The Constitutional Court of the Republic of Croatia
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PROBLEMS OF LEGISLATIVE OMISSION IN CONSTITUTIONAL JURISPRUDENCE

Answers of the Constitutional Court of the Republic of Croatia to the Questionnaire for the XIVth Congress of European Constitutional Courts

1. THE PROBLEMATICS OF LEGAL GAPS IN SCIENTIFIC DOCTRINE

1.1. The concept of the legal gap

Provide a short review of the positions of scientists and specialists of law of your country on legal gaps (how the legal gap is described, what are the kinds of legal gaps (for example, the indetermination of legal regulation, *lacuna legis,* legal vacuum, legislative omission, etc.); does the scientific legal doctrine consider the reasons for appearance of legal gaps, the problem of real and alleged legal gaps and the peculiarities of gaps in public and private law, the positive and negative consequences of legal gaps, etc. ?)

In the Republic of Croatia the following legal scientists have studied the subject of legal gaps: Professor Berislav Perić, LLD, Professor Nikola Visković, LLD, Professor Vjekoslav Miličić, LLD, Professor Đuro Vuković, LLD, and Professor Duško Vrban, LLD. The stands taken by the above scholars are based on generally accepted theories about legal gaps. In essence, besides the basic meaning of the concept of „legal gap“, legal theorists also write about technical legal gaps and value legal gaps.

In the book *Država i pravni sustav* (The State and the Legal System, Informator, Zagreb, 1994, 223 – 225), Professor Perić wrote the following:

”No legal system is all-encompassing because existing applicable law is never sufficient to solve all cases. There will always be cases that that cannot be classed under “their own“ norm because the legislator did not anticipate a case of that kind (he did not anticipate its appearance) or omitted (forgot to) provide for it.

Therefore the legal system is “porous“ (“it has holes“), it is unfinished, unstated.

Phenomena of this kind are known as legal gaps. These are legal phenomena when a case appears that should be legally included, regulated and solved, but the necessary legal norm to do so does not exist.”

According to Professor Miličić, various boundary states in law can also be considered to be legal gaps, such as: „pronounced generalisation of legal rules, some expressions of

legal phraseology, undefined but definable legal concepts, disharmony or breach between the intent to formulate a legal rule and its actual formulation, disharmony between some dogmatic forms in a legal regulation and the principles formulated in the general provisions of that regulation, and the like."[1]

He also gives a list of various kinds of legal gaps: "regular and obvious, essential/unessential, unhidden/hidden, complete/incomplete, temporary/permanent, gaps determined by the quality and scope of a dogmatic value content (the dogmatic scope of legal rules/legal regulations), conditional/unconditional, and/or legal gaps such as the 'silence of the legislator', 'technical and value' legal gaps."[2]

Professor Visković in the book *Država i pravo* (The State and Law, Birotehnika, Zagreb, 1997, 218-220) defines legal gaps and also gives some of the reasons for them:

"In every society there are certain kinds of relationships that have the three characteristics mentioned that make them 'governable by law' (importance for the survival and good of the society, containing strong conflict of interests and externally controllable), which shows that they should be legally regulated, but they nonetheless remain either completely legally unregulated or insufficiently regulated. Relations of this kind are called legal gaps.

This (…) mostly happens for two reasons:

First, when one state and legal system are overthrown (by revolution, coup, secession) the lawmakers of the new state and legal system may not immediately create new legal regulations to replace all those that have been repealed so for a time some social relations remain unregulated. This happens rarely, at least in modern societies, because the new lawmakers usually avoid the grave consequences of legal gaps by either lastingly taking over the legal norms of the old order, or immediately enacting new norms to replace the ones they repealed. This was, for example, done when the Republic of Croatia gained independence from the SFR Yugoslavia in 1990.

The second and more common reason for legal gaps is the appearance of new kinds of socially important and conflicting relations that the lawmakers do not immediately recognise as such or are for various reasons late to regulate. This is the reason for most of the legal gaps in modern societies where technical advance with increasing frequency and suddenness brings new relations that could not even have been anticipated several decades or years earlier so the lawmakers could not recognise them when they first appeared or assess their importance. In the modern world these are for example relations in the fields of: a) ecology, b) health, c) bioethics and d) culture.

(…)

Besides this basic meaning of the term "legal gap", legal experts also recognise technical legal gaps and value legal gaps. Unlike the basic meaning, where the gap lies outside legal regulation (as a relation that has not been regulated), legal gaps in these two meanings lie within legal regulation. A technical gap results from the insufficient

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[1] Vjekoslav Miličić: "Praznine u pravu" (Legal Gaps), *Hrvatsko pravosuđe: pouke i perspektive* (Croatian Jurisprudence: Lessons and Perspectives), Zagreb 2002, p. 142.

[2] Ib., p. 143.

normative covering of a legal relation, of poor normative regulation, a) either because some important element is missing, e.g. sanctions or the jurisdiction for undertaking legal actions are not prescribed, or b) because the regulation is expressed using unclear and undetermined concepts, e.g. abstract concepts or so-called "legal standards" such as conscientiousness, integrity and confidence, restraint, incompatibility of character. A value legal gap is the view of some subjects that the norm regulates a social relation unjustly or in some other value-deficient way, and that it must therefore be changed or brought into harmony with the values that these subjects uphold."

In Professor Vuković's opinion a legal gap also exists if a factual state is not regulated either positively or negatively so that it cannot lead to legal consequences of any kind. He points out, "Gaps can appear when the legislator does not delve deeply enough into the material he is regulating. They can also be the result of insufficient knowledge of legislative technique. The legislator may also intentionally fail to regulate an issue, leaving the matter to be solved in practice. Legal gaps can also appear initially, when the legislator, after passing the general act, does not regulate all the issues. Or they can appear later when social conditions change and the legislator does not keep up with the changes and does not react in time."[3]

Professor Vrban writes about the boundary between interpretation, legal gaps and so-called free space (issues that remain outside the legislator's reach because everything that has not been prohibited is legally permitted

„Unlike interpretation in the ordinary sense, when a legal norm exists but there are doubts about how to understand and apply it, the problem of the legal gap arises because of the absence (non-existence) of a norm. Thus we could reduce all the problems in connection with the application of a law to three great typical cases:

a) Legal regulations are unclear, ambiguous or even contradictory. In this case interpretation using known techniques is resorted to (...).
b) The legal system is not harmonised. In this case there are contradictions between different acts. This usually happens when a new law has been passed or if there are provisions for special cases.
c) There are no regulations for solving a specific case.

In the last case we can speak about a legal gap. (...)

Establishing the existence of legal gaps, therefore, also means recognising the need to extend legal regulation to those fields that are not reached by applicable law, i.e. where no legal solutions exist. This should not imply the denial of free space. (...)"[4]

To demarcate between legal gaps and legally irrelevant actions, so-called legally free space, and taking into account the nature of law and legal technique, Professor Vrban states that legal gaps only appear under the following circumstances: „ a) the legislator did not consciously (intentionally) leave out some beings, actions and conditions; b) an

[3] Đuro Vuković: *Pravna država* (The State Governed by Law), Zgombić i Partneri, Zagreb, 2005, pp. 107-108.
[4] Duško Vrban: *Država i pravo* (The State and Law), Golden marketing, Zagreb, 2003, pp. 461-462.

important legal area or legal branch is not regulated and by its nature should be, and c) filling in the gap will not contradict the basic principles of the country's legal order. If these circumstances are not fulfilled, it is the case of a legally irrelevant or indifferent space. To it especially belong mental life (thoughts and feelings) and forms of human communication (greetings, etiquette and the like), some fields of morals and the question of belief."[5]

Furthermore, Professor Vrban also includes in the question of legal gaps the problem of filling them in and in connection with this the role of judges who are not only empowered to interpret legal regulations but also to fill in legal gaps by making use of the usual legal techniques and reasoning in accordance with value criteria. He mentions analogy (either based on laws or legality) as the most frequent means used to fill in legal gaps, except in criminal law where this is prohibited.[6]

The problem of peculiarities of gaps in public and private law and the positive and negative consequences of legal gaps have not been considered in Croatian legal theory.

1.2. The concept of legislative omission

Are the legal gaps which are prohibited by the constitution (or legal regulation of higher power) distinguished in the scientific literature? What is the prevailing concept of legislative omission as a sort of the legal gap in the country's legal literature?

The Constitution of the Republic of Croatia (*Narodne novine*, Nos. 56/90, 135/97, 8/98-consolidated wording, 113/00, 124/00-consolidated wording, 28/01 and 41/01-consolidated wording; hereinafter: Constitution) does not explicitly prohibit legal gaps, and nor does the Constitutional Act on the Constitutional Court of the Republic of Croatia (*Narodne novine*, Nos. 99/99, 29/02 and 49/02–consolidated wording; hereinafter: Constitutional Act).

The answer to the preceding question showed the kind of legal gaps considered by legal scientists in Croatia.

Professor Smiljko Sokol, LLD, a former President of the Constitutional Court, described how the Constitutional Court proceeds when it finds the existence of legal gaps in the regulation of certain relations:

"The Constitutional Court accepted and elaborated the principle of the rule of law as the basic comprehensive standard in the approach to constitutional interpretation. This is, therefore, the objective that can in a specific case of constitutional interpretation provide the Constitutional Court with a point of reference in finding a legal provision unconstitutional because it includes a legal gap in regulating a relation which, for example, has led to the inequality or the discrimination of a certain group. This is, we

[5] Ib., p. 462.
[6] Ib., pp. 462-465.

think, the final line beyond which the Constitutional Court should not go even to protect the rule of law, so as not to become a legislator. We therefore deem that the Constitutional Court should not, and indeed it would find it difficult to do so, intervene by passing a repealing decision in the case when the legislator completely omitted to regulate a social relation or relations, which means that no legal provision exists in which there is a legal gap or which is connected to a legal gap.

However, the new powers of the Constitutional Court, which were enacted in the constitutional amendments of 2000, provide a solution for these and some other situations in which the Constitutional Court cannot react to unconstitutionality it observed by passing a decision to repeal the act or other regulation. Under Article 128 sub-paragraph 5 of the Constitution, the Constitutional Court has the right to "monitor the realization of constitutionality and legality and notify the Croatian Parliament of the instances of unconstitutionality and illegality observed". Thus the Constitutional Court can notify the legislator that omitting to regulate a certain social relation or relations leads to an unconstitutional situation."[7]

1.3. The concepts of the Constitutional Court or the corresponding institution which implements constitutional control (hereinafter referred to as the constitutional court) as a "negative" and "positive" legislator.

What is the prevailing concept of the mission of the constitutional court as a judicial institution in the scientific doctrine of your country? The constitutional court as a "negative legislator". The concept of the constitutional court as a "positive legislator". Problems of the influence of the jurisprudence of the constitutional court on law-making? Does the scientific legal doctrine consider the activity of the constitutional court when the constitutional court investigates and assesses legal gaps as well as the influence of the decisions of the constitutional court regarding filling in the said legal gaps? Was the naming of the activity of the constitutional court as the one of "activism", "moderation" and "minimalism" reasoned based on such decisions?

"The Constitutional Court is a separate and to a great measure an autonomous state body of high authority whose primary task is to supervise the constitutionality of laws."[8] In legal theory the starting point for determining the mission of the Constitutional Court are the powers of the Constitutional Court given in the Constitution.

Jadranko Crnić, LLD, also a former President of the Constitutional Court of the Republic of Croatia, writes:

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[7] Smiljko Sokol: „Ustavni sud Republike Hrvatske u zaštiti i promicanju vladavine prava" (The Constitutional Court of the Republic of Croatia in the Protection and Promotion of the Rule or Law), *Zbornik Pravnog fakulteta u Zagrebu*, No. 6/01, p. 1163.

[8] Branko Smerdel and Smiljko Sokol: *Ustavno pravo* (Constitutional Law), Pravni fakultet Sveučilišta u Zagrebu, Zagreb, 2006, p.176.

"Central government in the Republic of Croatia is organised on the principle of the separation of powers into:
- legislative,
- executive
- judicial.

In this separation the Constitution gives the Constitutional Court of the Republic of Croatia a special position. It does not place it in any of the three powers. In this way, because this is a regulation that is given in the Constitution itself (…), it makes possible the interpretation that there is a constitutional exception and a special constitutional category that cannot be dealt with by laws, because it deals with laws – this is the Constitutional Court as a separate body of high legal expertise and authority, separated from the system of the organisation of power, whose main task is constitutionality and legality.

Thus we can to a certain extent speak either about a separation into four powers or (we think this is more appropriate) about an inter-power that supervises all the three state powers (legislative, executive and judicial) in their competence under the Constitution. It is not hierarchically above them nor is it part of them in the sense of governmental organisation or any other sense. Constitutional questions are legal questions like any others, only with much greater political implications. This also characterises the position of the Constitutional Court and constitutional jurisprudence.
In manner of decision-making and work methods it is close to the judicial power because it could be said to judge laws and other regulations, and through the institute of the constitutional complaint it also judges individual acts."[9]

Therefore, the powers of the Constitutional Court given in the Croatian Constitution show that the Constitutional Court is not a body that creates the Constitution or laws (it is not a legislator) but a body which, in exercising the function of protecting constitutionality and legality, removes unconstitutional laws and unconstitutional and illegal other regulations from the legal order; it may in this sense be considered a negative legislator. This complies with the theory of judicial self-restraint according to which the Constitutional Court cannot allow itself to take the role of a "positive" legislator, as this would be in breach of the constitutional principle of the separation of powers. Only the legislator has the competence to regulate particular legal relations by enacting the corresponding regulations or amending them in such a way as to ensure full compliance with constitutionally guaranteed rights and freedoms.

