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**THE EXECUTION OF DECISIONS
OF THE ADMINISTRATIVE COURT**

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Introduction

The following conclusions are a comparative analysis based on the twenty-seven national reports submitted to the VIIIth Congress of the International Association of Supreme Administrative Jurisdictions. Its subject matter, the implementation of decisions of the administrative court, has been divided into three main sections, following the structure previously established by the Board of the Association.

A few methodological questions must be pointed out. Due to the high number of national reports, an exact account of every aspect regarding national law has been avoided. The conclusions blend the main features outlined by each report, but its final form is comparative. Therefore, this paper describes general aspects applicable to several reports, accompanied by a case-by-case analysis of individual examples. A particular effort has been invested in order to portray as many national examples as possible, but in some cases it was inevitable to make selections.

It must also be highlighted that the following conclusions are strictly based on the contents of the national reports. With a few exceptions (specifically mentioned), the descriptions are strictly attached to the information provided by each written contribution to the Congress. Further details on other Member States of the Association would have been of the utmost interest, but, as stated, the contents of this paper are firmly attached to the submitted reports.

I.- Legal consequences of decisions of the administrative courts

1.- Diversity

A.- Diversity of legal administrative traditions and its consequences in judicial review.

The divergent traditions of administrative justice offer a varied and apparently contradictory scenario. Therefore, a comparative analysis of the legal consequences of an administrative judge's decisions must trace, in the first place, the main structural differences in the models of judicial review currently in operation. This brief study will then lead us, in section 1.B, to a comparative analysis of judicial decisions in proceedings for judicial review.

As stated, the divergent traditions of judicial review have provided a rich and sophisticated scenario, which ultimately have consequences in the powers of implementation of the court's decisions. A first line can be traced between two different traditions of public law. The enormous impact of Administrative Law and its model of administrative justice has been embedded in the legal framework of many States, translating into a rigid partition between judicial and administrative matters¹. This distinction can have a decisive influence in the content of judicial decisions and their consequent implementation. On the other hand, non-Administrative Law traditions can be characterized by a stronger judicial presence, and such a feature can sometimes imply a

¹ The influence of Administrative Law can be found, although in different degrees, in countries such as Germany, Austria, Belgium, Benin, Bulgaria, Colombia, Congo, France, Greece, the Netherlands, Indonesia, Italy, Luxembourg, Mali, Nicaragua, Poland, Spain, Switzerland, Thailand and Turkey. In Australia, as its report has pointed out, the common law tradition has slowly parted towards a deeper influence of Administrative Law and it could currently be considered a "mixed" system.

more intense degree of review². Of course this is not always the rule, and several States have created strictly judicial (and non-administrative) systems of review, although characterised by minimum standards of scrutiny, mostly procedural³.

Due to these different traditions of judicial review, courts of a judicial nature are constrained by a series of limitations pursuant to constitutional requirements. A strict separation of powers contributes, in some cases, to restrict the powers of the courts when it comes to implement its decisions. On the contrary, administrative-based courts can sometimes act with a wider margin of action, bearing in mind that their decisions are adjudicative, but of an administrative nature. This different approach to judicial review further conditions the powers of courts in the implementation of their decisions.

A further example of divergence can be seen in the different degrees of compliance, and the more or less structural tendency of the administration to abide by judicial decisions. Several national reports have expressed concern about this matter, whilst others are optimistic about the level of acceptance shown by administrative bodies to judicial decisions. However, the degree of acceptance will have an impact in the powers and remedies provided for the implementation of decisions of the administrative court's decisions. This matter will be studied later in this report, and has contributed to reinforce extra-judicial mechanisms of implementation in some States.

However, these differences must be put in their proper context, and thus we must also point out the *similarities* of the aforementioned traditions. The most remarkable coincidence is a question of approach: the strict separation of functions between the administrative body and the adjudicative body. When the latter is of a judicial nature, the constitutional provisions guaranteeing a division of powers have an evident impact on this separation of functions. However, in the case of administrative adjudicative bodies, such as

² In the light of the reports, and also in divergent degrees, various States show an autonomous form of administrative law, as in the case of Canada, China, Egypt, Finland, Israel, Norway, Sweden and England and Wales.

³ For example, the case of England and Wales. And despite the importance of procedural guarantees in judicial review, the national report explains the gradual increase in the degrees of judicial scrutiny over administrative action, in what is called the "long trek away from *Wednesbury* irrationality". However,

the French *Conseil d'Etat* or the British or Australian *Tribunals*, the review of administrative action will also be anchored in a strictly distinct function. This common feature has evident consequences for the implementing powers of such bodies, and it contributes to shape separate and autonomous procedures to implement the court's decisions.

B.- Diversity of judicial decisions and its consequences in judicial review.

Having considered in very wide and ample terms the different models and traditions of judicial review, we must now explain the diversity of judicial decisions and their scope. Bearing in mind the existence of judicial-based and administrative-based models of judicial review, judicial decisions can be categorised considering the powers of *substitution* in the hands of the court. This feature may provide a critical distinction that ultimately has an impact on the implementing powers of the court. After all, judgements with substitutive contents will enter into the province of administrative bodies, and their ultimate implementation will turn the courts into full-fledged administrations. The balance between the right to an effective remedy and the strict separation of powers has been struck in different terms throughout the States, as the national reports have proved. Therefore, substitutive judgements are the most incisive form of judicial review, and we will use the distinction between substitutive and non-substitutive judgements in order to describe the divergent forms of judicial decisions, and their consequences.

Of course other distinctions must be outlined, in order to offer a complete scenario in view of the national reports. However, most of them will lead to very similar consequences in terms of implementation. Many States have consolidated well-known typologies, categorising judgements as declaratory, constitutive or requiring performance. Such judgements will either conclude with the annulment or confirmation of an administrative act, a declaration of existence or non-existence of a legal relationship, or an instruction to take action. These features are common to most States, and the national

England and Wales are still deeply attached to procedural guarantees, and the rules of natural justice are still the essence of judicial review.

reports have so provided. As stated, the most marked divergence lies in the substitutive powers of the court.

The reports show a varying degree of substitutive powers, and thus a line must be drawn at some stage. If we consider that the *contentieux de pleine juridiction*, mainly in cases dealing with administrative inaction, is of a substitutive nature, it could be said that approximately 50% of the States that have submitted reports recognise substitutive powers to their administrative courts. Of course it could be debated whether a judgement instructing the Administration to take action is of a substitutive character. However, from the consequences of the judgement it can be said that the court has expressly provided for a form of administrative action, and the content of such action is previously established in the court's judgement.

Employing the aforementioned criterion, it can be said that Canada, Congo, Egypt, Finland, Ivory Coast, Mali, Nigeria, Norway, Poland, Senegal and the United Kingdom preclude any form of substitutive judgements. In the case of Belgium, Benin and Colombia the reports have not expressly described this issue, but it may be said, from their texts and other features of their respective administrative legal systems, that substitutive judgements are also precluded in such States. A strict separation of powers has created a frontier between adjudicative and administrative functions, and therefore decisions of the former must be, in all cases, restricted to the role of a "negative administration".

On the contrary, reports from Australia, Austria, Bulgaria, China, France, Germany, Greece, Italy, Luxembourg, the Netherlands, Spain, Switzerland and Turkey give an account of some type of substitutive decision-making among the powers of their administrative courts⁴. This power is not, however, to be interpreted in wide and open terms, but restrictively and depending on each State. Thus, several degrees of substitutive judgements can be noted in the light of the reports.

⁴ It must be noted that France, Greece, the Netherlands and Turkey have administrative courts with a restricted jurisdiction in terms of substitutive judgements. All four countries are closely linked to the tradition of the *excès de pouvoir*, and thus the separation of functions between adjudicative and administrative powers is very strict. Substitutive judgements are scarce, and mostly linked to actions requiring performance.

The most intense form of substitution can be observed in cases where the courts may substitute administrative acts which impose sanctions. The Chinese report gives an account of a high standard of scrutiny over administrative disciplinary action, and the courts have made use of it by altering sanctions. Such a power can only be used when the administrative sanction is “obviously unjust”, but it can be exercised both to reduce and to increase the concrete sanction previously imposed. The Spanish case-law has also made substitutive decisions in this area of administrative action, however avoiding any form of *reformatio in peius*, and thus restricting substitution only in cases which allow a reduction of the sanction.

