THE ISSUE OF LEGAL GAPS IN THE JURISPRUDENCE OF THE CONSTITUTIONAL COURT OF THE REPUBLIC OF BULGARIA

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1. The Bulgarian legal system allows for gaps in the law. According to Art. 46, para 1 of the Normative Acts Law (NAL)[1], when a normative act has gaps, not-provided-for cases are regulated by the provisions, pertaining to similar cases, if that complies with the aim of the act; or, lacking such provisions, by the basic principles of law in the Republic of Bulgaria. The text is phrased as a general prescription, which gives a specific formula for self-development of the law. Taking into consideration its content, on one hand, and the legal technique used, on the other hand, we can draw two basic conclusions on the significance and the role of this provision. Firstly, regarding the fact that, in principle, it allows for normative acts to have gaps, as well as to lack rules (norms) on certain social relations. Besides, it is significant that, when the legislator acknowledges such a possibility, they do it fully in the spirit of positivism, i.e. the issue of the lacking legal rule is decided exclusively within the framework of legislation and on the premise that positive law, through its principles, constitutes an accomplished and all-encompassing system, which can give an answer to any specific problem. Next, it is obvious that the text does not aim at giving a definition, but, rather, at showing what is to be done, when it is established that the law has gaps. The definition of "legal gaps" still awaits clarification in legal theory.

Bulgarian legal literature presents no unanimous opinion as to what "legal gaps" means. To some, "legal gap" means the lack of a definite legal rule for the regulation of certain relations.[2] Others believe that "legal gaps" should be seen as the compete absence of a legal rule, i.e., the law has no answer to a certain issue either by direct application or by analogy, nor is there any exclusive rule for the mediated regulation of the case, either.[3]

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[1] The phrase "normative acts" here refers to whole legislation

[2] Таджер,В., Гражданско право на НРБ. Обща част, Part I, С., 1972, p.135-136. Василев,Л. Гражданско право на Народна република България. Обща част.С.,1956, p.107. Янев,Я. Функции на правилата на социалистическото общежитие при прилагането на правните норми.С.,1977, p.84. Фаденхехт,Й. Българско гражданско право. Обща част.С.,1929, p.90.

[3] Диков, Л. Курс по български граждански право. Обща част. Volume I.,С.,1936, p.90. Same in Христов, В., Правоприлагане по аналогия в гражданското право. Сп.Правна мисъл, 2004, №4, p.40-41.

According to the first view, "legal gap" is identified by the lack of a specific prescription in a legal rule, while, according to the second, "legal gap" means the total lack of a legal rule and hence the opportunity for mobilization of extra-legal categories, eg., equity, for the solution of specific legal disputes. The discrepancy, which concerns the essence of the lacking legal rule, continues in the interpretation of relations, which may turn out to be "uncovered" by legal regulation. According to the first concept, legal gap refers to the lack of legal rules or, if there is a rule, there are gaps therein with regard to relations which come under legal regulation. In other words, legal gap as a *conditio sine qua non*, faces us with a relation, which is legally regulated and which demands legal provision. Hence the conclusion that legal gaps pertain to all cases which fail the regulation of legal facts.[4] The other view proposes a broader formula claiming that through instances of legal gaps we encounter facts and relations, which are within the sphere of legal impact.[5] This means that the problem of legal gaps is not solved solely within the context of relations, which are the object of legislative regulation, but in a broader sense – within the context of relations, which are the object of legal impact. Such a claim appears better grounded as long as it is consonant with the old Roman differentiation between justice *(jus)* and law (*lex*), and also with the argument that the law does not exhaust legal regulation. Moreover, this broader view does not rule out that a certain issue be solved by means of what we call *analogia iuris* and not only by means of *analogia legis*.

The quoted opinions diverge further on the scope of "lack of legal rule". Some authors hold that a legal gap also means absence of direct regulation in a certain category of cases.[6] They argue that, the law, being an accomplished system, will provide the answer to a specific issue, in another identical legal rule. Others include within the scope of the concept both the lack of a direct legal rule, as well as the lack of a similar one.[7] The solution to the specific problem should then be sought in the spirit of the law *(ratio legis)* and its general principles.

As for reasons for the existence of legal gaps, these are primarily objective ones. On one hand, the legislator cannot predetermine all the cases that may arise, on the other, it should be taken into consideration that life itself undergoes change. According to some, however, the subjective factor also has a role in the existence of legal gaps. Some authors speak of it indirectly agreeing that a legal rule can be devoid of meaning, i.e. as the consequence of legislative oversight.[8] For example, some claim that in a number of cases the

[4] Таджер,В., op.cit., p.136.
[5] Христов,В., op.cit, p.41.
[6] Василев,Л., op.cit., p.107. Фаденхехт,Й., op.cit., p. 90.
[7] Христов,В., op.cit., p. 40. Таджер, В., op.cit., p. 136.
[8] Таджер,В., op.cit., p. 136.

legislator allows for certain relations, which are neither explicitly regulated, nor prohibited, either.[9] But the problem is that not every single omission of the legislator should be seen as a gap. Silence on a certain issue might just as well be dictated by the wish to entrust the solution of a specific question to the discretion of the court. Therefore, there is no legal gap when the specific case can be subsumed under a more general rule, which can be applied, or when the legal rule contains abstract formulae (good faith, morals) offered as a general direction on the application of the law. Neither is there a legal gap, when the existing legal prescription does not suit cases of recent emergence and its application seems unjust.

