Chapter 2 The Legal Effect of Rulings by National Constitutional Courts

In all of the constitutions of the ECOWAS Member States which were created in the course of the third *vague de démocratisation (The third wave*[1]*)*, the respective Constitutional Court has its own chapter dedicated to it.[2] Therefore, the Constitutional Court is separate from the various stages of court proceedings. Also, from a systematic viewpoint, Togo's Constitution confirms the highest weighting of the Constitutional Court by rendering respective regulations, (Titel VI: De la Cour Constitutionnelle) even before the regulations regarding the Judiciary (Titel VIII: Du Pouvoir Judiciaire). Therefore, the Constitutional Court is placed above the Judiciary.[3] This marks the special constitutional role that is assigned to the Constitutional Court within this novel process of democratisation. With regard to the substantive jurisdiction of the Constitutional Court, the Constitutional Court of Togo exercises, for example, both an advisory and a judicial competence. The judicial competence of the Constitutional Court essentially includes the examination of the constitutionality of laws, the delimitation

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1 Huntington, The Third Wave. Democratization in the late twentieth century, 41.

2 Art. 152 Constitution of Burkina Faso of 02 June 1991; Art. 99 Constitution of Togo of 14 Oc- tober 1992; Art. 114 Constitution of Benin of 11 December 1991; Art. 88 Constitution of Ivory Coast of 23 July 2000; Art. 93 Constitution of Guinea of 07 May 2010; Art. 120 Constitution of Niger of 25 November 2010; Art. 85 Constitution of Mali of 25 February 1992.

3 Please see: § 129 paragr. 2 Constitution of Ghana of 1992; Art. 106 Constitution of Togo of 14. October 1992; Art. 124 Constitution of Benin of 11 December 1991; Art. 94 Constitution of Mali of February 1992; Art. 134 Constitution of Niger of 25 November 2010; Art. 99 Constitution of Guinea of 07 May 2010, Art. 98 Constitution of Ivory Coast of 23 July 2000; Art. 159 Constitution of Burkina Faso of 02 June 1991; Art. 92 paragr. 2 Constitution of Senegal of 22 January 2001; Sect. 230, 232, 233, 235 Constitution of Nigeria of 29 May 1999; Art. 65 Constitution of Liberia of 06. January 1984; Art. 92 Constitution of Bissau Guinea of 16 January 1984; Sect. 126, 127 Constitution of Gambia of 16. January 1997; Art. 229 paragr. 1 Constitution of Cape Verde of 23 November 1999; Art. 122 paragr. 1 Constitution of Sierra Leone of 03 September 1991; Bado, Constitutional Jurisdiction and Democratisation in francophone West Africa, Study of countries/Benin, 18, available at: http:// intlaw-sgiessen.de/fileadmin/user_upload/bilder_und_dokumente/forschung/westafrikaprojekt/ workingpapers/Draft_WP_2014_benin.pdf (last accessed on 02/07/ 2015).

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of competences of constitutional state organs and the amendment of the constitution. In general, the respective Constitutional or Supreme Court, as guardian of the Constitution, watches over the constitutional interpretation of any state acts.[4]

According to the constitutions of the ECOWAS Member States, the Constitutional Court or the Supreme Court represents the highest judicial power in the respective Member State. As such, a special binding force is attributed to the decisions of the Constitutional Courts or the Supreme Courts [5]. Therefore, this chapter will primarily address the question of judicial power in its various forms (B). Meanwhile, the case which partially forms the grounds for this study will be preemptively presented (A). Subsequently, a few opinions by Constitutional Courts will be critically examined (C). Lastly, the reasoned positions will be correlated to the initial case (D).

A. *The Initial Case under Municipal Law*

The predominant initial case regarding municipal (national) law is the decision N° N°E018/10 of 22. November 2010 by the Constitutional Court of Togo and resulting from it, the dispute over imperative of a parliamentarian mandate (as opposed to a free mandate of parliamentarians). Before the question of the effect of the decision can be dealt with at a deeper level it

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4 Art. 104 Constitution of Togo of 14 October 1992; Art. 114, 117, 118 Constitution of Benin of 11 December 1991; Art. 152 Constitution of Burkina Faso of 02 June 1991; Art. 88, 94, 95 Constitution of Ivory Coast of 23 July 2000; Art. 94 Constitution of Guinea of 07 May 2010; Art. 120 Constitution of Niger of 25. November 2010; Art. 85, 86, 87, Constitution of Mali of 25 February 1992; Art. 92 Constitution of Senegal of 22 January 2001; Art. 237 Constitution of Cape Verde of 23. November 1999); Art. 124 Sierra Leone Constitution of Sierra Leone of 03 September 1991.

5 See also: § 129 paragr. 2 Constitution of Ghana of 1992; Art. 106 Constitution of Togo of 14 October 1992; Art. 124 Constitution of Benin of 11 December 1991; Art. 94 Constitution of Mali of February 1992; Art. 134 Constitution of Niger of 25 November 2010; Art. 99 Constitution of Guinea of 07. May 2010; Art. 98 Constitution of Ivory Coast of 23 July 2000; Art. 159 Constitution of Burkina Faso of 02 June 1991; Art. 92 Abs. 2 Constitution of Senegal of 22. January 2001; Sect. 230, 232, 233, 235 Constitution of Nigeria of 29 May 1999; Art. 65 Constitution of Liberia of 06 January 1984; Art. 92 Constitution of Guinea-Bissau of 16 January 1984; Sect. 126, 127 Constitution of Gambia of 16 January 1997; Art. 229 paragr. 1 Constitution of Cape Verde of 23 November 1999; Art. 122 paragr. 1 Constitution of Sierra Leone of 03 September 1991.

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seems recommendable, from a methodical point of view, to summarily describe the decision by the Constitutional Court of Togo[6] which is the object of this study.

Nine parliamentarians of the opposition party UFC left the party and founded a new party, the ANC. On 18 November 2010, the President of the Parliament submitted a list of these members of parliament to the Constitutional Court with the request to find successors or substitutes for them. However, the concerned parliamentarians had already informed the Constitutional Court on 17 November 2010 that they did not intend to resign from Parliament.[7] Notwithstanding this irregularity, the Constitutional Court implemented the substitution of the parliamentarians.[8] They, in turn, brought a complaint before the Constitutional Court. At the centre of the discussion were the letters of resignation that the parliamentarians had signed as candidates during the legislative election campaign in 2007. The content of these letters read: “I commit myself to the party.

Should I deviate from the orientation of the party, I resign as a member of parliament.“ Such disclaimers are fundamentally unconstitutional. In effect, such a promise contravenes Art. 52 of the Constitution, which expressly emphasises that Members of Parliament are representatives of the entire people. Despite this, the Constitutional Court rejected the complaint and replaced the parliamentarians respectively with their substitutes.[9]

For a deeper insight into the presented decision, a detailed description of all of the elements in the Constitutional Court judgment is required. On closer inspection, three basic elements can be determined from the external division of the judgment transcript: the facts of the case, the main reasons for the decision and the verdict. Not least, a legal judgment generally also consists of non-abstract elements: These are the counterpart to the external division of the decision. However, the decision of the Constitutional Court must, before it can be called such, become *res judicata*. Last but not least, the decision has a binding effect. After all these questions, an analysis now follows.

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6 Cour constitutionnelle du Togo, Decision N°E-018/2010 of 22 November 2010, available at: http://www.courconstitutionnelle.tg/ (last accessed on 22/06/2015).

7 CJ CEDEAO, Affaire Isabelle Ameganvi v. Republique Togo, N°ECW/CCJ/JUD/09/11 (07/10/2011), par. 65.

8 Cour constitutionnelle du Togo, Decision N°E-018/2010 of 22 November 2010, available at: http://www.courconstitutionnelle.tg/ (last accessed on 22/06/2015).

9 Cour constitutionnelle du Togo, Decision N°E-018/2010 of 22 November 2010, available at: http://www.courconstitutionnelle.tg/ (last accessed on 22/06/2015).

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B. The Legal Force of Decisions by National Constitutional Courts

Object of the present study is the comparison of the Togolese Constitutional Court with the ECOWAS Court of Justice. For this reason, the effects of procedural law regarding the judicial review proceedings according to Art. 104 of the Constitution of Togo, which concerns solely national law, will not be included in the examination. Instead, the constitutional complaint against a breach of a constitutional right by the state as the object of dispute will be mainly analysed. The decisions by the Constitutional Court in this regard and their legal consequences will be presented to their full extent.

The legal force has a date of effect (formal legal force), a subject matter(material legal force), Addressees, a scope(key-reasons for decisions and tenor) as well as a limit.

I. Formal Legal Force

The legal force has two fundamental directions of effect. On one hand, it has an inwards effect (irrevocability), and on the other hand, an outward effect (non-appealability). Before the effect concerning the outward legal force is explained (2) the binding of the court itself will be discussed (1).

1. The Binding Force of Internal Proceedings of the Constitutional Court

The inward effect of the decision means the internal procedural self-commitment of the Constitutional Court to the content of its own decision.

a. Irrevocability of the Decision in Principle

It must be noted upfront that the institute of legal force, in a constitutional-procedural sense, is rarely regulated or mentioned. Is this a legislative error? The question cannot be conclusively answered here. In almost all constitutions there is, however, a separate regulation regarding the binding effect res judicata of constitutional decisions. The internal procedural effect results directly out of the decisions entry into force. Therefore, out of the rule of legal certainty results the prohibition of a revocation of that which

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was already decided upon.[10] It is thus clear that the formal legal force is constitutional plays a significant role for the Constitutional Court in that it must observe the rule of irrevocability. The risk of endlessly pursued proceedings is thus resolved.[11] Due to the formal legal force for the Constitutional Court a judgment can no longer be randomly amended once it has been issued. All these consequences are not expressly regulated in the constitution but result out of the principle of the rule of law.[12] In this sense, the principle of the rule of law is understood, in an African context, as the self-limiting authority of the state through ones own legislation.[13] This means that the state is obligated to comply with the regulations that itself has stipulated.[14]

Furthermore, the legal force of a Constitutional Court judgment expresses the authority of the Constitution.[15] Therefore, the sovereignty of the Constitution is linked to the sovereignty of the decision by the Constitutional Court.[16] This, The Constitutional Court of Benin has recently emphasised this irrevocability and finality of its legal decision with the following words:

> « Qu'en conséquence, en application des dispositions de l'article 124 […] de la Constitution, il y a autorité de chose jugée; que, dès lors, la requête […] doit être déclarée irrecevable».[17]

Art. 106 of Togo's Constitution follows the same principle and ascribes the decision of the Constitutional Court the highest possible effect that a court

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10 Diop, La justice constitutionnelle au Sénégal. Éssai sur l'evolution, les enjeux et les réformes d'un contre pouvoir juridictionnel, 162.

11 Yebisi, The constitutional power of review of Supreme Court of Ghana: Lesson for Nigeria, in: International Journal of Humanities and Social Science (2014), 39 (40).

12 Detterbeck, Streitgegenstand und Entscheidungswirkungen im öffentlichen Recht, 328. [Object of Dispute and Legal Effects in Public Law, 328].

13 Cabanis/Martin, Les constitutions d'Afrique francophone. Évolutions récentes, 64.

14 Cabanis/Martin, Les constitutions d'Afrique francophone. Évolutions récentes, 65.

15 Renoux, Autorité de la chose jugée ou autorité de la Constitution? A propos de l'effet des décisions du conseil constitutionnel, 817 (834); Adeloui, L'autorité de la chose jugée par les juri- dictions constitutionnelles en Afrique, in: Revue Togolaise des Sciences Juridiques (2012), 54 (56).

