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PROBLEMS OF LEGISLATIVE OMISSION IN CONSTITUTIONAL JURISPRUDENCE

Replies to the Questionnaire
for the XIVth Congress of the Conference of European Constitutional Courts
drawn up by the Constitutional Court of the Republic of Lithuania

1. PROBLEMATICS OF LEGAL GAPS IN THE SCIENTIFIC DOCTRINE

1.1. The concept of the legal gap.

Provide with 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 sorts 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 of appearance of legal gaps, the problem of real and alleged legal gaps and the peculiarities of gaps in public and private law and positive and negative consequences of legal gaps, etc.?)

The concept of legal gap has not enjoyed a thorough treatment in Estonian legal doctrine. Among the existing approaches to the gap, which are predominantly based on the teaching of the gap in German legal doctrine, the following types can be distinguished.

First of all the gaps of law and gaps of legislation are being distinguished. Pursuant to the definition used in Estonia there is a gap of law when a sphere which has to be decided upon has not at all been legislatively regulated (this pertains either to spheres outside the law or to the legislator's conscious choice not to regulate a sphere of life). In the light of the title of this sub-paragraph this amounts to one of the sub-types of legal gap as a general concept – namely the legal vacuum. The gap of legislation, on the other hand, means a lack of a rule that should be there according to the intent behind the regulation of an Act (statute) (there is a lack of a rule the existence of which can be presupposed on the basis of the teleology of a statute).[1]

Another important differentiation is made between genuine and non-genuine (actual and alleged) gaps. There is a non-genuine gap when, from the formal point of view, the positive law can be applied without the need to supplement it, yet the legal cognition requires the supplementation (the norm can not be implemented when "taking into account all the circumstances" – the solution suggested by a statute can not be regarded as the right one, because it is considered to be "wrong").[2] The genuine gaps embrace such instances where a statute completely lacks a rule concerning the sphere that the statute regulates (the statute is so to say silent). Thus, a genuine gap is a legislative gap or the legislative omission where

[1] See M. Luts, Lünga vastu tõlgendamise või analoogiaga? (Diskussioon juriidilises meetodiõpetuses) [To bridge a gap by interpreting or analogy? (Discussion in legal teaching of method)]. Juridica VII 1996, pp 348-352.
[2] See e.g. M. Sillaots. Kohtunikuõiguse võimalikkusest ja vajalikkusest kontinentaal-euroopalikus õiguskorras [The possibility and necessity of judge-made law in the legal order of Continental Europe]. Tartu 1997, pp 39-40.

legislating is required by the Constitution (it is expected that there be a legal rule concerning an existing norm).[3]

Sometimes a differentiation is made between obvious and covert gaps. There is an obvious gap when the implementer of law notices it at the fist glance, and there is a covert gap when the existence thereof becomes apparent only as a result of interpretative effort.

As a rule, the indetermination of legal regulation is not treated as a gap in Estonian legal doctrine – the ambiguity and abstract character of norms is overcome through interpreting, *inter alia* with the help of constitutional values. There is a gap only when a norm is so unclear that it is impossible to ascertain the applicable rule on the basis of none of the generally recognised interpretation methods.

Also, there is no a gap when a rule is not established in the text of statute *expressis verbis*, yet it can be deducted from the general teleology of the statute. Neither is there a gap when a necessary rule is not included in the statute regulating a given sphere, but it has become – by a mistake – an object of regulation of some other statute or when it can be deducted from several statutes in their conjunction. A relationship under examination need not be regulated explicitly; it is sufficient if the guidelines for the resolution of a case derive form the legal order implicitly.

The debate in Estonian legal doctrine about the relationship between interpreting and the legal gap has not reached a clear solution. What seems to be prevailing is the approach that there is a gap in legislation when the legislator has not provided for a specific case, or it has not been provided to the full extent and a pertinent solution can not be found on the basis of the statute even with the help of interpretation methods. What is still under discussion is how far one can go to ascertain the existence of a gap by using interpretation methods. If we were to allow expansive interpretation one could argue that it is always possible to deduct an applicable rule from the text of the Constitution or from the general constitutional values. Under such approach legal gaps are not possible at all, as the rule is always within the Constitution itself and is deductible from it with the help of interpretation. Although the Estonian legal doctrine seems to favour more limited approach to interpretation, the borderline between interpretation and filling a gap can not be drawn in the abstract sense.

The reasons for appearance of legal gaps, the peculiarities of gaps in public and private law, and the positive and negative consequences of legal gaps have not been dealt with in the Estonian legal doctrine.

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 scientific legal doctrine?*

As the problematic of legal gap have not enjoyed thorough examination in Estonian legal doctrine, an exhaustive theoretical approach to legislative omission as a type of legal gap is nonexistent, too. In the most general terms the legislative omission can be defined as a situation wherein a statute does not contain a rule necessary for resolving a situation the legal regulation of which is required by the Constitution, and the applicable norm can not be ascertained upon constitution-conforming interpretation of the statute without going beyond the limits of interpretation. First and foremost this covers the relationships the regulation of which can be requested by invoking individual constitutional rights or the necessity of regulation of which arises from the text of the Constitution itself.

[3] See A. Taska. Õigusteaduse metodoloogia [The Methodology of Law]. Lund 1978, p 61.

In Estonian legal order the legislative omission was established by law in 2004, when the Supreme Court was given the competence, under the Constitutional Review Court Procedure Act (hereinafter "CRCPA") to review the constitutionality of failure to issue legislation of general application and to declare the failure to issue legislation of general application unconstitutional. Pursuant to Section 15(2^1) of the CRCPA the Supreme Court may, upon adjudicating a matter, declare the failure to pass legislation of general application unconstitutional.

Although motivated by the need to guarantee the protection of persons' rights in a situation where the state fails to apply an EU regulation or fails to transpose an EU directive, the norm providing for the aforementioned competence of the Supreme Court is – pursuant to the explanatory letter to the Act amending the CRCPA – also applicable to domestic legal relationships, that is in a situation where "the legislator has not established a procedure required by the Constitution or when, despite the existence of a statutory norm delegating authority, a pertinent implementation act is not issued"[4]. It is essential to point out that long before the amendments to the CRCPA the right to demand that the legislator take action was deducted by the Supreme Court from the general right to organisation and procedure, included in Section 14 of the Constitution, pursuant to which the guarantee of the rights and freedoms is the duty of the legislative, executive and judicial powers, and of local governments (see about this and the relevant practice of the Supreme Court under 2.3.).

1.3. The Constitutional Court or the corresponding institution which implements the constitutional control (hereinafter "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 legal 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 the said legal gaps? Was the naming of the activity of the constitutional court as the one of "activism", "moderation" and "minimalism" reasoned on the basis of such decisions?*

Similarly with the generally accepted approach, the Estonian legal doctrine recognises the constitutional court as a "negative" legislator when it adjudicates with a minus sign, i.e. when it declares statutes or provisions thereof invalid. "Positive" legislation, on the contrary, comes to play when the constitutional court makes a certain specific policy mandatory by prescribing to the legislator the sole guidelines for action.

The doctrine houses diverging approaches regarding what the mission of a constitutional court is/ should be in the era of constitutionalism. Pursuant to the (so far) predominant view in Estonia the underlying principle has been that the court does not prescribe how the legislator must regulate certain spheres. If the court should do this, it will amount to (impermissible) judicial activism. In relation to the competence of the Supreme Court (given to it in 2004) to exercise, in addition to the review of constitutionality of existing norms, also the review of constitutionality of a failure to issue norms[5], it has been pointed out in law literature that a judgment concerning legislative omission should not be more

[4] Explanatory letter to the Draft of State Liability Act and Constitutional Review Court Procedure Act Amendment Act (357 SE I).
[5] See above under 1.2.

than merely declarative, because the court can not furnish a provision which the legislator has failed to establish. The constitutional court can not substitute for the legislator by prescribing the solutions acceptable to the court, because this would amount to an impermissible violation of the principle of separation of powers, which must be avoided according to the doctrine of judicial restraint, arising from the same principle.[6] The proponents of this view regard a constitutional court as a mere negative legislator that is a body whose duty consists in nothing more than eliminating unconstitutional provisions from the legal order.

On the other hand, an opinion has been voiced that similarly with the tendencies observed elsewhere in the world there are more and more cases in Estonia, too, where one has to create – not only annul – norms, and that this does not amount to any extraordinary judicial activism. Thus, the differentiation between the negative and positive legislating of the constitutional court has been used for the assessment of the level of activism of the court. Nevertheless, this subject has not been thoroughly researched and it has only been pointed out that one assessment criterion of judicial activism could be the level of positive policy-making or the particularity of prescriptions of the constitutional court.[7] There is one problem, though, related to terming the activities of the Supreme Court as "negative" or "positive" legislating and, thus, categorising the Supreme Court as an "activist", "moderate" or "minimalist" one. Namely, such discrimination may prove complex and – in the end – only conditional. The Supreme Court judgments in the cases of Brusilov[8], election coalitions[9] and resettlers[10] serve as good examples in this respect.