Bulgarian legal literature also suggests some particular instances of legal gaps. Apart from the cases of lack of legal rules, it is accepted that there is a legal gap also whenever there is a legal rule, which is devoid of sense and which cannot be clarified by way of interpretation, or when there is a legal rule, which contradicts another legal rule and the two negate each other.[10] In other words, a legal gap does not stem from the lack of a legal rule, but refers to an existing legal rule, which demonstrates a serious fault in the sense that it is either meaningless or is in collision with another rule. Such a statement does not deserve full support, because it is constructed in a mechanical rather than in a logical fashion. To speak of a legal rule devoid of sense is a *contradictions in adiecto*. If a rule is meaningless, this simply means that there is no legal rule. On the other hand, one cannot claim that "mutual negation" itself identifes a legal gap, because it is not clear whether it leaves the specific case within the framework of legal regulation or not.

The criterion whether a legal rule exists or not is the only one, which Bulgarian legal literature accepts so as to differentiate among various legal gaps. There are no other differentiations. In older writings authors who are under the influence of Zitelmann, the German civil law author and his view from the beginning of 19th century, also accept the division of legal gaps into "genuine" and "non-genuine".[11]

When we speak about the opinions on legal gaps, expressed in Bulgarian legal writings, we should also note the discrepancy of views on the nature of the activity concerning the filling in of gaps. Most authors opine that this activity is part of the application of the law: that the law evolves and that in this manner it goes on both on its own as well as with the help of logic[12]. Others, however, think that this is no ordinary application of the law, but the creation of new legal rules, which in spite of being derivative, are still contingent by

[9] Христов, В.,op.cit., p. 40.
[10] Фаденхехт, Й., op.cit., p. 90. Таджер,В., op.cit., p. 136. Христов,В., op.cit., p. 41.
[11] Диков, Л., op.cit., p. 89-90.
[12] Василев, Л., op.cit., p. 106. Таджер, В., op.cit., p. 136. Христов, В., op.cit., p. 42.

nature. When the Constitutional Court fills in legal gaps, it does not apply the law, it creates it. Although the two activities are part of one and the same process, they are entirely different and never merge into one.[13] Both arguments agree that this activity concerns relations, which are in the domain of legal impact. The discrepancy, however, is a conceptual one and concerns their attitude towards the issue whether acting legal rules and principles *per se* form a complete and accomplished system for the regulation of social relations. As for the correlation between gap- filling and interpretation, a difference is being acknowledged – the first case acknowledges the exact meaning of the law, whereas the other one suggests the presumed will of the legislator. However, they should not be opposed to each other, because both filling in of gaps and interpretation are intellectual activities, using the same tools of grammar and logic.[14]

2. In its jurisprudence the Constitutional Court prefers to talk about "legislative gaps". It uses the term to identify gaps in existing legislation, i.e., a total lack of legal regulation for the specific case – e.g. with regard to the possibility to request recusal of a constitutional justice, if they, in their capacity as Member of Parliament took part in the adoption of the law, which is being challenged before the Constitutional Court (Ruling № 1/95 on constitutional case (c.c.) № 9/95); lack of legal definition of the category "equitable monetary compensation" (Decision № 6/06 on c.c. № 5/06), etc. Besides, the lack of regulation may result from the exercise of its basic function: review over the constitutionality of laws. The concept that Constitutional Court decisions declare a law unconstitutional and that these decisions have an annulling effect *ex nunc*, may lead to a legislative gap (Decision № 15/96 on c.c. № 14/96; decision 22/95 on c.c. № 25/95). I would also like to point out that the Constitutional Court has tackled the issue of legislative gaps in its jurisprudence in most general terms only and that it has used this term to simply indicate that there is lack of legal regulation on a certain issue. Moreover, the lack of regulation is seen in the broadest possible sense as a regulatory omission, a lack of rules on a particular issue, on which the Constitution prescribes regulation by law, or the declaration of a certain law unconstitutional.

3. The Constitutional Court follows the assumption that it is not competent to consider claims concerning existing gaps in laws on the grounds that its sole competence is to deal with laws already adopted (Ruling № 2/94 on c.c. № 1/94) and that Parliament only has the power to adopt a respective legal regulation on the principle of separation of powers (Ruling

[13] Ганев,В., Трудове по обща теория на правото, С., 1998, p. 304.
[14] Апостолов, Ив. Еволюция на континенталната тълкувателна теория. ГЮФ СУ „Св.Кл.Охридски", 1945/46, т.XLI., p. 45-46. Таджер, В., op.cit., p. 136. Христов, В., op.cit., p. 42.

№ 2/96 on c.c. № 5/96). In a dissenting opinion over c.c. №1/94, however, there emerges another view. According to it, the Constitutional Court is competent to assess whether a legislative gap may lead to the unconstitutionality of an entire law. The argument in its favour is that constitutional review assesses not only a specific rule, but the whole system of binding rules, projected upon social relations as well. That is why, there might be occasions when social relations will be regulated unconstitutionally due to lack of certain legal rules, despite the fact that the legal rules, which regulate those relations, will not be unconstitutional by themselves if we consider them in isolation. This opinion on the possibility that the Constitutional Court assess whether the lack of legal regulation may serve as basis for the declaration of an entire law unconstitutional remains fairly rare.

4. The Constitutional Court is a public authority, a body of State power, whose basic function is to exercise review over the constitutionality of laws. According to Art. 1 of the Constitutional Court Law (CCL), it ensures the supremacy of the Constitution. This provision is decisive for the legal status of the Constitutional Court and, consequently, for its powers. Actually, the legal regulation of this institution in Bulgaria largely follows the model, which became current in Europe under the influence of H. Kelsen. The Constitutional Court is a public authority, part of the public institution's system – its competence stems directly from the provision of Art. 149 of the Constitution, which specifies its powers. More specifically, it is equal to the supreme bodies of the three Powers, but it does not interfere with their activity. As a public authority the Constitutional Court has its own function – to review the constitutionality of laws. It is, therefore, directly related to legislation, but it is not a legislator itself. According to Art. 62, para 1 of the Constitution legislative power in the Republic of Bulgaria is exercised by the National Assembly. In other words, Parliament is sole legislator. The Constitutional Court is called upon to review the compliance between laws and the Constitution.[15] In legal theory, some authors try to avoid the formula of Art. 62, para 1 of the Constitution that the National Assembly is sole legislator and adopt the compromising stance that the activity of the Constitutional Court is not legislative, but identical to rule-creation.[16] Apparently they are, likewise, not inclined to regard constitutional review as "negative legislation", and give review and the concept of "legislator" a meaning different from the meanings which refer to the competence of the National Assembly.