However, to a certain extent the constitutional jurisprudence of the Constitutional Court influences both legislative procedure and filling in legal gaps. After Croatia gained independence the Constitutional Court was forced, in the interpretation of certain provisions, to solve questions of procedure that were not regulated in the first Constitutional Act and even to create procedural rules either through constitutional case-

[9] Jadranko Crnić: *VLADAVINA USTAVA Zaštita sloboda i prava čovjeka i građanina ili kako pokrenuti postupak pred Ustavnim sudom Republike Hrvatske* (THE RULE OF THE CONSTITUTION. The protection of human and civil rights and freedoms or how to institute proceedings before the Constitutional Court of the Republic of Croatia), Informator, Zagreb 1994, pp. 3-4.

law or by autonomously regulating certain procedural rules for acting in constitutional justice cases in the Standing Rules of the Constitutional Court. This was objected to in the form of proposals to review the constitutionality of certain provisions of the Standing Rules (*Narodne novine*, No. 29/94), which the Constitutional Court answered in its rulings, for example:

1. Ruling No.: U-I-252/95 of 16 May 1995:

*The Public Attorney of the Republic of Croatia submitted an application – a proposal to institute proceedings to review constitutionality – noting that he was, under Article 13 of the Public Attorney's Office Act (*Narodne novine*, Nos. 17/77, 47/77, 17/86, 19/90, 41/90, 83/92) in conjunction with Article 4 of the Constitutional Act on the Implementation of the Constitution of the Republic of Croatia (*Narodne novine*, Nos. 34/92, 91/92, 62/93, 50/94), instituting proceedings to review the constitutionality and legality of Article 53 para. 2 of the Standing Rules of the Constitutional Court of the Republic of Croatia (*Narodne novine*, No. 29/94; hereinafter – Standing Rules) and alternatively, that he was submitting a proposal to institute proceedings.*

*The Constitutional Court accepted the application as a proposal to institute proceedings to review constitutionality and legality under Article 15 para. 1 of the Constitutional Act on the Constitutional Court of the Republic of Croatia (*Narodne novine*, No. 13/91; hereinafter: Constitutional Act).*

It did so because Article 13 of the cited Constitutional Act specifies who is empowered to present a request to institute the review of constitutionality and legality, and these do not include the Public Attorney of the Republic of Croatia.

No other act, including the Public Attorney's Office Act, can lay down who is empowered to institute proceedings to review constitutionality and legality.

The disputed provision reads as follows: "On the proposal of the applicant of a constitutional complaint, the Court may postpone execution until a decision is made if execution would cause the applicant damage of a nature that would be difficult to rectify, and the postponement is not contrary to the public interest nor would it result in considerable damage for anyone."

The applicant of the proposal deems that the above provision contravenes Article 127 para. 3 of the Constitution of the Republic of Croatia and Articles 1 and 18, in conjunction with Articles 28 – 30, of the Constitutional Act. This is so because Article 53 of the Standing Rules is a substantive norm and cannot be included in the concept of prescribing the internal organisation of the Court.

Furthermore, he states that the nomotechical method of the Constitutional Act on the Constitutional Court of the Republic of Croatia does not foresee the temporary suspension of execution of an individual act that is disputed by a constitutional complaint; this possibility is only foreseen in relation to an individual act grounded in a law or other regulation whose constitutionality or legality is under review, whereas Section IV entitled: "The protection of constitutional freedoms and human and civil rights" does not allow for the above possibility.
The proponent finds further substantiation for this view in linguistic disharmony because the Constitutional Act in Article 18 uses the term "temporarily suspend execution" and the Standing Rules in Article 53 para. 2 say "postpone execution".

In the proponent's view, in the disputed part the Standing Rules have become a higher-ranking legal act than the Constitutional Act although they comes fifth in the hierarchy of legal acts under Article 70 in conjunction with Article 80 of the Constitution of the Republic of Croatia.

On the grounds of the above, he proposes that the Constitutional Court repeals Article 53 para. 2 of the Standing Rules.

The proposal is not well founded.

The duties and work of the Constitutional Court are not defined only by Article 125 of the Constitution of the Republic of Croatia, which lays down its jurisdiction, but by the totality of constitutional determination, the organisation of government in the state in which the Constitutional Court has a special place and powers outside the legislative, executive and judicial branches, as laid down in Article 4 of the Constitution of the Republic of Croatia.

The Constitution and the Constitutional Act define the constitutional powers and position of the Court in such a way that it is not under the authority of any governmental body. Only the Croatian Parliament is empowered to regulate the jurisdiction of the Constitutional Court in the procedure used for passing the Constitution and a Constitutional Act.

Under Article 127 para. 3 of the Constitution, the Constitutional Court of the Republic of Croatia shall establish its internal organisation in standing rules.

Paragraph 1 of that article determines what material will be regulated in a constitutional act and this also includes "other issues important for performing the duties of the Constitutional Court".

This determination is also contained in Article 1 of the Constitutional Act in the text "other issues of importance for the performance of duties and functions of the Constitutional Court".

The internal organisation should include, besides the usual contents of Standing Rules, also all the other questions important for the successful work and role of the Constitutional Court as given in the Constitution and the Constitutional Act.

The Constitutional Act regulated some of the matters defined in Article 127 para. 1 of the Constitution. Some of the matters essential for performing the duty and work of the Constitutional Court are regulated only in principle leaving specific decisions to the Court. It has the obligation to regulate these matters in such a way that it can perform its duties in accordance with its constitutional position and powers.
In the section on the protection of constitutional freedoms and human and civil rights, the Constitutional Act contains only three articles about the constitutional complaint (Articles 28 to 30) and these regulate only questions of admissibility, preclusive term for lodging a complaint and the contents of the Constitutional Court decision about a constitutional complaint.

No proceedings in connection with a constitutional complaint can be carried out on the grounds of such sparse procedural regulation. Therefore the Constitutional Court, faced with a legal gap in relation to procedure for acting in matters of constitutional justice, had the power and duty to create procedural norms in the course of specific proceedings.

The Constitutional Court thus, in the course of its proceedings, created rules of procedure for proceedings in connection with a constitutional complaint by using the equivalent procedural rules from other procedural acts (Civil Procedure Act, General Administrative Procedure Act,

Criminal Procedure Act and the like) and in some cases – taking account of the special nature of proceedings before the Constitutional Court – it created new rules for its own procedure.

Other courts and bodies vested with public authority use a similar approach, the difference being that potential legal gaps in other procedural acts are relatively rare and do not appear in such a breadth of procedural questions as in the case of proceedings in connection with a constitutional complaint provided for in the Constitutional Act.

The Constitutional Court, of course, considers itself bound by the rules of procedure that it created during its own practice, as described above, and it acted in this way from the very beginning of its work, until its Standing Rules were enacted. This way of creating procedure could have continued, but the constitutional demand of the legal security of those who turn to the Court for constitutional and legal protection lies at the very heart of proceedings before the Constitutional Court.

The so-called system of precedent binds the Court, which knows its procedural rules based on precedent, but this way of work creates considerable problems for citizens who turn to the Constitutional Court because they cannot be expected to know the case-law of the Constitutional Court.

This is why it is useful for the rules of procedure, formulated in earlier proceedings, to be adequately brought together, regulated and made public.

This is also the reason why the Constitutional Court included many rules of procedure in its Standing Rules. In this way it restricted itself because it is obliged to act according to rules of its own creation; and what is even more important, these rules of procedure have now been published in the official gazette of the Republic of Croatia - Narodne novine, *and are accessible to everyone, which has also ensured the legal security of natural and other legal subjects who seek or will seek the protection of the Constitutional Court.*

Concerning Article 53 para. 2 of the Standing Rules (which is not a provision of substantive law, as the applicant states, but of procedural law), it must be said that this institute represents a civilising development in procedural law. This is why it must be allowed for in constitutional proceedings instituted by a constitutional complaint against a possible violation of basic human and civil rights – constitutional rights.

Constitutional jurisprudence has introduced the temporary postponement of the execution of decisions disputed under a constitutional complaint in the interest of the person seeking constitutional justice. This brings it into complete harmony with the basic goals of constitutional protection, the protection of fundamental freedoms and human and civil rights, which is under Article 125 sub-para. 3 in the jurisdiction of the Constitutional Court.

If it were not so, in many cases constitutional protection – without the timely postponement of the disputed provision – would not have any real effect on the constitutional rights of the person requesting their protection.

What has been said above shows that Article 53 of the Standing Rules serves for the effective protection of constitutional rights.

It therefore follows that Article 53 does not deviate, in content and legal logic, from the legal logic that underpins Article 18 of the Constitutional Act.

The term used (postponement of execution) is a legal concept valid in legal terminology and leaves no room for doubt, especially as these are cases of the protection of a constitutional right of a particular individual or particular legal person. Thus there is no terminological disharmony which might affect the constitutionality of the disputed provision of the Standing Rules.; and

2. Ruling No.: U-I-238/95 and U-I-797/97 of 11 June 1998:

J.S. from Z. and the Croatian Peasant Party, Zagreb, submitted proposals to institute proceedings to review the constitutionality and legality of Section Three, Articles 22 to 71, of the Standing Rules of the Constitutional Court of the Republic of Croatia (hereinafter: Standing Rules).

*J.S. also submitted a proposal for the Constitutional Court, under Article 18 of the Constitutional Act on the Constitutional Court of the Republic of Croatia (*Narodne novine*, No. 13/91, hereinafter: Constitutional Act), to temporarily postpone passing decisions on the merits under the disputed provisions of the Standing Rules until the final decision is made.*

The applicants deem that the disputed provisions contravene Article 127 paras. 1 and 3 of the Constitution of the Republic of Croatia. They point out that Article 127 para. 1 of the Constitution specifies that a constitutional act passed by the Parliament of the Republic of Croatia by a two-thirds majority shall regulate proceedings before the Constitutional Court. Under Article 127 para. 3 of the Constitution, the standing rules only regulate the internal organisation of the Constitutional Court, so the applicants deem that the disputed provisions, which prescribe procedure before the Constitutional Court, contravene the Constitution. The applicants also substantiate their proposals by referring to distinguished theorists of procedural law, Academician Ivo Krbek and Professor Mihajlo Dika, LLD. They point out that Academician Krbek wrote in the book Ustavno sudovanje *(Constitutional Jurisprudence, published by HAZU No. 321, 1960) that in proceedings before the Constitutional Court procedural provisions from the Constitutional Act on the Constitutional Court are primarily applied, and if these are insufficient then the provisions of the Administrative Disputes Act or the Civil Procedure Act are applied, all with the necessary adaptations. They also refer to some of the writings by Professor Dika published in the collection* Ljubljansko-zagrebački kolokvij *(Faculty of Law in Ljubljana 1993), in particular: ".... proceedings before the Constitutional Court may, it seems, only be regulated by law, while the standing rules only regulate its internal organisation", and in the manual* Kriza hrvatskog sudstva - nijekanje vladavine prava *(The Crisis of Croatian Jurisprudence – denying the rule of law, Croatian Helsinki Committee for Human Rights, Zagreb, 1995), which reads: "In the strictly formal sense, perhaps the Constitutional Court was not empowered to regulate its procedure when solving constitutional complaints in its Standing Rules. Substantively, it seems to us, there was no other solution."*

The applicants deem that the decisions of the Constitutional Court grounded on the disputed provisions are legally non-existent and should be placed out of force (Croatian Peasant Party), or are null and void and should be annulled (applicant J.S.).

On the grounds of the above, the applicants propose that the Constitutional Court of the Republic of Croatia accepts the proposal to institute proceedings to review the constitutionality of Articles 22 to 71 of the Standing Rules and repeals the disputed provisions.

The proposals are not well founded.

*The Court starts by pointing out that it already ruled on the constitutionality of the Standing Rules of the Constitutional Court of the Republic of Croatia in Decision No. U-I-252/95 of 16 May 1995 (*Narodne novine*, No. 33/95).*

The position and the powers of the Constitutional Court are regulated by the Constitution and the Constitutional Act in such a way that the Constitutional Court enjoys a special position and powers, outside the legislative, executive and judicial powers in the principle of the separation of powers under Article 4 of the Constitution. Only the Croatian Parliament, when it enacts the Constitution and Constitutional Act, may regulate the powers of the Constitutional Court.

The jurisdiction of the Constitutional Court is regulated under Article 125 of the Constitution of the Republic of Croatia.

Article 127 para. 1 of the Constitution determines the material to be regulated by a constitutional act, among which it mentions "other issues important for implementing the duties and work of the Constitutional Court". Article 1 of the Constitutional Act says the same.

Under Article 127 para. 3 of the Constitution, the internal organization of the Constitutional Court of the Republic of Croatia shall be regulated by its standing rules.

In the view of the Court, internal organisation means defining the powers and duties, i.e. the scope of work, of the: president of the Court, the sessions of judges, the secretary general, court adviser, records and documentation centre, manner of designating cases, manner of providing information to parties and other persons in connection with cases that are under consideration by the Court. In internal organisation the Court also includes other issues important for its successful work and performing the role given to it by the Constitution and Constitutional Act.

The Constitutional Act regulated some issues defined in Article 127 para. 1 of the Constitution. Some of these issues, essential for performing the duties and the work of the Constitutional Court, are regulated in principle only. For example, the Constitutional Act has only three provisions, Articles 28 to 30, dealing with the procedure in connection with the constitutional complaint. Taken formally, proceedings related to the constitutional complaint cannot be implemented on the basis of such sparse procedural determination.

Therefore the Court, faced with a legal gap in relation to rules for proceeding in matters of constitutional jurisprudence, was empowered and compelled to create procedural provisions in the course of specific proceedings.

In doing so, the Court used the corresponding procedural rules from other acts, namely the Civil Procedure Act, General Administrative Procedure Act, Criminal Procedure Act and the like, bearing in mind the special nature of procedure before the Court.

The procedural provisions that the Court created from the beginning of its work until the Standing Rules were enacted, bind the Court.

However, citizens who apply to the Court seeking the protection of constitutional rights and freedoms cannot be expected to know the case-law of the court, which was also created in the manner described by the applicants in their reference to legal theory.

Procedural provisions created in earlier proceedings, prescribed and made public in the official gazette of the Republic of Croatia, are accessible to everyone. In this way the legal security of citizens and other legal subjects that turn or will turn to the court has been ensured.

The basic preconditions for realising the principle of the rule of law guaranteed in Article 3 of the Constitution are legal security in general and in proceedings of constitutional jurisprudence in particular, and also the effective protection of constitutional rights.

Pursuant to the above, the Court has found that the proposals submitted are without foundation, and has not accepted them.

Later the above objections were eliminated by amendments to the Constitutional Act into which the disputed provisions of the Standing Rules of the Constitutional Court were assimilated.