In the much discussed Brusilov case the general Assembly of the Supreme Court argued that the Penal Code Implementation Act was unconstitutional because it did not provide for the alleviation of punishments of convicted persons serving prison sentences up to the maximum term of the (more lenient) punishment established in the new Penal Code. The General Assembly pointed out that upon rendering this judgment it took "into account the need to give the courts clear guidelines on how to adjudicate similar cases". As the valid law did not provide for a procedure for the protection of the rights of the persons whose situation was analogous to that of Brusilov, the Supreme Court instructed in its judgment the lower level courts to adjudicate similar cases by way of analogy. In essence, in this matter the Supreme Court acted as a positive legislator both in the substantive and the procedural senses.

In the so called first case of electoral coalitions the question was whether the prohibition of citizens' election coalitions in the local government elections was in conformity with the constitutional right to stand as a candidate and to vote. The Supreme Court came to the conclusion that the prohibition of citizens' election coalitions was unconstitutional and pointed out in the so called first case of election coalitions that "[E]nforcement of the judgment of the Supreme Court will require the amendment of valid regulation in order for the local elections to be constitutional. Here the legislator has the possibility to weigh different solutions. Re-creation of election coalitions is not the only possible way to overcome

[6] V. Saarmets. Individuaalne konstitutsiooniline kaebus põhiseaduslikkuse järelevalve kohtus [Individual constitutional complaint in a constitutional review court]. Juridica VI 2001, p 382.

[7] B. Aaviksoo. Kohtuliku aktivismi kontseptsioon. Kohtulik aktivism Eesti Vabariigi Riigikohtu põhiseaduslikkuse järelevalve praktikas 1993 – 2004. Magistritöö. Tartu Ülikool, [Concept of judicial activism. Judicial activism in the constitutional review practice of the Supreme Court of the Republic of Estonia. Master's Thesis. Tartu University], 2005.

[8] General Assembly of the Supreme Court judgment of 17 March 2003 in matter no 3-1-3-10-02.

[9] Constitutional Review Chamber of the Supreme Court judgment of 15 July 2002 in matter no 3-4-1-7-02, and the General Assembly of the Supreme Court judgment of 19 April 2005 in matter no 3-4-1-1-05.

[10] Constitutional Review Chamber of the Supreme Court judgment of 28 October 2002 in matter no 3-4-1-5-02; General Assembly of the Supreme Court judgment of 12 April 2006 in matter no 3-3-1-63-05; Constitutional Review Chamber of the Supreme Court judgment of 31 January 2007 in matter no 3-4-1-14-06.

the drawbacks of the present regulation. Yet it is probable that to permit the election coalitions again is the only way capable of ensuring the conduct of local government council elections on the fixed date."[11]

In the so called second case of election coalitions the Supreme Court again declared the prohibition of citizens' election coalitions in the local government elections unconstitutional, pointing out – once again – that the legislator has the possibility to eliminate the unconstitutional situation by taking other steps than permitting the participation of citizens' election coalitions. Nevertheless, the General Assembly continued its reasoning by stating that "the general assembly is of the opinion that in the local government units with small number of residents allowing to set up candidates in the lists of political parties only would not be constitutional even if the requirement of 1 000 members, imposed on political parties, were decreased for example tenfold. In many local government units, it would be impossible, even in the case of the requirement of 100 members, to found several local political parties."[12] In regard to the possibility of eliminating the conflict with the Constitution by some other alternative means chosen by the legislator the Supreme Court pointed out that the possibilities were excluded by the short period of time remaining until the elections. In these cases the Supreme Court, in fact, stated that the Constitution prescribes for the legislator the one and only correct (i.e. constitutional) way for eliminating the conflict with it.

In the so called first case of resettlers the Supreme Court found that the provision of the Principles of Ownership Reform Act, pursuant to which the issue of return of property to those who had re-settled to Germany was to be solved by an agreement between the states, was in conflict with the principle of legal clarity in conjunction with the general right to organisation and procedure (the legislator had not determined with sufficient clarity whether such property shall or shall not be returned to owners). Yet, the Supreme Court did not declare the provision invalid, because that would have entailed answering the principal question of whether such property should be returned or not, and this was considered by the court to be a political issue within the competence of the legislator. The legislator proved unable – during more than three years – to eliminate the conflict with the Constitution, established by the Supreme Court, and thus, in the so called second case of resettlers, the Supreme Court declared the provision invalid, as a consequence of which the property was to be returned to the owners. At the same time the Supreme Court postponed entering into force of its judgment, thus giving the legislator a chance to "revert" the Supreme Court judgment, if they wished. Subsequently, the legislator amended the law, legalising the situation that would have been created after the entering into force of the Supreme Court judgment. With the referred amendment the legislator established, *inter alia*, restrictive conditions for the return of the resettlers' property. The President of the Republic refused to proclaim the Act, being of the opinion that it treated different groups of resettlers unequally. The Supreme Court agreed with the view of the President of the Republic, arguing that upon the return of property to resettlers the legislator must guarantee equal treatment of all resettlers, stating also that "[t]he Riigikogu has not fulfilled the requirements of Section 30 of the judgment of the general assembly of the Supreme Court in case 3-3-1-63-05, pursuant to which an effective regulation should have been prepared for the resolution of the issues following the repeal of Section 7(3) of the PORA, a regulation that would enable the resettlers and persons entitled to privatise unlawfully expropriated dwellings to exercise their rights."

The consequence of the Supreme Court judgments in the so called election coalition cases was the implementation of the "guidelines" issued by the constitutional court – the legislator allowed again the election coalitions in local government elections. Also, regarding the issue of resettlers the question of their property is now regulated by the Supreme Court judgment rendered in the so called second case of resettlers, and that is because the date of entry into force of the first Supreme Court judgment expired

[11] Constitutional Review Chamber of the Supreme Court judgment of 15 July 2002 in matter no 3-4-1-7-02, para 34.
[12] Constitutional Review Chamber of the Supreme Court judgment of 19 April 2005 in matter no 3-4-1-1-05, para 45.

and the President of the Republic refused to proclaim the legislator's second Act with the same content. An effective regulation providing for the procedure for the return of resettlers' property, the lack of which was pointed out by the Supreme Court in the so called third case of resettlers, was not yet been drafted.

The topics of activities of the constitutional court in examining legal gaps and the impact of the constitutional court judgments on fulfilling these gaps have not been dealt with in the legal doctrine so far.

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

Constitution is the most important act in the legal order of the state, occupying the top position in the hierarchy of legislation. Pursuant to Section 3(1), Section 102 and Section 15(2) of the Constitution all other national legal acts must be in conformity with the constitution.[13] Next in the hierarchy are the (parliamentary) Acts and the decrees of the President of the Republic; the lowest in the hierarchy are regulations issued by the executive (i.e. the Government of the Republic, ministers, local governments, Bank of Estonia and public-law legal persons within the limits of their autonomy). The highest legal effect among the Acts is attributed to the constitutional laws enumerated in Section 104 of the Constitution; these are more important and for the adoption of these Acts the Constitution provides for a higher (qualified) majority vote requirement. The issues falling within the sphere of regulation of constitutional laws may not be regulated by ordinary laws or decrees. Among the regulations those have higher legal force that is issued by bodies ranking higher within the hierarchy of bodies. If there is no such hierarchy it must be ascertained who has the competence concerning a given issue. To resolve conflicts between legal acts ranking on the same level in the hierarchy the principles of *lex specialis derogat legi generali* and *lex posterior derogat legi priori* are used.[14] There is no hierarchy between the norms of the Constitution. Even if there seems to be a conflict between the constitutional norms, none of the norms can be regarded invalid. All conflicts must be solved by weighing and by finding an optimum solution. All norms must be used as far as possible.[15]

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[13] Section 3(1)of the Constitution: *„The powers of the state shall be exercised solely pursuant to the Constitution and laws which are in conformity therewith. Generally recognised principles and rules of international law are an inseparable part of the Estonian legal system."*
Section 102 of the Constitution: *„The laws shall be passed in accordance with the Constitution."*
Section 15(2) of the Constitution: *"The courts shall observe the Constitution and shall declare unconstitutional any law, other legislation or procedure which violates the rights and freedoms provided by the Constitution or which is otherwise in conflict with the Constitution."*

[14] T. Annus. Riigiõigus [Constitutional law]. Tallinn 2006 (hereinafter "*Annus*"), pp 75-76.

[15] Annus, p 32.

The principle of priority (primary character, supremacy) of Constitution is first and foremost established by the first sentence of Section 3(1) of the Constitution, which requires that the powers of the state be exercised solely pursuant to the Constitution and laws which are in conformity therewith. The principle of supremacy of the Constitution means that the activities of the public authority must not be in conflict with the Constitution. In essence this provision is a matter of course, having the character of an order of validity.[16] The Constitution is the highest law of the land; consequently the laws may only be passed in observance of the constitutional rules of procedure. This is established by Section 102 of the Constitution. One of the guarantees of the supremacy of the Constitution is the fact that it is very difficult to amend it. The legitimacy of the Constitution renders legitimacy to the constitutional review procedure.