A more lenient form of substitution can be found in judgements of a constitutive nature requiring performance. In such cases, the court may establish a legal relationship and thereafter impose specific administrative action. This is a “soft” approach to substitution, for constitutive judgements are predefined legal decisions, and the court decides pursuant to the relevant provisions. However, the final result is clearly a form of substitution, for the final decision has been adopted by a court, and the court takes care of its implementation. This power is a main feature of the *contentieux de pleine juridiction* (e.g. France, Greece, the Netherlands and Turkey), also available in States where the administrative courts have the power to “restore the legal situation of the plaintiff” (e.g. Colombia, Germany, Italy and Spain).

Another lenient expression of substitutive judgement is to be found in the Austrian and German legal systems. In Germany, the action for the issue of an administrative act (*Verpflichtungsklage*) entitles the court to order the relevant authority to issue a previously requested act, even when it is an act of a discretionary nature. However, in case of discretionary powers the German court will limit itself to “instruct the authority to resume the case”. Although the court’s decision does not give an answer to the individual, it certainly constrains the discretion in hands of the Administration, for the court’s instruction is binding. This particular action is complemented by a general action of performance, provided both in Austrian and German administrative law. In such cases the individual does not seek an individual act, but some form of material administrative action that is specified by the court. The Austrian report gives an account of the peculiarities of

this action, known as *Säumnisbeschwerde*, and, in contrast with the German remedy just noted, the administrative court can only substitute the illegal administrative inaction by solving the case *in merito*, without the need to return the issue to the administrative authority. This faculty is often exercised with care, and a margin of technical appraisal is usually granted to the administrative authorities.

Lastly, substitutive powers can be granted to the courts by specific statutory provisions. In Italy, the courts can substitute administrative decisions under special circumstances, only if provided by statute. A similar situation can be found in Luxembourg, where the *compétence en matière de réformation* allows the courts to substitute administrative decisions, provided a statutory provision grants such power. According to the Luxembourg report, there are no clear-cut criteria in the legislator's decisions, and currently have a wide range of cases in which administrative acts can be replaced by judicial decisions.

2.- Enforcement and the principle of legal certainty

A.- Administrative judicial decisions and their retroactivity

Decisions of an administrative court have an *erga omnes* effect in all jurisdictions, at least in general terms. This feature extends to the subject-matter and parties of the case, and carries another consequence too: the retroactivity of the decision, and thus a total or partial re-establishment of the original legal situation of the parties to the case. Most reports have made an express mention of this feature of administrative justice, but they have also stated the limitations of such doctrine, mainly due to its consequences in the light of the principle of legal certainty. In the following section the basic limitations will be outlined, and it will be seen how different States have adopted varied and contradictory solutions to the aforementioned problem. Such limitations can be sketched in the light of the following cases: relevant changes of factual or legal circumstances, consolidation of former situations, annulment of general provisions and legislative interventions.

A change of circumstances can lead to a restriction over the retroactivity of an administrative court's decision. The French *Conseil d'Etat* has explored this possibility, and in the *Colonna* case (14-2-1997), it ruled in favour of an attenuated retroactivity of its judgements, when the new administrative act required a consultative report from a public authority. The *Colonna* case posed the following question: must the new act be adopted having heard the opinion of the same consultative public body, and thus including the same members of the board at the time of the annulled act? The *Conseil d'Etat* approved a slight limitation to the retroactivity of its judgements, and ruled in favour of keeping the consultative procedure, but under the new circumstances present at the time of approval of the act in the light of the *Conseil's* judgement. As long as the consultative body provides the same procedural and substantive guarantees as it once did, the judgement will thus combine its retroactivity with a more nuanced approach.

In Italy, the *Consiglio di Stato* has also made considerable exceptions to the retroactivity of its judgements, considering the legal circumstances of the case at the time of the annulment. The Italian and Austrian reports have described how their case law accepts a nuanced retroactivity of administrative judgements, mainly when the court faces administrative acts prior to its judgement. When these acts obstruct a full retroactive effect, exceptions can be made. When such difficulties arise, the court may be willing to reconsider the precise measures needed in order to implement its decisions, as in Spain, where article 105 of the Administrative Jurisdiction Act provides for specific procedures when judgements face the "legal or material impossibility" of their implementation. Article 105 provides for a special procedure, where all parties to the case are heard, that shall conclude with a resolution of the court stating "the necessary measures in order to guarantee the implementation in its highest degree".

Secondly, further exceptions can be made when past situations have consolidated in the course of time. Several reports explain the different contexts in which these exceptions can be found, and they arise with particular intensity in cases concerning civil servants. In Belgium, Greece and Mali, the doctrine of the *fonctionnaire de fait* has led the courts to attenuate the full consequences of their judgements, particularly when the annulment affects the appointment of a civil servant to a post. In these cases, the removed civil servant

is not obliged to reimburse the salary illegally received. This doctrine extends to the administrative acts adopted by the removed agent, which will maintain their full effects, despite being approved under the authority of an illegally appointed individual. In such cases, the principle of legal certainty restrains the consequences of a judgement in order to avoid what the Belgian *Conseil d'Etat* described in the Tibax case:

“Indeed, a judgement of the *Conseil d'Etat* can not act as a sort of ‘time-machine’ that can recreate a past moment in the legal order or in the context of social relations. [...] In particular, the complete re-establishment of legality may cause more harm than good to those individuals who were not responsible for the initial legal wrong, and thus have no call to carry the burden of an annulment caused by others [...]”.

However, the main cause for intense observation of the principle of legal certainty appears when the court annuls a regulation or a general administrative act. Considering the effects of a void regulation over its implementing acts, most administrative courts have developed case-law to restrict the effects of their judgements in such cases. In some States, such as Spain or Belgium, the limitation has been provided by Parliament in specific legal provisions. However, other States have developed a different doctrine over the matter by way of case-law. For example, it is settled case-law of the Turkish State Council that void regulations will extend their nullity only to the contested implementing act. The same conclusion has been reached by the French *Conseil d'Etat* since the *Caussidéry* case (3-12-1954). But it must also be noted how other States refrain from any restriction when it comes to void regulations, as in Greece or Colombia. In these countries, the annulment of a regulation is enforced with its full consequences, in order to guarantee complete and unconditional effect to the administrative court’s judgements.

Finally, it must be noted how the Greek report highlights the role of Parliament in cases requiring complex and/or large-scale nullities. In such cases, the legislator must intervene, in order to attenuate the full consequences of the administrative court’s ruling.

B.- The scope of administrative judicial decisions over subordinate or accessory administrative acts (*actes liés*)

An administrative judgement declaring a nullity can extend its effects beyond the contested administrative act. Several reports point out this feature of their legal system, particularly in cases where several acts are linked to each other, either in a subordinated or an accessory form. What are commonly known as *actes liés* in French law or *actos conexos* in Spanish law (linked or connected acts, respectively) face different consequences in different States. It can be said, in the light of the reports, that *actes liés* can either be annulled in the course of the proceedings on the main or principal contested act, or formally declared void in further proceedings. These two solutions can be described as follows.

In States such as Poland, Greece or France, subordinate or accessory administrative acts can be annulled in the course of proceedings against the main or principal act. The French system has traditionally made use of such a mechanism, known as *annulation par voie de conséquence* (consequential annulment). This power will be employed when an administrative act is an implementing measure of another act, or when an administrative act is so closely linked to another that they can hardly be described as separate decisions. Even stronger powers are held by the Polish courts under article 135 of the Administrative Courts Proceedings Act. Pursuant to the said provision, the court is able to review any act if deemed necessary “to reach the legality of the case”, and no procedural conditions have to be met in order to make such judgement.

