which provides for imprisonment of one to

five years for an official or responsible person who refuses to execute a decision of the Constitutional Court of Northern Macedonia which is obliged to perform.

d) The above is the general legal framework that refers to the execution of the decisions of the Constitutional Court. On the other hand, there are certain legal provisions that refer to this issue, but regulate legal and political consequences for a certain entity, can be stated. An example of this is Article 75 paragraph 1 item 1 of the Law on Local Self-Government ("Official Gazette of the Republic of Macedonia" No. 5/2002), according to which the Council (of the municipality) is dissolved, among other things and if adopted the regulation that was previously annulled or repealed by a decision of the Constitutional Court of the Republic of Macedonia.

II. SOME ISSUES RELATED TO THE ENFORCEMENT OF THE DECISIONS OF THE CONSTITUTIONAL COURT

a) The non-existence of a constitutional norm that will determine who is responsible for ensuring the execution of the decisions of the Constitutional Court has already been pointed out, although with the constitutional determination of the capacity of enforceability, the obligation for their enforcement undoubtedly arises.

Through the interpretation of Article 113 of the Constitution, according to which the manner of work and the procedure before the Court are regulated by an act of the Court, the position of the Constitutional Court is that it has jurisdiction, and as a consequence of this is the regulation with the Rules of Procedure of the Constitutional Court which is adopted on the basis of the cited constitutional provision. Moreover, the Court considers that this is an exclusive procedural matter that indisputably arises from the cited decision by which the two provisions of the Law on the Government of the Republic of Macedonia were repealed.

However, it seems that the issue of jurisdiction is of secondary importance given that there is a general obligation of the decisions of the Constitutional Court for everyone from which arises an obligation for their implementation (execution), but also provided criminal liability for non-execution. The basic question is whether this matter

should be regulated by the Rules of Court or by a law that is often the subject of debate with the professional public. Namely, it is necessary to have a legal framework that will have adequate legal force that will guarantee that the decisions of the Court will be respected by all and will be acted upon.

The argument that it should not be with the Rules of Procedure of the Court is primarily due to the legal nature of the Rules of Procedure of the Constitutional Court. Undoubtedly, it is a legal act that was adopted directly on the basis of a constitutional provision (Article 113 of the Constitution). However, in essence it is an act that is "inward-looking" and addresses issues exclusively related to the Court: its work and procedure before the Court, and enforcement cannot be considered in either of these two categories. Furthermore, this act does not and cannot have the same legal character and force as the laws that are mandatory for all legal entities, and may prescribe legal consequences for their non-compliance, for which there is adequate judicial and administrative protection that is not case with the Rules of Procedure.

An additional argument is that until the adoption of the Rules of Procedure of the Constitutional Court, the execution of the Court's decisions was regulated by laws: the Law on the Constitutional Court of Macedonia ("Official Gazette of the Socialist Republic of Macedonia" No. 45/1963), the Law on the Basis of Procedure before the Constitutional Court of Macedonia and the legal effect of its decisions (Official Gazette of the Socialist Republic of Macedonia No. 42/1976).

b) The second basic question is what is the execution of the decisions of the Court, i.e. what is its content and essence. In this regard, it should be noted that there is no legal norm in the Constitution, nor in the Rules of Procedure that define this. However, it can be said that basically it means a legal obligation for all state bodies and other holders of public powers to act in accordance with the decisions of the Constitutional Court, otherwise there is a basis for criminal liability for their responsible or official persons.

This is a general definition, while the content of the execution of decisions has its own specifics that depend on the jurisdiction within which the Court decided.

For example, a decision made in the procedure for assessing the constitutionality and legality of a law or regulation can be enforced in several ways. In any case, this means that the enactor of the repealed or annulled law or regulation or their separate provisions must not adopt a law or regulation or provision with the same content. This does not mean revoking the authority of the lawmaker or the regulation to legally regulate a certain issue because there is indisputably a certain legal gap in the legal order, but in the event of future regulation, it must take into account the views of the Court expressed in the relevant decision.

Furthermore, if in the explanation of its decision, the Constitutional Court has concluded that a certain procedural violation has been committed, the body, if it deems it necessary to adopt the same law or regulation, must act in accordance with it and eliminate the procedural omissions.

Finally, if the Decision of the Constitutional Court, which has established unconstitutionality or illegality because it was adopted by an incompetent body, the same body may not adopt the same act in the future.

c) It can be noted that in the existing Rules of Procedure of the Constitutional Court, there is no general provision as there was in Article 70 of the Law on the Constitutional Court of Macedonia from 1963, according to which, in each case, according to the nature of the decision, the Constitutional Court determines which bodies and in what way will execute his decision. Such a normative solution can be found in the comparative legal example with Article 46 item 6 of the Law on the Constitutional Court of the Republic of Serbia, according to which the Constitutional Court, among other things, determines the manner of execution of decisions or decisions of the Constitutional Court.

There is no doubt that there is a need for such a norm, given that as stated above, there is no general legal definition for the execution of decisions of the Constitutional Court, and on the other hand each of the different proceedings before the Court has its own specificity and differ in the manner of execution.

Another argument is that the Court does not always, in its decision (sentence and reasoning), indicate how it should be enforced. For example, a decision in a procedure for assessing constitutionality or legality only determines that a certain law or regulation is repealed or annulled, and the reasons for such a decision are given in the explanation.

However, for the sake of truth, it is true that such a general norm is missing, but the Rules of Procedure contain a special norm that is important for the execution of the decisions of the Constitutional Court when deciding on the protection of freedoms and rights.

Thus, in accordance with Article 82 of the Rules of Procedure, with a decision by which the Constitutional Court decides on protection of freedoms and rights from Article 110 line 3 of the Constitution, the Constitutional Court will determine the manner of removing the consequences of the application of the individual act or action by which those rights and liberties were violated.

d) Finally, it seems that the issue on which there is no dilemma is the moment when the obligation to execute the decisions of the Constitutional Court arises, although it is not determined by a norm. This is certainly the moment when the decision of the Court begins to produce legal effect which is regulated by the Rules of Court (by publication in the Official Gazette).

The same applies to the deadline, i.e. the period in which the decision of the Constitutional Court should be acted upon, which is not regulated again. However, from the case law of the Court (Decision *U.no.193 / 2005* of 12.07.2006 quoted above), it follows that this should be without extension, which would mean the shortest possible time.

CURRENT PROBLEMS IN EXECUTION OF JUDGMENTS OF THE SUPREME COURT OF PAKISTAN

Syeda Saima Shabbir
Qaisar Abbas

SUPREME COURT OF PAKISTAN

CURRENT PROBLEMS IN EXECUTION OF JUDGMENTS OF THE SUPREME COURT OF PAKISTAN

Syeda Saima Shabbir[*]
Qaisar Abbas[**]

ABSTRACT

The Supreme Court of Pakistan is the apex Constitutional Court, exercising original, appellate, review and advisory jurisdiction under Articles 176-191 of the Constitution of Pakistan, 1973. It is the Court of last resort and final arbiter against the decisions of High Courts, Federal Shariat Court, Tribunals and Subordinate Courts. However, despite the existence of constitutional and statutory provisions, the Supreme Court often faces problems in the execution of judgments due to non-compliance of its orders, delays in implementation of judgments, lack of coordination in State organs and other factors; thus, hampering the process of dispensation of constitutional justice.

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INTRODUCTION

Pakistan is a Federal Republic.[1] Article 175(1) of the Constitution of Pakistan, 1973, pertains to the establishment and jurisdiction of courts. It postulates that there shall be a Supreme Court of Pakistan, a High Court for each Province and a High Court for the Islamabad Capital Territory and such other courts as may be established by law.

I. THE SUPREME COURT OF PAKISTAN

It is the apex Constitutional Court, having original, appellate, review and advisory jurisdiction.[2] The Supreme Court of Pakistan is the court of last resort and final arbiter against the decisions of High Courts, Federal Shariat Court, Tribunals and Subordinate Courts. However, despite the existence of constitutional and statutory provisions, the Supreme Court often faces problems in the execution of judgments due to:

- Non-compliance with its orders;
- Delays in implementation of judgments;
- Lack of coordination in State organs;
- Procedural difficulties and other factors.

Thus, the above-mentioned issues are hampering the process of dispensation of constitutional justice.

A. Provisions for the Execution of Judgments of the Supreme Court

Many legislative provisions exist for the execution of the judgments, orders and decrees of the Supreme Court of Pakistan, which are listed below:

- Article 187 of the Constitution of Pakistan.
- Article 189 of the Constitution.
- Article 190 of the Constitution.
- Order:10, Rule 9 of the Supreme Court Rules, 1980.
- Article 204 of the Constitution Contempt of Court Ordinance 2003.

1 Article 1 of the Constitution of Islamic Republic of Pakistan.
2 Articles 171-191 of the Constitution of Islamic Republic of Pakistan.

- Order XXI and Rule 15 of Order XLV of the Code of Civil Procedure, 1908.
- Order XXVII of the Supreme Court Rules, 1980.

B. Article 187 of the Constitution of Pakistan

Article 187 pertains to the issue and execution of processes of the Supreme Court and provides that "*the Supreme Court shall have power to issue such directions, orders or decrees as may be necessary for doing complete justice in any case or matter pending before it, including an order for the purpose of securing the attendance of any person or the discovery or production of any document. Any such direction, order or decree shall be enforceable throughout Pakistan and shall, where it is to be executed in a Province, or a territory or an area not forming part of a Province but within the jurisdiction of the High Court of the Province, be executed as if it had been issued by the High Court of that Province. If a question arises as to which High Court shall give effect to a direction, order or decree of the Supreme Court, the decision of the Supreme Court on the question shall be final.*"

C. Article 189 of the Constitution

This Article provides that "*any decision of the Supreme Court shall, to the extent that it decides a question of law or is based upon or enunciates a principle of law, be binding on all other courts in Pakistan.*"

D. Article 190 of the Constitution

Article 190 pertains to the action in aid of Supreme Court. It postulates that "*all executive and judicial authorities throughout Pakistan shall act in aid of the Supreme Court*."

E. Order:10, Rule 9 of the Supreme Court Rules, 1980

The decree passed or order made in every appeal, and the direction or writ issued in any matter by the Court shall be transmitted by the Registrar to the Court, the tribunal or other authority concerned and from whose judgment, decree or order the appeal or matter was brought. Moreover, any such decree, order or direction shall be executed and enforced as if it had been made and issued by the High Court of the respective province.

F. Article 204 of the Constitution

Article 204 (2) (a) of the Constitution *inter alia* empowers the Supreme Court to punish any person who abuses, interferes with or obstructs the process of the Court in any way or disobeys any order of the Court.

G. Contempt of Court Ordinance, 2003

The Contempt of Court Ordinance, 2003, empowers the Supreme Court to punish a person under contempt proceedings for flagrant disregard of its orders and judgments

H. Order XXI and Rule 15 of Order XLV of the Code of Civil Procedure, 1908

These provisions pertain to the execution proceedings. Rule 15 provides that whoever desires to obtain execution of any order of the Supreme Court shall apply by petition, accompanied by a certified copy of the decree passed or order made in appeal and sought to be executed, to the Court from which the appeal to the Supreme Court was preferred.

I. Order XXVII of the Supreme Court Rules, 1980

Order XXVII of the Supreme Court Rules, 1980, provides that the Supreme Court may take cognizance of its contempt *suo motu* or on a petition filed by any person; provided that where the alleged contempt consists of willful disobedience of any judgment, decree, direction, order, writ or other process of the court, or a breach of an undertaking given to the Court or a Judge in Chambers, the Court may take cognizance *suo motu* or on a petition filed by the aggrieved person.

II. STEPS UNDERTAKEN BY THE SUPREME COURT FOR THE EXECUTION OF ITS JUDGMENTS

There are many instances where in order to ensure the execution and implementation of its judgments, the Supreme Court of Pakistan undertakes various steps which *inter alia* include:

- Formation of implementation bench,

- Calling of reports,
- Cognizance under the contempt jurisdiction,
- *Suo motu* action under Article 184(3) of the Constitution of Pakistan,
- Circulation of judgments to the concerned quarters for implementation in letter and spirit.

III. CASE LAW:

***Naimatullah Khan Advocate and others versus Federation of Pakistan*[3].**

The Supreme Court of Pakistan took cognizance of the matter under Art 184(3) of the Constitution, keeping in view the urgency and the dire need to resolve the problem of overcrowding on roads and to grant some relief to the people of Karachi City. The Supreme Court issued certain directions for completion of Karachi Circular Railway vide its order dated 10th August, 2020. This matter has been kept pending by the Supreme Court in order to ensure the compliance of directions as given in the order, and reports have been called from concerned quarters.

***Saeeda Sultan versus Liaqat Ali Orakzai and Others*[4].**

In this case a preliminary decree was passed by the trial court in the year 1972. The matter came up for hearing before the Supreme Court of Pakistan and an order was passed in the year 2010. The said order was not complied by the relevant parties, therefore the petitioner sought implementation of the Supreme Court's order in contempt proceedings.

The Supreme Court observed that as a matter of general principle, where an order, judgement or decree originating from the lower court reaches the apex Court for final adjudication, such final order, judgement or decree is to be implemented and executed by the court of first instance under Section 38, read with Rule 15 of Order XLV of the Code of Civil Procedure, 1908, and not through contempt.

3 Reported as 2020 SCMR 1474.
4 Reported as PLD 2021 SC 671.

***Rai Muhammad Riaz versus Ejaz Ahmed*[5].**

In this case, while hearing a petition for leave to appeal regarding a suit for specific performance of an agreement, the Supreme Court on the issue of non-appearance of plaintiff and his counsel noticed that from the year 2014 to 2016, three were 56 dates determined for hearing of the matter and nobody appeared from the petitioner's side despite multiple, last and final opportunities.

The Supreme Court by referring to its earlier judgment reported as *Moon Enterpriser CNG Station v. Sui Northern Gas Pipelines Limited (2020 SCMR 300),* strongly deprecated this practice.

The Court observed that this practice must stop forthwith and the trial courts must implement the judgments of this court in letter and spirit as the same are binding on them in terms of Article 189 of the Constitution. The Supreme Court further observed that failure to comply can entail serious penal consequences for judicial officers failing or refusing to follow and implement clear and categorical judgments and orders of this Court.

***State versus Ahmed Omar Sheikh*[6].**

The Supreme Court observed in paragraph 24 of the judgment that:

> *"24.[…] The guidelines given by this Court in numerous judgments have binding effect upon all the courts below in view of Article 189 of the Constitution."*

***Pakistan Bar Council versus Federal Government*[7].**

A petition was filed by the Pakistan Bar Council (hereinafter: "PBC") under Article 184(3) of the Constitution of Islamic Republic of Pakistan; seeking the enforcement of the judgment of the Supreme Court rendered in *Pakistan Bar Council v. The Federal Government and others (PLD 2007 SC 394),* wherein the Court considered the matter of declining standards of legal education and the mushroom growth of substandard law colleges in the country. Through the present petition the PBC had claimed that none of the Respondent law colleges

5 Reported as PLD 2021 SC 761.
6 Reported as 2021 SCMR 873.
7 Reported as 2019 SCMR 389.

and universities had complied with the directions given in the PBC judgment and had instead granted affiliation certificates to private law colleges in violation of the Affiliation Rules that lay down, *inter alia*, the standards of legal education, criteria for disaffiliation, necessary infrastructural resource etc. Further directions were issued in the light of recommendations of the Special Committee of Pakistan Bar Council and an observation was made that the universities and colleges aggrieved by this judgment may directly approach the Supreme Court of Pakistan.

***Suo motu* actions regarding suicide bomb attack of 22-9-2013 on the Church in Peshawar and regarding threats being given to Kalash tribe and Ismailies in Chitral[8].**

Suo motu action was initiated by the Supreme Court under Article 184(3) of the Constitution of Islamic Republic of Pakistan on a letter received from an NGO, regarding an attack on a Church in Peshawar, in which 81 persons died. The Supreme Court issued directions for the protection of minorities' rights in general.

The office of the Supreme Court was directed to open a separate file to be placed before a three Members Bench to ensure that this judgment is given effect to, in letter and spirit, and the said Bench may also entertain complaints/petitions relatable to violation of fundamental rights of minorities in the country. The issues arising from time to time are being dealt with by this Court as per mandate of the judgment.

***Ishaq Khan Khakwani versus Railway Board*[9].**

Constitution petition under Article 184(3) of the Constitution relating to a recreational club built on land belonging to Pakistan Railways leased out to private parties to finance, redesign, develop and manage its operations was entertained by the Supreme Court of Pakistan.

The impugned lease agreement pertaining to the area of the property to be leased out, the term of the lease and the revenue sharing formula, were changed to benefit one bidder. Based on admitted documents, the Court found various illegalities, procedural improprieties

8 Reported as PLD 2014 SC 699.
9 Reported as PLD 2019 SC 602.

and violations of well-established principles of due process and transparency in the bidding.

The court while allowing the constitution petition declared and directed the agreement by which the land was leased as null and void *ab initio*, the land to be returned to Pakistan Railways along with all assets. A. F. Ferguson & Co to be appointed receiver and held indemnified. Auditor General of Pakistan was directed to conduct a forensic audit of the club and determine the amount owned by Pakistan Railways to the consortium in addition to benefits derived by the consortium.

A fresh tender was directed to be floated by Pakistan Railways and the club to continue running; all the club's bank accounts to be handed over; proceedings before the accountability court to continue; and an implementation bench to be formed.

The matter is now being dealt by an implementation bench.

CONCLUSION

The Supreme Court of Pakistan is the guardian of the Constitution of Pakistan and ultimate protector of the rights of the citizens. In order to ensure the compliance of its judgments, orders and guidelines; and in order to avoid the non-implementation caused *inter alia* by the reasons of delay, lack of coordination in State organs, procedural difficulties and other factors; the Supreme Court of Pakistan adopts various methods. Such methods include formation of implementation benches, calling of reports, initiation of contempt proceedings, *suo motu* action under Article 184(3) of the Constitution of Pakistan and the circulation of its judgments to the relevant individuals/ institutions.

THEORETICAL AND PRACTICAL ISSUES ON THE IMPLEMENTATION OF THE DECISIONS OF THE CONSTITUTIONAL COURT OF ROMANIA

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CONSTITUTIONAL COURT OF ROMANIA

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ABSTRACT

Constitutional courts are key institutions of a modern State and their fundamental role is to ensure the supremacy of the Constitution, of the rule of law and of the separation and balance of powers. All these can only relate to the main responsibility of any constitutional court, that is to ensure the conformity of the active legislation with the principles and values of the Basic Law. But it is not enough to empower a constitutional court. Its decisions must be implemented in order to render effective the constitutional review. The aim of this paper is to present the Romanian experience on the enactment of the decisions of the Constitutional Court, where its case-law plays a crucial role, since the Court itself does not have any powers to instruct other State authorities/institutions with the enforcement of its decisions; however, in the reasoning of its decisions, it can impose a certain manner of their enforcement and interpretation. The methodology consists in a content analysis of the legal framework and of the relevant case law. This paper reports aspects on a transversal and longitudinal study of the case-law in the last decade, which set out to examine and evaluate the characteristic features of the decisions of the Constitutional Court of Romania depending on the different powers bestowed to it by the Fundamental Law.