The exercise of the powers of state pursuant to the laws which are in conformity with the Constitution includes, in turn, the general reservation by law as well as the principle of legality.

→ The content of the concept of general reservation by law can be divided into *parliamentary reservation* (all important issues in the state, especially the restrictions of fundamental rights, must be decided by the legislator) and *the requirement of legal basis* (the infringement into a fundamental right of any person must have a legal basis).[17]

→ Principle of legality requires that the norm with lower legal force be in conformity with the higher norm. The principle of legality includes the *priority of the validity of higher law* (the content of the higher law can not be determined by a lower law, instead the lower law must be in conformity with the higher law, which can be regarded as a direct consequence of the hierarchy of norms,) and the *priority of application of lower law* (if the lower norm exists it must be applied in the first order and a higher act should be applied only if there is no lower one).[18]

The second sentence of Section 3(1) of the Constitution gives rise to the direct and immediate validity of generally recognised principles and rules of international law in the national legal order of Estonia. The Constitution does not *expressis verbis* determine the position of generally recognised principles and rules of international law in the hierarchy of Estonian legislation. The Constitution requires that the legislator take into account the rules of international law in the law-making process and gives persons the possibility to invoke the rules of international common law in national courts, but it does not directly attribute these rules the supremacy over the Constitution or the national law.[19] The Supreme Court has used the generally recognised principles of international law as a supporting argument, but usually in parallel with the principles recognised in Estonia.[20]

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[16] Eesti Vabariigi Põhiseadus. Kommenteeritud väljaanne [Constitution of the Republic of Estonia. Edition with Commentaries]. Tallinn 2002 (hereinafter "*Constitutional commentary*"), p 55.
[17] Constitutional commentary, pp 56-58.
[18] Constitutional commentary, pp 58-59.
[19] Constitutional commentary, pp 63-64, see Constitutional Review Chamber of the Supreme Court judgment of 30 September 1994 no III-4/1-5/94.
[20] Annus, p 204-206, referring to Criminal Chamber of the Supreme Court judgment of 7 February 1995 in matter no III-1/3-4/95. Even before becoming a EU member the Supreme Court had referred to the EU Charter of Fundamental Rights in three cases, despite of the non-binding character of the Charter. – J. Laffranque. "Euroopa Liidu õigussüsteem ja Eesti õiguse koht selles [The legal system of the European Union and the position of Estonian law therein]. Tallinn 2006, pp 332-333 (hereinafter "*Laffranque*"). E.g. the Supreme Court found in one of these judgments that the validity of the principle of a democratic state governed by rule of law in Estonia means that such general principles of law and basic values are valid in Estonia which are recognized within the European legal space. – See Constitutional Review Chamber of the Supreme Court judgment of 17 February 2003 in matter no 3-4-1-1-03, paras 14 and 15.

Ratified international agreements have a specific status among the sources of international law.[21] Section 123 of the Constitution allows for the application of international agreements on the Estonian territory alongside national law and to legal relationships that could be simultaneously be regulated by Estonian legislation. The fact that it is possible to apply ratified international agreements in Estonia, indicates recognition of the possibility that an international agreement may be in conflict with Estonian legislation regulating the same issue, and in that case, the undertaking to adhere to the international agreement (monist approach)[22]. At the same time the supremacy of international agreements depends on their ratification by the Riigikogu, and the international agreements have no supremacy over the Constitution of Estonia. The Constitution does not define international agreements as part of Estonian legal system, as it is the case with generally recognised principles and rules of international law, and the Constitution does not require that laws be adopted in conformity with ratified international agreements (cf. Section 3 of the Constitution). The supremacy of the Constitution over international agreements is further supported by the fact that the general provisions of the Constitution (including Section 3) can not be amended upon ratification of international agreements. Namely, pursuant to Section 162 of the Constitution the general provisions may be amended only by a referendum, whereas Section 106(1) prohibits submission to a referendum of the issues of ratification and denunciation of international treaties. Thus, proceeding from Sections 3, 4, 15 and 152 of the Constitution the courts have the right and the obligation to declare international agreements violating the rights and freedoms provided by the Constitution or which are otherwise in conflict with it, unconstitutional, and to refuse to apply these. In order to guarantee the uniform application of international agreements throughout the state it is the Supreme Court who is entitled to render final judgments on these issues, whereas the competence of the Supreme Court is confined to ascertaining the unconstitutionality of an international agreement and precluding the application thereof on the national level.[23]

After accession to the EU the EU norms became a part of Estonian legal order. Pursuant to Section 2 of the Constitution Amendment Act[24] (hereinafter "CAA") the Constitution is still applied, but taking account of the rights and obligations arising from the Accession Treaty.[25] It proceeds from the EU law that upon application of national legislation the EU law must be taken into account. Thus, the courts must refuse to apply Acts or regulations that are in conflict with the EU law. The Supreme Court has stated in regard to the obligation of the Estonian state the following: "[w]ithin the spheres, which are within the exclusive competence of the European Union or where there is a shared competence with the European Union, the European Union law shall apply in the case of a conflict between Estonian legislation, including the Constitution, with the European Union law."[26]

If the protection of fundamental rights in the EU does not meet the standards established by the Constitution, the EU law should be preferred under Section 2 of the CAA, if the conflict can not be surmounted through interpretation. Yet, the Estonian people, when adopting the CAA, did not delegate

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[21] Section 123 of the Constitution: "*The republic of Estonia shall not conclude international treaties which are in conflict with the Constitution.*
If laws or other legislation of Estonia are in conflict with international treaties ratified by the Riigikogu, the provisions of the international treaty shall apply."

[22] About differences between monism and dualism see H. Vallikivi. *Status of International Law in the Estonian Legal System under the 1992 Constitution.* Juridica International 2001/1, pp 222-232. Available at: http://www.juridica.ee/international_en.php?document=en/international/2001/1/24248.SUM.php, 10.08.2007.

[23] Constitutional commentary, pp 547-553. Relevant competence of the Supreme Court is also provided by subsections 1(3) and 3 of Section 15 of the Constitutional Review Court Procedure Act. RT I 2002, 29, 174 … RT I 2005, 68, 524.

[24] Eesti Vabariigi Põhiseaduse täiendamise seadus [Constitution of the Republic of Estonia Amendment Act]. RT I 2003, 64, 429.

[25] Section 2 of the CAA: *"As of Estonia's accession to the European Union, the Constitution of the Republic of Estonia applies taking account of the rights and obligations arising from the Accession Treaty."*

[26] Constitutional Review Chamber of the Supreme Court opinion of 11 May 2005 in matter no 3-4-1-3-06, para 16.

unlimited state powers to the EU. Namely, Section 1 of the CAA establishes the so called protective clause[27], which guarantees the observance of the fundamental constitutional principles even in the cases when the EU law exceeds its competence and the fundamental principles of Estonian Constitution are prejudiced. Thus, for Estonia to be able to exercise the powers of state on the basis of EU norms, the latter still must meet certain conditions.[28] The first condition is that the norms should be in conformity with the fundamental principles of Estonian Constitution; the second is that the EU legislation itself must be valid pursuant to EU norms and be directly applicable.[29]

The state authorities of Estonia, including the courts, can not have doubts as to the validity of the norms of EU primary law. From among the secondary EU legislation an EU regulation is binding in its entirety and, thus, directly applicable – consequently, Section 3 of the Constitution is not applicable when powers of the state are exercised on the basis of an EU regulation without national implementing legislation. If national implementing legislation exists but is in conflict with the EU regulation, the principle of supremacy of the EU law prohibits the application of the implementing legislation (including a statute). The directives, as a rule, are not directly applicable, and thus the state can not exercise its powers against individuals on the basis of directives.[30]

On how the Supreme Court has overcome the constitutional gaps. The letter of the Constitution represents the values that one has to be able to concretise when he understands the Constitution. To understand the Constitution one has to implement both the *principle of guaranteeing conformity* (to avoid conflicts between the different parts of the Constitution itself) and the *contextual principle* (to have a clear-cut understanding of the position of a constitutional provision within the text of the Constitution).[31] Many of the constitutional provisions are general and abstract and need to be interpreted for the application of the Constitution.[32] Possible gaps in the Constitution can be filled with the help of Section 10 of the Constitution, which has been named a development clause and which leaves the catalogue of fundamental rights open.[33] The Constitution sets out general principles and frames for subsequent legislation. The Constitution contains general compromises, and does not contain precise and concrete solutions, thus there are several issues in regard to which the Constitution can be understood differently. A Constitution of general nature offers more possibilities of interpretation for successful resolution of individual problems. To find a compromise between different constitutional norms and principles one has to weigh different values, consequently the role of the legislator in the interpretation process is important. Pursuant to democratic principle the Riigikogu is entitled to specify what has been established by the Constitution in a sometimes general and ambiguous manner. At the same time the Supreme Court, by way of constitutional review procedure, has the right of final decision on whether a statute is constitutional or not.[34] For example, the Supreme Court has pointed out that when interpreting the Constitution one can not blindly adhere to the legal definition of a concept set out in a lower-ranking act. Otherwise the legislator could furnish the constitutional concepts with the meaning it desires and that in turn could result in impermissible restriction of constitutional rights. Thus, due to historical

