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COMPARATIVE STUDY ON THE ORGANIZATION OF EXECUTION OF JUDGMENTS OF THE GERMAN AND SPANISH CONSTITUTIONAL COURTS AND THE EUROPEAN COURT OF HUMAN RIGHTS

Comparative study on the organization of execution of judgments of the German and Spanish Constitutional Courts and the European Court of Human Rights

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Abbreviations

BVerfGG	Bundesverfassungsgerichtsgesetz (Act on the Federal Constitutional Court)
ECHR	European Convention of Human Rights
ECtHR	European Court of Human Rights
FCCt	Federal Constitutional Court (German)
SCC	Spanish Constitutional Court (Spanish)
SLoCC	Spanish Law on the Constitutional Court (Spanish)
TCC	Turkish Constitutional Court
TLoCC	Turkish Law on the Constitutional Court

Introduction, background and purpose

This study compares the organisation of the implementation or execution of judgments of the German and Spanish constitutional courts in the field of fundamental rights, and of judgments of the European Court of Human Rights.

In both Spain and in Germany, the constitutional courts have a well-established practice of adjudicating on human rights questions. In Spain, there is 40 years of experience with individual applications seeking human rights protection before the Constitutional Court (the *recurso de amparo*). The system relies on the existence of a clear set of human rights standards developed by the Constitutional Court, and the consistent application and implementation of these standards by other courts as well as by the executive and legislative branches of the State. In Germany, the Federal Constitutional Court has in the more than 70 years after its official inauguration in 1951 delivered more than 250,000 decisions and the practice of constitutional rights litigation is both efficient and impactful.

The European Court of Human Rights safeguards the implementation of the Convention for the Protection of Human Rights and Fundamental Freedoms across all Council of Europe member States. It is considered one of the major developments in European legal history and the crowning achievement of the Council of Europe, and the emergence of the authority of the European Court has been described as one of the most remarkable phenomena in the history of international law, perhaps in the history of all law. Effective implementation of the European Court's judgments is a crucial cornerstone of the system: the right of petition would be illusory if a final and binding judgment remains unimplemented.

The purpose of the study is to identify practices at these courts that promote the implementation of human rights standards, and provide the Turkish Constitutional Court with a set of recommendations on how to improve the functioning of its monitoring unit based on best practices, especially regarding those aspects of judgments that have implications beyond the individual complainant.

To this end, the study analyses the practices of each of the courts relating to the implementation of their judgments in the area of fundamental rights, especially with regard to those aspects of judgments whose execution have implications beyond the individual complainant (for example, because they require a change in law or in practices).

The study is divided in separate chapters for Spain, Germany, and the European Court of Human Rights. Each is divided into six substantive sections. The first describes the remit, powers and limitations of each of the courts, and the status of their judgments. The next section in each of the chapters focuses on the execution of judgments, considers their objective and subjective effects, whether lower courts have a margin of appreciation, how implementation is supervised, and the consequences of non-implementation. The following section in each of the chapters focuses on the question of how repetitive applications or repeat

violations are avoided or otherwise dealt with. The final two substantive sections in each of the chapters discuss the issues of judicial dialogue, and the promotion of constitutional and human rights standards. Each of the chapters makes recommendations based on the practice of the court discussed.

The study ends with a consolidated set of recommendations, drawn from the practices of each of the three courts.

Comparative study on the organization of the execution of judgments: the European Court of Human Rights

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I. Introduction

The European Court of Human Rights (hereinafter the ECtHR or the Court) is considered as “one of the major developments in European legal history and the crowning achievement of the Council of Europe”. The emergence of the authority of the European Court of Human Rights has been described as one of “the most remarkable phenomena in the history of international law, perhaps in the history of all law”.¹ Some practitioners and theoreticians refer to the ECtHR and to the European system of human rights protection as a new and unique legal system which is the most effective human rights regime the world has known.² Looking from the perspective of the case law of the ECtHR, the Court has pointed out that the mission of the system set up under the Convention for the Protection of Human Rights and Fundamental Freedoms (hereafter the European Convention on Human Rights, or the Convention) is to determine, in the general interest, issues of public policy, thereby raising the standards of protection of human rights and extending human rights jurisprudence throughout the community of the Convention states.³ In its 2020 judgment in the case of *N.D. and N.T. v. Spain*, the Court emphasised the role of the Convention as a “constitutional instrument of European public order” in the field of human rights.⁴ As the Court has emphasized in its case law, the Convention is intended to guarantee rights that are not theoretical or illusory, but practical and effective.⁵ Nevertheless, the right of petition would be illusory if a final and binding judicial decision were allowed to remain inoperative.

The Committee of Ministers of the Council of Europe has recognised the vital importance of the speedy and effective execution of the Court’s judgments for the credibility and efficacy of the Convention as a constitutional instrument of the European public order on which the

¹ See Michael O’Boyle, “On reforming the operation of the European Court of Human Rights”, *European Human Rights Law Review*, Issue 1, p. 1 and Richard S. Kay, “The European Convention on Human Rights and the Control of Private Law” (2005) E.H.R.L.R 479.

² Alec Stone Sweet, From the Point of View of National Judiciaries: The Role of National Courts in the Implementation of the Court’s Judgments, “Dialogue between judges, European Court of Human Rights, Council of Europe, 2014” available at https://echr.coe.int/Documents/Dialogue_2014_ENG.pdf accessed 11 October 2022.

³ *Konstantin Markin v. Russia [GC]*, Application No. 30078/06, 22 March 2012, § 89.

⁴ *N.D. and N.T. v. Spain [GC]*, Applications Nos. 8675/15 and 8697/15, 13 February 2020, § 110; and earlier in *Bosphorus Hava Yolları Turizm ve Ticaret Anonim Şirketi v. Ireland [GC]*, Application No. 45036/98, 30 June 2005, § 156.

⁵ see *Soering v. the United Kingdom*, Application no. 14038/88, 7 July 1989, § 87.

democratic stability of the continent depends.⁶ Implementation of the ECtHR's judgments is the collective responsibility of the European Court, Committee of Ministers, national governments, parliaments and national judges. The first paragraph of Article 46 of the Convention sets out the obligation on the contracting states to abide by the Court's judgments. The remaining paragraphs set the framework for the procedural modalities to assess the steps taken by a state to fulfil this obligation.

The study is divided into five parts, followed by conclusions and recommendations. The focus of the analysis is predominantly on the implications of the execution of judgments on human rights that in practice create systemic problems (referred to as the 'objective effect' of judgments). The aim of this study is to provide the Turkish Constitutional Court with a set of recommendations on how to improve the functioning of its monitoring unit, based on the best European examples, especially regarding those aspects of judgments that have implications beyond the individual complainant.

II. European Court of Human Rights

a) Remit, powers, limitations

The European Convention on Human Rights as an international instrument gives effect to certain of the rights stated in the Universal Declaration of Human Rights in judicial procedure and makes them binding. Envisaged by the Convention and with the aim to ensure the observance of the engagements undertaken by the high contracting parties, the ECtHR functions on a permanent basis. Based on Article 34, the Court may receive applications from any person, non-governmental organisation or group of individuals claiming to be the victim of a violation by one of the High Contracting Parties of the rights set forth in the Convention or the protocols thereto. That is why the most progressive provision of the Convention is undoubtedly Article 34, which "has removed the principal limitation by which the position of the individual in international law was traditionally characterised."⁷ The setting up of a Court whose jurisdiction is binding on all states parties to the Convention represents the basic mechanism for supervising compliance by the high contracting parties with the implementation of the rights guaranteed under the Convention.

The right of individual application enshrined in Articles 34 and 35 of the Convention is the most distinctive feature of this supervisory mechanism. The Court is the only international

⁶ The three high-level conferences on the future of the Court, which took place in Interlaken (February 2010), İzmir (April 2011), and Brighton (April 2012), acknowledged the fundamental importance of the execution of the Court's judgments for the effectiveness of the Convention system.

⁷ Van Dijk P., Van Hoof F., Van Rijn A, Zwaak L. (eds.) (2006), *Theory and Practice of the European Convention on Human Rights*, Fourth edition, Antwerp – Oxford. p. 51.

court to which any individual, non-governmental organisation, or group of individuals has access for the purpose of enforcing their Convention rights. The right of individual application is an essential part of the system as well as a basic feature of European legal culture in this field. This protection mechanism confers on the Court simultaneously a role of individual supervision as well as a ‘constitutional’ mission. The former consists in verifying the conformity with the Convention of any interference by a state with individual rights and freedoms and making findings as to a potential violation by the respondent state. Its constitutional mission “leads it to lay down common principles and standards relating to human rights and to determine the minimum level of protection which states must observe”.⁸

Individual complaints may be decided by the Court sitting in the formation of Single judge, as a Committee, as a Chamber, or as a Grand Chamber of seventeen judges.

A single judge may declare inadmissible or strike out of the Court’s list of cases an application submitted under Article 34 when such a decision can be taken without further examination. The decision is final. If the single judge does not declare an application inadmissible or strike it out, the case is forwarded to a Committee or to a Chamber for further examination.

The competences of *Committees of three judges* are prescribed by Article 28 of the Convention. In respect of an application submitted under Article 34, a Committee may, by a unanimous vote, declare it inadmissible or strike it out of its list of cases when such a decision can be taken without further examination; or declare it admissible and at the same time render a judgment on the merits if the underlying issue in the case concerning the interpretation or the application of the Convention or the Protocols is already the subject of well-established case law of the Court. Decisions and judgments of Committees are final. If the judge elected in respect of the contracting party concerned is not part of the Committee, it may at any stage of the proceedings invite that judge to take the place of one of the other members of the Committee, having regard to all relevant factors.

Chambers may decide on the admissibility and merits of individual applications submitted under Article 34, if no decision is taken under Article 27 or Article 28, or if no judgment has been rendered under Article 28. Namely, on the basis of Article 27 or Article 28, a single judge or committee may declare inadmissible or strike out of the Court’s list of cases an application submitted under Article 34, when such a decision can be taken without further examination. A decision on admissibility may be taken separately. A Chamber decides on the admissibility and merits of interstate applications. The decision on admissibility must be taken separately unless the Court, in exceptional cases, decides otherwise. When a case pending before a Chamber raises a serious question affecting the interpretation of the Convention or the Protocols thereto, or when the resolution of a question before the Chamber might have a result that would be inconsistent with a judgment previously delivered by the Court, the

⁸ Explanatory Report to Protocol No. 14.

Chamber may, at any time before it has rendered its judgment, relinquish jurisdiction in favour of the Grand Chamber.

The *Grand Chamber* determines applications submitted either when a Chamber has relinquished jurisdiction, or when the case has been referred to it. The Grand Chamber also decides on issues referred to the Court by the Committee of Ministers when the Committee of Ministers considers that a high Contracting Party has failed to abide by a final judgment in a case to which it is a party, and it considers requests for advisory opinions.

The Court may initiate a pilot judgment procedure and adopt a pilot judgment when the facts of an application reveal, in the respondent state concerned, the existence of a structural or systemic problem or a similar dysfunction which has given rise or may give rise to similar applications. For further clarifications, we will come back to the issues of the pilot judgment in Section IV.

When an individual application concerns an issue that is already settled in the Court's caselaw, a friendly settlement may be pursued. To this end, and once an application has been declared admissible, the Registrar, acting on the instructions of the Chamber or its President, enters into contact with the parties with a view to securing a friendly settlement of the matter in accordance with the Convention. The Chamber will take any steps that appear appropriate to facilitating such a settlement. The friendly-settlement negotiations are confidential and without prejudice to the parties' arguments in the contentious proceedings. No written or oral communication and no offer or concession made in the framework of an attempt to secure a friendly settlement may be referred to or relied on in the contentious proceedings. If the Chamber is informed by the Registrar that the parties have agreed to a friendly settlement, it verifies that the settlement is based on respect for human rights as defined in the Convention and the Protocols thereto and strikes the case out of the Court's list. The Court's decision is confined to a brief statement of the facts and of the solution reached. This decision is transmitted to the Committee of Ministers, which supervises the execution of the terms of the friendly settlement as set out in the decision.

When an individual application concerns an issue of well-established case law but no friendly settlement has been reached, a unilateral declaration may be made. This can be requested by the respondent state when an applicant has refused the terms of a friendly-settlement proposal. Such a request must be accompanied by a declaration clearly acknowledging that there has been a violation of the Convention in the applicant's case together with an undertaking to provide adequate redress and, as appropriate, to take necessary remedial measures. A declaration must be filed in public, and adversarial proceedings concerning it must be conducted separate from and with due respect for the confidentiality of any friendly-settlement proceedings. If it is satisfied that the declaration offers a sufficient basis for finding that respect for human rights as defined in the Convention and the Protocols thereto does not require it to continue its examination of the application, the Court may strike the application

out of the list, either in whole or in part, even if the applicant wishes the examination of the application to be continued.

b) Status of judgments in individual applications

The Court may receive applications from any person, non-governmental organisation, or group of individuals claiming to be the victim of a violation by one of the high contracting parties of the rights set forth in the Convention or the Protocols thereto. The Court may at any stage of the proceedings decide to strike an application out of its list of cases when the circumstances lead to the conclusion that the applicant does not intend to pursue his or her application or the matter has been resolved or if, for any other reason established by the Court, continuing the examination of the application is no longer justified. The Court may restore an application to its list of cases if it considers that the circumstances justify such a decision.⁹

If the Court finds that there has been a violation of the Convention or the Protocols thereto, and if the internal law of the high contracting party concerned allows only partial reparation to be made, the Court will, if necessary, afford just satisfaction to the injured party. The judgment of a Chamber becomes final when the parties to the case declare that they will not request that the case be referred to the Grand Chamber; three months after the date of the judgment if referral of the case to the Grand Chamber has not been requested; or when the panel of the Grand Chamber rejects a referral request. Within a period of three months from the date of a Chamber judgment, any party to the case may request that the case be referred to the Grand Chamber. A panel of five judges of the Grand Chamber may accept a referral request if the case raises a serious question affecting the interpretation or application of the Convention or the Protocols thereto, or a serious issue of general importance. If the panel accepts the request, the Grand Chamber decides the case by means of a judgment. The judgment of the Grand Chamber is final and will be published.

No other international court is confronted with a workload of such magnitude while also having the demanding responsibility of setting the legal standards of compliance required under the Convention. The Court's statistics for 2021 disclose an increase in the number of incoming applications allocated to a judicial formation. This can be explained principally by an increase in the number of allocated applications coming from Poland, Russia, Turkey, and Greece. In 2021, 44,250 applications were allocated to a judicial formation, an overall increase of 6% compared with 2020 (41,700). 27,100 of these were identified as single-judge cases likely to be declared inadmissible (an increase of 1% in relation to 2020). As in previous years, single-judge applications continue to be processed as soon as they are identified as qualifying for such a procedure. In addition, 17,150 applications were identified as probable

⁹ *Burmych and others v. Ukraine*, Applications no 46852/13, 47786/13, 54125/13, 12 November 2017.

Chamber or Committee cases (an increase of 15% compared to 2020).¹⁰ It is commonplace to say that the ECHR has become a victim of its own success.¹¹ To resolve this problem, the concept of “mass claims” was introduced to deal with “a potentially vast number of applications arising out of very different scenarios such as a single event of great impact (like confiscation, nationalization or similar measures) or the existence of an underlying structural dysfunction in a Member State”.¹² These are well-known ‘clone’ cases based on repetitive violations.

In ‘clone’ or mass cases the single violation is only a small part of a larger, systemic violation. In such cases it is evident that individual justice is not always and not necessarily the best solution; justice done to the individual applicant would not substantially contribute to the elimination of the root of the violation. In a systemic or mass violation, the root problem is usually a lack of domestic legislation or a systemic problem in the implementation of legislation. In such cases, the Court may initiate the pilot judgment procedure and adopt a pilot judgment.

Beside pilot judgment procedures, another new working method of the Court is prescribed in Protocol 16. Under this, the Court may, at the request of the highest courts and tribunals of a High Contracting Party, give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the Convention and the Protocols thereto. The requesting court or tribunal may seek an advisory opinion only in the context of a case pending before it, and is required to give reasons for its request as well as provide the relevant legal and factual background. A panel of five judges of the Grand Chamber decided whether to accept the request, and the Grand Chamber delivers the advisory opinion. Advisory opinions of the Court are not binding.

The Court gives reasons for its judgments as well as for decisions declaring applications admissible or inadmissible. If a judgment does not represent, in whole or in part, the unanimous opinion of the judges, a judge may issue a statement of dissent or deliver a separate opinion concurring with or dissenting from the judgment. It is the responsibility of the Registrar to publish all judgments, decisions, and advisory opinions on the Court’s case-law database (HUDOC: <https://hudoc.echr.coe.int/>), except for single-judge decisions, decisions taken by a Section President or a Section Vice-President acting as a single judge, and

¹⁰ Available Analysis of statistics 2021 https://echr.coe.int/Documents/Stats_analysis_2021_ENG.pdf, accessed 13 October 2023.

¹¹ Laubner T. (2004) “Relieving the Court of its Success? - Protocol No. 14 to the European Convention on Human Rights”, 47 German Yearbook of International Law 691.

¹² Gattini A. (2007), “Mass claims at the European Court of Human Rights”, in Breitenmoser et al. (eds), Human rights, democracy, and the rule of law - Menschenrechte, Demokratie und Rechtsstaat - Droits de l’homme, démocratie et état de droit: liber amicorum Luzius Wildhaber, Zürich-Dike-Baden-Baden, Nomos, p. 272.

summarily reasoned committee decisions. The final judgment of the Court is transmitted to the Committee of Ministers, which supervises its execution.

III. Execution of judgments (individual applications)

a) Objective and subjective effect of judgments

The Court's judgments are essentially declaratory in nature and it is primarily for the state concerned to decide, subject to supervision by the Committee of Ministers, the individual and general measures through which it will discharge its obligations, provided that these means are compatible with the conclusions set out in the Court's judgment. Only in certain special circumstances has the Court found it useful to indicate to a respondent state the type of measures that might be taken to put an end to the situation which has given rise to the finding of a violation, other than the payment of a sum of money by way of just satisfaction. Usually, this happens in cases addressing systemic problems, in particular in pilot judgments.¹³ The pilot-judgment procedure was conceived as a response to the growth in the Court's caseload, caused by a series of cases deriving from the same structural or systemic dysfunction, and to ensure the long-term effectiveness of the Convention machinery.¹⁴ Thus, the effect of the pilot-judgment procedure is to place the granting of relief to victims in follow-up cases within the framework of execution proceedings. The question whether the respondent state has complied with its obligations under the final judgment will be considered by the Committee of Ministers and, if necessary, by the Court itself.

It is not necessarily easy to execute a judgment of the Court. That is why it is important to understand how the Court, which in theory played no role in the execution of its judgments, has over the years had to introduce procedures (such as pilot judgments procedures) to ensure that its judgments are executed.

In deciding which individual measures to take, the state party must bear in mind that the primary aim of the judgment is to achieve *restitutio in integrum*. The aim of *restitutio in integrum* is to put the applicants, to the extent possible, in the position in which they would have been had the requirements of the Convention not been disregarded. Therefore, individual measures should be timely, adequate, and sufficient to ensure the execution of the judgments for the violations found by the Court. Individual measures for the applicants concerned may relate to the obligation for restitution. When a state has been found responsible for a human

¹³ See *Broniowski v. Poland* (merits) [GC], application no. 31443/96, 22 June 2004, §§ 190-191.