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INTRODUCTION

Created according to the European model of constitutional review, the Constitutional Court of Romania (hereinafter: "CCR") is, according to the Fundamental Law and its organic law, "*the guarantor for the supremacy of the Constitution*" and "*the only authority of constitutional jurisdiction*". The powers of the CCR are regulated by Article 146 of the Romanian Constitution[1], as revised in 2003, and, accordingly, by Law no. 47/1992 on the organization and functioning of the Constitutional Court[2] (hereinafter: "Law no.47/1992").

In the exercise of its powers, the CCR issues three categories of acts: decisions, rulings and opinions. Of these, decisions and rulings are generally binding, and opinions - issued only in the frame of a certain power of the CCR (concerning the proposal to suspend the President of Romania) are advisory in nature.

In this paper we will refer only to the decisions of the Constitutional Court, because they represent the most significant share of the Court's activity (over 90%) and give rise, in practice, the most discussions and nuances regarding their legal effects. According to Article 11 of Law no.47/1992, the CCR pronounces decisions in cases where:

1 Article 146 of the Constitution: "*The Constitutional Court shall have the following powers: a) to adjudicate on the constitutionality of laws, before the promulgation thereof upon notification by the President of Romania, one of the presidents of the two Chambers, the Government, the High Court of Cassation and Justice, the Advocate of the People, a number of at least 50 deputies or at least 25 senators, as well as ex officio, on initiatives to revise the Constitution; b) to adjudicate on the constitutionality of treaties or other international agreements, upon notification by one of the presidents of the two Chambers, a number of at least 50 deputies or at least 25 senators; c) to adjudicate on the constitutionality of the Standing Orders of Parliament, upon notification by the president of either Chamber, by a parliamentary group or a number of at least 50 Deputies or at least 25 Senators; d) to decide on objections as to the unconstitutionality of laws and ordinances, brought up before courts of law or commercial arbitration; the objection as to the unconstitutionality may also be brought up directly by the Advocate of the People; e) to solve legal disputes of a constitutional nature between public authorities, at the request of the President of Romania, one of the presidents of the two Chambers, the Prime Minister, or of the president of the Superior Council of Magistracy; f) to guard the observance of the procedure for the election of the President of Romania and to confirm the ballot returns; g) to ascertain the circumstances which justify the interim in the exercise of the office of President of Romania, and to report its findings to Parliament and the Government; h) to give advisory opinion on the proposal to suspend from office the President of Romania; l) to guard the observance of the procedure for the organization and holding of a referendum, and to confirm its returns; j) to check the compliance with the conditions for the exercise of the legislative initiative by citizens; k) to decide on the objections of unconstitutionality of a political party; l) to carry out also other duties stipulated by the organic law of the Court*".

2 Republished in the Official Gazette of Romania, Part I, no.80 of December 3, 2010, as subsequently amended and supplemented.

"a) it shall pronounce on the constitutionality of the laws, before their promulgation, when a case is submitted by the President of Romania, by one of the Presidents of the two Chambers of Parliament, by the Government, by the High Court of Cassation and Justice, by the Advocate of the People, by a number of at least fifty Deputies or of at least twenty-five Senators, as well as ex officio, on initiatives of revision of the Constitution;

b) it shall pronounce on the constitutionality of the treaties or other international agreements, before their ratification by the Parliament, when a case is submitted by one of the Presidents of the two Chambers, by a number of at least fifty Deputies or of at least twenty-five Senators;

c) it shall pronounce on the constitutionality of the Standing Orders of the Parliament, when a case is submitted by one of the Presidents of the two Chambers, by a parliamentary group or by a number of at least fifty Deputies or of at least twenty-five Senators;

d) it shall decide on the exceptions raised before courts of law or of commercial arbitration regarding the unconstitutionality of the laws and ordinances, as well as on those brought up directly by the Advocate of the People;

e) it shall resolve the legal disputes of a constitutional nature between public authorities, when a case is submitted by the President of Romania, by one of the Presidents of the two Chambers, by the Prime-Minister, or by the President of the Superior Council of the Magistracy;

f) it shall decide on the objections regarding the constitutionality of a political party."

It is noteworthy that the most of the powers, in the exercise of which the CCR renders its decisions, concerns the constitutional review of normative acts, which entails the *a priori* review (laws passed by Parliament, before their promulgation, respectively, in the case of laws revising the Constitution, before being subject to approval by referendum, as well as international treaties or agreements, before their ratification by Parliament) or the *a posteriori* review (international treaties and agreements after ratification - the law of ratification -, parliamentary Standing Orders, laws and ordinances in force). This difference is also duly reflected in the regulation of the specific effects

of the decisions of the CCR, as it will be explained in detail in this study. The Court also rules on the exercise of constitutional review of individual acts, such as decisions of Parliament (*e.g.*, appointment or removal from office), in resolving legal disputes of a constitutional nature and when ruling on the constitutionality of political parties.

As a result, the discussion regarding the implementation of CCR's decisions will be structured according to the above-mentioned types of constitutional review, highlighting the common and specific features, as it results from the constitutional and legal regulation, respectively from the relevant CCR case-law.

I. COMMON FEATURES TO ALL DECISIONS OF THE CCR

According to Article 147(4) of the Constitution, as revised in 2003, the decisions of the CCR are published in the Official Gazette of Romania, and from the date of publication, they are final and generally binding and effective only for the future[3].

It is important to underline that the current regulation of the effects of CCR decisions was established by the 2003 revision of the Constitution, when the possibility to invalidate CCR rulings on laws before their promulgation by a qualified two-thirds majority of members of Parliament[4] was abolished. Even if, in practice, such an invalidation never took place, the removal of such an option was an important step in strengthening the Constitutional Court as an institution of the rule of law.

The cited constitutional text leads to the following conclusions, valid for all CCR decisions, regardless of the power in the exercise of which they are ruled[5]:

3 In its case law, the Constitutional Court of Romania constantly held that *"The decision establishing the unconstitutionality is part of the normative legal order, as a result of which the unconstitutional provision ceases to apply for the future"* (*see*, for example, Decision no.392 of June 18, 2020, published in the Official Gazette of Romania, Part I, no.776 of August 25, 2020).

4 Thus, an unconstitutional law was considered to be constitutional by the will of a qualified conjunctural majority of deputies and senators, which, implicitly, led to a discrediting of the decisions of the Court.

5 *See* T. Toader, M. Safta, *Contencios constituțional* (Constitutional contentious), 2nd revised and updated edition, Hamangiu Publishing House, Bucharest, 2020, where this issue is discussed extensively.

A. All decisions of the Constitutional Court, regardless whether the Court dismisses or upholds the pleas, are generally binding

The Constitutional Court ruled in this regard that Article 147(4) of the Constitution, which enshrines the general binding nature of its decisions, "*does not distinguish either according to the types of decisions handed down by the Constitutional Court nor according to the content of those decisions, which leads to the conclusion that, in their entirety, they are generally binding*"[6]. Expounding these rulings, in a case the exception of unconstitutionality concerned the very general binding nature of the decisions of the Constitutional Court, interpreted by the authors of the exception of unconstitutionality as a restriction of free access to justice, the Court noted the following: "*a ruling of the Court on the unconstitutionality of a legal text determines erga omnes legal effects, a consequence deriving from the unique and independent character of the authority of constitutional jurisdiction. Otherwise, the decision of the Court - of rejection - is also generally binding and has power only for the future, pursuant to Article 147(4) of the Constitution, in the sense that the public authorities involved in the case in which the exception was raised, are bound to respect the decision, both the operative part and the considerations that substantiated it, but the legal effect of such a decision is limited to the procedural framework of the dispute in which the exception was raised, so it has an inter partes character. Therefore, the same legal text can be brought back for examination before the Constitutional Court, considering that new constitutional features and grounds can be revealed, which may justify, in the future, a different solution*"[7].

B. The reasoning of the CCR decisions supporting the solution set out in the operative part is also generally binding

In its settled case-law, the Court has ruled that the power of *res judicata* that accompanies jurisdictional acts, and therefore the CCR's decisions, is attached not only to the operative part, but also to the considerations on which it is based. Consequently - the Court noted - both the Parliament and the Government, as well as public authorities

6 Decision no. 2 of January 11, 2012, published in the Official Gazette of Romania, Part I, no.131 of February 23, 2012.

7 Decision no. 302 of March 27, 2012, published in the Official Gazette of Romania, Part I, no.361 of May 29, 2012.

and institutions must fully respect both the considerations and the operative part of the CCR's decisions[8]. This specific outcome of the acts of the Constitutional Court is a consequence of its role, which could not be fully realized without recognizing the binding character of the Court's interpretation of the texts and concepts of the Basic Law, of the meaning identified by it as representing the will of the constituent legislator. This procedure used by the Court is intended to bring to the attention of the public authorities involved in the legislative process the issue of the effectiveness of constitutional justice, in a context of obvious legislative instability, with profoundly negative effects on the values of the rule of law and legal certainty. As for the phrase "power of *res judicata*" referred to by the Constitutional Court, attaching it both to the considerations and to the operative part of its decisions, it represents the expression of the *erga omnes* binding nature of the interpretation given by the Court to the Constitution, based on the constitutional provisions of Article 1(3) and (5), Article 142(1) and Article 147(4). It is not, therefore, about an authority of *res judicata* as an institution of civil procedure with which the procedure before the Constitutional Court is completed, but the expression of the specific effect of the CCR decisions.

C. The decisions of the Constitutional Court are effective only for the future

Interpreting Article 147(4) of the Constitution, the CCR ruled that, in principle, the decision establishing the unconstitutionality is part of the normative legal order, as a result of which the unconstitutional provision ceases to apply for the future. However, the Court has ruled on the legal relations governed by the text deemed as unconstitutional, as follows:

8 For example, Decision no.196 of April 4, 2013, published in the Official Gazette of Romania, Part I, no.231 of April 22, 2013; Decision no.163 of March 12, 2013, published in the Official Gazette of Romania, Part I, no.190 of April 4, 2013; Decision no.102 of February 28, 2013, published in the Official Gazette of Romania, Part I, no.208 of April 12, 2013; Decision no.1.039 of December 5, 2012, published in the Official Gazette of Romania, Part I, no.61 of January 29, 2013; Decision no.536 of April 28, 2011, published in the Official Gazette of Romania, Part I, no.482 of July 7, 2011; Decision no.414 of April 14, 2010, published in the Official Gazette of Romania, Part I, no.291 of May 4, 2010; Decision no.415 of April 14, 2010, published in the Official Gazette of Romania, Part I, no.294 of May 5, 2010.

- the decision on the unconstitutionality shall apply to the legal relations arising after its publication in the Official Gazette - *facta futura* -, this being a clear application of the principle of non-retroactivity, which does not require further clarification;
- the decision on the unconstitutionality shall apply to pending legal situations;
- the decision on the unconstitutionality will not apply to situations that have become *facta praeterita* - these are cases resolved until the publication of the CCR decision and in which there is no referral to the CCR concerning the exception of a provision of a law or ordinance declared unconstitutional, cases which represent a *facta praeterita* since they were definitively and irrevocably resolved.

However, the Court also noted an important exception to the latter rule. According to the Court, a decision admitting the exception of unconstitutionality also applies in cases where the exception of unconstitutionality was invoked until the date of publication of the CCR's decision, other than the one in which the CCR's decision was pronounced, definitively resolved by ordinary courts, in which case the admission decision constitutes a reason for revision. The future application of CCR's decisions also concerns the cases in which the exception of unconstitutionality was raised, regardless if, until the publication of the CCR's decision declaring the unconstitutionality in the Official Gazette, they have been resolved definitively and irrevocably, since by exercising a revision (an extraordinary appeal), the CCR's decision will apply to these cases. The request for revision is to be resolved in accordance with the CCR's decision, which amends or removes for the future, as the case may be, all legal effects of the legal relationship governed by the unconstitutional text. According to the Court, the legislative solution enshrining the right of persons provided by law to exercise a revision does not conflict with the constitutional provisions on the *ex nunc* effects of the CCR's admission decision, since the revision may take place only after the publication of the Court's act in the Official Gazette of Romania.

With regard to the specific effects of decisions and duties incumbent on the legislative authority (whether the primary legislator

- the Parliament or the delegate – the Government), Article 147 of the Constitution distinguishes according to the nature of the power in the exercise of which the decision to establish unconstitutionality was ruled.

II. CHARACTERISTIC FEATURES OF THE CCR'S DECISIONS IN THE A PRIORI CONSTITUTIONAL REVIEW OF NORMATIVE ACTS

A. Constitutional review of laws before their promulgation

This power is provided by Article 146 (a) first sentence of the Constitution, which refers to the constitutional review of organic and ordinary laws before their promulgation by the President of Romania. Even if the constitutional text does not explicitly state the types of laws to which it refers, it is obvious that it does not consider the category of constitutional laws, as they are not subject to promulgation, but to approval by referendum and have a distinct regime in terms of constitutional review.

In exercising this power, the CCR may rule on the following solutions[9]:

a. uphold the notification of unconstitutionality and state on the unconstitutionality of the law as a whole (in which case it makes a distinction between a law resulting from a legislative initiative under Article 74 of the Constitution or a law approving a Government ordinance; in the latter case, there is a difference if the unconstitutionality concerns only the law of approval or the Government ordinance);

b. uphold the notification of unconstitutionality and state on the unconstitutionality of some provisions of the challenged law;

c. dismiss the notification of unconstitutionality either as inadmissible or as unfounded, in the latter case finding that the law/provisions of the law is/are constitutional in relation to the expressed exception.

9 *See*, extensively, M. Safta, *Reexaminarea legii de către Parlament. Caracterizare și dezvoltări jurisprudențiale* (Parliament's re-examination of laws. Characterization and jurisprudential developments), Universul Juridic Journal, 2020.

The last of the hypotheses is straight forward, as it is obvious that, if a law is deemed as constitutional, it will follow its course, in the sense that it will be promulgated by the President of Romania, published in the Official Gazette of Romania and enter into force.

For the purpose of the present study, there is a particular interest in the first two hypotheses mentioned and the distinctions regarding them in the CCR case-law, in the interpretation and application of Article 147(2) of the Constitution, according to which *"In cases of unconstitutionality of laws, before the promulgation thereof, the Parliament is bound to reconsider those provisions, in order to bring them into line with the decision of the Constitutional Court."*

We note that, in case of laws adopted as a result of legislative initiatives based only on Article 74 of the Constitution (which do not concern the approval/rejection of Government ordinances), the Court distinguished as the solution to uphold the notification of unconstitutionality concerns the law as a whole or only some provisions of it.

Thus, in principle, if the CCR rules on the unconstitutionality of a law as a whole, and not only of some provisions of it, "*the ruling of such a decision has a definitive effect on that normative act, the consequence being the termination of the legislative process of that regulation*". In that regard, the CCR held that "*the review, that is to say, the reconciliation of the decision, applies only where the Court has ruled on the unconstitutionality of some of its provisions, and not where the unconstitutionality concerns the law as a whole, which would otherwise breach Article 147(2) of the Constitution*"[10]. For the latter case, the Court noted that "*the Legislator's option to enact in the matter in which the Constitutional Court has uphold a complaint of unconstitutionality on a law as a whole involves the completion of all phases of the legislative process provided by the Constitution and the Standing Orders of the two Chambers of Parliament*"[11]. The Parliament has the duty

10 Decision no. 619 of October 11, 2016, published in the Official Gazette of Romania, Part I, no. 6 of January 4, 2017, par. 50, with reference to Decision no.308/2012, published in the Official Gazette of Romania, Part I, no. 309 of May 9, 2012 and Decision no. 581/2016, published in the Official Gazette of Romania, Part I, no. 737 of September 22, 2016, pars. 45-48.

11 See, to that extent, Decision no. 308 of March 28, 2012, published in the Official Gazette of Romania, Part I, no. 309 of May 9, 2012, Decision no. 1 of January 10, 2014, published in the Official Gazette of Romania, Part I, no. 123 of February 19, 2014, Decision no. 619 of October 11, 2016, cited above, par. 50 or Decision no. 432 of June 21, 2018, published in the Official Gazette of Romania, Part I, no. 575 of July 6, 2018, par. 35.

to ascertain the rightful termination of the legislative process, as a result of the unconstitutionality of the law, in its entirety, and, in case of initiating a new legislative approach on the same field of regulation, to comply with the CCR's decision[12].

In case of the laws approving Government ordinances (the specific hypothesis of the legislative initiative based on the corroborated application of Article 74(3) and Article 115 of the Constitution), in the CCR's case-law it was held that this situation has a double perspective. The first one concerns the unconstitutional flaw regarding the adoption of the emergency ordinance itself or its normative content, as the case may be. This means that the exception of extrinsic unconstitutionality are reported, in principle, to Article 1(4) in conjunction with Article 61(1) or Article 115(4)-(6) of the Constitution, while those of intrinsic unconstitutionality belong, exclusively, to the normative content of the emergency ordinance; in this case, the unconstitutionality of the emergency ordinance or of some of its provisions always determines the unconstitutionality of the law approving it, in whole or in part, as the case may be. The second perspective concerns the unconstitutional flaw regarding the adoption of the law approving the emergency ordinance or the normative content of this law, as the case may be. This means that the exception of extrinsic unconstitutionality are reported, in principle, to Articles 61, 67, 75 or 76 of the Constitution regarding the principle of bicameralism, the quorum of attendance, the required majority of votes, the qualification of the law as ordinary or organic, the order of notification of the two Chambers of Parliament, while those of intrinsic unconstitutionality rely, exclusively, of the very own normative content of the law approving the emergency ordinance; in this case, the unconstitutionality of the law approving the emergency ordinance does not determine the unconstitutionality of the emergency ordinance itself.