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[15] Стойчев,Ст., Конституционно право.Пето допълнено издание. С., 2002, p. 585. Друмева, Ем. Конституционното правосъдие в системата на разделените власти in „Конституционният съд в демократичната държава".С., 2006, p. 23 and following.

[16] Пенев, П.Тълкувателното правомощие на Конституционния съд на Република България. in „Конституционният съд и демократичната държава", С., 2006, p. 157.

In Decision № 18/93 on c.c. № 19/93 the Constitutional Court accepted that, although it is called "court", it is not a body which administers justice, nor is it part of the judiciary. The main argument is that the Constitution itself takes the Constitutional Court out of the system of the judiciary by means of regulating its functions in a separate chapter. The conclusion that the Constitutional Court is outside the system of the judiciary has been criticized in legal literature on the grounds that the Court is a body of the judiciary, because it considers legal disputes and thus administers justice.[17] But since the essence of the activity, entrusted to this Court in the Constitution, is a specific one, it should be defined as a special court of constitutional justice. Still, when one defines the legal status of the Constitutional Court, one should start from its basic function, i.e., review constitutionality of the laws. In this sense it does not administer justice. Indeed, when the Court reviews constitutionality of laws, its activity looks like a judicial administration of justice, but its very essence makes it different from ordinary justice. Beyond constitutional review, the Constitution gives the Court other powers and these are related to the ruling of legal disputes.

According to Art. 151, para 2 of the Constitution, the laws, which have been declared unconstitutional, are not to be applied as from the day on which the Court's decision comes into force. This phrasing gives rise to different reactions in legal doctrine. According to one set of opinions, the Constitution explicitly proclaims that an unconstitutional law is also non-applicable. Non-applicability has the meaning of postponement. The formulation has its logic in the role and status of the Constitutional Court – it does not share the legislative power of the National Assembly and it is the Assembly only that can abrogate laws (Art. 84 of the Constitution). As long as an unconstitutional law is not applied, it remains pending, until the legislator settles the emerging legal consequences (Art. 22, para 4 CCL).[18] In this sense, it would be unjustified to define the Constitutional Court as a "negative legislator".[19] The main problem of this argument, however, is that it leaves open the issue concerning the legal effect of the declaration of the unconstitutionality of a law.[20]

According to the other set of views, the meaning of the provision of Art. 151, para 2 of the Constitution is that the law, which has been declared unconstitutional, ceases to be a normative regulator, loses its effect and is therefore practically repealled. When a rule ceases

[17] Сталев, Ж.Същност на Конституционния съд. in „Проблеми на конституцията и на конституционното правосъдие".С., 2002, p. 79.
[18] Друмева, Ем. Конституционно право.С., 1995, p. 492. Мръчков, В., За правната сила на решенията на Конституционния съд, които установяват противоконституционност на законите. Сп. Съвременно право, 1998, № 6, p. 8.
[19] Стойчев,Ст., op.cit., p. 585.
[20] Only in one case, when the law is adopted by an incompetent institution, it is null and void (Art. 22, para 3 CCL).

to be in effect, it ceases to be a source of law. The grounds for the use of the term "non-applicability" should be defined as political ones.[21] Decision № 22/95 on c.c. № 25/95 of the Constitutional Court accepted that the coming into force of the decision, declaring a law unconstitutional, annuls the law on the strength of the decision and its constitutive effect. Annulment of a law is equal to its abrogation by the National Assembly (Art. 84 of the Constitution). With this decision, the Constitutional Court actually reinforced the argument about its being a "negative legislator", i.e. the annulment of the law *ex nunc* due to its unconstitutionality functions as abrogation of a law by another law. In this sense the Constitutional Court has limited legislative power: to abrogate laws, which are unconstitutional.[22]

Decision № 22/95 on c.c. № 25/95 made another significant step forward. According to it, when the Constitutional Court declares a law unconstitutional, and this in turn abrogates or modifies an existing law, the latter restores its effect in the phrasing prior to the abrogation or modification from the moment the Court's decision comes into force. The Constitutional Court argument is that, unless such a "resurrection" of the abrogated law is allowed, an unacceptable legislative gap will emerge. In this way Decision № 22/95 on c.c. № 25/95 fills in a gap in the constitutional regulation of the Court, namely, how to overcome the adverse effects following the declaration of the unconstitutionality of a law. In this par the Decision makes a substantial contribution with regard to the modification of the formulation about the Court's legal status. With its acceptance the Constitutional Court actually claims that, as long as it not only repeals the law, which has been declared unconstitutional, but also restores the preceding law, it is actually closer to the position of a "positive legislator". Even those in support of the decision immediately opposed the dogma of the omnipotence of the National Assembly.[23]

5. The Constitutional Court of the Republic of Bulgaria has a power, which is rarely seen in the normative regulation of constitutional justice. It can give binding interpretations of the Constitution. This is a separate power and comes first among the prerogatives of the Constitutional Court (Art. 149, para 1, item 1 of the Constitution). The interpretation of the

[21] Неновски, Н. Конституционното правосъдие – изпитание за традиционното правно мислене. in „Конституционния съд и правното действие на неговите решения". С.,1996, p. 50 and following. Сталев, Ж. Силата на решенията на Конституционния съд, обявяващи закон за противоконституционен. in „Проблеми на конституцията и на конституционното правосъдие".С., 2002, p.103.

[22] Same in Танчев, Ев. Учредителната власт в Конституцията на Република България от 1991 г. Сп.Съвременно право, 1995, №5, p. 35.