Siniša Rodin also had a degree of understanding for this active role of the Constitutional Court when he wrote the following about the motives underlying the Court's autonomous regulation of some proceedings:

"Various kinds of motives invite the changes. On one hand there is the wish for the more complete regulation of procedure. Until recently the theory of procedural constitutional law has been almost uninteresting to Croatian legal experts. However, the importance of the procedure used by the Constitutional Court of the Republic of Croatia grew parallel with the importance of the Court itself. The legislative inertia of Parliament was certainly another contributing factor, because in the almost eight years since the foundation of the Constitutional Court it has not comprehensively and completely regulated its procedure as required by Article 127(1) of the Croatian Constitution. Although it is true that the Constitutional Act on the Constitutional Court gives the main determinants of procedure, the regular work of the Court calls for additional regulation. The existing legal gap was filled by the Constitutional Court itself in its Standing Rules which *praeter constitutionem* regulate special procedural rules for certain branches of its jurisdiction."[10]

"The work of a constitutional court, as a kind of inter-power which – through its protection of the constitution as a living organism – supervises the constitutionality of the acts of all the other state bodies, is a condition for realising the principle of the rule of law. This principle covers the entire system of the complex inter-connected rules of procedure of all the bodies of the different powers of government so that basic human freedoms and rights are guaranteed in more or less the same way on all the levels of decision-making in all legal enactments and in their application in the same way as they are in international documents and contemporary democratic constitutions. We consider that the basic purpose of a constitutional court in constitutional interpretation is the protection of the rule of law in each individual case of reviewing the constitutionality of a law and the constitutionality and legality of other acts. The purpose of protecting the realisation and advancement of the rule of law justifies, in our opinion, a certain degree

[10] Quoted after Jadranko Crnić: „Komentar Ustavnog zakona o Ustavnom sudu Republike Hrvatske" (Commentary of the Constitutional Act on the Constitutional Court of the Republic of Croatia), *Narodne novine*, Zagreb, October 2002, p.14.

of activism in constitutional interpretation when examining the constitutionality of laws. This, we think, outweighs the supposed sovereignty of parliament as legislator and this is what places the issue outside the framework of what is seen as a political issue. Therefore, when protecting and advancing the rule of law the doctrine of self-restraint should not as a rule be applied, although it is certainly necessary in the case of some truly political issue, for example, regardless of the form it takes, a clash of interest between two bodies of the highest state authority that does not enter into the field of human rights or the constitutionally determined autonomy of the institutions of the civil society.

The principle of the rule of law is an objective which can offer a constitutional court, in any specific case of constitutional interpretation, a foundation for finding a legal provision unconstitutional on the grounds of a legal gap in the regulation of a certain relation which, for example, leads to inequality or discriminates a certain group. This, we think, is the final line beyond which a constitutional court should not go even when protecting the rule of law, so as not to turn itself into a legislator by replacing the legislator in the full and legal sense of the word. Accordingly, we hold that the constitutional court may not intervene in cases when the legislator completely omitted to regulate a social relation or relations, which means that there is no legal provision that has a legal gap or with which a legal gap could be connected. However, an effective constitutional solution can be found even in these and some other situations in which the constitutional court cannot apply its right to repeal. The Draft for Revisions and Amendments of the Constitution of the Republic of Croatia proposes that the jurisdiction of the court should not be limited to examining the constitutionality of laws and the constitutionality and legality of other regulations with the power to repeal them, but should also include monitoring the realization of constitutionality and legality and notifying the Croatian Parliament about the instances of unconstitutionality and illegality observed (...).

With this approach and this combination of activism and self-restraint in constitutional interpretation the constitutional court may be an important factor not only in the immediate protection of human rights and freedoms but also as a body that legally restricts, in a system of balance and counter-balance, the omnipotence of the legislative and executive powers or, it would be better to say, limits the rule of the majority by keeping it within the boundaries of its constitutional powers. (...)

The Constitutional Court of the Republic of Croatia, in the preceding and in the new composition, has accepted this basic approach to constitutional interpretation."[11]

2. CONSOLIDATION OF CONTROL OF CONSTITUTIONALITY OF THE LEGISLATIVE OMISSION IN THE CONSTITUTION, THE CONSTITUTIONAL

[11] Smiljko Sokol: „Ustavna interpretacija Ustavnog suda Republike Hrvatske u kontroli ustavnosti zakona, Ustavni sud u zaštiti ljudskih prava" (Constitutional Interpretation of the Constitutional Court of the Republic of Croatia. The Constitutional Court in the Protection of Human Rights), *Organizator*, Zagreb, 2000, pp.20-22.

JURISPRUDENCE AND OTHER LEGAL ACTS OF THE COUNTRY

2.1. The constitution in the national legal system.

Present the model of the hierarchical pyramid of your national legal acts (for example, in the Republic of Lithuania no national legal acts may be in conflict with the Constitution, while laws and other legal acts adopted by the Seimas or acts of the Government or the President of the Republic may not be in conflict with constitutional laws, etc.). The place and importance of the constitution in the national legal system? What concept of the constitution as the highest law is developed by the constitutional court? The concept of the constitution as explicit and implicit legal regulation. Is the constitution considered as law without gaps in the constitutional jurisprudence?

Article 5 para. 1 of the Constitution of the Republic of Croatia defines the hierarchy of legal acts, providing that laws shall conform with the Constitution, and other rules and regulations shall conform with the Constitution and law. This constitutional provision contains the principle of constitutionality (i.e. the supremacy of the Constitution over all other regulations) and legality.

Furthermore, Article 82 para. 1 of the Constitution provides that Parliament shall pass laws (organic laws) that regulate the rights of national minorities with a two-thirds majority vote of all the representatives, and paragraph 2 of that article that it shall pass laws (organic laws) that regulate constitutionally established human rights and fundamental freedoms, the electoral system, the organisation, authority and operation of bodies of the central government and the organization and authority of local and regional self-government by a majority vote of all the representatives.

Article 87 of the Constitution provides that the Croatian Parliament may authorize the Government, for a maximum period of one year, to regulate by decrees certain issues within its competence, except those relating to the elaboration of the constitutionally defined human rights and fundamental freedoms, national minority rights, the electoral system, the organization, authority and operation of government bodies and local self-government.

Article 100 para. 1 of the Constitution provides that during the state of war the President of the Republic may issue decrees with the force of law on the grounds of and within the authority obtained from the Croatian Parliament. If Parliament is not in session, the President of the Republic is authorized to regulate all the issues required by the state of war by decrees with the force of law. Paragraph 2 of that article provides that in case of an immediate threat to the independence, unity and existence of the State, or if the governmental bodies are prevented from regularly performing their constitutional duties, the President of the Republic may, at the proposal of the Prime Minister and with his counter-signature, issue decrees with the force of law.

Article 140 of the Constitution provides, among other things, that international agreements concluded and ratified in accordance with the Constitution and made public, and which are in force, shall be part of the internal legal order of the Republic of Croatia and shall be above law in terms of legal effects.

Therefore, the Constitution is the highest legal act, followed in the order given below by: constitutional acts, one of which, under the Constitution now in force, is the Constitutional Act on the Constitutional Court of the Republic of Croatia; ratified international agreements; laws (organic and ordinary), other regulations with legal force i.e. the decrees with the force of law issued by the President of the Republic under Article 100 of the Constitution (in the case of the so-called disorder of competence) and decrees of the Government of the Republic of Croatia under Article 87 of the Constitution issued on the grounds of authority provided by the Croatian Parliament (so-called delegated legislation); and finally, substatutory legislation and acts issued by the Government (e.g. regulations for the implementation of acts, decisions, standing rules etc.), ministries or ministers (e.g. rules of procedure, orders and instructions for the operation of laws and other regulations), bodies with public powers, bodies of local and regional self-government and other bodes.

In reference to whether the Constitution is seen as an explicit or implicit regulation, it must be pointed out that the Constitution may in principle be applied directly, but as some constitutional provisions are as a rule abstract they must be interpreted during application. Under Article 3 of the Constitution, freedom, equal rights, national equality and equality of genders, love of peace, social justice, respect for human rights, inviolability of ownership, conservation of nature and the environment, the rule of law, and a democratic multiparty system are the highest values of the constitutional order of the Republic of Croatia and the grounds for interpreting the Constitution.

Furthermore, under Article 5 para. 2 of the Constitution everyone shall abide by the Constitution and law and respect the legal order of the Republic of Croatia, and under Article 20 of the Constitution anyone who violates the constitutional provisions concerning human rights and fundamental freedoms shall be held personally responsible and may not be exculpated by invoking a superior order.

In a large number of its decisions and rulings the Constitutional Court directly applied particular constitutional provisions. However, some provisions of the Constitution contain only general principles and a framework that requires the legislator to regulate them in more detail, to which he is also invited by the Constitution itself. In this regulation constitutional principles and other values of the constitutional order directly bind the legislator, and the final assessment about the constitutionality of laws and the constitutionality and legality of other regulations is made by the Constitutional Court through the abstract control of their constitutionality and legality.

Article 19 para. 1 of the Constitution provides that individual decisions of administrative agencies and other bodies vested with pubic authority shall be grounded on law, and laws shall, under Article 5 para. 1 of the Constitution, conform with the Constitution.

Article 117 para. 3 of the Constitution provides that courts shall administer justice according to the Constitution and law. However, if an issue of constitutionality and legality arises in proceeding before a court (either regular or specialized), this court shall under Article 31 of the Constitutional Act request a review of the constitutionality of the law or the constitutionality and legality of another regulation by the Constitutional Court, because only the Constitutional Court has the jurisdiction to do so.

Concerning the question of whether constitutional jurisprudence considers the Constitution to be a "law" without any gaps, the legal position of the Constitutional Court is that its powers do not include reviewing the contents of constitutional provisions because these contents are exclusively a matter for the body that enacts the Constitution. This opinion is given, for example, in Decision No.: U-I-729/2001 of 6 June 2001 and in Ruling No.: U-I-1631/2000 of 28 March 2001 in which, starting from Article 128 of the Constitution, which defines the jurisdiction of the Constitutional Court, the Constitutional Court pointed out:

"These constitutional provisions show that the Constitutional Court does not have the jurisdiction to assess the substantive provisions of the Constitution (so-called "substantive anti-constitutionality") because it is legally and factually impossible to review whether a constitutional provision substantively conforms with a higher legal act since the Constitution is the basic and highest national legal act. It is, therefore, meaningless to speak about anyone's competence to decide on the "constitutionality of the constitution", and this includes the Constitutional Court.
However, the procedure of enacting and amending the Constitution may be a subject of constitutional review to determine whether the Constitution has been enacted, changed or amended in conformity with the provisions of the Constitution."

2.2. The *expressis verbis* consolidation in the constitution concerning the jurisdiction of the constitutional court to investigate and assess the constitutionality of legal gaps.

What legal acts (constitutional, organic laws, laws adopted by referendum, ordinary laws, regulations of the parliament, international agreements, laws of the subjects of the federation, substatutory acts, as well as laws adopted before coming into force of the constitution and other legal acts) are directly named as the object of constitutional control? Does the constitution of your country establish *expressis verbis* that the constitutional court investigates and assesses the constitutionality of gaps (legislative omission) in the legal regulation? Does the constitution provide for any special procedures for the investigation of legislative omission?

Under Article 128 of the Constitution, the Constitutional Court shall:
- decide on the conformity of laws with the Constitution;
- decide on the conformity of other regulations with the Constitution and laws;
- may decide on the constitutionality of laws and the constitutionality of laws and other regulations which have lost their legal force, provided that not more than one year has

passed from the moment of losing legal force to the submission of a request or a proposal to institute the proceedings;
- decide on constitutional complaints against the individual decisions of governmental bodies, bodies of local and regional self-government and legal entities with public authority, when these decisions violate human rights and fundamental freedoms, as well as the right to local and regional self-government guaranteed by the Constitution of the Republic of Croatia;
- observe the realization of constitutionality and legality and notify the Croatian Parliament on the instances of unconstitutionality and illegality observed;
- decide on jurisdictional disputes between the legislative, executive and judicial branches;
- decide, in conformity with the Constitution, on the impeachment of the President of the Republic;
- supervise the constitutionality of the programs and activities of political parties and may, in conformity with the Constitution, ban their work;
- supervise the constitutionality and legality of elections and national referenda, and decide on the electoral disputes which are not within the jurisdiction of courts;
- perform other duties specified by the Constitution.

One of these other duties, specified in Article 129 of the Constitution, is supervisory control over enacting operational regulations needed for the application of the Constitution, laws or other regulations. Under this article of the Constitution, if the Constitutional Court finds that the authorized body has not enacted a rule or a regulation needed for the application of the Constitution, law or other regulation, and was bound to enact such a regulation, it shall notify the Government thereof, while it shall notify the Croatian Parliament about the regulations which the Government was obliged to enact. The way in which the Constitutional Court acts in cases of supervision is regulated in Article 105 of the Constitutional Act, whereby if the Constitutional Court finds that the competent body has not passed a regulation for executing provisions of the Constitution, laws and other regulations, and was obliged to pass such a regulation, it shall inform the Government of the Republic of Croatia thereof, and if it finds that the Government has not passed a regulation that it was obliged to pass, it shall inform the Croatian Parliament thereof, by delivering a report to the Prime Minister of the Republic of Croatia, or to the Speaker of the Croatian Parliament. The Session of the Constitutional Court shall decide about the publication of the reports in *Narodne novine*.

Under Article 128 sub-para. 5 of the Constitution, the Constitutional Court observes the realization of constitutionality and legality and notifies the Croatian Parliament about the instances of unconstitutionality and illegality observed, and the manner in which the Constitutional Court acts in such cases is regulated under Article 104 of the Constitutional Act, whereby the Constitutional Court monitors the execution of constitutionality and legality and the Session of the Constitutional Court writes a report about any kind of unconstitutionality and illegality it has observed and delivers it in written form to the Speaker of the Croatian Parliament, who informs the Croatian Parliament thereof. It is by reference to Article 104 of the Constitutional Act that the Constitutional Court, in its reports, informed the Croatian Parliament about instances of unconstitutionality and illegality it observed in cases when a legal provision, because of

a legal gap in the regulation of a certain relation, led to the inequality or discrimination of a certain group. Examples of this will be given in the answer to the following question.

Therefore, the Constitutional Court decides on the conformity of laws with the Constitution, and on the conformity of other (substatutory) regulations with the Constitution and law (so-called *a posteriori* control), and it may also review the constitutionality of laws and the constitutionality and legality of other regulation that have gone out of force provided that not more than one year has passed from the moment of losing legal force until the submission of a request or a proposal to institute the proceedings. Furthermore, the Constitutional Court may review the conformity of a law with the Constitution or the conformity of another regulation with the Constitution and law even if it has already reviewed the same law or regulation (Article 54 of the Constitutional Act). It also monitors the realisation of constitutionality and legality and supervises the enactment of operational instruments. However, neither the Constitution nor the Constitutional Act *expressis verbis* give the Constitutional Court authority to examine and review the constitutionality of "*legal gaps*" in the legal order, nor do they contain special procedural rules for such cases.