¹⁴ *Hutten-Czapska v. Poland* [GC], application no. 35014/97, 19 June 2006, § 238; *Kurić and Others v. Slovenia* [GC], Application no. 26828/06 12 March 2014; *Association of Real Property Owners in Łódź and Others v. Poland* (dec.), application no. 3485/02, 8 March 2011, §§ 86-87; and *Anastasov and Others v. Slovenia* (dec.), application no. 65020/13, 18 October 2016, §§ 94-96.

rights violation it is under an obligation to make restitution, consisting of restoring the situation which existed before the human rights violation was committed, so long as restitution is not “materially impossible” and “does not involve a burden out of all proportion to the benefit deriving from restitution instead of compensation”.¹⁵ While restitution is the rule, the state may be exempted (either fully or in part) from this obligation if it can show that the circumstances justify it.¹⁶ It is for the respondent State to remove any obstacles in its domestic legal system that might prevent the applicant’s situation from being adequately redressed.¹⁷ If national law does not allow or allows only partial reparation to be made for the consequences of the breach, Article 41 empowers the Court to afford the injured party such satisfaction as appears to it to be appropriate.¹⁸

In some cases, the Court may find it useful or necessary to indicate to the respondent state the type of measures that might or should be taken to put an end to the situation that gave rise to the finding of a violation. In some cases, the nature of the violation found may leave no choice as to the individual measures required.¹⁹ For example, the Court does not have jurisdiction to order the reopening of proceedings. However, when an individual has been convicted following proceedings that have entailed breaches of the right to a fair trial, the Court may indicate that a retrial or the reopening of the case, if requested, represents in principle an appropriate way of redressing the violation. On the other hand, in some of its judgments the Court has itself explicitly ruled out the reopening of a case, following a finding of a violation of the right to a fair trial in proceedings that have been concluded by final judicial decisions.²⁰ In line with abovementioned approach, for example, in the specific context of cases concerning the independence and impartiality of the Turkish national security courts, the Court has held that, in principle, the most appropriate form of redress would be for the applicant to be given a retrial by an independent and impartial tribunal.²¹ That approach was confirmed in *Sejdovic v. Italy*, where the Court set out general principles. The Court summarised that where an individual has been convicted following proceedings that have entailed breaches of the requirements of Article 6 of the Convention, a retrial, or the reopening of the case, if requested, represents in principle an appropriate way of redressing the violation. However, the specific remedial measures, if any, required of a respondent State in order for it to discharge its obligations under the Convention must depend on the particular circumstances of the individual case and be determined in light of the Court’s judgment in that case, and with due regard to the Court’s case-law. The respondent State remains free to choose the means by which it will discharge its obligation to put the applicant, as far as

¹⁵ See *Broniowski v. Poland* (merits) [GC], application no. 31443/96, 22 June 2004, §§ 180-182.

¹⁶ *Ilgar Mammadov v. Azerbaijan* [GC], Application No. 15172/13, 29 May 2019, § 151.

¹⁷ *Maestri v. Italy* [GC], Application No. 39748/98, 17 February 2004, § 47.

¹⁸ *Brumărescu v. Romania (just satisfaction)* [GC], Application No.28342/95, 29 January 2001, § 20.

¹⁹ *Hirsi Jamaa and Others v. Italy* [GC], Application no. 27765/09, 23 February 2012, §§ 209-211; *Assanidze v. Georgia* [GC], application no. 71503/01, 8 April 2004, § 202; *Al-Saadoon and Mufdhi v. the United Kingdom*, application no. 61498/08, 2 March 2010, § 171; *Savridin Dzhrayev v. Russia*, application no. 71386/10, 25 April 2013, §§ 252-254.

²⁰ *Moreira Ferreira v. Portugal (no. 2)* [GC], application no. 19867/12, 11 July 2017, §§ 49 and 51, and *Guðmundur Andri Ástráðsson v. Iceland* [GC], application no. 26374/18, 1 December 2020, §§ 311-314.

²¹ see *Gençel v. Turkey*, Application no. 53431/99, 23 October 2003, § 27.

possible, in the position he would have been in had the requirements of the Convention not been disregarded, provided that such means are compatible with the conclusions set out in the Court's judgment and with the rights of the defence.²² The question of reopening proceedings has also been considered where the Court has found a violation of Article 4 of Protocol No. 7 (the right not to be tried or punished twice).

To facilitate the effective implementation of its judgments, the Court may adopt a pilot judgment procedure, enabling it to clearly identify any structural problems that underly violations of the Convention and to indicate specific measures or actions to be taken by the respondent state to remedy them. The Court may order general measures in cases where the main aim is to prevent similar violations occurring in the future.²³

In ratifying the Convention, contracting states undertake to ensure that their domestic law is compatible with the Convention.²⁴ Under Article 46, the Court may indicate the type of individual and/or general measures that can be taken in order to put an end to the situation which has been found to violate the Convention.²⁵ The measures taken should be such as to remedy the Court's finding of a violation in respect of a general practice, so that the system established by the Convention is not compromised by repetitive applications stemming from the same root cause.²⁶

It falls to the Committee of Ministers to evaluate the implementation of individual and general measures prescribed by the judgment of the Court.²⁷

b) Margin or discretion left to lower courts/other implementing bodies

The "margin of appreciation" is a legal doctrine developed by the ECtHR that refers to the space for manoeuvre that the Court is willing to grant national authorities in fulfilling their obligations under the European Convention on Human Rights.²⁸ The doctrine contains concepts that are analogous to the principle of subsidiarity. The purpose of the margin of appreciation is to balance individual rights with state interests and to resolve any potential conflicts. The margin of appreciation provides the flexibility needed to avoid damaging confrontations between the Court and member states and enables the Court to balance the sovereignty of member states with their obligations under the Convention. As the Court has

²² *Sejdovic v. Italy* ([GC], no. 56581/00, 1 March 2006).

²³ The Court has drawn attention to the Recommendation of the Committee of Ministers of 12 May 2004 (Rec (2004)6) on the improvement of domestic remedies, in which the Committee of Ministers reiterates that states have the general obligation to solve the problems that underly any violations that have been found.

²⁴ *Scordino v. Italy (no. 1)* [GC], Application No. 36813/97, 29 June 2006, §§ 232-234.

²⁵ *Suso Musa v. Malta*, Application No. 42337/12, 23 July 2013, § 120.

²⁶ *Baybaşın v. the Netherlands*, Application No. 13600/02, 6 July 2006, § 79.

²⁷ *Greens and M.T. v. the United Kingdom*, Applications Nos. 60041/08 60054/08, 23 November 2010, § 107.

²⁸ Greer S (2000), *The Margin of Appreciation: Interpretation and Discretion under the European Convention on Human Rights*, Council of Europe, Strasbourg.

stated: “The Court points out that the machinery of protection established by the Convention is subsidiary to the national systems safeguarding human rights. The Convention leaves to each Contracting State, in the first place, the task of securing the rights and liberties it enshrines.”²⁹ The principle of subsidiarity means that the state should itself decide democratically what would be appropriate. Therefore, the main responsibility of ensuring the implementation of the rights provided in the Convention rests with the member states, and the role of the Court and the Committee of Ministers is limited to ensuring whether the relevant authorities have done so within the limits of the margin of appreciation available to them.

States enjoy a broad margin of appreciation when it comes to executing judgments. The mechanism for the execution of the Court’s judgments as set out in Article 46 of the Convention provides, firstly, that judgments are binding on respondent states and, secondly, that their execution is subject to the supervision of the Committee of Ministers. In practice, the Court has become more proactive regarding the execution of its judgments. This may be a consequence of the commonly accepted reality that execution entails not only individual measures, but also general measures aimed at eliminating the systemic problems that cause mass violations found by the Court. In the context of the Court’s case-law, the main question has been whether the Court has the power to prescribe in the operative part of a judgment exactly how the respondent state should redress the violation. Occasionally, the Court has included indications with relevance to the execution process concerning both individual and general measures.³⁰ Taking note of the institutional balance under the Convention between the Court and the Committee of Ministers, and of the states’ responsibility in the execution process, the ultimate choice of measures to be taken remains with states, under the supervision of the Committee of Ministers.³¹

Since the Convention forms part of national law under the legal systems of member states, the remedies available at the national level must be effective and well known to citizens. Indeed, they constitute the first line of defence for the rule of law and human rights. It is for the national courts in the first instance to protect human rights within their domestic legal system and ensure respect for the rights safeguarded by the Convention. The principle of subsidiarity underlying this institutional and judicial framework is one of the cornerstones of the human rights protection system in Europe.³²

Based on practice, the domestic courts are best placed to act in the dissemination of the Court’s case-law in the high contracting states. It is crucial that national courts accept their

²⁹ *Handyside v. The United Kingdom*, Application No. 5493/72, 4 November 1976, § 48, paraphrasing its judgment in the “Belgian Linguistic” case, Application Nos. 1474/62, 1677/62, 1691/62, 1769/63, 1994/63, and 2126/64, 29 July 1968, § 10 in fine.

³⁰ See for example *Kurić and Others v. Slovenia* (just satisfaction) [GC], no. 26828/06, § 136, 12 March 2014.

³¹ *Ilgar Mammadov v. Azerbaijan* [GC], Application No. 15172/13, 29 May 2019, § 182.

³² Report of Group of Wise Persons to the Committee of Ministers (15 November 2006) paragraph 15 and 16, available at https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805d7893 accessed on 12 October 2022.

responsibility to understand and implement the judgments of the ECtHR. Therefore, judgments of the Court must be well reasoned, be clear and consistent, widely disseminated and translated, both literally and figuratively, into the domestic legal order.³³

c) Supervision of implementation/execution of judgments, especially regarding objective effect

Under Article 46 of the Convention, the supervision of the execution of the Court's judgments is part of the duty of the Committee of Ministers. The Registrar sends copies of the judgment to the parties, to the Secretary General of the Council of Europe, to any third party, including the Council of Europe Commissioner for Human Rights, and to any other person directly concerned. The original copy, duly signed, is placed in the archives of the Court.

As indicated above, the Court is entitled to indicate or order the necessary general and/or individual measures. Nevertheless, under the Convention it is the Committee of Ministers that has primary responsibility in matters of execution. It is important that States should be allowed to decide upon and give effect to the most appropriate execution measures. This practice facilitates the task of the Committee of Ministers and the execution department in an effective manner and is based on the principle of subsidiarity. Cognisant of this practice, the Court leaves space to the Committee of Ministers to exercise its own jurisdiction, and to states in choosing the appropriate measures for execution. Given the various means available to achieve the required results as well as the variety in nature of the issues involved, the Committee of Ministers is better placed than the Court to assess the specific measures to be taken. It is thus for the Committee of Ministers to supervise, based on information provided by the respondent State and with due regard to the applicant's evolving situation, the adoption of such measures as are feasible, timely, adequate, and sufficient to ensure the maximum possible reparation for the violations found by the Court.³⁴

Although the Committee is the executive body of the Council of Europe and as such its work has a political character, the supervision of the execution of judgments is a particular task which consists of applying the relevant legal rules. Supervision of the execution process concerns ensuring compliance by a contracting party with its obligations in international law, under the Convention. Those obligations are based on the principles of international law relating to cessation, non-repetition, and reparation.³⁵

³³ "Dialogue between judges, European Court of Human Rights, Council of Europe, 2014" Julia Laffranque, pg.9 available at https://www.echr.coe.int/Documents/Dialogue_2014_ENG.pdf accessed on 12 October 2022.

³⁴ *Ilgar Mammadov v. Azerbaijan [GC]*, Application No 15172/13, 29 May 2019, § 155.

³⁵ Rule 6.2 of the Rules of the Committee of Ministers for the supervision of the execution of judgments and of the terms of friendly settlements, also see *Ilgar Mammadov v. Azerbaijan [GC]*, Application No 15172/13, 29 May 2019, §§ 161-162.

If the Committee of Ministers considers that the supervision of the execution of a final judgment is hindered by a problem concerning the interpretation of the judgment, it may refer the matter to the Court for a ruling on this question. A referral decision requires a two-thirds majority vote of the representatives entitled to sit on the committee. If the Committee of Ministers considers that a contracting party refuses to abide by a final judgment in a case to which it is a party, it may, after serving formal notice on that state and by a two-thirds majority vote refer to the Court the question whether that state has failed to fulfil its obligations from the final judgment. If the Court finds that that is the case, it refers the case back to the Committee of Ministers for consideration of the measures to be taken. If the Court finds that the state has fulfilled its obligations, the Committee of Ministers closes its examination of the case.

Article 46, as amended by Protocol No. 14, recognizes that the Court has a complementary role to play in the execution process. The supervision mechanism under Article 46 of the Convention provides a comprehensive framework for the execution of the Court's judgments, reinforced by the practice of the Committee of Ministers. The structure of the Convention rests on the general assumption that public authorities in the member states act in good faith. This structure includes the supervision procedure, which presupposes that judgments are executed in good faith and in a manner that is compatible with the "conclusions and spirit" of the judgment concerned. The Court has reiterated that failure to implement a final, binding judicial decision would be likely to lead to situations incompatible with the principle of the rule of law which the contracting states have undertaken to respect when they ratified the Convention.³⁶

d) Consequences of non-implementation, especially regarding objective measures

The Parties to the Convention have a collective duty to preserve the Court's authority and the Convention system's credibility and effectiveness. It is the duty of the Committee of Ministers to consider situations where a high contracting party refuses, expressly or through its conduct, to comply with the final judgment of the Court in a case to which it is party. So-called infringement proceedings should be brought only in exceptional circumstances. They may not be initiated unless formal notice of the Committee's intention to bring such proceedings has been given to the High Contracting party concerned. Such formal notice must be given six months before proceedings are lodged, unless the Committee decides otherwise, and takes the form of an interim resolution. In such a case the referral decision of the matter to the Court must be reasoned and should concisely reflect the views of the high contracting party concerned. The Committee of Ministers is represented before the Court by its Chair unless the Committee decides upon another form of representation.

³⁶ See *Kavala v. Turkey [GC]*, Application No. 28749/18, 11 July 2022.

To ensure respect for the principles of binding force and execution of the Court's judgements, their rapid and full execution is vital. This is even more important in cases concerning structural problems, to ensure that the Court is not overburdened with repetitive applications. For this reason, it has been considered essential to strengthen the powers of the Committee of Ministers. It is important to note that the infringement procedure does not seek to reopen the question of violation, which has already been decided in the Court's first judgment. The infringement proceedings in the Grand Chamber and the Grand Chamber's judgment should suffice to secure execution of the Court's initial judgment by the state concerned.

The Committee of Ministers should bring infringement proceedings only in exceptional circumstances. Nonetheless, it appeared necessary to give the Committee of Ministers, as the competent organ for supervising the execution of the Court's judgments, a wider range of means of pressure to secure the execution of judgments. The ultimate measure available to the Committee of Ministers is recourse to Article 8 of the Council of Europe's Statute, which provides for suspension of a state party's voting rights in the Committee of Ministers or, in extreme cases, expulsion from the Council of Europe. This is an extreme measure which would prove counter-productive in most cases. Infringement proceedings are therefore seen as a more productive procedure: the Court must in a final ruling decide whether its earlier judgment has been executed in good faith and in a manner compatible with the "conclusions and spirit" of the judgment and determine whether the respondent State has complied with its obligations.³⁷

The Court has emphasized the competence of the Committee of Ministers to assess the specific measures to be taken by a State to ensure the maximum possible reparation for the violations found.³⁸ It has also found that the question of compliance by the high contracting parties with its judgments falls outside its jurisdiction if it is not raised in the context of the infringement procedure.³⁹

As to the time-frame relevant to the assessment of a State's alleged failure to fulfil its obligation to abide by a judgment, the Court has observed that the date on which the Committee of Ministers refers a question to the Court under Article 46 § 4 is the date by which it has deemed that the State in question has refused to abide by a final judgment within the meaning of Article 46 § 4.⁴⁰

The focus of the infringement procedure is to add pressure and to secure the execution of the Court's initial judgment. It was introduced to increase the efficiency of the supervision proceedings, and to improve and accelerate them. The supervision mechanism under the Convention provides a comprehensive framework for the execution of the Court's judgments,

³⁷ The general principles in this line are set out in the *Ilgar Mammadov* judgment (cited above, §§ 147-171).

³⁸ see *Cyprus v. Turkey* [GC], Application no. 25781/94, 10 May 2001.

³⁹ See *Mukhitdinov v. Russia*, no. 20999/14, 21 May 2015, § 114; *Mamazhonov v. Russia*, no. 17239/13, 23 October 2014, § 236; *Kim v. Russia*, no. 44260/13, 17 July 2014, § 74.

⁴⁰ see *Moreira Ferreira v. Portugal (no. 2)* [GC], no. 19867/12, 11 July 2017, § 102.

reinforced by the Committee of Ministers' practice. In infringement proceedings the Court is required to make a definitive legal assessment of the question of compliance. In so doing, the Court takes into consideration all aspects of the procedure before the Committee of Ministers, including any measures for execution indicated by the Committee.⁴¹

IV. Avoiding repetitive applications/repeat violations

As part of a package of measures to guarantee the effectiveness of the Convention machinery, in May 2004 the Committee of Ministers adopted Resolution Res(2004)3 on judgments revealing an underlying systemic problem.⁴² In this Resolution, the Committee emphasises the interest in helping the state concerned to identify underlying systemic problems and the necessary execution measures and invites the Court "to identify in its judgments finding a violation of the Convention what it considers to be an underlying systemic problem and the source of that 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".⁴³ The Court expressly referred to this resolution in its first pilot judgment, considering it in the context of the growth of its case load, particularly because of the series of cases deriving from the same structural or systemic causes.⁴⁴

As indicated in Section II above, the Court may initiate the pilot judgment procedure where the facts of an application reveal in the contracting party concerned the existence of a structural or systemic problem or another similar dysfunction which has given rise, or which may give rise to similar applications. Before initiating a pilot judgment procedure, the Court will ask for the views of the parties on whether the application under examination results from the existence of such a problem or dysfunction in the contracting party concerned, and on the suitability of processing the application in accordance with that procedure. A pilot judgment procedure may be initiated by the Court of its own motion or at the request of one or both parties. Any application selected for pilot judgment treatment will be processed as a matter of priority in accordance with the Rules of the Court. In its pilot judgment procedure, the Court will identify both the nature of the structural or systemic problem or other dysfunction as established as well as the type of remedial measures which the contracting party concerned is required to take at the domestic level by virtue of the operative provisions of the judgment. The Court may direct in the operative provisions of the pilot judgment that the remedial measures should be adopted within a specified time frame, bearing in mind the nature of the measures required and the speed with which the problem which it has identified can be remedied at the domestic level. When adopting a pilot judgment, the Court may reserve the

⁴¹ see *Egmez v. Cyprus* (dec.), no. 12214/07, 18 September 2012, § 49.

⁴² Resolution CM/Res (2004)3 of the Committee of Ministers on judgments revealing an underlying systemic problem, adopted by the Committee of Ministers on 12 May 2004 at its 114th session.

⁴³ *Ibid.*, paragraph I.

⁴⁴ *Broniowski v. Poland [GC]*, Application no. 31443/96, 22 June 2004, § 190.

question of just satisfaction either in whole or in part pending the adoption by the respondent contracting party of the individual and general measures specified in the pilot judgment. As appropriate, the Court may adjourn the examination of all similar applications pending the adoption of the remedial measures required by virtue of the operative provisions of the pilot judgment. The applicants concerned will be informed in a suitable manner of the decision to adjourn. They will be notified as appropriate of all relevant developments affecting their cases. The Court may at any time examine an adjourned application where the interests of the proper administration of justice so require. It follows that the Court's assessment of the situation complained of in a pilot judgment necessarily extends beyond the sole interests of the individual applicant and requires it to examine the case before it also from the perspective of the general measures that need to be taken in the interests of other already or potentially affected persons.⁴⁵

If the parties to the pilot case reach a friendly-settlement agreement following the pilot judgment, such an agreement will include a declaration by the respondent contracting party on the implementation of the general measures identified in the pilot judgment as well as the redress to be afforded to other actual or potential applicants. According to the rationale of the pilot judgment, therefore, the respondent State is required to eliminate the source of the violation for the future and to provide a remedy for the past prejudice suffered not only by the individual applicant(s) in the pilot case but also by all other victims of the same type of violation. The intention is that, under the umbrella of the general measures required of the respondent State, all the other victims are absorbed into the process of execution of the pilot judgment. In the event of a failure by the contracting party concerned to comply with the operative provisions of a pilot judgment, the Court will resume its examination of the applications which had been previously adjourned. The Committee of Ministers, the Parliamentary Assembly of the Council of Europe, the Secretary General of the Council of Europe, and the Council of Europe Commissioner for Human Rights will be informed of the adoption of a pilot judgment as well as of any other judgment in which the Court draws attention to the existence of a structural or systemic problem in a contracting party. Information about the initiation of pilot judgment procedures, the adoption of pilot judgments and their execution, as well as the closure of such procedures is published on the Court's website.

The most important element of the pilot judgment procedure is the demand that the respondent state resolves the large numbers of individual cases that arise from the same structural problem at the domestic level, thus implementing the principle of subsidiarity which underpins the

⁴⁵ *Hutten-Czapska*, cited above, § 238; *Wolkenberg and Others v. Poland* (dec.), no. 50003/99, 4 December 2007, § 73.