We must emphasise that the Basic Law does not state any deadlines for Parliament to eliminate the flaws of unconstitutionality deemed

12 *See*, to that extent, Decision no. 76 of January 30, 2019, published in the Official Gazette of Romania, Part I, no. 217 of March 20, 2019, par. 42, Decision no. 139/2019, published in the Official Gazette of Romania, Part I, no. 336 of May 3, 2019, par. 88, Decision no. 140 of March 13, 2019, published in the Official Gazette of Romania, Part I, no. 377 of May 14, 2019, par. 86 or Decision no. 141 of March 13, 2019, published in the Official Gazette of Romania, Part I, no. 389 of May 17, 2019, par. 96.

as such by the CCR, as it cannot be forced to legislate. Also, in the procedure of reconciling a law/norm deemed as unconstitutional by a CCR decision, in principle, the Parliament is free to decide whether to amend that law/norm within the meaning of those ruled by the Court or whether to abandon the intervention on the text in question by eliminating the norm or even by rejecting the law.

However, such an "abandonment" cannot be accepted in the situation where the duty to legislate arises as a result of a decision finding the unconstitutionality of a law in force, *i.e.*, ruled within the *a posteriori* constitutional review, when the duty to enforce the law in accordance with the Constitution relies on an express norm of the Fundamental Law[13]. In such a case, once the procedure for amending the law has been initiated in order to bring it into line with the Constitution, the Parliament has to adopt the rules transposing the judicial act of the Court, eliminating the flaws of unconstitutionality. This duty springs directly from the constitutional text of Article 147 that imposes on Parliament an active role in the process of constitutionalizing legal norms, in accordance with the CCR's decisions. To allow a different solution which would enable the Legislator to withdraw from the legislative procedure for such a purpose would be tantamount to maintaining the legislative solution deemed as unconstitutional by means of *a posteriori* constitutional review and, implicitly, to the lack of legal effects of the CCR's decision underlying the initiative amending legislation. Such conduct of the Parliament would annul the very purpose of the legislation, that of bringing in line the legislation with the CCR's decisions, thus violating the constitutional duty enshrined in Article 147(2) of the Basic Law. Or, in accordance with the role of the Constitutional Court and the valences of the constitutional review, the process of reviewing the law necessarily involves a fair conduct by Parliament and an applied and responsible analysis of all texts deemed as unconstitutional, by reference to the reasons for the decision.

B. Constitutional review of the laws amending the Constitution

Regarding the revision of the Constitution, the CCR adjudicates, *ex officio*, by means of a decision, both on the initiatives to revise the

13 Decision no.467 of July 29, 2019, published in the Official Gazette of Romania, Part I, no.765 of September 20, 2019.

Constitution (Article 146 (a) second sentence of the Fundamental Law), and on the law on the revision of the Constitution after its passing by Parliament (Article 23 of Law no. 47/1992).

The constitutional review of the initiatives to revise the Constitution was provided by the Constitution in its original form, since 1991. As for the constitutional review of the law on the revision of the Constitution, it was introduced in 2003, after the revision of the Constitution, provided that according to Article146(l) of the revised Constitution, new powers for CCR can be introduced by the organic law of this Court. By Law no.47/1992, in accordance with Article 146(l) of the Constitution, an *a priori* constitutional review was established *ex officio* regarding the revision law, before submitting it for approval by referendum. Also, Article 23(2) of the same normative act stipulates that "*The decision which ascertains that constitutional provisions concerning revision have not been complied with shall be sent to the Chamber of Deputies and to the Senate in order to re-examine the law for the revision of the Constitution and bring it into accord with the decision of the Constitutional Court.*"

Considering the rigid character of the Romanian Constitution, as well as the fact that it establishes certain intangible values, structured by provisions that it declared impossible to amend, the constitutional review regarding both the revision initiative and the constitutional laws, on the one hand, concerns the degree and extent to which the law complies with the revision procedure established by the Basic Law itself (extrinsic constitutionality), and, on the other hand, ensures compliance with the substantive limits established in the matter of revising the Constitution (intrinsic constitutionality).

C. Constitutional review of international treaties before their ratification

In case of ruling on the unconstitutionality of an international treaty or agreement based on Article 146(b) of the Constitution (in *a priori* review), it cannot be ratified.

As this power of the CCR, first introduced by the revision of the Constitution, is the only one that has never been exercised, there is no case-law in which to apply the specific effects of CCR's decisions.

III.CHARACTERISTIC FEATURES OF THE CCR'S DECISIONS IN *A POSTERIORI* CONSTITUTIONAL REVIEW OF NORMATIVE AND INDIVIDUAL ACTS

A. Constitutional review of Parliament's Standing Orders, of laws and ordinances in force

Although subject to distinct powers, set by Article146(c) and (d) of the Constitution, the constitutional review of Parliament's Standing Orders, of laws and ordinances in force enjoys the same treatment from the point of view of the legal effects of the decisions ruled by the CCR. Thus, according to Article 147(1) of the Constitution, the legal effects of the provisions of the laws and ordinances in force, as well as those of the Standing Orders, deemed as unconstitutional, are permanently terminated 45 days after the publication of the decision of the Constitutional Court if, in this time frame, the Parliament or the Government, as the case may be, do not agree the unconstitutional provisions with the provisions of the Constitution. During this time, the provisions deemed as unconstitutional are suspended. For the particular case of the constitutional review of a law ratifying the treaties by way of exception of unconstitutionality, *i.e. a posteriori* review (pursuant to Article 146(d) of the Constitution), Law no.590/2003 on treaties establishes[14] that, if, in exercising its powers, the CCR deems the provisions of a treaty in force for Romania are unconstitutional, the Ministry of Foreign Affairs, together with the ministry or the institution in whose area of competence lies the main field regulated by the treaty will take initiative, within 30 days, for taking the necessary steps in order to either renegotiate the treaty or terminate its validity for the Romanian side or, as the case may be, in order to revise the Constitution.

As regards the CCR's decisions on the provisions of Parliament's Standing Orders, the law provides that the Chamber whose orders have been debated shall, in the event of a finding of unconstitutionality of certain provisions of the Standing Orders, within 45 days, re-examine these provisions in order to put them in line with the provisions of the Constitution. Since decisions ruled on parliamentary Standing

14 Article 40 (4), second thesis.

Orders do not raise special problems in practice, we will continue to refer to the decisions ruled within the constitutional review of laws and ordinances in force, a power which has the most important weight in the activity of the Constitutional Court[15].

Thus, according to Article 146(d) of the Constitution and Article 29 of Law no.47/1992, the Court adjudicates on the exceptions raised before ordinary courts or commercial arbitration ones regarding the unconstitutionality of a law or an ordinance or of a provision of a law or an ordinance in force, which is related to the settlement of the case, at any stage of the dispute and whatever is its object. The courts before which exceptions of unconstitutionality are raised have the duty to notify the Constitutional Court, after verifying the conditions of admissibility provided by law. Also, the exception of unconstitutionality can be raised directly via the People's Advocate.

In exercising this power, the CCR may rule on the following solutions:

a. uphold the exception of unconstitutionality and deem the challenged provisions as unconstitutional;

b. dismiss the exception of unconstitutionality as unfounded in relation to the formulated objection;

c. dismiss the exception of unconstitutionality as inadmissible.

Regarding the decisions where the Court found the unconstitutionality of a law, ordinance or provision of a law or

15 From its establishment in 1993 and until June 30, 2021, the Constitutional Court of Romania had to adjudicate on 51.452 complaints, of which: 574 complaints within the constitutional review of laws before promulgation; 11 adjudications related to initiatives to revise the Constitution; 56 notifications within the constitutional review of Parliament's Standing Orders; 50.143 exceptions of unconstitutionality, of which 107 were raised directly by the People's Advocate; 53 requests solve legal disputes of a constitutional nature between public authorities; 506 appeals concerning the procedure for the election of the President of Romania; 2 requests for the ascertainment of the existence of the circumstances that justify the interim in the exercise of the position of President of Romania; 3 proposals for suspension from office of the President of Romania; 29 notifications regarding the observance of the procedure for organizing and conducting the referendum; 8 notifications regarding the review of the fulfilment of the conditions for the exercise of the legislative initiative by citizens; 1 notification regarding the constitutionality of a political party; 69 notifications regarding the constitutional review of the Parliament's decisions. At the same time, out of a total of 21.511 decisions, rulings and advisory opinions, 502 decisions were adjudicated within the *a priori* constitutional review, while 20.427 decisions were adjudicated within the *a posteriori* constitutional review. URL: https://www.ccr.ro/wp-content/uploads/2021/06/ActivitateRo_iun.pdf (visited on 26 July 2021).

ordinance in force, the CCR ruled that they are part of the normative legal order, while by their effect the unconstitutional provision cease its application for the future[16]. The decisions are communicated to the two Chambers of the Parliament and to the Government, as well as - for information purposes - to the public authorities involved.

The penalty for non-compliance within the term of 45 days, respectively the duty provided by the constitutional norm of reference to reconcile the provisions deemed as unconstitutional with the CCR's decision is that, at its end, the text deemed as unconstitutional ceases its legal effects, the effect of the Court's decision being, from this point of view, similar to a repeal. We consider that this is the most energetic intervention of the constituent Legislator in order to give effect to the Court's decisions. Thus, the legal provisions deemed as unconstitutional in *a posteriori* review can no longer be applied by any court and by any other public authority from the date of publication of the CCR's decision in the Official Gazette of Romania, Part I, and the Constitutional Court can no longer be notified, with the same exception of unconstitutionality already deemed as such[17].

As for the decisions establishing the constitutionality of a legal norm, they allow the CCR to reconsider its case-law and to establish the unconstitutionality of the legal text in question. These decisions allow legal subjects, in other cases, to re-challenge the constitutionality of legal texts that were previously deemed as constitutional. Thus, their right to appeal to the CCR is not blocked, and the latter has, in this way, a flexible mechanism for exercising constitutional review. However, in the same litigation, the parties will not be able to raise again the same exception of unconstitutionality and with the same motivation, but they must motivate it by appealing to other constitutional texts than those used in their initial objection. Otherwise, the authority of

16 Decision no.392 of June 18, 2020, published in the Official Gazette of Romania, Part I, no.776 of August 25, 2020, par. 23.

17 Moreover, Article 29 (3) of Law no.47/1992 demands that *"the provisions deemed as unconstitutional by a previous decision of the Constitutional Court cannot be the object of the exception"*. This text is a legislative application of the constitutional provisions regarding the effects of the decisions of the Constitutional Court. In these circumstances, considering that the observance of the case-law of the Constitutional Court is one of the values that characterize the rule of law, the repeated entreaty of the exception of unconstitutionality of certain norms already deemed as unconstitutional and, implicitly, removed from application would violate the general binding nature of the decisions of the Constitutional Court.

the *res judicata* enjoyed by the CCR's decisions would be overturned. Such a limitation no longer applies when an identical exception of unconstitutionality is raised with the same reasoning in another procedural framework, as the same exception of unconstitutionality may lead to the admission of the complaint of unconstitutionality if the factual and legal circumstances of the case prove the existence of some novelty elements compared to the initial situation, when the Court deemed the respective legal provisions as constitutional.

As regards decisions by which the exceptions of unconstitutionality are dismissed as inadmissible, they appear in the situation when the constitutional and legal framework for notifying the CCR is not respected or the reasons invoked do not fall within the competence of the CCR. In this sense, a true "doctrine" of the causes of inadmissibility in the constitutional review has been developed, based on the case law of the CCR[18].

B. *A posteriori* constitutional review on individual acts of Parliament

The constitutional review of the decisions of the Parliament, other than the Standing Orders and by this including individual decisions of Parliament, was introduced in 2010 by the organic law of the Court, pursuant to Article 146(l) of the revised Constitution.

A time of shaping the CCR's case-law followed in the exercise of the new task, which triggered numerous debates, especially regarding Parliament's decisions of appointment in certain offices, with the arrival of the risk that in this way the CCR might replace the Parliament in carrying out such of appointments.

In a first stage, the CCR established the conditions of admissibility of such a referral[19], mentioning conditions that are not explicitly provided by law[20], but which represent the result of the interpretation of the

18 *See* T. Toader, M. Safta, *Ghid de inadmisibilitate la Curtea Constituțională a României* (Guide of inadmissibility at the Constitutional Court of Romania), 2nd edition, Hamangiu Publishing House, Bucharest, 2021.

19 *See*, for example, Decision no.563 of September 18, 2018, published in the Official Gazette of Romania, Part I, no.887 of October 22, 2018.

20 Here, we have in mind the object of constitutional review, which must be a decision of the plenum of one of the two Chambers of Parliament or of the plenum of the two reunited Chambers, as well as the holders of the right to refer to the Court: one of the Presidents of the two Chambers, a parliamentary group, a number of at least 50 deputies or at least 25 senators.

legal texts, given by the Court in its case-law. In this respect, one such condition for parliamentary decisions is the constitutional relevance of the subject matter of those decisions. The Court found that only decisions of Parliament passed after the conferral of the new power, decisions affecting constitutional values, rules and principles or, as the case may be, the organization and functioning of constitutional authorities and institutions, may be subjected to constitutional review. Law no.47/1992 does not establish any distinction between the decisions that may be subjected to the review of the CCR in terms of the field in which they were adopted or of the normative or individual character, which means that all these decisions are likely to be subjected to constitutional review, by virtue of the general principle of law according to which *ubi lex non distinguit nec nos distinguere debemus*. Consequently, complaints of unconstitutionality concerning such decisions are *de plano* admissible. Moreover, the scrutiny of individual acts of Parliament is both a matter of the rule of law and a matter of human rights.

The Court also noted[21], with regard to decisions on the organization and functioning of constitutional authorities and institutions, that the reference norm, within the constitutional review, can be both a constitutional and an infra-constitutional provision, taking into account the provisions of Article 1(5) of the Constitution, which enshrines the principle of legality. Such an orientation of the Court is given by the area of maximum importance in which these decisions intervene - constitutional authorities and institutions -, so that the constitutional protection offered to the fundamental authorities or institutions of the State must be appropriated. Therefore, the decisions of the plenum of the Chamber of Deputies, the plenum of the Senate and the plenum of the two reunited Chambers of Parliament concerning the organization and functioning of constitutional authorities and institutions may be subjected to constitutional review, even if the alleged violated normative act has infra-constitutional value.

The effects of the conclusion that such decision is unconstitutional is also *erga omnes* and the CCR's ruling is to be respected and implemented by the public authorities involved in both the adoption of the decision

21 Decision no.847 of November 18, 2020, published in the Official Gazette of Romania, Part I, no.1.302 of December 29, 2020, par.22.

and those addressed to by the unconstitutionality decision. Moreover, the CCR's scrutiny can regard only the constitutionality of Parliament's decisions, and not the content of any political agreements which led to their adoption[22]. Recently[23], the Court issued a decision in this regard in which it expressed itself in a very active manner with regard to the enforcement of its decisions. Thus, in the context of the analysis of a decision of the Romanian Parliament regarding the dismissal of the People's Advocate, a decision deemed as unconstitutional by an unanimous vote, the Court expressly stated in the recitals that, since the dismissal act, which is the cause of the termination of office for the People's Advocate, ceases to produce legal effects and, pursuant to Article 147(4) of the Constitution, which enshrines the general binding nature and future effects of the decisions of the Constitutional Court from the date of publication of the decision in the Official Gazette of Romania, the office of the People's Advocate is resumed by the person in question, who will continue to exercise the constitutional mandate for which she/he was appointed.

IV. CHARACTERISTIC FEATURES ON CCR'S DECISIONS ON CONFLICTS OF A CONSTITUTIONAL NATURE

Just like any other CCR's decision, the ones by which the CCR solves legal disputes of a constitutional nature between public authorities are generally binding from the date of publication in the Official Gazette of Romania and effective only for the future.

As for the characteristic features of the mentioned decisions, they must be examined from the perspective of the role this CCR's power has, of the reason for which it was established[24]. Therefore, in the exercise of the power provided by Article 146(e) of the Constitution, the Court applies a two stages procedure: the analysis of the existence of the legal dispute of a constitutional nature; and in case of a positive answer, the indication of the conduct to be followed by the public authorities in dispute. Regardless of the authority that generated the legal dispute of a constitutional nature, it has the duty, under the

22 Decision no.128 of March 8, 2014, published in the Official Gazette of Romania, Part I, no.292 of April 22, 2014.

23 Decision no.455 of June 29, 2021, published in the Official Gazette of Romania, Part I, no.666 of July 6, 2021.

24 *See*, widely, M. Safta, URL: https://www.juridice.ro/677890/nota-de-jurisprudenta-a-curtii-constitutionale-2-martie-2020-27-martie-2020-conflictele-juridice-de-natura-constitutionala.html.

rule of law, to respect and comply with the CCR's decision[25]. In other words, "*solving legal disputes of a constitutional nature is not an academic, purely theoretic exercise, but means understanding the constitutional rules that public authorities must obey/apply; and establishing the concrete conduct of the parties to the dispute. If this had not been the reason for the regulation, there would have been no need for a procedure involving the presence of the parties, contradictory debates, the mere expression of the Court on the interpretation of the constitutional texts on which the dispute relates being satisfactory.*"[26]

V. CHARACTERISTIC FEATURES OF CCR'S DECISIONS ON CONSTITUTIONAL REVIEW OF POLITICAL PARTIES

The constitutional provisions regarding the constitutional review of political parties are developed in Articles 39 and 40 of Law no.47/1992. The request may be lodged by the President of one of the Chambers of Parliament or by the Government. The President of the Chamber may file a request only on the basis of a decision passed by the Chamber, by a majority of its members. The Court shall rule by a final and generally binding decision. The decision to uphold the referral is sent to the Bucharest Tribunal in order to remove the unconstitutional political party from the Register of Political Parties.

Since in the history of the CCR there has been only one request on this object, which was rejected as inadmissible[27] because it was lodged by a person who did not have the procedural quality required by law, there is no case-law on this issue.

CONCLUSIONS

In conclusion, we find that the effects of CCR's decisions are expressly regulated by the Constitution, which includes a separate article in this regard (Article 147), and their specific consequences, depending on responsibilities, are also detailed by law or Parliamentary Standing

25 *See* Decision no.85 of February 24, 2020, published in the Official Gazette of Romania, Part I, no.195 of March 11, 2020.

26 *See* T. Toader , M. Safta – *Dezlegările date conflictelor juridice de natură constituțională* (Resolutions given to legal conflicts of a constitutional nature); URL: https://www.juridice.ro/essentials/2169/dezlegarile-date-conflictelor-juridice-de-natura-constitutionala.

27 Decision no.272 of May 7, 2014, published in the Official Gazette of Romania, Part I, no.451 of June 20, 2014.

Orders (if we consider, for example, the revision of the law following the decision of the Constitutional Court).