2.3. Interpretation of the jurisdiction of the constitutional court to investigate and assess the constitutionality of legal gaps in constitutional jurisprudence

The constitutional court as the official interpreter of the constitution. Has the constitutional court revealed in more detail its powers, which are explicitly entrenched in the constitution, to investigate and assess legislative omission? What are the grounds for the conclusions about the implicit consolidation in the constitution regarding the competence of the constitutional court to investigate and assess the legislative omission? Has the constitutional court formed the doctrine of consequences of stating the existence of legislative omission? If yes, describe it.

It has already been said in the preceding answer that the Constitution, in the part referring to the powers of the Constitutional Court, does not explicitly include the power of the Constitutional Court to examine and assess legal gaps or legal omission. However, the Constitutional Court met with the issue of legal gaps in its cases and it took certain stands both on the issue itself and on the way it should deal with it within the framework of its jurisdiction in the Constitution and the Constitutional Act.

The Constitutional Court took the view that it does not have the jurisdiction to decide on the existence of legal gaps in proceedings of abstract control, but that under Article 205 para. 1 of the Constitutional Act it has the jurisdiction to act if it finds the existence of a legal gap when it is reviewing the conformity of a law with the Constitution or of another regulation with the Constitution and law, or if it finds that the makers of the regulation did not completely exhaust their powers to apply the provisions of the Constitution, law or other regulation. Thus, for example, in Ruling No.: U-II-1315/2001 of 9 July 2003, the Constitutional Court stated the following:

1. *The proposal to review conformity with the Constitution and law of the provisions of Articles 2 and 3 of the Excessive Use of Public Roads Ordinance (*Narodne novine*, No. 40/00, hereinafter: Ordinance), or of the Ordinance in its entirety, was submitted by: (…)*

2. *The applicants deem that the provisions of the Ordinance mentioned above are in breach of Article 25 paras. 1 and 3 of the Public Roads Act (*Narodne novine*, Nos. 100/96, 76/98, 27/01, 114/01, 117/01 and 65/02), and of the provisions of Article 3, 5 para. 1 and 49 para. 2 (first sentence) of the Constitution of the Republic of Croatia.*

The applicants substantiate the violation of the above constitutional and legal provisions by stating that the only activity whose performance leads to the excessive use of a public road is transportation, and this activity is not included in Article 3 of the disputed Ordinance, that is, that the Minister of Maritime Affairs, Transport and Communications, who issued the disputed Ordinance, failed to do so.

Concerning the disputed Article 2 of the Ordinance, the applicants indicate that it does not set standards for determining compensation for excessive use of public roads, as required by the provision of Article 25 para. 2 of the Public Roads Act.
(...)
The proposal is not admissible in the part disputing the constitutionality and legality of the provisions of Article 2 and Article 3 of the Ordinance.
(...)

4. *The Court found that the disputed provisions of Article 2 and Article 3 of the Ordinance, and its other provisions, have not set standards for the excessive use of a public road, but have only stipulated excessive use of a public road and increased traffic load (Article 2 paras. 1 and 2) and activities (Article 3). The disputed provisions of the Ordinance, and its other provisions, do not set the criteria.*
The content of the provisions of Article 2 and Article 3 the Ordinance does not regulate issues that should have been regulated in accordance with the relevant legislation. For Article 25 para. 1 to come into legal effect, standards should have been set based on the three cumulative legal requirements that represent an indivisible set of legally relevant facts which can only jointly lead to excessive road use, and therefore to the obligation to pay compensation.
Therefore, the Court holds that there is a legal gap in this part of the disputed Ordinance.

5. *In accordance with the provision of Article 128 para. 1 sub-para. 2 of the Constitution of the Republic of Croatia, the Constitutional Court decides on conformity of other regulations with the Constitution and law. In accordance with the provision of Article 55 para. 1 of the Constitutional Act, the Constitutional Court shall repeal a law, or some of its provisions, if it finds that it is not in accordance with the Constitution; or another regulation, or some of its provisions, if it finds that it is not in accordance with the Constitution and the law.*

It follows from the above provisions that the Constitutional Court is not competent to review the constitutionality of a law, or the constitutionality and legality of another regulation, in response to a proposal that disputes the law or other regulation because the body that issued the law or regulation omitted to regulate something in it.
The Court expressed its stand about legal gaps in its Ruling No.: U-I-709/1995 of 1 March 2000.

(...)

7. *The provision of Article 105 para. 1 of the Constitutional Act stipulates the following:*

(1) If the Constitutional Court finds that the competent body has not passed a regulation for executing provisions of the Constitution, laws and other regulations, and was obliged to pass such a regulation, it shall so inform the Government of the Republic of Croatia.

(2) If the Constitutional Court finds that the Government of the Republic of Croatia has not passed a regulation for executing provisions of the Constitution, laws and other regulations, it shall so inform the Croatian Parliament.

(3) The report in para. 1 of this Article shall be delivered in written form to the Prime Minister of the Republic of Croatia, and the report in paragraph 2 of this Article to the Speaker of the Croatian Parliament.
(4) The Session of the Constitutional Court shall decide about the publication of the reports in paragraphs 1 and 2 of this Article in the Official Gazette Narodne novine.

The Constitutional Court holds that, in accordance with the provision of Article 105 para. 1 of the Constitutional Act, it is competent to act in the case when, during the review of conformity of a law with the Constitution or of another regulation with the Constitution and law, it establishes the existence of a legal vacancy, that is, when it establishes that the body that issued a regulation had not completely exhausted the authority to execute provisions of the Constitution, law or another regulation.

Considering the finding in Point 4 of this ruling, that there is a legal vacancy which has, in the opinion of this Court, come about because the body that issued the disputed regulation (the Minister of Maritime Affairs, Transport and Communications) failed to completely exhaust the authority stipulated in Article 25 para. 2 of the Law of Public Roads, in this Ruling the Court is informing the Government of the Republic of Croatia thereof.“

Unlike the above stand (which was also taken in many other cases, see the examples given in the answer to question 3.4.), in a similar case, in Decision No.: U-II-81/1999 of 13 September 2000, the Constitutional Court took a different stand. In reference to the proposal of a group of councillors of the Požega City Council to review conformity with the constitution and law of the provisions of Section V of the Požega City Statute (which regulated local self-government in the City of Požega), the Constitutional Court found that in these regulations the Statute did not regulate the issues which Article 59 of the Local Self-Government and Administration Act delegates to the Statute, so it repealed these provisions of the Statute giving the following reasons:

7. *Under Article 59 of the Act, the Požega City Council has the obligation to regulate by Statue the rules for the election and recall of the councillors of local councils, and lay the foundations of the rules for local councils that will be valid for the whole City of Požega.*

Since the Požega City Council did not regulate these questions in its Statute, it violated the provision of Article 5 para. 1 of the Constitution, whereby regulations must be in conformity with the Constitution and law.

In the view of the Constitutional Court, this case it is not only a problem of legal gaps but also one of not complying with the legal obligation of the Požega City Council, i.e. an omission by a local self-government body to regulate local self-government, which is a violation of the Constitution of the Republic of Croatia and of the Local Self-Government and Administration Act. The Constitutional Court, in proceedings of reviewing the conformity of another regulation, in this case the Statute, with the Constitution and law, starts from the contents of the other regulation

and if it finds that it is not in conformity with the Constitution and law, it repeals or annuls it, in part or completely. The Constitutional Court cannot examine the constitutionality and legality of the inexistent provisions of another regulation, and it can therefore neither repeal nor annul them. However, when a law explicitly binds a body to issue another regulation to regulate certain question, and the body does not do so, then this regulation is illegal and unconstitutional and the Constitutional Court, in this case, renders a decision to repeal or annul it."

Furthermore, in proceedings of reviewing the conformity of a law with the Constitution or of another regulation with the Constitution, the Constitutional Court *ex officio* reported to the Croatian Parliament (under Article 128 sub-para. 5 of the Constitution and Article 104 of the Constitutional Act, which do not explicitly mention legal gaps but occurrences of unconstitutionality and illegality) about the need to amend certain legal provisions, the existence of legal gaps because substatutory regulations were not brought within the statutory deadlines and the omission to amend laws after the Constitutional Court passed a decision on repeal in the following cases (but it also referred to the above provisions of the Constitution and Constitutional Act in reports delivered in other cases where legal gaps were not the issue):

In the Report to the Croatian Parliament No.: U-X-1457/2007 of 18 April 2007 the Constitutional Court stated that the Pension Insurance Act should also have regulated the requirements necessary for common-law widows and widowers to acquire the right to a survivor's pension, not only married widows and widowers. It reported to the Croatian Parliament about the unconstitutionality noticed in the pension insurance system which concerns the unequal legal position in the right to a survivor's pension of some family members – common-law widows and widowers, in relation to other family members – married widows and widowers. It noted the need to amend the Pension Insurance Act so that it also recognises the right of a common-law widow or widower of the insured person, as a family member, to receive a survivor's pension.

In the Report to the Croatian Parliament No.: U-X-835/2005 of 24 February 2005 the Constitutional Court, among other things, observed that substatutory regulations are often brought after the statutory deadline has passed, which contravenes the principle of constitutionality and legality. The Court received a large number of proposals to review the constitutionality and legality of other (substatutory) regulations that were enacted after the statutory deadline and to repeal them for breach of Article 5 para. 2 (everyone shall abide by the Constitution and law and respect the legal order of the Republic of Croatia) and Article 14 para. 2 (equality before the law) of the Constitution. In Ruling No.: U-II-4343/2004 of 24 February 2005 the Constitutional Court gave a detailed explanation of its reasons for not accepting these proposals, taking the stand that the reasons of legal security of the existing legal order outweigh the reasons for the requests to repeal the disputed substatutory acts.

In the Report to the Croatian Parliament No.: U-X-2191/2007 of 20 June 2007 the Constitutional Court notified about the need to amend the Apartment Lease Act, and stated the following:
(...)

1. *The Constitutional Court of the Republic of Croatia passed, on 31 March 1998, decision No U-I-762/1996 and repealed the provision of Article 40 para. 2 of the Apartment Lease Act (*Narodne novine*, No 91/96). In the same decision the Constitutional Court ordered that the disputed legal provision shall lose its legal force after the expiry of six months from the day of its publication in* Narodne novine.
The decision was published in Narodne novine *No 48 of 6 April 1998.*
(...)
The Constitutional Court observes that the Croatian Parliament failed, in the period from the publication of the stated Constitutional Court decision (6 April 1998) to the date when its repealing effect enters into force (6 October, 1998), to revise or amend Article 40 of the Apartment Lease Act in accordance with the legal stand expressed in the stated Constitutional Court decision, and it has failed to do so by the time of asserting this Report.
(...)
4. *Pursuant to the provisions of Article 31 of the Constitutional Act on the Constitutional Court of the Republic of Croatia (hereinafter: the Constitutional Act), Constitutional Court decisions are obligatory and all bodies of the central government shall, within their constitutional and legal jurisdiction, execute the decisions of the Constitutional Court.*

The Constitutional Court notes that, within its jurisdiction, it has no authority to remove the inconsistency in the application of the Apartment Lease Act that came about after the repealed legal provision lost its force.
(...)
It follows that only the legislator is empowered to regulate, by passing the respective revisions and amendments to the Apartment Lease Act, the disputed legal relations in the manner that will ensure the equality of all before the law.

5. *Monitoring the execution of constitutionality and legality, and bearing in mind the obligatory execution of Constitutional Court decisions (Article 31 of the Constitutional Act), pursuant to Article 128 sub-para. 5 of the Constitution of the Republic of Croatia and Article 104 of the Constitutional Act, this Report is being delivered to the Croatian Parliament.*

The above practice of constitutional justice shows that the Constitutional Court differentiates between two kinds of cases in reference to legal gaps. One is when the law-maker omits to enact a regulation as a whole or part of it (complete absence of rule) and his obligation to do so and the statutory deadline were prescribed by a hierarchically higher regulation (e.g. Ruling No.: U-II-1315/2001 of 9 July 2003). The second is when the Court finds, during proceedings of reviewing the conformity of a law with the Constitution or of another regulation with the Constitution and law, that the legislator or other law-maker formulated a provision in such a way that its wording leads to constitutionally unacceptable inequality or discrimination (incomplete rule, e.g. Report No.: U-X-1457/2007 of 18 April 2007).

Furthermore, the Constitutional Court encountered legal gaps in proceedings of concrete control when it examined, in reference to constitutional complaints, whether the general courts interpreted existing legal gaps in conformity with the Constitution. An example of this is the case in which the applicant (a natural person) lodged a constitutional complaint for, among other things, the violation of the right to the equality of all before the law and the right to work, earnings and social security. He appealed against a judgment of the Supreme Court of the Republic of Croatia which finalised a labour

dispute in which the Supreme Court found that the applicant's employment had ended because a new firm had been created from a working unit of the former firm on the grounds of the Decree Prohibiting the Disposal of Real Property on the Territory of the Republic of Croatia (*Narodne novine*, No. 52/91, hereinafter: Decree). In the reasoning for Decision No.: U-III-1621/2001 of 30 March 2005, in which it quashed the judgment of the Supreme Court of the Republic of Croatia, the Constitutional Court, among other things, stated:

5. *The Constitutional Court of the Republic of Croatia finds no grounds for the view given by the revision court, because Article 6 of the Decree from 1991 recognises the right of workers in a working unit to decide how they will set up the new form of organisation, which also implies their right to decide on their status in labour law. Otherwise the form of organisation would be to the detriment of the workers, which contravenes the legal purpose of the Decree which was issued to protect the economic interest of the Republic of Croatia under the current circumstances.*
It must also be noted that the above Decree from 1991, although it does not explicitly regulate relations in labour law and the status in labour law of the existing workers, cannot be interpreted to the detriment of the workers because of the existence of a legal gap. Accepting the legal opinion of the Supreme Court would imply that the new legal person has the right to organise itself without any obligation towards the fact that it employs workers at the moment of its organisation, which was undoubtedly not the purpose of the Decree.
The Court took the identical stand in case No.: U-III-1027/1998 of 26 January 2001.