[23] Сталев,Ж., Анализ на решение № 22 от 31 октомври 1995 г.- на Конституционния съд. in „Проблеми на конституцията и на конституционното правосъдие".С., 2002, p. 131.

Constitutional Court is official, i.e. binding and abstract (Decision № 8/05 on c.c. № 7/05). In Ruling № 4/04 on c.c. № 9/07 the Court rejects the possibility that the interpretation of the Constitution transforms it into a "positive legislator"; the power to interpret should not be used to seek and achieve circumvention of constitutionally established powers. This Ruling expresses a trend in the recent jurisprudence of the Court – its unwillingness, when interpreting the Constitution, to be a "positive legislator" (see also Ruling № 1/06 on c.c. № 10/05; Decision № 8/05 on c.c. № 7/05). This position is justified through the argument that only the National Assembly can legislate and that the Constitutional Court should not "substitute" it in its function. As for the meaning of Constitutional Court power to interpret the Constitution, it aims at clarifying the sense of constitutional provisions, the connections between them and other provisions, as well as the principles of the Constitution. Of course, in a number of instances the Court's interpretation of a constitutional text did add much more to the normative sense of the Constitution than to its clarification. For example, in Decision № 22/95 on c.c. № 25/95 the Court proceeded from the basic principles of the Constitution (*analogia iuris*) to rule that its decisions not only abrogate the law, which was declared unconstitutional, but that they also restore the provisions, which this same law had abrogated. In Decision № 3/03 on c.c. № 22/02 the Court determines which constitutional amendments lie within the competence of the Grand National Assembly and which are the ones an ordinary Parliament may make. There are other examples as well. From this point of view, the Constitutional Court turns into a legislator and its interpretative decisions have the nature of sources of law, or, more specifically, subsidiary sources of law. It should, therefore, be accepted that the Court, while exercising its power to interpret, functions as no ordinary legislator, but that its decisions have the same power as constitutional rules.

In Bulgarian legal theory opinions divide as to whether the decisions of the Constitutional Court concerning the interpretation of the Constitution, are sources of law and further on, whether the Constitutional Court becomes a "positive legislator" through such decision making.[24] Still, scholars are unanimous that the power of the Court to interpret the Constitution is essential and that this power has important consequences, thus suggesting that it should be exercised cautiously and reasonably. Legal theory sustains that the interpretative power of the Constitutional Court under Art. 149, para 1, item 1 of the Constitution includes

[24] This issue is tackled in the affirmative in Неновски, Н., Относно решение № 22 от 31 октомври 1995 г. на Конституционния съд. in „Проблеми на конституцията и на конституционното правосъдие".С., 2002, p. 101; Сталев, Ж. Тълкуване на Конституцията от Конституционния съд въз основа на чл.149, ал.1, т.1 от Конституцията, p. 151; Зартов,Яв. В „Конституционно правосъдие на Република България", С., 2004, p. 283. For the opposite view, see Стойчев, Ст., op.cit., p. 595; Спасов, Б. Конституционният съд. С., 1998, p. 75; Костов, М. Една година Конституционен съд на Република България. -Правна мисъл, 1993, № 1, p. 11.

the filling in of gaps in the constitutional regulation. Arguments in favour are found in the general nature of the provision of Art. 46 of the NAL, which encompasses the hypothetical clarification of the meaning of unclear provisions, as well as instances in which gaps arise due to the non-existence of legal regulation.[25] However, the powers of the Constitutional Court cannot be amended or abrogated by law (Art. 149, para 2 of the Constitution). Therefore, the establishment of a power of the Court by means of referring to a law is not entirely appropriate.

6. The Constitution of the Republic of Bulgaria is *fons et origo* of the legal order and the entire legal system. Art. 5, para 1 of the Constitution postulates that the Constitution is the Supreme Law and that no other laws may contradict it. The supremacy of the Constitution is first expressed in the fact that its provisions have originary nature. Their content does not presuppose that they comply with another superordinate legal act. Constitutional supremacy is also manifest in the fact that the Constitution regulates the main principles and rules, which pre-determine the content of legal regulation and which as a result evolve in primary and secondary legislation.[26] The primacy of the Constitution has a formal aspect, which relates to the observance of hierarchy in the system of sources of law, and which determines the substantive content of all remaining sources. Ultimately, the primacy of the Constitution is also a matter of its legal power. As far as its effect goes, the supremacy of the Constitution provides the requirement that laws comply with it and that they may be declared unconstitutional by the Constitutional Court.

The general phrasing of Art. 5, para 1 of the Constitution formulates the priority of all provisions of the Constitution over all other normative acts, regardless of the fact whether they have been phrased in an abstract or a more specific fashion, and whether they proclaim main principles or other issues. However, the system of constitutional provisions has its own hierarchy – for example, the norms of international treaties, which have become part of domestic legislation, based on Art. 5, para 4 of the Constitution, are superordinate to constitutional provisions, wherein the legislator reserves the right to establish a specific legal regulation.

Another aspect of the primacy of the Constitution is its direct application. This principle has been formulated in explicit terms in Art. 5, para 2 of the Constitution. The provisions of the constitution are part and parcel of existing law and their application does not need any mediation from the legal or technical point of view (Decision № 10/94 on c.c. №

[25] Сталев,Ж. Анализ на решение № 22 от 31 октомври 1995 г. на Конституционния съд, p. 76-77.
[26] Танчев, Ев. Въведение в конституционното право.С.,2003, p. 171.

4/94). The absence of a law or secondary legislation or even the existence of a gap in a specific law does not serve as an excuse to refuse to apply the Constitution in a case of legal dispute. If a law or a piece of subsidiary legislation contradicts the Constitution, the bodies, which apply the law, should apply the Basic Law instead.