16 Adeloui, L'autorité de la chose jugée par les juridictions constitutionnelles en Afrique, in: Revue Togolaise des Sciences Juridiques (2012), 54 (59).

17 Décision DCC 15–027 (12/02/2015), p. 6, available at: www.cour-constitutionnell e-benin. org (last accessed on 25/04/2015).

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decision can have. Therefore, the decisions of the Constitutional Court have at first the effect that is generally attributed to court decisions.[18] However, the face that the Constitutional Court is itself bound not only affirms the prohibition of amendment but also of deviation.[19]

b. Interdiction of deviation

The substantive res judicata does not oppose the admissibility of the object of dispute from a new point of view.[20] Therefore, the irrevocability is to be seen separately from the interdiction of deviation. The irrevocability has already been mentioned. [21]The interdiction of deviation also prohibits the Constitutional Court to distance itself from its previous legal opinion when deciding on a case involving different aspects of the same subject. The admissibility of an application with new factual and legal aspects is an exception of the *ne bis in idem* principle. However, because of the intent and purpose of the substantive res judicata, the decision must be left untouched. It serves to ensure legal certainty and legal order. In the case that new factual and legal circumstances which give rise to new causes of action exist, the application should be declared admissible. Intent and purpose of the legal force prohibit, in such a case, a renewed examination, yet allow for a renewed decision.[22] A deviation from the previous decision by the Constitutional Court would only be justified if the new facts represent a radical change of the object of the dispute.[23]

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18 Benda/Klein, Verfassungsprozeßrecht, 2. edition, § 38, Rn. 1289.
19 Kpodar, Commentaire des grands avis et décisions de la Cour constitutionnelle togolaise, 102.
20 Kpodar, Commentaire des grands avis et décisions de la Cour constitutionnelle togolaise, 105.
21 See irrevocability in principle of the decision on page 38.
22 Detterbeck, Streitgegenstand und Entscheidungswirkungen im öffentlichen Recht, 343. [Object of Dispute and Effects of Decisions in Public Law, 343].
23 Detterbeck, Streitgegenstand und Entscheidungswirkungen im öffentlichen Recht, 344.
[Object of Dispute and Effects of Decisions in Public Law, 344].

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c. Possibility of a Rectification of Material Errors

The legal force neither opposes a rectification of errors in drafting nor a mere supplementation. According to Art. 27 and 28 of the rules of procedure of the Constitutional Court of Togo, the Constitutional Court may rectify factual errors in its decision.[24] This includes typing errors, confusions and drafting errors. The fact that these factual mistakes represent an acceptable reason regarding the relativisation of the legal force is recognised amongst academics as well as in case law.[25] Such legally flawed judgments by the Constitutional Court are based on a mistake that does not lead to consequences relevant to the decision.In other words, actual errors are not grave mistakes which are able to significantly change the content of decision of the Constitutional Court.[26] The Constitutional Court of Benin defines these material errors as follows:

> « Considérant que, selon une jurisprudence constante de la Cour, l'erreur matérielle se définit comme une simple erreur de plume ou de dactylographie, d'orthographe d'un nom, de termi nologie ou d'une omission dans la décision ».[27]

Moreover, the rectification of the facts of the case is permissible. This would be the case if the court pointed out a fact in the tenor of its judgment that does not appear at all in the facts of the case.[28]

Even additions to a ruling are permissible, if the court simply by mistake did not decide on an application ascertained in the facts. In this case, there is the possibility to adjudicate on this application in hindsight to its full

24 Also see the Rules of Procedure of the ECtHR (Art. 81 Rules of Procedure ECtHR).

25 Adeloui, L'autorité de la chose jugée par les juridictions constitutionnelles en Afrique, in: Revue Togolaise des Sciences Juridiques (2012), 54 (68); Yebisi, The constitutional power of review of Supreme Court of Ghana: Lesson for Nigeria, in: International Journal of Humanities and Social Science (2014), 39 (39); Décision DCC 96–010 du 24 janvier 1996 de la Cour constitutionnel- le du Bénin; Décisions DCC 03–166 du 11 novembre 2003 de la Cour constitutionnelle du Bénin; Benda/Klein, Verfassungsprozeßrecht[Constitutional Process Law]., 2. edition, § 16, Rn. 331.

26 Adeloui, L'autorité de la chose jugée par les juridictions constitutionnelles en Afrique, in: Revue Togolaise des Sciences Juridiques (2012), 54 (68).

27 Cour constitutionnelle du Bénin, Décision DCC 03–166 (11.11.2003), available at: www. cour-constitutionnelle-benin.org (last accessed on 25/04/2015).

28 Benda/Klein, Verfassungsprozeßrecht [Constitutional Process Law], 2. edition, § 16, Rn. 331.

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extent without intervention of the legal force. This would be possible through supplementing the decision.[29] However, the legal force prohibits a rectification of the decision at a later date. This means that the possibility of an addition depends on the modus operandi of the Constitutional Court. In case that the Constitutional Court would like to retract a wrong decision under the pretext of an addition, the principle of non-appealability would oppose such an approach.[30] It can no longer deviate from the original decision during the same proceedings. This means that the legal consequences, resulting from the originally rendered judgment, must be considered in the further course of the same object of dispute.[31]

Concerning the prerequisites for approaching the Constitutional Court with regards to the material errors, Art. 27 and 28 of the rules of procedure of the Constitutional Court of Togo stipulate:

> « Toute personne intéressée peut saisir la Cour d'une demande en rectification d'erreur maté rielle d'une de ses décisions. La Cour peut rectifier d'office une erreur matérielle dûment constatée par elle-même. »[32]

Contrary to the rectification of the factual error, the possibility of resumption or the amendment of the legal assessment on the grounds of gross procedural errors represent a special scenario.

d. Resumption due to gross miscarriage of justice

The question must be asked whether a misjudgment by the Constitutional Court, because of its legal force, will be untouchable or if it can be changed by rectifying the legal assessment of the misjudgment?[33] In principle, the reexamination of its own legal assessment is not possible under the

29 Benda/Klein, Verfassungsprozeßrecht [Constitutional Process Law], 2. edition, § 16, Rn. 331.
30 Benda/Klein, Verfassungsprozeßrecht[Constitutional Process Law], 2. edition, § 16, Rn. 331.
31 Benda/Klein, Verfassungsprozeßrecht[Constitutional Process Law], 2. edition, § 38, Rn. 1291.
32 Art. 27 und 28 der Geschäftsordnung des Verfassungsgerichts Togo: Reglement intérieur du
26.01.2005. [Rules of Procedure of the Constitutional Court of Togo...].
33 Adeloui, L'autorité de la chose jugée par les juridictions constitutionnelles en Afrique, in: Revue Togolaise des Sciences Juridiques (2012), 54 (57).

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principle of irrevocability. Therefore, this is a rather rare case. Nevertheless, the constitutional system of Ghana, for example,. provides the possibility of a reexamination of the legal assessment. According to § 133 paragr. 1 of the Constitution (Ghana):

> "The Supreme Court may review any decision made or given by it on such grounds and sub-ject to such conditions as may be prescribed by rules of the Court".[34]

At first glance, this regulation seems to contradict the principle of non-appealability of a Supreme Court decision which has acquired the status of *res judicata*. However, the revision is not made automatically and is not unconditional. There must be special circumstances in order for the judgment to be brought before the Supreme Court again. This regulation takes the principle of the assumption of truth into account. The reasons for a possible examination of the judgment are listed in detail in Art. 54 of the rules of procedure of the Supreme Court of Ghana:

> "The Court may review any decision made or given by it on the following grounds –
> (a) exceptional circumstances which have resulted in miscarriage of justice;
> (b) the discovery of new and important matter or evidence which, after the exercise of due diligence, was not within the applicant's knowledge or could not be produced by him at the time when the decision was given."[35]

It is in the interest of the judiciary, in case of a gross miscarriage of justice[36] that the court amends the decision that is already entered into force[37]. In this exceptional procedure, the composition of the Supreme Court is, According to § 133 section 2 of the Constitution, different compared to normal circumstances:

34 § 133 section 1 Constitution of Ghana of 1992.
35 Ghana's Supreme Court Rules, 1996 (C.I 16), Art. 54.
36 See also erreur de droit bei Adeloui, L'autorité de la chose jugée par les juridictions cons- titutionnelles en Afrique, in: Revue Togolaise des Sciences Juridiques (2012), 54 (68).
37 Yebisi, The constitutional power of review of Supreme Court of Ghana: Lesson for Nigeria, in: International Journal of Humanities and Social Science (2014), 39 (44).

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> “The Supreme Court, when reviewing its decisions under this article, shall be constituted by not less than seven Justices of the Supreme Court”.

The signifigance of the exceptional review of a decision already in force accounts for this raised number of judges according to stipulations in § 133 section 2.The resumption of the judgment already in force has the advantage of granting better legal protection to persons seeking justice. Under exceptional circumstances, especially if there is an obvious factual error or mistake in the assessment of the relevant prerequisites for admissibility, an application[38]already declared inadmissible can be declared as partially admissible.[39] The Supreme Court also points out that the applicant has to prove the violation of his fundamental rights.[40] It is also not in the interest of legal certainty that a miscarriage of justice remains non-appealable within a legal order. In particular because a miscarriage of justice causes, in some cases, further injustice which in turn is not in the interest of legal certainty.[41] Therefore, it should be recommended that the Constitutional Court quickly rectifies, within a reasonable period of time, its own error by resuming its consideration of the object of dispute.[42] An error-free, constitutional decision has priority over legal force and takes the idea of the principle of fairness into account.[43] However, the question must be asked what the meaning of “exceptional circumstances“ in Art. 54 of the rules of procedure (Supreme Court Ghana) is. Neither voices in literature nor case law can offer well-established criteria.[44] According to some authors, however, an error in law seems to be considered a special circumstance in the

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38 CEDH, Nr. 61603/00, Arrêt (16/06/2005), Affaire Storck c. Allemagne, par. 4.
39 CEDH, Nr. 61603/00, Arrêt (16/06/2005), Affaire Storck c. Allemagne, par. 7.
40 Bimpong-Buta, The role of the Supreme Court in the development of constitutional law in Ghana, 70.
41 Yebisi, The constitutional power of review of Supreme Court of Ghana: Lesson for Nigeria, in: International Journal of Humanities and Social Science (2014), 39 (49).
42 Yebisi, The constitutional power of review of Supreme Court of Ghana: Lesson for Nigeria, in: International Journal of Humanities and Social Science (2014), 39 (49).
43 Yebisi, The constitutional power of review of Supreme Court of Ghana: Lesson for Nigeria, in: International Journal of Humanities and Social Science (2014), 39 (40); Bimpong-Buta, The role of the Supreme Court in the development of constitutional law in Ghana, 355.
44 Yebisi, The constitutional power of review of Supreme Court of Ghana: Lesson for Nigeria, in: International Journal of Humanities and Social Science (2014), 39 (43).