Another kind of case instituted by a constitutional complaint was when applicants objected to the violation of their right to a trial in a reasonable time and access to court in civil suits for compensation of damage caused by terrorist acts or by members of the Croatian Army and police force in connection with their service during the Homeland War. The Obligations Act prescribed the State's responsibility in the above cases but it was amended to stay all civil suits of this kind until special laws are passed regulating the State's responsibility in the above cases. Although the amendments of the Obligations Act prescribed a deadline for the legislator to pass the new regulation, he did not obey this deadline even approximately but passed the regulations much later (therefore, until the special laws were passed there was a legal gap, and the stay of proceedings by the force of law made it impossible for the competent courts to during that time undertake actions with the purpose of deciding about the claims). In such cases the Constitutional Court passed decisions (e.g. Decision No.: U-IIIA-892/2002 of 7 July 2004 and many others) finding a violation of the right to a trial in a reasonable time and a violation of the right of access to court and awarded appropriate compensation for the violation of the above constitutional rights.

The Constitutional Court has not formed a doctrine of the consequences of stating the existence of legislative omission.

2.4. The establishment, either in the law which regulates the activity of the constitutional court or in other legal act, of the jurisdiction of the constitutional court to investigate and assess the constitutionality of legal gaps.

The powers of the constitutional court (provided for in the law which regulates the

activity of the constitutional court or in other legal act (if this is not directly established in the constitution)) to investigate and assess legal gaps in the legal regulation established in laws and other legal acts. Does the law (or other legal act) provide for any special procedure for investigation into legal omission? If yes, describe them briefly. What decisions, under this law or other legal act, does the constitutional court adopt after it has stated the existence of the legislative omission? Does the said law or legal act provide as to who and how must remove the legislative omission? Is it provided for in other laws and legal acts (for example, the regulation of the parliament)?

The answers to questions 2.2. and 2.3., which presented the relevant provisions of the Constitution and the Constitutional Act and the practice of constitutional justice, showed the powers of the Constitutional Court to investigate and assess the constitutionality of legal omission. Pursuant to the above, and in connection with the Constitutional Court's powers to monitor the execution of constitutionality and legality (Article 104 of the Constitutional Act) and supervise passing operational instruments (Article 105 of the Constitutional Act), it must be noted that in these cases the Constitutional Act does not lay down the procedure nor the persons empowered to institute proceedings, but in accordance with the practice of constitutional justice any natural or legal person may apply to the Constitutional Court under the provisions of Articles 104 and 105 of the Constitutional Act. The applications filed under these articles to date show that as a rule the applicant claimed that certain operational regulations that by Constitution, law or some other regulation should have been passed within a certain deadline, had not been passed. In such proceedings the Constitutional Court requests the body competent for passing the operational regulation to declare whether the regulation has been passed, and if not why. On the grounds of this declaration, if the regulation has been passed the Constitutional Court informs the applicant thereof, and if it has not been passed decides on further proceedings under Articles 104 and 105 of the Constitutional Act.

The Constitutional Act does not stipulate who and how must remove the unconstitutionality and illegality noted in the report, or the omission to pass operational instruments, but only states that the Constitutional Court is reporting about this either to the Government or to Parliament. No other regulation, including the Standing Rules of the Croatian Parliament, specially prescribe how, after the report of the Constitutional Court is delivered, the legal omission it refers will be removed, nor are there any provisions about how to act after the report of the Constitutional Court is received. In connection with the reports, the competent bodies act on the grounds of the same rules they use to enact laws and other regulations.

3. LEGISLATIVE OMISSION AS AN OBJECT OF INVESTIGATION BY THE CONSTITUTIONAL COURT

3.1. Application to the constitutional court

What subjects may apply to the constitutional court in your country? Can they all

raise the question of legislative omission?

Natural and legal persons may submit various kinds of applications to the Constitutional Court (constitutional complaints, proposals, requests, appeals etc.) to institute various kinds of proceedings provided for in the Constitution and the Constitutional Act (see answer to question 2.2.). However, instituting proceedings in the case of legislative omission is not regulated in the Constitution or in the Constitutional Act or in the Standing Rules of the Constitutional Court (nor do they recognise the concept of legislative omission) so there is no rule about who may raise the question of legislative omission. Therefore we show below which subjects are empowered to institute proceedings in which they, among other things, also raised the question of the existence of legislative omission. As a rule these were proceedings reviewing the conformity of laws with the Constitution and other regulations with the Constitution and law, and proceedings instituted by a constitutional complaint. The answers to questions 2.2-2.4. have already shown in detail the proceedings in which the Constitutional Court was requested to act under Articles 104 and 105 of the Constitutional Act.

Reviewing the conformity of laws with the Constitution and other regulations with the Constitution and law.

Under the provisions of the Constitutional Act, proceedings reviewing the conformity of laws with the Constitution and other regulations with the constitution and law:
- are presented by request by one fifth of the members of the Croatian Parliament**,** a committee of the Croatian Parliament, the President of the Republic of Croatia, the Government of the Republic of Croatia (to review the constitutionality and legality of regulations), the Supreme Court of the Republic of Croatia or another court of justice, if the issue of constitutionality and legality has arisen in proceedings conducted before that particular court of justice, and the People's Ombudsman when the question of constitutionality and legality appears in his proceedings (Article 35 of the Constitutional Act);
- the representative body of a unit of local or regional self-government in the Republic of Croatia, if it considers that a law regulating the organisation, competence or financing of units of local and regional self-government is not in accordance with the Constitution, may present a request with the Constitutional Court to review the constitutionality of that law or some of its provisions (Article 36 para. 1 of the Constitutional Act);
- every individual or legal person has the right to propose the institution of proceedings to review the constitutionality of the law and the legality and constitutionality of other regulations (Article 38 para. 1 of the Constitutional Act), in which the existence of legal interest is not required; and
- the Constitutional Court may institute proceedings *ex officio* (Article 38 para. 2 of the Constitutional Act).

It is in this kind of proceedings (so-called abstract control) that the Constitutional Court finds out about the existence of legal gaps (it states their existence in the reasoning for its decisions and rulings, but it does not review them), even when the parties do not explicitly refer to them. So far the proponents (usually natural persons, companies and associations) noted the existence of legal gaps in only several cases of this kind. The

Constitutional Court rejected such proposals for lack of jurisdiction and decided, depending on the circumstances, about further proceedings under Articles 104 and 105 of the Constitutional Act. If it was a case of a hierarchically higher regulation providing for something to be regulated by a hierarchically lower or operational regulation, and this had not been done, the Court acted in accordance with Article 105 of the Constitutional Act (e.g. Ruling No.: U-II-1315/2001 of 9 July 2003, see answer to question 2.3.), and if it was a case of an incomplete rule contextually conceived in such a way that it led to the inequality or discrimination of a certain group, it acted in accordance with Article 104 of the Constitutional Act (e.g. U-X-1457/2007 of 18 April 2007, see answer to question 2.3.). As a rule these were cases when the "inexistence of a norm" made it objectively impossible to repeal either the provision or its part. Because of the incomplete nature of the provision or regulation it was necessary to supplement it with the required normative contents, not repeal it.

The constitutional complaint for the protection of human rights and fundamental freedoms guaranteed in the Constitution.

Another kind of proceedings in which the question of legal gaps appeared directly or indirectly, but rarely, were those instituted by the constitutional complaint (so-called concrete control). In the Republic of Croatia, everyone may lodge a constitutional complaint with the Constitutional Court if he deems that the individual act of a body of the central government, a body of local and regional self-government, or a legal person with public authority, which decided about his rights and obligations, or about suspicion or accusation for a criminal act, violated his human rights or fundamental freedoms guaranteed by the Constitution, or his right to local and regional self-government guaranteed in the Constitution (hereinafter: constitutional right). These are proceedings (Article 62 of the Constitutional Act) in which it is necessary for the applicant to exhaust all the legal remedies and to lodge the constitutional complaint within 30 days from the day he received the decision that all the legal remedies have been exhausted. Furthermore, the Constitutional Court may institute proceedings in response to a constitutional complaint even before all the legal remedies have been exhausted (Article 63 of the Constitutional Act) in cases when the court of justice did not decide within a reasonable time about the rights and obligations of the party, or about the suspicion or accusation for a criminal offence, or in cases when the disputed individual act grossly violates constitutional rights and it is completely clear that grave and irreparable consequences may arise for the applicant if Constitutional Court proceedings are not initiated.

3.2. Legislative omission in the petitions of the petitioners.

May the petitioners who apply to the constitutional court ground their doubts on the constitutionality of the disputed law or other act on the fact that there is a legal gap (legislative omission) in the said law or act? What part of the petitions received at the constitutional court is comprised of the petitions, wherein the incompliance of the act with the constitution is related to the legislative omission? What subjects, who have the right to apply to the constitutional court,

relatively more often specify in their petitions the legislative omission as the reason of the act's being in conflict with the constitution? Are there any specific requirements provided for as regards the form, contents and structure of the applications concerning the unconstitutionality of the legislative omission? If yes, describe them. Are they established in the law which regulates the activity of the constitutional court or are they formulated in the constitutional jurisprudence?

The answers to these questions have partly already been given in the answers to questions 2.3. and 3.1. of this Questionnaire.

In the proceedings of reviewing the constitutionality of laws and the constitutionality and legality of other regulations the empowered petitioners (usually natural persons, and among legal persons companies and associations) have, in relation to the total number of cases of this kind (in the period from 1991 to 31 December 2007, of the 5,628 filed cases 4,728 were solved), rarely raised the question of a legal gap as the reason for the unconstitutionality of laws or the unconstitutionality and illegality of other regulations. The number of cases that referred to legal gaps is very small (a text search of the Constitutional Court's decisions base resulted in a rough estimate of about twenty solved cases from 1991 to 31 December 2007) in relation to the total number of cases, and the Constitutional Court does not keep a special record of such cases.

In the proceedings of monitoring constitutionality and legality (Article 104 of the Constitutional Act) and supervisory control over passing operational regulations (Article 105 of the Constitutional Act) in the period from 1991 to 31 December 2007, of a total number of 221 filed cases 155 were solved, but the Constitutional Court delivered a report to the competent body in only several of them. If the number of these cases is compared with the total number of solved cases in the same period (in all kinds of proceedings), i.e. 32,146 solved cases of a total number of 39,466 filed cases, this is a small number of cases in relation to the total number of cases dealt with by the Constitutional Court.

The Constitution and the Constitutional Act do not provide for a special procedure for reviewing the constitutionality of legislative omission so no special conditions are prescribed for the form, contents and structure of applications concerning unconstitutionality caused by legislative omission, nor have these been established in constitutional jurisprudence (bearing in mind what has already been said in the answers to questions 2.2., 2.3., 2.4. and 3.1.). The Constitutional Act stipulates the form of a request (Article 39) or a proposal (Article 40) to review the constitutionality of laws or the constitutionality and legality of other regulations, and of a constitutional complaint (Article 65), and if the applicants also raise the question of possible legal gaps in these applications it is not necessary because of that for them to comply with any special, additional conditions in form, contents and structure.

3.3. Investigation of legislative omission on the initiative of the constitutional court.

Does the constitutional court begin the investigation of the legislative omission *ex officio* on its own initiative while considering the petition and upon what does it ground it (if the petitioner does not request to investigate the question of the legislative omission)? Specify more typical cases and describe the reasoning of the court in more detail.

Generally, the Constitutional Court finds out about the existence of legal gaps and/or legislative omission from the applications of its petitioners, as a rule in proceedings of reviewing the constitutionality of laws and the constitutionality and legality of other regulations, regardless of whether they bring up the question of a legal gap or not. An example of this is Decision No.: U-I-1152/2000 etc. of 18 April 2007, rendered in proceedings reviewing the constitutionality of the Pension Insurance Act (*Narodne novine*, Nos. 102/98, 127/00, 59/01, 109/01, 147/02, 117/03, 30/04, 177/04 and 92/05, hereinafter: PIA) instituted by the proposals of several natural persons, in which the Constitutional Court, among other things, stated as follows:

20. *On the other hand, the applicant A.M. deems that Article 21 para. 1 sub-para. 1 PIA contravenes the Constitution because she, as the common-law widow of the deceased insured person, does not have the right to a survivor's pension. This is an issue of the legal equality of common-law widows/widowers with married widows/widowers in entitlement to a survivor's pension after the death of the spouse.*

The Constitutional Court notes that the PIA entitles divorced spouses to a survivor's pension (if the court has granted them the right to maintenance), but not the common-law widow/widower of a deceased insured person (even in cases when the court has granted them the right to maintenance).

Article 61 of the Constitution provides as follows:

Article 61

The family shall enjoy special protection of the State.
Marriage and legal relations in marriage, common-law marriage and families shall be regulated by law.

In the Republic of Croatia the family is under the special protection of the state, so it represents a protected constitutional benefit. Marriage and common-law marriage are constitutionally recognised unions. In family matters, the Constitution makes no difference between marriage and common-law marriage. Both unions are recognised in the Constitution and both are regulated by law.

It follows from the above that not recognising entitlement to a survivor's pension for the common-law widow or widower of a deceased insured person leads to inequality between two constitutionally-recognised family unions, which contravenes equality as a highest value of the constitutional order of the Republic of Croatia, provided for in Article 3 of the Constitution.

In accordance with the above, starting from Article 61 of the Constitution which recognises two kinds of family unions, and taking into account the legal nature and purpose of a survivor's pension in the pension insurance system, which is based on the obligation of the insured person to support family members (see first paragraph of point 19.1 above), the Constitutional Court

finds that the PIA should regulate entitlement to a survivor's pension not only to married widows and widowers, but also to common-law widows and widowers.

Thus the Constitutional Court will, under its powers in Article 128 sub-para. 5 of the Constitution and Article 104 of the Constitutional Act, report to the Croatian Parliament about this instance of unconstitutionality, i.e. about the need for the necessary amendment of the PIA so as to entitle common-law spouses to a survivor's pension within the PIA regulated pension insurance scheme.

In this case the Constitutional Court cannot avail itself of its powers under Article 130 para. 1 of the Constitution and Article 55 para. 1 of the Constitutional Act, because repealing Article 21 para. 1 sub-para. 1 PIA would groundlessly deprive married widows/widowers of the right to a survivor's pension (Article 62 PIA clearly shows that only married spouses are considered widows/widowers in the sense of the disputed Article 21 para. 1 sub-para. 1 PIA), which would not achieve the purpose for which the proponent submitted to the Constitutional Court the proposal to review conformity with the Constitution of Article 21 para. 1 sub-para. 1 PIA.

Furthermore, this purpose would also not be accomplished by repealing Article 21 para. 1 sub-para. 1 PIA because this article is grounded on the legal view that married partners have the duty to support one another and their children (see point 19.1 above). On the other hand, the existence of a common-law marriage, as a condition for recognising entitlement to a survivor's pension, would by the nature of things have to be proved in special proceedings, which requires an amendment of the PIA, not the repeal of the existing legal arrangement.