Convention system.⁴⁶ Since its first pilot judgment procedure in *Broniowski v. Poland*,⁴⁷ it has been the Court's consistent practice to include in pilot judgments, in addition to rulings in the pilot case, various procedural decisions concerning the future treatment of follow-up cases, those already communicated to the respondent state and new applications deriving from similar factual situations.⁴⁸ If appropriate, the Court has decided to communicate, on the basis of the pilot judgment, all similar applications lodged with it before the date of delivery of the judgment.⁴⁹ This practice helps all cases deriving from the same systemic root cause to be incorporated into the framework of the pilot judgment and be absorbed into the execution process.⁵⁰ However, the Court has concluded that it is not for the Court to set a deadline at this stage, noting that the Committee of Ministers is better placed to do so.⁵¹ The Court nevertheless set a period of six months for the respondent Government to provide, in cooperation with the Committee of Ministers, a precise timetable for the implementation of the appropriate general measures in the case of *Rezmives and others v. Romania*.⁵²

If, following a pilot judgment, the respondent state fails to adopt general measures of implementation and continues to violate the Convention, the Court may have no choice but to resume the examination of all similar applications that had previously been adjourned, and to adopt a judgment in each of them to ensure the effective observance of the Convention. However, when the Court has resumed its examination of similar applications in the context of a pilot judgment and the execution process for that judgment has failed to eliminate the root cause of the systemic problem, the Court has found that in some cases the re-examination of all pending similar applications can be incapable of achieving its intended purpose. For example, in *Burmych and Others v. Ukraine*,⁵³ the Court found that pending and future cases were part and parcel of the process of execution of the pilot judgment. The Court proceeded to strike the pending similar cases out of its list, and it considered that their resolution, including the granting of individual measures of redress, had to be encompassed by the general measures of execution to be put in place by the respondent State under the supervision

⁴⁶ *Varga and Others v. Hungary*, Application Nos. 14097/12, 45135/12, 73712/12, 34001/13, 44055/13, and 64586/13, 4 March 2015, § 96.

⁴⁷ *Broniowski v. Poland [GC]*, Application No. 31443/96, 22 June 2004.

⁴⁸ The Court has often decided to adjourn similar cases pending the implementation of general measures by the respondent State. It has discontinued its examination of similar applications already pending before it and suspended the processing of any applications not yet registered at the date of delivery of the pilot judgment (*Greens and M.T. v. the United Kingdom*, Application Nos. 60041/08 60054/08, 23 November 2010, §§ 121-122)

⁴⁹ *Rutkowski and Others v. Poland*, Application No. 72287/10, 7 July 2015, §§ 226-227.

⁵⁰ *Burmych and Others v. Ukraine*, Application Nos. 46852/13, 47786/13, 54125/13, 56605/13, and 3653/14, 12 July 2017, § 166.

⁵¹ *Greens and M.T. v. the United Kingdom*, Application Nos. 60041/08 60054/08 23 November 2010, § 122.

⁵² *Rezmives and others v. Romania*, Application Nos. 61467/12, 39516/13, 48231/13, and 68191/13, 29 April 2017, § 126.

⁵³ *Burmych and Others v. Ukraine*, Application Nos. 46852/13, 47786/13, 54125/13, 56605/13, and 3653/14, 12 July 2017, §§ 176- 199.

of the Committee of Ministers. The Court considered that no useful purpose would be served, in terms of the aims of the Convention, by the Court continuing to deal with these cases.

In some cases, the Court has relied on Article 32 of the Convention, which provides for the Court's jurisdiction to decide on its own competence.⁵⁴ In a different situation, the Court had the occasion to point out that, under Article 19 of the Convention, it had jurisdiction to "ensure" the observance of the engagements undertaken by States in the Convention.⁵⁵ Most pilot judgments have been successfully implemented by means of general remedial measures introduced by the respondent States.⁵⁶ When States have introduced amending legislation providing existing and potential victims of a systemic violation with relief at domestic level such that the Court's further examination of similar applications was no longer justified, the Court has struck those cases out of its list on the ground that the matter had been resolved, within the meaning of Article 37 § 1 (b) of the Convention, through the adoption of general measures, including compensatory remedies for redress with retrospective effect.⁵⁷

V. Judicial Dialogue

The implementation of the judgments of the ECtHR is the collective responsibility of the Court, the Committee of Ministers, national governments, parliaments, and national judges. The Court must fully acknowledge the complexity of the national judge's task in enforcing Convention rights, which is why the Court takes into account domestic law and context as well as the views of a respondent state. However, because the margin of appreciation shrinks as transnational consensus on higher standards of rights protection emerge, the ECtHR has proclaimed that in considering national law and practice, no national court is alone. It is therefore important to analyse the role of an international court in the implementation of its own judgments and the role of the national courts in the implementation of the Court's judgments. One of the crucial issues in the relationship between the Court and the national authorities is the principle of subsidiarity, as emphasised by the Protocol No. 15 to the Convention. This principle also imposes obligations on states and on their courts as regards the execution of the Court's judgments. The highest national courts, even indirectly, play a

⁵⁴ *Verein gegen Tierfabriken Schweiz (VgT) v. Switzerland* (no. 2), Application No. 32772/02, 30 June 2009.

⁵⁵ *Manushaqe Puto v. Albania*, Application No. 604/07, 43628/07, 46684/07, and 34770/09, 4 November 2014.

⁵⁶ See, for instance, *Demopoulos and Others*, Application nos. 46113/99, 3843/02, 13751/02, 13466/03, 10200/04, 14163/04, 19993/04, 21819/04, 1 March 2010; *Nagovitsyn and Nalgiyev v. Russia* (dec.), nos. 27451/09 and 60650/09, 23 September 2010; *Latak v. Poland* (dec.), no. 52070/08, 12 October 2010; *Müdürlük Turgut and Others v. Turkey* (dec.), no. 4860/09, 26 March 2013; *Balakchiev and Others v. Bulgaria* (dec.), no. 65187/10, 18 June 2013; *Valcheva and Abrashev v. Bulgaria* (dec.), nos. 6194/11 and 34887/11, 18 June 2013; *Techniki Olympiaki A.E. v. Greece* (dec.), no. 40547/10, 1 October 2013; *Stella and 10 Other applications v. Italy* (dec.), no. 49169/09, 16 September 2014; and *Xynos v. Greece*, no. 30226/09, 9 October 2014.

⁵⁷ see *Wolkenberg and Others*, cited above, §§ 72-77; *E.G. v. Poland and 175 Other Bug River applications v. Poland* (dec.), no 50425/99, §§ 22-25, 23 September 2008 (extracts); *Association of Real Property Owners in Łódź and Others*, cited above, §§ 82-89; and *Anastasov and Others*, cited above, §§ 89-102.

central and crucial role in the implementation of the Court's judgments on account of their position in the hierarchy of the domestic judiciary. It follows that the ECtHR and the domestic courts should treat each other with high mutual respect.

The ECtHR has been very active in developing a judicial dialogue with European constitutional, supreme, and international courts, within the framework of the Superior Courts Network. The Court has established a Knowledge Sharing Platform which brings together and systematizes all the knowledge on the Convention and on the Court's jurisprudence.⁵⁸ This provides an opportunity for direct exchange on procedural and substantive issues with the supreme and constitutional courts and other international courts as partners of the ECtHR. There are many challenges common to all national and international courts, such as human rights problems linked to migration, terrorism, and to digitalization, but also challenges concerning the execution of the final judgments of courts. All these issues are important to the advancement of the protection of human rights. The dialogue between the courts is a sign that human rights are truly universal.

There is no doubt that the ECtHR influences the standard of protection of human rights and the rule of law at the national level in member states. The interaction between the national courts and the Court in Strasbourg has a strong impact on the work of Europe's constitutional and supreme courts. It can be said that the Convention rights are the bedrock of fundamental rights, promoting the universality of human rights common to all legal systems in Europe. At the same time, there is a lot yet to be achieved. The development of the international law framework for mutual benefit should be observed as enriching and should lead toward the coherent and harmonious protection of human rights throughout Europe.

National courts, despite their various initial reservations, have over the course of time become partners in the implementation of the judgments of the Court. This process is now extremely important. A dialogue has built up because of their shared judicial responsibility. Protocol No. 16, which allows the highest national courts to lodge requests for advisory opinions and which entered into force in August 2018, strengthens this dialogue.⁵⁹ The preamble of Protocol 16 stipulates that "the extension of the Court's competence to give advisory opinions will further enhance the interaction between the Court and national authorities and thereby reinforce implementation of the Convention, in accordance with the principle of subsidiarity".⁶⁰

⁵⁸ See available at https://www.echr.coe.int/Documents/SCN_2019_ENG.pdf, accessed 12 October 2022.

⁵⁹ Protocol No. 16 to the ECHR, came into force after 10 Member States signed and ratified it: Albania, Armenia, Estonia, Finland, France, Georgia, Lithuania, San Marino, Slovenia, and Ukraine.

⁶⁰ See for example Advisory opinion requested by the Armenian Court of Cassation, Request no. P16-2021-001 from 26.4.2022 [GC].

The dialogue between the national courts and the Court is of prime importance for the effective enforcement of the Court's judgments. The national judges must be human rights judges in their respective countries and the key to successful interaction lies in mutual trust and respect. In exercising this supervision, it is important for the Court to consider the whole picture of the country's legal system and to give orientation and guidance to the State, leaving to the national authorities the final choice as to the methods to be used to achieve Convention-compatible measures, and respecting the division of powers both at the national level and between the Court and the Committee of Ministers.

VI. Promotion of Standards

a) Formal training and education

Training and education of international and national judges and lawyers are important elements for the rightful implementation of human rights protection. This is of even greater importance at times of crisis, when judges, prosecutors, and lawyers have the responsibility to ensure that public policies do not block the protection of fundamental rights. This is a priority for both the ECtHR and the national courts across Europe. The best model would be to start the education on human rights from an early age in school, to continue at university, and to be followed by training and education throughout the career of legal professionals. Professional training is the most important method through which to develop the knowledge and skills to safeguard human rights and to implement the ECtHR system at the national level. Judges have a duty to perform judicial work professionally and diligently, which implies that they should have great professional ability, acquired, maintained, and enhanced through training.⁶¹

Over the past decades, the Court, the Council of Europe, the European Union and other regional organizations have invested a significant amount of money as well as energy in developing programs for the training and education of judges, lawyers, and others in the judicial system. This has included specialized programs on European human rights standards, including concerning the execution and implementation of the judgments of the ECtHR.

The Council of Europe has adopted several recommendations and opinions on this topic. In its Opinion No. 4 of 2003, on the appropriate initial and in-service training for judges at the national and European levels, the Consultative Council of European Judges (CCJE) stated that "it is essential that judges, selected after having done full legal studies, receive detailed, in-depth, diversified training so that they are able to perform their duties satisfactorily". CCJE Opinion 9 (2006) on the role of national judges in ensuring the application of international

⁶¹ Opinion no 4 of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on appropriate initial and in-service training for judges at national and European levels.

and European law states that its aim is “to achieve a sound application of international and European law, particularly human rights law. The training of judges, availability of relevant formation and documentation as well as translation and interpretation are means to reach this goal”. Another milestone is Committee of Ministers Recommendation Rec (2004)4, on the ECHR in university education and professional training. This Recommendation calls on member states to establish stable training structures which incorporate human rights in university and professional curricula.

The work of the Council of Europe’s Human Rights Education for Legal Professionals (HELP) Programme is of particular importance to training legal professionals across the continent on fundamental rights.⁶² The 2015 Brussels Declaration called on States to “increase efforts at national level to raise awareness among members of parliament and improve the training of judges, prosecutors, lawyers and national officials on the Convention and its implementation, including as regards the execution of judgments, by ensuring that it constitutes an integral part of their vocational and in-service training, where relevant, including by having recourse to the Human Rights Education for Legal Professionals (HELP) programme of the Council of Europe...”⁶³ The HELP Programme in the Western Balkans and Turkey enhances the effectiveness of the ECHR and of its implementation at the national level in Albania, Bosnia and Herzegovina, Montenegro, Serbia, North Macedonia, and Turkey.

The training programmes of other organisations, such as the European Judicial Training Network (EJTN), also aim to enhance the knowledge of judges and other legal professionals on the implementation of judgments of the ECtHR as well as of the Court of Justice of the European Union. The EJTN presents comprehensive judicial training that utilises its expertise and training methodologies to offer initial as well as continuous training opportunities that address traditional and crucial issues through face-to-face as well as distance learning.

In line with their strategic objectives, many national judicial academies or other specialized bodies for the education and training of judges and prosecutors provide training on fundamental rights and on the case law of the Court, as well as on the implementation and execution of the Court’s judgments. In some countries, inter-ministerial or similar bodies have been established with the aim of following and facilitating the execution of the judgments of the Court. For example in the Republic of North Macedonia, the Law for the execution of the judgments and decisions of the ECtHR prescribes, in Articles 8 and 9, that the inter-ministerial

⁶² HELP is the Council of Europe’s main educational platform for legal professionals (in accordance with Recommendation (2004) 4 on the ECHR in university education and professional training).

⁶³ High-level Conference on the “Implementation of the European Convention on Human Rights, our shared responsibility” Brussels Declaration 27 March 2015, available at https://echr.coe.int/Documents/Brussels_Declaration_ENG.pdf, accessed on 13 October 2022.

commission is composed of officials representing the Ministry of Justice, the Ministry of Internal Affairs, the Ministry of Foreign Affairs, the Ministry of Labour and social policy, the Ministry of Finance, the Ministry of Education and Science, the Ministry for Health, the Ministry of Transport and Communications and the Ministry of Local Self-Government. Ex officio members of this commission are the President of the Judicial Council, the President of the Supreme Court and the Director of the Academy for training and education of judges and public prosecutors. They are responsible for the execution of the judgments of the ECtHR. They propose an action plan for the execution, and they follow the implementation of the action plan.⁶⁴

In line with the joint task of educating and training legal professionals, future strategic goals should include to continue to foster mutual trust between judges and prosecutors from different European legal systems; to increase the level of knowledge of the execution and implementation of the ECtHR judgments; to promote high standards of quality for national judicial training; to work on effective internal cooperation between institutions responsible for the implementation of ECtHR judgments; to work on external cooperation and a continued form of dialogue between the Court and national courts; and to reinforce, as far as possible, the primacy of the role of the national specialised institutions for training and education in all areas of judicial training at the national level.

Judicial training is essential for the development of competence and professionalism, and to ensure that legal professionals perform their duties with efficiency and legitimacy. All judges and prosecutors should receive training before or upon their appointment. It is equally important that all judges and prosecutors have access to continuous professional development training after their appointment and throughout their careers, and it is their responsibility to take such training, including in the area of human rights. Every member state should put in place systems that ensure that judges and prosecutors are able to exercise this right and responsibility. Judges and prosecutors should have time to undertake this training as part of their normal working hours. Training should primarily be delivered by judges and prosecutors who have been previously trained for this purpose. To ensure the successful training and education of judges, it is important to create awareness among their superiors and among national authorities responsible for setting budgets that investing in targeted training is of long-term importance. At the national level, this would normally include bodies such as ministries of justice, councils for the judiciary, councils of prosecutors, supreme judicial and prosecutorial authorities, associations of judges, presidents of courts, and heads of prosecutors' offices.

⁶⁴ Law for the execution of the judgments and decisions of the ECtHR (Official Gazette no. 67/09 from 29.05.2009 and 43/2014 from 04.03.2014)

b) Awareness raising of new judgments, particularly regarding objective measures

The system of the ECtHR is a very good example of how to raise awareness of new judgments, particularly regarding new standards and principles, or judgments that are linked with systemic problems in a country. When a judgment is pronounced, it is immediately published in the HUDOC online database. Along with the judgment, the Court also publishes a legal summary. These legal summaries can be used not only by national judges or other legal professionals, but also for research purposes, by applicants or by any other person interested in the case law of the Court.

The duty of raising awareness among the wider public about judgments and new standards set by the case law is delegated to the Court's Press service. The aim of the press service is to help media professionals with questions about the work of the Court in general, to provide publicly available information about cases (excluding any information that might be confidential), and to guide media professionals in the use of the Court's databases of previous cases and of cases which have been notified to states. Press officers of the Court are available to brief journalists by email or by phone.

The Press service of the Court generally informs the public through press releases. All press releases issued by the press service since 1 January 1999 are available in English and in French on the HUDOC database. Press releases for some high-profile cases are translated into non-official languages (for example, the *GC case El Masri* has been translated into German and Macedonian).⁶⁵

Press releases concerning Court judgments are generally published at 10 a.m. on Tuesdays and Thursdays. Upcoming Chamber and Grand Chamber judgments are announced about a week in advance in press releases that include a short summary of the cases concerned. Upcoming hearings are announced in a press release at the end of the preceding month.

The Court takes full advantage of the opportunities provided by the Internet and other information tools. Those who are interested can receive the Court's press releases systematically by following the Court on Twitter, by subscribing to the Court's RSS feeds ('Press releases'), and by subscribing to its mailing list. The Press service does not use Facebook. The Calendar of the hearings is published in advance on the website of the Court. All hearings are webcast.

⁶⁵ See [https://hudoc.echr.coe.int/eng-press#{%22fulltext%22:\[%22el%20masri%22\]}](https://hudoc.echr.coe.int/eng-press#{%22fulltext%22:[%22el%20masri%22]}), accessed 12 October 2022.

VII. Conclusions and recommendations

From the foregoing, several conclusions may be drawn.

1. The implementation of the judgments of the ECtHR is the collective responsibility of the Court, the Committee of Ministers, national governments, parliaments, and national judges. It could similarly be said that the execution of the judgments of the highest national courts, such as the constitutional courts, is the collective responsibility of the national courts, governments, legislators, and administrative bodies. The concept of the subsidiarity is built on the mutual understanding that the duty of implementing human rights rests primarily with states.
2. The lack of knowledge about the importance of the execution of judgments raises the risk of repeated violations of human rights. Therefore, it is important to bear in mind the binding effect of the judgments of the ECtHR and of the constitutional courts. For that purpose, there should be a systematic monitoring activity on the execution of judgments. The duty to enforce judgments rests with all state powers.
3. The measures to execute a judgment of the ECtHR or of a constitutional court taken by a respondent state must be compatible with the conclusions and spirit of the court's judgment. The scope of the legal obligations that flows from a final judgment is set out in the reasons given by the Court for finding a violation. To ensure their effective implementation, it is important that judgments are clear, well elaborated, and reasoned.
4. Constitutional courts might consider introducing a pilot judgment procedure as a working method to help resolve applications that stem from a structural or systemic problem or other similar dysfunction that has given rise or may give rise to multiple applications. The pilot judgment procedure aims to resolve systemic problems but also to prevent large numbers of further applications. Depending on national law and procedure, a court may be able to institute a pilot judgment procedure of its own motion. Successful pilot judgment procedures require good cooperation with the legislator as well as with the government.
5. A good example from the ECtHR for resolving individual applications that concern well established case law is the friendly settlement procedure or, where a friendly settlement cannot be reached, the procedure for unilateral declaration. This may be a good and inspiring model for national courts on how to deal with mass applications in areas where constitutional courts have already established case law. Friendly settlements and unilateral declarations may be a form of follow up after a successful pilot judgment procedure.
6. Constitutional and supreme courts in all countries must seek a balanced dialogue with the aim of improved implementation of legislation and the effective execution of judgments. A dialogue among high national courts and between high national courts

and the European Court is as important as the dialogue with legislatures and other stakeholders. A well-balanced dialogue will bring about a better understanding of the role of the judges and of the importance of the execution of the judgments.

7. In the context of the execution of the judgments of the Court, the national constitutional courts and the ECtHR need to join forces and strengthen their common work to build a stronger culture of rule of law and respect for fundamental rights and values. To attain this objective, the participation of all actors at all levels is significant. That is why the legislature should fulfil what is prescribed and required by the judgments of the constitutional courts and the ECtHR. Namely, if the execution of judgments of these courts requires legislative changes or even new legislation, this should be accepted and fulfilled by the legislator. In the same way, constitutional courts should cooperate with the national administrative organs, political bodies, and courts of all instances. Execution of the judgments of the constitutional courts will lead to a decrease in the workload of the constitutional courts and prevent repetitive applications before both the constitutional courts and the European Court.
8. With respect to all highest courts at the national level, and while being mindful that in most countries there is no hierarchy between the constitutional courts and supreme courts, the national system should be organized in such a way as to establish full respect for and the efficient execution of judgments of the constitutional court and of the ECtHR. To achieve this, various mechanisms can be established. One such mechanism is to establish periodic joint meetings of the high-level courts, the legislator, the government, and the responsible administrative bodies to discuss judgments that are in the process of execution. The annual meeting of the European Court and high-level courts from Council of Europe countries, during the opening of the judicial year, may serve as an example for such judicial dialogue.
9. For national courts, as for the European Court, it is important to maintain an open and trustful dialogue with the media. Also, it is important to continuously inform the public about new and important judgments, decisions, and working methods. National courts may follow the example of the ECtHR and take advantage of the opportunities of the internet, including social media to raise awareness of new judgments. It may be helpful to follow the example of the European Court and use networks such as Twitter or other social media.
10. The obligation to enforce the judgments applies to all state bodies; no organ is exempt. Therefore, it might be a joint task of the national governments and the Council of Europe to build public awareness on the binding effect of judgments of the European Court and of the constitutional courts. This approach would lead to a better understanding of the aim and purpose of the efficient and proper execution of the judgments. This would also help protect the integrity of the courts.
11. At the national level, a judicial press service, such as exists for the European Court, might help national constitutional courts to disseminate judgments, publications,

statements, and information notes prepared by the registry of the constitutional court. This would bring the work of the court closer to the public and result in greater awareness of and appreciation for the work of the court.