[27] Section 1 of the CAA: *"Estonia may belong to the European Union in accordance with the fundamental principles of the Constitution of the Republic of Estonia."*
[28] Laffranque, pp 72, 82.
[29] Laffranque, pp 289-291.
[30] Annus, pp 90-91, for the treatment of the same issue see Administrative Law Chamber of the Supreme Court ruling of 25 April 2006 in matter no 3-3-1-74-05 (paras 12 and 13), and Civil Chamber of the Supreme Court judgment of 30 March 2006 in matter no 3-2-1-4-06 (para 58).
[31] Constitutional commentary, p 29.
[32] Annus, p 32.
[33] Section 10 of the Constitution: *„The Rights, freedoms and duties set out in this Chapter shall not preclude other rights, freedoms and duties which arise from the spirit of the Constitution or are in accordance therewith, and conform to the principles of human dignity and of the state based on social justice, democracy, and the rule of law."*
[34] Annus, pp 39-40.

reasons and because of more abstract character the content of the terms used in the Constitution could differ from the content of the same terms within specific branches of law.[35]

Constitution as explicit and implicit legal regulation in the practice of the Supreme Court.
In principle, the Constitution can be applied directly, without passing lower-ranking acts. Proceeding from the principle of supremacy of the Constitution the courts as well as the executive are under the obligation to observe the Constitution when making decisions. The Supreme Court has applied the Constitution directly (without a pertinent implementation legislation) for example to allow to reopen judicial proceedings after the European Court of Human Rights found that Estonia had violated the European Human Rights Convention, irrespective of the fact that Estonian procedural law lacked relevant regulation. The Supreme Court held that if the legislator has failed to establish an effective and complete mechanism for the protection of fundamental rights, the judicial power must – under Section 14 of the Constitution – guarantee the protection of fundamental rights.[36] One of the reasons set out by the Supreme Court for reopening the case was the fact that the violation of the fundamental rights of the person was continuing, the violation was material and there was no public interest that the earlier judgment should stand.[37] Nevertheless, the principle of direct applicability of the Constitution does not mean that it should be applied without any reservations. The legislator has been given wide discretion for rendering content to several provisions of the Constitution which are very general in nature, whereas the legislator is bound by the constitutional principles and the nature of fundamental rights when making the choices. For example, in the Social Welfare Act case[38] the Supreme Court found it possible, when social rights were violated, to evaluate a regulation only to the extent that the aid guaranteed to needy persons by the legislator falls below the minimum, and to do that with the aim of preventing the violation of human dignity. It follows that certain regulation is still necessary for the implementation of the Constitution and that the Constitution can give but general guiding principles, which have to be specified by the legislator.

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 the constitutional control? Does the constitution of your country establish expressis verbis that the constitutional courts 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?*

2.2.1. Section 149(3)2) of the Constitution designates the Supreme Court as the court of constitutional review. The Supreme Court is competent to exercise the review of constitutionality of valid legislation as well as of legislation that has not yet entered into force. The President of the Republic is entitled to request for a preventive control of statutes within the constitutional review procedure (Section 107 of the Constitution); the Chancellor of Justice is entitled to request both preventive and subsequent control of

[35] General Assembly of the Supreme Court judgment of 17 March 2003 in matter no 3—1-3-10-02, para 25.
[36] Section 14 of the Constitution: *"The guarantee of the rights and freedoms is the duty of the legislative, executive and judicial powers, and of local governments."*
[37] See General Assembly of the Supreme Court judgment of 6 January 2004 in matter no 3-1-3-13-03, para 36 ff; General Assembly of the Supreme Court judgment of 6 January 2004 in matter no 3-3-2-1-04, paras 27-29, and Criminal Chamber of the Supreme Court judgment of 22 November 2004 in matter no 3-1-3-5-04, para 13. See also Estonian reply to CCJE questionnaire, C.3 (footnote 1).
[38] Constitutional Review Chamber of the Supreme Court judgment of 21 January 2004 in matter no 3-4-1-7-03, para 16.

legislation of general application issued by the legislator, the executive and the local governments (Section 142 of the Constitution).[39] The Supreme Court can exercise the review of constitutionality of legal acts passed before the entering into force of the Constitution on the basis of Section 2 of the Constitution Implementation Act,[40] as well as proceeding from the principle of supremacy of the Constitution (Section 3). Under Section 152(1) of the Constitution the ordinary courts are entitled to declare a norm unconstitutional and to refuse to apply it, but subsequently they have to transfer the norm to the Supreme Court who shall render the final decision on whether to repeal the norm or let it stand.

The central norm concerning the competence of constitutional review is Section 152(2) of the Constitution, which provides that the Supreme Court shall declare invalid *any law or another legislation* that is unconstitutional. As the Constitution separately highlights laws besides other legislation, it can be concluded that a "law" means parliamentary acts or statutes in the formal sense.[41] For the purposes of Section 152 it is the universal character (material criterion) of legislation that is of decisive importance -- all acts of general application, irrespective of who passed these (including e.g. statutes passed by referenda, regulations of the Government of the Republic and of local governments), are the objects of constitutional review.[42] Constitutional review also encompasses international agreements (see above at 2.1.).

2.2.2. The Constitution does not *expressis verbis* establish the right of the constitutional court to examine and evaluate the constitutionality of gaps in legislation or legislative omission. This right can be derived from Sections 14 and 15 of the Constitution.[43] The fundamental right to organisation and procedure, established in the former, embraces the right to active activities of the legislator, which is safeguarded by the general judicial guarantee.[44]

2.2.3. The Constitution does not provide for a special procedure for the examination of legislative omission.

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

[39] Constitutional commentary, pp 482-486; pp 601-602 p 626.
[40] Põhiseaduse rakendamise seadus [The Constitution of the Republic of Estonia Implementation Act]. RT I 1992, 26, 350. Section 2: *„Legislation currently in force in the republic of Estonia shall be valid after the entry into force of the Constitution in so far as it is not in conflict with the Constitution or the Constitution Implementation Act and until it is either repealed or brought into complete conformity with the Constitution."*
[41] Constitutional commentary, p 634.
[42] Annus, p 171.
[43] See Section 14 under footnote 36. Section 15(1) of the Constitution: *"Everyone whose rights and freedoms are violated has the right of recourse to the courts. Everyone has the right, while his or her case is before the court, to petition for any relevant law, other legislation or procedure to be declared unconstitutional."* See Section 15(2) under footnote 13.
[44] Constitutional commentary, pp 134, 140.

Pursuant to Section 9(1) of the Constitutional Review Court Procedure Act the courts of first and second instances can declare unconstitutional also the failure to pass legislation of general application and transfer relevant judgments to the Supreme Court for the review of constitutionality.

Before entry into force of the referred provision the Supreme Court had derived the competence of finding of unconstitutionality of legislative omission from the right to organisation and procedure included in Section 14 of the Constitution. Namely, the Supreme Court held in the so called first case of resettlers[45] that the provision of the Principles of Ownership Reform Act pursuant to which the issue of return of property to those who had resettled to Germany was to be resolved by an international agreement, in a situation where during more than 10 years such agreement has not been concluded, was in conflict *inter alia* with the general right to organisation and procedure, and the court stated that to overcome this unconstitutionality the legislator was to pass relevant legal regulation. As the legislator was unable – during more than three years – to eliminate the unconstitutional situation ascertained by the Supreme Court in the so called first case of resettlers, the Supreme Court declared the contested provision invalid in the second case of resettlers in 2006 due to legislative omission.[46]

The Supreme Court reaffirmed its competence again in the so called Dwelling Act case, where it found in paras 42 and 43 of the judgment by way of *obiter dictum* the following: "[t]he legislator's failure to act or insufficient action may, indeed, be in conflict with the Constitution and the Supreme Court can ascertain unconstitutionality of the omissions of the legislator within constitutional review proceedings. The law clearly gives such competence within concrete norm control on the basis of a court judgment."[47]

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 other legal acts (if it 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 this law (or other legal act) provide for any specific procedures 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 one must remove the legislative omission? Is it provided for in other laws and legal acts (for example, the regulation of the parliament)?*

The competence of the Supreme Court in constitutional review proceedings is established by Section 2 of the Constitutional Review Court Procedure Act (hereinafter "CRCPA"), clause 1 of which *expressis verbis* empowers the Supreme Court to review the constitutionality of legislation of general application or the failure to pass such legislation (i.e. legislative omission). The competence of the Supreme Court is further specified in Section 4 of the Act, pursuant to which the Supreme Court shall review the constitutionality of legislation of general application or the failure to pass such legislation or of an international agreement on the basis of a petition of the President of the Republic, the Chancellor of Justice, a local government council or the Riigikogu or a court judgment. The CRCPA gives the power