The reasons for the decision quoted above also show why the Constitutional Court does not repeal laws and other regulations (or provisions thereof) when it finds a legal gap or legislative omission. On the grounds of the unconstitutionality noticed, which appeared in the unequal legal position of family members – common-law widows or widowers - in realising the right to a survivor's pension and the established need to amend the above provision of the PIA, the Constitutional Court, under Article 128 sub-para. 5 of the Constitution and Article 104 of the Constitutional Act, delivered to the Croatian Parliament Report No.: U-X-1457/2007 of 18 April 2007, in the reasons for which it stated the following:

1. *In the pension system regulated by the Pension Insurance Act (Narodne novine, Nos. 102/98, 127/00, 59/01, 109/01, 147/02, 117/03, 30/04, 177/04 and 92/05; hereinafter: PIA), a survivor's pension is a long-term monthly income from pension insurance to which certain family members are entitled after the death of the insured person under general and special legal conditions. This pension is recognised on the grounds of the contributions paid by the insured person for old age, disability or death, and is based on the obligation of spouses (insured persons) to support one another and their children, and other members of their family, under statutory conditions*
Article 21 paragraph 1 PIA defines persons who are considered family members:

C. THE INSURED PERSON'S FAMILY MEMBERS
Article 21
(1) In the event of the death of the insured person or of the beneficiary of a statutory or early old-age or disability pension, the following members of their families shall be insured:
1) widow or widower
2) divorced spouse entitled to be supported

3) children (marital, extramarital, or adopted)
4) foster-children supported by the insured person, grandchildren supported by the insured person – provided that they have no parents, or if their only parent is or both parents are completely disabled for work,
5) parents – father, mother, stepfather, stepmother and fosterer of the insured person, who were supported by the insured person
6) children with no parents – brothers, sisters and other children the insured person supported, provided they have no parents, or if they only parent is or both parents are disabled for work.

In the case of the closest family members (widow/widower, children of certain age), PIA is based on the obligation of spouses to support one another and their children.
On the other hand, in the case of other family members (divorced spouse, foster children, grandchildren, parents and children of certain age) the PIA requires that the insured person supported them until his/her death, and it is therefore necessary in all these cases to establish this fact in respective proceedings.

2. *Pursuant to Article 62 PIA, widows/widowers, within the meaning of Article 21 para 1 sub-para. 1 PIA, are only those widows/widowers who lived in a married union with a deceased insured person. It reads:*

Article 62

(1) A widow shall be entitled to a survivor's pension:
1) if before the death of her spouse, from whom she derives the entitlement, she has reached the age of 50, or
2) if she is below the age of 50 and if she has suffered general disability for work prior to her spouse's death, or if such disability arose within one year after her spouse's death, or
3) if after the death of her spouse, the widow performed parental duties for one or more children who are entitled to a survivor's pension after their father's death. If the widow suffers general disability for work during the utilisation of the entitlement from the above mentioned title, she shall continue to be entitled to a survivor's pension as long as such disability exists.
(2) The widow who prior to the death of her spouse has not reached the age of 50, but has reached the age of 45, shall acquire the entitlement to a survivor's pension when she reaches the age of 50.
(3) The widow who, during the time she was entitled to a survivor's pension under paragraph 1 sub-para. 3 of this article, reached the age of 50, shall continue to be entitled to a survivor's pension permanently, and if divested of such right before she has reached the age of 50, but after she has reached the age of 45, she may acquire the entitlement again when she has reached the age of 50.
(4) The widow who, prior to the death of her spouse or prior to the termination of the entitlement to survivor's pension, has reached the age of 45, shall acquire the entitlement to a survivor's pension even before she reaches the age of 50 if she suffers general disability to work.
(5) A widower shall be entitled to a survivor's pension in accordance with the conditions specified in paragraphs 1 to 4 of this article.
(6) A widow shall also be entitled to a survivor's pension when a child of the insured person was born after his death (paragraph 1 sub-para. 3) beginning from the day of the insured person's death.

The above legal provisions clearly show that PIA does not recognise a common-law widow/widower as a deceased insured person's family member. Therefore, PIA does not entitle a widow/widower who lived in a common-law marriage with a deceased insured person to a survivor's pension, even in cases when the court granted them the right to maintenance.

3. *Article* 61 *of the Constitution provides as follows*:

Article 61

The family shall enjoy special protection of the State.
Marriage and legal relations in marriage, common-law marriage and families shall be regulated by law.

In the Republic of Croatia the family is under the special protection of the state, so it represents a protected constitutional benefit. Marriage and common-law marriage are constitutionally recognised unions. In family matters, the Constitution makes no difference between marriage and common-law marriage. Both unions are recognised in the Constitution and both are regulated by law.

Starting from the provision of Article 61 of the Constitution, which recognises two kinds of family unions (marriage and common-law), and taking into account the legal nature and purpose of a survivor's pension in the pension insurance system, which is based on the obligation of the insured person to support family members (see first point of this Notification), the Constitutional Court finds that PIA should regulate entitlement to a survivor's pension not only for married widows, but also for common-law widows and widowers.

4. *In examining the issues concerning the entitlement to a survivor's pension of common-law widows/widowers, the Constitutional Court bore in mind the fact that the Family Act (*Narodne novine*, Nos. 116/03, 17/04 and 136/04) regulates the legal effects of a common-law union between a woman and a man, and that in inheritance relations, pursuant to the law, the common-law spouse, who is in the same position as a married spouse regarding inheritance right, is also entitled to inherit the testator (Article 8/2 of the Inheritance Act,* Narodne novine*, No. 48/03).*

Although the above acts are not directly applicable in the pension insurance system regulated by the PIA, they represent the framework for regulating the right to a survivor's pension for widows/widowers in that system.

5. *Finally, the Constitutional Court stresses that the Act on the Rights of Croatian Homeland War Defenders and Members of their Families (*Narodne novine*, No. 174/04, hereinafter CHWDA) explicitly recognises the position of a close family member for common-law widows/widowers, and therefore also the right to a survivor's pension.*

The common-law spouse of a deceased, captured or missing Croatian defender is recognised as a close family member provided that, before the defender's death, capture or disappearance, they lived in a common household for at least three years, where the common-law marriage status, with the purpose of establishing the rights recognised in the CHWDA, is established in a non-contentious court proceeding (Article 6 paragraphs 2 and 3 CHWDA).

6. *Starting from the fact that the rights recognised in the CHWDA (including the right to a survivor's pension) are funded from the State Budget (Article 106 CHWDA), it could be said that the common-law spouse (also), as a close family member of a deceased, captured or missing Croatian defender, is entitled to some kind of state pension. The Constitutional Court therefore finds even stronger grounds to recognise, in the pension insurance system regulated by the PIA, the common-law spouse of a deceased insured person as a family member, because this system is financed by the contributions paid by the insured persons.*

In connection with this the Constitutional Court notes that, pursuant to Article 2 paragraph 4 indent 1 of the Constitution, the Croatian Parliament is empowered to regulate all issues regarding the right of a common-law spouse to a survivor's pension (e.g. which union of a man and woman would be considered a common-law marriage within the meaning of the PIA, the manner of proving it, under which special conditions would the right to a survivor's pension be recognised to a common-law spouse, to what extent etc.

7. *In accordance with the above, the Constitutional Court notifies the Croatian Parliament about the need to amend the PIA with the purpose of regulating the legal conditions for entitlement to a survivor's pension of a common-law widow/widower, as a member of the deceased insured person's family.*

Another case of legislative omission, and the only one of its kind in the practice to date of the Constitutional Court, is that when the legislator did not enact a new provision instead of the one repealed by a decision of the Constitutional Court. In its Report to the Croatian Parliament, No.: U-X-2191/2007 of 20 June 2007, the Constitutional Court stated as follows:

1. *The Constitutional Court of the Republic of Croatia passed, on 31 March 1998, decision No U-I-762/1996 and repealed the provision of Article 40 para. 2 of the Apartment Lease Act (*Narodne novine*, No 91/96). In that decision the Constitutional Court also ordered that the disputed legal provision should lose its legal force six months from the day of its publication in* Narodne novine*.*

The decision was published in Narodne novine *No. 48 of 6 April 1998.*

The repealed provision of Article 40 para. 2 of the Apartment Lease Act reads:

"(2) For the cases in para. 1 sub-para. 2 of the Apartment Lease Act, a landlord may terminate a lease agreement concluded for an indefinite period only if he/she has provided the lessee with another appropriate apartment with living conditions not less favourable for the lessee."

The above provision was related to the grounds for termination of a lease in Article 21 para. 1 of the Apartment Lease Act, pursuant to which a landlord (owner) may terminate a lease agreement concluded for an indefinite period of time if he/she, among other things, intends to move into the apartment himself/herself or intends to move his/her descendants, parents or persons whom he/she is, pursuant to separate regulations, obliged to support.

In the decision repealing Article 40 para. 2 of the Apartment Lease Act (point III.12) the Constitutional Court expressed the following view:

"The disputed provision conditions the right of a landlord to terminate a lease agreement if he/she intends to move into the apartment himself/herself or intends to move his/her descendants, parents or persons he/she is, pursuant to separate regulations, obliged to support, with the obligation to provide the lessee with another appropriate apartment with living conditions not less favourable for the lessee, that is, in the same way as stipulated in Article 21 para. 2 of the Apartment Lease Act which the Court found in breach of the Constitution. Therefore, the reasons stated in point III.6 stand here as well, for which reasons, and also for not being sufficiently selective, the provision should have been repealed in relation to protected tenants also. However, due to its correlation with the provision of para. 1 of the same Article the effect of

*its repeal should have been postponed within the meaning of Article 21 para. 2 of the Constitutional Act on the Constitutional Court (*Narodne novine*, No 13/91), which was done in point 1.2. of the Decision. The legislator can, within the determined period of six months, appropriately regulate the requirements for termination within the meaning of the provision of Article 40 para. 1 sub-para. 1 of the Lease Act.*

Along with the above, the provision of Article 40 para. 1 sub-para. 2, stipulating the obligation of a unit of local self-government i.e., the City of Zagreb, to provide the lessee with another appropriate apartment, has no effect on the review of the disputed provision of para 2."

We enclose in this Report the Constitutional Court Decision No. U-I-762/1996 of 13 March 1998.

2. *The Government of the Republic of Croatia informed the Constitutional Court that the first reading of the Proposal for the Revisions and Amendments to the Apartment Lease Act was deliberated on at the session of the Croatian Parliament held on 29 January 2003.*
The Constitutional Court observes that the Croatian Parliament failed, in the period from the publication of the stated Constitutional Court decision (6 April, 1998) to the date when its repealing effect entered into force (6 October, 1998), to revise or amend Article 40 of the Apartment Lease Act in accordance with the legal stand expressed in the stated Constitutional Court decision, and it failed to do so by the time of asserting this Report.

3. *In the period after the Constitutional Court decision was delivered, i.e. after the repealed legal provision lost its legal force, owners of apartments (landlords) filed a considerate number of proceedings before the competent courts for terminating lease agreements, pursuant to the provisions of Article 40 para. 1. sub-para. 1 of the Apartment Lease Act.*

According to the Constitutional Court records, the Constitutional Court filed constitutional complaints against the decisions of courts on the suits filed by the owners of apartments (landlords) to evict the lessees, with no prior determination of the requirements for such evictions in the Apartment Lease Act. Constitutional complaints were lodged, depending on the judgments, by the owners and lessees, because they deemed that these judgments violated their constitutional rights.

In response to such constitutional complaints, the Constitutional Court has, in two cases (U-III-135/2003 and U-III-485/2006), postponed the eviction of lessees until the constitutional complaint is decided on. The Constitutional Court did not deliver its decision on the stated constitutional complaints because the Croatian Parliament failed to execute the repealing decision of the Constitutional Court, this being a prerequisite for deciding on the substance of the case in these constitutional complaints.

4. *Pursuant to the provisions of Article 31 of the Constitutional Act on the Constitutional Court of the Republic of Croatia (hereinafter: the Constitutional Act), Constitutional Court decisions are obligatory and all bodies of the central government shall, within their constitutional and legal jurisdiction, execute the decisions of the Constitutional Court.*
The Constitutional Court notes that it has no authority, within its jurisdiction, to remove the inconsistency in the application of the Apartment Lease Act that came about after the repealed legal provision had lost its force. Decisions of the Constitutional Court (acceptance or refusal of constitutional complaints) would lead to further inequality before the law, that being contrary to the constitutional guarantee in Article 14 para. 2 of the Constitution. Therefore, the existing normative situation is not acceptable and admissible in constitutional law, since it fails to solve the entire problem of the application of the Apartment Lease Act in the same way for all.

It follows that only the legislator is empowered to regulate, by passing the respective revisions and amendments to the Apartment Lease Act, the disputed legal relations in a manner which will ensure the equality of all before the law.

5. *Monitoring the execution of constitutionality and legality, and bearing in mind the obligatory execution of Constitutional Court decisions (Article 31 of the Constitutional Act), pursuant to Article 128 sub-para. 5 of the Constitution of the Republic of Croatia and Article 104 of the Constitutional Act, this Report is being delivered to the Croatian Parliament.*

The cases in which the Constitutional Court took the view that it is not empowered to decide on the existence of legal gaps in proceedings of reviewing the constitutionality of laws or the constitutionality and legality of other regulations are listed in the answer to question 3.4 .

3.4. Legislative omission in laws and other legal acts.

Does the constitutional court investigate and assess the gaps of legal regulation only in laws or in other legal acts as well (for example, international agreements, substatutory acts, etc.)? Does legislative omission mean only a gap in the legal regulation that is in conflict with the constitution, or a gap in the legal regulation that is in conflict with legal regulation of higher power as well (for example, when an act of the government does not include the elements of the legal regulation which, under the constitution or the law which is not in conflict with the constitution, are necessary)? Is it possible to perceive legislative omission in the cases of delegated legislation, when the notion "may" ("has the right") is used while delegating, while the regulation established in the substatutory act includes only part of the said delegation?