The Romanian legislation does not provide specific penalties for the non-implementation of the CCR's decisions, and the CCR cannot substitute the Parliament or the Government to legislate, in the sense of amending or supplementing the norm subjected to constitutional review. This is because, in all cases in which it rules on the normative acts subject of the notifications addressed to it, the review of the Court is exclusively constitutional in nature. Law no.47/1992 establishing in this sense that the provisions of the acts subjected to the review of the Court are unconstitutional if they violate the provisions or principles of the Constitution. The Court cannot amend or supplement the challenged legal texts, therefore it cannot substitute the Legislator, it cannot interpret and apply these texts to specific cases, and, therefore, it cannot be a substitute for the courts or the High Court of Cassation and Justice which, according to Article 126(3) of the Constitution, "*provides a unitary interpretation and implementation of the law by the other courts of law, according to its competence*", it cannot proceed to compare the legal norms with each other and to report the conclusion that would result from this comparison of constitutional texts and principles.

Usually, the authorities respect the decisions of the CCR even though, at times, they strongly disapprove them.

For example, in the context of Covid-19 pandemic, in 2020, the CCR ruled on some exceptions of unconstitutionality raised directly by the People's Advocate, upholding the pleas and examining the constitutionality of controversial legislative measures imposed in the frame of the pandemic, which had a very special socio-political impact. For instance, because some of the measures concerned the restriction on the exercise of certain rights or freedoms of the citizens were established by emergency ordinances, the CCR found these acts of the Government unconstitutional. According to the Article 53 of the Constitution, such restrictions can be ordered only by law and not by emergency Government ordinance and certainly not by decision of the Minister of Health.

Sometimes, it takes a more extended period of time to amend/ pass new legislation in accordance with the decisions of the Court.

Therefore, in order to avoid creating a legislative "vacuum", with negative consequences on legal certainty, the CCR resorts sometimes to the mechanism of interpretative decisions[28], *i.e.*, by which the text of the law is preserved in so far as one refers to that interpretation in agreement with the Constitution.

There are still cases where, in a new normative act, the Legislator resumes a legislative solution deemed as unconstitutional, although Article 147 of the Constitution implicitly prohibits it. The CCR sanctioned this behaviour when it was notified, upholding the unconstitutionality of the new normative act thus passed, with reference to Article 147 of the Constitution, which enshrines the effects of its decisions. Thus, the Court ruled[29] that the implementation by the Legislator of rules contrary to those enshrined in a CCR's decision, which tends to preserve the legislative solutions affected by unconstitutionality, violates the Basic Law. Or, in a State governed by the rule of law, as proclaimed in Article 1(3) of the Constitution, the public authorities do not enjoy any autonomy in relation to the law, as the Constitution establishes in Article 16(2) that no one is above the law, and in Article 1(5) that the observance of the Constitution, of its supremacy and of the laws is mandatory. By infringing the *erga omnes* effects of the decision upholding the unconstitutionality, the Legislator acts in a manner contrary to the loyal constitutional conduct that he must prove to the CCR and to its case-law. As compliance with the case-law of the CCR is one of the values that characterizes the rule of law, the constitutional duties arising from the case-law of the CCR are limited to the future legislative activity; or, by adopting a legislative solution similar to the one found to be contrary to the provisions of the Constitution, the Legislator acts *ultra vires*, violating his constitutional duty resulting from Article 147(4).

In practice, the prompt reaction of the primary or delegated Legislator in the sense of amending the law (respectively of the act declared unconstitutional) and of agreeing with the Basic Law,

28 On the interpretative decisions in the CCR case law, *see*, extensively T. Toader, M. Safta, *Contencios constituțional* (Constitutional contentious), 2nd revised and updated edition, Hamangiu Publishing House, 2020, pp.387-414.

29 Decision no.581 of July 20, 2016, published in the Official Gazette of Romania, Part I, no.737 of September 22, 2016.

according to the CCR's decision, is related to the loyal constitutional behaviour of these authorities. The CCR established that it is mainly the responsibility of the public authorities to apply this principle in relation to the values and principles of the Constitution, including in relation to Article 147(4) of the Constitution regarding the general binding nature of CCR's decisions[30]. The Court emphasized the importance, for the proper functioning of the rule of law, of the partnership between the State powers, which should be displayed in the spirit of norms of constitutional loyalty, the loyal behaviour being an extension of the principle of separation and balance of powers provided by Article 1(4) of the Constitution and guaranteed by Article 1(5), all the more so when fundamental principles of democracy are under discussion.

We believe that the implementation of the acts of the constitutional courts is the key to the effectiveness of the constitutional review, and therefore, this area must be analysed and followed closely. In this framework, constitutional dialogue and the experience of constitutional courts around the world can be an important source of inspiration for strengthening constitutional justice worldwide.

30 Decision no.795 of December 16, 2016, published in the Official Gazette of Romania, Part I, no.122 of February 14, 2017.

CURRENT ISSUES OF REALISATION OF JUDGEMENTS OF THE CONSTITUTIONAL COURT OF THE RUSSIAN FEDERATION IN COURT PRACTICE

Olga Egorshina
Pavel Ulturgashev

CONSTITUTIONAL COURT OF THE RUSSIAN FEDERATION

CURRENT ISSUES OF REALISATION OF JUDGEMENTS OF THE CONSTITUTIONAL COURT OF THE RUSSIAN FEDERATION IN COURT PRACTICE

*Olga Egorshina**
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INTRODUCTION

The Constitutional Court of the Russian Federation (hereinafter: "Constitutional Court", "CCRF") is the highest judicial body of constitutional supervision in the Russian Federation. It exercises judicial powers by way of administering constitutional justice with the aim to protect the basis of the constitutional system, fundamental human and civil rights and freedoms, ensuring supremacy and direct effect of the Constitution of the Russian Federation on the entire territory of the Russian Federation.

Unlike some other constitutional courts – Members to the Asian Association of Constitutional Courts and Equivalent Institutions, the Russian constitutional judicial proceedings do not foresee the so called full constitutional complaint. Applicants (natural and legal persons) generally lodge a constitutional complaint only when they have exhausted all available judicial legal remedies. The subject of complaint is concerned with legislative provisions applied in the applicants' concrete case. The Constitutional Court, under the relevant Federal Constitutional Law, normally refrains from establishing factual circumstances, concentrating on the issues of law. Therefore, its rulings are primarily aimed to resolve an existing systemic legal problem that manifests itself in the applicants' concrete case.

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The legal properties of the rulings of the Constitutional Court are defined by the Constitution of the Russian Federation and the Federal Constitutional Law of 21 July 1994 No. 1-FKZ "On the Constitutional Court of the Russian Federation" (hereinafter: "the FCL"). In particular, according to the said Federal Constitutional Law the rulings of the Constitutional Court shall be generally binding and final. They are also directly applicable and require no additional acknowledgement by any authorities or persons. They cannot be overcome by repeated adoption of unconstitutional act.

Such special legal properties of the rulings oblige courts and other authorities that apply the law to closely follow the instructions reflected in the rulings of the Constitutional Court (this includes instructions establishing interim regulations pending adoption of the necessary legislation aimed to execute judgements of the Constitutional Court, special order of execution of its judgements or special conditions of review of the applicants' cases) and to duly take into account the legal positions expressed therein.

Moreover, the Constitutional Court is not empowered to directly ensure the execution of its rulings. This is the obligation of the public authorities to which the rulings are addressed. The Secretariat of the Constitutional Court contributes to this as well since its work results in providing information and analytical support to state authorities involved in law-making and law application. The Secretariat prepares annual information and analytical reports on the execution of rulings of the Constitutional Court, which are approved during meetings of Justices and are later published in the official website of the Court. These reports reflect main aspects of the work on execution of rulings; identify difficulties encountered in this sphere; inform the authorities in charge of organisation of the execution process and of the execution itself about the suggestions on rectification of the situation.

Procedural rules of review of final judicial acts are established by procedural codes on the relevant types of judicial proceedings. These rules are based *inter alia* on the regulations established by the Federal Constitutional Law "On the Constitutional Court of the Russian Federation", which were substantially expanded in 2020. For example, Article 79 of the FCL as regards legal force of rulings of the

Constitutional Court was expanded to clarify the rules for reviewing judicial acts on the basis of the judgements of the CCRF. These rules are applicable to the judgements of the Constitutional Court adopted after 9 November 2020 (the date that the relevant amendments came into force). Yet, since little time has passed from these additions, it would be premature to comment presently on the formed practice of application of the relevant provisions.

With regard to forming and rectifying courts' practice, the work on ensuring systemic implementation of the legal positions of the CCRF developed in its rulings acquires special importance. On this basis the present paper concentrates on the several aspects of the issue of realisation of judgements of the Constitutional Court in the sphere of application of law (courts' practice). The paper was prepared on the basis of information available as of 1 September 2021.

I. EXECUTION OF JUDGEMENTS OF THE CONSTITUTIONAL COURT RECOGNISING NORMS UNCONSTITUTIONAL

The general grounds for review of a final judicial act in the case of an applicant before the Constitutional Court lead to the recognition of the norm on which the relevant judicial act has been based as not being in conformity with the Constitution of the Russian Federation. This is a relatively simple manner of execution of a judgement. Potential issues may arise in connection with the exclusion of the unconstitutional norm from the legal system, that results in legal lacuna in place of relevant rule.

In order to eliminate problems that can arise in connection to the consideration of cases pending the necessary legislative amendments, the Constitutional Court is empowered to establish the order of its judgement coming into force, as well as the modalities, time-frame and peculiarities of its execution.

These can *inter alia* be formulated as an interim rule to be executed by authorities that apply the law (see example below, item 4). One of the other many options is the possibility for the Constitutional Court to establish a compensatory mechanisms for the courts to be apply to the applicants case (when it does not appear possible to restore the applicants' damages, e.g. when it would not be viable to recalculate

payments for heating for several years since it would lead to increase such payments for other dwellers of an apartment building – see *Judgement of 27 April 2021 No. 16-П*); or the indication that the applicants' case shall be reviewed after adoption of new normative regulation in order to execute a judgement of the Constitutional Court (where such postponement was foreseen with regard to compensation for animal killing performed to eliminate the threat of spreading serious disease where the epidemic centre appeared because of carelessness of the animal farm company - see *Judgement of 8 July 2021 No. 33-П*).

In 2020, the Constitutional Court adopted 18 Judgements foreseeing special order for their execution and/or special requirements for the concerned authorities. In 2021, 15 similar judgements have been rendered by now (Editor's note: September 2021). The relevant special order is often addressed not only to courts, but to other bodies and officials applying the law, that are competent to deal with the corresponding issues.

II. EXECUTION OF JUDGEMENTS OF THE CONSTITUTIONAL COURT RECOGNISING CHALLENGED NORMS TO BE IN CONFORMITY WITH THE CONSTITUTION OF THE RUSSIAN FEDERATION WITHIN DISCOVERED CONSTITUTIONAL LEGAL MEANING

The Constitutional Court frequently encounters situations when resolving the constitutional legal issue does not require the elimination of a legislative shortcoming (*lacunae*, contradictions etc.), but rather the correction of the practice of application of the law that has led to violation of constitutional rights.

In such situations, the Constitutional Court rectifies the identified defect in law-application by way of revealing the true constitutional legal meaning of the challenged provisions (or, rarely, by disqualifying the challenged provision). The constitutional interpretation is essentially an optimal way to resolve a constitutional dispute, allowing the Constitutional Court to use potential of the constitutionally provided possibilities to a maximum extent. In this situation, the Constitutional Court refrains from full disqualification of a norm, and at the same time (where needed) formulates relevant suggestions to the legislator as regards further avenues of improving current regulation, bringing it

to conformity with the constitutional requirements and legal positions of the Court. Besides, the trial courts considering cases after the Constitutional Court's judgement are obliged to apply the challenged provisions on strict conformity with the revealed constitutional legal meaning. It should be noted that such finding in a CC RF judgement does not always mean that the identified defect was connected to judicial or other law enforcement practices.

An example of such finding would be the *Judgement of 12 May 2021 No. 17-П* on the verification of constitutionality of a number of provisions of the Code on Administrative Offences of the Russian Federation. The Constitutional Court noted that the law application practice of the authorities was wrong, and that the challenged legal provisions itself does not deserve any serious criticism.

In practice it was possible to bring to liability an official of an organisation – tax agent for submission of tax documents out of time; despite quashing decisions bringing to liability the organisation – tax payer (represented by the same tax agent) without additional justification. Moreover, the necessary tax documents with all required information, albeit submitted with a certain formal mistake, could be in fact presented to the tax authority, and the formal mistake was later rectified. If in such situation a tax authority would prepare the protocol on administrative offence, this would amount to asserting its decision previously quashed by court in the case with the participation of the same organisation. This was contrary to the true meaning of constitutional regulations as regards the principles of the rule of law, division of branches of powers, obligatory nature and finality of judicial acts.

As the result of its consideration in this case, the Constitutional Court concluded that the challenged norm in itself does not contradict the Constitution of the Russian Federation, since when it established grounds of administrative liability for foreseen actions such as failure of timely submission of relevant documents defined by the tax legislation, or the refusal to submit to the tax authorities the properly prepared documents and/or other information necessary to perform tax supervision, or the submission of such documents (information) in incomplete or in distorted form, this norm provides, in accordance

with its constitutional legal meaning, that if a final judicial decision did not qualify actions (omission) of an organisation – tax agent, conditioned by the relevant actions (omission) of its official as tax offence in accordance with the Tax Code of the Russian Federation, the law enforcement authorities shall be obliged (if the necessary grounds are present) to specially justify application of this norm in respect of such official, taking into account the described circumstances.

The situation where the Constitutional Court encounters necessity to eliminate defect in application of law (i.e. primarily the defect of an ordinary court interpretation of a legislative provision) is not rare. Such deficiencies are established in about a half of judgements on the merits. Thus, the Constitutional Court adopted 27 judgements resolving a constitutional legal dispute by revealing the constitutional legal meaning of the challenged provision in 2018 (over 47 judgements in total); 27 in 2019 (over 41 judgements in total), 29 in 2020 (over 50 judgements in total). In 2021 (by the end of summer) out of 40 judgements, the Constitutional Court revealed the constitutional legal meaning of the challenged provisions in 31 cases (while in 5 judgements the concerned norm was at the same time recognised unconstitutional)[1].

Nevertheless, in the past, the Constitutional Court had to point out sometimes that the courts refused to review the applicants' case as its judgement recognised the concerned norm to be in conformity with the Constitution, while the procedural legislation provides that the necessary grounds for reviewing a case are connected to the recognition of the norm as unconstitutional.

In this regard, the Constitutional Court has formulated the legal position, that was numerous times repeated in its later rulings, that legal consequences are equal for judgements that recognises the challenged provisions unconstitutional, and ruling in which the Constitutional Court reveals the constitutional legal meaning of the challenged provision and thus eliminates its unconstitutional application (interpretation). In practice both types of judgements shall be subject to execution irrespective of foreseeing the relevant grounds

1 One should note that a judgement can contain several different resolutions, i.e. one as regards legal meaning of the challenged norms, and one on unconstitutionality.

for review in other legislation except the Federal Constitutional Law on the Constitutional Court – including the procedural codes' provisions. Otherwise it would be a blatant violation of provisions of the Constitution as regards the powers of the Constitutional Court, consequences of its rulings, powers and obligations of inferior courts with regard to the execution of rulings of the CCRF in respect of a concrete case that was basis to the application submitted to the Constitutional Court (decisions of the Constitutional Court of *7 July 2016 No. 1435-O-P* and *13 March 2018 No. 586-O-P and other*).

Therefore, the revelation of the constitutional legal meaning of a norm by the Constitutional Court means bringing the legal regulation foreseen by this norm to conformity with the Constitution. In terms of legal consequences, it is comparable to changing the legal regulation subjected to this norms' provisions and foreseen in laws considered by the Constitutional Court, as well as laws repeating the provisions of the norms verified by the Constitutional Court or based on, or in identical provisions of this or any other normative act. Thus, the authorities that apply the law are obliged to follow the revealed constitutional legal meaning while accepting for consideration the citizens' applications received after the Constitutional Court ruling that contains constitutional legal interpretation of the challenged norm becomes final, as well as its legal positions based on (*Judgement of 26 April 2016 No. 13-П*).

Following this logic, amendments were introduced to the Federal Constitutional Law of the Constitutional Court in 2016, according to which the legal consequences of the rulings of the Constitutional Court became equal. In particular, Article 79 of the said Federal Constitutional Law was supplemented by prohibition to apply or otherwise realise the normative act in contrary to the interpretation given by the Constitutional Court in a judgement.

So, even if the Constitutional Court does not recognise the challenged norm unconstitutional, the court practice at least does not exclude the possibility to execute the judgement by way of reviewing the ordinary court judgement rendered in the applicant's case.

Analysis of data regularly presented by the Supreme Court of the Russian Federation shows that review of applications on the basis

of the CCRF rulings (with regard to persons who were parties to the Constitutional Court proceedings) is normally conducted within procedurally established time-limits and order (including situations where the applicants are required to show certain initiative, i.e. apply for review themselves).

Nevertheless, there are isolated cases of issues accompanying such review. Thus, *AO "Verkhnevolgaelectromontazh-NN"* applied to the Constitutional Court seeking for clarification of the Judgement of *25 April 2019 No 19-П*. The commercial court of first instance refused the claim of this company since the Decree of the Government of 26 December 2019 No. 1857, which was adopted in lieu of execution of the said Judgement of the Constitutional Court, contained no indication that its effect applies to legal relations started before adoption of this Decree.

In its Decision of *29 October 2020 No. 2519-O-P*, the Constitutional Court separately noted that that if it follows from a judgement of the Constitutional Court that the necessary condition for reviewing the applicant's case is the adoption of necessary amendments to legal regulation, the corresponding judicial acts shall be subject to review on the basis of the legal act adopted with the aim to execute the Constitutional Court's judgement, irrespective of the indication on possibility to apply such act retroactively. Such approach foreseeing the review of a concrete case, at least in respect of the person who applied to the Constitutional Court of the Russian Federation, does not exclude the possibility to review other previous court judgements, and it is mandated with the aim of preserving balance among the principles of legal certainty in material legal relations, stability of civil relations and fair judicial proceedings, which is incompatible with a wrongful judicial act (judgements of the Constitutional Court of the Russian Federation of *8 November 2012 No. 25-П, of 26 June 2020 No. 30-П*, decisions of the Constitutional Court of *14 January 1999 No. 4-O* and of *5 February 2004 No. 78-O*).

III. EXECUTION OF JUDGEMENTS OF THE CONSTITUTIONAL COURT OF THE RUSSIAN FEDERATION WITH REGARD TO PERSONS WHO WERE NOT A PARTY TO THE CONSTITUTIONAL JUDICIAL PROCEEDINGS

Special legal force of the rulings of the Constitutional Court of the Russian Federation implies the possibility to review the cases of persons who were not a party to the relevant constitutional judicial proceedings, but in whose respect the normative provisions recognised by the CC FRY as unconstitutional (or constitutional within established constitutional legal meaning) had been applied. According to previously expressed positions of the Constitutional Court (these were concentrated in the Decision of *5 February 2004 No. 78-O*) this can be applied with regard to judicial decisions that have not yet come into force, or final judicial decisions that were not executed or only partially executed.