Finally, the primacy of the Constitution also finds expression in its direct abrogating effect as regards existing laws, which are in contradiction with the Constitution (§ 3 of the Transitional and Concluding Provisions of the Constitution).

7. The legal force of Acts adopted by the State as part of Bulgaria's legal system, is determined by the position of the institution in the State hierarchy and the nature of social relations they regulate. Only public institutions, named in the Constitution or in law, may adopt normative acts. The Constitution and the NAL determine the types of normative and non-normative acts State bodies may adopt. Within the system of normative acts laws come next to the Constitution in legal force. According to Art. 2 of the NAL laws provide primary regulation or regulation, which bases itself on the Constitution, of relations, which can be subject to sustainable regulation. Among various other laws, pride of place is given to constitutional laws, which amend or supplement the Constitution. What is specific about them is that they do not exist on their own but are incorporated in the Constitution. In this sense, it is assumed that the remaining laws have less power than constitutional laws.[27] Codes have their own place in the system of normative acts: they regulate relations within a separate branch of the legal system or a specific segment thereof, and they, just like any other laws, are subject to the same rules (Art.4 of NAL). The normative acts of the Government or the Ministers are based upon laws – they contain subsidiary legislation in compliance with the laws. The NAL defines a regulation or an ordinance as a normative act. Municipal Councils can also issue regulations and ordinances, but their application is restricted to matters of local importance.

The National Assembly can also adopt non-normative acts, such as decisions, declarations and addresses. All Acts of the Assembly are subject to constitutional review by the Constitutional Court. The President of the Republic of Bulgaria also issues non-normative decrees and these are likewise subject to constitutional review. The Government and the Ministers adopt decisions, orders and instructions, which are also non-normative ones. However, they are not subject to review by the Constitutional Court, but can be challenged instead before the Supreme Administrative Court.

[27] Стойчев, Ст., op.cit., p. 450.

International treaties have their specific place in the normative system of the Republic of Bulgaria. The Bulgarian Constitution follows the principle of primacy of international treaties over domestic legislation. International treaties, ratified in line with constitutional arrangements, promulgated and having come into force for the Republic of Bulgaria, are part of the country's domestic legislation and have precedence over those rules, which contradict them. International treaties, which are part of Bulgaria's domestic law, have a direct abrogating effect over those provisions of primary and secondary legislation, which contradict them (Decision № 7/92 on c.c. № 6/92). Their legal force places them right after the Constitution, but before the laws, adopted by the National Assembly. This is due to the fact that the Constitution requires harmonization of international treaties with the Basic Law prior to ratification (Art. 85, para 1 and Art.149, item 4 of the Constitution).

8. In its jurisprudence the Constitutional Court has several times ruled expressly on the issue whether the Constitution has gaps. For example, Ruling № 2/95 on c.c. № 5/96 notes that the Constitution has no provision to regulate the exercising of local governance after local elections have been quashed; nor is this regulated in existing legislation. On this issue of interpretation the Court submits that there is a gap in legislation. In another case it concludes that there is a gap in legislation, regarding the protection of justices' rights or control over Supreme Judicial Council decisions (Ruling № 2/94 on c.c. №1/94). In a third case the Court determines that the issue about the recusal of constitutional justices is not normatively regulated and that this opens a gap in Bulgarian constitutional justice (Ruling № 1/95 on c.c. № 9/95). Legal theory also notes the possibility of gaps in the Constitution itself –e.g., what the Constitutional Court should do, when, on the basis that an application is ill-grounded, it had rejected its claim to declare a law constitutional, but afterwards the Court was re-approached on the same issue: to dismiss the application on the basis of the principle *ne bis in idem* or to hold a hearing and to deliver the same decision as the previous one.[28] At the same time the Constitutional Court also maintains that the Constitution does not allow for gaps in legal order, based on the principle of the rule of law, as proclaimed in Art. 4, para 1 of the Constitution and its Preamble (Decision № 22/95 on c.c. № 25/95). In other words, an argument is raised that the rule of law does not allow for legislative gaps.

According to Art. 149, para 1, item 2 of the Constitution the Constitutional Court rules on applications for the declaration of unconstitutionality of laws and other acts of the National Assembly (decisions, declarations, addresses and the Rules of Organization and Functions of

[28] Сталев,Ж. Анализ на решение № 22 от 31 октомври 1995 г. на Конституционния съд, p. 136.

the National Assembly), as well as acts of the President (decrees, addresses and messages). Therefore, constitutional review covers only some normative acts, i.e., the laws and the Rules of Organization and Functions of the National Assembly. The remaining normative acts of other State institutions, having the necessary normative competence, do not fall within the scope of this review. Non-normative acts may also be subject to such review

Constitutional review is subsequent. Under Art. 17 of the CCL applications concerning the declaration of unconstitutionality of laws and other acts may be made from the day of the laws' promulgation. The fact that the *vacatio legis* has not expired, makes no difference. Further on, constitutional review over National Assembly laws and other acts, just like review over those of the President, is an abstract one, i.e. it is exercised without reference to any particular dispute.

According to Art. 149, para 1, item 2 of the Constitution constitutional review extends to every law. There is no doubt that review may impact either upon the law in its entirety or upon some of its provisions. However, applications concerning the declaration of unconstitutionality of a law in its entirety are fairly rare (Decision № 14/01 on c.c. № 7/01; Decision № 29/98 on c.c. № 28/98).

Over the past 15 years Bulgaria has had no law, adopted by a referendum. Legal literature, however, accepts that referendum-adopted laws are not subject to constitutional review, because under Art. 149, para 1, item 2 of the Constitution it is only laws, adopted by the National Assembly, that may be declared unconstitutional.[29]

The Constitutional Court accepts that laws, which amend or supplement the Constitution, can likewise be subject to constitutional review. Such review however, has certain limitations – it scrutinizes constitutional procedure: the submission, hearing and adoption of the law in terms of strict observance of constitutional arrangements as well as the character of the amendment itself: whether it involves issues which might be the exclusive competence of the Grand National Assembly. There is no review over compliance of the amendments within the power of an Ordinary National Assembly with constitutional provisions, which were in force prior to the amendment's adoption (Decision № 3/03 on c.c. № 22/02). The explanation is that the Constitution itself provides for a special procedure for its amendment by a law, adopted by an ordinary National Assembly. In this way in 2006 the Court declared unconstitutional the new para 4 of Art. 129 of the Constitution, because it was in contradiction with the basic principle of separation of powers (Decision № 7/06 on c.c.