In its previous practice the Constitutional Court has several time ruled that it is not empowered to decide on the existence of legal gaps (from the position that the legislator omitted to prescribe something) in the proceedings of reviewing the constitutionality of laws and the constitutionality and legality of other regulations. For example, besides the ruling of the Constitutional Court No.: U-II-1315/2001 of 9 May 2003, already mentioned and quoted (in reference to the Ordinance on the Excessive Use of Public Roads, whose enactment was stipulated by the Public Roads Act, see a quotation from that ruling in the answer to question 2.3.), the Constitutional Court took an identical stand in the following cases: U-I-104/1999 of 20 October 1999 (in connection with a provision of the Political Parties Act); U-I-709/2005 of 1 March 2000 (in connection with certain provisions of the General Administrative Procedure Act); U-I-11/1993 and U-I-904/1995 of 24 May 2000 (in connection with a provision of the Inheritance Act); U-I-2788/2003 of 22 December 2004 (in connection with a provision of the Labour (Revisions and Amendments) Act); U-I-1108/1998 of 22 December 2004 (in connection with the Labour Act); U-I-2273/2001 of 9 February 2005 (also in connection with the Labour Act); U-I-4045/2003 of 12 January 2005 (in connection with the Parliamentary Election Act); U-I-304/2001 of 21 December 2005 (in connection with certain provisions of the Communal Economy Act); U-I-4000/2003 of 22 February 2006 (in connection with a provision of the

Family Act); U-I-2519/2004 and U-I-31/2006 of 21 March 2007 (in connection with a provision of the Value Added Tax Act), U-I-5001/2004 of 18 April 2007 (in connection with provisions of the Customs Act), U-I-3784/2004 of 30 October 2004 (in connection with the Reconstruction Act); U-I-1013/1997 of 17 October 2007 (in connection with the Transformation of Rights to Socially-Owned Assets of Former Socio-Political Organisations Act), etc.

Since the Constitutional Court as a rule learns about the existence of legal gaps and legislative omissions in proceedings of abstract control, and in connection with what has already been said about these proceedings in question 3.1. and the question asked here about legal gaps in international agreements, it is necessary to say that the Constitutional Court in Ruling No.: U-I-825/2001 of 14 January 2004 took the stand that it does not have the power to decide on the conformity of international agreements with the Constitution (so-called subsequent control). Article 140 of the Constitution provides, among other things, that the provisions of international agreements may be amended or repealed only under the conditions and in the way that they specify or in accordance with the general rules of international law. The Constitution does not provide for control of the constitutionality of international agreements before their ratification, so-called preliminary control.

Furthermore, in the cases when abstract control refers to “another regulation” (a constitutional concept in Article 128 sub-para. 2 of the Constitution) it is necessary to note that the Constitutional Court, in every such case, first investigates (in accordance with criteria it elaborated through its jurisprudence) whether it is indeed a case of “another regulation” or not, and only when it has found that it is a case of “another regulation” it reviews its constitutionality and legality.

The reports about occurrences of unconstitutionality observed in connection with legal gaps and legislative omission, which the Constitutional Court under Article 128 sub-para. 5 of the Constitution and Article 104 of the Constitutional Act delivered to the Croatian Parliament, are given in the answer to question 2.3., and so is an example of the Constitutional Court’s proceedings under Article 129 of the Constitution and Article 105 of the Constitutional Act on executing supervisory control over the enactment of operational regulations (see the answer to question 2.3., point 7 of the quoted Ruling No.: U-II-1315/2001 of 9 July 2003, in connection with a substatutory regulation).

In connection with investigating legal gaps it is interesting to note that in its practice of constitutional justice the Constitutional Court encountered the question of the valid interpretation of laws and substatutory acts.

In Ruling No.: U-I-2488/2004 of 14 November 2007, the Constitutional Court found that the institute of the valid interpretation of a law made by the Croatian Parliament under Article 119 of its Statutory Rules in the way provided for in these Rules, is in conformity with the Constitution only if it remains within the boundaries of legal interpretation (interpretative law) i.e. provides a legitimate answer to a legal doubt about which meaning to give to particular legal provisions. On this occasion the Constitutional Court noted that an act that gives a valid interpretation of a law must not through the

interpretation change or amend the contents of the law, and that if the provisions of the law are to be changed or amended it is necessary to enact a law amending the said law in accordance with the Constitution and the Standing Rules of the Croatian Parliament. Furthermore, the Constitutional Court found that acts which give a valid interpretation of particular provisions of laws formally enter into force when they are published in *Narodne novine* so they are also not in breach of the Constitution in the sense of retroactive effect, because the interpretation only refers to cases that will be solved after the act on valid interpretation enters into force. Bearing in mind Article 89 para. 5 of the Constitution, whereby only individual provisions of a law may have a retroactive effect for exceptionally justified reasons, the Constitutional Court also noted the following: „*Concerning the question of whether an act on the valid interpretation of a law is by its nature retroactive or not, we deem that its retroactive effect is in principle only apparent since all it does is establish which of the meanings about which there is legal doubt should be given to a certain provision or provisions of a law that is in force and that has no retroactive effect, so that the act on its valid interpretation also has no such effect."*

In Ruling No.: U-II-3438/2005 of 16 May 2007, the Constitutional Court annulled the valid interpretation of a substatutory regulation for the following reasons:

7. *The Constitutional Court finds it important to emphasise that the makers of (substatutory) regulations are not empowered to make valid interpretations of regulations.*
A valid interpretation by its nature produces legal effects from the day when the regulation entered into force, which means that it has a retroactive effect.
Under Article 89 para. 4 of the Constitution, other regulations of governmental bodies or bodies vested with public authority shall not have a retroactive effect.
Physical planning documents, under Article 12 para. 2 of the Physical Planning Act, have the force and legal nature of a substatutory regulation so they may not have a retroactive effect by force of the Constitution and their valid interpretation is not permitted."

3.5. Refusal by the constitutional court to investigate and assess legal gaps.

How does the constitutional court substantiate its refusal to investigate and assess the constitutionality of a gap in legal regulation (absence of direct reference concerning such investigation in the constitution and the laws, the doctrine of "political questions", the respect to the discretion of the legislator in law-making, etc.)?

The answer to question 2.3. includes a quotation from Ruling No.: U-II-1315/2001 of 9 July 2003, which also shows the reasoning on which the Constitutional Court based its position that it is not empowered to decide about the existence of legal gaps in proceedings of reviewing the conformity of laws with the Constitution and the conformity of other regulations with the Constitution and law. A legal gap is not only the complete absence of a legal rule but also an incomplete and constitutionally unacceptable provision which, for example, leads to inequality between persons who are included in the provision that grants a certain right and those who are not included because of an omission of the legislator, but who should be included (e.g. see the reasons for Decision No.: U-I-1152/2000 etc. of 18 April 2007 in the answer to question 3.2., and the reasons

why the disputed provision was not repealed). If a legal rule is absent it is impossible for the Constitutional Court to repeal it, and if a legal rule is incomplete a repealing decision would not rectify the situation because it would, in the example given above, make the group of people who were granted a right by the incomplete legal rule lose this right, and the group of people who were not granted the right would not get it.

The provisions of Article 129 (which is given in the answer to question 2.2., and it gives the Constitutional Court the jurisdiction of supervisory control over the enactment of regulations for the application of the Constitution, laws or other regulations) and 130 of the Constitution are of essential importance in understanding the legal opinion of the Constitutional Court that it is not empowered to decide about the existence of legal gaps (from the standpoint that the legislator omitted to regulate something) in the proceedings of reviewing the constitutionality of laws and the constitutionality and legality of other regulations. Article 130 of the Constitution (which is elaborated in detail in Articles 55-57 of the Constitutional Act) provides that the Constitutional Court shall repeal a law if it finds it unconstitutional (paragraph 1), and shall repeal or annul any other regulation if it finds it to be unconstitutional or illegal (paragraph 2), and that if it is reviewing the constitutionality of a law and the constitutionality and legality of another regulation which have lost their legal force, and it finds that the law was not in conformity with the Constitution or that the other regulation was not in conformity with the Constitution and law, it shall pass a decision ascertaining the unconstitutionality or illegality provided that not more than one year has passed from the moment of losing legal force until the submission of the request or the proposal to institute proceedings (paragraph 3).

Legal specialists also support the above standpoint (see answer to the question 1.2.).

3.6. Initiative of the investigation of the "related nature".

Can the constitutional court which does not investigate into legislative omission carry out the "related nature" investigation in constitutional justice cases? Are such investigations begun upon the request of a petitioner or on the initiative of the court? Were such investigations related to the protection of the constitutional rights and freedoms?

The answers to these questions have already been given in detail in the answers to questions 2.2.- 2.4. and 3.1. – 3.4. Furthermore, those questions also referred to constitutional rights and freedoms, and examples for this were given in the answer to question 2.3.

4. INVESTIGATION AND ASSESSMENT OF THE CONSTITUTIONALITY OF LEGISLATIVE OMISSION

4.1 Peculiarities of the investigation of legislative omission.

The peculiarities of the investigation of the legislative omission while implementing *a priori* control and *a posteriori* control? Do the problems of

legislative omission arise also in the constitutional justice cases concerning the violated constitutional rights and freedoms, etc.? The peculiarities of the investigation and assessment of legislative omission in the constitutional justice cases concerning the laws which guarantee the implementation of the rights and freedoms (civil, political, social, economical and cultural) of the person. The peculiarities of the investigation of the legislative omission in the laws and other legal acts which regulate the organisation and activity of public power. The peculiarities of investigation and assessment of legislative omission in private and public laws. The particularity of investigation of legislative omission in the verification of the constitutionality of international agreements. When answering these questions, indicate the constitutional justice cases with more typical examples.

Starting from what has already been said, that the Constitutional Court is not empowered to implement *a priori* control and that in proceedings of *a posteriori* abstract control it is not empowered to decide on the existence of legal gaps, it must be noted that the problems of legal gaps and legislative omission appeared in such a small number of cases in the practice of the Constitutional Court that it is not possible to conclude from them about any peculiarities or draw conclusions of a general nature. Furthermore, the preceding answers have given almost all the cases that are directly or indirectly connected with the existence of legal gaps.

4.2. Establishment of the existence of legislative omission.

Specify the criteria formulated in the jurisprudence of the constitutional court of your country, on the grounds whereof gaps in the legal regulation may and must be recognised as unconstitutional. Does the constitutional court investigate only the disputed provisions of a law or other legal act? Does the constitutional court decide not to limit itself with only autonomous investigation of the content of the disputed provisions (or disputed act) but to analyse it in the context of the whole legal regulation established in the act (or even that established in the system of acts or the whole field of law)? Can the constitutional court investigate and assess legislative omission of the legal regulation that used to be valid in the past? Does the constitutional court state the existence of gaps in the legal regulation which used to be valid in the past, when it analyses the development of the disputed provisions (disputed act)? Does the constitutional court, when identifying the legislative omission, investigate and assess only the content and form of the legal regulation or also the practice of the implementation of the legal regulation?

Starting from the examples of legal gaps met by the Constitutional Court in its practice, given in the preceding answers, and not including the cases when a hierarchically higher-ranking legal regulation stipulated the enactment of a hierarchically lower-ranking regulation and its contents, in which case the failure to enact it (either completely or

partly) is easily recognised as a legal gap (see e.g. Ruling No.: U-II-1315/2001 of 9 July 2003 quoted in the answer to question 2.3.), in establishing the existence of legal gaps the Constitutional Court started from the disputed provision of the law or other regulation and investigated it in the context of the law or regulation in which this provision was contained, and also in the context of the hierarchically higher-ranking legal regulation and the entire relevant legal field (an example for this is the quoted reasoning of Report No.: U-X-1457/2007 of 18 April 2007 in the answer to question 3.3.).

We note that the Constitutional Court does not investigate the practical implementation of a legal regulation in proceedings of abstract control but only in proceedings of concrete control instituted by the constitutional complaint.

4.3. The methodology of revelation of legislative omission.

Describe the methodology of revelation of legislative omission in the constitutional jurisprudence: what methods and their combination does the constitutional court apply while revealing legislative omission? How much importance falls upon grammatical, logical, historical, systemic, teleological or other methods of interpretation in stating the existence of legislative omission? Does the constitutional court, while investigating and assessing legislative omission, directly or indirectly refer to the case-law of the European Court of Human Rights, the European Court of Justice, other institutions of international justice and constitutional and supreme courts of other countries?

The Constitutional Court has not developed a special methodology for revealing legal gaps and legislative omission. In its work it uses all the existing methods of interpretation. In doing so it refers to the case-law of the constitutional courts of developed European democracies, especially the Constitutional Court of Germany and the Constitutional Court of Austria, and it also uses the experiences of the constitutional courts of the new democracies. In addition, it applies in its practice (in all kinds of cases) the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter: Convention) and the decisions, judgments and legal views of the European Court of Human Rights, either by directly applying the relevant provision of the Convention interpreted in accordance with the legal views of the European Court of Human Rights (in cases of the abstract control of the constitutionality of a law, e.g. Decisions No.: U-I-149/1999 of 3 February 2000, U-I-745/1999 of 8 December 2000 etc.), or by accepting the interpretation of the content and scope of particular legal principles and institutes given by the European Court of Human Rights when it applied the Convention in its practice (e.g. Decision No: U-I-1156/1999 of 26 January 2000, Decision No.: U-I-659/1994 etc. of 15 March 2000 etc.). The Constitutional Court partly shapes many of its decisions on the model of the decisions and judgments of the European Court of Human Rights, and within constitutional interpretation it applies principles such as the principle of proportionality, the principle of legal certainty etc., which allow a more complete protection of fundamental human rights and freedoms and of the autonomy of institutes of the civil society.

4.4. Additional measures

Does the constitutional court, after having stated the existence of the legislative omission, and if it is related to the protection of the rights of the person, take any action in order to ensure such rights? If yes, what are these actions?

The answers to questions 2.2.-2.4. have already provided answers about the proceedings of the Constitutional Court under Articles 104 and 105 of the Constitutional Act, and the answer to question 3.3. also includes examples.