The Constitutional Court encountered numerous situations when the courts, referring to different grounds, refused to review the cases of persons who were not parties to constitutional judicial proceedings.

The recent example in this regard is the Judgement of *26 June 2020 No 30-П* related to the assessment of constitutionality of certain provisions of Article 79 of the FCL as well as Article 439, Part 1 of the Civil Procedural Code of the Russian Federation, and Article 43, Part 1, Item 4 of the Federal Law "On enforcement proceedings". The Constitutional Court recognised the challenged provisions as not contravening the Constitution of the Russian Federation. According to the Court, they do not allow continuation of enforcement proceedings on eviction from living premises of citizens who were not party to constitutional proceedings - if the judicial decision on eviction recognising property rights of a public entity with regard to relevant premise was based on normative acts or their provisions that were recognised as unconstitutional (or received constitutional interpretation), providing that this decision was not fully executed at the moment of delivery of the Judgement of the Constitutional Court. The described stay shall be effective until review of the judicial decision ordering eviction.

As noted in this ruling, the conclusion on impossibility to execute a judicial decision in view of the judgement of the Constitutional Court

with regard to cases of persons who were not a party to constitutional judicial proceedings, is in any event a condition for applying to a court with a demand to review such judicial decisions, taking into account the legal positions expressed in the Judgement of the CCRF (this does not exclude *inter alia* returning of a competent court to consideration of the issue of review under the rules foreseen in Chapter 42 of the Civil Procedural Code of the Russian Federation).

The Constitutional Court separately addressed to the Federal Legislator the instruction to introduce necessary legislative amendments (in view of the legal positions expressed) aimed to establish the legal mechanism to review the judicial decisions based on acts or their provisions recognised unconstitutional by the Constitutional Court (or the ones that received constitutional interpretation in the Constitutional Court judgement), that were not executed (or were partially executed) at the moment of delivery of such judgement.

Presently the draft legislation prepared by the Government of the Russian Federation on the execution of the Constitutional Court's Judgements is considered by the State Duma. The foreseen amendments are connected to provisions of the Code of Commercial Procedure, the Civil Procedural Code, and the Code of Administrative Procedure of the Russian Federation. It should be noted that certain issues related to the execution of the Judgement of the Constitutional Court of *26 June 2020 No. 30-П* are partially resolved by amendments and additions introduced to the FCL on the Constitutional Court. Yet, this does not exclude the necessity to update corresponding procedural legislation.

Moreover, the amendments introduced to the FCL in 2016, establishing that consequences of rulings that recognise norms as constitutional within its constitutional legal meaning are equal to those that foreseen rulings on unconstitutionality, also required the amendment of procedural legislations with regard to list of grounds for application for the review of a final judicial judgement. But given the superior legal force of the FCL, as compared to ordinary federal legislation or procedural code, the relevant regulation can be applied directly.

IV. OTHER ISSUES RELATED TO THE EXECUTION OF JUDGEMENTS OF THE CONSTITUTIONAL COURT

During constitutional judicial proceedings, the Constitutional Court encounters, sometimes, situations when considering of a concrete case it should be noted that the normative legal act adopted by Federal Legislator in view of the execution of a judgement of the Constitutional Court, does not fully take into account the Court's legal positions (or reflects them without necessary precision); i.e. in these situations, the practice of application of the relevant new norms indicates that lack of clarity as regards their constitutionality persists, therefore the regulation process is apparently unfinished, therefore additional work is required to ensure that normative acts are in conformity with the legal positions of the Constitutional Court. Such situations create difficulties also for ordinary courts, since it obstructs realisation of the Constitutional Court judgements by them.

An example of this situation would be the legislative amendments introduced after the Judgement of *23 July 2018 No. 35-П*. This Judgement identified a defect on Article 208, Part 1 of the Civil Procedural Code of the Russian Federation (hereinafter: "the CCPRF") connected to the lack of criteria according to which indexation of sums ordered must be determined by a court, as well as the lack practically developed mechanism for realisation of this indexation. The challenged provision had only established the possibility of indexation as such in the frame of the application of the claimant or defendant. This led to the impossibility of real application of the said mechanism of indexation of the sums ordered by court and substantial deficiency of the right to a court protection. Thus, the Federal Legislator received the relevant instructions.

The Federal Law of 28 November 2018 No. 451-ФЗ "On Introduction of Amendments to Certain Legislative Acts of the Russian Federation" changed the provisions in Article 208 of the Civil Procedural Code. But the new regulations changed the lack of criteria for indexation for a reference – indexation in the amount and cases provided for by law or agreement of the parties. And no law was adopted defining the general conditions of amount of indexation.

As a result, new application was lodged with the Constitutional Court seeking for assessment of constitutionality of Article 208 of the Civil Procedural Code.

In its Judgement of 12 January 2021 *No. 1-П*, the Constitutional Court noted that the Federal Legislator introduced amendments to Article 208 of the CCPRF after the adoption of the Judgement of 23 July 2018 *No 35-П*, and these amendments objectively had to aim to execution of this Judgement. The Constitutional Court indicated that the new edition of Article 208 of the CCPRF did not overcome the lack of clarity as regards the constitutionality of the said normative regulation, since the amendments did not exclude the possibility of further violation of constitutional rights and freedoms of claimants and defendants following the consideration by the courts of their applications for indexation of the sums ordered by court, since not clear, unambiguous criteria for indexation were established.

The Federal Legislator was given new instruction: taking into account the legal positions and findings of the Constitutional Court remaining in force and reflected in its Judgements of 23 July 2018 *No. 35-П* and of 12 January 2021 *No 1-П* ordering the introduction of amendments to legal regulations in force, including the Article 2018 of the CCPRF. These amendments must allow courts to apply indexation to ordered sums in the frame of the application of claimants and ensure a real restoration of their right to correction and timely execution of a court's decision. Pending these amendments, the CCRF instructed courts to use the official consumer price index when ordering indexation.

In a connected issue, the Constitutional Court also adopted the Judgement of 22 July 2021 *No. 40-П* in a case regarding the assessment of constitutionality of Article 183 of the Code of Commercial Procedure of the Russian Federation. This ruling was rendered following the request of a commercial court of a constituent entity of the Russian Federation and the complaint of a citizen who believed his constitutional rights was violated by the judicial decisions delivered in his case.

The commercial court decided to lodge a request with the Constitutional Court in order to verify constitutionality of the challenged provision since it believed that due to a lack in the

mechanism (that would be commonly recognised as necessary, obligatory and applicable) of indexation of the monetary sums ordered by a court, these provisions do not contain clear and unambiguous criteria according to which foreseen indexation must be performed.

As the result, the challenged provisions of the Code of Commercial Procedure of the Russian Federation were recognised as contravening the Constitution of the Russian Federation. The Constitutional Court formulated a temporary order of execution of the judgement (pending the necessary legislative amendments) according to which; where the conditions and amounts of indexation of the ordered sums are not established by Federal Law recognised by courts as grounds to make indexation adjustments, or by an agreement of the parties, the courts must use the generally accessible official statistical data on the consumer prices (tariffs) index with regard to prices for goods and services in the Russian Federation.

The Constitutional Court noted numerous times that proper execution of its rulings requires the authorities that apply the law to pay due attention to previously expressed legal positions in similar interconnected issues, ensuring efficiency of the constitutional judicial protection and decreasing the rate of new applications addressed to the Constitutional Court. In practice there are, sometimes, issues connected to refusal of law-applying authorities to take into account the previous legal positions of the Constitutional Court following its consideration on issues similar to those previously examined by the Constitutional Court.

Thus, the Constitutional Court adopted the Judgement of 22 July 2020 *No.38-П* assessing the constitutionality of Article 159, Part 3 of the Criminal Code of the Russian Federation defining the type and severity of sanction for fraud committed by a person using his or her official position.

The challenged provision was interpreted as criminalizing unjustified application by the applicant for tax exemption to the tax authority, since this application right was granted by the tax authority without necessary grounds for it. Therefore, the assessment of behaviour of the applicant as criminally prohibited was conducted

on the basis of decisions made by officials of a tax authority, and no regard was given to possibility of *bona fide* ignorance of the applicant or mistake of tax authorities. This resulted in arbitrary application of the challenged provisions in connection to provisions defining the necessary grounds, order and conditions of granting tax exemption, and to violation of criminal law principles, such as legality, guilt and fairness.

The Constitutional Court recognised the challenged provisions as not contradicting the Constitution of the Russian Federation since according to their constitutional legal meaning, within the current system of normative regulation, they did not provide for imposing criminal liability for unjustified application to the tax authority for tax exemption, with the aim to exercise the relevant right for exemption connected to buying living premises, in situation where the tax authority decides to approve this right to exemption but then refutes existence of such right in case the tax payer provided the necessary documents and those documents contained no indication of their forgery or counterfeit, and they were enough to decide, after due and attentive consideration by tax authorities, to decide on the refusal to grant the relevant tax exemption; and if the applicant did not take other actions (omission) aimed specially at creating conditions for the tax authority to take an incorrect decision in favour of the applicant (tax payer).

In 2021, the Constitutional Court was bound to return to the assessment of constitutionality of Article 159 of the Criminal Code; this time with regard to Part 1 of the same Article (defining the type and severity of sanction for fraud committed without qualifying properties of using official position). The factual circumstances were similar. As a result, the Constitutional Court adopted the Judgement of 4 March 2021 *No. 5-П* extending its previous findings and legal positions to Part 1 of Article 159 of the Criminal Code.

CONCLUSION

The described problems in execution of the rulings of the Constitutional Court of the Russian Federation by ordinary courts should nevertheless be regarded as isolated cases. Analytical work

conducted by the Secretariat of the Constitutional Court did not reveal a systemic defect in execution of its judgements.

With regard to ensuring uniform court practice and due execution of constitutional justice acts, the Constitutional Court closely cooperates with the Supreme Court of the Russian Federation.

The Constitutional Court follows, for example, the practice of preparation and publishing of quarterly reviews of the most important rulings, including judgements and decisions developing previously formulated legal positions. These reviews are published on the official website of the Constitutional Court, and are also sent to the Supreme Court. The Supreme Court regularly provides information on review of judicial acts due to new circumstances following the recognition of an act (or a part of an act) unconstitutional by the Constitutional Court, or the recognition of the concerned act constitutional but revealing its constitutional legal interpretation, along with the copies of relevant judicial acts.

Therefore, despite the Constitutional Court have no powers to affect other judicial bodies with the aim to "coerce" them to take due account of its legal positions and, thereby, to execute its rulings, this cooperation appears to be an effective monitoring tool, and opens possibilities for timely identification of any issues. This also allows the Supreme Court of Russian Federation to promptly react to any situation of improper execution of rulings of the Constitutional Court.

Many analytical materials prepared by the Secretariat of the Constitutional Court are publicly accessible, which also allows the Legislator to react to certain shortcomings of law applications practice in some spheres.

Finally, it should be noted that legislative enhancement of the mechanism of execution of judgements of the Constitutional Court is ongoing. The substantial amendments to the FCL introduced in 2020 have affected the issues of review of judicial acts on the basis of Constitutional Court judgements. The Legislator, for example, clearly established situation when judicial and other decisions based on acts or their provisions recognised unconstitutional by a judgement of the Constitutional Court, or applied according to their interpretation

differing from the one given by the Constitutional Court, must be reviewed (and shall not be executed pending such review). These amendments represent, to a large extent, legislative embodiment of legal positions of the Constitutional Court with regard to the execution of its judgements. Therefore, they create additional guarantees of due realisation of Constitutional Court rulings in law enforcement practice, ultimately ensuring effective protection of citizens' rights.

THE QUESTION ON THE IMPLEMENTATION OF THE DECISIONS OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF TAJIKISTAN

Nurlyaminzoda Gulnora Abdulyamin

CONSTITUTIONAL COURT OF THE REPUBLIC OF TAJIKISTAN

THE QUESTION ON THE IMPLEMENTATION OF THE DECISIONS OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF TAJIKISTAN

*Nurlyaminzoda Gulnora Abdulyamin**

The topic on the execution of the decisions of the Constitutional Court of the Republic of Tajikistan (hereinafter: "the Constitutional Court"), as a body of constitutional control, is very important and relevant, since the state of constitutional legality both in the Republic of Tajikistan and in developed democratic countries with constitutional control bodies largely depends on the execution of the Constitutional Courts' decisions by all the state authorities, including the legislative and executive authorities. Strict execution of the decisions of a constitutional control body is the most important element of the mechanism for ensuring constitutional legality in a state and shows the high level of legal culture of authorities and officials, the consent of the subjects of the appeal to the constitutional courts with the prescriptions of the Basic Law of the country.

In this regard, the non-fulfillment or improper execution of the decisions of the constitutional control bodies calls into question the entire mechanism for implementing the Constitution, leads to fluctuations in the goals to achieve what were directed, i.e. to ensure the supremacy and direct action of the Constitution of each state, the protection of human and civil rights and freedoms, as well as the strengthening of a single constitutional and legal space in the state.

Regardless of the fact that constitutional justice is a fundamentally new constitutional and legal institution for Tajikistan, which is carried out by the Constitutional Court, its role in society has recently increased significantly through decision-making, the implementation of which

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contributes, first of all, to ensuring the supremacy and direct effect of the Constitution, as well as the protection of human and civil rights and freedoms.

An important legal guarantee for the execution of the decisions of the Constitutional Court is the Constitution of the Republic of Tajikistan (hereinafter: "the Constitution"), according to Article 89 of which the acts of the Constitutional Court are final.

That means that, according to the constitutional prescriptions, the acts of the Constitutional Court are final and not subjectable to appeal, their binding applies without exception. The decision adopted by the Constitutional Court does not require confirmation of any other bodies - it is subject to strict execution.

Strict execution of the decisions of the constitutional control body is the most important element of the mechanism for ensuring constitutional legality in the State and the effective operation of the institution that judicial constitutional control depends on.

In this regard, to ensure the direct effect of the acts of the Constitutional Court, and to completely prevent the re-adoption of the norms declared unconstitutional by the Constitutional Court, a new amendment was recently introduced within the framework of the implementation of the new Program of Judicial and Legal Reform in the Republic of Tajikistan for 2019-2021, in Part 5 Article 60 of the Constitutional Law of the Republic of Tajikistan "On the Constitutional Court of the Republic of Tajikistan" (hereinafter: "the Constitutional Law"), according to which the "*Re-adoption of acts that contradict a decision of the Constitutional Court of the Republic of Tajikistan is prohibited. When such acts are adopted, they will not have legal force.*"

However, it should be noted that in this area, there is still an unresolved problem associated with the absence in normative legal acts of norms regulating the mechanism for the execution of decisions of the Constitutional Court, which also directly or indirectly affects the effectiveness of its acts.

Practice shows that only the actual execution of decisions taken by constitutional control bodies, based on the exercise of their legal powers, makes constitutional justice real and completed. Therefore,

the mechanism of an independent judicial authority, ensuring the supremacy of the Constitution and the protection of human and civil rights and freedoms, includes the enforcement of a judicial act as a mandatory element. This, of course, is determined by the presence of a legally established mechanism for the execution of these decisions.

In this connection, it is considered expedient for public authorities to execute the decisions of the Constitutional Court with the existence of legislatively fixed procedures of execution, measures of responsibility for non-execution of judicial acts within a reasonable time. In this case, the legally established measures of responsibility will be considered as necessary measures of state coercion, ensuring the execution of the acts of this independent body of the judicial power.

The Constitutional Court, as a body of constitutional control, adopts acts completing constitutional proceedings in the form of resolutions or rulings that contain a justified legal position, which is also important in law-making activities.

Statistics and practice show that every year the intensity and number of appeals to the Constitutional Court of the Republic of Tajikistan increases. It should also be noted that, of course, most of the appeals still contain questions that are not within the competence of the Constitutional Court. In this connection, answers are sent to the applicants on such appeals, in which the powers of the Constitutional Court are explained.

But in general, during its activity, the Constitutional Court considered a number of issues that played a significant role in ensuring the supremacy of the Constitution, strengthening constitutional legality and protecting the rights and freedoms of man and citizen.

For instance, the resolution of the Constitutional Court of October 16, 2001 "On Determining the Compliance of Articles 10, 17, 19 and 88 of the Constitution of the Republic of Tajikistan with Part 1 of Article 303 and Part 1 of Article 337 of the Civil Procedure Code of the Republic of Tajikistan", according to which the fact that the parties and other persons participating to the procedure were deprived of the right to appeal and protest the decisions and the rulings of the Supreme Court of the Republic of Tajikistan, rendered during its consideration on

cases communicated by the first instance courts, was inconsistent with the norms of the Constitution. This resolution gave the parties and other participants to the process the right to appeal and lodge a protest against decisions and rulings of the Supreme Court of the Republic of Tajikistan as o result of its consideration on cases communicated by the first instance courts.

Also, by the resolution of the Constitutional Court dated January 20, 2005 "On determining the compliance of Article 181 of the Economic Procedure Code of the Republic of Tajikistan with Articles 17, 19 and Part 2 of Article 88 of the Constitution of the Republic of Tajikistan", Article 181 of the Economic Procedure Code of the Republic of Tajikistan, regarding the failure to provide the parties and other participants to the process with the right to bring a supervisory complaint against decisions and resolutions of economic courts that have entered into legal force, was recognized as inconsistent with Articles 17, 19 and part 2 of Article 88 of the Constitution of the Republic of Tajikistan. On the basis of this resolution, the parties and other participants to the process were granted the right to bring a supervisory complaint against the decisions of the economic courts that have entered into legal force.

In each of its adopted acts, the Constitutional Court indicates the need to clarify and develop legislative norms in order to eliminate uncertainty in legal regulations and ensure the constitutional meaning of the application of the norms of law. The effectiveness of the decisions of the Constitutional Court is determined by their impact on legislative and law enforcement activities, on overcoming the shortcomings of regulations, including inconsistencies between various legal acts.

A frequent defect in legal regulation that the Constitutional Court faces in the process of carrying out its activities, is the existence of a gap in the legislation. If a gap in the law, leads to an interpretation and application that results or may results to the violation of specific constitutional rights, this gap may be the basis for checking the constitutionality of this law by the Constitutional Court.