The second solution is of far more limited scope, but provides some type of answer to the issue of *actes liés*. In States such as Austria or Belgium, the courts can give a ruling on the legality of subordinate or accessory acts, but their formal nullity will only be declared following a new procedure for judicial review. In the case of Belgium, the State Council has established a two month period in order to make a claim over subordinate or accessory acts. A similar course has been traced by the Austrian legal order, where acts can become illegal *par conséquence*, but will not immediately lose their validity. Bearing in mind the harshness of such solution, the Austrian case law has made a few exceptions to the former rule, and admits the nullity of a subordinate or accessory act when it is considered to be

very closely related to the main or principal act. Therefore, the Austrian system has gradually evolved towards the first solution described above, although it is still based on the need of a second review procedure.

Of course the extension of a judgement can cause serious problems to the legal situation of third parties, and thus specific procedures have been provided in several States in order to protect their interests. Countries such as Italy, Congo, France, Greece, Mali and Germany have instituted third-party opposition procedures (*tierce-opposition*, *Drittwiderrspruchsklage*), allowing affected parties to take part in the main proceedings. When subordinate or accessory acts are under scrutiny, these mechanisms secure the interests of those affected by every reviewed act.

Although hardly related to the doctrine of *actes liés*, it is worth mentioning that Spanish administrative law offers an original solution from the opposite perspective: the right of citizens to claim the extension of a judgement to their individual case. Article 110 of the Administrative Jurisdiction Act provides for the aforementioned extension in cases of tax law and public employment, as long as the third parties are in the same legal situation as the parties involved in the main proceedings, and make their claim within the period of a year since the notice of the judgement. Even though the action is circumscribed to tax law and public employment, legal writers and several judges support a wide and ample interpretation of both concepts in order to extend the mechanism as far as possible. A similar solution, allowing the extension of a judicial annulment to further administrative acts, has also been recognised in the recent case-law of the Greek State Council, due to which nationals of third States are enabled to request the annulment of an administrative decision if it is based on a previously annulled regulation. However, the nullity of these “related acts” will be precluded if it affects rights of *bona fide* third parties.

3.- The restrictions to *res iudicata*

A.- Precedent in administrative law

Prior to the study of *res iudicata* and its restrictions, it is worth mentioning the impact of the doctrine of precedent in some administrative legal orders. In States with a solid and far-reaching tradition of precedent, judgements have an extraordinary effect in all areas of the law, and their normative force will be close to that of statute. In England and Wales, “the use of precedent is an indispensable foundation upon which English courts decide the law and its application to individual cases” (Report of England and Wales, 17). The Australian report has made similar references to the doctrine of precedent, as a means to describe the legal force of judgements and the doctrine of *res iudicata*.

However, the doctrine of precedent does not appear to be incompatible with other conceptions of *res iudicata*, particularly with conceptions close to French administrative law. All reports have insisted on the fact that judgements of administrative court are binding *erga omnes* once they are *res iudicata*, and thus achieve a similar force to that of precedent in England, Wales or Australia. Perhaps the main difference lies in the styles of argumentation of judicial decisions. While continental legal systems rely on the authority of statute in order to develop and even modify the case law, the common law traditions place special emphasis on the need for *distinction* among cases. The latter requirement puts a heavy burden on the judges, as far as they become involved in a discourse of distinguishable and non-distinguishable elements in the case law.

B.- Statutory restrictions to *res iudicata*: extraordinary procedures of revision and legislative interventions.

All reports have made a special reference to the normative effects of *res iudicata* in administrative law, and it appears to be a general principle imbedded in every legal order. Administrative court decisions are binding on all parties, and they are irrevocable when faced with same parties, subject-matter and cause. Of course *res iudicata* will differ in scope depending on the type of judicial decision adopted (decisions allowing an appeal or dismissing an appeal; decisions of a declaratory nature, a constitutive nature, or requiring performance) or on the admission of an appeal. Also, several States make use of a distinction well-known in continental procedural law: formal and substantive *res iudicata*,

which base the force of a judgement on the time passed since the delivery of the judgement (formal *res iudicata*) or on the identity of parties and subject-matter (material *res iudicata*).

However, the normative force of a judgement can be restricted for several reasons, some of which were outlined above, when we dealt with the study of retroactivity. Several reports also describe the means through which administrative court decisions may be restricted in scope due to legislative action. In some cases, statutory provisions articulate special procedures to revoke a judicial decision, despite its condition of *res iudicata*. In others, some reports have expressed their worries towards a type of legislative restriction, currently known as “validation laws”, by which Parliament legalises administrative action judicially declared illegal.

Special procedures to revoke judicial decisions have been described in reports from Bulgaria, Greece, Spain, Norway and Poland. The reasons justifying such procedures are usually linked to requirements of justice: new or false evidence, judicial error, etc. The reports have mentioned the exceptional nature of these procedures, and in some States, such as Spain, the remedy is conditioned by a time-limit.

The second source of restriction to *res iudicata* is a “validation law”. Parliamentary supremacy can be interpreted in such ample terms, that it may even allow the adoption of statute law in direct contradiction with previous judicial decisions. In some cases, statute is only the means to legalise previously illegalised administrative action⁵. Several States, such as Egypt, Belgium, France, Italy and Greece, have expressed concern about this phenomenon, and it is interesting to see the different solutions to be found in each legal order.

The Egyptian and Belgian reports describe how legislative interventions have been employed in the past, and express the worries of their highest courts and doctrine over the

⁵ The Belgian report includes a very useful classification of “validating legislation” at 24, note 55. Such interventions may be pursuant to a ratification (transcribing the text of the illegal administrative act in a statutory provision), pursuant to a substitution (deciding anew through a statutory provision), or pursuant to an empowerment (granting powers to the executive, in order to circumvent through administrative action the orders contained in a judgement).

matter. However, no concrete solution appears to be found, in contrast with the case of France, Italy and Greece, where the courts have set limits to legislative action in this field of the law. In France, the *Conseil constitutionnel* has made an important ruling on the issue in its *Validation d'actes administratifs* decision (decision of 22-7-1980, followed by the *Loi de fin* decision, of 28-12-1995). It is now settled case law that Parliament can only make use of validating instruments when they pursue “aims of a sufficient public interest”, and abide by the conditions of the right to a fair trial. Pursuant to this case law, the *Conseil d'Etat* has the power to examine whether a validating statutory instrument fulfils the said requirements. In order to maintain the real scope and meaning of a balanced constitution, the French courts have made an outstanding exception to the supremacy of Parliament, in line with the Italian and Greek courts. In the mid-nineties, the Italian State Council developed similar case law, contrary to the implementation of validating statutes. Also, since 1991 the Greek State Council has confirmed a similar line of argument, anchored in article 26 of the Greek Constitution, which states the division of powers in Greece.

Even though it was not mentioned in the reports, a few words must be said in relation to the impact of European Community Law in the administrative legal orders of EU/EC Member States⁶. The European Court of Justice has recently stated that judgements of Member State's courts with the force of *res indicata* can be revoked, whenever the European Court delivers a judgement following the national decision, but in contradictory terms (*Kühne & Heitz*, C-453/00, 13-1-2004). Thus, the supremacy of European Community law extends as well to the case law of the European Court, and its judgements enable the same parties to re-initiate proceedings over the same matters, despite the existence of a judgement with the force of *res indicata*. It must be noted that the European Court provided strict conditions in order to render its judgement fully operative⁷,

⁶ Austria, Belgium, Denmark, Finland, France, Germany, Greece, Italy, Ireland, Luxembourg, the Netherlands, Portugal, Spain, Sweden and United Kingdom. The European Union will expand to twenty-five members in May 2004, including the Czech Republic, Cyprus, Estonia, Hungary, Latvia, Lithuania, Malta, Poland, Slovakia and Slovenia.

⁷ The judgement states the following conditions before a decision can be reopened: “1) That under national law, [the administrative authority] has the power to reopen that decision. 2) The administrative decision in question has become final as a result of a judgement of a national court ruling at final instance. 3) That judgement is, in the light of a decision given by the court subsequent to it, based on a misinterpretation of Community law which was adopted without a question being referred to the court for a preliminary ruling under Article 234(3) EC. 4) And the person concerned complained to the administrative body immediately after becoming aware of that decision of the court.”

but, in any case, it is a graphic example of the force and nature of European Community law in relation to national legal orders.