[45] Constitutional Review Chamber of the Supreme Court judgment of 28 October 2002 in matter no 3-4-1-5-02.
[46] The Supreme Court postponed the entry into force of its judgment under Section 58(3) of the Constitutional Review Court Procedure Act, to give the legislator a possibility to choose between different solutions and to draft necessary legal regulation. About the postponement see under 4.8.
[47] Constitutional Review Chamber of the Supreme Court judgment of 2 December 2004 in matter no 3-4-1-20-04, para 42.

to contest the legislative omission *expressis verbis* only to the courts[48], but as already pointed out above, the Supreme Court has in principle accepted the right of the President of the Republic to contest the lack of a norm, necessary form the constitutional point of view, in the Act that has been presented to him for promulgation.[49]

The procedure for evaluating the constitutionality of failure to pass legislation of general application does not in principle differ from the ordinary constitutional review of legislation exercised by the Supreme Court. Subsequent to the finding of legislative omission, the Supreme Court has – under Section 15(1)2[1]) of the CRCPA – only one possibility, namely to declare to failure to pass legislation of general application unconstitutional. Neither the CRCPA nor any other act provide for further steps to be taken to eliminate the legislative omission. This problem has been referred to in Estonian law literature as "the impossibility for the court to check the enforcement of its judgments".[50]

The right of the courts to review legislative omission also proceeds from the EU law, e.g. when considering the right to compensation when the damage was caused by failure to transpose an EU directive or by insufficient transposition.[51] Section 14 of the State Liability Act[52] (hereinafter "SLA") entitles a person to claim compensation for damage caused by failure to pass legislation of general application when the damage was caused by material violation of the duties of a public authority, the norm serving as a basis for the duties violated is directly applicable, and the persons is among those who suffered special damage because of the legislative omission. In order to exercise the right of claim the person has to file a complaint with a first instance administrative court. If the court, having examined the circumstances, comes to the conclusion that the damage has been caused and that the failure to pass legislation, which was the cause of the damage, was in conflict with the Constitution, the courts shall adjudicate the concrete case[53] (and shall order the payment of compensation) by applying higher-ranking legislation, giving rise to the person's subjective right, and at the same time the court shall initiate concrete norm control within the constitutional review procedure of the Supreme Court.[54]

3. LEGISLATIVE OMISSION AS AN OBJECT OF IMVESTIGATION 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?

[48] The CRCPA establishes separate regulation for the "ordinary" chambers of the Supreme Court and the first and second instance courts: Section 3(3)(2): *"The general Assembly [of the Supreme Court] shall adjudicate a matter transferred to it by the Administrative law, Civil or Criminal or by an ad hoc Chamber, if the Chamber or ad hoc chamber has a reasonable doubt as to the constitutionality of legislation of general application, the failure to pass such legislation or of an international agreement relevant for the adjudication of a pending case."*

[49] See above Constitutional Review Chamber of the Supreme Court judgment of 2 December 2004 in matter no 3-4-1-20-04.

[50] See in more detail R. Järvamägi. Põhiseaduslikkuse järelevalve kohtu mõju seadusandjale [The impact of the constitutional review court on the legislator]. Juridica 6/2006, pp 414-422, at 2.3.

[51] Annus, p 164.

[52] Riigivastutuse seadus [State Liability Act]. RT I 2001, 47, 260 … RT 1 2004, 56, 405.

[53] The court adjudicating the case may also suspend the proceeding (Section 22(2)4) of the Administrative Court Procedure Code, see also Section 218(1[1]) of the Criminal Court Procedure Code, Section 213(2)4) of the Civil Court Procedure Code).

[54] 357 SE I. Explanatory letter to the Draft of State Liability Act and Constitutional Review Court Procedure Act Amendment Act. Available at: http://web.riigikogu.ee/ems/saros-bin/mgetdoc?itemid=041130026&login=proov&password=&system=ems&server=ragne11, 10.08.2007.

Review of constitutionality of t legislation of general application in the Supreme Court is possible by way of both concrete and abstract norm control

Concrete norm control of legislation of general application is exercised by the Supreme Court on the basis of references from ordinary courts. As already pointed out under 2.4. the CRCPA *expressis verbis* empowers the courts to contest legislative omissions in the Supreme Court.

The right to petition for abstract norm control is vested in the President of the Republic in the form of preventive control, and in the Chancellor of Justice and local government councils (in case of conflict with constitutional guarantees of local governments) in the form of both preventive and subsequent control.[55]

On the basis of one Supreme Court judgments it is also possible to ascertain legislative omissions within abstract norm control.

In the so called Dwelling Act case, which indirectly concerned everyone's right to housing, the Supreme Court found the following: "In addition to declaring the legislator's failure to act unconstitutional in the framework of concrete norm control, the Supreme Court has also accepted the right of the Chancellor of Justice to contest the omissions of the legislator. […] The Chamber is of the opinion that the President of the Republic has the right to contest the legislator's failure to act. There are no convincing reasons why, in regard to review of laws, the President of the Republic should not have rights equal to those of the Chancellor of Justice. If an Act lacks a norm which it should contain pursuant to the Constitution, the President of the Republic is allowed not to proclaim the Act."[56]

In this context the Supreme Court makes a reference to the so called Social Welfare Act case[57], where it declared invalid, on the basis of the petition of the Chancellor of Justice, Section 22^1(4) of the Social Welfare Act to the extent that "expenses connected with dwelling of needy people and families who were using dwellings not referred to in Section 22^1(4) of Social Welfare Act were not taken into account

[55] Relevant provisions of the CRCPA:
„Section 4. Initiation of proceedings
(1) The Supreme Court shall review the constitutionality of legislation of general application or international treaties on the basis of a reasoned request, court judgment or court ruling.
(2) A request may be filed with the Supreme Court by the President of the Republic, the Chancellor of Justice, a local government council and the Riigikogu."
Section 5: "Request of the President of the Republic
The President of the Republic may submit a request to the Supreme Court to declare a law, passed by the Riigikogu but not proclaimed by him or her, unconstitutional, if the Riigikogu had again passed the law which was returned to it for a new debate and decision, unamended."
Section 6(1): " The Legal Chancellor may submit to the Supreme Court a request to 1) declare legislation of general application or a provision thereof passed by the legislative or executive power or a local government, which has entered into force, invalid; 2) to declare an Act, which has been proclaimed but has not yet entered into force, unconstitutional; 3) to declare legislation of general application passed by the executive or a local government body unconstitutional; 4) to declare an international treaty signed by the Republic of Estonia or a provision thereof unconstitutional; 5) to repeal a resolution of the Riigikogu concerning submission of a draft Act or other national issue to a referendum, if the draft Act to be submitted to a referendum, except draft Acts amending the Constitution, or other national issues are in conflict with the Constitution or if upon deciding to hold a referendum the Riigikogu has materially violated the prescribed procedure."
Section 7: "A local government council may submit a request to the Supreme Court to declare an Act or a provision thereof, which has been proclaimed but has not yet entered into force, or a regulation of the Government of the Republic or a minister or a provision thereof, which has not entered into force, invalid, if it is in conflict with the constitutional guarantees of a local government."
[56] Constitutional Review Chamber of the Supreme Court judgment of 2 December 2004 in matter no 3-4-1-20-04.
[57] Constitutional Review Chamber of the Supreme Court judgment of 21 January 2004 in matter no 3-4-1-7-03.

and were not compensated for upon the grant of subsistence benefits", because it was in conflict with Section 28(2) and Section 12(1) of the Constitution.

As this case mainly concerned the unequal treatment of equals and not so much finding the legislative omission, the right of the Chancellor of Justice to contest legislative omission, derived from this case, has been questioned later on. Greater clarity as to the relevant competence of the Chancellor of Justice is expected in the nearest future, when the General Assembly of the Supreme Court will form its opinion on the Chancellor of Justice's petition to have a norm, which does not guarantee sufficiently effective control over the financing of political parties, declared unconstitutional.

By way of analogy and from the theoretical aspect it can be regarded probable that similar petitions of local government councils could be regarded acceptable, if the constitutional guarantees of local government are violated by legislative omission. Such cases have not been brought to the Supreme Court so far.

Pursuant to later amendments to the CRCPA, since 23 December 2005, the Riigikogu can ask for the opinion of the Supreme Court on how to interpret the Constitution in conjunction with the European Union law, if the interpretation of the Constitution is of decisive importance for the adoption of a draft Act necessary for the fulfillment of obligations of a member of the European Union (Section 7^1 of the CRCPA). Still, it is difficult to imagine that the legislator itself would contest its omissions this way.

Under the CRCPA individuals have no right of submitting constitutional complaints directly to the Supreme Court (see above 3.2. commentary on the Supreme Court judgment in the so called Brusilov case).