The normative and methodological criterion for the assessment of gaps in legislations by the Constitutional Court, is defined in the Constitution with the principles of legal equality, the rule of law, legitimacy of power, the balance of constitutionally protected values,

legal certainty, maintaining citizens' confidence in the law and actions of the State, proportionality of restriction of rights and freedoms, the presumption of innocence, full and effective judicial protection, separation of the branches of government and the resulting system of balances, etc.

Of course, in general, it would be expedient to achieve more effective interaction among constitutional control bodies and other supreme bodies of State power by virtue of their powers in terms of promoting the timely execution of decisions of the Constitutional Court, since most of the means that can be designated as guarantees for the execution of these decisions belong to the powers of these bodies.

The specification in the domestic normative acts of the relevant state bodies concerning the procedure for implementing the decisions of the Constitutional Court, as well as the establishment of possible measures of personal responsibility for non-fulfillment of the obligation to ensure the execution of a decision of the Constitutional Court is, thus, an extremely important aspect of the problem of execution of decisions of the Constitutional Court.

In accordance with Article 60 of the Constitutional Law, the acts of this body are final, not subject to appeal and are binding on all bodies, enterprises, institutions, organizations, political parties, other public associations, officials and citizens to whom they are addressed.

Also, Part 5 of this Article provides for a provision according to which laws and other normative legal acts or their respective provisions that are recognized unconstitutional by the Constitutional Court shall lose force, and, at the same time, cancel the effect of other normative legal and other acts based on this act.

Article 61 of the Constitutional Law establishes the norms relating to the execution of the decisions of the Constitutional Court. Thus, in accordance with Part 1 of Article 61 of this normative legal act, the decisions and conclusions of the Constitutional Court shall enter into force from the moment of adoption or from the moment defined by it. Other acts shall enter into force from the moment of their announcement. Two existing important properties of the acts of the Constitutional Court – their final and binding character – also play a key role in the execution of the decisions of the Constitutional Court.

Article 61, Paragraph 2, of this Constitutional Law states that the decisions and conclusions of the Constitutional Court of the Republic of Tajikistan shall be published in the mass media. At the discretion of the Constitutional Court, its other acts may also be published. The Constitutional Law establishes, firstly, the forms of implementation of the principle of publicity in constitutional proceedings, and secondly, the proper and prompt execution of the final decisions of the Constitutional Court, since the adoption of such decisions is brought to the public attention through the media.

Also, in the same Article the list of state bodies and parties to constitutional proceedings to which decisions and conclusions of the Constitutional Court need to be sent is mentioned. By sending them its final decisions, the Constitutional Court thereby obliges the relevant State authorities and officials to take appropriate measures to implement the decisions of the Constitutional Court.

The special significance of decisions adopted by the Constitutional Court, within the framework of the exclusive powers granted to it by the Constitution to check the constitutionality of normative legal acts, pre-determines the need for their strict implementation by state authorities and officials, which ensures the requirements of the unity of the constitutional and legal field of the republic and the inadmissibility of opposing legality and expediency.

Of course, in order to suspend the provisions of the law and other normative legal acts recognized as unconstitutional, and prevent their future application in other legal relations, it is necessary to ensure the timely execution of the decision of the Constitutional Court by the relevant authorized entities. In this connection, Article 62 of the mentioned Constitutional Law provides for a provision according to which non-performance, improper execution or obstruction of the execution of acts of the Constitutional Court entails prosecution established by the relevant legislation of the Republic of Tajikistan.

In general, the legally proclaimed binding nature of these acts does not entail the automatic implementation of their prescriptions. Only the actual execution of the decisions of the Constitutional Court makes constitutional justice real and complete, which requires legislative

consolidation of the procedures for the execution of these acts, as well as measures of state coercion to execute the acts of the Constitutional Court.

It should be noted that Article 363 of the Criminal Code of the Republic of Tajikistan provides for a general provision according to which for malicious failure by a representative of the authorities, a civil servant of a local body of State power and self-government bodies of settlements and villages, as well as an employee of a state institution, commercial or other organization, to enter into legal force of a court verdict, court decision or other judicial act, as well as obstruction of their execution, shall be subjected to a criminal punishment.

Timely and full execution of the decisions of the Constitutional Court serves to ensure a single constitutional and legal framework in the conditions of the rule of law, which, ultimately, determines the supremacy and direct effect of the Constitution of the country, the inviolability of State sovereignty as the most important component of the foundations of the constitutional system of Tajikistan.

The effectiveness of the execution of Constitutional Court's decisions is mainly in the internal relationship and correlation with the concepts of the effectiveness of constitutional control and the effectiveness of constitutional proceedings. The disclosure of this relationship is a comprehensive and systematic approach to understanding the effectiveness of the execution of decisions of the Constitutional Court. Of course, the main criterion for the effectiveness of the execution of decisions of the Constitutional Court should be understood as the timeliness of their execution, based on the presence of social and value content in the decisions of the Constitutional Court, and the subsequent accounting in the current legislation.

The world experience arising from activities of constitutional control bodies shows that the effectiveness of the execution of judicial acts depends on the completeness and quality of legislative regulation on issues concerning the procedure, deadlines, responsibility for non-execution of acts of the Constitutional Court, and, accordingly, incomplete legislative settlement of these issues does not allow timely enforcement of acts adopted by the Constitutional Court.

The analysis of domestic legislation testifies to the insufficiency of legislative regulations on issues concerning the procedures for the execution by public authorities of the decisions of the Constitutional Court, and concerning the responsibility of bodies and their officials for non-execution of these acts. It should also be noted that all this entails the possibility to prolong the non-execution of decisions of the constitutional control body recognizing normative legal acts that violate the rights and freedoms of man and citizen as inconsistent.

The non-execution of decisions of the Constitutional Court in time indicates also the presence of gaps in law, including legislative regulation, expressed without clearly defining procedures and deadlines, as well as measures of responsibility for non-fulfillment or delay in the execution of judicial acts, which undermines the authority of the constitutional control body in the country.

Unfortunately, the effectiveness of the activities of constitutional control bodies, including the judiciary branch in general, is still assessed only by those indicators that characterize the quality of the process of consideration and resolution of the griefs of the subjects of the appeal. But it does not include the process of execution of acts that ensure the real supremacy of the Constitution and the restoration of violated rights, freedoms and legitimate interests of man and citizen.

In this regard, we express our solidarity with the position of some legal scholars that it is expedient within the framework of the legislation, that determines the legal basis for the activities of public authorities, to include a provision establishing the mandatory execution of decisions of constitutional control bodies and improving the mechanism for the execution of decisions of Constitutional Courts.

CURRENT PROBLEMS IN EXECUTION OF JUDGEMENTS: EXPERIENCES OF THE CONSTITUTIONAL COURT OF THE KINGDOM OF THAILAND

Chonlapoom Yensuang
Pitaksin Sivaroot

CONSTITUTIONAL COURT OF THE KINGDOM OF THAILAND

CURRENT PROBLEMS IN EXECUTION OF JUDGEMENTS: EXPERIENCES OF THE CONSTITUTIONAL COURT OF THE KINGDOM OF THAILAND

Chonlapoom Yensuang[*]
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INTRODUCTION

In Thailand, the Constitutional Court of the Kingdom of Thailand was established for the first time after the promulgation of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997) on April 11th, 1998, which is the day that the royal decree to appoint the first President and Justices of the Constitutional Court of the Kingdom of Thailand was rendered in 1998. Currently, the Constitutional Court of the Kingdom of Thailand is 23 years old.

In the Constitution of the Kingdom of Thailand B.E.2560 (2017), the Constitutional Court is stipulated in a specific Chapter, namely Chapter XI, which is separated from other Chapters about other judicial organs, as the Constitutional Court has a very significant role on reviewing the constitutionality of laws, bills of law, and emergency decrees, as well as, on adjudicating constitutional cases. The binding force of its rulings and the composition of the Justices are similar to the former ones. The rulings of the Constitutional Court are binding, not only for the litigants, as is the case of the decisions of other Courts, but also for the National Assembly, the Council of Ministers, courts, independent organs, and State agencies.

For the composition of the Constitutional Court, under the current Constitution, priority is given to the diversity of the background of the

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Justices, that will be selected from various fields of law and political sciences, as well as, governmental administration, with particular qualifications and specified term of office. For a candidate from the Courts of Justice, the three qualified judges elected by a plenary meeting of the Supreme Court must have hold the positions not lower than President Justice of the Supreme Court and at least for three years. While, for the candidate from the Administrative Court, two qualified judges elected by the Supreme Administrative Court must have hold the positions not lower than judge of the Supreme Administrative Court and for at least five years. Other qualified persons compose candidate from positions of professors of a university in Thailand in the field of law and political science for not less than five years and currently having renowned academic work: a field per person. Additionally, two persons who are holding or have held a position in the head of government agency not lower than General Director or a position equivalent to a head of government agency, or a position not lower than Deputy Attorney General, for not less than five years.

The details of the composition of the Justices as stipulated in the Constitution are the following[1]:

(1) three judges from the Supreme Court holding a position not lower than the President Justice of the Supreme Court for not less than three years, elected by a plenary meeting of the Supreme Court;

(2) two judges of the Supreme Administrative Court holding a position not lower than Judge of the Supreme Administrative Court for not less than five years, elected by a plenary meeting of the Supreme Administrative Court;

(3) one qualified person in law selected among persons holding or having held a position of Professor of a university in Thailand for not less than five years, and currently having renowned academic work;

(4) one qualified person in political science or public administration selected among persons holding or having held a position of Professor of a university in Thailand for not less than five years, and currently having renowned academic work;

(5) two qualified persons selected among persons holding or having

1 Constitution of the Kingdom of Thailand B.E. 2560 (2017), s 200.

held a position not lower than General Director or a position equivalent to a head of government agency, or a position not lower than Deputy Attorney General, for not less than five years.

Duties and Powers vested to the Constitutional Court can be divided into thirteen categories of cases as following[2]:

(1) cases concerning the constitutionality of bills of law, laws already in force and emergency decrees;

(2) cases concerning duties and powers of the House of the Representatives, the Senate, the National Assembly, the Council of Ministers, and independent organs;

(3) cases concerning a complaint on ceasing an act overthrowing the democratic regime of government with the King as Head of State;

(4) cases filed by the public or community against a state agency calling for benefits under Chapter 5, Duties of the State, of the Constitution;

(5) cases concerning the termination of the membership of a member of the House of the Representatives or the Senate;

(6) cases concerning the submission of a bill having an identical or similar principle to the principle of a bill that has been withheld;

(7) cases concerning proposal, submission of a motion, or commission of any act, which results in direct or indirect involvement in the use of the appropriations by a member of the House of the Representatives, the Senate, and draft rules of procedure of the National Assembly;

(8) cases concerning the constitutionality of the draft rules of procedure of the House of the Representatives, draft rules of procedure of the Senate, and draft rules of procedure of the National Assembly;

(9) cases concerning the termination of a ministerial office;

(10) cases concerning a treaty which requires approval of the National Assembly;

(11) cases concerning a constitutional complaint of a person whose rights and liberties guaranteed by the Constitution has been violated;

2 Constitution of the Kingdom of Thailand B.E. 2560 (2017), s 179, 210 and 213 in conjunction with the Organic Act on Procedures of the Constitutional Court B.E. 2561 (2018), s 7.

(12) cases relating to the constitutionality of a constitutional amendment;

(13) any other cases stipulated by the Constitution, organic law or other laws to be within the jurisdiction of the Court.

I. THE BINDING EFFECT OF THE THAI CONSTITUTIONAL COURT'S RULINGS

The Constitution of the Kingdom of Thailand, B.E. 2560 (2017), Section 211 paragraph 4 states that "*[t]he decision of the Constitutional Court shall be final and binding on the National Assembly, the Council of Ministers, courts, independent organs, and State agencies".* From the said provisions, one can observes the compulsory condition of the Constitutional Court's rulings. The Constitutional Court's Rulings have a binding effect on and involves all people, whether they are parties or not parties to the proceeding. The term used in the Latin language is "*Res Commun*" or "*Erga Omnes*" in academic language, which means that the effect of the Constitutional Court's ruling has general impact.

While the rulings of the Court of Justice, the Administrative Court, or the Military Court affects only the person who is a party to the proceeding. The word used in Latin language is "*Res Judicata*" or "*Inter Partes*" in academic language which means that the ruling will affects only the person who is a party. The ruling will not be bounding on any third parties or any other people who are not aparty in the case.

In addition, the Constitutional Court's rulings also affect the political, economic, social and academic changes of Thailand since its establishment for the first time in Thailand, under the Constitution of the Kingdom of Thailand B.E. 2540 (1997) until now.[3]

To sum up, the general impact to all people of the Constitutional Court's rulings is an exceptional one. Most of the rulings of the other Courts affect only the parties in the case, who have the right to defend themselves before the trial Court.

On the other hand, the Constitutional Court's rulings have general impact to all people who are not the parties in the case.

3 Prof. Dr. Wissanu Krea-Ngam. Special Lecture on the Topic "*Analyzing the Impact According to the Rulings of the Constitutional Court*" on Friday, October 7th, 2005 at the Office of the Constitutional Court of the Kingdom of Thailand, p. 26 - 27.

They have no right to defend themselves before the Constitutional Court but they are affected by its rulings.[4]

In Thailand, the Constitutional Court's rulings are equivalent to law. The Constitutional Court's ruling shall come into effect on the reading date.[5]

II. PROBLEMS IN EXECUTION OF JUDGMENTS: EXPERIENCES OF THE CONSTITUTIONAL COURT OF THE KINGDOM OF THAILAND

In this part, I will give you some examples of the problems encountered in the execution of judgments based on some of the Thai Constitutional Court's rulings.

In Constitutional Court's Ruling *No. 47/2547 (2004) "the President of the National Assembly requested from the Constitutional Court a ruling under Section 266 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), in the case of the use of powers by the State Audit Commission and the Senate in the process of selecting the State Audit Governor."*

The President of the National Assembly was of the opinion that under Section 333 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), Section 15, Section 30, Section 31 and Section 33 of the Organic Act on State Audit, B.E. 2542 (1999), in conjunction with Article 6(5) of the Rules of the State Audit Commission on Rules and Procedures for the Selection and Nomination of Suitable Candidates for the Position of State Audit Governor, B.E. 2543 (2000), the State Audit Commission had the power and duty of selecting suitable candidates for the position of State Audit Governor and informing their names to the Senate for approval. In this regard, the Senate's powers were limited to the conferment of an approval or disapproval. If the Senate did not give its approval, the State Audit Commission would once more be under the duty to carry out the selection of suitable persons for the position of State Audit Governor and make nominations to the Senate

4 Honorary Prof. Dr. Borwornsak Uwanno. Seminar on the Topic "*The Status of the Binding of the Constitutional Court Order*" and the Topic "*Status of Constitutional Provisions, Chapter 6 : Directive Principles of State Policies*" on September 17 th - 18th, 2020 at Saksiam Lakeside Resort, Nontaburi Province,Thailand, p. 27- 28.

5 The Organic Act on Procedures of the Constitutional Court B.E. 2561 (2018), s 76 first paragraph.

until an approval was granted. Therefore, in this case where the State Audit Commission nominated three candidates for the position of State Audit Governor to the Senate, the Senate's resolution to select one of the three suitable candidates for the position of State Audit Governor was likely to be an unconstitutional exercise of duties and unlawful under the Organic Act on State Audit, B.E. 2542 (1999). Consequently, the President of the National Assembly relied on his powers under Section 266 of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), in submitting the matter together with an opinion to the Constitutional Court for a ruling on whether the proceedings whereby the State Audit Commission nominated three suitable candidates for the position of State Audit Governor and the Senate passed a resolution to select one State Audit Governor from the three nominees presented by the State Audit Commission was constitutional in this case.

The Constitutional Court held as follows: The State Audit Commission had carried out the selection and election of suitable candidates for the position of State Audit Governor, where the person who received the highest number of votes which was not less than the half of the existing members of the State Audit Commission was Mr. Prathan Dabpech. The proceedings were conducted in accordance with Section 312 and Section 333(1) of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), in conjunction with Section 15 paragraph (1) subparagraph (6) and Section 30 of the Organic Act on State Audit, B.E. 2542 (1999) and Article 6(5) of the Rules of the State Audit Commission on Rules and Procedures for the Selection and Nomination of Suitable Candidates for the Position of State Audit Governor, B.E. 2543 (2000). Thereafter the Chairman of the State Audit Commission sent a letter on behalf of the State Audit Commission making a nomination of three candidates for the Senate to select. The Senate passed a resolution selecting one State Audit Governor out of the three nominations. In this case, when the Constitution provided that the State Audit Commission had the power and duty of selecting a suitable candidate for the position of the State Audit Governor and that the Senate was as an organ which gave advice to the King, whereby Section 15 paragraph (1) subparagraph (6), Section 30 and Section 33 of the Organic Act on State Audit, B.E. 2542 (1999), provided that the State Audit Commission was the organ which made the selection and election of nominees presented to the Senate for

approval. The approval of the Senate therefore meant that the Senate could only give its approval or disapproval of the candidate elected by a resolution of the State Audit Commission with the highest number of votes and not less than the half the existing members of the State Audit Commission. Hence, the Senate's election of Mrs. Jaruwan Menthaka, who was in the list presented by the Chairman of the State Audit Commission on behalf of the State Audit Commission, which included a letter stating the election results of the State Audit Commission, and who received the second highest number of votes with less than the half of existing members of the State Audit Commission, was therefore an exercise of powers and duties which was not in accordance with Section 312 and Section 333(1) of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), and Section 15 paragraph (1) subparagraph (6), Section 30 and Section 31 of the Organic Act on State Audit B.E. 2542 (1999) in conjunction with Article 6(5) of the Rules of the State Audit Commission on Rules and Procedures for the Selection and Nomination of Suitable Candidates for the Position of State Audit Governor, B.E. 2543 (2000).

An eventual problem in execution of this judgment emerged. The selected person as the State Audit Governor (Mrs. Jaruwan Menthaka) did not accept the ruling of the Constitutional Court and continued to perform her duty. However, it's important to note that it was not in accordance with the ruling of the Constitutional Court because in this case, the Constitutional Court only ruled that the nomination process was unconstitutional. The Constitutional Court did not order her to terminate from her duty.

In addition, in Constitutional Court's ruling *No. 15-18/2556 (2013)* "*Application for Constitutional Court's ruling under Section 68 of the Constitution.*"

This case is related to the constitutional amendment regarding people's right to protect the Constitution.

In the circumstances of the case, the Government parties acting in the Parliament tried to amend the Constitution of the Kingdom of Thailand B.E. 2550 (2007). The Draft Amendment to the Constitution contained provisions which were in the essence contrary to the

fundamental principles, and it was not in accordance with the modes provided in the Constitution. This Constitution draft tried to amend the Senate qualification that overthrow the democratic regime of the Government with the King as Head of State under the Constitution. Therefore, the Constitutional Court had the decision that the draft of the Constitution amendment was inconsistent with the Constitution.