II.- Powers of administrative courts to enforce their decisions

The national reports have proved the existence of a vast number of divergences in relation to the mechanisms and powers of administrative courts for enforcing their decisions. Highly developed systems coexist with models of administrative justice that have yet to introduce such procedural instruments and are open to the influence of foreign legal orders. In this regard, the conclusions of the Republic of Congo are rather expressive: “Altogether, the powers entrusted to the administrative court for enforcing its decisions against the Administration improve the image and reputation of judicial review, and at the same time encourage citizens to solve before the courts their disputes with the authorities. The Democratic Republic of Congo is interested in going further down this track.” Also, Bulgaria highlights that “the present reform of administrative justice is strongly influenced by the process of integration of the Republic of Bulgaria in the European Union’s structures, in order to rank Bulgarian administrative legislation with the legal orders of other European countries.”

Another element common to all reports should also be noted: the belief in the fact that enforcing administrative courts decisions is one of the many features of the right to an effective remedy, of the rule of law, or, at the least, an aspect of general principles such as legal certainty (see the reports from Egypt, Germany, Morocco, Portugal, Senegal, Spain, Switzerland and Turkey). There is only one exception to this regard: the report of Mali, in light of the social and historical context of its legal order, states that “the enforcement of administrative court decisions is a source of social disturbance. In specific terms, individual

rights can be seriously breached. In general terms, it provides a real danger to the rule of law and democracy itself.”

Lastly, all national reports have made reference to the enforcement of judgements against public authorities. Even though some reports have also described the enforcement of administrative court judgements in favour of public interests (such is the case of Bulgaria, China or Switzerland), the issue common to all countries concerns defective enforcement, or inaction, by an Administration.

1.- Authorities in charge of enforcing an administrative court’s decisions

Before entering the substance of this section, we must tackle several issues of a conceptual nature. Indeed, the Congress’ topic is “the execution of decisions of the administrative court”, and the second sub-topic proposed for the reports and the Congress is the “powers of administrative courts to enforce their decisions”. The use of such terms highlights a particular understanding of administrative law, of judicial review and, as a consequence, of the enforcement of administrative court decisions. However, several reports have pointed out, and it was also outlined in section I.1 of this paper, that some States lack a judicial structure with different jurisdictions according to the areas of law, including Administrative law. For example, Nigeria made references to this conceptual problem when stating that “Nigeria has no separate and distinct courts administering administrative law to wear the name ‘administrative court’ or ‘administrative judge’, as the title of this paper conveys.” Other States, particularly those far from French or German legal traditions, as in the case of Australia or Canada order, show important differences in this regard. And despite the fact that administrative courts exist (and even, this is not always the case), such courts, known as tribunals, are closer to administrative or executive bodies of governance, than to judicial courts proper. It is for this reason that national reports invest a considerable amount of pages explaining how their instruments of judicial review are organised, in order to then portray the issue of enforcement. Having said that, it is important to insist on the fact that problems concerning enforcement are very much alike among all legal orders, particularly when the risk of non-enforcement on the part of the executive is present.

In general terms, the Administration is in charge of enforcing an administrative court's decision, except in cases where direct enforcement by the court is provided for. However, the appointment of a specific administrative body responsible for enforcement can change from State to State. In most legal orders, it is the authority which was in charge of deciding the administrative act judicially reviewed (Australia, Finland). In Switzerland, where the rule is the same as in Australia and Finland, the judge can appoint another authority if he considers it is better placed in order to enforce the court's decision. Some Swiss *cantons* have also established a subsidiary power of enforcement in the hands of several administrative authorities.

In other legal systems, the judge can request the aid of another power of the State, that decides what are the proper means for the implementation of the court's decision. Such is the case, for example, of Congo, where the judge makes the request to the President of the Republic, who orders the enforcement to the administrative authorities (in the same terms as Ivory Coast). In the case of Finland, administrative enforcement of the court's decisions is supervised by the Minister of Justice.

Finally, special statutory provisions can be found in particular areas of the law. For example, in Bulgaria the Procedural Tax Code empowers the *Agence des créances des l'Etat* to carry out the compulsory enforcement of State credit, while the enforcement of tax-related judgements lies in the hands of the tax or social security authorities. The Bulgarian Parliament has also established a system for the appointment of specific administrative bodies in charge of enforcement, leaving subsidiary powers in the hands of local government, and also providing for cooperative instruments for the sole purpose of enforcement. This duty of collaboration among administrative authorities is also present in other States, particularly in Switzerland.

The enforcement (and that includes instruments of compulsory enforcement) is often controlled and supervised by the court, either directly or with the aid of other administrative bodies or agents. In Spain, for example, a constitutional provision establishes so in very clear terms. The Spanish Constitution guarantees, in very clear terms, the power

of judges and courts to enforce their decisions: *juzgar y hacer ejecutar lo juzgado* (to judge, and enforce what has been judged). This provision is equally important in interpreting the powers of the court in relation to enforcement, for its powers in this area are, as it can be seen, of a considerable high degree. Other States have also introduced constitutional provisions of a similar kind, as Egypt or Turkey. In Portugal, as well as in Greece, the Constitution gives due prominence to the duty of administrative authorities to enforce administrative court decisions.

There are also important differences concerning the judicial body in charge of supervising the enforcement measures. Thus, in the case of Spain such measures belong to the competent court that decided the main proceedings – either of first or last instance – , while in Germany, on the contrary, enforcement is always in the hands of the courts of first instance. In Greece a Committee for the Supervision of Enforcements has been created in the past within the State Council. However, its powers are strictly limited, for the scrutiny can only be exercised in declaratory terms and the Committee is banned from taking the measures necessary to judicial decisions.

In some legal systems, the courts or any other bodies in charge of judicial review are deprived of enforcement powers. Such is the case of Australia, where the Administrative Appeals Tribunal (the highest adjudicative instance in administrative affairs) is not a court strictly speaking. In other words: its powers are not judicial. Therefore, the court has no coercive powers, and, for that reason, the Government has a considerable freedom (although not absolute) as regards enforcing the court of Appeal's decisions. But despite this restriction, in those States where a situation similar to the one of Australia obtains, there is always a remedy before the civil courts in order to implement by coercive means the administrative court's decision. A similar structure can also be found in Canada, where administrative tribunals (of a non-judicial nature, as in Australia) lack enforcement powers.

In general terms, the systems of the common law tradition (England and Wales, Australia, Canada, Nigeria) show peculiarities in comparison to the orders first mentioned in regard to their judicial organisation and the mechanisms for supervising administrative authorities.

In England and Wales, the report explains that hardly any problems concerning enforcement arise. Furthermore, the instruments to enforce judgements in the area of administrative law are the same as the mechanisms provided in private or criminal law. It is submitted that several legal orders with autonomous systems of administrative law make reference to civil procedures only to regulate certain aspects (that is an outstanding feature of German administrative law). In those countries where administrative law has case-law roots, such as France, the courts have made use of particular elements of civil procedures and have thus constructed a body of specific norms for conflicts arising between citizens and public administrations. In the case of Morocco, the Courts make use of civil procedural rules in order to develop enforcement mechanisms against public administrations. Contrary to these systems, the English and Welsh enforcement model is a common *corps* along with the instruments of private law. This feature carries several consequences. First, whenever a public official in charge of enforcing the court's decision does not comply with his duty, he will be in contempt of court. Second, the authorities in charge of imposing such coercive measures are not the courts, but specific agents with special enforcement powers. That is the case, for example, of England, Wales and Nigeria (and here we must make a reference to the Nigerian Sheriffs and the Civil Procedure Act). In England and Wales there is no such thing as an "enforcement or executing judge", but the court will have the support of Sheriffs, County Court bailiffs, certificated and private bailiffs and distrainers. The role of these authorities is crucial in order to enforce judicial decisions in every area of the law. However, their powers are more often exercised in cases of private law, particularly in the enforcement of orders for damages or possession of private property. Even though the authorities have powers in cases of judicial review, it must be noted that their interventions will be restricted to enforcing the orders just mentioned (damages and property). Outside these cases, the authorities will hardly intervene.