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adjudication of the object of dispute.[45] It therefore concerns a severe legal error in the assessment of the facts of the case. [46]

There is no exclusive list of facts under the current Supreme Court case law that constitute grounds for an exceptional revision of an already decided case.[47] In particular, legal force may be deviated from if a gross mistake has been made regarding an already taken decision. In such a case the Constitutional Court would not be prevented from revisiting the same object of dispute as long as an application is made.[48] It is predominantly assumed amongst scholars that if gross procedural injustice has been committed, an exception of non-appealability can be made.[49] However, a new assessment is only done if new causes of action exist under the German Constitutional Court.[50] The Federal Supreme Court of Germany recognised that it can never be completely ruled out that objectively wrong judgments are made because of the natural limitations of human ability.[51] In view of the relevance of this point, it is recommended to quote the following statement:

> „Die rechtsprechende Gewalt, die den Richtern anvertraut ist, hat zum Inhalt, im Rahmen des dem Gericht unterbreiteten Sachverhalts einen bestimmten Lebenstatbestand festzustellen, den Tatbestand unter Gesetz und Recht zu subsumieren und die sich danach aus diesem Tatbestand ergebenden Rechtsfolgen verbindlich auszusprechen. Dass hierbei auch objektiv unrichtige Richtersprüche ergehen können, ist niemals völlig auszuschließen, da *dem menschlichen Erkenntnisvermögen von der Natur her Grenzen gesetzt sind*".[52]

45 Adeloui, L'autorité de la chose jugée par les juridictions constitutionnelles en Afrique, in: Revue Togolaise des Sciences Juridiques (2012), 54 (62); Yebisi, The constitutional power of re- view of Supreme Court of Ghana: Lesson for Nigeria, in: International Journal of Humanities and Social Science (2014), 39 (43).

46 Adeloui, L'autorité de la chose jugée par les juridictions constitutionnelles en Afrique, in: Revue Togolaise des Sciences Juridiques (2012), 54 (67).

47 Bimpong-Buta, The role of the Supreme Court in the development of constitutional law in Ghana, 71.

48 Yebisi, The constitutional power of review of Supreme Court of Ghana: Lesson for Nigeria, in: International Journal of Humanities and Social Science (2014), 39 (43); Benda/Klein, Verfas- sungsprozeßrecht[Constitutional Process Law...], 2. edition, § 16, Rn. 332.

49 Benda/Klein, Verfassungsprozeßrecht [Constitutional Process Law...], 2. edition, § 16, Rn. 332; dazu BVerfGE 72, 84 (84).

50 BVerfGE 72, 84 (91); vgl. Bimpong-Buta, The role of the Supreme Court in the development of constitutional law in Ghana, 71.

51 BGHZ 36, 379 (393).

52 BGHZ 36, 379 (393), (emphasis added by author).

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There is no regulation comparable to § 133 (Constitution of Ghana) in the Benin constitution. Indeed, Art. 23 of the rules of procedure of the Constitutional Court of Benin allows the rectification of constitutional judgments which are already in force. However, this rectification of actual errors does not represent a breach of the legal force. Hence, the Constitutional Court decided in 2002 that the legal force is not opposed to the rectification of the actual error in the judgment draft.[53] In contrast to the rectification of actual errors, the review of the legal grounds of the decision represents a breach of the legal force. Despite the fact that there is no constitutional regulation regarding this scenario, the Constitutional Court allowed the review of legal errors through case law.[54] In this manner, the Constitutional Court of Benin decided in one of its first judgments that the arrest and containment of a plaintiff (Loko M. Maurice) by police for more than 48 hours as constitutional.[55] However, the Court found in a new assessment of the same case that this was unconstitutional.[56] Therefore, the second decision nullifies the legal force of the first judgment. It is questionable which effect a resumption of the proceedings will have on the legal force. One can assume this will result in a suspension of the legal effect. At the very least, the resumption of the proceedings should have a *suspensory effect*[57] on the first judgment, because on resuming the proceedings, the result is not predictable. Therefore, the execution of the judgment should be postponed until the court has made its judgment.

As a result, it is certain that the perpetuation of a misjudgement by the Constitutional Court would forcibly harm legal certainty even more than the breaching of the legal force.[58] Therefore, the institution of legal force is not absolute but may be breached under justified circumstances, such as misjudgements, by a renewed assessment of the case. It is recommended

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53 Cour constitutionnelle du Bénin, Décision DCC 02–134 (18/12/2002), available at: www. cour-constitutionnelle-benin.org (last accessed on 25/04/2015).

54 Adeloui, L'autorité de la chose jugée par les juridictions constitutionnelles en Afrique, in: Revue Togolaise des Sciences Juridiques (2012), 54 (68).

55 Cour constitutionnelle du Bénin, Décision DCC 98–24 (12/03/1998), available at: www. cour-constitutionnelle-benin.org (last accessed on 25/04/2015); Kommentar dazu bei Adeloui, L'autorité de la chose jugée par les juridictions constitutionnelles en Afrique, in: Revue Togolaise des Sciences Juridiques (2012), 54 (68).

56 Cour constitutionnelle du Bénin, Décision DCC 98–098 (11/12/1998), available at: www. cour-constitutionnelle-benin.org (last accessed on 25/04/2015).

57 Benda/Klein, Verfassungsprozeßrecht [Constitutional Process Law...], 2. edition, § 36, Rn. 1234.

58 Adeloui, L'autorité de la chose jugée par les juridictions constitutionnelles en Afrique, in: Revue Togolaise des Sciences Juridiques (2012), 54 (57).

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that the procedure of a renewed assessment of the judgment, if obvious miscarriages of justice are present, should be included in a constitutional code of procedure of West African states.[59]This would contribute to an effective implementation of judgments by Constitutional Courts and at the same time enforce the confidence in the rule of law. Overall, the possibility of a later, revision of the object of dispute displays the double nature of the legal force.[60] It is absolute if there are no special circumstances. It is, however, relative if special and relevant circumstances were not taken sufficiently into consideration when the case was first assessed.

e. Delimitation with regard to future disputes

The internal procedural commitment of the Constitutional Court precludes a renewed opinion by the court regarding the same object of dispute. This follows, as shown, from the principles of the rule of law and serves legal certainty. However, the legal force of decisions by the Constitutional Court is limited in time (see also below: limits of legal force). The temporary element in the legal force allows for a new decision to be based on reasons if new facts arise after the decision has been made. New facts are, in this sense, actual changes.[61] Primarily, a new fact can be understood as a fundamental change of the life circumstance.[62] These actual changes include, amongst others, amendments to the law and the general legal opinion.[63] The relevance of this change is measured by the core elements of the legal force. At this point, it is important to note that new facts must relate to the object of dispute and the same parties to the dispute. Without an identity of the object of the dispute and the parties to the dispute, there is no legal force.[64]Whether a legal force is ascribed to the decision by Con-

59 Adeloui, L'autorité de la chose jugée par les juridictions constitutionnelles en Afrique, in: Revue Togolaise des Sciences Juridiques (2012), 54 (75).
60 Kpodar, Commentaire des grands avis et décisions de la Cour constitutionnelle togolaise, 103.
61 Pestalozza, Verfassungsprozeßrecht. [Constitutional Process Law...], 3. edition, § 20, Rn. 69.
62 Benda/Klein, Verfassungsprozeßrecht [Constitutional Process Law...], 2. edition, § 13, Rn. 245.
63 Pestalozza, Verfassungsprozeßrecht [Constitutional Process Law...], 3. edition, § 20, Rn. 69; Benda/Klein, Verfassungspro- zeßrecht, 2. edition, § 13, Rn. 245.
64 Adeloui, L'autorité de la chose jugée par les juridictions constitutionnelles en Afrique, in: Revue Togolaise des Sciences Juridiques (2012), 54 (54); Pestalozza, Verfassungsrozeßrecht [Constitutional Process Law...], 3. edition, § 20, Rn. 69.

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stitutional Court[65], According to Art. 106 of the Togolese Constitution is insignificant with regard to the judgment of the legal force of such future changes in legal opinion. A prerequisite for this remains the fundamental change of the object of the dispute. The possibility of future changes in legal opinion of the Constitutional Court is expressly stipulated in the Ghanaian Constitution. With this in mind, § 129 section 3 of the Constitution of Ghana stipulates as follows:

> "(3) The Supreme Court may, while treating its own previous decisions as normally binding, depart from a previous decision when it appears to it right to do so; and all other courts shall be bound to follow the decisions of the Supreme Court on questions of law."[66]

This regulation clearly shows that some degree of development of the Constitutional Court jurisdiction should be possible. It is solely questionable who can kick-start this change in legal reasoning. According to the literal interpretation of § 129 section 3, the change in legal reasoning happens at the discretion of the Supreme Court itself. It is also left to the discretion of the court whether it should deviate from its previous opinion.[67] This regulation cannot be interpreted in the sense that the legal force of previous decisions by the court is principally no longer binding. Rather, the creator of the Constitution does not wish to exclude future changes of the legal force just by having the above criteria present.[68] This represents a reasonable stance by the creator of the Constitution to prevent rigidity of the legal force. It is, however, difficult to imagine that the court will change its legal opinion ex officio without an application to do so because, as it is commonly known, parties to the dispute drive the proceedings and are therefore able to influence the decision by the Constitutional Court in many ways. Consequently, one must assume that the change in legal opinion can also take place at the request of the parties to the dispute through due process.

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65 According to the expression on the website of the Constitutional Court of Togo: „*Lex est quod notamus*", available at: http://www.courconstitutionnelle.tg/ (last accessed on 22/06/2015).

66 See also sect.126 paragr. 2 Constitution of Gambia of 16 January 1997; Art. 122 paragr. 2 Constitution of Sierra Leone of 03 September 1991.

67 Yebisi, The constitutional power of review of Supreme Court of Ghana: Lesson for Nigeria, in: International Journal of Humanities and Social Science (2014), 39 (43).

68 Benda/Klein, Verfassungsprozeßrecht [Constitutional Process Law...], 2. edition, § 38, Rn. 1334.

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As a result, a renewed complaint before the Constitutional Court or Supreme Court may be permitted if there are significant changes in life circumstances. Nevertheless, the resumption of the proceedings represents a special exception. Apart from this case the judgment may not be appealed by the parties to the dispute. It is not at their disposal.

2. The Non-appealability of the Decision

The formal legal force, excluding its irrevocability, follows the principle of non-appealability of the decision. This means that the decision by the court is neither subject of negotiation by the Constitutional Court nor by the parties to the dispute. It is final and binding. This principle of non-appealability (a) can be justified (b) in such a manner that the judgment of a Constitutional Court isdeterminant for all participants. However, an exception to the principle of non-appealability exists (c).

a. The principle of non-appealability

The decision by the Constitutional Court, according to the judgment, facilitates an assumption of truth according to the principle: „*res judicata pro veritate habetur*". This legal assumption of truth prevents the participants to the proceedings from questioning the judgment by the Constitutional Court again.[69] The principle of non-appealability does justice to the fundamental principle of *interest republicae ut sit finis litium* because it is not in the interest of the public that proceedings before the Constitutional Court are endlessly continued. Hence, the non-appealability of the judgment develops its effect, first and foremost, for the benefit of the parties to the dispute. More than anything, this has practical reasons because the proceedings must ultimately reach an end. This can be seen as a direct result from the requirement for legal certainty. On the one hand, the non-appealability of the Constitutional Court decision is therefore addressed to the parties to the proceedings. They may not question the authority of the decision and therefore that of the Constitutional Court. On the other hand, non-appealability means that there are no legal remedies against decisions by the Con-

69 Kpodar, Commentaire des grands avis et décisions de la Cour constitutionnelle togolaise, 100; Adeloui, L'autorité de la chose jugée par les juridictions constitutionnelles en Afrique, in: Revue Togolaise des Sciences Juridiques (2012), 54 (54).