In this case, the Prime Minister at the material time brought the draft of the Constitutional amendment to present to His Majesty the King without waiting to hear the ruling of the Constitutional Court. However, in this case, it does not appear that the draft of the Constitutional amendment has been signed by His Majesty the King. Therefore, it cannot be clearly stated that there is a problem with the enforcement of the Constitutional Court's ruling.

CONCLUSION

The Constitutional Court performs the important function of safeguarding the supremacy of the Constitution. It also serves as a judicial body which recognizes and protects the fundamental rights and liberties of the people and translates into reality the protection of the fundamental rights and liberties by the exercise of its adjudicative power.

From the past to the present, since the establishment of the Constitutional Court of Thailand for the first time after the promulgation of the Constitution of the Kingdom of Thailand, B.E. 2540 (1997), most of the Constitutional Court's rulings have been followed by the National Assembly, the Council of Ministers, courts, independent organs and State agencies. As provided in all of the constitutions of the Kingdom of Thailand that the Constitutional Court's rulings shall be final and binding on all of State organs.

Last but not least, since the establishment of the Constitutional Court according to the Constitution of the Kingdom of Thailand B.E. 2540 (1997) on 11th April, 1998, until now for 23 years, the Constitutional Court has performed its function remarkably well, so it is definitely certain that it will keep its outstanding records in the future according to the motto of our Court "*[a]dhere the Rule of Law, Uphold Democracy and Protect Rights and Liberties of the People*."

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TRNC CONSTITUTIONAL COURT: ENFORCEMENT OF JUDGMENTS

Hale A. Dağlı

SUPREME COURT OF THE TURKISH REPUBLIC OF NORTHERN CYPRUS

TRNC CONSTITUTIONAL COURT: ENFORCEMENT OF JUDGMENTS

Hale A. Dağlı[*]

ABSTRACT

The Constitutional Court's main role is to decide upon constitutionality of any law made by the General Assembly and interpretation of any provision of the Constitution.

TRNC Constitutional Court's jurisdiction powers which are regulated under the TRNC Constitution include the Court's power to annul a statute, decree, rules etc. which is inconsistent with any provision of the Constitution and to decide upon issues referred to it by Courts on questions of unconstitutionality of any law or decision or any provision thereof. The Court also has power to decide upon questions referred to it by the President of the Republic and give its opinion regarding any law or any provision of the law's inconsistency with the Constitution at any time prior to the promulgation. In addition to these powers the Court under the Political Parties Statute (No:49/2015) has the duty to inspect the political parties' financial status and decide whether their proceeds are consistent with the law. The Court's financial review powers under this Law are quite extent and in practice the enforcement of these decisions differ from the other types of decisions made by the Court.

There is no right to individual application to the Constitutional Court so in terms of enforcement and coming into effect of the Constitution Court's judgments most of the judgments come into effect directly. Otherwise under common law powers the Supreme Court has power to make a mandamus order on application by a party to the proceeding, ordering certain matters to be done in accordance with the decision of the Court. Enforcement and coming into effect of the decisions in practical terms will be reviewed under each duty and power above mentioned.

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INTRODUCTION

The Constitutional Court consists of five Supreme Court judges and it has exclusive jurisdiction to adjudicate finally on all matters concerning the Constitution. The jurisdiction of the Court is stated under the Constitution. The main types of suits the Court deals with are annulment suits, reference of questions of unconstitutionality made by lower courts and Supreme Court Judges. One other type of legal suit is reference made by the President of the Republic to seek opinion on unconstitutionality before promulgation of a new statute. The Court has the sole jurisdiction to decide upon interpretation of any provision of the Constitution. Under TRNC Constitution there is no right for individual application to the Court. The Court has a quite different role than the ones just mentioned which is to inspect the finances of the political parties and review whether their finances and practices are lawful.

Only under this statutory duty the Court has power to make orders similar to ordinary courts and the enforcement procedure may become an issue. However, in practice there have only been a few cases on this matter.

PART ONE

A. Annulment Suits

Under Article 147 of the Constitution The President of the Republic, political parties represented in the Assembly of the Republic, political groups and at least nine deputies or other associations, institutions or trade unions on matters concerning their existence and functions, may directly initiate an annulment suit in the Constitutional Court on the ground that a law, decree, rules, Rules of the Assembly of the Republic, decision of the Assembly of the Republic, regulations, or any of the provision thereof, is repugnant to or inconsistent with any provision of the Constitution.

The annulment suit can only be initiated by the President of the Republic, political parties represented in the Assembly of the Republic, political groups and at least nine deputies or other associations, institutions or trade unions on matters concerning their existence and functions.

There is no individual right to apply for an annulment suit in the Constitutional Court. The groups or entities who can apply are exclusively mentioned under Article 147.

Any law, decree, rules, Rules of the Assembly of the Republic, decision of the Assembly of the Republic, regulations or any provisions thereof, the annulment of which has been decided upon by the Constitutional Court, for being inconsistent with the Constitution, shall be null and void as from the date of publication in the Official Gazette of the reasoned judgment if not otherwise stated by the Court in its judgment.

B. Reference of Questions of Unconstitutionality by Courts to the Supreme Court

Under Article 148 of the Constitution a party to any judicial proceedings, including proceedings on appeal, may, at any stage thereof, raise the question of the unconstitutionality of any law or decision or any provision thereof which is material for the determination of any matter at issue in such proceedings and thereupon the Court shall reserve the question for the decision of the Constitutional Court, and stay further proceedings until such question is determined by the Constitutional Court.

Judgments of the Constitutional Court shall be binding on the Court by which the question has been reserved and on the parties to the proceedings.

If the Court decides that the law or decision or any provision thereof is unconstitutional, such decision shall, unless the Constitutional Court decides to the contrary, so operate as to make such law or decision or any provision thereof inapplicable to such proceedings only.

This means that when the Constitutional Court decides that a provision of any law is unconstitutional in a case referred by the lower court or Supreme Court, the decision only binds the parties to that case. In terms of enforcement the procedure is as such; when the lower court refers the question of unconstitutionality to the Constitutional Court, the court referring the question at the same time delays and stays the judicial proceeding until the outcome of the Constitution Court's decision. When the Constitution Court decides upon the issue of whether the referred

law or any provision thereof is unconstitutional or not, the lower court is bound to apply this decision and continue judicial proceedings in accordance with the decision of the Constitution Court.

PART TWO

Regarding the enforcement of Constitutional Court's judgments recent case law on this matter is about an annulment suit.[1] The Parliament passed a new statute allowing the state health workers to be able to practice in private clinics which meant that health workers employed by the state could at the same practice in private. This new statute was annulled by the Constitutional Court in 2011 in an annulment suit and thus by the decision of the Court it became unlawful for the state health workers to work in private clinics or hospitals. However even after the annulment judgment, the Ministry of Health did not initiate any disciplinary measures against state health workers who kept working in private clinics or hospitals. In 2015 the Union of Private Working Doctors filed an application against the Health Ministry for an order of mandamus to be made by the Supreme Court.

In 2017 the Supreme Court issued an order of mandamus which stated that the Minister of Health should use his legal powers regarding the issue of state health workers who unlawfully practice in private[2]. The order specified that the Minister should exercise his powers within six months starting from the issue date of the mandamus order to take action and act according to the law.

CONCLUSION

In conclusion, there is no specific law or department for the execution of the judgments of the Constitutional Court. As Cyprus used to be a British colony, the common law rules and provisions are still a part of the jurisdiction. Although from time to time enforcement of the judgments of the Court in practice may become problematic, this problem is addressed by mandamus orders which derive from common law powers of the Courts to secure the enforcement of judgments.

1 Case Reference: *Birleştirilmiş Anayasa Mahkemesi:2,4,5 ve 8/09 D.2/2011,* URL: www.mahkemeler.net.

2 Case Reference: *Yargıtay/Asli Yetki: 1/2015 D.1/2017,* URL: www.mahkemeler.net.

CURRENT PROBLEMS IN EXECUTION OF JUDGEMENTS: CONSTITUTIONAL JUSTICE (UKRAINIAN EXPERIENCE)

Liuchyia Spesyvtseva
Volodymyr Andrushchenko

CONSTITUTIONAL COURT OF UKRAINE

CURRENT PROBLEMS IN EXECUTION OF JUDGEMENTS: CONSTITUTIONAL JUSTICE (UKRAINIAN EXPERIENCE)

Liuchyia Spesyvtseva[*]
Volodymyr Andrushchenko[**]

ABSTRACT

The presentation provides analysis of the law on execution of judicial acts of the Constitutional Court of Ukraine and the relevant practice of enforcing its judicial acts. In particular, it states that judgments and opinions adopted by the Constitutional Court of Ukraine shall be binding, regardless of whether they set out specific procedures for their execution, or not. The execution status of judicial acts depends on the content of their provisions, which may require taking different actions for their execution. The Parliament or other state bodies do not always properly execute the judgments according to which they are obliged to change the relevant legal regulation. According to the current legal regulation, the Court does not have the authority to apply coercion to enforce its judgments and opinions; the Court is only empowered to demand the relevant bodies' written confirmation on the execution of the judgments, compliance with the opinions.

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I. BRIEF ANALYSIS OF THE LAW ON EXECUTION OF JUDICIAL ACTS OF THE CONSTITUTIONAL COURT OF UKRAINE

The Constitutional Court of Ukraine (hereinafter: "the Court") is the body of constitutional jurisdiction that ensures the supremacy of the Constitution of Ukraine; decides on conformity of laws of Ukraine or other acts in cases prescribed by the Constitution of Ukraine with the Constitution of Ukraine; provides official interpretation of the Constitution of Ukraine; as well as exercises other powers under the Constitution of Ukraine. It should be noted the Court is a constitutional body which activity is based on the principles of the rule of law, independence, collegiality, transparency, reasonableness, and the binding nature of its judgments and opinions (Article 147 of the Constitution of Ukraine; Article 1 of the Law of Ukraine "On the Constitutional Court of Ukraine", dated 13 July, 2017 № 2136-VIII (hereinafter "the Law")).

Judgments and opinions[1] adopted by the Court shall be binding, final and may not be challenged; laws, other legal acts or their separate provisions that are declared unconstitutional lose legal force from the day the Court adopts the judgment on their unconstitutionality, unless otherwise established by the judgment itself, but not earlier than the day of its adoption (Article 151-2, Article 152.2 of the Constitution of Ukraine).

The Constitution of Ukraine and the Law govern procedure for execution of judgments of the Court.

The Law authorizes the Court to determine within the judgment or opinion the procedure for and the terms of the execution thereof,

1 An opinion of the Court is a judicial act that shall be delivered by the Grand Chamber in the cases concerning: 1) conformity with the Constitution of Ukraine of applicable international treaties of Ukraine or of international treaties to be submitted to the Verkhovna Rada of Ukraine (the Parliament) for its consent to a binding nature thereof; 2) conformity with the Constitution of Ukraine (constitutionality) of the questions to be put, on a popular initiative, to an all-Ukrainian referendum; 3) observance of the constitutional procedure for investigating and considering a case on removal of the President of Ukraine from office through impeachment; 4) conformity of draft legislation on amendments to the Constitution of Ukraine with Articles 157 and 158 of the Constitution of Ukraine; 5) violation by the Verkhovna Rada of the Autonomous Republic of Crimea of the Constitution of Ukraine or laws of Ukraine; 6) conformity of the regulations of the Verkhovna Rada of the Autonomous Republic of Crimea with laws of Ukraine and the Constitution of Ukraine (Article 85 of the Law). Judgment of the Court is a judicial act, that shall be approved on constitutionality of the laws of Ukraine and other legal acts of the Verkhovna Rada of Ukraine, acts of the President of Ukraine, acts of the Cabinet of Ministers of Ukraine, legal acts of the Verkhovna Rada of the Autonomous Republic of Crimea and on official interpretation of the Constitution of Ukraine (Article 84 of the Law).

and oblige relevant government authorities to provide monitoring of the execution of such judgment or the compliance with such opinion (Article 97.1). The Court may also demand from the relevant authorities a written confirmation of the execution of a judgment or the compliance with an opinion (Article 97.2).

In accordance with the Regulations of the Court[2] (hereinafter: "the Regulations") the Court monitors the execution status of the judgment or the compliance with the opinion by collecting relevant information thereof, as well as summarizing the execution practice of its judicial acts. The monitoring mentioned above is one of the tasks of the Court's Secretariat. As a result of such monitoring, the Court decides the issues related to the non-execution with its judgments and the non-compliance with its opinions at the Court's sessions. Thus, the Court may address a written request to public authorities, local governments, their officials in order to obtain information, answers to questions or clarifications on actions (measures) aimed at execution of judgments and complying with opinions. The request shall specify the deadline for providing a response. If information provided on such a request indicates the non-execution of judgments, the non-compliance with opinions, or if the monitoring results provide information on their non-execution/non-compliance, the Court considers the issues related to take action in order to prosecute officials for failure to execute judgments or comply with opinions of the Court. Simultaneously the Court resolves the issue on inclusion of relevant information in the Court's annual information report (§§ 77, 78).

Failure to execute judgments or to comply with opinions of the Court shall entail liability under the law (Article 98 of the Law). In particular, according to the Criminal Code of Ukraine, intentional failure of an official to execute judgments or to comply with opinions of the Court is punishable by imprisonment for three to eight years with deprivation of the right to hold certain positions or engage in certain activities for up to three years (Article 382.4 of the Criminal Code of Ukraine). This crime is classified as a serious crime in accordance with the national law (Article 12.5 of the Criminal Code of Ukraine).

2 The Regulations of the Constitutional Court of Ukraine were approved by the Resolution of the Constitutional Court of Ukraine dated February 22, 2018 № 1-ps/2018 and set the order of internal work of the Court.

At the same time, the Court does not currently have a practice of taking action in order to prosecute officials for intentional failure to execute judgments or to comply with opinions of the Court.

II. CONCERNING THE PRACTICE OF ENFORCING JUDICIAL ACTS OF THE COURT

A. The Court has formed a number of legal positions (some kind of *ratio decidendi*) on the binding nature of its judicial acts:

> *"[A]dditional determinations within the judgments or opinions of the Constitutional Court of Ukraine and the inclusion of procedures to be followed for their execution do not cancel or replace the general mandatory nature of the requirement of their execution. Regardless of whether the judgments or opinions of the Constitutional Court of Ukraine set out specific procedures for their execution, any laws, legal acts or individual provisions, which have been declared constitutionally invalid are not to be applied (because they are invalid) as of the date of the judgment concerning their constitutional invalidity by the Constitutional Court of Ukraine"*[3];

> *"[…] the obligation to enforce judgments of the Constitutional Court of Ukraine is the requirement of the Constitution of Ukraine, which has the highest legal force in respect of all other normative legal acts. This eliminates the possibility of a body of public authority, including the Parliament, body of local self-government and their officials to reproduce the provisions of legal acts declared unconstitutional by the Constitutional Court of Ukraine, except the cases when the provisions of the Constitution of Ukraine, due to the non-conformity to which a specific act (individual provisions) was declared unconstitutional, were subsequently amended in the manner envisaged in Chapter XIII of the Constitution of Ukraine"*[4];

> *"[…] the reintroduction of a legal regulation that the Constitutional Court of Ukraine declared unconstitutional gives grounds for an assertion as to the violation of the constitutional regulations according to which laws and other normative legal acts are adopted on the basis*

3 Sixth paragraph of item 4 of the motivation part of the Judgment of the Court dated December 14, 2000 № 15-rp/2000.

4 Second and third paragraphs of item 3.3 of the motivation part of the Judgment of the Court dated June 10, 2010 № 16-rp/2010.

of the Constitution of Ukraine and shall conform to it." (Article 8.2 of the Constitution)[5]

B. An analysis of the Court's case law over the last 4 years reveals that during this period the Court has approved judgments and delivered opinions that generally did not contain any recommendations for their execution. In such cases, in order to execute them, the Parliament and other public authorities shall take appropriate action on their own. The Court defined the execution procedure in some judgments or formulated recommendations to the Parliament and other public authorities to fill the gaps, eliminate the collisions in existing laws and other regulations, or to bring them into conformity with the Constitution of Ukraine. According to the information contained in the relevant annual information reports[6], the Court has repeatedly stated that not all its judgments have been executed. At the same time, it should be noted that the necessary draft laws have been submitted to the Parliament in order to execute the judgments, which are currently being considered.

It is worth marking the positive practice of the Court's judgments execution.

For instance, on June 13, 2019, the Court approved its Judgment № 4-r/2019 on the unconstitutionality of the provisions of Article 392.2 of the Criminal Procedure Code of Ukraine, which stipulated the impossibility of a timely appeal review of a first-instance court's decision on the extension of the preventive measure of detention on remand. At the same time, the Court obliged the Parliament to bring the regulation mentioned above into conformity with the Constitution of Ukraine and the Court's Judgment. The Court also obliged the Parliament to implement such a mechanism to guarantee the right to liberty for an accused (who has been remanded in custody during the criminal proceedings before a court of first instance), which should protect constitutional rights and freedoms of other participants to the criminal procedure and guarantee procedural principles, in particular reviewing a case in reasonable time while not preventing to achieve

5 Second sentence of second paragraph of item 7 of the motivation part of the Judgment of the Court dated June 08, 2016 № 4-rp/2016.

6 See: *Щорічна інформаційна доповідь КСУ. Конституційний Суд України. Офіційний вебсайт* (Annual information report of the CCU. Constitutional Court of Ukraine's Official website) URL: https://ccu.gov.ua/storinka/shchorichna-informaciyna-dopovid-ksu (visited on 29 July 2021).

the objectives of justice (paragraph 3 of the motivating part of the Judgment). The Parliament adopted the law[7] amending a number of articles of the Criminal Procedure Code of Ukraine in order to execute the Court's Judgment.

On April 24, 2018, the Court approved the Judgment № 3-r / 2018 on the unconstitutionality of the provisions of Article 216.6 of the Criminal Procedure Code of Ukraine, according to which investigators of the State Penitentiary Service of Ukraine conduct pre-trial investigation of crimes committed on its territory or in its premises. The Court also obliged the Parliament to bring this regulation into conformity with the Constitution of Ukraine and this Judgment. On October 4, 2019, the Parliament adopted the law[8] that excluded these provisions from the Code and thus the investigation of mentioned crimes is referred to the jurisdiction of the National Police.