[29] Спасов,Б. Конституционният съд, p. 87; Пенев,П. В Конституционно правосъдие, p. 130.

№6/06).[30] Legal theory, however, sustains that such review is inadmissible, since such laws do not exist on their own and are incorporated in the Constitution.[31] At the same time, one should note that the Constitutional Court does not have the right to rule over the constitutionality of acts, adopted by the Grand National Assembly.

As international treaties, which have been ratified and have come into force, become part of domestic legislation and enjoy the status and power of a law (Art. 5, para 4 and Art. 85 of the Constitution), they are also subject to constitutional review (Decision № 9/99 on c.c. № 8/99). Initially Constitutional Court jurisprudence prescribed that only a ratification act could be subject to constitutional review by the Constitutional Court, but later on jurisprudence was changed in compliance with the said Decision of 1999; it was accepted that a ratification law incorporates the international treaty and that both law and treaty should be seen as a single act. This was subsequently clarified through the statement that review over the ratification law also extends to international treaties, subject to ratification, but only if those treaties refer to public international law (Ruling № 4/02 on c.c. № 6/02). Here we should add that, according to Art. 149, para 1, item 4 the Constitutional Court has the power to rule before ratification on international treaties, concluded by the Republic of Bulgaria, in terms of their compliance with the Constitution as well as on the compliance of these laws with generally accepted norms of international law and international treaties, to which Bulgaria is a State Party. Such an example of constitutional review is obviously a preceding one. This, however, does not exclude constitutional review after the treaty's ratification (Decision № 9/99 on c.c. № 8/99).

Ruling № 1/96 on c.c. № 31/95 of the Constitutional Court accepted the admissibility of applications asking it to declare the unconstitutionality of laws, if they were adopted prior to the Constitution. Initially, it held the opposite view (Ruling of 29.12.1991 on c.c. № 1/91). The main argument for the alteration was that the Republic of Bulgaria follows the rule of law, where laws, including those preceding the Constitution, cannot be in contradiction with it. The Constitution does not differentiate as to when a law was adopted. As for laws, which had been adopted and had come into force prior to the adoption of the Constitution, and which had exhausted their effect by the time of its adoption, the Constitutional Court ruled that it was not competent to pronounce an opinion on their constitutionality (Ruling № 1/99 on c.c. № 37/98). The argument is that, if a law had ceased functioning before the adoption of the

[30] The text empowered the President to remove the Supreme Cassation Court and Supreme Administrative Court Presidents and the Prosecutor General, if they commit a serious crime or systematically fail to exercise their duties, by proposal of a 2/3 majority of the Members of Parliament.
[31] Стойчев,Ст., op.cit., p. 590.

Constitution, it would be inadmissible to assess whether it complies with the Constitution or not.

When in review of the constitutionality of laws and other acts of Parliament and the acts of President, the Constitutional Court assesses their compliance with constitutional provisions. An Act can be deemed unconstitutional, if it was adopted in violation of a procedure, set in the Constitution, e.g. if it was not adopted in two sessions of voting, as Art. 88, para 1 of the Constitution provides (Decision № 3/07 on c.c. № 2/07). It cannot, however, be declared unconstitutional when its adoption violates a procedure, set in another Act, for example the Rules of the Organization and Functions of the National Assembly (Ruling № 3/07 on c.c. № 8/07). The assessment, whether a law is unconstitutional, is based exclusively on the juxtaposition of its content with the provisions and principles of the Constitution.

9. Ruling № 2/94 on c.c. № 1/94 of the Constitutional Court expressly states that the Court is not competent to rule on claims about existing gaps in laws. It does not have such powers, because it is competent to deal solely with laws which have already been adopted. In Ruling № 1/06 on c.c. № 10/05 the Court develops the argument further, stating that it cannot interpret a certain provision in the Constitution if that interpretation would infringe upon a power, bestowed by the Constitution on the National Assembly. The Court cannot, by virtue of interpretation, give specific instructions to the National Assembly how to act, let alone, limit its sovereign function of sole legislator of State. Thus, the issue of legislative gaps is extraneous to constitutional review of the Court due to its belief that it cannot infringe upon a power, which the Constitution has bestowed solely upon the National Assembly.

In a number of cases the Constitution tasks the National Assembly to regulate a certain matter by law. One could assume that, as longs as the Constitution prescribes the legislative regulation of certain issues, it does not regulate the matter itself and, therefore, there is a gap in it, which the legislator is required to fill in (Decision № 2/06 on c.c. № 9/05; Ruling № 1/06 on c.c. №10/05). The Constitution prescribes the act of issuance, in most general terms while it is the legislator, who is competent to propose some solution in accordance with the accepted legislative policy, bearing in mind the principles and requirements it poses. Whether the law will be accepted and when acceptance will take place is an issue within the exclusive ambit of the National Assembly, since it is expressly empowered by the Constitution to act in this sense. The Constitution does not bestow upon the Constitutional Court the power to watch over National Assembly compliance with what the Constitution has tasked it to do, neither is the Court empowered to bind the Assembly to adopt the law in question. The Constitutional Court is not, furthermore, to give instructions to the National Assembly as to

how to fill in the existing legislative gap. It reviews the constitutionality of laws (Art. 149, para 1, item 2 of the Constitution) and can, consequently, deal only with an actual normative fact. On the other hand, the point of such steps obviously goes well beyond the parameters of constitutional review. Besides, the powers of the Constitutional Court are strictly and extensively listed and no such a power could be justified. That is why the Court cannot deal with such gaps in the Constitution, nor can it rule that they be filled in.