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stitutional Court. As the judgment has been delivered, it cannot be appealed. Therefore, the formal legal force confirms the nature of the decision-making authority of the Constitutional Court as a last instance. There are no other higher-ranking instances above the Constitutional Court. Especially for this reason, its decisions immediately develops formal legal force with it's delivery or notification.[70] In terms of external legal effect, the formal legal force expresses the authority of the constitutional court (s. a.). Jurisdiction and doctrine also unanimously assume that the function of the substantive res judicata, with regard to the decision by the constitutional court, is indispensable.[71]

b. Justification of non-appealability

There are many reasons that speak for the non-appealability of a Constitutional Court decision. There is simply no higher instance above the Constitutional Court that is responsible for the review of Constitutional Court decisions. Moreover, the Constitutional Court represents the only legitimate interpreter of the Constitution. With this in mind, it can be assumed that it avails of the monopoly to interpret the Constitution. Especially since the legally effective decision has been given by the Constitutional Court itself, there is no reason why its decision should be appealed before it. Seeing as the object of dispute and the parties to the dispute are identical, the Constitutional Court would not take a different point of view when interpreting the constitutional regulations.[72] Furthermore, it can be observed that the respective Member State's Constitutions express its outward and internal sovereignty and authority. Therefore, the jurisdiction of the Constitutional Court also represents the judicial confirmation of this national sovereignty.

70 Benda/Klein, Verfassungsprozeßrecht[Constitutional process law], 2. edition, § 38, Rn. 1291.

71 Cour constitutionnelle du Togo, Décision N°E-002/2011 vom 22 June 2011, available at: http://www.courconstitutionnelle.tg/ (last accessed on 22/06/2015); Décision DCC 15–027 (12/02/2015), available at: www.cour-constitutionnelle-benin.org (last accessed on 25/04/2015); Kpodar, Commentaire des grands avis et décisions de la Cour constitutionnelle togolaise, 105.

72 Kpodar, Commentaire des grands avis et décisions de la Cour constitutionnelle togolaise, 101.

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c. Need for legal protection as an exception

It cannot, however, be underestimated that reasons may exist in exceptional cases that could challenge the legal force. There is consensus amongst scholars that the legal force represents a negative prerequisite for proceedings. Nevertheless, there is a possibility to modify the sanctity of the legal force to a certain degree. This is because there are factors that, in exceptional circumstances, can allow a breach of the legal force. E.g., the legal force can be breached if there is a particular need for legal protection.[73] Should there be a particular interest in legal protection, a complaint with regard to the same object of dispute would be admissible.[74]This should not be seen as a violation against the *ne bis in idem* doctrine but as a special case regarding the generally valid non-appealability of the legal force. The latter scenario addresses a different level (see chapter 3: Derogation of Legal Force). For example, in case of a sustained human rights complaint before the ECOWAS Court of Justice, one should come to the conclusion that there is a need for legal protection, which should be reason for aresumption of proceedings regarding a constitutional complaint.[75]Whether the plaintiff has a legally protected need in an individual case after the legal force takes effect depends on the intensity of the Unconstitutionality of the violation and the risk of its repetition.[76] It does not matter whether the violation took place in the past or not.[77] This aspect of the exceptional overriding of the principle was unfortunately overlooked by the Constitutional Court of Togo as it proclaimed without differentiation an *erga-omnes-effect* of its decisions without pointing out the possibility of an individual complaint at an international level. Thus, the Constitutional Court proclaimed the following words:

> « Qu'aucune autorité civile ou militaire, qu'aucune institution, fut-elle internationale, ne peut s'opposer à une décision de la Cour».[78]

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73 Hillgruber/Goos, Verfassungssprozeßrecht[Constitutional Process Law...], 4. edition, § 5, Rn. 469.

74 Koussoulis, Beiträge zur modernen Rechtskraftlehre[Contributions to modern doctrine of legal force], 209.

75 See also the resumption of the proceedings (page 227).

76 Hillgruber/Goos, Verfassungsprozeßrecht [Constitutional Process Law...], 4. edition, § 5, Rn. 475.

77 Hillgruber/Goos, Verfassungsprozeßrecht [Constitutional Process Law...], 4. edition, § 5, Rn. 475.

78 Cour constitutionnelle du Togo, Décision N°E-002/2011 vom 22 June 2011, available at: http://www.courconstitutionnelle.tg/ (last accessed on 22/06/2015).

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The difference between the renewed proceedings due to a special need of legal protection and the rectification due to gross miscarriages of justice includes the fact that the former is launched by a complaint of the concerned party after the declaratory judgment by an international instance[79], while the latter is supposed to be executed after the declaration by the judiciary body itself (compare § 133 of the Constitution of Ghana).

A need for legal protection also exists, if a fact becomes known after the judgment which would have been suitable for exercising a significant influence on the result of an already decided dispute. Therefore, the Constitutional Court of Togo could have decided differently once it had realised that the parliamentarians, who were excluded from parliament, had not submitted a proper waiver.[80] Unfortunately, the Constitutional Court overlooked this aspect in its legal assessment.[81] In this case, it would have been plausible to assume an exceptional breach of the legal force, based on the need for legal protection. Thus, Art. 80 of the rules of procedure of the ECtHR, for example, allow under certain circumstances a resumption of proceedings with regard a judgment that is already in legal force.[82]

II. Substantive Res Judicata

The practical significance of the differentiation between the formal and substantive res judicata lies in the face that the substantive res judicata has effect in a second trial. The formal legal force, on the other hand, binds the court irrespective of a second trial.[83] As already mentioned, the formal legal force is the basis for the substantive res judicata.[84] In the following, the individual elements (1), the exact object (2) and the legal consequences (3) of the substantive res judicata will be discussed.

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79 See also the declaratory judgment ECOWAS: CJ CEDEAO, Affaire Isabelle Ameganvi v. Republique Togo, N°ECW/CCJ/JUD/09/11 (07/10/2011), par. 66.

80 CJ CEDEAO, Affaire Isabelle Ameganvi v. Republique Togo, N°ECW/CCJ/JUD/09/11 (07/10/2011), par. 61, 62.

81 Cour constitutionnelle du Togo, decision N°E-018/2010 of 22 November 2010, available at: http://www.courconstitutionnelle.tg/ (last accessed on 22/06/2015).

82 Art. 80 paragr. 1 of the Verfahrensordnung des EGMR [Rules of Procedure of ECtHR].

83 Pestalozza, Verfassungsprozeßrecht. [Constitutional Process Law...], 3. edition, § 20, Rn. 49.

84 Benda/Klein, Verfassungsprozeßrecht, 2nd edition, § 38, Rn. 1295. [Constitutional Process Law...].

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1. Object of Substantive res judicata

Substantive res judicata means that a claim, raised in a complaint or counter-complaint, has been decided upon.[85] The substantive res judicata therefore includes the decision regarding the disputed claim. With this in mind, there is no difference between the object of the dispute and the object of the decision, because what is being litigated during the trial by the parties must also be decided on by the court.[86]The substantive res judicata fixates the factual and temporal elements of the object of the decision. It means that the decision by the Constitutional Court is significant for the Constitutional Court as well as for those participants in the dispute seeking adjudication. As such, the purpose of the substantive res judicata is to ensure the content of a formal final judgment for a possible second trial.[87]

2. Elements of Substantive res judicata

Not everything contained in a decision by the Constitutional Court, is to be included in the substantive res judicata. The substantive res judicata has a specific scope (a) and has certain limits (b).

a. Extent of legal force

First of all, the question must be answered whether the tenor and the key reasons for the decision make up the respective elements of the substantive res judicata.[88] In response, the French Conseil Constitutionnel has taken the following position:

> « Considérant, d'une part, qu'aux termes de l'article 62 in fine de la Constitution les décisions du Conseil constitutionnel s'imposent aux pouvoirs publics et à toutes les autorités adminis tratives et juridiction-

85 Adeloui, L'autorité de la chose jugée par les juridictions constitutionnelles en Afrique, in: Revue Togolaise des Sciences Juridiques (2012), 54 (54).
86 Rosenberg/Schwab/Gottwald, Zivilprozessrecht [Rules of Civil Procedure], 13 th edition, § 153, Rn. 2.
87 Lechner/Zuck, Bundesverfassungsgesetz [Federal Constitutional Law...], § 31, Rn. 11.
88 Adeloui, L'autorité de la chose jugée par les juridictions constitutionnelles en Afrique, in: Revue Togolaise des Sciences Juridiques (2012), 54 (55).

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nelles; que l'autorité des décisions visées par cette disposition s'attache non seulement à leur *dispositif* mais aussi aux *motifs* qui en sont le soutien nécessaire et en constituent le fondement même».[89]

This suggests that the substantive res judicata fixates the content of the decision. In this regard, the elements of the tenor are decisive. As a result, the substantive res judicata in principle does not include the key reasons for the decision. However, these key reasons for the decision help with the interpretation of the verdict.[90] They describe in more detail the grounds for the verdict. In other words, the reasons for the decision are all those statements from which the court comes to the answer of the claim by way of logical conclusion.[91] To this extent, the reasons for the decision partake in the legal force[92] and influence its effects. Moreover, the key reasons for the decision are closely linked to the extent of the procedural claim, which forms the basis for the object of the dispute. Especially when a claim is rejected or dismissed a recourse to the key reasons of the decision is essential [93]because the Constitutional Court does not explain the rejection of the claim in the formula of the judgment but solely in the key reasons for the decision. In the formula of the judgment the Constitutional Court gives an answer only to the pertinent legal issue raised regarding a certain constitutional regulation. Thereby, the preliminary and incidentally dealt with question by the Constitutional Court does not share the legal nature of the material legal question.[94]

Furthermore, the substantive res judicata does not develop an unlimited effect.

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89 Conseil constitutionnel francais, Décision n°62–18 L (16/01/1962), available at: www.conseil-constitutionnel.fr (last accessed on 08/07/2015).

90 Conseil constitutionnel francais, Décision n°62–18 L (16/01/1962), available at: www.conseil-constitutionnel.fr (last accessed on 08/07/2015).

91 Zeuner, Die objektiven Grenzen der Rechtskraft im Rahmen rechtlicher Sinnzusammenhän- ge, 5. [The objective limits of legal force within the framework of legal contexts...].

92 Zeuner, Die objektiven Grenzen der Rechtskraft im Rahmen rechtlicher Sinnzusammenhän- ge, 6. [The objective limits of legal force within the framework of legal contexts...].

93 Detterbeck, Streitgegenstand und Entscheidungswirkungen im öffentlichen Recht [Object of dispute and effects of decisions in public law...], 333; Ben- da/ Klein, Verfassungssprozeßrecht, 2. edition, § 38, Rn. 1298. [Constitutional Process Law...].

94 Detterbeck, Streitgegenstand und Entscheidungswirkungen im öffentlichen Recht, 332. [Object of dispute and effects of decisions in public law...].

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b. Limits of legal force

First of all, it should be mentioned that the question of the objective scope of the substantive res judicata is hardly regulated in the Constitutions of the ECOWAS. For this very reason, the question regarding the limits of the legal force of decisions by the Constitutional Court is especially difficult. Due to the lack of legal remedies against decisions by the Constitutional Courts, the decisions initially have an unlimited effect. However, there are opinions in literature that allege an objective limit to the substantive res judicata.[95] These opinions are supported by the rule of law. The general effect of the decisions can, According to Art. 106 (Constitution of Togo), not take effect absolutely because there are constitutional obligations of the state at international level which may question the legal force of the decisions by the Constitutional Court. This may be the case within the ECOWAS legal order, where individual complaints are admissible at the ECOWAS Court of Justice (discussed in detail in chapter 3). The admissibility of such complaint proceedings against the decision of national Constitutional Courts represents, from a procedural viewpoint, an *objective limit of the legal force* of the judgment by the national Constitutional Courts.