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 legal system of the Republic of Estonia does not recognise the system of individual constitutional complaints. Yet, once – in the so called Brusilov case – the right of an individual to have a recourse to the Supreme Court was recognised and this was derived – due to the absence of pertinent procedural rules – directly from the Constitution: "Criminal Chamber admitted that none of the grounds for correction of court errors, established in Section 77^7(1) of the Code of Criminal Court Appeal and Cassation Procedure, is present in S. Brusilov's petition and that the term for correction of court errors had expired. The Chamber finds that the hearing of the matter is justified by the fundamental rights established in Sections 14 and 15 of the Constitution."[58]

[58] General Assembly of the Supreme Court judgment of 17 march 2003 in matter no 3-1-3-10-02, para 5.

The *expressis verbis* right to initiate constitutional review proceedings in the Supreme Court is given to the first and second instance courts. Pursuant to Section 9(1) of the Constitutional Review Court Procedure Act a court of first or second instance may declare unconstitutional also the failure to pass legislation and transfer relevant judgment to the Supreme Court for the review of constitutionality.[59]

A petitioner has the right to contest the constitutionality of a law or a legal act in the first and second instance courts if there is a situation the regulation of which is required by the Constitution and the applicable norm can not be deducted by constitution-conforming interpretation of the statute without exceeding the limits of interpretation. Thus, primarily it has to be a relationship the regulation of which a person can demand by invoking constitutional rights or the necessity of regulation of which arises on the basis of the text of the Constitution (see reply under 1.2. above).

In the practice of the Supreme Court is has mainly been the court who has contested legislative omissions[60]; in the Brusilov case the Supreme Court was addressed with a petition for the correction of a court error[61], and in the Principles of Ownership Reform Act case the Administrative Law Chamber of the Supreme Court requested that the General Assembly give an opinion on the legislator's failure to act[62].

In between 1993 – 2006 the Supreme Court has adjudicated the total of 174 constitutional review cases. The legislative omission has been under review of the General Assembly in at least four[63] and of the Constitutional Review Chamber in at least five cases.[64] In addition, between 2005-2006 two petitions[65] and in 2007 three petitions[66] were submitted in which, by reference to the Brusilov judgment and to the right to organisation and procedure included in Sections 14 and 15 of the Constitution[67] and to the general right of recourse to the courts, the petitioners have sought direct recourse to the Supreme Court constitutional review proceedings, arguing that a legislative omission has resulted in a situation where the procedural rights of persons are unprotected. The referred petitions have been rejected under Section 40 of the CRCPA[68] without hearing[69].

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[59] *"Section 9. Constitutional review on the basis of court judgment or ruling*
(1) If a court of first or second instance has, upon adjudication of a case, not applied a pertinent legislation of general application or an international treaty, declaring it unconstitutional, or if a court of first or second instance has, upon adjudication of a case, declared the failure to pass legislation unconstitutional, it shall deliver the pertinent judgment or ruling to the Supreme Court."

[60] General Assembly of the Supreme Court judgment of 28 October 2002 in matter no 3-4-1-5-02, and Constitutional Review Chamber of the Supreme Court judgment of 30 April 2004 in matter no 3-4-1-3-04.

[61] General Assembly of the Supreme Court judgment of 17 March 2003 in matter no 3-1-3-10-02.

[62] General Assembly of the Supreme Court judgment of 12 April 2006 in matter no 3-3-1-63-05.

[63] General Assembly of the Supreme Court judgments of 28 October 2002 in matter no 3-4-1-5-02, of 17 March 2003 in matter no 3-1-3-10-02, of 19 April 2005 in matter no 3-4-1-1-05, and of 12 April 2006 in matter no 3-3-1-63-05.

[64] Constitutional Review Chamber of the Supreme Court judgments of 15 July 2002 in matter no 3-4-1-7-02, of 21 January 2004 in matter no 3-4-1-7-03, of 30 April 2004 in matter no 3-4-1-3-04, of 2 December 2004 in matter no 3-4-1-20-04, and of 31 January 2007 in matter no 3-4-1-14-06.

[65] Constitutional Review Chamber of the Supreme Court rulings of 23 March 2005 no 3-4-1-6-05 and of 9 May 2006 no 3-4-1-4-06.

[66] Constitutional Review Chamber of the Supreme Court rulings of 17 January 2007 no 3-4-1-17-06, of 4 April 2007 no 3-4-1-8-07 and of 17 May 2007 no 3-4-1-11-07.

[67] Section 14. The guarantee of rights and freedoms is the duty of the legislative, executive and judicial powers, and of local governments.
Section 15. Everyone whose rights and freedoms are violated has the right of recourse to the courts. Everyone has the right, while his or her case is before the court, to petition for any relevant law, other legislation or procedure to be declared unconstitutional.
The courts shall observe the Constitution and shall declare unconstitutional any law, other legislation or procedure which violates the rights and freedoms provided by the Constitution or which is otherwise in conflict with the Constitution.

[68] Section 40. Return of complaint without hearing

Presently a petition of the Chancellor of Justice of 16 February 2007 is pending before the General Assembly of the Supreme Court, where he requests that the Political Parties Act be declared unconstitutional (in conflict with principle of democracy in Section 1(1) and Section 10 and the general right to political parties of the second sentence of Section 48(1) of the Constitution) and invalid to the extent that the Act does not establish effective control over the financing of political parties.

From among the (at least) fourteen cases related to legislative omission before the Supreme Court it has rejected without hearing five individual complaints[70], impermissible under the Constitutional Review Court Procedure Act, which sought that legislation be declared unconstitutional because of legislative omission. On three occasions it has been the Chancellor of Justice[71] who has initiated the proceedings and referred to legislative omission (in addition the present, fourth, petition which the court received in February 2007 and which concerns the financing of political parties). On two occasions the President of the Republic has filed a petition for constitutional review, referring to legislative omission.[72] Also on two occasions the courts initiating constitutional review in the Supreme Court have referred to legislative omission.[73]

No specific requirements concerning the form, content or structure of complaints concerning unconstitutionality of legislative omission have been stipulated. To such complaints the general requirements of the Constitutional Review Court Procedure Act apply.[74]

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(1) A complaint shall be returned without hearing if
1) hearing of the complaint is not in the competence of the Supreme Court; […]

[69] In the referred case the Constitutional Review Chamber held that the Constitutional Review Court Procedure Act did not *expressis verbis* provide for the possibility to submit individual complaints for the review of constitutionality of legislation of general application. Nevertheless, on the basis of Sections 13, 14 and 15 of the Constitution and the application practice of the European Convention for the Protection of Human Rights and Fundamental Freedoms, the General Assembly has found that the Supreme Court can refuse to hear a complaint only if the person has other effective ways of exercising the right to judicial protection, guaranteed by Section 15 of the Constitution. The right to judicial protection provided in Sections 13, 14 and 15 of the Constitution embraces the right of a person to have recourse to the courts if his rights or freedoms are violated, as well as the obligation of the state to establish appropriate judicial procedure for the protection of fundamental rights, a procedure that is fair and guarantees effective protection of persons' rights. In these concrete cases the Constitutional Review Chamber argued that the contested valid procedure guaranteed sufficiently effective possibilities for the applicants for the judicial review of the alleged violations. Thus, the opinion of the petitioner that he or she had no other means for the protection of his or her fundamental rights than the recourse to the Supreme Court by way of constitutional review, was erroneous and that is why the petition was impermissible and the Supreme Court could not and did not hear it on the merits.

[70] Constitutional Review Chamber of the Supreme Court rulings of 23 March 2005 no 3-4-1-6-05, of 9 May 2006 no 3-4-1-4-06, of 17 January 2007 no 3-4-1-17-06, of 4 April 2007 no 3—4-1-8-07 and of 17 May 2007 no 3-4-1-11-07.

[71] Constitutional Review Chamber of the Supreme Court judgments of 15 July 2002 in matter no 3-4-1-7-02, of 21 January 2004 in matter no 3-4-1-7-03, General Assembly of the Supreme Court judgment of 19 April 2005 in matter no 3-4-1-1-05.

[72] Constitutional Review Chamber of the Supreme Court judgment of 2 December 2004 in matter no 3-4-1-20-04 and of 31 January 2007 in matter no 3-4-1-14-06.

[73] General Assembly of the Supreme Court judgment of 28 October 2002 in matter no 3-4-1-5-02 and Constitutional Review Chamber of the Supreme Court judgment of 30 April 2004 in matter no 3-4-1-3-04.

[74] Section 8. Requirements concerning requests
(1) A request shall be reasoned and shall set out the provisions or principles of the Constitution, with which the contested legislation of general application, international treaty or Riigikogu resolution is incompatible.
(1^1) A request of the Riigikogu for an opinion on the interpretation of the Constitution in conjunction with the European Union law shall set out the reasons why the Riigikogu considers it necessary to ask for the opinion of the Supreme Court. The request shall contain references to pertinent parts or provisions of the draft Act, as well as to the provision or principles of the Constitution on the interpretation of which the opinion of the Supreme Court is requested.
(2) The person filing the request shall sign it and shall annex to it the text of the legislation of general application, international treaty or resolution of the Riigikogu or pertinent extracts thereof and other source documents.