Furthermore, the Constitutional Court may under Article 31 para. 4 of the Constitutional Act itself determine which body is authorized to execute its decision or its ruling. This is how it acted in Decision No.: U-I-283/1997 of 16 December 1998, in which it stated:

1. *The Constitutional Court of the Republic of Croatia hereby notifies the Republican Pension and Disability Insurance Fund of Workers of Croatia, the Republican Pension and Disability Insurance Fund of Independent Businessmen of Croatia and the Republican Pension and Disability Insurance Fund of Farmers of Croatia that on the grounds of the its Decision to repeal the Harmonization Act of Pensions and Other Monetary Income from Pension and Disability Insurance of 12 May 1998, No.: U-I-283/1997 (*Narodne novine*, No. 69/98), the right of the beneficiaries under the Harmonization Act of Pensions and Other Monetary Income from Pension and Disability Insurance (*Narodne novine*, No. 20/97) to the payment of differences have not ceased, nor has their right for the payments to be made in the deadlines specified in the Ordinance on the Deadlines and Manner of Payment of the Differences of Pensions and Other Monetary Income from 1 February 1995 to 31 December 1996 (*Narodne novine*, No. 66/97). It therefore invites the above subjects to pay the above instalments of the difference without postponement.*

2. *This decision shall be published in* Narodne novine.
(…)
The suspension of paying this difference contravenes the Decision of the Constitutional Court of 12 May 1998, No.: U-I-283/1997, because it has deprived the pension beneficiaries of a legally acquired right to payment, which did not cease to exist even after the Decision of the Constitutional Court.

*Thus the Constitutional Court, under Article 25 paras. 2 and 3 of the Constitutional Act on the Constitutional Court of the Republic of Croatia (*Narodne novine*, No. 13/91), invited the republican pension and disability insurance funds to pay the above unconstitutionally and illegally suspended instalments of the difference without delay.*

4.5. The constitutional court investigates legislative omission as an element of the investigation of the case of constitutional justice, but it does not assess its constitutionality.

Is a gap in legal regulation (legislative omission) stated in the reasoning part of the ruling of the constitutional court and is the attention of the legislator (other

subject of law-making) drawn to the necessity to fill in the gap (legislative omission): is an advice set forth to the legislator (other subject of law-making) on how to avoid such deficiencies of legal regulation (are there any specified criteria of a possible legal regulation and recommended deadlines for the adoption of the amendments)?
Does the constitutional court set forth in the reasoning part of its decision how the legal regulation is to be understood so that it would not include the legislative omission, by this essentially changing the existing legal regulation (actually by supplementing it)?
Does the constitutional court state the existence of legislative omission or other gap in the legal regulation in the reasoning part of its decision and does it specify that such inexistence of the legal regulation is to be filled in when courts of general jurisdiction apply the general principles of law?
Does the constitutional court apply other models of assessment and filling in legislative omission?

The preceding answers give almost all the cases that are directly or indirectly connected to the question of legal gaps the Constitutional Court met in its practice, and how the Constitutional Court proceeded in such cases (see the answers to questions 2.3.-3.5.). The Constitutional Court has no other models except those given above.

4.6. Assessment of legislative omission in the resolution of the constitutional court decision.

The constitutional court, after it has stated the existence of the legislative omission in the reasoning part of its decision, in the resolution of the decision performs the following:

a) recognises the law (other legal act) as being in conflict with the constitution;

b) recognises the provisions of the law (other legal act) as being in conflict with the constitution;

c) leaves the act (provisions thereof) to be in effect and at the same time recognises the failure to act by the legislator (other subject of law-making) as unconstitutional by specifying the time period in which, under the constitution, the obligatory legal regulation must be established;

d) states the duty of the legislator (other subject of law-making) to fill in the legal gap (by specifying or without specifying the filling in of the legal gap);

e) states the existence of a gap in the legal regulation and points out that it may be filled in by general or specialised courts;

f) obligates courts of general jurisdiction and specialised courts to suspend the consideration of the cases and not to apply the existing legal regulation until the legislator (other subject of law-making) fills in the gap;

g) states the existence of the gap in the legal regulation without drawing direct conclusions or establishing any assignments;

h) applies other models of assessment of legislative omission.

All the ways in which the Constitutional Court proceeds have already been given in the answers to questions 2.3. and 3.3. Briefly, if the Constitutional Court, in proceedings of abstract control, states the existence of a legal gap or legislative omission in the reasoning of the decision (such a request or proposal will be dismissed for lack of jurisdiction) it does not as a rule repeal such a provision or regulation but gives them the qualification of "observed appearance of unconstitutionality or illegality" and reports thereof to the competent body so that it may fill in the legal gap or the legislative omission. A second possibility is that in executing supervisory control over the enactment of regulations for the execution of the Constitution, laws and other regulations it delivers a report to the competent body (the Government or Parliament) for the enactment of the regulation (completely or in part) that was not enacted but should have been enacted.

4.7. The "related nature" investigation and decisions adopted.

What is typical for the "related nature" investigation carried out in the constitutional justice cases by the constitutional court which does not investigate the legislative omission? The peculiarities of decisions adopted in such cases. When answering this question, point out the constitutional justice cases with more typical examples.

The answers to these question, including examples, have already been given in the answers to questions 2.2.-2.4. and 3.1.-3.4.

4.8. Means of the legal technique which are used by the constitutional court when it seeks to avoid the legal gaps which would appear because of the decision whereby the law or other legal act is recognised as being in conflict with the constitution.

What means of the legal technique are used by the constitutional court when it seeks to avoid the legal gaps which would appear because of the decision whereby the law or other legal act is recognised as being in conflict with the constitution? Postponement of the official publishing of the constitutional court decision. Establishment of a later date of the coming into force of the constitutional court decision. Statement by the constitutional court that the

investigated act complies with the constitution temporarily, at the same time specifying that in case that the act is not amended till a certain time, it will be in conflict with the constitution. Recognition of the act as being in conflict with the constitution due to the legislative omission, without removing such act from the legal system. Interpretation of the act (provisions thereof) which complies with the constitution, in order to avoid the statement that the act (provisions thereof) is in conflict with the constitution due to the legislative omission. "Revival" of previously effective legal regulation. Other models of the decision are chosen (describe them).

The Constitutional Court is careful, and also makes use of the appropriate legal means at its disposal to do so, that its decisions repealing a law (provisions thereof) and repealing or annulling other regulations (provisions thereof) do not result in legal gaps in the legal order, and thus also in legal uncertainty in a particular legal field.

In proceedings in which it decides on the conformity of laws with the Constitution and on the conformity of other (substatutory) regulations with the Constitution and law, the Constitutional Court may, if it finds that a law or another regulation (provisions thereof) is not in conformity with the Constitution or the Constitution and law, repeal such a law (provision thereof) or other regulation (provision thereof), and this could lead to a legal gap in the legal order. However, no legal gaps as a rule occur because under Article 55 para. 2 of the Constitutional Act, the repealed law (provision thereof) or other regulation (provision thereof) lose legal force on the day when the Constitutional Court decision is published in *Narodne novine,* unless the Constitutional Court sets another term. And the Constitutional Court, depending on the circumstances of each individual case, always takes into account the time the legislator needs to enact a new law or other regulation or just a separate provision, and it sets the term depending on the kind and scope of the repealed regulation and of its importance and influence on society as a whole. Thus, for example, in Decision No.: U-I-1152/2000 etc. of 18 April 2007 the Constitutional Court ruled that the separate repealed provisions of the Pension Insurance Act shall not go out of force until 31 December 2018 (about ten years after the time when the decision was passed), and in Decision No.: U-I-1569/2004 of 20 December 2006 that the separate repealed provisions of the Civil Procedure Act shall not go out of force until 15 July 2008 (about one and a half years after the decision was passed).

On the other hand, there are cases when the Constitutional Court passed decisions to extend the postponed entry into force of repealed legal provisions several times at the legislator's request. For example, in Decision No.: U-I-1010/1994 of 29 November 1995 the Constitutional Court repealed the Public Information Act, which was to go out of force on 30 June 1996. After the decision to repeal the Public Information Act, the Constitutional Court in decisions of 28 June 1996 and 29 August 1996 prolonged the deadline for the Act to go out of force to 31 August 1996, and to 30 September 1996 The new Public Information Act (*Narodne novine*, No. 83/96) entered into force on the day of its publication, 8 October 1996.

Furthermore, the Constitutional Court may not annul a law but may annul another regulation (provisions thereof) and must annul it if it violates the human rights and fundamental freedoms guaranteed in the Constitution, and if it without grounds places some individuals, groups or associations in a more or less privileged position (Article 55 para. 3 of the Constitutional Act). In this case, too, the annulled regulation (provision thereof) shall not be applied from the day when the decision of the Constitutional Court enters into force, or from the day of publication, or from another term set by the Constitutional Court.

5. CONSEQUENCES OF THE STATEMENT OF THE EXISTENCE OF LEGISLATIVE OMISSION IN CONSTITUTIONAL COURT DECISIONS

5.1. Duties arising to the legislator.

Does the statement of the existence of legislative omission in a decision of the constitutional court mean a duty of the legislator to properly fill in such gap of legal regulation? Does the regulation of the parliament provide how the questions are considered concerning the implementation of the constitutional court decision? Does the parliament promptly react to the decisions of the constitutional court, wherein the legislative omission is states? Are there cases when the parliament disregarded the decisions of the constitutional court concerning the legislative omission? How is it ensured that the parliament would implement the duty which has appeared due to the decision of the constitutional court? What are the powers and role of the constitutional court in this sphere?

Under Article 31 of the Constitutional Act the decisions and the rulings of the Constitutional Court are obligatory and every individual or legal person shall obey them (paragraph 1). All bodies of the central government and of local and regional self-government shall, within their constitutional and legal jurisdiction, execute the decisions and the rulings of the Constitutional Court (paragraph 2). The Government of the Republic of Croatia ensures, through the bodies of central administration, the execution of the decisions and the rulings of the Constitutional Court (paragraph 3). The Constitutional Court may determine which body is authorized to execute its decision or its ruling (paragraph 4). The Constitutional Court may determine the manner in which its decision or its ruling shall be executed (paragraph 5).

Starting from the above provisions of Article 31 of the Constitutional Act and the jurisdiction of the Constitutional Court (see the answers to questions 2.2. and 2.3.), we note that the reports the Constitutional Court delivers to the Croatian Government or the Croatian Parliament act with the power of the authority of the Constitutional Court and the existence of the so-called “general obligation” contained in Article 5 para. 1 (principle of constitutionality and legality) and paragraph 2 (everyone shall abide by the Constitution and law and respect the legal order) of the Constitution.

The provisions of the Constitutional Act and the Standing Rules of the Croatian Parliament do not explicitly prescribe how questions of complying with the decisions of the Constitutional Court will be addressed. The speed with which the Croatian Parliament reacts to decisions of the Constitutional Court differs from case to case.
As a rule the legislator honours the Constitutional Court's deadlines for enacting a new law instead of the one that has been repealed and new legal provisions instead of those that have been repealed. However, there are cases when the new laws that are enacted to replace repealed ones, or the new legal provisions enacted to replace repealed ones, are not enacted on time (see example in the answer to question 4.8.), and there is also a case when, because of a long lapse of time, no new legal provision was enacted instead of the one that was repealed (see e.g. Report No.: U-X-2191/2007 of 20 June 2007, whose reasoning was quoted in the answer to question 3.3.).

5.2. Duties arising to other subjects of law-making (for example, the Head of State, the Government).
Does the statement of the existence of legislative omission in a decision of the constitutional court mean the duty of other law-making subjects to properly fill in such a gap of legal regulation? Do the acts regulating the activity of these subjects provide how the said subjects implement the constitutional court decisions? Do the said subjects promptly react to the decisions of the constitutional court, wherein the legislative omission is stated? Are there any cases when these subjects disregarded the decisions of the constitutional court concerning the legislative omission? How is it ensured that the said subjects would properly implement such duty? What are the powers and role of the constitutional court in this sphere?

This question has been answered in the answer to the preceding question.

Furthermore, in proceedings of concrete control when the Constitutional Court, deciding on a constitutional complaint, finds that the general court's interpretation when filling in a legal gap in a regulation is constitutionally unacceptable (Decision No.: U-III-1621/2001 of 30 March 2005, see the answer to question 2.3.), and if the Constitutional Court accepts the constitutional complaint and quashes the disputed (individual) act, the competent judicial or administrative body, body of local and regional self-government or legal person vested with public powers, whose act was quashed, has the obligation to pass a new act instead of the one that was quashed (Article 76 para. 2 of the Constitutional Act). When passing the new act these bodies are obliged to obey the legal opinion of the Constitutional Court expressed in the decision on quashing the act in which the applicant's constitutional right was violated (Article 77 para. 2 of the Constitutional Act).

6. WHEN DRAWING CONCLUSIONS concerning the experience of the constitutional court of your state regarding consideration of cases by the Constitutional Court related to legislative omission, answer the following

questions: is it possible to consider such investigations as an important activity of the constitutional court (explain why), does the constitutional court have sufficient legal instruments of such investigation and how do the constitutional court decisions influence the process of law-making in such cases?

The Constitutional Court of the Republic of Croatia has in its practice met and meets the question of legal gaps and its activities in relation to this question may be considered significant in the measure to which it contributes to the total stability of the legal order and the protection of human rights and fundamental freedoms guaranteed in the Constitution.

Constitutional justice to date shows that the Constitutional Court has filled in legal gaps through constitutional jurisprudence by first establishing rules of procedure through its case-law, then by their autonomous regulation in the Standing Rules of the Constitutional Court, from which the legislator adopted them entirely in amendments of the Constitutional Act on the Constitutional Court. Furthermore, although the Constitutional Court found that it does not have the power to decide about the existence of legal gaps in proceedings of reviewing the constitutionality of laws and constitutionality and legality of other regulations, it is in these proceedings that it states the existence of legal gaps (either when rules are completely absent or when provisions are incomplete and their wording leads to inequality or discrimination). In this case it, as a rule, either reports to the Croatian Parliament about the occurrence of unconstitutionality or illegality it observed, or it, within the framework of its authority to execute supervisory control over the enactment of regulations for executing the Constitution, laws and other regulations, reports to the Government or Parliament that the competent body which had the obligation to enact a regulation did not enact it either completely or partly. In this way it contributes to filling in legal gaps observed i.e. to the enactment of the necessary laws and other regulations. The Constitutional Court has so far filed the largest number of applications in the execution of supervisory control over the enactment of operational instruments, either by natural or legal persons, in which they indicate the existence of legal gaps i.e. the non-enactment of operational instruments by competent bodies. In most cases, after the Constitutional Court requested statements about the applications from these bodies, they informed it that the regulations had in the meantime been enacted.

Therefore, the Constitutional Court has at its disposal certain legal instruments for examining legal gaps, which it makes use of in its practice and in this way influences the creation of laws and other regulations in the cases given above.

Note: If possible, present the statistical data about the considered cases related to legislative omission and their relation with other cases together with the national report.

The number of cases that refer to legal gaps is small in relation to the total number of filed cases and the Constitutional Court does not keep special records about them. The statistical data available are given in the answer to question 3.2.