CONCLUSION

Judgments and opinions adopted by the Court shall be binding, regardless of whether they set out specific procedures for their execution, or not. It should also be noted that the execution status of judicial acts depends on the content of their provisions, which may require to take different actions for their execution. In particular, the execution of the Court's judgment on constitutionality of a legal act means the continuation of its application; declaring a legal act unconstitutional excludes automatically the possibility of its application and the execution status of judgments mentioned above is appropriate. At the same time, it should be stated that the Parliament or other state bodies do not always properly execute the judgments according to which they are obliged to change the relevant legal regulation.

According to the current legal regulation, the Court does not have the authority to apply coercion to enforce its judgments and opinions; the Court is only empowered to demand the relevant bodies' written confirmation on the execution of its judgments or their compliance with its opinions.

7 The Law of Ukraine "On amendments to the Criminal Procedure Code of Ukraine to enforce the Judgment of the Constitutional Court of Ukraine on appealing the court's decision to extend the term of detention" dated December 2, 2020 № 1027-IX.

8 The Law of Ukraine "On amendments to certain legislative acts of Ukraine concerning the improvement of certain provisions of criminal procedure legislation" dated October 4, 2019, № 187-IX.

NEW CONSTITUTIONAL LAW "ON THE CONSTITUTIONAL COURT OF THE REPUBLIC OF UZBEKISTAN" AND CERTAIN ISSUES OF THE IMPLEMENTATION OF DECISIONS OF THE CONSTITUTIONAL COURT

Sukhrob Norbekov

CONSTITUTIONAL CORT OF THE REPUBLIC OF UZBEKISTAN

NEW CONSTITUTIONAL LAW "ON THE CONSTITUTIONAL COURT OF THE REPUBLIC OF UZBEKISTAN" AND CERTAIN ISSUES OF THE IMPLEMENTATION OF DECISIONS OF THE CONSTITUTIONAL COURT

Sukhrob Norbekov[*]

The Constitutional Court has an important place in the system of State authorities, whose activities are aimed at ensuring the supremacy of the Constitution and protecting the constitutional rights and freedoms of citizens.

The beginning of the modern stage of the development of constitutional justice is stipulated by the fundamental changes in the judicial and legal system initiated by the President Shavkat Mirziyoyev. In accordance with the Action Strategy on five priority development areas of the Republic of Uzbekistan in 2017-2021, adopted on its initiative fundamental reforms are also being carried out in the field of democratization of constitutional justice.

In accordance with the Action Strategy, a new Constitutional Law "On the Constitutional Court of the Republic of Uzbekistan" was recently adopted on April 27, 2021, which contains provisions aimed at democratizing constitutional proceedings, improving the effectiveness of constitutional control, as well as strengthening the sovereignty and independence of the Constitutional Court.

The new law has expanded the range of subjects who have the right to appeal to the Constitutional Court. Now, the right to appeal to the Constitutional Court is also possessed by the Deputy Commissioner for Human Rights of the *Oliy Majlis* (Ombudsman) - the Commissioner for the Rights of the Child, the National Center for Human Rights of the

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Republic of Uzbekistan, the Presidential Commissioner for Protection of Rights and Legitimate Interests of Entrepreneurs, as well as citizens and legal entities.

The institution of constitutional complaint was introduced by the law. Citizens and legal entities have the right to appeal to the Constitutional Court to verify the constitutionality of the law if the law, in their opinion, violates their constitutional rights and freedoms, does not comply with the Constitution of the Republic of Uzbekistan and is applied in a specific case, the consideration of which is completed in court and all other judicial remedies have been exhausted.

In accordance with Article 4 of the Law, the Constitutional Court determines whether laws and resolutions of houses of parliament, decrees, decisions and orders of the President of the Republic of Uzbekistan, government regulations, decisions of local State authorities, interstate contractual and other obligations of the Republic of Uzbekistan are in conformity with the Constitution;

Determines whether constitutional laws and laws on the ratification of international treaties of the Republic of Uzbekistan are in conformity with the Constitution, prior to their signing by the President of the Republic of Uzbekistan;

Interprets the Constitution and laws;

Consider the appeal of the Supreme Court, initiated by the courts, on the conformity of the Constitution with the normative legal acts to be applied in a particular case;

The Constitutional Court also considers complaints from citizens and legal entities whose constitutional rights and freedoms, in their opinion, are violated by a law applied in a particular case that is not in accordance with the Constitution.

The Constitutional Court also considers other cases within its competence by the Constitution and laws.

In accordance with Article 67 of the Law, the final decisions of the Constitutional Court on the merits of the case examined on the constitutionality of the normative legal act, interstate contractual and other obligations of the Republic of Uzbekistan and the interpretation

of the norms of the Constitution and laws are referred to as resolutions. The Constitutional Court adopts a resolution in the name of the Republic of Uzbekistan.

In accordance with Article 73, the decision of the Constitutional Court is final and not subject to appeal.

A regulatory act or part thereof, which is deemed to be incompatible with the Constitution by decision of the Constitutional Court, shall cease to apply.

A public authority which has adopted an act recognized by the Constitutional Court as incompatible with the Constitution must bring its act into conformity with the Constitution no later than one month from the date of entry into force of the decision of the Constitutional Court. The resolutions of the Constitutional Court shall come into force from the date of their official publication.

In addition, in accordance with the Law, resolutions of the Constitutional Court are sent to the parties, including the state body and the official who adopted the unconstitutional act, and to other participants in constitutional proceedings.

State bodies that have adopted decisions on the basis of a regulatory act recognized as inconsistent with the Constitution must review them within one month.

The legislation of the Republic of Uzbekistan provides for measures of responsibility for the non-implementation of judicial acts, including resolutions of the Constitutional Court.

Thus, in accordance with the Code on Administrative Liability (art. 198-2), violation of the law on the execution of judicial acts entails a fine on officials from ten to fifteen basic calculation wells. Administrative penalties for this offence are applied by the bodies of the Bureau of forced execution under the Prosecutor General's Office of the Republic of Uzbekistan.

In addition, the Criminal Code also provides for liability (Art. 232) for evading the execution of a judicial act after application of an administrative sanction, as well as for perceiving the execution of a judicial act.

The Constitutional Court may request the initiation of proceedings to hold officials accountable for such offences.

Thus, the legislation of the Republic of Uzbekistan in general, the new Constitutional Law "On the Constitutional Court of the Republic of Uzbekistan," in particular, provide for mechanisms for ensuring the implementation of resolutions of the Constitutional Court, which is aimed at ensuring human rights and freedoms, and further strengthening the sovereignty and independence of the Constitutional Court.

CLOSING SPEECH OF THE NINTH SUMMER SCHOOL OF THE AACC ON CONSTITUTIONAL JUSTICE

8 September 2021, Ankara (video-conference)

Distinguished participants,

Esteemed colleagues,

I would like to extend to you all my sincere and respectful greetings. This is the end of the 9th Summer School organized on behalf of the Association of Asian Constitutional Courts and Equivalent Institutions. As known, the summer school events with different topics every year are intended for exchanging information and experience by and among the constitutional courts and equivalent institutions. This year, it is the second time we have organized an online Summer School. I hope this will be the last online Summer School we have held in this manner. I wish we will organize the next summer school face to face in Turkey.

On behalf of the Center for Training and Human Resources Development of AACC, I would like to say that we are proud of the solidarity among AACC members. Since 2013, the Turkish Constitutional Court has held Summer School programs every year with growing interest from the members as well as guest institutions. In addition to all AACC members, the Balkan courts and councils and certain African courts have supported the Summer School organization with their inspiring contributions. This year participants from 25 different countries have contributed to the summer school program. Summer School gives us, who work in the field of constitutional justice and human rights, the opportunity to cooperate, share and understand each other. In the future, the Turkish Constitutional Court is planning to invite a higher number of courts from different countries, which will allow participants to discuss human right issues from a more diverse perspective. Indeed, we take great pride in organising such events.

Esteemed colleagues,

Before concluding my speech, I would like to express that we will send you your certificates of participation and our yearly publication called "Constitutional Justice in Asia" in which the presentations delivered during the 9th summer school will be collected as soon as possible. On this occasion, I would like to thank you all for your participation and contribution to this online Summer School.

Indeed, such organizations are never as easy as they appear. It requires a great effort in the processes of both planning and organization. Hence, I would also like to extend my thanks to everyone who has contributed to the organization of the Summer School.

Hopefully, this event will lead to further and greater cooperation and collaboration between our colleagues and our institutions. I once again greet you all with my sincere respect and I extend my wishes of health, peace and prosperity to all of you.

Dr. Murat ŞEN

Secretary General of the Constitutional
Court of the Republic of Turkey

PHOTOGRAPHS FROM THE 9th SUMMER SCHOOL

Prof. Dr. Zühtü Arslan
President of the Constitutional Court of Turkey
The Opening Session of the 9th Summer School

President Arslan delivering the opening speech of the 9th Summer School

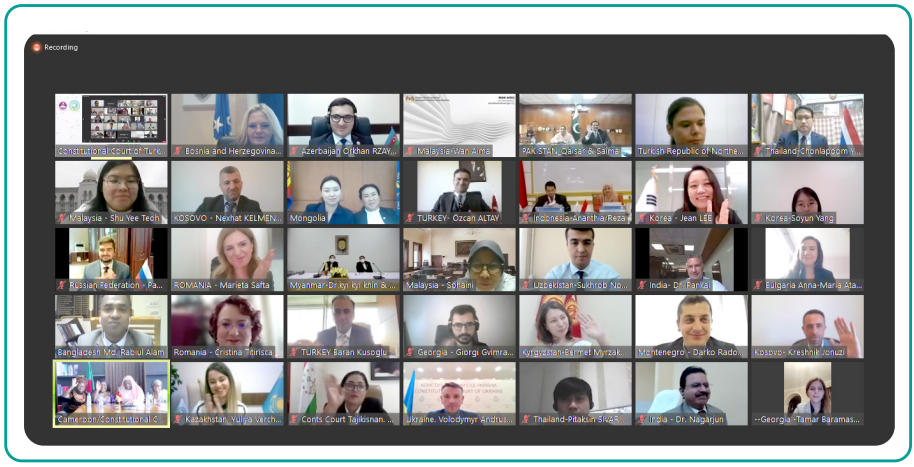
Dr. Murat Şen, the Secretary General of the Constitutional Court of Turkey, delivering the closing speech of the 9th Summer School

Mr. Yücel Arslan, the Deputy Secretary General of the Constitutional Court of Turkey, moderating the 9th Summer School

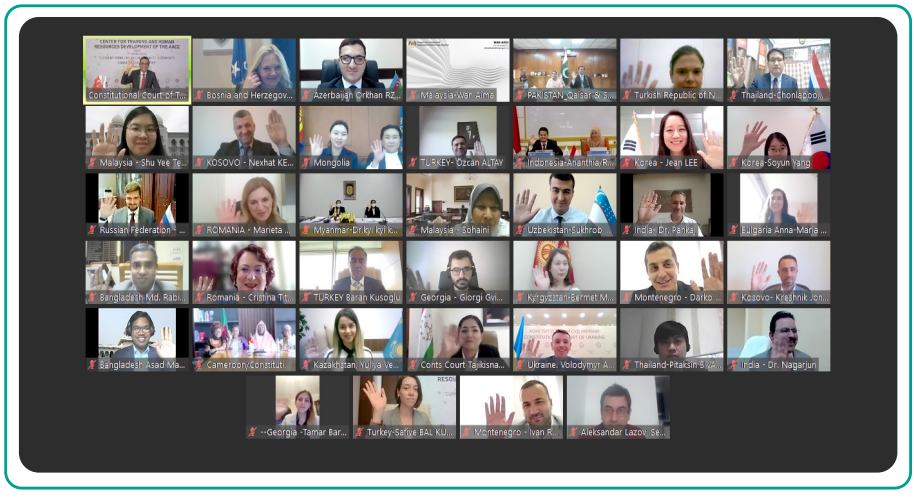
Mr. Özcan Altay, Director of the Execution of Judgments of the Constitutional Court of Turkey, delivering his presentation

Mr. Baran Kuşoğlu, the Director of the International Relations of the Constitutional Court of Turkey, greeting the participants of the 9th Summer School

Mr. Yücel Arslan presenting Ms. Özlem Aydın, Deputy Director of the International Relations



Participants greeting each other during the closing session of the 9th Summer School



Participants waving hands during the closing session of the 9th Summer School

Executive Committee of the 9th Summer School Program

Constitutional Court of the Republic of Turkey

Murat Şen
Secretary General

Yücel Arslan
Deputy Secretary General

Baran Kuşoğlu

Director of the Department of International Relations

Mr. Baran Kuşoğlu has left his position at the Constitutional Court of Turkey as of 30th September 2021

Özlem Talaslı Aydın

Deputy Director of the Department of International Relations

Korhan Pekcan

Officer at the Department of International Relations

Safiye Bal Kuzucu

Translator-Interpreter at the Department of International Relations

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(In alphabetical order)

Constitutional Court of the Republic of Albania

Ela Elezi
Legal Adviser at the Legal service Unit

Constitutional Court of the Republic of Azerbaijan

Orkhan Rzayev
Senior Adviser at the Sector of Control Over Execution of Court's Decisions

Supreme Court of Bangladesh

Md. Rabiul Alam

Chief Metropolitan Magistrate at the Metropolitan Court of Chattogram

Al Asad Md. Mahmudul Islam

Joint District and Session Judge at the District Court of Sylhet

Constitutional Court of Bosnia and Herzegovina

Marijana Sladoje

Judicial Associate in the Office of the Registrar

Constitutional Court of Republic of Bulgaria

Anna-Maria Atanasova
Legal expert at the Specialized Administration

Constitutional Council of the Republic of Cameroon

Akoni Terrence Asuh
Head of the Department of
Administrative and Financial Affairs

Hamadjoda
Registrar-in-Chief at the
Registry Service

Penkwang Yvonne Doh
Senior Court Registrar at the
Registry Service

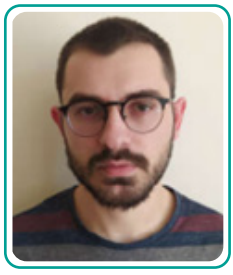
Nana Sylviane Nickaise
Court Registrar at the
Registry Service

Kongfon Linda Mangah
Court Registrar at the
Registry Service

Council of Europe

Işık Batmaz
Legal Expert at the Department for the Execution of Judgments

Constitutional Court of Georgia



Giori Gvimradze
Senior Legal Adviser at the
Department of Legal Provision and Research

Tamar Baramashvili
Senior Legal Adviser at the
Department of Legal Provision and Research

Supreme Court of the Republic of India

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Registrar at the Judicial Department of the High Court of Telanga, Hyderabad

Pankaj

Deputy Director-cum-Additional Registrar at the Centre for Research and Planning

Constitutional Court of the Republic of Indonesia

Ananthia Ayu Devitasari

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Center of Research and Case Study

Muhammad Reza Winata

Researcher at the
Center for Research and Case Study

Constitutional Council of the Republic of Kazakhstan

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Expert at the Department of Legal Support and International Cooperation Apparatus

Constitutional Court of the Republic of Korea

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Rapporteur Judge at the
Civil and Political Rights Division

Soyun Yang
Rapporteur Judge at the
Civil and Political Rights Division

Constitutional Court of the Republic of Kosovo

Nexhat Kelmendi
Senior Constitutional Legal Advisor
at the Legal Unit

Kreshnik Jonuzi
Constitutional Legal Advisor
at the Legal Unit

Supreme Court of the Kyrgyz Republic

Zarina Esenalieva
Head of the Department for Analysis of the Execution of the Decision and Systematization of Legislation

Bermet Myrzakanova
Consultant at the Expert and
Analytical Department

Federal Court of Malaysia

Sohaini binti Alias
Head of the Mediator Centre of the Seremban Courts

Wan Aima Nadzihan Wan Sulaiman
Head of Research Unit

Shu Yee Teoh
Research Officer to the Hon. Dato' Mohamad Zabidin bin Mohd. Diah at the Court of Appeal of Putrajaya

Constitutional Court of Mongolia

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Referent at the Research Center

Gantuya Dulaanjargal
Referent at the Research Center

Constitutional Court of Montenegro

Ivan Radojičić
Constitutional Court Adviser at the
Normative Department

Darko Radonjić
Constitutional Court Adviser at the
Normative Department

Constitutional Tribunal of the Union of Myanmar

Kyi Kyi Khin
Deputy Director of the
Judicial Department

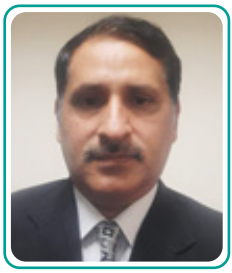
May Kyawt Mhue
Assistant Director of the
Procedural Department

Constitutional Court of the Republic of North Macedonia

Alexandar Lazov
Secretary

Supreme Court of Pakistan

Syeda Saima Shabbir
Senior Research Officer at the
Judicial Department



Qaisar Abbas
Senior Research Officer at the
Judicial Department

Constitutional Court of Romania

Marieta Safta
First Assistant Magistrate at the
Assistant Magistrate's Body

Cristina Titirişcă
Assistant Magistrate at the
Assistant Magistrate's Body

Constitutional Court of the Russian Federation

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Counsellor at the Department of International Relations and Research of Constitutional Review Practice

Pavel Ulturgashev

Counsellor at the Department of International Relations and Research of Constitutional Review Practice

Constitutional Court of the Republic of Tajikistan

Nurlyaminzoda Gulnora Abdulyamin

Head of the Department of Legal Support for the Activities of Judges

Constitutional Court of the Kingdom of Thailand

Chonlapoom Yensuang

Constitutional Court Academic Officer at the Division of International Relations and International Affairs

Pitaksin Sivaroot

Constitutional Court Academic Officer at the Division of International Relations and International Affairs

Constitutional Court of the Republic of Turkey

Özcan Altay

Director of the Execution of Judgments

Supreme Court of the Turkish Republic of Northern Cyprus

Hale Dağlı
Senior District Court Judge at the
Nicosia District Court

Constitutional Court of Ukraine

Volodymyr Andrushchenko
Chief Consultant at the Department of Law

Liuchyia Spesyvtseva
Chief Consultant at the Department of Law

Constitutional Court of the Republic of Uzbekistan

Sukhrob Norbekov

Senior Expert at the
Department of International Affaires

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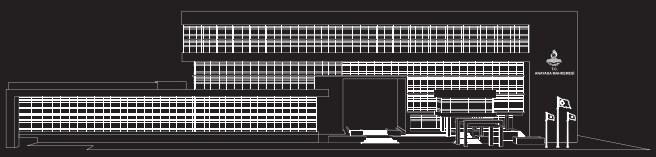
9TH SUMMER SCHOOL OF THE ASSOCIATION OF
ASIAN CONSTITUTIONAL COURTS AND EQUIVALENT INSTITUTIONS



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