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.

The Supreme Court has no obligation to examine legislative omissions *ex officio*. Nevertheless, the General Assembly of the Supreme Court has initiated the investigation of legislative omission in the Brusilov case, because the applicant had no other effective remedy for the protection of his fundamental rights. The Criminal Chamber of the Supreme Court justified the referral of the case to the General Assembly by the fact that the resolution of the criminal case required evaluating whether Section 1(1)-(3) of the Penal Code were in conformity with Section 23(2) in conjunction with Section 12(1) of the Constitution to the extent that the referred provisions of the Penal Code did not allow to apply the statute alleviating punishments to those persons serving sentences or to whom a sentence has been imposed under the Criminal Code, which is more severe than the maximum term provided for in relevant provision of the Special Part of Penal Code. The Criminal Chamber admitted that none of the grounds for correction of court errors, established in the Code of Criminal Court Appeal and Cassation Procedure, were present in S. Brusilov's petition and that the term for correction of court errors had expired. The Chamber held that the hearing of the matter was justified by the fundamental rights established in Sections 14 and 15 of the Constitution.[75] In its judgment the General Assembly held that "[a]t the same time the fact that Section 15 of the Constitution recognises everyone's right of recourse to the courts, if his or her rights and freedoms are violated, must not be ignored. S. Brusilov's petition concerns the rights referred to in the Constitution, as he raises the question of retroactive force of an Act, providing for a less onerous punishment for a commission of an act, whish is referred to in Section 23 of the Constitution. On the basis of Section 15 of the Constitution the Supreme Court may refuse to hear S. Brusilov's petition only if S. Brusilov has other effective ways to obtain judicial protection of the right established in the same article […]", and also that "[t]here is no effective remedy for S. Brusilov for the protection of his fundamental right. Taking into account this fact, the fundamental rights at stake and the duration of the sentence served, the Supreme Court *en banc* can find no justification to refuse to hear S. Brusilov's petition on merits. The Supreme Court *en banc* also bears in mind the need to give the courts clear guidelines on how to solve similar cases."[76] In the final paragraph of the judgment the General Assembly explains, once again, its motives for having resorted to such an exceptional measure of accepting an individual complaint which is outside the scope permitted by procedural law, as follows: "The Supreme Court *en banc* emphasises that it heard S. Brusilov's petition taking into account fundamental rights at stake and the duration of the imprisonment already served by S. Brusilov."

Also, the Supreme Court acted on its own initiative when examining the legislative omission in the so called second case of resettlers. The Supreme Court had found in the first case of resettlers[77], within the constitutional review proceeding initiated by Tallinn Administrative Court, that there was a legislative omission, that the provision of the Principles of Ownership Reform Act pursuant to which the issue of return of property to those who had resettled to Germany was to be resolved by an international agreement, in a situation where during more than 10 years such agreement has not been concluded, was in conflict *inter alia* with the general right to organisation and procedure. On 28 October 2002 the Supreme Court did not declare Section 7(3) of the Principles of Ownership Reform Act invalid, instead it confined itself to finding of unconstitutionality of the provision in the decision part of the judgment,

[75] General Assembly of the Supreme Court judgment of 17 March 2003 in matter no 3-1-3-10-02, para 5.
[76] General Assembly of the Supreme Court judgment of 17 March 2003 in matter no 3-1-3-10-02, paras 17-18.
[77] General Assembly of the Supreme Court judgment of 28 October 2002 in matter no 3-4-1-5-02.

and in the reasoning of the judgment it held that the legislator had to bring Section 7(3) of the Principles of Ownership Reform Act into conformity with the principle of legal clarity, admitting at the same time that the finding of unconstitutionality of the referred provision meant the continuation of the ambiguous situation. The General Assembly held that to overcome the legal ambiguity the legislator must adopt relevant legal regulation and that until the Act is brought into conformity with the principle of legal clarity, the issue of return or compensating for or privatisation of the resettlers' property could not be resolved.

In 2006 the Supreme Court again examined the same topic of resettlers, because the legislator had failed – in more than here years' time – to eliminate the unconstitutional situation that the Supreme Court had ascertained in the first case of resettlers. In the so called second case of resettlers[78] the Administrative Law Chamber of the Supreme Court referred the matter to the General Assembly with the request that the latter assess the constitutionality of the legislator's inactivity (of three years) and the validity of Section 7(3) of the Principles of Ownership Reform Act, which had been declared unconstitutional.

The agreement referred to in Section 7(3) of the Principles of Ownership Reform Act had not been concluded in the meantime and the provision had not been amended during the more than tree years' period that had lapsed since the court judgment of 28 October 2002. Yet, Section 7(3) of the Principles of Ownership Reform Act was (still) in conflict with the Constitution. The General Assembly underlined that "[i]t would not be conducive to the resolution of the situation if Section 7(3) of PORA were again declared unconstitutional without the declaration of invalidity thereof. In order to put an end to the unconstitutional situation which has lasted for years Section 7(3) of PORA shall have to be declared invalid. The declaration of invalidity of the provision would terminate the legal ambiguity for the resettlers as well as the lessees of the unlawfully expropriated residential buildings that had belonged to the former. The consequence of the declaration of invalidity of Section 7(3) of PORA would be that the applications for the return of or compensation for the unlawfully expropriated property which was in the ownership of persons who resettled to Germany on the basis of an agreement entered into with the German state in 1941, as well as the applications of the lessees of the unlawfully expropriated buildings, which had been in the ownership of the resettlers, shall have to be processed."[79]

The rest of the cases related to legislative omission, resolved either by the General Assembly or the Constitutional Review Chamber of the Supreme Court, were initiated by the petitions of either the President of the Republic, the Chancellor of Justice or the courts for the review of legislative omission.

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 od 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 case 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 said delegation?*

[78] General Assembly of the Supreme Court judgment of 12 April 2006 in matter no 3-3-1-63-05.
[79] Para 27 of the judgment.

In addition to the review of constitutionality of gaps in laws the Supreme Court can also review the constitutionality of other legislation valid in Estonian legal order.

Above under 2.1. the possibility of review of constitutionality of international agreements was explained. Pursuant to Sections 3, 4, 15 and 152 an international agreement or a provision thereof violating the rights or freedoms established by the Constitution may be declared unconstitutional, but the CRCPA does not provide for a possibility to establish gaps in international agreements.

Nevertheless, the Supreme Court is empowered to establish that lower-ranking legislation of general application is in conflict with higher-ranking one (including a conflict of a regulation of the Government of the Republic, of a minister or of a local government with a law).[80] The Supreme Court has found, for example, that Section 87(6) of the Constitution means an obligation of the state to guarantee not only that a regulation is in conformity with the Constitution at the time of issue, but also an obligation to see to it that the regulations that have been issued earlier on be in conformity with new statutes.[81]

The Supreme Court can establish legislative omission in regard to delegated legislation. If the norm delegating authority to legislate is permitting, not obligating in nature, the court must take into account the administrative right of discretion.[82] So far the Supreme Court has not had to analyse gaps in lower-ranking legislation of general application by way of constitutional review; at the same time there are numerous cases on whether a government regulation meets a delegating norm or has been issued without a norm delegating authority to do so. One of the most important judgments in this sphere is the so called alcohol arrangements' case, in which the Supreme Court analysed the possibilities of issuing *intra legem*, *praeter legem* and *contra legem* regulations.[83]

[80] Relevant competence is provided by Sections 2(1),6(1)1) and 3), 7, 9(1) of the CRCPA.
[81] Constitutional Review Chamber of the Supreme Court judgment of 6 October 1997 in matter no 3-4-1-2-97, para IV.
[82] K. Merusk. Administratsiooni diskretsioon ja selle kohtulik kontroll [Discretion of administration and judicial review thereof]. Tallinn 1997, p 114.
[83] In this judgment the Supreme Court argued as follows: In case of an *intra legem* regulation a law must contain a norm, which clearly states that an administrative body is entitled to issue administrative acts on the basis of the law. The same principle is embodied in Article 27(2) of the Government of the Republic Act. The purpose, content and extent of authorisation may, as far as *intra legem* regulations are concerned, be derived from law by interpreting it. In this case, though, the subject of the law, when reading it, must be able to be sure that in the cases regulated by the law the executive is entitled to issue administrative acts of general character. An *intra legem* regulation must not exceed the scope regulated by the law. / In case of an *intra legem* regulation a law must contain a norm, which clearly states that an administrative body is entitled to issue administrative acts on the basis of the law. The same principle is embodied in Article 27(2) of the Government of the Republic Act. The purpose, content and extent of authorisation may, as far as *intra legem* regulations are concerned, be derived from law by interpreting it. In this case, though, the subject of the law, when reading it, must be able to be sure that in the cases regulated by the law the executive is entitled to issue administrative acts of general character. An *intra legem* regulation must not exceed the scope regulated by the law. Proceeding form the principle of separate powers, according to which the legislative function is vested in the legislator, an administrative act of general character which exceeds the scope regulated by law, is considered to be either a *praeter legem or contra legem* regulation. A constitution of a country may give the legislator the right to authorise an administrative body to issue *praeter legem* regulations. The provision, which gives authorisation to issue regulations pertaining to spheres not regulated by law, that is *praeter legem* regulations, must contain clear permission that the executive is entitled to issue such regulations on the basis of this provision. The government, when acting *praeter legem*, appropriates a part of the legislator's competence, and this can be done only when the legislator has *expressis verbis* authorised it to do so. The provision delegating the right to issue *praeter legem* regulations, must contain, in addition to clear permission, also the name of the authorised administrative body and must specify the purpose, content and extent of the pertinent regulation. / *Contra legem* regulations amend and quash laws. In Estonia, pursuant to the principle of separate powers, *contra legem* regulations are debarred by the Constitution. – See Constitutional Review Chamber of the Supreme Court judgment of 20 December 1996 no 3-4-1-3-96, para III.