When the Constitution tasks the National Assembly to regulate a certain matter by law, the structure and content of the normative regulation is decided upon in accordance with the accepted legislative policy. The National Assembly should, however, also take into consideration the principles and specific requirements of the Constitution. If the Constitution contains certain prescriptions and the legislator does not take them into consideration, one cannot say that there are gaps in legal regulation. The Constitution has direct application (Art. 5, para 2), therefore, the respective legal regulation should be inferred from the Basic Law itself. The Constitutional Court does not have the power to give instructions in this sense.

10. It was already mentioned that Art. 149, para 1 of the Constitution gives the Court the power to issue binding interpretations of the Constitution. As legal theory affirms, the said provision covers only a certain type of interpretation – the official and abstract one.[32] Besides, this interpretation concerns only the Constitution, not laws themselves. Interpretation means clarification of the exact meaning of the Constitution. It reveals the normative intentions of the legislator and hence encompasses normative prescriptions. When the Court's jurisprudence talks about interpretation, it usually means clarification of the exact sense of a given constitutional provision (Decision № 8/05 on c.c. № 7/05; Ruling of 17.08.2004 on c.c. № 3/04). It is a standing practice of the Constitutional Court also to take into consideration the Constitution's Preamble when interpreting its provisions (Decision № 1/05 on c.c. №.8/04; Decision № 6/04 on c.c. № 7/04 г.; Decision № 11/03 on c.c. № 9/03). Although the Preamble is not normative in essence, it sets the basic democratic and humanity principles, which inspired the Constitution. Since interpretation means clarification of the exact sense of the Constitution, it cannot supplement or make amendments to the Basic Law (Ruling of 17.05.2004 on c.c. № 3/04). Nor can it aim at circumventing, substituting or violating constitutionally established powers, let alone giving concrete instructions to the National Assembly or other public institutions (Decision № 8/05 on c.c. № 7/05). While interpreting, the Constitutional Court should not feel bound to always give a thorough answer to the

[32] Сталев, Ж. Тълкуване на Конституцията от Конституционния съд въз основа на чл.149, ал.1, т.1 от Конституцията, p. 151

questions posed to it, because in this way it may substitute the nature of its own power and turn into a consultative organ or a "positive legislator" (Decision № 8/05 on c.c. № 7/05).

The Constitutional Court has outlined the functions of interpreting which lie in its power in Art. 149, para 1, item 1 of the Constitution. First among them is the need "through interpretation of constitutional provisions to build a clear and non-contradictory system of rules". The second function of interpretation is to "prevent the use of the sanctioning powers of the Constitutional Court and, specifically, its power to declare a law unconstitutional" (Decision № 8/05 on c.c. № 7/05). In this sense through its power under Art. 149, para 1 of the Constitution the Constitutional Court affirms the supremacy of the Basic Law and contributes to the protection and observance of fundamental civic rights and freedoms.

Legal theory maintains that the interpretative decisions of the Constitutional Court are subsidiary sources of law.[33] The Constitutional Court is, however, much more cautious whenever it addresses that issue. According to it, the interpreted provision of the Constitution and the interpretative decision of the Court form a unity and the respective constitutional provision cannot be applied in a way, different from what the Constitutional Court has ruled on it (Decision № 8/05 on c.c. № 7/05). Consonant with this is also the claim that the Court's interpretative power cannot include supplementing to or amending the Constitution (Ruling of 17.05.2004 on c.c. №3/04). The Constitutional Court is obviously not so willing to support what theory describes as its function "to develop constitutional regulation through interpretation".[34]

To sum up, Constitutional Court jurisprudence allows for the existence of legal gaps. Its attitude towards the different types of gaps, however, appears to be different. On one hand, the Court, while interpreting the Constitution, refuses to tackle legal gaps, even when legislative regulation is missing on an issue, and in addition the Constitution also prescribes that it be regulated by law (Decision № 8/05 on c.c. № 7/05; Ruling № 1/06 on c.c. №10/05). Legislative delegation excludes any intervention, despite gaps in the regulation. The Court goes even further when it rejects applications as absent of legal basis on grounds that, it must not, through interpretation takes upon itself to bind the legislator or substitute it. For this reason the Constitutional Court is not bound to answer thoroughly all the questions an application may ask. Generally, if a matter should be regulated by law, this constitutes a

[33] Сталев,Ж. Тълкуване на Конституцията от Конституционния съд въз основа на чл.149, ал.1, т.1 от Конституцията, p. 151; Неновски,Н., Относно решение № 22 от 31 октомври 1995 г. на Конституционния съд, p. 101

[34] Сталев,Ж. Анализ на решение № 22 от 31 октомври 1995 г. на Конституционния съд, p. 79.

ground for the Court to refuse to deal with the issue, despite the emergence of a gap in legal regulation.

The situation is a different one, when constitutional review, exercised by the Court, results in the abrogation of the respective law and the emergence of a legislative gap. It is the assumption that such a gap is inadmissible which makes the Court, by virtue of interpretation, conclude that its decisions "resurrect" *ex lege* the law it had abrogated earlier. The Constitution may not possibly prescribe the non-application of the unconstitutional law and at the same time allow for a legislative gap. Thus through interpreting the Constitution (Art. 149, para1, item 1) the Court proclaims its power to fill in gaps in the legal regulation, set by the Constitution (Decision № 22/95 on c.c. № 25/95). The idea is to fill in the gaps not by means of instructions to the legislator, but through the effect of the decision itself. It is assumed that the decision is binding on everybody, including the National Assembly (Art. 14, para 6 of the CCL), therefore, no instructions are needed.