12. Press releases and short and informative legal summaries should be published by national court services. This will help in informing the public as well as legal institutions, the academic community, and civil society about the final and binding judgments of the constitutional court or of the European Court.
13. It is important to establish a network with judicial academies or other bodies responsible for training and educating judges and lawyers. Through such a network, conferences, round-table meetings with judges and prosecutors from courts of first instances, courts of appeal, and courts of cassation can be organised. This is as essential today as it was in the past. National human rights institutions such as the ombudsman or human rights and equality institution may also be involved in such meetings.

Comparative study on the organization of the execution of judgments: the German Constitutional Court

Dr. Erol Pohlreich

I. Introduction

In the more than 70 years after its official inauguration in 1951, the Federal Constitutional Court (hereafter FCCt) has delivered more than 250,000 decisions. The FCCt, which is a constitutional organ as well as a court, has encountered a significant increase in the number of cases it has to manage. Whereas the FCCt received 481 cases in its first year – including other types of proceedings as well as constitutional complaints – it now receives around 5,200 to 6,600 new constitutional complaints every year.⁶⁶ Based on the German experience, this chapter seeks to offer recommendations how TCC decisions could be implemented more effectively.

II. The German Constitutional Court

a) Remit, powers, limitations

German Law conceives the FCCt as a people's court, in other words as a court that is easily accessible for everyone and that develops its jurisprudence not only for the judiciary and the academic world but also for the broader public. Pursuant to § 90(1) Bundesverfassungsgerichtsgesetz (Act on the Federal Constitutional Court, hereafter BVerfGG),⁶⁷ any person claiming a violation of one of his or her fundamental rights or one of his or her rights under Art. 20(4) (the right of resistance against any person seeking to abolish the constitutional order), Art. 33 (equal citizenship and public service), Art. 38 (the right to general, direct, free, equal and secret elections), Art. 101 (ban on extraordinary courts and the right to jurisdiction by one's lawful judge), Art. 103 (the right to be heard, *nulla poena sine lege* and the right not to be tried or punished twice) and Art. 104 (procedural safeguards to be respected in case of deprivation of liberty) of the Basic Law⁶⁸ by a public authority may,

⁶⁶ Cf. FCCt, Jahresstatistik 2020, pp. 2 and 7, https://www.bundesverfassungsgericht.de/DE/Verfahren/Jahresstatistiken/2020/statistik_2020_node.html.

⁶⁷ An English translation of the BVerfGG can be found here: https://www.gesetze-im-internet.de/englisch_bverfgg/englisch_bverfgg.html.

⁶⁸ For an English translation of the Basic Law see https://www.gesetze-im-internet.de/englisch_gg/englisch_gg.html.

generally after having exhausted all legal remedies at his or her disposal, lodge a constitutional complaint with the FCCt.⁶⁹ Exceptions to the requirement of exhausting all legal remedies can be made if this appears unreasonable, for example if the available remedies would have had no prospect of success because the court decision that is challenged complies with established case-law.⁷⁰

The complainant can challenge any sovereign act or omission by any of the three state powers, including legislation, provided the complainant is affected individually, presently, and directly. In practice, the number of constitutional complaints that is lodged with the FCCt per year exceeds by far the number of other types of proceeding lodged with it.⁷¹

Lodging a constitutional complaint is an extraordinary legal remedy and does not extend the appeals process before the ordinary courts. The FCCt, in principle, does not examine whether the sovereign act by a public authority that is challenged complies with the standards set by ordinary law. Instead of being a ‘supreme court of appeal’ and in the spirit of a sensible division of labour vis-à-vis the ordinary courts, the FCCt only examines whether constitutional law – to be more specific: a fundamental right (Art. 1 to 19 of the Basic Law) or an equivalent right (Art. 20(4), Art. 33, 38, 101, 103 and 104 of the Basic Law) – has been violated. Exceptions to this principle must be grounded in the Basic Law. There are only a few constitutional provisions that allow the FCCt to leave no discretion to the ordinary courts when it comes to the interpretation of ordinary law. For example, pursuant to Art. 103(2) of the Basic Law, an act may be punished only if it was defined by a law as a criminal offence before the act was committed. According to the FCCt’s established case-law, this constitutional provision guarantees the specificity of criminal provisions and the monopoly of the legislator to establish criminal provisions. Inversely, the judiciary must acquit in cases that do not fall within the ambit of any criminal provision. This point of departure concerning the interpretation of Art. 103(2) of the Basic Law allows the FCCt to strictly control the ordinary courts’ interpretation of criminal provisions since any unfavourable interpretation of a criminal provision that is incompatible with its wording, the legislator’s intention or the *ratio legis* results in a violation of Art. 103(2) of the Basic Law. In essence, this approach, though frequently contested by academics and especially by members of the judiciary, permits the FCCt to verify upon a constitutional complaint directed against a criminal conviction whether the ordinary court’s interpretation of a criminal provision was correct. By means of example: Pursuant to § 142(2) N° 2 of the German Criminal Code, parties to an accident who leave the scene of the accident justifiably or excusably but who do not subsequently allow for

⁶⁹ § 90(2) BVerfGG.

⁷⁰ FCCt, Judgment of the First Senate of 17 December 2013 - 1 BvR 3139/08 -, para. 151, http://www.bverfg.de/e/rs20131217_1bvr313908en.html.

⁷¹ As per the Court’s annual report for 2021, a total of 5,332 new proceedings were lodged with the FCCt during that year. Of these, 5,059 were constitutional complaints: FCCt, Annual report 2021: https://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/Jahresbericht/jahresbericht_2021.pdf, pp. 36 et seq.

the determination of their identity, of their vehicle, and the nature of their involvement commit the offence of leaving the scene of an accident. The FCCt found a violation of Art. 103(2) of the Basic Law in a case where the complainant who had left the scene of an accident unintentionally was convicted under § 142(2) N° 2 of the German Criminal Code. It reasoned that the challenged decisions went beyond the methodologically correct interpretation of the relevant criminal provision since its wording was clear and leaving the scene of accident unintentionally did not equal leaving it justifiably or excusable.⁷²

Complaints against legislation need to be lodged within one year of the law entering into force.⁷³ Such complaints are rather an exception because individuals are rarely affected individually, presently, and directly by laws; instead, they are usually affected by sovereign acts enforcing the law. However, exceptions are possible. For instance, the FCCt has held that legal provisions that restrict classroom lessons at general education schools when incidence rates of Covid-19 exceed a certain threshold could be challenged by pupils as well as by their parents.⁷⁴ While, in principle, a complainant is only affected directly if the legislation in question does not require any act of execution, complaints against legislation are, as an exception, admissible if there is no legal recourse or if it would be unreasonable to expect the complainant to provoke an act of execution and to challenge that act before the ordinary courts. Therefore, a person who is directly or indirectly affected by a new criminal provision can lodge a complaint without having to wait for a criminal conviction. For instance, the FCCt accepted to hear constitutional complaints from seriously ill persons who wished to end their lives with the help of assisted suicide services provided by professional third parties against a new legal provision that criminalised professional assisted suicide services. The Court considered these complainants to be directly affected by the prohibition because, although the prohibition criminalised only professional service providers and not those seeking their assistance, it indirectly also restricted their liberties.⁷⁵

Sovereign acts by the administrative or by the judiciary can be unconstitutional in two ways: (1) when the complainant's fundamental rights were not respected in the application of the relevant legislation, or (2) or if the statutory provisions relied on or used are themselves unconstitutional.⁷⁶ Therefore, a complainant can also challenge legislation indirectly by challenging a sovereign act by a public authority that relies on or uses the law that he or she

⁷² FCCt, Order of the 1st Chamber of the Second Senate of 19 March 2007 - 2 BvR 2273/06 -, para. 13 et seq., http://www.bverfg.de/e/rk20070319_2bvr227306.html.

⁷³ § 93(3) BVerfGG.

⁷⁴ FCCt, Order of the First Senate of 19 November 2021 - 1 BvR 971/21 and 1 BvR 1069/21 -, para. 30, http://www.bverfg.de/e/rs20211119_1bvr097121en.html.

⁷⁵ FCCt, Judgment of the Second Senate of 26 February 2020 – 2 BvR 2347/15 et al. –, para. 195, http://www.bverfg.de/e/rs20200226_2bvr234715en.html.

⁷⁶ See § 95(3) 2nd phrase BVerfGG.

deems unconstitutional. This is possible even after expiry of the one-year time limit laid down in § 93(3) BVerfGG, provided the complaint is lodged within one month of notification of the sovereign act concerned.

The complainant is not required to be represented by a lawyer, but he or she may, of course, choose to be represented. Legal representation is only compulsory in the event of an oral hearing, which form a rare exception in the practice of the FCCt.⁷⁷ The complaint proceeding is free of charge. For these reasons, the grant of legal aid depends on the complainant's indigence, on his or her incapacity to adequately assert his or her rights on his or her own and, lastly, on the prospects of success of the complaint.⁷⁸

In order to unburden the FCCt, § 93a(1) BVerfGG subjects any constitutional complaint to an admissibility requirement. Pursuant to § 93a(2) BVerfGG, a constitutional complaint shall be admitted insofar as it has general constitutional significance or if it appears necessary in order to enforce the complainant's fundamental rights. It must be borne in mind that the necessity to enforce the complainant's fundamental rights does not only depend on the existence of a violation: admission may be refused even though there was a violation if that violation was not decisive in substance. In other words: if an ordinary court violated a fundamental right of the complainant and it is clear that the decision would have been the same without that violation, the FCCt may decide against the admission of the constitutional complaint.⁷⁹

In contrast to the situation in Türkiye, the FCCt is not empowered to decide on pecuniary compensation: in Germany, only the ordinary courts have this power.

b) Status of judgments in individual applications

Pursuant to § 31(1) BVerfGG, the decisions of the FCCt are binding on all constitutional organs of the Federation and of the Länder, as well as on all courts and all those who hold public authority. The binding effect of constitutional complaint decisions of the FCCt concerns both the operative part of the decision and its decisive reasons.⁸⁰ The binding effect differs depending on the reasons why the Court granted the complaint. All FCCt judgments that grant a constitutional complaint (hereafter referred to as 'grant decisions') have in

⁷⁷ In 2020, the FCCt only held four oral hearings in total, including other types of constitutional procedures, out of a total case load of 5,194 constitutional complaints. This was not due to the Covid-19-pandemic; the number of oral hearings per year is mostly under ten. See FCCt, Jahresstatistik 2020, p. 16: https://www.bundesverfassungsgericht.de/DE/Verfahren/Jahresstatistiken/2020/gb2020/Gesamtstatistik%2020.pdf?__blob=publicationFile&v=2.

⁷⁸ FCCt, Order of the First Senate of 21 January 1952 - 1 BvR 68/51 -, BVerfGE 1, 109.

⁷⁹ FCCt, Order of the First Senate of 8 February 1994 - 1 BvR 1693/92 -, para. 13, http://www.bverfg.de/e/rs19940208_1bvr169392.html.

⁸⁰ FCCt, Judgment of the Second Senate of 23 October 1951 - 2 BvG 1/51 -, BVerfGE 1, 14 (37).

common that the FCCt may, in addition to finding a violation of constitutional law, declare that a repetition of the contested act or omission would also violate the Basic Law.⁸¹

In theory, grant decisions of the FCCt are legally binding only in relation to the individual complainant. Most complaints lodged with the FCCt are addressed directly against decisions by ordinary courts. Pursuant to § 95(2) BVerfGG, when the FCCt grants a constitutional complaint against a decision by an ordinary court, it must reverse the ordinary court's decision. If the decision complained of was a court decision or an administrative decision subject to legal recourse, the FCCt must remand the matter to a competent court. As a rare exception to this, the FCCt is allowed to refrain from remanding the case to a competent court if the FCCt's decision leaves the competent court no margin for manoeuvre, and would require it merely to repeat the FCCt's decision. In such a situation, the FCCt may decide the case in substance and remand the matter only insofar as the decision on the costs is concerned.⁸² This situation is very rare; in most cases the ordinary courts enjoy a certain degree of discretion on how to take the fundamental rights of the individuals concerned by the matter into account.

Regardless of all this, the practical effects of grant decisions go beyond the individual case insofar as the Court sets abstract constitutional standards in its decision. After all, any public authority must be aware that its acts might be declared unconstitutional if the individual concerned lodges a constitutional complaint against it.

If the Court grants a constitutional complaint because it considers the legislation that is challenged to be directly or indirectly unconstitutional, the legal effect of the grant decision goes far beyond the individual application. In these cases, the decision of the FCCt has retroactive effect (*ex tunc*) and the legislation challenged is voided. In recognition of this far-reaching effect, only the Senate of the FCCt may declare legislation to be incompatible with the Basic Law or to be void.⁸³

Furthermore, § 35 BVerfGG allows the FCCt to specify in its decision who is to execute it; in individual cases the FCCt may also specify the method of execution. Such specifications may be helpful in cases where a law is null and void but the void is, from a constitutional point of view, unwelcome. In such situations, the FCCt obliges the legislator to adopt new statutory provisions within an adequate period of time that respect constitutional standards. In the interim, § 35 BVerfGG allows the Court *ex officio* to determine temporary provisions or to decide that the unconstitutional provisions remain in force until the expiry of the deadline that the Court has set the legislator.⁸⁴

⁸¹ § 95(1) 2nd phrase BVerfGG.

⁸² FCCt, Judgment of the First Senate of 5 June 1973 – 1 BvR 536/72 – BVerfGE 35, 202 (244 et seq.).

⁸³ § 93c(1) 3rd phrase BVerfGG.

⁸⁴ For an example see FCCt Judgment of the Second Senate of 24 July 2018 – 2 BvR 309/15 et a. –, http://www.bverfg.de/e/rs20180724_2bvr030915en.html.

III. The Execution of Judgments

a) Objective and subjective effect of judgments

Grant decisions have a subjective effect insofar as the decisions that the constitutional complaint challenges are quashed and as the case is remitted to an ordinary court which is bound to respect the constitutional standards that the FCCt will have specified in the grant decision. This kind of decision is legally binding only between the individual complainant and the State as the constitutional complaint proceeding is a proceeding initiated by the complainant and directed against an act of a public authority. From a legal perspective, it does not have a legally binding effect in similar cases. Nevertheless, any grant decision against an individual act must be understood as a warning addressed to State authorities not to make the same mistake.

In the event the complaint challenges a statutory provision, this provision can be nullified; in this case, the grant decision's effects are not limited to the individual complainant but they reach every individual that falls within the ambit of the nullified provision. In that sense, grant decisions against statutory provisions have an objective effect insofar as they reach beyond the individual case of the complainant. This objective effect does not need to be executed by other State institutions; it is, in principle, self-executing.

However, the question arises how to deal with individual decisions that are based on a statutory provision that the FCCt nullified, that have become final before the FCCt decision, and that have not been challenged by a constitutional complaint. The German answer to this question depends on the nature of the statutory provision that the FCCt nullified. Under the Code of Criminal Procedure, all convictions based on a criminal provision that the FCCt has declared to be incompatible with the Basic Law, that it has voided, or that are based on an interpretation of the criminal provision that the FCCt has declared to be unconstitutional, may be reopened.⁸⁵ According to the settled case law of the Court, the same applies to secondary legislation or public regulations.⁸⁶ In all other cases, unless they fall under § 95(2) BVerfGG⁸⁷ or when a specific statutory provision specifically provides otherwise,⁸⁸ decisions that cannot

⁸⁵ § 95(3) BVerfGG, read in conjunction with § 79(1) BVerfGG.

⁸⁶ Cf. FCCt, Judgement of the First Senate of 17 December 1953 – 1 BvR 323/51 et al. –, BVerfGE 3, 162 (171).

⁸⁷ § 95(2) BVerfGG reads as follows: “If the Court grants a constitutional complaint which challenges a decision, the Federal Constitutional Court shall reverse the decision; in the cases referred to in § 90(2) 1st sentence, it shall remand the matter to a competent court.”

⁸⁸ Such statutory provisions are very rare. For example, pursuant to § 176(1) N°1 Abgabenordnung (German Fiscal Code), where a tax assessment notice is cancelled or amended, it may not be taken into account to the taxpayer's disadvantage if the FCCt nullifies a law upon which the tax assessment was based.

be appealed and that are based on a legal provision that the FCCt has voided remain unaffected. However, the execution of such decisions is not permissible.⁸⁹ Of course, these effects are unnecessary for the first complainant that had successfully challenged court decisions based on unconstitutional legal provisions or based on an unconstitutional interpretation of the legislation in question: in these cases, the challenged court decisions would be reversed and the FCCt would remand the case to the competent court pursuant to § 95(2) BVerfGG. For these reasons § 95(3) BVerfGG, read in conjunction with § 79 BVerfGG, prescribes an objective legal effect binding in all cases that are final and that were not brought to the FCCt.

b) Margin or discretion left to lower courts/other implementing bodies

The FCCt grants a constitutional complaint that challenges a decision if the decision failed to take into account the constitutional rights of the complainant, or if the decision relied on or used unconstitutional legislation. In the case of the former, the state authority that issued the decision violated the complainant's constitutional rights and is responsible for the execution of the FCCt decision. The question of how to prevent that same state authority from repeating its mistake, once its decision has been reversed, is a delicate one. The division of labour and competences between the FCCt and the ordinary courts implies that the ordinary courts must, in principle, have some discretion as far as the mere interpretation of ordinary law is concerned and as far as fundamental rights are properly taken into account.

The simple fact that the constitutional complaint was granted does not necessarily imply that the ordinary court to which the FCCt has remanded the case is bound to decide the entirety of the case in favour of the complainant. The FCCt therefore does not review whether ordinary law was correctly applied. It rather limits its review to whether the fundamental rights of the complainant have been observed.⁹⁰ Observance of these rights does not necessarily anticipate a certain outcome – neither conviction nor acquittal, in a criminal case. Apart from violations of constitutional rights that leave no discretion to the ordinary courts, the decisions of the FCCt do not prejudice the ultimate outcome of the case, so as to prevent a caseload that it could not possibly manage. For these reasons, when the FCCt, having ruled on the question of constitutionality, refers a case back to an ordinary court, that court may come to the same result as before, provided it takes into account the complainant's fundamental rights. Consider, for example, the following scenario. A complainant was criminally convicted for insult because the criminal court has failed to take into account the complainant's freedom of

⁸⁹ § 95(3) 3rd phrase BVerfGG read in conjunction with § 79(2) BVerfGG. This may at first sight seem counterintuitive, but expresses a balance between the interests that are in conflict in such situations, namely legal security calling for the persistence of final decisions on hand and justice speaking for their quashing.