The legal force of the decision by the Constitutional Court is also limited in time. This means that the substantive res judicata only refers to the circumstances that occurred before the judgment was rendered. The element of time represents, according to prevailing opinion within the doctrine, a barrier to the substantive res judicata.[96] The point in time at which the legal force takes effect plays an important role in its preclusive effect. This means that actual and legal circumstances which were present before the legal force took effect and which refer to the object of the dispute are precluded regarding the same object of dispute.[97] For the assessment of the decisiveness of this point in time, the formal legal force should be applied. There are two exceptions that should be paid attention to when it comes to the preclusive effect. Firstly, circumstances that were not included in the initial assessment by the Constitutional Court are not affected. Because of

95 Kpodar, Commentaire des grands avis et décisions de la Cour constitutionnelle togolaise, 105 f.

96 Detterbeck, Streitgegenstand und Entscheidungswirkungen im öffentlichen Recht, 338. [Object of dispute and effects of decisions in public law...].

97 Detterbeck, Streitgegenstand und Entscheidungswirkungen im öffentlichen Recht, 338. [Object of dispute and effects of decisions in public law...].

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the objective function of the constitutional jurisdiction, these circumstances would require a different object of dispute.[98] Secondly, the actual and legal circumstances that occurred before the legal force took effect are not included in the preclusive effect. A transformation of the views and values prevailing in the population, e.g. is seen as a circumstance of an actual nature that is opposed to the preclusive effect of the legal force.[99]

Regarding the addressees of the effects of the legal force, it is established in general procedural law that the substantive res judicata only concerns the parties directly involved in the dispute.[100] However, the constitutional procedural law has a special nature which justifies a general *erga-omnes-effect* (also see C below).

3. Consequences of Substantive res judicata

The substantive res judicata must be strictly separated from the substantive legal effects of the judgment. As shown, *substantive res judicata* concerns the core elements of the decision. In contrast, the substantive legal effects of the judgment concern the legal consequences which are caused by the decision of the Constitutional Court. In this regard, the *substantive res judicata* represents an obstacle to proceedings (a). Meanwhile, there is the possibility of the admissibility of a new complaint despite the enforcement of *substantive res judicata*. This situation is possible, if there are new reasons for a complaint (b).

a. Substantive res judicata as an obstacle to proceedings

One of the most important consequences of substantive res judicata from a procedural-legal viewpoint is the possible inadmissibility of further law suits. Therefore, the legal force serves as an obstacle to proceedings. The

98 Detterbeck, Streitgegenstand und Entscheidungswirkungen im öffentlichen Recht, 339. [Object of dispute and effects of decisions in public law...].
99 Detterbeck, Streitgegenstand und Entscheidungswirkungen im öffentlichen Recht, 339.
100 Koussoulis, Beiträge zur modernen Rechtskraftlehre, 22 f. [Object of dispute and effects of decisions in public law...].

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doctrine therefore rightfully qualifies the *substantive res judicata* as a negative prerequisite for a decision in the matter.[101]

In general, the finality of the legal force takes effect, once all possible legal remedies have been exhausted.[102] Since there are no legal remedies available against the decisions by the Constitutional Court, the finality of decisions by the Constitutional Court take immediate effect once the judgment is announced.[103]Therefore, the judgment by the Constitutional Court is also immediately enforceable.[104]

Since most of the proceedings at the Constitutional Court do not involve disputes between parties, the effect is usually enforced for the overall constitutional order. In case of disputes between parties, there are specifics regarding the effect of the decision. In this case, the substantive res judicata presents an obstacle to proceedings that interferes if there is the same object of dispute between the same parties in a two-party case.[105] This is logical, because a renewed assessment of the same case would contravene the principle of *ne bis in idem*. The Constitutional Court of Togo has just referred to exactly this principle in order to reject the application of the parliamentarians of the Togolese parliament in the initial case. In this regard, the court said the following:

> « Considérant par ailleurs que par décision n°E-018 du 22 novembre 2010, la Cour a constaté la vacance des sièges occupés par le requérant et huit (08) autres personnes, précédemment députés inscrits de l'Union des Forces de Changement (UFC) à l'Assemblée nationale, et a procédé à leur remplacement conformément aux dispositions du Code électoral; […] qu'ainsi les décisions de a Cour constitutionnelle ont un

101 Kpodar, Commentaire des grands avis et décisions de la Cour constitutionnelle togolaise, 100; Benda/Klein, Verfassungsprozeßrech t[Constitutional Process Law...], 2. edition, § 38, Rn. 1296.

102 Kpodar, Commentaire des grands avis et décisions de la Cour constitutionnelle togolaise, 100.

103 Kpodar, Commentaire des grands avis et décisions de la Cour constitutionnelle togolaise, 100.

104 Kpodar, Commentaire des grands avis et décisions de la Cour constitutionnelle togolaise, 100.

105 Kpodar, Commentaire des grands avis et décisions de la Cour constitutionnelle togolaise, 100; Benda/Klein, Verfassungsprozeßrecht [Constitutional Process Law...], 2. edition, § 38, Rn. 242.

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> caractère impératif; qu'il en résulte qu'une obéissance absolue est due aux décisions de la Cour […]».[106]

With this statement, the Constitutional Court clearly confirms the scope of substantive res judicata as a negative prerequisite for a decision. However, substantive res judicata does not oppose a new application with regards to the same object of dispute if it is based on other causes of action.

b. Admissibility in the presence of new causes of action

First of all, it must be pointed out that the legal force does not have an absolute effect on the object of dispute. Rather, the effect of the legal force is essentially enforced with regard to the non-appealability of the causes of action, because with regards to the same dispute, different reasons could still justify another action regarding the same object of dispute.

This would be admissible from a constitutional-procedural point of view.[107]At first glance, this opinion seems difficult to justify but on closer inspection it becomes clear that the admissibility of a renewed application with regards to the same legal dispute does not violate the principle of *ne bis in idem*. In this context, the French Conseil Constitutionnel has rejected the opinion that the legal force conflicts with a law already declared unconstitutional by the Conseil, if the Parliament resubmits the disputed law to the Constitutional Court under new aspects. Based on the significance of this judgment, the respective opinion by the Conseil Constitutionnel is herewith repeated:

> « Considérant que l'autorité de chose jugée attachée à la décision du Conseil constitutionnel du 22 octobre 1982 est limitée à la déclaration d'inconstitutionnalité visant certaines disposi- tions de la loi qui lui était alors soumise; qu'elle ne peut être utilement invoquée à l'encontre d'une autre loi conçue, d'ailleurs, en termes différents ».[108]

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106 Cour constitutionnelle du Togo, Décision N°E-002/2011 of 22 June 2011, available at: http://www.courconstitutionnelle.tg/ (last accessed on 22/06/2015).

107 Kpodar, Commentaire des grands avis et décisions de la Cour constitutionnelle togolaise, 105.

108 Conseil constitutionnel français, Décision n°88–244 DC (20/07/1988), 18ème Considérant, available at: www.conseil-constitutionnel.fr (last accessed on 08/07/2015).

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This point of view by the French Conseil Constitutionnel expresses that the legal force only then develops a relative binding effect if the Constitutional Court is presented with the same object of dispute with different reasons for legal action for review.[109] The admissibility of new reasons for legal action regarding the same object of dispute contributes to the development of the Constitutional Courts' case law and must be welcomed for this reason.[110]

A further important argument in support of this view is that the Constitutional Court gives an answer in its tenor specifically to questions posed in the reasons for legal action. This means that the opinion by the court in its tenor does not necessarily refer to the object of dispute but instead to the legal issues raised.[111]

In conclusion, the legal force and the associated principle of non-appealability do not conflict in every case with a subsequent application regarding the same object of dispute. There are exceptions when the reasons for legal action, on which the new application is based, give rise to a different legal assessment of the object of dispute.[112]Over and above the legal force of the decision, decisions by the Constitutional Court develop further particular effects.

C. The Binding Effect of the Decision

Generally, the decisions by the Constitutional Court have an *erga-omnes*-effect (I). However, there are in exceptional cases also some decisions that only develop an *inter-omnes*-effect (II).

I. Erga-omnes-Effect

The decisions by the Constitutional Court result in final legal force not only in a formal and material respect but also have a binding effect with re-

109 Kpodar, Commentaire des grands avis et décisions de la Cour constitutionnelle togolaise, 104.
110 Kpodar, Commentaire des grands avis et décisions de la Cour constitutionnelle togolaise, 106.
111 Kpodar, Commentaire des grands avis et décisions de la Cour constitutionnelle togolaise, 106.
112 Kpodar, Commentaire des grands avis et décisions de la Cour constitutionnelle togolaise, 105.

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gard to all state powers. Procedural principles of the *erga-omnes*-effect[113] are constitutionally entrenched in Art. 106 of the Constitution of Togo,[114] which in turn expands the circle of the target group the binding effect applies to. The civil and military authorities as well as the judiciary are bound to the decisions by the Constitutional Court.[115] Thereby, it must be noted that the legal force develops a binding effect not only externally but also internally because the Constitutional Court itself is, like the mentioned target group, also bound by its decision.[116] The decision may, therefore, not be arbitrarily changed, as long as there is no circumstantial change.[117]

It is correct that, in the interest of legal certainty, all actors are subject to the binding effect of decisions by the Constitutional Court.[118] Logically, the Constitutions of ECOWAS Member States do not provide legal reme-

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113 Kpodar, Commentaire des grands avis et décisions de la Cour constitutionnelle togolaise, 103.

114 See also: § 129 section 2 Constitution of Ghana of 1992; Art. 124 Constitution of Benin of 11 December 1991; Art. 94 Constitution of Mali of 25 February 1992; Art. 134 Constitution of Niger of 25 November 2010; Art. 99 Constitution of Guinea of 07 May 2010; Art. 98 Constitution of Ivory Coast of 23 July 2000; Art. 159 Constitution of Burkina Faso of 02 June 1991; Art. 92 Abs. 2 Constitution of Senegal of 22 January 2001; Sect. 230, 232, 233, 235 Constitution of Nigeria of 29 May 1999; Art. 65 Constitution of Liberia of 06 January 1984; Art. 92 Constitution of Guinea-Bissau of 16 January 1984; Sect. 126, 127 Constitution of Gambia of 16 January 1997; Art. 229 Abs. 1 Constitution of Cape Verde of 23 November 1999; Art. 122 Abs. 1 Constitution of Sierra Leone of 03 September 1991.

115 Bado, Verfassungsrechtliche Gerichtsbarkeit und Demokratisierung im frankophonen Westafrika, Länderstudie/Benin [Constitutional Jurisdiction and democratisation in Francophone West Africa], 14, available at: http://intlaw-sgiessen.de/fileadmin/user_upload/bilder_ und_dokumente/forschung/westafrikaprojekt/workingpapers/Draft_WP_2014_benin.pdf (last accessed on 02/07/2015).