In some systems with codified law, such as Germany, Finland or Norway, statutes provide, as an alternative, for the appointment of an enforcement agent different from the court. In Italy, mechanisms of assistance to the court have been instituted in cases of administrative inaction. Such is the case of the commissioner *ad acta*, although he currently lacks of a well defined statutory profile. The commissioner *ad acta* will either be a member

of the judicature, a private practitioner or, if the court considers it reasonable, a civil servant in charge of those matters linked to the contents of the enforced decision. It is important to underline, as the Italian report has insisted, that the commissioner *ad acta*'s actions are not considered to be administrative acts, and thus he is merely an authority under the orders of the court in charge of enforcement. Thus, the parties can turn to the court in order to review the commissioner's actions. Other systems with codified law have also created such figure. That is the case of Luxembourg, where the Committee of Judicial Review of the State Council (*Comité du Contentieux du Conseil d'Etat*) has the power to appoint a special commissioner in charge of enforcing the court's decision. In Belgian law (which was the inspiring model of Luxembourg's system, as the report from the Grand Duchy points out), special commissioners are specifically confined to mechanisms of control over the powers of decentralised authorities.

Lastly a brief mention of the Swedish system must be made, for administrative authorities (the Enforcement Authorities) have been created in order to enforce *all* decisions from the courts, either administrative or civil. Under the provisions of the Enforcement Code, the procedure applies to implement specific obligations derived from an administrative court's decision. Thus, Swedish judgements must clearly specify what is the content of each obligation in every case.

2.- Measures to avoid administrative inaction

Several reports have outlined the fact that national administrations most frequently abide by administrative court decisions (Germany, England and Wales, Finland, France, Israel and Italy). However, they also insist on the importance of adequate means to guarantee the enforcement of rulings, particularly when the authorities refuse to do so, either in explicit or implicit terms, or whenever the execution becomes incomplete or defective. Only Switzerland has shown its concern on this matter, and proposes further research on means of enforcement that can achieve a balance between the requirements of efficacy and the legal protection of the individual's interests. The Swiss proposal derives from the following affirmation: "the study of enforcement procedures shows a tendency towards their

multiplication and the enlargement of legal procedures, with the risk of them being used for delaying purposes”.

Besides the means of enforcement which will be now described, one of the “simplest” mechanisms for the prevention of inaction (and thus a dissuasive instrument) is the publication of judgements, including the obligations on the administration deriving from such decisions. Spain, France and Turkey have made references to this technique.

A.- Preventive measures

Before the court’s decision is issued, a private party may possibly request, and the court thus grant, a measure destined to avoid the risk of eventual non-compliance. In France, such instruments are known as “urgency procedures” (*procédures d’urgence*), “urgency measures” (*mesures d’urgence*) or “interim measures” (*mesures provisoires*). Urgency measures are the result of the inevitable lapse of time from the moment when a right arises until the moment when the right is recognised by the court. To be more precise: the lapse of time will frequently end when the court’s decision is finally executed. The French report has made reference to the recent reform made to these mechanisms in France, by the Law of 30th June of 2000, mentioning two institutions: the *référé-suspension* (interim stay of execution) and the *référé-liberté fondamentale* (interim measure, pertaining to the protection of fundamental rights). Other reports have described this model as exemplary. That is the case of Congo, where its report makes a thorough analysis of French interim measures, including those other than *référé-suspension* and *référé-liberté fondamentale*.

Greece has also pointed to the grant of a time-period as a means to avoid non-compliance, as well as the pre-contractual interim measure. The latter is a novelty derived from European Community law, and guarantees the rights of tenderers. According to this instrument, a tenderer can demand the suspension of the award of a contract if traces of illegality, either national or community, are successfully argued.

In German law, it is possible to adopt such measures – urgency measures – albeit considering a feature of the German legal system: once the court has granted leave to review an administrative act, it automatically implies the suspension of such act (an identical feature exists in Finland). On the other hand, the remaining interim measures besides suspension are left to the ordinary interim mechanisms common to all legal orders, and two conditions must be met: the measure shall not cause serious and irreparable damage to the rights and interests involved, and there must be serious doubts concerning the legality of the reviewed act. These two elements are thus balanced, taking into account the public and private interests in hand.

The mentioned criteria (serious and irreparable damage, and serious doubts concerning the legality of the review act, followed by a balance of the interests involved), are also conditions taken into account by the courts whenever provisional enforcement is regulated by statute (as provided by German, Spanish and Portuguese legislation).

Besides urgency measures, the court may prevent, or limit the risk of, non-compliance by stating in the written judgement, in specific and clear terms, the duties set upon the authority (see the reports from England and Wales, Egypt, Greece and Luxembourg). Also detailed reasoning of judgements can contribute to improve the development of justice (this is openly proposed by France).

B.- Means to re-establish legality

Having described the different authorities with the power to enforce an administrative court's decisions, we will now turn to the role of the courts in the implementation of such decisions. Some courts are able to enforce by their own authority, either through their judgements or through other types of decisions. They can also enforce indirectly, either with the aid of other authorities or further mechanisms.

Enforcing a decision implies, in all cases, the existence of a title for enforcement (*titre exécutoire*), as the reports from Belgium, Germany and Spain have shown. The

judgement is a title for enforcement itself, but other types of decisions can act as titles too: injunctions or interim measures. Their consideration as titles for enforcement brings about their need to be enforced, including, if necessary, the use of compulsory means.

a.- Direct judicial enforcement

A court can directly enforce its decisions whenever their content is clear and does not need any further interpretation. This is the case of judicial decisions recognising or declaring individual rights along with precise administrative duties, such as the grant of a construction licence. Australia is a clear-cut example of this model. The Administrative Appeals Tribunal (although of a non-judicial nature and deprived of enforcement powers) will make decisions substituting, if necessary, the initial action taken by the administration. However, it lacks coercive powers in case of administrative inaction. In Colombia, direct judicial enforcement by the State Council or the administrative courts is only available in electoral matters. In Poland, the court can grant a deferral or impose duties, but if the authorities keep inactive the court will decide on the substance of the case.

Direct judicial enforcement may seem surprising to those legal orders where such powers are unknown to the courts. This is usually due to a particular comprehension of the separation of powers, which bans a judge from issuing injunctions to the administration, or, more frequently, stating how it must act. Belgium insists on this point, but also makes reference to case-law from the State Council which has gradually expanded the powers of the courts in this sense. Thus, the State Council will frequently include in its judgements specific instructions concerning the implementing measures which must be taken by the administration. These instructions are known by scholars as “injunctions in disguise” (*injonction déguisée*) or semi-injunctions (*quasi-injonction*), but they are quite different from other judicial decisions binding upon the administration, for they are not considered to be titles for enforcement. The underlying rationale behind this restriction regards the discretion of the administration and the discretion of the court, matters which are the

source of common concern to many other systems (such as Egypt, Greece, Italy, the Netherlands and Turkey).

Lastly, there are cases in which the administration requests from the court further instructions on the precise mechanisms to be instituted in order to execute its judgements. This is frequently noted in France, where the Code of Administrative Justice enables administrative authorities to request from the State Council further clarifications over the means of execution of a particular judgement (not necessarily of the State Council). This task is assigned to the Section of Reports and Studies of the State Council, which will issue the instructions it considers necessary to enforce the decision. In Mali, government ministers can also request from the Administrative Section of the Supreme Court an interpretation of the contents of a judgement (there is no hierarchy among the administrative courts of Mali; the Supreme Court has jurisdiction over every area of the law; and in this context, the Administrative Section is in charge of judicial review).

b.- Other means of enforcement

Besides the systems empowering the court to enforce its judgements directly, other systems leave the task in the hands of the administration, supervised however by the court, or by specific authorities. This is the case of the Swedish Enforcing Authorities, previously mentioned, and the Committee for the Surveillance of Enforcement currently at work in the Greek State Council.