⁹⁰ Established case-law, cf. FCCt, Order of the First Senate of 6 November 2019 – 1 BvR 276/17 -, para. 111, http://www.bverfg.de/e/rs20191106_1bvr027617en.html.

speech (protected under Art. 5(1) of the Basic Law) by erroneously deciding that the expression in question was not protected by this fundamental right. If the complainant, after exhausting all legal remedies, challenges his conviction before the FCCt for violation of Art. 5(1) of the Basic Law, the FCCt would remind the criminal court of the relevant constitutional standards to take into account and explain what exactly the conviction has failed to consider and why. But this does not necessarily anticipate the complainant's acquittal, since generally the criminal court will now have to accept the relevance of the complainant's freedom of speech and weigh this fundamental right against the honour of the person affected by the expression in question.

c) Supervision of implementation/execution of judgments, especially with regard to objective effect

There is no specific body at the FCCt that is responsible for supervising the implementation or execution of the Court's decisions, neither with regard to the subjective effect nor with regard to the objective effect. As to the subjective effect, it is up to the complainant to observe whether the FCCt is correctly implemented and, if need be, have recourse to the ordinary courts. As to the objective effect, department IV within the Federal Ministry of Justice examines all legislative or regulatory propositions as to their conformity with the Basic Law. Such departments also exist at the level of the federated States.

d) Consequences of non-implementation, especially with regard to objective measures

If an ordinary court to which a case has been remitted in a grant decision decides the case in a way that is still unconstitutional, the complainant will need to submit a new constitutional complaint to the FCCt. The situation is the same with regard to administrative decisions. Although in general, grant decisions are implemented, the legal mechanisms to enforce implementation are very limited. This is precisely the reason why it is paramount that grant decisions seek to persuade their readership. Refusal to implement is a rare exception, but it does occur. As there are no legal means to enforce grant decisions, such resistance must be handled through 'soft' mechanisms. For example, in 2018, the municipality of Wetzlar had denied the NPD – a far-right political party – access to use the city hall for its election campaign. Although the NPD, after exhaustion of all legal remedies, successfully brought the case to the FCCt,⁹¹ the mayor of Wetzlar obstinately refused access to the city hall. The NPD's later application for an enforcement decision pursuant to § 35 BVerfGG would have been ineffective because a decision would only come after the election campaign. Instead, the FCCt requested the competent municipal supervisory authority to investigate the case, to take the

⁹¹ FCCt, Order of the 3rd Chamber of the First Senate of 24 March 2018 - 1 BvQ 18/18 -, http://www.bverfg.de/e/qk20180324_1bvq001818.html.

necessary supervisory measures and to swiftly inform the FCCt about the outcome. On 20 April 2018, the FCCt published a press release with regard to the situation: “[...] Apparently the municipality of Wetzlar had misconceptions as to the legally binding effect of court decisions and the discretion they leave for her own actions. In order to prevent future overstraining of municipalities in such situations, the President of the First Senate, Mr. Vice-President Prof. Dr. Ferdinand Kirchhof, has written the district president a letter in order to encourage him to make sure as municipal supervisory authority that court decisions be abided by, for instance by establishing an obligation to report any refusal of access to city hall or by synchronous monitoring.”⁹²

Pursuant to Art. 97(1) of the Basic Law, all judges are independent and subject only to the law. Therefore, non-implementation of FCCt judgments by ordinary courts cannot in principle be sanctioned under German law. In theory, unlawful actions and omissions by the judiciary and public prosecutors could amount to unlawful imprisonment (“Freiheitsberaubung”, § 239 of the German Criminal Code) or to prosecution of innocent persons (“Verfolgung Unschuldiger”, § 344 of the German Criminal Code).⁹³ However since the criminal offense of judicial perversion of justice (“Rechtsbeugung”, § 339 of the German Criminal Code) – which may be committed by judges, other public officials or arbitrators – requires proof of the offender’s intent to bend the law, German jurisprudence acknowledges that § 339 of the German Criminal Code in principle bars the application of the other aforementioned criminal provisions in cases of judges and public prosecutors. For this reason, judges and public prosecutors cannot be convicted of unlawful imprisonment or prosecution of innocent persons unless there is proof of their intent to bend the law – even though this requirement is not explicitly mentioned in §§ 239 and 344 of the German Criminal Code.⁹⁴

If the FCCt rules that legislation is to be revised and the legislator fails to comply, this can have two reasons: either the legislator has failed to pass a law at all, or new legislation was passed that is unconstitutional, too. In the second case, the new law can and must be challenged with a new constitutional complaint. In the first case, the FCCt can adopt measures pursuant to § 35 BVerfGG. According to its established case-law,⁹⁵ decisions pursuant to this provision can be adopted *ex officio* and separately from the decision on the constitutional complaint. This approach allows the FCCt to adopt measures pursuant to § 35 BVerfGG at

⁹² FCCt, Press release N° 26/2018 of 20 April 2018,

<https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/DE/2018/bvg18-026.html>.

⁹³ An English translation of the German Criminal Code can be found here: https://www.gesetze-im-internet.de/englisch_stgb/englisch_stgb.html.

⁹⁴ As per the established case law of the Federal Court of Justice: see, for example, Judgment of 7 December 1956 – 1 StR 56/56 – BGHSt 10, 294 (at 298 et seq.):

https://junsv.nl/seiten?tx_junsv_pi2%5Baction%5D=listPagesByNumber&tx_junsv_pi2%5Bcontroller%5D=Book&tx_junsv_pi2%5Bpagenumber%5D=382&tx_junsv_pi2%5Bsection%5D=3658&tx_junsv_pi2%5Bvolume%5D=28&cHash=ec4e91b9b36c983774d5d644bc28f6ff.

⁹⁵ FCCt, Order of the Second Senate of 7 June 2016 - 2 BvL 3/12 -, para. 7, http://www.bverfg.de/e/ls20160607_2bvl000312.html.

any time, even after the end of the constitutional complaint proceeding and even in the absence of an application for such a decision.

IV. Avoiding repetitive/repeat violations

Since the FCCt is empowered to nullify unconstitutional statutory provisions, repetitive violations can only stem from unconstitutional decisions by administrative bodies or the judiciary.

German law provides for the following mechanism to ensure that repeat constitutional complaints to the FCCt are swiftly dealt with. Each of the two Senates, composed of eight Justices each, as well as each of the three Chambers per Senate, composed of three Justices each,⁹⁶ can decide on both the admissibility and the merits of constitutional complaints. However, § 93c BVerfGG allows the Chambers to decide on the merits only if the constitutional standards at issue in the case have already been specified by the FCCt and if the constitutional complaint is manifestly well-founded. Furthermore, only the Senates may declare legislation to be incompatible with the Basic Law or to be void. If these conditions are met, the Chamber will grant the complaint, the grant decision being of equal binding force as a decision made by the Senate. Chamber decisions pursuant to § 93c BVerfGG are issued without an oral hearing and cannot be appealed; Chambers are not required to give reasons for decisions that refuse to grant a complaint.⁹⁷ They are adopted by unanimous vote of all three members of the Chamber; admission (§ 93a BVerfGG) by the Senate is granted if at least three Justices agree.⁹⁸ The Senate's decision to grant a constitutional complaint requires a majority of at least five votes; a tie amounts to a refusal decision.

The more developed the Senates' jurisprudence on the interpretation of the provisions of the Basic Law becomes, the easier it gets for the FCCt to decide cases by a Chamber decision. Eventually, Chamber decisions come to constitute the majority of the FCCt's decisions.

In order to give an idea of the practice: in 2021, the FCCt concluded 5,259 constitutional complaint proceedings in total. The vast majority (4,999 decisions) was rendered by the Chambers. 82 % of all constitutional complaint proceedings were dealt with within one year, which is without any doubt due to the facilitations that Chamber decisions imply (especially the involvement of only three judges and the absence of an obligation to give reasons for a rejection).⁹⁹

⁹⁶ This implies that one Justice sits in two chambers.

⁹⁷ § 93d(1) BVerfGG.

⁹⁸ § 93d(3) BVerfGG.

⁹⁹ FCCt, Annual report 2021,

https://www.bundesverfassungsgericht.de/SharedDocs/Downloads/EN/Jahresbericht/jahresbericht_2021.pdf, pp. 31 et seq.

V. Judicial Dialogue

There are forms of dialogue both within and outside of the framework of constitutional complaint proceedings.

The forms of dialogue within the framework of such proceedings help to widen the Court's perspective before deciding a complaint. Pursuant to § 94 BVerfGG, the FCCt provides the constitutional organ whose act or omission the constitutional complaint challenges the opportunity to submit a statement and to join the proceedings.¹⁰⁰ This allows constitutional organs whose acts or omissions are challenged to be heard in constitutional proceedings and to justify their position. For example: if a constitutional complaint challenges a law, the legislator usually will have clarified the reasons for the legislation in the explanatory memorandum of the draft act but the constitutional complaint might raise questions that are not addressed in the memorandum or it might question the memorandum itself. § 94 BVerfGG enables the legislator to broaden the basis for its decision by providing a statement that deals with the complainant's allegations and that elaborates why they are not justified. This allows a form of dialogue with the complainant as well as with the FCCt before a grant decision that might be perceived as negative by the constitutional organ whose decision has been challenged. It also allows the constitutional organ concerned to take note of a constitutional complaint proceeding that it might otherwise have ignored.

The mechanism is as follows. In accordance with the FCCt's internal allocation of competences, each Justice of the FCCt takes on the role of reporting Justice for certain constitutional matters. Each reporting Justice prepares written reports on constitutional complaints falling within his or her competence. He or she will, typically with assistance from his or her judicial clerks, summarize the case, provide a legal analysis and prepare a draft decision for the Senate or Chamber. If the constitutional complaint challenges a law and the reporting Justice comes to the conclusion that the complaint has prospect of success, the complaint brief, including any enclosures, will be served on the legislator inviting it to submit a statement within a certain period and to join the proceedings. The legislator will then have to decide whether to follow this invitation or not. If it decides to submit a statement, this can be prepared either by a member of parliament or by a lawyer or a professor of law at a state or state-recognised higher education institution of a Member State of the European Union.¹⁰¹

Because ordinary courts are not constitutional organs, they cannot join proceedings and submit statements under § 94 BVerfGG. For instance, an ordinary court that has issued a challenged decision has no opportunity to justify its point of view within the constitutional complaint proceeding. Dialogue with the judiciary in complaint proceedings is limited to Supreme Federal Courts and Supreme Courts of the federated States. Pursuant to § 22(4) of

¹⁰⁰ The same applies for federal ministers or ministers of a federated State, § 94(2) BVerfGG.

¹⁰¹ The details are laid down in § 22 BVerfGG.

the FCCt's internal rules of procedure¹⁰² read in conjunction with § 82(4) BVerfGG, the presiding Justice of the Senate at the suggestion of the reporting Justice or of the Senate may inquire with Supreme Federal Courts and Supreme Courts of the federated States as to how and on the basis of which considerations they have hitherto interpreted the Basic Law regarding the question in dispute, whether and how they have applied the contested legal provision in their past decisions, and which related points of law are awaiting a decision. The presiding Justice of the Senate may, furthermore, ask them to explain their considerations on a point of law which is relevant for the decision. The statements that the FCCt receives after such an inquiry are notified to the complainant.

Another form of dialogue is provided for under § 22(5) of the FCCt's internal rules of procedure.¹⁰³ This stipulates that at the suggestion of the reporting Justice or by decision of the Senate, the presiding Justice may request persons with special knowledge of a specific subject to provide an expert opinion on an issue that is material to a complaint.

The FCCt actively promotes judicial dialogue in exchanges, both at the national level, through delegation meetings with other courts of the federation, with the Chief Federal Prosecutor, members of Parliament and the Federal Government, and at the international level – especially with other constitutional courts and international courts such as the ECtHR. For instance, on 21 June 2021, a delegation of the President and Vice-President as well as other Justices of the FCCt travelled to Berlin to meet the President of the Bundestag and chairpersons of parliamentary groups and committees and exchanged views and experiences in the framework of a joint dinner.¹⁰⁴ Nine days later, a delegation of the President and Vice-President of the FCCt visited the Federal Government and had the opportunity to exchange at a joint dinner at the invitation of the Chancellor.¹⁰⁵ To give an example of bilateral national court visits, a delegation of the French Conseil Constitutionnel visited the FCCt from 28 to 29 June 2021 and participated in joint working sessions addressing the protection of the environment, the multi-level cooperation of European courts, and the current pandemic.¹⁰⁶ Furthermore, a delegation of the President and Vice-President as well as other Justices of the FCCt visited the ECtHR on 17 June 2021 to participate in joint working sessions on surveillance of foreign telecommunications, assisted suicide, and state liability for human rights violations.¹⁰⁷ These

¹⁰² An English translation of the rules can be retrieved under <https://germanlawarchive.iuscomp.org/?p=225> (last accessed 25 July 2022).

¹⁰³ An English translation of the rules can be retrieved under <https://germanlawarchive.iuscomp.org/?p=225> (last accessed 25 July 2022).

¹⁰⁴ FCCt, Press release N° 52/2021 of 22 June 2021, <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2021/bvg21-052.html>.

¹⁰⁵ FCCt, Press release N° 54/2021 of 1 July 2021, <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2021/bvg21-054.html>.

¹⁰⁶ FCCt, Press release N° 52/2021 of 30 June 2021, <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2021/bvg21-053.html>.

¹⁰⁷ FCCt, Press release N° 50/2021 of 18 June 2021, <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2021/bvg21-050.html>.

forms of dialogue are rooted in a long tradition and help the FCCt to broaden its perspective on constitutional matters as well as to further explain its own jurisprudence where misunderstandings arise.

VI. Promotion of Standards

a) Formal training and education

In Germany, all judges, prosecutors, and lawyers must have studied law at a German law faculty and they must have passed two state exams, the first one focusing mainly on substantive law and the second one mainly on procedural law. The importance of constitutional law, including constitutional procedure law, is emphasised at both these stages of German legal education. In contrast to constitutional law as well as the law of the European Union, including the respective fundamental rights protection mechanisms, practically no attention is paid to ECHR law or to the case-law of the ECtHR.

Constitutional law, including its procedural corollary, is taught in the first two semesters of university studies. The first semester is devoted to constitutional law on the organisation of the State, and the second semester addresses fundamental rights and constitutional complaints. Having passed the university exams in constitutional law is one of the prerequisites to be admitted to the first state exam. Hence, it is not possible to have a law degree but to have failed the university exam in constitutional law. Constitutional law is taught in other legal disciplines throughout the studies whenever and insofar as relevant.

In the first state exam, while for reasons of the federal structure of Germany the details differ from one federal state to the other, all candidates must pass several tests in all three branches of law – public law, criminal law and civil law – as well as an oral exam of around 5 hours that covers all these branches.¹⁰⁸ Candidates are aware that any of the written tests as well as some of the questions in the oral exam might require profound knowledge of constitutional law. As it is a state exam, the tests are prepared under the supervision of the competent judicial administration, not the university. Therefore, the legal questions raised by the tests in the state exams are not only limited to what was taught at the law faculty but also include very recent decisions of the FCCt. Profound knowledge of constitutional law is also required in the second state exam, particularly knowledge of fundamental rights pertaining to administrative as well as judicial proceedings.

It should also be mentioned that some German universities have established law clinics in the field of human rights that are not necessarily limited to fundamental rights as guaranteed under the Basic Law, but that also extend to rights granted under international law, including under the ECHR. For example, the Centre for Human Rights at the Friedrich-Alexander Universität

¹⁰⁸ The details differ from one federal state to the other, but these basic principles are the same.

in Erlangen-Nuremberg has established the Human Rights Clinic¹⁰⁹ through which students prepare expert opinions on human rights issues jointly with practitioners from NGOs and under the academic supervision of university chairs. The latest project of 2021/2022 dealt with the right of Afghan local employees working for the German development cooperation agency to have residence in Germany after the assumption of power by the Taliban regime. The expert opinion, which is published online, proposes how to implement the local employees' human rights on the basis of statutory provisions already in force and additionally suggests concrete legislative measures.¹¹⁰ In 2022/2023, the clinic is preparing an expert opinion on climate change, forced migration, and human rights.¹¹¹

In Germany, periodic in-service training is compulsory for working legal professionals. As to the topics of in-service training, practitioners are free to choose.¹¹² As of 2022, there is no in-service training particularly focused on the protection of fundamental rights. Basic knowledge of constitutional and EU law is taught at law faculties so there is little need in this respect. However, there is a need when it comes to new decisions which is why, where relevant, training activities also cover the relevant constitutional as well as ECHR standards in the training subject. For example, an in-service training of five days on violence in nursing care¹¹³ – particularly aimed at criminal judges, judges responsible for persons under legal guardianship due to physical or mental limitations, and public prosecutors – also covered a recent grant decision of the FCCt on constitutional requirements concerning the use of physical restraints on patients confined under public law in psychiatric hospitals.¹¹⁴

The involvement of judicial clerks at the FCCt can be considered as an important awareness-raising and educational mechanism. Currently, every Justice has four judicial clerks¹¹⁵ who support and disburden him or her. These clerks are usually judges from the ordinary courts and public officials such as public prosecutors. They are delegated by their judicial administration for a term that usually ranges between two and three years before they return to their court or public authority. The incentive for judges and public officials to work for the FCCt as judicial clerks is – apart from idealistic or intrinsic reasons, of course – that it will provide them better options for a promotion in office. The benefit for the FCCt is not only to be supported in managing the caseload, but also to raise awareness of constitutional law and to integrate the legal professional's perspective into the decision-making process at the FCCt.

¹⁰⁹ <https://www.humanrights-centre.fau.de/human-rights-clinic/>.

¹¹⁰ The expert opinion can be found here: <https://www.humanrights-centre.fau.de/praxisprojekt-21-22/>.

¹¹¹ <https://www.humanrights-centre.fau.de/praxisprojekt-22-23/>.

¹¹² The annual programme of the Deutsche Richterakademie (German academy of judges) can be found on its website: <https://www.deutsche-richterakademie.de/>.

¹¹³ Deutsche Richterakademie, Jahresprogramm 2022, p. 36 et seq.

¹¹⁴ FCCt, judgment of the Second Senate of 24 July 2018 - 2 BvR 309/15 and 2 BvR 502/16 -, http://www.bverfg.de/e/rs20180724_2bvr030915en.html.

¹¹⁵ As an exception, the Court's President currently has five judicial clerks at his or her disposal.

This latter aspect may help FCCt decisions to be viewed more sympathetically by the judiciary, especially in controversial matters.

b) Awareness raising of new judgments, particularly with regard to objective measures

The FCCt has several tools at its disposal to raise awareness of new judgments, particularly those that set new standards. For landmark cases, there may be hearings. While most constitutional complaint proceedings are in writing and are decided by a written order of the FCCt, an exception is made for landmark cases that, in the eyes of the FCCt, deserve particular attention. In these cases, the FCCt may hold a hearing. In such a hearing, the President of the Senate concerned presents the facts of the case and introduces the relevant constitutional problems raised by it. Following this introduction, the parties to the proceeding as well as any experts who have been called upon by the FCCt can express their points of view and arguments. Hearings can be attended by the media, and news coverage on these cases mostly reflects the arguments exchanged in the oral hearing. The coverage also creates a form of suspense among the public and makes the FCCt's judgment easier to be understood and agreed with. German law recognises and encourages this promotional effect by allowing the live broadcast of FCCt hearings as well as of the public pronouncement of judgments.¹¹⁶

The FCCt does not publish fact sheets on the most important cases annually, or official guides on the interpretation of fundamental rights. Official information of landmark decisions is instead a firm component of the FCCt's annual reports.¹¹⁷

The FCCt has a press spokesperson. He or she facilitates contact between the Court and the media, explains the Court's position in a comprehensible fashion, and, together with the reporting Justices, prepares press releases.¹¹⁸ In 2021, 177 press releases were issued covering all constitutional proceedings as well as delegation meetings of the Court.¹¹⁹ This number might appear low considering that the FCCt decided more than 5,000 cases in 2021, but it is reasonable taking into account that not every case raises new questions and that press releases might be ignored if they are published too frequently. 177 press releases mean an average of about three per week, which is a number that can be easily followed. Press releases – as long

¹¹⁶ Please note though that § 17a(1) 2nd phrase n° 1 BVerfGG limits the broadcast to the oral hearing to the part of the hearing until the Court has established that the parties are present.

¹¹⁷

¹¹⁸ Please note that in the context of the FCCt, the term “reporting Justice” (in German: “Berichterstatterin” or “Berichterstatter”) denotes the member of the Court that is responsible for preparing a written opinion on each constitutional complaint and drafting the Court's decision. The term is not to be confused with the term “judicial clerk” (in German: “Wissenschaftliche Mitarbeiterin” or “Wissenschaftlicher Mitarbeiter”) that designates the persons that assist the Justices with their duties and that were selected by them.

¹¹⁹ The press releases are online at https://www.bundesverfassungsgericht.de/DE/Presse/presse_node.html. Some are available in English.

as they are published in a frequency that can easily be followed – make it easier for the media to report on the FCCt’s latest jurisprudence. They can also help to explain the FCCt’s mode of operation. For example, there was criticism regarding the FCCt’s judicial restraint as to the controversial measures that German public authorities had taken in order to deal with the Covid-19-pandemic. Furthermore, the duration of constitutional complaint proceedings concerning such measures was harshly criticized.¹²⁰ In response to this, the FCCt published a press release explaining how many cases linked with the pandemic it had already decided and when a decision on the highly controversial ‘federal pandemic emergency brake’ was to be expected.¹²¹

The FCCt also has a presence on social media. Although for reasons unknown its official Instagram account was shut down after about five months, the FCCt has had an official account on Twitter since 2015, with 77,600 followers as of September 2022.¹²² The Court also provides an RSS feed for its decisions and press releases.

Interviews of Justices with the media are a rare exception, at least during their term of office. They are also delicate, because the individual Justice must put his or her individual opinions aside in order not to undermine the position of the FCCt as laid down in its decisions and judgments and so as not to create the false impression of a point of view of the FCCt that might be relevant in a pending or a future case. In the more than 70 years since the Court’s establishment, only once has a serving Justice given an interview to a TV news programme. He finished with the words “In the name of the Court, I heartily thank for the opportunity [of this interview].”¹²³ That interview, with Justice Radtke, was on 2 January 2022, in the middle of the Covid-19 pandemic and the controversy on how to deal with it. Justice Radtke summarised the relevant jurisprudence of the FCCt, refrained from concrete statements as to the constitutionality of measures against the pandemic that were under discussion, and justified the FCCt’s decision on the ‘federal pandemic emergency brake’¹²⁴ that had been the subject of criticism that partly accused the FCCt of “constitutional abstinence”.¹²⁵

¹²⁰ For an example see Boehme-Neßler, Der Rückzug der Verfassungshüter, Zeit Online of 30 November 2021, <https://www.zeit.de/politik/deutschland/2021-11/bundesverfassungsgericht-corona-bundesnotbremse-vertrauen>.