116 Kpodar, Commentaire des grands avis et décisions de la Cour constitutionnelle togolaise, 102.

117 Kpodar, Commentaire des grands avis et décisions de la Cour constitutionnelle togolaise, 103.

118 Jeze, De la vérité de la force légale attachée par la loi à l'acte juridictionnel, in: RDP 1913, 439 (440); Adeloui, L'autorité de la chose jugée par les juridictions constitutionnelles en Afrique, in: Revue Togolaise des Sciences Juridiques (2012), 54 (54).

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dies against the jurisdiction of the court.[119] The Constitutional Courts within the region emphasise repeatedly the *erga-omnes*-effect of their decisions and declare all complaints regarding their previous decisions as inadmissible.[120]In this regard, the legal force of decisions by Constitutional Courts are to be differentiated from decisions by specialised courts. Regarding the courts of general jurisdiction, only the parties to the dispute in the proceedings are bound to its decision.[121] The proceedings before the Constitutional Court, however, are usually objective proceedings.[122] They usually do not comprise of two-party proceedings. Even though the possibility of individual constitutional complaints exists, these mainly serve the interpretation of the Constitution. As a result, the legal force of decisions by the Constitutional Court has the same legal nature as this objective type of legal action. A violation of the legal force of decisions by the Constitutional Court thereby represents a violation of the Constitution.[123] This is an expression of the significance of the jurisdiction of the Constitutional Court. The *erga-omnes*-effect also demands that the authorities, as well as

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119 Siehe dazu: § 129 Abs. 2 Constitution of Ghana of 1992; Art. 106 Constitution of Togo of 14 October 1992; Art. 124 Constitution of Benin of 11 December 1991; Art. 94 Constitution of Mali of 25 February 1992; Art. 134 Constitution of Niger of 25 November 2010; Art. 99 Constitution of Guinea of 07 May 2010; Art. 98 Constitution of Ivory Coast of 23 July 2000; Art. 159 Constitution of Burkina Faso of 02 June 1991; Art. 92 Abs. 2 Constitution of Senegal of 22 January 2001; Sect. 230, 232, 233, 235 Constitution of Nigeria of 29 May 1999; Art. 65 Constitution of Liberia of 06 January 1984; Art. 92 Constitution of Guinea-Bissau of 16 January 1984; Sect. 126, 127 Constitution of Gambia of 16 January 1997; Art. 229 Abs. 1 Constitution of Cape Verde of 23 November 1999; Art. 122 Abs. 1 Constitution of Sierra Leone of 0. September 1991.

120 Décision de la Cour constitutionnelle du Bénin DCC 15–027 (12/02/2015), available at: www.cour-constitutionnelle-benin.org (last accessed on 25/04/2015); Décision de la Cour cons- titutionnelle du Bénin N°DCC 14–038 of 20 February 2014, available at: www.cour-constitutionnelle-benin.org (last accessed on 25/04/2015); Cour constitutionnelle du Togo, Décision N °E-002/2011 of 22 June 2011, available at: http://www.courconstitutionnelle.tg/ (last accessed on 22/06/2015); see also Yebisi, The constitutional power of review of Supreme Court of Ghana: Lesson for Nigeria, in: International Journal and Social Science Invention (2014), 39 (42).

121 Adeloui, L'autorité de la chose jugée par les juridictions constitutionnelles en Afrique, in: Revue Togolaise des Sciences Juridiques (2012), 54 (55).

122 Detterbeck, Streitgegenstand und Entscheidungswirkungen im öffentlichen Recht [object of Dispute and the Effect of Legal Decisions in Public Law], 333.

123 Adeloui, L'autorité de la chose jugée par les juridictions constitutionnelles en Afrique, in: Revue Togolaise des Sciences Juridiques (2012), 54 (55).

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other courts, participate in the implementation of Constitutional Court's judgments. [124]

Thereby, one must pay attention to two characteristics of the binding effect. The binding effect results in a duty of omission as well as a positive obligation. With this in mind, the Constitutional Court of Benin states:

> « Selon une jurisprudence constante de la Cour, l'autorité de chose jugée ainsi attachée à ses décisions impose à l'Administration une double obligation à savoir d'une part, l'obligation de prendre toutes les mesures pour exécuter la décision juridictionnelle et d'autre part, l'obligation de ne rien faire qui soit en contradiction avec ladite décision».[125]

The binding effect demands that the addressees of the judgment, mainly the state organs, must refrain from doing anything that could impede the effectivity of the binding judgment by the Constitutional Court.[126] On the other hand, the binding effect causes a positive obligation, whereby the recipients of the binding decision must take all necessary steps to ensure the effective impact of the judgment.[127]

Moreover, the binding effect of the judgments by the Constitutional Court has an *ex-tunc*-effect. Accordingly, all sovereign measures declared as unconstitutional by the Constitutional Court are null and void from the outset. For this reason, the Constitutional Court of Benin stipulates that the refusal of the demand by the Constitutional Court to the Minister of Justice to reinstate the candidates to their former status represents a violation against the legal force of its first decision.[128] With this judgment, the Constitutional Court implicitly refers to the *ex-tunc*-effect of its first judgment of 12 July 2005.[129] The Constitutional Court of Benin demands that the unconstitutional measures taken by the administration before the judg-

124 Yebisi, The constitutional power of review of Supreme Court of Ghana: Lesson for Nigeria, in: International Journal of Humanities and Social Science (2014), 39 (40).

125 Cour constitutionnelle du Bénin, Décision DCC 06–016 (31/01/2006), available at: www. cour-constitutionnelle-benin.org (last accessed on 25/04/2015).

126 Ould Bouboutt, Les Juridictions constitutionnelles en Afrique, évolutions et Enjeux, in: Annuaire international de justice constitutionnelle (1997), 38 (45).

127 Adeloui, L'autorité de la chose jugée par les juridictions constitutionnelles en Afrique, in: Revue Togolaise des Sciences Juridiques (2012), 54 (65).

128 Cour constitutionnelle du Bénin, Décision DCC 06–016 (31/01/2006), available at: www. cour-constitutionnelle-benin.org (last accessed on 25/04/2015).

129 Cour constitutionnelle du Bénin, Décision DCC 05–067 (12/07/2005), available at: www. cour-constitutionnelle-benin.org (last accessed on 25/04/2015).

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ment was made,[130] should be regarded as null and void from the beginning.[131] Overall, the measures declared as unconstitutional by the Constitutional Court, may not be applied at all.

The legal ineffectiveness[132] of the measure demands that the possible consequences must be removed.

II. Inter-omnes-Effect

As shown, the formal legal force constitutes the basis for *substantive res judicata*. The formal legal force gives rise to an *inter-omnes*-effect in special types of proceedings and especially in proceedings regarding parties, as in the initial case. This *inter-omnes*-effect in turn results in a binding effect regarding the facts of the case (1) as well as a direct effect (2).[133]

1. The impact of the decision on the facts of the case

The impact of the facts of the case usually occurs when an authority is bound by law to facts established by the court and to the subsequent consequences.[134]In case of a Constitutional Court decision, the impact of the facts comes to bear, when legal norms are linked to the decisions. The court links its decision to the legal norms and subsequently established facts. This consists of substantive legal effects of the decision. A typical example is the loss of a mandate in parliament as a result of the finding of the unconstitutionality of the corresponding political party.[135] In the initial case, the ANC members of parliament gave up their mandates in the Togolese Parliament. The Constitutional Court established this as fact. This determination by the court causes a so-called determination-impact.

130 Cour constitutionnelle du Bénin, Décision DCC 05–067 (12/07/2005), available at: www. cour-constitutionnelle-benin.org (last accessed 25/04/2015).

131 Cour constitutionnelle du Bénin, Décision DCC 06–016 (31/01/2006), available at: www. cour-constitutionnelle-benin.org (last accessed on 25/04/2015).

132 Schlaich/Korioth, Das Bundesverfassungsgericht [The Federal Constitutional Court], 8. edition, Rn. 379.

133 Benda/Klein, Verfassungsprozeßrecht [Constitutional Process Law...], 2. edition, § 38, Rn. 1295.

134 Creifelds, Rechtswörterbuch [Legal Dictionary], 19. edition, 1138.

135 Benda/Klein, Verfassungsprozeßrecht [Constitutional Process Law...] available at, 2. edition, § 38, Rn. 1295.

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The declaration of renunciation According to Art. 192 of the Togolese electoral law and the substitution of the members of parliament by the Constitutional Court of Togo therefore represents results in a binding effect regarding the facts of the case. Accordingly, the Constitutional Court stated in the tenor:

> « La Cour *constate* la vacance des sièges préalablement occupés ».[136]

Based on the use of the word *"constate"*, one can speak of the impact of the facts of the case. Equally, the determination of the unconstitutionality of a political party by the Constitutional Court and its legal consequences represent an impact of the facts of the case. The direct effect of the substantive res judicata is closely linked to the binding force concerning the facts of the case. The decision by the court actually creates a new situation for the new members of parliament[137] and at the same time determines the loss of the seats in parliament for the members of parliament who stepped down.[138] This double effect is a special feature of subjective decisions by the Constitutional Court.

2. The material impact of the decision

Scholars understand the impact that the design will have, as an intended change of the substantive res judicata which is attained by the inter omnes effective decision. It can be said that the decision by the Constitutional Court realises this effect.[139] In the subjective litigation of constitutional proceedings, it may occur that the decision by the Constitutional Court causes such design impacts. This scenario occurs when the Constitutional Court renders a positive judgment and, from the plaintiffs viewpoint, positive effects follow. Through the effective judgment, the legal situation is di-

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136 Cour constitutionnelle du Togo, Decision N°E-018/2010 of 22 November 2010, available at: http://www.courconstitutionnelle.tg/ (last accessed on 22/06/2015), Hervorhebung durch den Verfasser [emphasis by the author].

137 Cour constitutionnelle du Togo, Decision N°E-018/2010 of 22 November 2010, available at: http://www.courconstitutionnelle.tg/ (last accessed on 22/06/2015).

138 Cour constitutionnelle du Togo, Decision N°E-018/2010 of 22 November 2010, available at : http://www.courconstitutionnelle.tg/ (last accessed on 22/06/2015).

139 Pestalozza, Verfassungsprozeßrecht [Constitutional Process Law...], 3. edition, § 20, Rn. 71.

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rectly altered according to the decision.[140] In the tenor of the decision in the initial case in this examination, the Constitutional Court clarifies this as the impact of the design and the effect of the determination. The Togolese Court stated in particular:

> « La Cour constate la vacance des sièges préalablement occupés; dit que les sièges devenus vacants doivent être occupés […] »[141]

In this tenor, the Constitutional Court determined not only the loss of the mandate by the allegedly resigned members of parliament but designs at the same time a new legal situation for the new appointment of Members of Parliament.[142]

D. *Appreciation and Criticism of the Decision in the Initial Case*

In the initial case in this thesis,[143] the Constitutional Court was approached mainly in order to decide on the substitution of the parliamentarians. However, before the main question could be fully clarified, the loss of mandate for the parliamentarians who had resigned, had to be assessed as a preliminary question (I). The primary discussion of this question alone can make it possible for the Constitutional Court to discover a possible violation against the substantive res judicata as well as constitutional regulations with regard to the loss of mandate and the declaration of renunciation (II).

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140 Benda/Klein, Verfassungsprozeßrecht [Constitutional Process Law...], 2. edition, § 37, Rn. 1243.

141 Cour constitutionnelle du Togo, Decision N°E-018/2010 of 22 November 2010, available at : http://www.courconstitutionnelle.tg/ (last accessed on 22/06/2015).