The means of enforcement conferred upon the authorities just mentioned are rather varied, depending on the type of decision taken by the administrative court. Thus, the annulment of an administrative act or the imposition of an administrative duty to act will allow several solutions concerning their enforcement, as it will now be explained.

aa.- Annulment of administrative acts

It was previously noted how several reports have outlined the fact that the administration usually complies with the court's decisions, and thus hardly any problems concerning inaction or defective execution tend to occur. In the case of a judicially annulled administrative act (probably the most frequent consequence of an administrative court's action), hardly any difficulties arise. Indeed, as long as the administration refrains from taking any action, the court's decision will be enforced. This is what in Belgium is known as the "prohibitive effect" (*l'effet prohibitif*) of an annulment judgement. In Mali, if the administration disregards the judicial decision's authority and thus enforces a void administrative act, such action will be considered a trespass (*voie de fait*).

Problems may arise whenever a new administrative act must be issued in order to substitute the previously annulled decision. Leaving aside the restricted powers of the court to issue an administrative act, previously described, it is necessary to portray the mechanisms that may lead the administration to issue the new act and the constraints that will condition such action. In France, the State Council has agreed that the new act must be issued considering the legal and factual circumstances at the present time. The context of the annulled act will thus be considered only if the protection of vested rights so requires. In Belgium, annulment decisions are said to have a "constructive effect" (*effet constructif*) whenever they require a further administrative act in substitution of the former one. This duty can have its foundations in an act of Parliament, secondary legislation or in the concrete circumstances of the case. In contrast, the report from Mali has stated the need for a legal or judicial answer to questions such as the proper time to issue the new act or the re-establishment of the legal situation of the parties.

What are the limits and features of the newly issued act? Some legal orders leave a limited degree of freedom to the administration. For example, in France, the court's decisions can include specific duties that the administration must follow at the time of the execution. That is also the case of England, where the court can issue precise orders describing to the authorities the conditions in which they must act. In the Netherlands, the courts can use a mechanism by which precise orders can be issued to the administration, although it is a power that the Dutch courts hardly make use of. The Dutch court may also grant a deferral so that the administration can issue the substituting act, and even adopt

interim measures in order to give answer to the case until the administration complies with its duty. Another possibility is the imposition of a coercive fine, not as a means of compulsory enforcement (as will be seen in section II.3.4.a), but as an instrument whenever the administration fails in its duties to enforce. Lastly, the court itself may issue the new administrative act, substituting the former administrative decision. In such case, however, due deference to the administration's discretion comes into play. However, it is interesting to outline how Belgian law eradicates such discretion whenever a court annuls an administrative act. In these cases, the administration will have to issue a specific decision within the margins previously traced in the court's decision.

bb.- Imposition of an administrative duty to act

Along with the approval of a new administrative decision in substitution of the former, the court can also impose a specific duty on the Administration. In the German report it's explained, that such impositions have long been considered inconceivable, "harmful to the reputation of the State and a dangerous infringement on the sphere of the executive." Due to this traditional reticence, the German enforcement system clearly distinguishes such impositions (of specific duties) from judicial decisions involving pecuniary fines. Indeed, although German law provides for judicial decisions involving specific duties – article 172 of the Administrative Jurisdiction Act – its implementation is restricted. Furthermore, the supplementary application of the Civil Procedure Code has limitations in this field, thus creating legal gaps whenever an administrative court imposes a specific duty on the Administration.

In Spain, the courts can substitute administrative action by their own means, in order to have their judgements enforced. Substitution *stricto sensu* has been confirmed by the Spanish Constitutional Court. In regard to indirect substitution, this is another form of enforcement that implies judicial action which has effects equivalent to ordinary enforcement. It is also possible to have recourse to subsidiary enforcement, which implies that the court requests the collaboration of public or private bodies, at the expense of the Administration. This course is not in conflict with general enforcement rules, for the

Spanish Constitution entrust the courts with the enforcement of their decisions, and such power includes both direct and indirect enforcement.

cc.- Imposition of a pecuniary fine

The administrative court can also impose on the Administration a pecuniary fine. In this case, most legal orders have highly developed rules, including classic principles of administrative law: the privilege of non-seizable public properties and the principle of legality in the area of budgetary action. In Colombia, for example, legislation has made a few specifications to this regard, including a ban on enforcement actions whenever they hinder public policy. At the same time, time-periods can also be established in order to enable budgetary arrangements destined to enforce the court's decision. Once the court imposes a pecuniary fine on the administration, the departments in charge of the budget are notified and thus have the duty to make the relevant provision (in Portugal, the court's decision must also be included in the budget). If the items are not included in the budget, the authorities are banned by statute from approving or implement the aforementioned budget. In the case of budgetary implementation, delays in the payment of pecuniary duties imposed by judicial decisions (compared to other budgetary items), will include interest for delay.

Some States set limits to judicial decisions imposing pecuniary fines. In Mali, due to the "300.000" case law, the State is liable up to a limit of 300.000 francs. In contrast, in other States such as Germany, the Constitutional Court has considered that quantitative limits to pecuniary fines are in breach of effective enforcement (and thus, we assume, to an effective legal remedy). Lastly, in Benin, whenever the State is obliged to pay a judicially-based pecuniary fine of an important sum, the parties will often come to an arrangement.

The Spanish enforcement procedure obeys a strongly structured scheme, pursuant to the Administrative Jurisdiction Act. In the case of impositions of pecuniary fines, Parliament has established a time-limit to make the payment, although it can be subject to exception according to circumstances. It must also be noted that the parties have the power

to set off their respective credits, in accordance with the relevant provisions of the Spanish Civil Code. Lastly, if the Administration eludes its duties, it is possible to enforce the court's decision by compulsory means. At this stage, the unseizability of public property can cause problems.

In Germany, the provisions of the Civil Procedure Code are the relevant norms in this matter, due to a statutory reference made in the Administrative Jurisdiction Act. The plaintiff must request enforcement from the First Instance Administrative Court, where the statutory requirements will be examined – namely the existence of an title for enforcement. Legal scholarship believes that a six-month time-period must be granted to the Administration, for this is a general rule applicable to civil proceedings that may be extended to administrative enforcement. Also, the Civil Procedure Code includes a series of measures that may be taken by the court, and no pre-established order has been set by statute. Indeed, the court is free to choose the measure that is best suited to guarantee enforcement. However, the court is obliged to decide on the most effective and least onerous of measures. This requirement can also be found in other countries, such as Belgium or Finland, as a consequence of the principle of proportionality.

In regard to the unseizability of public property, it is necessary to define the goods covered by such privilege. For example, the recent Greek law n° 3068/2002 provides for a compulsory mechanism of enforcement, in regard to pecuniary duties derived from a court's decision, that may affect goods attached to “private property” of the State or of the legal entities involved. The Greek report states that it is still early to identify the exact elements that make up such “private property”. However, a reference could be made to the Spanish system, where the Constitutional Court itself has specified what property of the administration can be affected by the compulsory enforcement of a court's decision. Goods of the public domain (those attached to activities pursuant to the general interest), communal property, financial resources and “patrimonial goods” attached to the use or management of a public service, are not to be affected by a judgement. However, patrimonial goods attached to the use or management of a public service, may indeed be seized in the course of enforcement. In Germany, the Administrative Jurisdiction Act enumerates the goods precluded from seizure, and leaves in the hands of the court the

decision over doubtful cases, following a prior consultation of the competent Minister or authority.

3.- Inciting enforcement or dissuading inaction: further measures

It is difficult to compartmentalize in the description of problems and phases concerning enforcement. It is even more difficult to do so when the legal systems compared are far from homogeneous. Therefore, issues relating to the incitement of enforcement or the dissuasion of inaction, which will be now portrayed, are connected with matters previously outlined, or to be explained later. Having said that, a brief sketch of the existing mechanisms will now be made for the sake of clarity.

First, the indications contained in the court's judgement must be mentioned. As stated in previous sections (II.1), the decision's clarity and precision concerning the administration's obligations will contribute to more adequate execution. In China, assistance mechanisms are provided between the administration and the courts, before the execution is put into effect.

Regarding this point, it is possible for the court to issue injunctions in specific circumstances, in order to "aid" the administration. Injunctions may include precise instructions for the execution, or *astreintes*, or a "warning". Other types of sanctions, such as disciplinary measures to civil servants, or their imprisonment, can not only be considered sanctions, but also dissuasions to inaction.