Here, an issue naturally arises – to what extent are those two assumptions compatible? In the first case when the Court is asked to interpret texts, including texts, which assign the adoption of a law, it states firmly that it cannot be a "positive legislator". In the second case, when a law is declared unconstitutional, the Court takes upon itself to "develop" the Constitution, while eliciting support not from the "letter", but from the principles of the Constitution; in this manner it models further its power. Restoration of the action of an abrogated law itself turns the Court into a legislator. The fact that the Court does not allow, in its recent jurisprudence, for the admissibility of its being a "positive legislator" requires that it be consistent and solve any internal contradictions which arise in its stance, due to this status.

11. The existence of legislative gaps is most often diagnosed in applications concerning the interpreting of constitutional provisions (Ruling № 2/96 on c.c. № 5/96; Ruling № 2/94 on c.c. № 1/94; Decision № 22/95 on c.c. № 25/95; Ruling № 1/96 on c.c. № 10/95). It was also mentioned in requests about recusal of constitutional justices (Ruling № 1/95 on c.c. № 9/95).

The existence of a legislative gap is not unconstitutional by itself. Even the fact that the Constitution prescribes that a certain matter be regulated by law and then this same law has gaps, does not make that law unconstitutional. The Constitutional Court will only establish the legislative gap. Its filling in, however, would be a prerogative of the National Assembly. Whenever the Constitutional Court declares a law unconstitutional, it already accepts that the emerging gap within the system is unconstitutional, as long as the Constitution itself requires that the gap be filled in. On these grounds the Court arrived at the

idea of "resurrecting" the law, which preceded the one, abrogated on the grounds of unconstitutionality.

12. According to the Constitution of the Republic of Bulgaria, the Constitutional Court does not act *ex officio*, it cannot take the initiative to rule on the constitutionality of a law. The Constitutional Court can be seized a restrictively foreseen by the Constitution public institutions and certain number (group) of Members of Parliament: one fifth of the Members of Parliament, i.e. 48 of them, the President, the Council of Ministers, the Supreme Cassation Court, the Supreme Administrative Court, the Prosecutor General and the Ombudsman. Besides the Ombudsman can approach the Constitutional Court for declaring unconstitutionality only of a law which infringes human rights and freedoms (Art. 150 of the Constitution).

In Decision № 3/05 on c.c. № 2/05 the Constitutional Court accepted that it can be approached by the plenums of the Supreme Cassation and the Supreme Administrative Court, comprising all magistrates, as well as by the general assemblies of their colleges. When single panels of the Supreme Cassation or the Supreme Administrative Court find out, while hearing a dispute, inconsistency between a law and the Constitution, they suspend proceedings and submit the issue to the Constitutional Court (Ruling № 1/97 on c.c. № 5/97). Their reason for approaching the Constitutional Court here is a concrete one, but the review the Court will exercise, is still abstract. The Constitution of the Republic of Bulgaria does not allow for individual constitutional complaints by persons before the Constitutional Court on an unconstitutional law. This can be done through one of the institutions, listed above, i.e. by proxy. In practice, the initiative will most often be taken by the Ombudsman.

13. The decisions of the Constitutional Court are binding on all public authorities, legal entities and persons (*erga omnes*). This means that they are also binding on the Constitutional Court itself. Hence the argument that it cannot rule again on cases it has already ruled upon (Ruling № 4/96 on c.c. № 6/96). This is also affirmed by Art. 21, para 5 of the CCL, according to which no new applications on an issue may be submitted, if the Court has already delivered a decision or a ruling on the inadmissibility of the same issue. It is worth noting, however, that there are issues on which the Court's jurisprudence has evolved – for example, whether the Court can review laws, adopted before the Constitution, or whether review covers only a ratification law or similarly, the international treaty subject to ratification.

Legal theory sustains that both the operative part and the reasoning of the decision are binding.[35] The Court's decisions come into force three days after promulgation, they are non-appealable and act *ex nunc*. As for their effect, some of the Court's decisions are declaratory, e.g., those which reject an application as ill-grounded. Other decisions are, however, constitutive, such as those, which declare a law unconstitutional.

Since the decisions of the Constitutional Court are binding on all public institutions, legal entities and persons, including the National Assembly, up till now, whenever a law was declared unconstitutional, the National Assembly obeyed the decision. The same goes for decisions on interpreting the Constitution. The Court's decisions have a decisive role in the elaboration of new texts, to replace those declared unconstitutional, and generally in the elaborations of new laws and provisions. Compliance with the decisions of the Constitutional Court, including their reasoning, is achieved in the legislative process through different legal techniques – phrasing of texts in accordance with the terminology the Court used, modification of the systematic place of the provisions, adoption of a new approach (abstract or casuistic) in the elaboration of laws, etc.

14. According to Art. 22, para 4 of the CCL the legal consequences of the law, which was declared unconstitutional, are settled by the National Assembly. According to the Assembly's Rules of Organization and Functions, those consequences should be settled within two months after the Court's decision has come into force. The provision of Art. 22, para 4 of the CCL envisages pending relations, which have emerged by virtue of the unconstitutional law. This text, however, has nothing to do with the need to supply legal regulation of those relations. The Constitutional Court only reviews the constitutionality of laws and does not have the power to give binding instructions to State bodies, including the National Assembly. Due to this it cannot obligate the Assembly to fill in the gaps in has established. The Court only notes the existence of a gap and, without giving any instructions, usually points out that the creation of the respective legal regulation falls within the competence of the National Assembly. It is solely up to the Assembly to ultimately adopt such regulation.

[35] Стойчев, Ст., op.cit., p. 591 notes that the subjects of law should comply with the reasoning of the decision. Сталев, Ж. Сила на решенията на Конституционния съд. Обявяване на закон за противоконституционен. „Конституционния съд и правното действие на неговите решения". С., 1996, p. 17 notes that what is binding is the core reasoning of the decision.