142 Cour constitutionnelle du Togo, Decision N°E-018/2010 of 22 November 2010, available at : http://www.courconstitutionnelle.tg/ (last accessed on 22/06/2015).

143 Cour constitutionnelle du Togo, Decision N°E-018/2010 vom 22 November 2010, available at : http://www.courconstitutionnelle.tg/ (last accessed on 22/06/2015).

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I. Preliminary Question regarding the Object of the Dispute

The content of the preliminary question is defined as follows:

> « Question que le juge doit examiner pour vérifier si certaines des conditions requises pour l'existence de la question principale sont réunies.»[144]

A preliminary question therefore represents a prejudicial legal relationship. The impact of the facts of the case, triggered by the substantive res judicata, raises the question whether during the decision-making process regarding the substitution of the resigned parliamentarians the Constitutional Court of Togo should have examined the constitutional aspect of the resignation beforehand. Could the fear of the constitutional court regarding a violation against the principle of *ne ultra petita* justify the silence of the constitutional court? All this concerns the question of prejudicial legal relationships in Constitutional Procedural Law. Accordingly, the constitutional court must first decide on the constitutionality of the resignations by the previous parliamentarians, before it can decide on the application by the president of the Togolese National Assembly.[145]

This decisive question must be clarified before the main question in the main proceedings is addressed. In contrast to the scenario of the proceedings for preliminary decisions in the European judicial area,[146] a transfer to another instance is not required. Rather, the preliminary question must be decided on by the constitutional court itself. In the initial case, the constitutional court was approached, in order to decide on the substitution of the resigned parliamentarians. This was the main question. It is questionable, whether the question of the constitutionality of the resignation must be assessed before the assessment of this main question. This question is justified, because the answer to the main question of the substitution of the parliamentarians depends on the constitutionality of this resignation. In other words, the question of the legality of the resignation poses a preliminary question of significant importance, which needs to be answered before the main question can be assessed. Therefore, the answer to the preliminary question has a resounding effect on the main question.

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144 Guinchard/Debard, Lexique des termes juridiques, 18 éd., 660.

145 Cour constitutionnelle du Togo, Decision N°E-018/2010 of 22 November 2010, available at: http://www.courconstitutionnelle.tg/ (last accessed on 22/06/2015).

146 Hillgruber/Goos, Verfassungsprozeßrecht [Constitutional Process Law...], 4. edition, § 13, Rn. 963d.

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However, the question, whether the court should be approached in independent proceedings in order to decide on this preliminary question, seems problematic. From a constitutional point of view, the question arises whether the preliminary question should be linked independently or dependently to the main question. This question is legally significant regarding the prerequisites for the admissibility, especially since there are restrictions in the Togolese constitutional system for approaching the Constitutional Court. This concerns the locus standi which must be primarily considered here as a prerequisite to admissibility. With regard to these restrictions, a dependent connection would be, from a procedural point of view, advantageous to the concerned parties Especially, since the parties to the dispute are confronted with the legal effect of the decision regarding the main question. This is consistent: No objection may be brought against the legal effect of the decision by the Constitutional Court. As the decision by the Constitutional Court of Togo demonstrates in the initial case, the application of review of the constitutionality was rejected with the argument that the plaintiffs were not entitled to bring a complaint.[147] Over and above its influence on the participants to the proceedings the preliminary question also raises questions of competence. The question must be asked, whether the Constitutional Court must, of its own accord, ask this preliminary question in order to be able to better assess the main question as the principle that the Constitutional Court may only decide within the framework of the application applies. The ex officio rule found in the constitutional system of Benin is not customary in all Constitutional Procedural Laws of the region. Indeed the Constitutional Court of Benin may decide on its own initiative, i.e. *ex officio,* on the proper proceedings of the presidential elections (Art. 117 VerfB). This article is an appropriation of the *ex officio principle* in Benin's constitution.[148] Moreover, it may, on its own initiative, decide on human rights violations which it has determined without a prior complaint. Furthermore, the court established a „*procedure de saisine d'office*". This type of proceedings represents a creation of the judiciary and is, at the same time, an expression of the principle of constitutionality. This relates to a situation where the court declares an application as inad-

147 Cour constitutionnelle du Togo, Décision N°E-002/2011 of 22 June 2011, available at: http://www.courconstitutionnelle.tg/ (last accessed on 22/06/2015).

148 See comparison with German public law: ex officio access, official principle of ex proprio motu investigation, inquisitorial principle; Leibholz/Rupprecht, Federal Constitutional Court Act, § 90, Rn. 6; Pestalozza, Verfassungsprozeßrecht [Constitutional Process Law...], 3. edition, § 23, Rn. 21.

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missible but, at the same time, assesses the constitutionality of the law in question. The assumption of a violation of the human rights rooted in the Constitution is a requirement.[149]

Even if the Togolese constitutional system is not aware of the proceedings of the *ex-officio-* access, the dependent linkage of the preliminary question still simplifies the assessment of the main question. Therefore, the Constitutional Court may, in my opinion, assess the preliminary question as a dependent matter without being afraid of acting outside of its competence. This primary special treatment of the preliminary question triggers the intervention[150] of third parties in the proceedings. French law defines this so-called accession as:

> « Introduction volontaire ou forcée d'un tiers dans un procès déjà ouvert. »[151]

As it will be shown, the parties to the preliminary question are not always identical to those in the proceedings regarding the main question. There is an accession if at first parties, who are not concerned in the initial proceedings, join the current proceedings based on an own concern.[152] Moreover, the accession is admissible, if the answer to the main question is decisive for the parties with the intention to accede. This aspect clarifies our initial case: the substitution of the parliamentarians in the Togolese parliament has significant meaning to the resigned parliamentarians. Lastly, the decision by the Constitutional Court has the same importance for the parties to the dispute in the main proceedings as for those willing to join the assessment of the preliminary question.

In conclusion, it is established that the non-assessment of the preliminary question in the initial proceedings represents a severe mistake by the Constitutional Court of Togo because this question was legally decisive to the resigned parliamentarians. It is therefore not comprehensible why the

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149 Kangnikoé Bado, Constitutional Jurisdiction and Democratiation in francophone West Africa, country study/Benin, 18, available at: http://intlaw-sgiessen.de/fileadmin/user_ upload/bilder_und_dokumente/forschung/westafrikaprojekt/workingpapers/Draft_WP_2014_ benin.pdf (last accessed on 02.07.2015).

150 Benda/Klein, Verfassungsprozeßrecht [Constitutional Process Law...], 2. edition, § 23, Rn. 852.

151 Guinchard/Debard, Lexique des termes juridiques, 18 éd., 452; Abebe/Vijoen, Amicus Cu- riae Participation Before Regional Human Rights Bodies in Africa, in: Journal of African Law (2014), 22 (25).

152 Hillgruber/Goos, Verfassungsprozeßrecht [Constitutional Process Law...], 4. edition, § 4, Rn. 353.

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Constitutional Court of Togo did not observe this decisive feature of procedural law. In this regard, the decision by the Constitutional Court thus represents a violation of procedural guarantees. Even the ECOWAS Court of Justice confirmed this opinion[153] (explained in detail in chapter 3).

A further aspect that should have been given special attention in the initial proceedings of the legal assessment of the Constitutional Court of Togo was the question of the imperative mandate.

II. The prohibition of the imperative mandate and declaration of renunciation

Two fundamental aspects were misjudged in the case Ameganvi et al. in the initial proceedings by the Constitutional Court of Togo. In the parliamentarian system, the imperative mandate differs from the free mandate. An imperatives mandate means that the parliamentarian is bound by instructions of his party as well as his voters. In other words, a legal bond exists between parliamentarians and the will of the voters as well as instructions by his party.[154] Such a mandate is prohibited under Art. 52 of the Togolese Constitution. According to Art. 52 paragraph. 1 clause 2 of the Togolese Constitution:

> « Chaque député est le représentant de la Nation tout entière. Tout mandat impératif est nul.»

Thereby, the principle of the free mandate is entrenched in the constitution. The invalidity of the imperative mandate in Art. 52 prescribed in the Constitution of Togo aims at ensuring the independence of the parliamentarians. Voices in literature see this as a protective regulation.[155] It is surprising that the Constitutional Court confirmed the exclusion of the parliamentarians and their substitution, despite this constitutional guarantee of the free mandate and express prohibition of the imperative mandate as

153 CJ CEDEAO, Affaire Isabelle Ameganvi v. Republique Togo, N °ECW/CCJ/JUD/09/11 (07/10/2011).

154 Marsch/Vilain/Wendel (Publ.), Französisches und Deutsches Verfassungsrecht [French and German Constitutional Law], 139.

155 Cabanis/Martin, Les constitutions d'Afrique francophone. Évolutions récentes, 126; Kou pokpa, La perte du mandat par un parlementaire pour cause de démission ou d'exclusion de son parti en cours de législature en Afrique noire francophone, in: Revue Togolaise des Sciences Juri diques (2013), 65 (75).

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in the initial event.[156] Indeed, the prohibition of a bond with a party is questionable in this context as the political parties are mainly conduits of decision-making for the people.On the other hand, the parliamentarian is a representative of the entire population and not the mere representative of his party in parliament.[157] Based on the tense relationship resulting from this double-status, the parliamentarians are, as representatives of the entire people in parliament, solely amenable to their conscience. The constitutional status of the parliamentarian as a representative of the entire people with a free mandate grants him a number of rights and obligations. He exercises a right to speak and his right to vote.[158] He may participate in the parliament's right to question and information. Furthermore, he may take parliamentary initiatives. He for example has the possibility to join together with other parliamentarians to form a parliamentary group.[159] Exercising these competences contributes to the realisation of the legislative task given to parliament. The representatives of the people thus fulfill their official obligations.[160] This results in additional consequences for the status of the member of parliament. He is neither accountable to his party nor the voter.[161] His political accountability only bears relevance at the end of his current mandate and a subsequent electoral campaign. The highest priority is the principle that the party may not unlimitedly influence the parliamentarian. There are clear limits whereby one must differentiate between party discipline and line whip. Every time a measure by the parliamentary group threatens the direct freedom of choice of a representative of the people, one can assume an unlawful transgression. Such influences are

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156 See also the Criticism Koupokpa, La perte du mandat par un parlementaire pour cause de démission ou d'exclusion de son parti en cours de législature en Afrique noire francophone, in: Revue Togolaise des Sciences Juridiques (2013), 65 (75).

157 Marsch/Vilain/Wendel (Publ.), Französisches und Deutsches Verfassungsrecht [French and German Constitutional Law], 139.

158 Koupokpa, La perte du mandat par un parlementaire pour cause de démission ou d'exclusion de son parti en cours de législature en Afrique noire francophone, in: Revue Togolaise des Scien- ces Juridiques (2013), 65 (65).

159 The parliamentarians, who resigned, exercised this right in the Togolese Parliament: CJ CEDEAO, Affaire Isabelle Ameganvi v. Republique Togo, N °ECW/CCJ/JUD/09/11 (07/10/2011), par. 63.

160 Marsch/Vilain/Wendel (Publ.), Französisches und Deutsches Verfassungsrecht [French and German Constitutional Law], 140;BVerfGE 80, 188 (218).

161 . Koupokpa, La perte du mandat par un parlementaire pour cause de démission ou d'exclusion de son parti en cours de législature en Afrique noire francophone, in: Revue Togolaise des Scien- ces Juridiques (2013), 65 (66).