Secondly, when pecuniary obligations are involved, the imposition of interests for delay can contribute to the administration's compliance in due time.

Thirdly, other authorities such as the *Médiateur de la République* (as in France), or the *Procurateur Général* (in Mali) can collaborate in the enforcement of a judicial decision. By including in the *Médiateur's* report the administration's duties previously declared by a

court's decision, it may reinforce compliance, particularly to avoid a second appearance in the report stating how a judgement is plainly un-executed.

4.- Punishing inaction: compulsory enforcement

Several reports gave account of administrative techniques that have the aim of circumventing judgements. For example, England and Wales mentioned three different actions that lead to non-execution: delaying tactics; the approval of administrative decisions once again, but taking care of procedural requirements; and Parliamentary intervention, through retrospective legislation to nullify the effects of a judgement. In Spain, administrative action destined to elude the obligations set out in a court's decision is sanctioned by nullity. Furthermore, such actions can give rise to State liability. Also, the plaintiff can request the court to adopt appropriate measures and thus restore the original situation, previous to the fraudulent administrative measures. As the Spanish report shows, this action can be taken not only during the phase of compulsory enforcement, but also before the time-limit set by the court has expired.

If the measures to incite enforcement or dissuade inaction have no effect, if the administration directly or indirectly eludes a court's judgement, some States have provided specific sanctions as well as procedures of compulsory enforcement.

Some legal orders make no provision to allow compulsory enforcement (as in Congo), or only accept a few exceptions. Mali is an example of the second case, where Parliament has allowed compulsory enforcement in a reduced number of areas: electoral issues, public employment and procurement. As an exception in the comparative landscape, Norway precludes plaintiffs from demanding the enforcement of a judgement ("It is neither necessary nor possible for a private party to take steps in order to have such a ruling enforced"). In China, although administrative legislation does not include specific provisions concerning compulsory enforcement, the courts have interpreted the rules of the Civil Procedure Code as applicable in administrative law.

In regard to the States where compulsory enforcement is allowed, an important difference must be outlined. Some States (such as Spain) allow compulsory enforcement once the time-limit to comply voluntarily has expired, while other States demand the lodging of another appeal before the court. This is the case of Austria, where the plaintiff has two courses of action in his hands: to start proceedings for judicial review once again, or apply for the issue of a writ of mandamus. Judicial review will be of use whenever the administration has adopted another decision in breach of the court's judgement. The writ of mandamus can be issued once the time-limit given by the court has expired, which is usually six months. It is frequent that the court grants three additional months to the administration, in order to fulfil all its obligations. If the authority keeps silent and refuses to enforce, the court will then make decisions and take action itself, substituting the authority.

A similar system can be found in Benin, where access to the court is possible whenever the administration has breached the authority of *res iudicata*. If the administration refuses to execute a judgment, the court may adopt a pecuniary sanction. However, if the administration keeps inactive, there are no mechanisms left in the hands of citizens, unless the Constitutional Court declares the non-execution contrary to the Constitution.

In Belgium, the procedures are almost identical. If the administration eludes its obligations as stated in a judgement, the plaintiff must start proceedings for judicial review once again, and thus the State Council will specify in detail the precise obligations that follow from the nullity. Here the State Council can indicate the executive authority the decision he must eventually adopt. It was previously noted that such action is rather exceptional. Similarly, in the Netherlands, a party who wishes to request the enforcement of a judgement must start proceedings once again before the courts.

In Germany, compulsory enforcement procedures are different from the ordinary procedures of judicial review. The requests of the plaintiff, as well as the powers of the court, are restricted, for the subject matter of the procedure is strictly confined to the enforcement of a judgement. At this stage, no issues can be raised concerning the main

proceedings. It is also possible to oppose the enforcement, and such action must be exercised before a court of first instance.

Colombia has also a compulsory enforcement procedure under the powers of the administrative courts. However, the applicable rules are those common to civil procedures.

Lastly, a reference must be made to the Italian system. Compulsory enforcement procedures are a creation of case-law, particularly for cases of breach of *res iudicata*, where the administration eludes its obligations derived from a judgement, or enforces the court's decision partially or erroneously. Two orientations of the case-law can be mentioned here. First, some courts are of the opinion that such measures can only be adopted when the judgement contains a specific obligation and the administration has applied a different measure. If the administration is granted a discretionary power in order to execute the judgement, the plaintiff must start proceedings for judicial review once again, and not a compulsory enforcement procedure. Secondly, a majority of the courts understand that the judge in charge of a compulsory enforcement is also empowered to make decisions of substance in regards to the main proceedings. Any gaps that derive from the obligations judicially imposed on the administration, will be solved by the judge himself.

A.- Imposition of coercive fines (*astreintes*)

Several mechanisms have been instituted to punish non-compliance by the administration, but also to force proper execution of the court's decisions. First, we will make reference to coercive fines (*astreintes*) as established in some legal orders. These are sometimes hard to distinguish from measures that incite enforcement or dissuade inaction (see section II.3). Their main difference lies in the preventive function of the latter, while the former come into play at a later stage of the procedure, once it is clear that the administration has made no action whatsoever in order to comply with the court's decision.

The coercive fine can be imposed either on the administration or on a civil servant, particularly he who was in charge of taking the appropriate execution measures. In Belgium

(as in Greece) it is explicitly provided that coercive fines can only be imposed on “moral persons of public law, but not on civil servants or members of an organisation on an individual basis”. On the contrary, Austria, Bulgaria, Colombia and Spain provide for coercive fines on civil servants whenever a breach of a court decision is involved, although the Austrian regime is only exercised *a posteriori*, once the judgement has been enforced.

In some legal orders it is necessary to prove the administration’s inaction, and that may lead to the initiation of new proceedings. Such is the case of Belgium, where the court must verify that the authority has indeed ignored the force of *res iudicata*. It is interesting to note how the Belgian system increases the powers of the court during the procedures of compulsory enforcement. Thus the coercive fine, that must be requested by the plaintiff, can be adopted along with other measures, such as an injunction, or the imposition of an administrative duty to act. It must be noted that the Belgian courts have, as a rule, only the power to annul an act, but not to impose specific duties on the administration.

In the French legal system (which has been used as a model for the future reform of coercive fines in Benin), coercive fines can be adopted by the court, as in Belgium, in a different judgement from the one that solved the main proceedings, or in the same decision (and here is the difference with the Belgian system). The coercive fine as a punishment for non-execution is, as it was previously outlined, a different institution from the coercive fines of a provisional and preventive nature. However, the French report has stated several cases in which the court may use the coercive fine (in its final, and not preventive, form) as a dissuasive measure. Coercive fines can thus be accompanied by the grant of a delay so that the administration can fulfil its duties. If the administration accepts the delay and finally enforces the judgement, the coercive fine becomes void. This is also the solution given in the Netherlands, although its report has stated that coercive fines are rarely used, for the authorities usually enforce the court’s decisions.

In Spain, by the grant of a delay the court also confirms the initiation of compulsory enforcement proceedings. As the Spanish report has stated, such delay does not necessarily mean that the authorities can still enforce on a voluntary basis. The administration is bound by the new time-period and by the obligations imposed in the court’s decision. Once the

compulsory proceedings begin, the court may use coercive mechanisms provided by legislation. In order to impose a coercive fine, the exact amount must be previously determined, and it must comply with the principle of proportionality. Also, the court must take into consideration the type of activity to be accomplished by the authorities, the scope of the delay, its damaging effects and the defendant's economic resources. It must be noted that Spanish law only allows the imposition of coercive fines on individuals, and precludes their application to administrations as such.

B.- Disciplinary sanctions and imprisonment

Besides coercive fines, disciplinary sanctions and imprisonment are other additional measures at the hands of the courts.

As we pointed out in previous pages, imprisonment is a measure attached to legal orders close to English law (see reports from Australia or England and Wales, but also Finland), although it is clear that each system has undergone different experiences. In other States such as Colombia, the arrest of authorities can be an alternative in order to dissuade non-compliance, albeit under specific circumstances (such is the case of constitutional remedies known as “terminating, concluding protection and civil actions”).