¹²¹ FCCt, press release n° 78/2021 of 20 August 2021, <https://www.bundesverfassungsgericht.de/SharedDocs/Pressemitteilungen/EN/2021/bvg21-078.html>.

¹²² <https://twitter.com/BVerfG>.

¹²³ <https://www.zdf.de/nachrichten/politik/corona-bundesverfassungsrichter-radtke-verhaeltnismaessigkeit-100.html>.

¹²⁴ FCCt, Order of the First Senate of 19 November 2021 - 1 BvR 781/21 et al. -, http://www.bverfg.de/e/rs20211119_1bvr078121en.html.

¹²⁵ Cf. Lepsius, Zerstörerisches Potential für den Verfassungsstaat, https://www.lto.de/persistent/a_id/46831/.

VII. Conclusions and recommendations

From the foregoing discussion of the practice of the German Federal Constitutional Court, the following conclusions can be drawn and recommendations be made to the Turkish Constitutional Court.

1. **The TCC should consider to begin to use its authority to hold oral hearings.** Oral hearings in individual application cases that raise intricate or controversial constitutional questions can help the Court to broaden its perspective, to deepen the foundations of its decision, and ultimately to generate a greater understanding of the rationale behind its decisions. Whatever the legal powers of the TCC, the Court's chances of strengthening respect for fundamental rights in Türkiye are heavily dependent on whether it can convince other State institutions as well as the public. Oral hearings that can be attended by the media facilitate news coverage on a case that can report the arguments exchanged in the oral hearing, create suspense or a degree of expectation among the public, and that makes the Court's judgment easier to be understood, agreed, and implemented. It is paramount for the Court not only to develop its jurisprudence with regard to the judiciary and the academic world, but to be considered as a people's court. This is a prerequisite for strong public demand for compliance with TCC judgments. The German experience with oral hearings in constitutional complaint proceedings that concern delicate constitutional questions could serve as an example. The necessary legislative basis for oral hearings is already in place in Türkiye. Under Art. 49(4) of Law No. 6216, the TCC may decide to hold a hearing if it deems it necessary. **The Court should begin to exercise its authority to hold oral hearings especially when the case deserves particular attention of the public in the eyes of the TCC** (for example because an individual application case raises potentially controversial matters).
2. As there is no sensible reason for repeat individual applications to the TCC in cases where Turkish legislation or an unconstitutional interpretation of it is an obstacle for the respect of the individual's rights, an amendment of the Law on TCC appears necessary in order to unburden the TCC as well as ordinary courts with cases affected by unconstitutional legislation. Drawing on the experience of the German Federal Constitutional Court, **allowing for individual applications to challenge legislation directly as well as indirectly is firmly recommended.** The serious nature and consequences of the resulting decisions should be reflected in the procedural framework (for example, by reserving such decisions to a special body, by requiring the Grand National Assembly of Türkiye to submit a statement and be joined to the proceedings as a party, and/or requiring a certain majority for decisions). Furthermore, **a retrial should be required for convictions that are based on a criminal provision**

that the TCC has declared to be incompatible with the Constitution or that are based on an interpretation of the criminal provision that the TCC has declared to be unconstitutional, even for individuals who have not lodged an individual application with the TCC.

3. To better manage the workload of the TCC, particularly with regard to cases where the relevant constitutional standards are already well-established, the structure of the TCC's Chambers and their competences should be reconsidered. **The Turkish legislator should allow Chambers to decide on the merits if the relevant constitutional standards have already been specified by the TCC and if the individual application is manifestly well-founded.** This broadening of the Chambers' competences should be reflected in their composition (for example, three Justices instead of two) and by requiring a unanimous vote.
4. In order to increase the acceptance of the TCC's decisions, to inform the TCC of different perspectives, and to keep other constitutional organs informed of pending individual applications that raise as yet undetermined constitutional questions, the TCC should be required to communicate applications that raise novel or undetermined constitutional questions to **other constitutional organs** that may be affected by the issue, invite them to submit written statements, join the proceedings, and to take part in any oral hearings. Furthermore, the TCC should **invite experts** to share their knowledge with it. The legislative basis for such a course of action can be found in Art. 49(4) of Law No. 6216. Pursuant to this provision, the Court can also decide to hold a hearing if it deems it necessary. As to the communication with other constitutional organs in individual application proceedings, the current wording of Art. 49(2) of Law No. 6216 limits this to the Ministry of Justice. **The legislation should make the necessary amendments so as to make it compulsory for the TCC to inform any other constitutional organ concerned by an individual application case and to invite that organ to submit its written opinion.**
5. Raising awareness among the judiciary of the relevance of fundamental rights and of the decisions of the TCC in individual application cases requires a change in mentality. Awareness raising should therefore also be focused on future generations of legal practitioners. Awareness of constitutional law among legal practitioners in Germany is based in the prominence of constitutional law at all levels of legal education, and in the requirement that profound knowledge of it is essential. **Constitutional law should receive prominent attention in legal education and be a compulsory subject for all law students, not only as to the organisation of the State but also as to the protection of fundamental rights and the individual application procedure through which fundamental rights questions are decided.** To this end, it may be

necessary to teach and examine firstly the protection of fundamental rights under constitutional law and individual application as a distinct discipline, and secondly to teach the implications of constitutional law in other legal disciplines whenever relevant. **Law faculties should be encouraged to establish law clinics in the field of the protection of fundamental rights and individual application.**

6. With a FCCt having decided on constitutional complaints since its establishment in 1951, compulsory lectures on constitutional law at law faculties, and the relevance of this field of law at the state exam level, every legal practitioner in Germany can be expected to have competences in this regard. The situation in Türkiye is very different as the individual application mechanism entered into force only in 2012. For this reason, the **in-house training programmes** that the TCC has conducted for serving judges and public officials should be continued and expanded. In addition, the TCC should issue fact sheets on the most important cases annually, following the example of the ECtHR, in order to make it easier for the ordinary courts to follow thematic developments in the TCC's case-law.
7. The integration of excellent judges from the lower courts and public officials in the decision-making process at the TCC in individual applications should be considered in order to introduce the practitioners' perspective at the Court and to raise awareness of constitutional matters among the judiciary. The German model of delegating judges from ordinary courts and public officials to the FCCt for a specified period as judicial clerks can serve as an example and does not need to supersede the Turkish model of Rapporteur Judges. The German model could be introduced as complementary to the current system. The delegation of each judge or public official should be limited in time so as to introduce the fresh perspective of a legal practitioner into the Court's jurisprudence as well as its way of working, as well as to ensure that this practitioner can, after a reasonable amount of time, return to his or her home institution and serve as a 'propagator' of the TCC's jurisprudence.

The "Assessment Report of the Current System of Execution of Judgments of Turkish Constitutional Court" proposes to increase the number of press releases issued by the TCC and to be more present on social media.¹²⁶ Apparently, the rationale behind this proposition is that there was a huge contrast between the number of press releases issued on individual application cases in 2019 (117) and the number of applications adjudicated in the same year,¹²⁷ which amounted to 39,469 applications.¹²⁸ The German experience as described

¹²⁶ Pp. 4 and 17.

¹²⁷ P. 17.

¹²⁸ TCC, Annual Report 2021, https://anayasa.gov.tr/media/7957/2021_annual_report.pdf, p. 212.

above illustrates the beneficial impact that press releases and other media work can have on the awareness of constitutional standards among State institutions as well as among the public. But while it is true that this can be beneficial with regard to the objective effects of the TCC's decisions in individual application cases, attention must be had to the frequency and quality of press releases. Taking into account that since the introduction of the individual application in Türkiye in 2012, the TCC has found a violation in 25,857 cases,¹²⁹ that the average number cases per year in which a violation is found is 2,155, and that press releases on each of these cases would result in an average of 44 press releases per week, an alignment of the quantity of grant decisions with the quantity of media work would probably overstrain the public. **Press releases should not be published excessively because otherwise the public might lose interest.** What an excessive use of press releases means, is hard to specify in figures. Starting from the German example, a starting point is three press releases per week. This number might be higher under exceptional circumstances – for example, unforeseen situations such as the Covid-19 pandemic that raise many constitutional questions that call for swift answers. Media work should be reserved for important cases, as well as for visits that the Court makes or receives. Press releases can also help the TCC to further explain the rationale behind its decisions and its course of action in non-legal terms where the Court's decision-making policy is harshly misunderstood or where criticism stems from poorly understood decisions of the TCC.

¹²⁹ TCC, Annual Report 2021, https://anayasa.gov.tr/media/7957/2021_annual_report.pdf, p. 217.

Comparative study on the organization of the execution of judgments: the Spanish Constitutional Court

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I.- Introduction

The sustainability of a system of human rights protection requires that the protection is granted at the earliest possible stage, thus avoiding violations or at least eliminating them swiftly. Otherwise, it would be always necessary to bring an individual application before the Constitutional Court once other procedural remedies have been exhausted without success. This would result in two serious problems: (a) for the Constitutional Court, a heavy workload that would be almost impossible to manage in a timely manner; (b) for the applicant, a lengthy procedure to get relief for a human rights violation.

This goal of ensuring fast and efficient protection for human rights depends on the existence of a clear set of human rights standards developed by the Constitutional Court in its judgments, and the consistent application of these standards by the competent authorities when they adjudicate or decide in another manner on questions that raise human rights issues.

This report offers analysis and recommendations on how to achieve greater impact for the interpretation of constitutional provisions in judgments on individual applications on the basis of the 40-year Spanish experience of the *recurso de amparo*.¹³⁰

II. Status of the Constitutional Court and its Judgments

a) Remit, powers, limitations

The Spanish Constitutional Court (hereinafter, SCC) is the highest national authority concerning the interpretation of constitutional provisions that guarantee human rights. The Spanish Constitution provides for a specific procedure called *recurso de amparo* on which the human rights jurisdiction of the SCC is based. This jurisdiction is limited in two ways. First, as a consequence of the principle of subsidiarity, which is a key rule in the Spanish system of human rights protection, the SCC only intervenes through the *recurso de amparo* procedure as a last remedy, once any other remedies provided for under the relevant

¹³⁰ An individual application seeking human rights protection lodged before the Constitutional Court is called “*recurso de amparo*” in Article 53.2 SCC

procedural laws have been exhausted. Second, the *recurso de amparo* is limited to construing the relevant constitutional provisions. *Recurso de amparo* is not a third-instance procedure, and the SCC takes care not to take the place of ordinary judges or other competent authorities by interpreting statutory provisions or assessing facts.¹³¹

b) Status of judgments in individual applications

In the Spanish context, it would not be accurate to discuss the binding effect of Constitutional Court judgments as a whole. The binding effect is more correctly referred to as the interpretation of the relevant constitutional provisions, established by the Constitutional Court, from which it then adjudicates the case before it. The Constitutional Court first sets up the interpretation of the constitutional provisions that guarantee the relevant human rights and then applies this interpretation to the facts of the case, either granting or not granting the protection sought by the applicant.

Consequently, Constitutional Court judgment regarding human rights may be separated into two parts:

- 1) the interpretation of the provisions of the constitution applicable to the case before it, setting out criteria about the scope and limits of the constitutional right at issue;
- 2) The application of those interpretative criteria to the facts of the case, resulting in a verdict that either grants or denies the protection claimed by the applicant.

The second part of the judgment only affects the case before the Constitutional Court, because it is decided on its specific facts. This final decision has the force of *res judicata*, and the competent authorities must comply with it. In the event that any of them rejects to do this or adjudicates the same case (or a sequel of it¹³²) in an incompatible way, the Constitutional Court has strong execution powers, including quashing those non-compliant decisions and even issuing orders compelling the relevant public authorities to implement concrete compliance measures under a penalty for failure.¹³³

¹³¹ The powers and limitations of the SCC will be discussed further in the section on the status of judgments in individual applications (*recurso de amparo*).

¹³² Sometimes courts adjudicate on new cases (different from that decided in a Constitutional Court judgment) which mostly concern the same facts (for instance, a new detention based on the same situation; a new public servant dismissal supported on identical reasons).

¹³³ Article 92.4 SLoCC reads as follows: “In case there is a suspicion about the unfulfilment of any ruling, the Court, *ex officio* or at request of a party to the process, will request the institutions, authorities, employees or individuals to whom the compliance of the decision may concern, to inform thereon in the period they were determined to. Following receipt of the report or after the set period has elapsed, if the Court assesses whether there has been a complete or partial breach of its decision and may adopt any of the following measures: a) Impose reiterated fines from three thousand to thirty thousand euros on the authorities, public employees or individuals failing to enforce the Court decisions, until the complete fulfilment of the ruling”.

The binding effect of a Constitutional Court judgment, taken as a general or *erga omnes* effect, is confined to the first part described above. Every time it is called upon to rule on a *recurso de amparo*, the Spanish Constitutional Court must, as a preliminary task, decide on the correct interpretation of the scope and limits of the human rights at issue as enshrined in the relevant sections of the Constitution. Insofar as the Constitutional Court is the supreme authority in this respect, its interpretation is binding (on any public authority).

Section 87.1 of the Spanish Law on the Constitutional Court (hereafter SLoCC)¹³⁴ reads:

The judgments of the Constitutional Court shall be binding on all public authorities.

This amounts to an objective effect of judgments (beyond the subjective effect of the judgment over those who were parties to the application) in questions concerning the interpretation of the Constitution. All public authorities are bound by the interpretation of the Constitution by the Constitutional Court in its judgments.

The binding nature of the Constitutional Court's judgments interpreting the constitution ultimately derives from the primacy of the Constitution combined with the status of the Constitutional Court as the supreme authority safeguarding the constitution.

Section 5.1 of the Law on the Judiciary¹³⁵ reads:

The constitution is the supreme norm of the legal system, and binds all the Judges and Courts, who will interpret and apply the laws and regulations according to the constitutional precepts and principles, in accordance with the interpretation of the same that results from the resolutions issued by the Constitutional Court in all kinds of processes (emphasis added).

In practice, this provision was very helpful at the beginning of the Spanish experience, in the 1980s and 1990s. Judges and courts frequently referred to it to justify their reliance on the new human rights standards that the Constitutional Court set in its judgments.

Through the interpretation of the relevant constitutional provisions in its judgments, the Spanish Constitutional Court sets human right standards that, because of their binding effect, must be applied by public bodies and members of the judiciary in the adjudication of future cases dealing with the same issue. They must set aside any other incompatible criteria, even criteria that have been established in the case law of the high courts, in secondary legislation, or in the provisions of primary legislation (in this last case, there are some important specificities that will be addressed under the next point of this subchapter).

The binding effect of the Constitutional Court's interpretation of constitutional provisions is the most powerful instrument to achieve the objective impact of the Constitutional Court's

¹³⁴ Organic Law 2/1979, 3 October, on the Constitutional Court

¹³⁵ Organic Law 6/1985, 1 July, on the Judiciary

judgments. Compliance by all public authorities with their human rights obligations under the Constitution, as determined by the Constitutional Court, is a key element in ensuring effective human rights protection: it prevents human rights violations at an early stage. Avoiding violations is much more effective than repairing them several years after they occurred.

As indicated above, sometimes the criteria that are inconsistent with human rights standards set out in Constitutional Court judgments stem directly from legislation. As the courts and judges are strictly bound by legislation, they cannot of their own motion set aside legislative provisions that may be unconstitutional: they must instead raise an action before the Constitutional Court. In this event, they must stay the proceedings before them and formally request the Constitutional Court to declare that the legislation or certain of its provisions are inconsistent with one or several constitutional provisions as interpreted by the Constitutional Court. Only if the Constitutional Court determines that the legislation in question is unconstitutional can the relevant court or judge set aside the legislation and apply instead the human rights standards established by the Constitutional Court.

A significant disadvantage of this mechanism is the length of time that it takes: approximately two to three years. Another option may be for a court to interpret the legislation in a manner that would be in conformity with the Constitution. This may be possible when a certain legal provision is capable of being interpreted in different ways. In this event, courts can comply with the binding effect of the constitutional interpretation by discarding the interpretation that violates the constitution and instead apply standards that are consistent with the interpretation made by the Constitutional Court. This is a faster and therefore more effective way of ensuring the implementation of human rights. However, it is only available when the legal provisions concerned are sufficiently broadly worded to allow for different interpretations, and at least one of those interpretations is consistent with the constitutional provisions as construed by the Constitutional Court in its judgments.

Although the binding effect of the interpretation of the constitutional provisions by the Constitutional Court has shown itself to be the most powerful instrument to ensure wide compliance with constitutional requirements, it has weaknesses.

First, as will be discussed in Section III below, the Constitutional Court only has a power of execution over matters that are *res judicata*. This means that the only recourse available to a defendant is to exhaust all ordinary legal remedies and then lodge an application with the Constitutional Court. That is a very long procedural route to follow. In other words, the Constitutional Court's interpretation of the Constitution is binding on all public authorities, but the only way to enforce it is through the existing procedural remedies.

Improving effectiveness through the objective effect of the Constitutional Court judgments will be better fulfilled by fostering compliance with them, as enforcing it takes too much time.

Sections V and VI of this chapter will discuss ‘soft’ measures used in the Spanish experience to promote compliance with the Constitution as interpreted by the Constitutional Court. However, if it could be concluded as a matter of fact that ordinary judges and public bodies are somehow intentionally ignoring that constitutional interpretation in certain issues, then it would be advisable to try new measures or mechanisms updated to current times and appropriate to the national circumstances.

Second, all Constitutional provisions, including those that enshrine human rights, provide for a framework within which there are several valid options for interpretation. The Constitutional Court should have regard to this when construing constitutional provisions and ensure that the human rights standards that it establishes are broad enough and prevent it acting *ultra vires*. In other words, constitutional interpretation¹³⁶ is binding but it only consists of setting *broad* standards.

Third, the judgment of the Constitutional Court in a case is not the final decision in the case. In the final decision the facts of the case are a significant factor. Even slight changes in the facts may result in different final decisions. It is not unusual for public authorities and courts to implement the human rights standards set out in Constitutional Court judgments and still conclude that there is no violation of the relevant human right in the case before it. When assessing these cases, close attention should be paid to the facts in order to determine whether they justify the final decision or if there has been an unreasonable or disproportionate implementation of the criteria set out by the Constitutional Court.

III. Execution of judgments (individual applications)

a) Objective and subjective effects of judgments

An individual application is an *inter partes* procedure that concerns a specific complaint by an applicant stemming from a concrete set of facts. The applicant’s ultimate aim is that the Constitutional Court finds a violation and then grants adequate relief, providing restitution for any damages suffered. Sometimes this so-called ‘subjective effect’ of the judgment requires the intervention of authorities other than the Constitutional Court, for example in cases where a re-trial is needed.

The Constitutional Court is entitled to supervise the execution of its judgments. In the event that a competent authority refuses or fails to comply with the Constitutional Court’s judgment, or adjudicates the same case (or a sequel of it) in a way that is incompatible with it, the

¹³⁶ This chapter uses the phrase “constitutional interpretation” as shorthand for “constitutional standards as developed through the Constitutional Court’s interpretation of constitutional provisions in its judgments in individual applications”. In the context of constitutional scholarship, the phrase has a slightly different meaning.

Constitutional Court has powers of execution that include the power to quash non-compliant decisions and the power to issue orders compelling the relevant public authorities to implement concrete compliance measures, on pain of a penalty.

As a preliminary task, individual application judgments must construe the applicable constitutional provisions, setting out criteria about the scope and limits of the human right at issue. This interpretation of the constitutional provisions, as determined by the Constitutional Court, which is the highest authority in this respect, is binding. Each authority - judicial, administrative or legislative - is compelled to have due regard to it when adjudicating or deciding in any other manner on a similar issue, case or situation. This is the objective effect of individual application judgments.