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fundamentally prohibited. In addition, there is the important rule that the parliamentarian will keep his mandate even if he resigns from the party.[162] This reflects a confirmation of the high priority of the freedom of opinion in a liberal democracy.[163] The ECtHR therefore rightfully rated the dissolution of the DEP, a Turkish political party, as a violation of human rights.[164] Based on his status as a representative of the whole people, every parliamentarian is, in this respect, untouchable. [165]

The only possibilities of a forced discharge from office are therefore death, incompatibility [166], resignation and forfeiture.[167] These barriers to a free mandate serve to ensure the functionality of the parliament in a free democracy.[168]

Except in the aforementioned cases, neither the Constitution nor the supplementary laws provide for further ways to lose a parliamentary mandate. Especially for this reason it is inconceivable why the Constitutional Court was unable to prevent such a serious infringement of the constitution. With its decision, the Constitutional Court deprives Art. 52 paragr. 1 clause 2 of the Constitution of Togo of its essence.[169] Luckily, the legal dispute did not end before the national Constitutional Court. The case was later submitted to the ECOWAS Court of Justice in Abuja for assessment. The ECOWAS Court of Justice rightfully assumed a serious infringement of principles of the rule of law (more in detail in chapter 3).

Although several voices in literature consider the prohibition to resign from one's party to be a certain "therapy" of the phenomenon of "*transhu-*

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162 Marsch/Vilain/Wendel (Publ.), Französisches und Deutsches Verfassungsrecht [French and German Constitutional Law], 140.

163 Hillgruber, Parteienfreiheit, in: Handbuch der Grundrechte [Manual of Fundamental Rights](HGR) V, § 118, Rn. 108.

164 CEDH, Nr. 25.144/94, Arrêt (11/06/2002), Affaire Selim Sadak et.al c. Turquie, par. 38, 40.

165 Koupokpa, La perte du mandat par un parlementaire pour cause de démission ou d'exclusion de son parti en cours de législature en Afrique noire francophone, in: Revue Togolaise des Scien- ces Juridiques (2013), 65 (66).

166 Art. 211 of the Togolese electoral law N°2012–002.

167 Koupokpa, La perte du mandat par un parlementaire pour cause de démission ou d'exclusion de son parti en cours de législature en Afrique noire francophone, in: Revue Togolaise des Scien- ces Juridiques (2013), 65 (66).

168 Hillgruber/Goos, Verfassungsprozeßrecht [Constitutional Process Law...], 4. edition, § 9, Rn. 721.

169 Koupokpa, La perte du mandat par un parlementaire pour cause de démission ou d'exclusion de son parti en cours de législature en Afrique noire francophone, in: Revue Togolaise des Scien- ces Juridiques (2013), 65 (75).

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mance politique“[170], the fear of a constant change of party cannot justify the assumption of an infringement of the free mandate entrenched in Art. 52.

What would the legal situation be if the Constitutional Court would assume the loss of mandate based not on a resignation from the party, but because of the unconstitutionality of a newly founded party? This question comes to mind because the determination of unconstitutionality of a party triggers the loss of mandate as a substantive effect and consequence of the decision. In this sense, the decision has a constitutive meaning.[171]

For instance, in the SRP and KPD-proceedings, the Constitutional Court of Germany recognised the loss of a mandate as a legal consequence of the banning of a party.[172] The loss of the mandate would follow from the finding that the respective party would now be considered to be unconstitutional.[173] The mandate of the concerned parliamentarian would only be lost by way of this declaration.[174]

It is primarily intended that proceedings on banning political parties should themselves also suffice substantial principles of the rule of law. National security or the safeguarding of stability are in some cases the background of possible restrictions.[175] This range of topics deserves a separate and individual assessment since the new parliamentarians in the initial case immediately founded a new party (ANC)[176] after the resignations. Even in this case, a loss of mandate would have been a possibility due to the unconstitutionality of the newly founded party because the parliamentarians were entrusted with their parliamentary mandate as members of a constitutional and recognised political party. A declaratory judgment

170 Koupokpa, La perte du mandat par un parlementaire pour cause de démission ou d’exclusion de son parti en cours de législature en Afrique noire francophone, in: Revue Togolaise des Scien- ces Juridiques (2013), 65 (67); Boumakani, La prohibition de la « transhumance politique » des parlementaires. Étude de cas africains, in: Revue française de Droit constitutionnel, (2008), 499- 512.

171 Hillgruber/Goos, Verfassungsprozeßrecht [Constitutional Process Law...], 4. edition, § 9, Rn. 715.

172 Hillgruber/Goos, Verfassungsprozeßrecht [Constitutional Process Law...], 4. edition, § 9, Rn. 721.

173 Benda/Klein, Verfassungsprozeßrecht [Constitutional Process Law...], 2. edition, § 38, Rn. 1295.

174 Hillgruber/Goos, Verfassungsprozeßrecht [Constitutional Process Law...], 4. edition, § 9, Rn. 715.

175 Hillgruber, in: Handbuch der Grundrechte [Manual of Fundamental Rights] (HGR) V, § 118, Rn. 111.

176 CJ CEDEAO, Affaire Isabelle Ameganvi v. Republique Togo, N °ECW/CCJ/JUD/09/11 (7/10/2011), par. 63.

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would, quite rightly, not develop a retrospective effect.[177] A loss of mandate on the grounds of a later finding of a partys unconstitutionality would be a non-acceptable infringement of the sovereign right of the voter, who gave the parliamentarians their parliamentary assignment.[178] Nevertheless, the ECtHR has, in similar cases, decided that an automatic loss of mandate due to the banning of a party represented a disproportionate infringement of the guaranteed right to free elections as per Art. 3 of the 1st Additional Protocol.[179] It explained in detail:

« La Cour conclut que la sanction infligée aux requérants par la Cour constitutionnelle ne saurait passer pour proportionnée à tout but légitime invoqué par le Gouvernement. Dès lors, la Cour considère que la mesure litigieuse était incompatible avec la substance même du droit d'être élus et d'exercer leur mandat, reconnu aux requérants par l'article 3 du Protocole no 1, et a porté atteinte au pouvoir souverain de l'électorat qui les a élus députés. Il s'ensuit que l'article 3 du Protocole no 1 a été violé en l'espèce».[180]The decision by the Constitutional Court regarding the validity of the declaration of renunciation does not seem justified. Regarding the facts of the initial case, it follows that the plaintiffs, the rejected parliamentarians, submitted a declaration of renunciation before their election. In this declaration of renunciation, they committed to relinquish their seat in parliament in case of resignation from their party. Such blank declarations of renunciation or agreements regarding the exercising of the mandate are null and void because they are directed against the freedom of expression of the will of the parliamentarian.[181] The nullity of the general declaration of renunciation can also be justified by the fact that the parliamentarians were ordinary citizens when the signing of such blank declarations of renunciation took place.[182] Only after their election did they receive their

177 Hillgruber/Goos, Verfassungsprozeßrecht [Constitutional Process Law...], 4. edition, § 9, Rn. 715.
178 CEDH, Nr. 25.144/94, Arrêt (11.06.2002), Affaire Selim Sadak et al. c. Turquie, par. 40.
179 CEDH, Nr. 25.144/94, Arrêt (11.06.2002), Affaire Selim Sadak et al. c. Turquie, par. 37; vgl. Hillgruber, in: Handbuch der Grundrechte[Manual of Fundamental Rights] (HGR) V, § 118, Rn. 114.
180 CEDH, Nr. 25.144/94, Arrêt (11/06/2002), Affaire Selim Sadak et al. c. Turquie, par. 40.
181 Marsch/Vilain/Wendel (Publ.), Französisches und Deutsches Verfassungsrecht [French and German Constitutional Law], 140.
182 CJ CEDEAO, Affaire Isabelle Ameganvi v. Republique Togo, N °ECW/CCJ/JUD/09/11 (07.10.2011), par. 62; Adeloui, L'autorité de la chose ju-

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status as members of parliament.[183] Therefore, all obligations they agreed to before being elected as parliamentarians are legally invalid.[184]

It follows that the loss of mandate of the Togolese parliamentarians cannot be justified in any way whatsoever. Therefore, the contrary decision by the Togolese Constitutional Court must be seen as a serious miscarriage of justice. It is therefore not surprising that the ECOWAS Court of Justice regarded the loss of mandate and therefore the decision by the Togolese Constitutional Court as a serious infringement against Art. 7 paragr. 1 of the African Charta for Human Rights and Peoples' Rights.[185]

It may be concluded: legal force does not, dogmatically, represent an absolute legal concept. Many actual and legal grounds can trigger a derogation or can supersede legal force.[186] The need for legal protection is for example the typical case which triggers an exception to legal force. On closer inspection, the Togolese Constitutional Court, however, gives the impression that the legal force is an absolute institution of constitutional processes.[187] Such an understanding is, however, misguided. Consequently, the Constitutional Court rid itself of its task as the guardian of the Constitution in the present matter,[188] by not recognising explicit infringements against procedural and substantive constitutional guarantees in the present case. This can and should be addressed before the ECOWAS Court of Justice by way of an individual human rights complaint.

Moreover, a regulation such as § 133 in the Constitution of Ghana seems necessary for the constitutional jurisdiction of every ECOWAS Member State. Although Constitutional Courts are, without a doubt, faced

gée par les juridictions constitutionnelles en Afrique, in: Revue Togolaise des Sciences Juridiques (2012), 54 (75).

183 CJ CEDEAO, Affaire Isabelle Ameganvi v. Republique Togo, N °ECW/CCJ/JUD/09/11 (07.10.2011), par. 62.

184 Adeloui, L'autorité de la chose jugée par les juridictions constitutionnelles en Afrique, in: Revue Togolaise des Sciences Juridiques (2012), 54 (75).

185 Darauf wird ausführlich im dritten Kapitel eingegangen. Siehe dazu Adeloui, L'autorité de la chose jugée par les juridictions constitutionnelles en Afrique, in: Revue Togolaise des Sciences Juridiques (2012), 54 (74).

186 Kpodar, Commentaire des grands avis et décisions de la Cour constitutionnelle togolaise, 105.

187 Cour constitutionnelle du Togo, Décision N°E-002/2011 vom 22 June 2011, available at: http://www.courconstitutionnelle.tg/ (last accessed on 22/06/2015).

188 Tchapnga, Le juge constitutionnel, juge administratif au Bénin et au Gabon?, in: Revue française de Droit constitutionnel (2008), 551 (583).

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with a dilemma regarding legally-flawed decisions with legal effect[189] either to rectify the error through a renewed assessment of the case, which would comply with a breach of the legal force, or to insist on the retention of the legal force. However, as a few voices in the literature emphasise, a correction of its own miscarriages of justice would, in the end, be better for the Constitutional Court than to insist on the retention of errors.[190]190 Last but not least, it is even in the interest of justice itself that the Constitutional Courts or Supreme Court has the opportunity to rectify misjudgements. All this justifies a derogation of the legal force at an international level.

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189 Adeloui, L'autorité de la chose jugée par les juridictions constitutionnelles en Afrique, in: Revue Togolaise des Sciences Juridiques (2012), 54 (68).

190 Yebisi, The constitutional power of review of Supreme Court of Ghana: Lesson for Nigeria, in: International Journal of Humanities and Social Science (2014), 39 (41); Adeloui, L'autorité de la chose jugée par les juridictions constitutionnelles en Afrique, in: Revue Togolaise des Sciences Juridiques (2012), 54 (68).

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