In Austria, civil servants who use their powers in order to breach individual rights, either conscious or unconscious of their actions, will be punished according to the Austrian Criminal Code and judged by the criminal courts.

The Criminal Code will also be implemented in Belgium in specific cases where a civil servant eludes the obligations set out in a court's decision, or in the order of a higher administrative authority. Criminal proceedings can also be initiated when the civil servant eludes an extended time-limit granted by the court.

Disciplinary sanctions are provided in Greece in order to punish civil servants responsible for executing the court's judgements. Criminal charges are employed as complementary measures.

In Spain, during compulsory enforcement procedures, the court can also draw up a report with the aim of initiating criminal proceedings.

C.- Subsidiary enforcement

Subsidiary enforcement is a form of compulsory enforcement in which the court, or agents appointed by the court, perform themselves the specific obligations derived from the judgement. As a type of compulsory execution, subsidiary enforcement is quite different from the previously mentioned mechanisms of enforcement.

D.- State liability

Lastly, reference must be made to State liability. This might be an efficient way to dissuade the administration from failing to execute judgements, but it may also provide the citizen with a sum of money that can fulfil his interests.

A number of reports have mentioned State liability as a sort of corollary to the system. The Netherlands' report admits that in certain cases a claim for damages is the only course of action left to a party. This remedy is also available in Austria, England and Wales, as a claim against damage caused by the administration's inaction. In Belgium, liability can have its source in a direct claim for damages filed against the administration.

In Spain, the power to claim damages from the administration for non-execution is not provided by statute. However, the case-law has gradually accepted that State liability will arise whenever the administration ignores its duty to execute a judgement, or in case of incomplete or defective execution

Lastly, State liability in Turkey can either derive from the Constitution, or from specific statutory provisions. Constitution-based liability will arise from the breach of a principle derived from the rule of law. Statute-based liability can be either criminal, financial or political. In all cases, liability can involve either the administration as a whole, or one of its employees. Also, in Moroccan legal scholarship supports personal liability of public authorities whenever they decline to fulfil the Court's judgements. On the contrary, in Senegal, the personal liability of civil servants and officials has never been considered.

III.- Guarantees of effective execution

1.- Extra-judicial means

Implementing judicial decisions is still a highly adjudicative function in most States, and extra-judicial means can hardly be equated to the instruments described in section II of this report. Recourse to extra-judicial mechanisms is still a secondary alternative, but it shows a tendency to strengthen the main enforcement proceedings. It is certainly true that the enforcement actions in section II are the principal source of implementation, but they can be supported by the following techniques: Mediators, parliamentary supervision, public reports, disciplinary action over civil servants and media control. Reports from Austria, Belgium, Finland, Greece, Mali, Spain, Sweden, Switzerland, Turkey and England and Wales have made references to some of these mechanisms, although special emphasis must be put on mediators, also known, in the Scandinavian tradition, as *Ombudsmen*.

In Austria, Belgium, Finland, Greece, Mali, Morocco, Senegal, Spain, Sweden and Switzerland, mediators play an important role in guaranteeing the authorities' exercise of powers, including judicial action. It must be noted that in Mali, article 13 of the Mediator Act has provided for specific mediating powers in case of deficiencies or lack of implementation of judicial decisions. Generally, as in Belgium, mediators are banned in

affairs previously submitted to judicial scrutiny in concrete cases. In other cases their powers can be guaranteed by constitutional provisions, as in the case of Greece or Spain (article 103.9 of the Greek Constitution and article 54 of the Spanish Constitution). In some cases, they can be created in governmental regions within a State, as in Switzerland (the *cantons* of Zurich and Vaud, the *demi-cantons* of Bâle-Ville and Bâle-Campagne, and the cities of Zurich, Winterthur and Berne have their respective mediator in public affairs), or based on specialised areas of administrative action, as in Spain. It must be noted that mediators play no adjudicative function whatsoever, and their roles are mainly of a consultative nature between the parties to a case, with the sole purpose of arranging a proper and efficient solution to a particular problem. The role of a mediator over judicial enforcement actions can also be circumscribed to the search for common ground between the citizen and the defendant authority, but it can reach no binding decision. Only the reports of Sweden and Greece point out to the capacity of the Swedish and Greek mediators to initiate proceedings, but their role is still confined to a non-binding and solution-oriented role (although compatible with criminal actions to be taken by the mediator himself, in the case of Sweden). Despite the lack of powers, mediators appear to be highly respected according to all reports, and their activities are made public in their reports.

In England and Wales, Parliament has a considerable role in supervising the execution of administrative judicial decisions, particularly through the tasks assigned to the Parliamentary Commissioner for Administration. Although its powers are limited, a similar and more powerful institution has been created for Northern Ireland: the Commissioner for Complaints, who can ask the Attorney General to apply to the High Court for an injunction or other relief, in contrast with the Parliamentary Commissioner for Administration. The Austrian report also highlights the task of members of Parliament, in order to disclose deficiencies in the exercise of public powers, including judicial activities and administrative compliance with these. The right of petition is another parliamentary institution outlined by the German and Spanish reports, and it allows citizens directly to pose questions before members of Government sitting in Parliament.

Another source of democratic extra-judicial control can be found in Mali, where Government is annually exposed to the so-called “space of democratic interpellation” (SDI) since 1992. This is an original source of democratic participation and control, which allows citizens to pose questions to the Government on matters relating to maladministration. The SDI resumes its activities once a year, and it is chaired by the Minister of Justice. Although its functions are presently under reconsideration, it as an open and transparent mechanism highly appreciated by citizens of Mali, and thus an efficient way of keeping public officials under media scrutiny.

Transparency can also be a useful means to guarantee the execution of administrative judicial decisions. Thus, the Austrian legal system provides for an annual Administrative Court report, describing its activities and outlining the major difficulties found during the course of the year. It is merely an informative instrument, but it proves to be an efficient tool to keep track of the degree of compliance with the Austrian administrative courts.

Other sources that can also reinforce the implementation of administrative court decisions are disciplinary measures against responsible civil servants (pointed out by reports from Germany, Austria and Finland), and the supervisory role sometimes played by the media, particularly in highly publicised issues or test-cases (as highlighted by the report of England and Wales). These courses of action have been studied in section II of this paper.

2.- Access to the “executing judge”

This issue has been studied under section II and section III.1, of this paper. In order to avoid further repetition, we make reference to those sections.

3.- Implementation of out-of-court settlements

Reports from Benin, China, Finland, the Netherlands, Spain and England and Wales have given an account of the role of out-of-court settlements in their respective administrative orders, and their implementation. Particularly in the cases of China, the Netherlands and Spain, the execution of such settlements is judicially supervised, and the administrative court's powers will be exercised as in the case of judgements. Settlements are available in order to agree, firstly, on the dispute, or secondly, on its actual solution. The reports from the Netherlands, Spain and England and Wales point out to the first type of settlements, while in Benin and Finland the second type appears to be more developed. The Chinese report mentions both types of settlements in its legal system.

In China, out-of-court settlements are available in order to agree on the main contents of the dispute, but specifically in cases dealing with State liability. However, it appears that settlements are more frequent when it comes to agree on the means of performance, and not on the main issue. In these cases, Chinese administrative law promotes the agreement among the parties. The procedural rules relating to these matters allow that a settlement may “alter the subject of performance, object, amount, time limit and the way of performance of the legally effective instruments”.

On the contrary, the Spanish legal system has developed the first type of settlement, relating to the contents of the case, and not its specific solution. Article 113 of the *Ley de la Jurisdicción Contencioso-Administrativa* gives the parties the chance to enforce by judicial action settlements previously agreed on. In such cases, the court will implement the general system of enforcement of judicial decisions, with only a few exceptions. In the Netherlands, out-of-court settlements relating to the contents of the dispute can also be judicially enforced. According to Dutch Administrative law, “if a decision that is being challenged in administrative or judicial proceedings, is amended or revoked in the course of those proceedings, the objection or application for annulment is regarded as being directed against the new decision as well”. Therefore, the settlement becomes a formal source of administrative action submitted to review, and the provision just quoted empowers the courts to supervise the enforcement of the agreement.