As transpires from the statistics provided by the Turkish Constitutional Court (hereinafter, TCC) and the analysis carried out by the Cooperation Division of the Council of Europe's Directorate General of Human Rights and Rule of Law, there is still a significant number of judgments whose subjective aspect is not executed. This may lead to the conclusion that attention needs to be paid to the remedies that are available to tackle refusals by courts or judges to conduct timely re-trials or otherwise to implement the TCC's judgment finding a violation of human rights and ordering a re-trial. Nevertheless, it is even more urgent to pay attention to the decisive improvement of the objective impact of individual application judgments, in order to secure the effectiveness and the sustainability of the system of human rights protection, as set out in the introduction of this chapter.

b) Margin of discretion left to lower courts and other implementing bodies

The SCC's jurisdiction in the protection of human rights is limited to the interpretation of the applicable constitutional provisions. Therefore, ordinary judges and other competent authorities retain a margin of discretion when adjudicating or deciding in other manner similar situations. This margin encompasses construing statutory provisions and assessing the relevant facts. As stated above, the interpretation of the constitutional provisions is separate from determining the final judgment in an application. It will not be unusual for courts and other public bodies to implement the human rights standards set out in Constitutional Court judgments and yet find that there is no violation of the relevant human right in the case before them. In these cases, regard should be had to the facts and the relevant statutory provisions, in order to know whether the peculiarities of them justify the different final decision or this effect is due to an unreasonable or disproportionate implementation of the criteria set out by the Constitutional Court. This may be a part of the supervision of implementation activities with which a specific department within the Constitutional Court could be tasked, as will be argued below.

c) Supervision of implementation/execution of judgments, especially with regard to objective effect

Section 4 of the Law on the Constitutional Court empowers the Court to protect its jurisdiction by adopting any necessary measure. However, there is no doubt that the Constitutional Court's jurisdiction is only compromised where there is non-implementation of a matter that is *res judicata*.

The first interim conclusion should be that the Spanish Constitutional Court has no power concerning the implementation of the constitutional interpretation in similar cases in the future, and that it is not tasked with supervising that implementation. Accordingly, the Spanish Constitutional Court does not have a department for this. The Court drafts an Annual Report of its activities which provides information about its judgments, execution orders (in the cases already adjudicated) and non-judisdictional activities, but this report does not include information about the implementation of the constitutional interpretation in similar cases to those that have been the subject of previous Constitutional Court judgments, as this supervision is not one of the functions of the Constitutional Court.

The supervision of the implementation of standards set through constitutional interpretation is not a function of the Constitutional Court, nor of any other institution. The closest to this function in Spain is the role of the *Defensor del Pueblo* ("public defender", akin to an ombudsman institution) in supervising the implementation of human rights throughout all public powers. This institution examines the level of implementation of human rights, which is different from supervising the implementation of the constitutional standards as set in Constitutional Court Judgments. Moreover, in Türkiye the Ombudsman institution has existed since 2012¹³⁷.

The lack of this kind of supervision task in Spain, or in other European constitutional models, should not prevent the Turkish authorities from considering relying on it to increase the objective impact of Constitutional Court judgments. Seen as such a model does currently exist within the Turkish Constitutional Court and has been functioning for several years, it is recommended to retain and strengthen it.

The question would be how to organize this task. It is important to characterise it as a *high-level* supervision. It should not be aimed at imposing forcefully and directly the constitutional interpretation as determined by the Constitutional Court. This would go against the role of the judiciary in the protection of human rights and would probably produce serious conflicts between the Constitutional Court and ordinary courts (high courts as well as subordinate courts).

¹³⁷ Law n° 6328 published at Official Gazette in 29/06/2012

The task would probably be much more effective if it functions as a mechanism of gathering information to inform other actions of the Constitutional Court aimed at increasing the objective impact of its judgments:

- (a) It would help the Constitutional Court to organise in advance the admissibility process. The information gathered will show the Constitutional Court what to search for among the applications lodged with it, allowing it to select the best case to repeat the human rights standards already well established or to further elaborate on them.
- (b) The Constitutional Court may add to its annual activities report a chapter discussing the level of implementation of constitutional standards set by it, highlighting areas where it is concerned about a low level of implementation. This annual report should be sent to all public authorities as a means of institutional dialogue, in particular the most important judicial authorities (for example, High Courts), the legislative chambers, and the executive.

As a good practice the focus should not be on concrete cases but rather be more general, so as to create ‘soft’ pressure and avoid direct conflicts with the judiciary.

- (c) The information gathered about the level of implementation of the constitutional standards as determined by the Court in its judgments could be used in judicial dialogue, to exchange information or to ensure that the High Courts are aware of widespread practices of the lower courts that might be non-compliant with the constitutional interpretation, thus allowing High Courts to focus on granting redress to appeal applicants in these situations.
- (d) Finally, this gathering of information would be helpful to identify human rights issues that should be focused on in training activities for lawyers, judges, public prosecutors, and public officials.

This high supervision depends on gathering and processing a large amount of information. To ensure this can be done, it would be crucial to strengthen the IT department of the Constitutional Court. There should also be increased cooperation with the IT mechanisms established within the judiciary (such as the UYAP system, with necessary adaptations), as data needed for this exercise needs to come from courts. This cooperation may consist of adding classifications relevant to supervision to judgments and sharing this data with the relevant department within the Constitutional Court (either the IT department, or the department for the Supervision of the execution of judgments).¹³⁸

¹³⁸ Any data sharing should have regard to personal data protection requirements.

d) Consequences of non-implementation, especially with regard to objective effect

All public powers (public bodies, higher and lower courts, and even the legislative chambers) are bound by the Constitution. As the Constitutional Court is the supreme authority regarding the interpretation of the Constitution, public powers are also bound by the standards set in its judgments. This binding effect of the *interpretation* made by the Constitutional Court is characterised as a general effect, in that it affects not only the situation decided in the judgment but also any similar situations that these powers could be faced with in the future.

When a public power deciding on a similar case (relating the same issue) sets aside the standards established in the interpretation made by the Constitutional Court and instead applies other interpretative criteria, the applicant should use the procedural remedies available to request that the previous decision be reversed. In this scenario, the only consequence of non-implementation is access to the procedural remedies provided for by law, including as a last remedy an individual application to the Constitutional Court.

In Spain, the evaluation of the performance of the judges is, as a general rule, restricted to quantitative criteria. Except in cases concerning corruption or other crimes committed by judges in the performance of their judicial duties, there is little regard to qualitative considerations, including the implementation of human rights standards as determined by the Constitutional Court. This is most likely to avoid the risk of undermining the key principle of judicial independence.

Nevertheless, there are some judicial appointments where the Council of the Judiciary enjoys a certain amount of discretionary power, such as the appointment of new Supreme Court judges or new Presidents of Courts of Appeals across all Spanish territory. The application procedure for such appointments includes an assessment of a candidate's suitability. As part of this, the candidate may indicate and present orally five of his or her judgments that they deem to be important, for any reason, including for implementing high standards in the protection of human rights. The relevance to the topic of this chapter is that the implementation of human rights standards stemming from ECtHR or from the TCC may be valued positively instead of negatively for the evaluation of judges. This would encourage judges to optimize the implementation of those human rights standards without compromising their judicial independence.

The lack of strong consequences for non-implementation of the constitutional standards as interpreted by the Constitutional Court has not been a big problem in Spain. However, while Spanish public authorities do not regularly ignore the constitutional standards as interpreted by the Constitutional Court, there have been obstacles in practice. There are two main reasons for this:

- 1) Creating awareness of Constitutional Court judgments and the Court's interpretation of the Constitution takes time, particularly when the interpretation is a nuanced one (for instance, in the area of freedom of expression¹³⁹).
- 2) It can be difficult to determine whether a case before a court is sufficiently similar to one that has already been ruled on by the Constitutional Court.

To successfully tackle these practical problems, the 'soft' measures that will be discussed in Sections V and VI of this chapter (judicial dialogue, promotion of standards through wide dissemination of judgments, and several training activities or other good practices that give rise to equivalent effects) have been very successful.

Finally, the Spanish Constitutional Court is making an effort to issue judgments that intend to produce stronger objective effects. In short, effectiveness requires fewer judgments but more leading ones. In addition, this approach is present in the 2007 amendments to the Law on the Constitutional Court introducing the constitutional relevance as an admissibility requirement. I will address this issue later in this report.

IV.- Avoiding repetitive applications/repeat violations

The practice of pilot judgments, as provided for in the ECtHR's Rules of Court and whereby the Court indicates in the operative provisions of its judgment remedial measures which the contracting state is required to take to eliminate a structural problem that is the root cause for a significant number of violations, is unknown in the Spanish experience.¹⁴⁰

This is because the operative provisions of SCC judgments refer exclusively to case before it. As has been stated above, the final decision of the SCC as contained in the operative provisions of its judgment only has *inter partes* effect. It is the other part of the judgment, where the SCC sets out its interpretation of the relevant constitutional provisions, which has a general binding effect.

However, there are mechanisms in the Spanish practice that play a similar role and that seek to prevent repetitive applications, such as the possibility to annul a statutory provision if the violation of human rights stems directly from it or the functioning of the special constitutional relevance inserted in the Law on the Constitutional Court in 2007.

Repetitive applications may arise where a statutory provision is inconsistent with human rights standards set out in the Constitution. If this is the case, then every time the statutory provision is applied in administrative or judicial proceedings, there is a violation. This could lead to a large number of repetitive applications being lodged with the Constitutional Court.

¹³⁹ For an analysis of the nuances of the freedom of expression SCC's case law, see footnote 25 below in this report.

¹⁴⁰ As per Rule 61 of the ECtHR's Rules of Court.

The best solution to put an end to this situation is to annul the legal provision for inconsistency with the Constitution, thereby expelling it from the legal system.

Section 55.2 of the SLoCC¹⁴¹ expressly empowers the SCC to do this. Under this procedure, the relevant Chamber of the SCC (which consists of 6 judges) must stay the individual application proceedings before it and refer a preliminary question to the Full Court of the SCC (12 judges) on the constitutionality of the legal provision concerned. This gives rise to a new procedure (“in accordance with the provisions of Articles 35 et seq”¹⁴²) which consist of an abstract comparison between the legal provision and the Constitution. If the Full Court finds that the legal provision is not consistent with the Constitution, a judgment will be issued declaring it null and void. Once this legal provision is struck from the statute book, the individual application procedure that has been stayed as well as any other identical cases, whether before the SCC or at a previous stage before any ordinary court, must be decided without applying the legal provision that was found to be unconstitutional.

An example of this is the legal provision regulating the amount of compensation that is due to defendants in criminal cases who have been held in detention but who were eventually acquitted.¹⁴³ This provided that defendants who were acquitted on presumption of innocence reasons were denied compensation. When a significant number of cases raising this issue came before the Constitutional Court, the relevant Chamber stayed the proceedings in one of those cases and referred a preliminary question to the Full Court. This initiated a new abstract procedure on the constitutionality of the legal provision, eventually declaring it to be inconsistent with the equality principle (section 14 of the Constitution) and the presumption of innocence (section 24.2 of the Constitution).¹⁴⁴ Once this provision was struck from the statute book, the cases that were pending before the Constitutional Court as well as before ordinary judges were resolved without applying the unconstitutional provision and thus granting the right to compensation claimed by the defendants.

The Turkish Law on Constitutional Court¹⁴⁵ (hereinafter, TLoCC) regulates the individual application procedure in Section 4 (Procedures of examination), Chapter 4 (individual application), Articles 45 to 51. This does not provide the Turkish Constitutional Court with the power to declare a statutory provision unconstitutional. For this reason, Turkish legal experts (including members and rapporteur judges of the TCC) claim that the TCC cannot annul a statutory provision in the context of the individual application procedure. According

¹⁴¹ It reads as follows “When protection should be granted because, according to the Chamber or, where appropriate, the Section, the law applied violates fundamental rights or public freedoms, shall lay the question before the full Court to suspend the deadline for delivering judgment, in accordance with the provisions of Articles 35 et seq”.

¹⁴² *Ibid.*

¹⁴³ Section 294.1 of the Organic Law 6/1985, 1 July, on the Judiciary.

¹⁴⁴ See to this effect, STC 85/2019, 19 June 2019.

¹⁴⁵ Law n° 6216, 30 March 2011

to this unanimous opinion, when a human rights violation derives directly from a statutory provision, the TCC should limit itself to issuing a judgment finding that a violation has occurred in the case before it and avoid the annulment of the legal provision.¹⁴⁶ As a consequence, the legal provision concerned continues to be part of the legal system, and the relevant administrative and judicial authorities are required to comply with it. This leads to the same violation being repeated in similar cases. This is perhaps one of the most salient challenges for the effectiveness of TCC judgments delivered in the context of individual application procedures.

There could be three solutions.

The first one would be to introduce a new provision in the chapter of the Law on the Constitutional Court that regulates individual applications (articles 45 to 51 TLoCC) granting the TCC the power to annul statutory provisions, akin to the power of the Spanish Constitutional Court.

A second option might be to use the procedure entitled “remedy of objection”, provided for by Article 40 TLoCC. Under this provision any ordinary court that considers that a statutory provision applicable to a case before it is unconstitutional (for instance, when inconsistency with the Constitution has already been found by the TCC in a previous judgment in an individual application) may stay the proceedings before it and refer the question to the TCC for a preliminary ruling on the constitutionality of the statutory provision. In doing so, ordinary courts may contribute to increasing the effectiveness of the standards sets by the TCC in individual applications, allowing the TCC to strike the provision that is inconsistent with constitutional human rights standards from the statute book. It would be interesting to gather information on whether or not ordinary courts are using the “remedy of objection” for this purpose.

There might also be a third option. Sometimes, the statutory provision that has led to the Constitutional Court finding a human rights violation may be read in more than one way. An alternative reading of the provision may avoid the provision being held to be inconsistent with the Constitution. Ordinary judges called upon to apply the statutory provision concerned may choose to adopt an interpretation that is consistent with the Constitution, setting aside the interpretation that is inconsistent.

In this context, the situation arising from the judgments of the TCC collectively known as “family name judgments” deserves examination. It appears that the TCC found a violation of the Constitution that stemmed from Article 187 of the Turkish Civil Code.¹⁴⁷ The Court of

¹⁴⁶ See to this effect the judgments which are known as “family name judgments”, discussed below.

¹⁴⁷ Article 187 reads: “The wife shall take on her husband’s surname after marriage. However, through a written application made to the marriage officer or civil registry office later on, the wife can also use her own surname preceding that of her husband. Women having used two surnames before can benefit from this right only for one surname”.

Cassation set aside the previous interpretation, found to be unconstitutional, and adopted a new interpretation allowing women to use only their former family names, and family courts followed this new interpretation¹⁴⁸. Another example that deserves examination in this context would be the execution of the judgments relating to the Law on Meetings and Marches (No. 2911), concerning the right to freedom of assembly¹⁴⁹.

In 2007, the SLoCC was amended to allow the Spanish Constitutional Court to focus on delivering judgments with wider impact. The amendment consisted of establishing a new requirement for admissibility, so that the SCC could only admit those cases that have a special constitutional relevance.¹⁵⁰ In a subsequent judgment (STC 155/2009), the Constitutional Court specified that a file represents special constitutional relevance in the following situations (among others¹⁵¹):

- (a) where the asserted violation stems directly from a legal provision, including secondary legislation and rules or regulations issued by ministries or other public bodies;
- (b) where the asserted violation raises a fundamental rights problem in an area where there is no case law of SCC;
- (c) where the asserted violation requires that the SCC clarify or change its doctrine, as a consequence of a process of internal reflection, because of new social realities which have arisen, because of regulatory changes relevant for the configuration of the content of the fundamental right concerned, or because of a change in the doctrine of the bodies entrusted with the interpretation of international treaties on human rights, such as the European Court of Human Rights;
- (d) where the asserted violation of the fundamental right derives from reiterated case law of ordinary courts that the SCC deems to be damaging to one or several fundamental rights;
- (e) where the SCC case law on the fundamental right concerned is not being complied with in a general and reiterated manner by ordinary courts.

All these situations have one feature in common: they imply an interest that goes beyond the individual case concerned. Apart from adjudicating it, the concrete case allows the SCC to set out (or clarify, or change, or confirm) an interpretation of constitutional provisions when this appears to be necessary to guide ordinary judges in resolving similar cases. The SCC is

¹⁴⁸ The *Sevim Akat Ekşi* and *Gülsim Genç* judgments enabled the applicants to use their maiden names alone as a result of the retrial in first instance courts.

For more information see Court of Cassation General Assembly of Civil Chambers, E. 2014/889, K. 2015/2011, 30.09.2015.

¹⁴⁹ See to this effect “Assessment report of the current system of execution of judgments of judgments of Turkish Constitutional Court”, Strasbourg, 12 May 2021, page 20.

¹⁵⁰ The amendment was inserted in the Spanish LoCC by Organic Law 6/2007, 24 May.

¹⁵¹ I am only listing situations that are relevant to strengthening the objective effect of judgments. Other situations have to do with the nature or character of the violation.

encouraged to focus their efforts on fewer judgments, focusing on those where it is possible to establish a constitutional interpretation that has a wider objective impact because it would be applicable to a significant number of similar cases.

The Spanish Constitutional Court should expressly indicate in its judgment which of the above-mentioned situations gives special constitutional relevance to the case. It should also clearly set out its constitutional interpretation, in order to clearly indicate to ordinary courts what human rights standards are applicable to similar cases that may be pending or that may in the future appear before them.

V.- Judicial dialogue

In practice, increasing the objective impact of Constitutional Court is highly dependent on the attitude of ordinary judges. Although the Constitutional Court's interpretation of constitutional human rights standards through its judgments is binding on all authorities, including the courts, they might resist implementing the interpretation for reasons that a particular case before them is not sufficiently similar, or merely delay the retrial. Such an attitude reduces considerably the effectiveness of the Constitutional Court's judgment, which can be overcome only by lodging an individual application with the Constitutional Court once all other procedural avenues have been exhausted.

It is therefore of great importance for the Constitutional Court to engage in a fruitful judicial dialogue with national ordinary courts. This should be focused on the higher courts (in Türkiye this would be the Court of Cassation and the Council of State), since their case law is followed by lower and appeal courts. Through such a judicial dialogue, a partnership may be developed, instead of a situation of rivalry. When ordinary judges see the Constitutional Court as a rival who either invades the room reserved for them or who oversteps the bounds of its jurisdiction, they will be less likely to cooperate in the implementation of the constitutional standards as determined by the Constitutional Court when adjudicating on similar cases.

In the Spanish experience, this judicial dialogue, aimed at setting up a cooperative relationship between the Constitutional Court and ordinary judges, has been enhanced through several mechanisms.

Between 1995 and 2005, some bodies of the judiciary (mainly the civil and criminal branches of the Supreme Court), complained that the Constitutional Court was managing the *recurso de amparo* as a third-instance appeal. They considered that, at times, the Constitutional Court, in the determination of cases dealing with substantive rights, went far beyond the task of determining the scope and limits of human rights and also assessed facts and interpreted concepts arising from ordinary laws.

As a result, ordinary courts showed reluctance in the implementation of the Constitutional Court's standards in their judgments on similar cases, holding that the individual application procedure could not be used as a third instance appeal to revise the assessment of the facts or the way in which ordinary courts had construed statutory provisions.

Initially, this situation led to a sort of dialogue between courts that ended up in a stand-off, with neither the Constitutional Court nor the ordinary courts moving from their standpoints. There were some judicial decisions that indirectly undermined the Constitutional Court's jurisdiction, as regards situations already adjudicated by it. For example, the civil branch of the Supreme Court found all twelve judges of the Constitutional Court liable for delaying a decision on the admissibility of an individual application (which in the end was declared inadmissible).¹⁵²

A twofold solution was found to overcome this conflict. First, As regards the subjective effects of the SCC's judgments (where a judicial decision impairs SCC jurisdiction because it affects, in one way or another, files already adjudicated by the SCC), the SLoCC was amended in 2007 to provide the SCC with stronger executive powers. Second, as regards the objective effects of the SCC's judgments, the judicial dialogue continued for several years until, eventually a balance was reached¹⁵³. Nowadays, the Constitutional Court practises a degree of self-restraint to ensure that it does not go beyond the scope of its competence, and ordinary judges consistently implement the constitutional standards as developed by the Constitutional Court when adjudicating in similar cases.

There are some areas of human rights where a nuanced constitutional interpretation is unavoidable. This is the case in the area of freedom of expression, where this situation will continue because of the new framework of freedom of expression in the digital era. In scenarios such as this, a complete set of standards takes decades to be developed. The Constitutional Court should bear in mind that slightly different situations appearing before

¹⁵² Supreme Court Judgment (Civil branch), 23 January 2004.

¹⁵³ Although this dialogue benefits from different actions (many of them organised and systematic, as will be argued below in the text of this report, it always results in specific judgments regarding specific human rights issues. You can see the ongoing dialogue on the limits of freedom of expression in the following strand of SCC's judgments (all of them provide information on the respective position of the ordinary judges and contain SCC's judges' dissenting opinions):

- 1) 133/2021, 24 June (demonstrators preventing Catalanian MP from entering Catalanian Parliament to vote on the Budget)
- 2) 93/2021, 10 May (a message in a social network referring to a bullfighter as a murderer and expressing relief for his death)
- 3) 192/2020, 17 December (discourse disrespectful to the flag)
- 4) 190/2020, 15 December (pro-abortion demonstrators interrupt a catholic ceremony)
- 5) 35/2020, 20 February (lyrics wishing the King and member of the security forces be murdered)

ordinary courts may necessitate at least partial changes to standards previously set out in constitutional judgments. Therefore, it should be assumed as a normal outcome that the judicial dialogue will continue over many decades, without an end.

The judicial dialogue could also take place outside of judgments, by regularly organising meetings to share ideas on common issues. Two modalities have been consolidated in recent years. The first consists of annual meetings attended by delegations of members both of the Constitutional Court and the Supreme Court. These meetings alternate between the venues of each court. The second is a week-long study visit of judges that is organised every year under a cooperation agreement between the Constitutional Court and the Council of the Judiciary.¹⁵⁴ The attendants are mainly appeal judges, from the civil, criminal, administrative and social branches of the judiciary, and sometimes judges from lower courts.

Finally, members and Rapporteur-Judges of the Constitutional Court are organised in a way that ensures judicial dialogue. The Spanish Constitution provides that the twelve members of the Constitutional Court are appointed from among prestigious legal professionals. Often, half of them have been former Supreme Court judges. Furthermore, the Spanish Law on the Constitutional Court requires that rapporteur judges must be appointed from among civil servants with expertise on legal issues. However, on average 40% are selected from among judges and prosecutors who, after working at the Constitutional Court for on average six years, return to their original posts, or to a new post within the judiciary or the public prosecutor's institution. As a consequence, several judges and prosecutors working at ordinary courts have previous experience at the Constitutional Court, ensuring a fruitful judicial dialogue and a cross-pollination of ideas and viewpoints.

VI. Promotion of Standards

a) Formal training and education

A university degree in law is a four-year programme. Constitutional Law is a required subject which is divided into two semesters with approximately four hours per week each. As this covers many topics, there is little specific attention to the role of the Constitutional Court and even less to the execution of its judgments. A university degree in law also includes optative subjects that vary from one university to another, but it is rare that they cover the role of the Constitutional Court. Although many universities offer human rights as an optative subject, this commonly focuses on substantive issues rather than procedural questions.

Aspiring practising lawyers are required to take a year-long postgraduate university programme and pass a state exam organised by the Ministry of Justice. This programme pays

¹⁵⁴ In Spain, the judiciary encompasses only judges; prosecutors are integrated in another institution, outside the judiciary.

more attention to the functioning of the Constitutional Court. It includes an approximately 20-hour module on the most important procedural issues relating to the Constitutional Court, as well as a 2-hour sub-module specifically on the execution of its judgments, including a reference to the binding effect of *recurso de amparo* judgments. Often, these modules are taught by rapporteur judges of the Constitutional Court, or by professors who have previously have been rapporteur judges.

As part of the continuing professional development of lawyers, Bar Associations regularly organise short courses on particular topics regarding the role of the Constitutional Court, or the evolution of its jurisprudence on issues of current interest. For instance, the Madrid Bar Association and the Constitutional Court have an ongoing agreement to organise at least one course annually in the venue of the Bar Association, with rapporteur judges of the Constitutional Court as trainers.

Aspiring judges and prosecutors must pass a state exam and then undertake a year-long pre-service training program. As part of this, specific attention is paid to the features of the individual application mechanism and its functioning. The program covers the general binding effect of the Constitutional Court's interpretation of the scope and limits of the human rights enshrined in the Constitution, and also focuses on the limits of the jurisdiction of the Constitutional Court, stipulating that it does not function as a third-instance appeal and that courts and judges enjoy a wide margin to construe statutory provisions applicable to cases before them except for issues concerned with constitutionally protected human rights. As a consequence, judges and prosecutors are well aware from the beginning of their career that the Spanish system relies firstly on the judiciary to protect human rights and provide redress for any violations that may have occurred, and that in doing so they should always have due regard to the standards set by the Constitutional Court through its constitutional interpretation in *recurso de amparo* judgments.

Finally, the Council of the Judiciary, sometimes together with the Constitutional Court, regularly offers series of lectures or training programmes on human rights covering both substantive and procedural issues as part of the in-service training for judges. By taking part in these training programmes judges can claim merits which are relevant to discretionary appointments, such as appointments of Supreme Court judges.

b) Awareness raising of new judgments, particularly with regard to objective measures

The Annual Report of the Constitutional Court offers a useful opportunity raise awareness among public authorities of shortcomings in the implementation of human rights standards and engaging them in a dialogue.

The Constitutional Court drafts a comprehensive annual report covering all its activities, but focused on its judicial performance. This annual report is available online as well as in book form and is sent to the main public authorities. As an important part of the institutional

relationships of the Constitutional Court, its President presents the Annual Report to the Head of State, the Head of Government, the Presidents of the two legislative chambers and the President of the Judiciary.

Section V of this Chapter elaborated on judicial dialogue as a means of securing increased objective impact of *recurso de amparo* judgments. While it is not unusual for the implementation of human rights standards set out in those judgments to require the active participation of other public authorities, it is much more difficult for the Constitutional Court to engage in a dialogue with the Executive and the Legislative. The only way of doing so is through ‘soft’ interactions such as the delivery of the Annual Report through an institutional visit, allowing the Constitutional Court to demonstrate to the Executive and the Legislative the risks and challenges to the protection of human rights.

In Türkiye, the formal presentation of the Constitutional Court’s Annual Report to the heads of state, government, parliament, and other high courts could be very powerful in ensuring the dissemination of human rights standards set by the Turkish Constitutional Court’s judgments, particularly since supervision of the objective impact of its judgments is one the tasks of the Constitutional Court and is therefore included in the Annual Report. The Annual Report should explicitly assess the implementation by the competent public bodies, including those pertaining to the Executive and the Legislative, of standards set by the Constitutional Court in its judgments.

Through this supervision and assessment, published in the Court’s annual report, the Turkish Constitutional Court could draw attention not only to its latest judgments, but more importantly also to the low objective impact of previous judgments. This could then engage authorities that have a competency relevant to that implementation in a dialogue. Indirectly this would also involve other stakeholders, and it would engage the general public opinion.

The Spanish Constitutional Court issues press releases of those judgments that it presumes are of interest to the public. Press releases summarise the main points of the judgment, as their goal is to help the media communicate the Constitutional Court’s decision to the public. Press releases rarely contain anything that could be considered as a legal analysis of the judgment. Sometimes, the Constitutional Court publishes the press release as well as the entire text of a judgment in the press zone of its website. The relationship between judgments and the media is inherently problematic. The language of the media and the language of the judgment are quite distant. Translating a judgment in a press headline is always highly controversial. Although it is hard to completely remedy this situation, it is important to be aware of it.

The Spanish Constitutional Court also actively promotes research and analysis of the human rights standards set out in its judgments, and their implementation by the competent authorities. The most important and consolidated example of this is a private association that convenes all current and former rapporteur judges of the Constitutional Court. The aim of the association is to discuss constitutional issues of current interest, and its main activities are

holding an annual study meeting and publishing a book compiling that meeting's speeches and related discussions. This annual meeting always has two parts. The first part is dedicated to the study of a specific topic chosen for that year (2021 was about the state of emergency and its consequences for the protection of human rights). The second part of the meeting deals with the most important judgments of the last year. The keynote speeches and the discussion are collected and published in a yearbook that is well known in Spain and beyond as the best source for understanding the human rights standards stemming from the Spanish Constitutional Court's *recurso de amparo* judgments. The Spanish Constitutional Court provides partial funding for the association. The purpose of this financial support is to promote the analysis of the Court's judgments and ensure so that there is widespread awareness of them among legal professionals, including lawyers, judges, and prosecutors.

An association akin to that of the Spanish association of former and current judge rapporteurs could be organised in three parts. The first part could discuss a specific constitutional topic; the second part could give notice of and discuss the most important judgments of the previous year; and the third part could analyse and discuss the objective impact of the Turkish Constitutional Court's judgments in one or several aspects, which might vary from year to year.

All judgments of the Spanish Constitutional Court are published in the Official Gazette (*Boletín Oficial del Estado*), ensuring awareness of them. However, the tool that really facilitates legal professionals to access and manage the large number of judgments is the search engine on the Constitutional Court's website. Its most important feature is that it provides legal professionals with quite useful filters to search among the judgments and find the most appropriate ones for a specific purpose.

Conclusions and Recommendations

A human rights protection system can only be sustainable when the objective effect of the Constitutional Court's judgments objective effects is sufficiently ensured. To improve the system and help it move toward reaching this goal, the following measures are recommended.

1. Increasing the number of leading judgments: The Turkish Constitutional Court should mainly focus on those cases that allow it to issue judgments with wider objective impact. Two actions can be recommended to achieve this:
 - at the admissibility stage, the TCC should carefully assess the large number of applications and identify those that are most appropriate to issue judgments that can have a wide objective impact;
 - in its judgments, the TCC should identify the issue that goes beyond the particular interest of the applicant and then set out clearly the constitutional interpretation that ordinary courts and other public bodies must have regard to when adjudicating on

similar situations. Although this practice would trigger effects very similar to pilot judgments, there is a difference because the recommended course of action focuses on the constitutional interpretation instead of ordering the implementation of a set of measures.

2. Reinforcing the TCC's activities aimed at supervising the objective impact of its judgments, framing them as high-level supervision. This task would probably be most effective if it is carried out as a soft measure: a mechanism of gathering information which would be most useful to support other actions aimed at increasing the objective impact of judgments:
 - This would help the TCC to organise in advance the admissibility process. The information gathered will show the TCC what to search for among the applications lodged with it.
 - The TCC should add to its Annual Report a chapter showing the level of implementation of standards set in its judgments and elaborating on particularly concerning issues. This could be sent to all public authorities, as a means of institutional dialogue.
 - The information gathered could be used in the judicial dialogue, at least to exchange information, but ideally also to ensure that the High Courts are aware of widespread practices of the lower courts that might be non-compliant.
 - The information would also help identify human rights issues that need to be focused on as part of continuous professional development training activities for legal professionals.
3. In order to avoid repetitive applications arising from non-compliant statutory provisions, the legislative solution would be to amend the TLoCC Chapter relating to individual applications to expressly empower the TCC to declare that a specific legal provision is inconsistent with the Constitution, and therefore strike it from the statute book. Other recommendations would be to encourage ordinary courts to use the "remedy of objection" procedure (art 40 TLoCC) which allows the TCC to annul an inconsistent provision; and to encourage ordinary courts to use their discretion to interpret legislation in a manner that is consistent with the Constitution, setting aside any inconsistent interpretation.
4. The implementation of human rights standards stemming from the ECtHR or from the TCC should be seen as positive factor in the performance evaluation of judges, thus encouraging them to implement these standards without compromising their judicial independence. To this effect, implementation of human rights standards should

also encompass the use of the “remedy of objection” and the selection of an interpretation consistent with the Constitution from among several possible.

5. Engaging the TCC in judicial dialogue with ordinary courts such as discussed in Section V of this report might help develop a partnership status instead of a situation of rivalry. Where ordinary court judges see in the Constitutional Court a rival who either invades the room reserved for them or who habitually oversteps the bounds of its jurisdiction, the result will most likely be that ordinary courts will be less inclined to cooperate in the implementation of constitutional standards determined by the Constitutional Court when adjudicating on similar cases.
6. The TCC’s Annual Report should be used as a means to engage in a dialogue with the Executive and the Legislative, showing them the risks and challenges faced by human rights protection, especially focused on risks and challenges that arise from their actions or their lack of implementation of the human rights standards determined by the Constitutional Court.
7. The TCC may promote initiatives, including by funding them, aimed at conducting research and analysis by prestigious private actors such as associations, academics, and universities, on the human rights standards set out in its judgments and their implementation by the competent authorities.
8. Institutions such as the Justice Academy, Bar Associations, Government, and Universities should increase their awareness-raising work among lawyers, judges, prosecutors, public officials, and others of the features and functioning of the individual application procedure. It is of paramount importance to focus on the role of courts and judges in protecting human rights, emphasising that their task consists of not only applying statutory provisions but also applying them consistently with the human rights enshrined in the Constitution, as well as on the binding effect of the interpretation of the constitutional provisions made by the Turkish Constitutional Court in its judgments.
The Turkish Constitutional Court should engage in close cooperation with these institutions in the organisation of this kind of activities, in order not only to disseminate more accurately its judgments but also to promote a partnership status instead of a rivalry situation.
9. Media coverage of a human rights judgment is important but complex, and the media may have a tendency to focus only on very broad issues. Developing a channel of cooperation with the media, for instance by publishing press releases, although

somehow problematic, may be helpful to place the individual application in the public opinion as a trusted mechanism.

Consolidated Recommendations

The previous chapters have provided an overview of the execution of judgments of the German and Spanish constitutional courts and of the European Court of Human Rights. The experience of these courts is rich and productive, stretching back several decades, and has resulted in strengthening the framework of constitutional and human rights law in these countries and jurisdictions. Each has learned important lessons not only with regard to the execution of individual judgments, but also with regard to how to ensure that judgments whose effects go beyond the interests of the parties are effectively embedded or followed-up on in the legal order of the jurisdiction concerned. Important lessons can be drawn from these that are of relevance to the Turkish constitutional courts.

This chapter summarises and consolidates the recommendations made in each of the individual and country chapters.

Recommendation 1: Effectively tackle unconstitutional legislation or other systemic obstacles to the enforcement of constitutional rights

The Constitutional Court should have effective tools to deal with applications that raise as yet undetermined constitutional questions as well as cases where domestic law or other systemic issues are an obstacle for the implementation of human rights. This can be achieved in several ways:

- (1) Allow the individual application proceedings to deal with the annulment of legislative provisions on the basis that they are incompatible with the implementation of human rights;
- (2) Encouraging ordinary courts to use the ‘remedy of objection’ procedure under Article 40 of the Law on the Constitutional Court which allows the Court to annul legislative provisions that are inconsistent with the Constitution; and
- (3) Introducing a procedure whereby the Court carefully identifies, at the admissibility stage, cases that raise as yet undetermined constitutional questions or cases where domestic law or other systemic issues form an obstacle for the implementation of constitutional rights. In its judgments in such cases, the Court should clearly identify the issue that goes beyond the particular interest of the applicant and set out the constitutional interpretation of the issue which should be followed by ordinary courts as well as by other public bodies.

The serious nature and consequences of the resulting decisions should be reflected in the procedural framework, for example, by reserving such decisions to a special body, by requiring the Grand National Assembly of Türkiye to submit a statement and be joined to the proceedings as a party, by requiring a supermajority for decisions. Retrials should be required for convictions that are based on a criminal provision that the Constitutional Court has declared to be incompatible with the Constitution or that are based on an interpretation of the criminal provision that the Court has declared to be unconstitutional, even for individuals who have not lodged an individual application with the Constitutional Court.

In addition, ordinary courts as well as the Constitutional Court should be encouraged to use their discretion to interpret legislation in a manner that is consistent with the Constitution, setting aside any inconsistent interpretation.

With the exception of encouraging ordinary courts to use the remedy of objection procedure which is already provided for and encouraging ordinary courts as well as the Constitutional Court to interpret legislation in accordance with the Constitution, these recommendations would require an amendment of the Law on the Constitutional Court.

Recommendation 2: More streamlined judicial decision-making in cases where constitutional standards are well-established

To better manage the workload of the Constitutional Court, particularly with regard to cases where the relevant constitutional standards are already well-established, several measures can be introduced. The structure of the Court's Sections and their competences should be reconsidered. The Court's Sections should have the authority to decide on the merits of cases in which the relevant constitutional standards are well-established, for example through previous caselaw, and if the individual application in question is manifestly well-founded. This broadening of the Sections' competences should be reflected in a broadening of their composition from two Justices to three and by requiring a unanimous vote. Consideration should also be given to introducing friendly settlement and unilateral declaration procedures, empowering Sections to quickly resolve individual applications in areas where constitutional standards are well-established. These recommendations would require amendment of the Law on the Constitutional Court.

Recommendation 3: Input and involvement from other constitutional organs and invited experts

Individual applications that raise as yet undetermined constitutional questions should be communicated to other constitutional organs that may be affected by the issue, and these organs should be invited to submit written statements, join the proceedings, and to take part in any oral hearings. This would ensure that the Court receives input from different perspectives, keep other constitutional organs informed of pending cases, and increase the acceptance of the Court's decisions. The Constitutional Court should also invite experts to share their knowledge with it. A change in legislation is required for this recommendation to be implemented (Article 49 of the Law on the Constitutional Court currently only requires the communication of applications to the Ministry of Justice).

Recommendation 4: Oral hearings

The Constitutional Court should consider using its authority to hold oral hearings in individual application cases that raise intricate or controversial constitutional questions. These can help the Court to broaden its perspective, to deepen the foundations of its judgments, and generate a greater understanding of the rationale behind its judgments among state institutions, other courts, academia, and the wider public. No legislative changes are required for this recommendation to be implemented (Article 49(4) of the Law on the Constitutional Court provides that the Court may hold hearings).

Recommendation 5: Judicial dialogue and cooperation

Effective dialogue between the Constitutional Court and other courts is necessary to ensure the continuing high quality of the Court's judgments as well as the acceptance and implementation of judgments by other courts and tribunals. Several steps should be taken to achieve this:

- (1) Judges from other courts and public officials should be delegated to the Court for a specified period of time, following which they return to their 'home' institution. This would introduce a practitioner's perspective at the Court, propagate the Court's standards and constitutional approaches, and raise awareness of constitutional matters among the judiciary as well as among public officials.
- (2) As well as establishing a network, there should be formal periodic joint meetings of representatives from courts across the Turkish judicial system, the legislator, the government, and relevant administrative bodies, to discuss recent Constitutional Court judgments as well as any issues that may have arisen in the implementation of constitutional standards set in judgments.

The Constitutional Court should also consider cooperating with the European Court of Human Rights in raising awareness of constitutional and human rights standards, through joint seminars, workshops, training courses, producing publications, and other educational and awareness raising tools.

No legislative change is required to implement these recommendations.

Recommendation 6: Promotion and awareness-raising

So as to ensure wide awareness of its judgments, especially those that have implications beyond the interests of the parties before it, the Court should issue press releases on the most important cases decided by it. The Court should consider publishing press releases aimed at the media as well as legal summaries of its judgments aimed at an audience of legal professionals. In addition, the Court should issue thematic fact sheets summarising standards set in cases decided by it and keep these updated on at least an annual basis.

A network should be established that includes representatives of the Court along with other legal professionals, including representatives from other courts, the Judicial Academy, the Ombudsman, the Judicial Academy, and academia more broadly. Such a network can facilitate ongoing communication and the organisation of conferences and workshops.

The Court should promote initiatives, including by funding them, aimed at conducting research and analysis by private actors such as associations of lawyers, academics, and universities, on the human rights standards set out in its judgments and their implementation.

The Court should not be the only institution to promote awareness of standards set in its judgments. Institutions such as the Judicial Academy, bar associations, government ministries, and universities should increase their awareness-raising work among lawyers, judges, prosecutors, public officials, and others on constitutional standards and procedures, including the features and functioning of the individual application procedure.

No legislative change is required to implement these recommendations.

Recommendation 7: Enhance education of constitutional court law and procedure

The prominence of constitutional standards and their interpretation and enforcement by the Constitutional Court should be emphasised in legal education at all levels. Constitutional law and procedure should be a compulsory subject for all law students, not only with regard to the

organisation of the State but also with regard to the protection of fundamental rights and the individual application procedure through which fundamental rights questions are decided. This should also be a required subject of continuing education for all legal professionals, on a suitably regular basis (at least every five years). Furthermore, the in-house training programmes that the Court has conducted for serving judges and public officials should be continued and expanded.

Recommendation 8: Collect and publish information on the enforcement and implementation of judgments

Effective implementation is most likely to be achieved through the mechanisms of education and judicial dialogue mentioned above. To support these mechanisms and inform how they are implemented, the Court should bolster its capacity to monitor the objective impact of its judgments. The Court should also add to its Annual Report a chapter showing the level of implementation of standards set in its judgments and elaborating on particularly concerning issues. This should be formally presented to Parliament, the government, and representatives from the Court of Cassation and other courts of appeal, and sent to all public authorities as a means of institutional dialogue.

Recommendation 9: Include appropriate implementation and use of constitutional standards and procedures in performance evaluations

The implementation of human rights standards as set by the Constitutional Court as well as by the European Court of Human Rights, the appropriate use of the Article 40 “remedy of objection” procedure, and the interpretation of legislation so as to conform with human rights standards, should all be included as positive factors in the performance evaluation of judges.