The Supreme Court does not examine the administrative legislation of specific application (individual acts) within the constitutional review procedure, these can be contested by way of administrative court procedure.[84]

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.)?*

In the so called Dwelling Act case the Constitutional Review Chamber of the Supreme Court refused to examine the constitutionality of an alleged gap in legal regulation because the petitioner had exceeded the powers provided by law to initiate constitutional review proceedings. The Supreme Court held that the right of the Chancellor of Justice and of the President of the Republic to contest the legislator's inactivity can not be an unlimited one. The President of the Republic can only evaluate Acts that have been submitted to him for promulgation. He can contest the legislator's inactivity only if the norm, which has not been passed, should be included namely in the contested legal act or is essentially related to the act. Thus, the President of the Republic can not contest the legislator's failure to act "when the norm, which was not passed, should undoubtedly be included in some other Act, already proclaimed, or if the legislator has provided for the allegedly non-issued norms in some other Act." As in his petition the President of the Republic argued that upon the implementation of the Act the current social security system will not sufficiently guarantee the right to housing, the President of the Republic has actually contested the norms of Social Welfare Act, concerning the right to housing allowance. „Pursuant to Section 22 of Social Welfare Act, a person living alone or a family whose monthly net income, after the deduction of the fixed expenses connected with dwelling is below the subsistence level has the right to receive a subsistence benefit, which also includes a housing allowance. A subsistence benefit can also be applied for by the tenants of restituted dwellings. The President of the Republic does not argue that the right to housing of tenants of restituted houses is or should be of different extent than the general right of every person to housing. Thus, the President of the Republic has contested the Social Welfare Act, which is already in force. The President of the Republic has no such competence, and that is why the Chamber can not review that part of the petition of the President of the Republic on its merits."[85]

In the same Dwelling Act judgment the Supreme Court used the arguments of "political issue" and legislator's discretion, stating that "[t]he legislator is competent to decide which reforms to undertake and which groups of society to favour with these reforms. The Chamber shall not analyse the expediency of the political decision taken by the legislator - the Chamber can only review the constitutionality of the Act […],"[86] "[t]he principle of legitimate expectation does not mean that it could be invoked to demand that the legislator establish the benefits which have been a subject of political discussions […],"[87] and that „[w]hen establishing the contested regulation the legislator has considered the referred measures sufficient for the protection of the rights of tenants. The Chamber has no reason to doubt the efficiency of the protective measures chosen by the legislator."[88].

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[84] Halduskohtumenetluse seadustik [Code of Administrative Court Procedure]. RT I 1999, 31, 425 … RT I 2007, 12, 66; see Sections 4(1) and 6(2).

[85] Constitutional Review Chamber of the Supreme Court judgment of 2 December 2004 in matter no 3-4-1-20-04, paras 45-47.

[86] Para 14 of the judgment.

[87] Para 23 of the judgment.

[88] Para 36 of the judgment.

In the so called first case of election coalitions the Supreme Court satisfied the Chancellor of Justice's petition in part. Namely, the Chancellor of Justice requested that three provisions of the Local Government Council Election Act be declared unconstitutional "to the extent that they do not allow persons with the right to run as a candidate to participate in local government council elections in the lists of citizens' election coalitions". The Constitutional Review Chamber found that the disputed provisions did not enable persons to run as candidates in the lists of election coalitions. The declaration of invalidity of the Act in the extent requested by the Legal Chancellor would not re-create the provisions regulating citizens' election coalitions and would not give persons the right to run as candidates in the lists on citizens' election coalitions; that is why the Chamber confined itself to declaration of unconstitutionality of the Local Government Council Election Act to the extent that it did not allow citizens' election coalitions to participate in local elections.[89]

In the so called second case of election coalitions the General Assembly of the Supreme Court satisfied the Chancellor of Justice's petition partly. The General Assembly refused to hear the Chancellor of Justice's request that one of the contested provisions of the Political Parties Act be declared unconstitutional, because the Supreme Court could not, on the request of Chancellor of Justice, declare national legislation invalid due to conflict with the European Union law.[90]

Furthermore, on five occasions, described above under 3.1., the Supreme Court has rejected without hearing the individual complaints[91], impermissible under the Constitutional Review Court Procedure Act, requesting that legislation be declared unconstitutional because of legislative omission. In these cases the court argued that the petitioner had assessed the legal situation erroneously, there was no legislative omission, and the regulation was sufficient enough to guarantee adequate protection of the petitioners' procedural rights (see footnote 19).

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?*

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[89] Constitutional Review Chamber of the Supreme Court judgment of 15 July 2002 in matter no 3-4-1-7-02, paras 32-34.

[90] Constitutional Review Chamber of the Supreme Court judgment of 19 April 2005 in matter no 3-4-1-1-05, paras 48-49 and 51. "The Chancellor of Justice can only act on the basis of the law. Neither the Chancellor of Justice Act nor the Constitutional Review Court Procedure Act give the Chancellor of Justice the competence to request that the Supreme Court declare an Act unconstitutional on the ground that it is in conflict with the European Union law. There are different possibilities for bringing national law in conformity with the European Union law, and neither the Constitution nor the European Union law provide for the existence of constitutional review proceedings for this purpose. The European Union law has indeed supremacy over Estonian law, but taking into account the case-law of the European Court of Justice, this means the supremacy upon application. The supremacy of application means that the national act which is in conflict with the European Union law should be set aside in a concrete dispute (see also joint cases C-10/97 until C-22/97, Ministero delle Finanze vs. IN.CO.GE.'90 [1998] ECR I-6307). Pursuant to Article 226 of the Treaty establishing the European Community, the Commission, if it considers that a Member State has failed to fulfil an obligation under this Treaty, including not bringing national law into conformity with the European Union law, may bring the matter before the Court of Justice. This does not mean that such abstract review procedure over national law should exist on the national level. Thus, the Supreme Court will not be able to examine the petition of the Chancellor of Justice to the extent that the Chancellor of Justice requests, on the basis of Article 19 of the Treaty establishing the European Community and directive 94/80/EC, that Section 5(1) of PPA be declared invalid."

[91] Constitutional Review Chamber of the Supreme Court rulings of 23 March 2005 no 3-4-1-6-05, of 9 May 206 no 3-4-1-4-06, of 17 January 2007 no 3-4-1-17-06, of 4 April 2007 no 3-4-1-8-07 and of 17 May 2007 no 3-4-1-11-07.

The Supreme Court is competent to examine the legislative omission cases. That is why there is no "related nature" investigation in the Estonian legal doctrine.

4. INVESTIGATION AND ASSESSMENT OF THE CONSTITUTIONALITY OF LEGISLATIVE OMISSION

4.1. Peculiarities of the investigation of the 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 competence of public power institutions, the 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 the substantive and procedural law. The particularity of investigation of legislative omission in private and public law. 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.*

The two cases where the Supreme Court has given a detailed explanation of the principles of reviewing legislative omission are the so called Dwelling Act case[92] and the case concerning the Act invalidating Section 7(3) of the Principles of Ownership Reform Act[93], were both cases of abstract *a priori* control. Also, in the so called utility works case[94], the Supreme Court reviewed the constitutionality of legislative omission on the basis of a referral by a court within concrete norm control.

In the referred abstract norm control cases the Supreme Court considered it possible to analyse more broadly whether the norms, the lack of which was brought forward by the President of the Republic as a question of constitutionality, should be included in the Act which the President refused to promulgate or, perhaps, they are already included in some other (promulgated) Act. Similarly with other cases concerning legislative omission, in the case of an Act invalidating Section 7(3) of the Principles of Ownership Reform Act, the Court, after having declared the petition admissible, analysed the proportionality of legislative omission as an infringement into the general right to protection and to the principle of equal treatment of the general right to organisation and procedure.

The Supreme Court had already dealt with the issue of legislative omission within the proportionality test, it had done so on request by the Chancellor of Justice and within the abstract control of legislation of general application.[95] In the so called first election coalition case, under the last step of proportionality test and trying to establish the existence of legislative omission, the Constitutional Review Chamber analysed whether the electorate and candidates had a reasonable and effective alternative to the local lists of national political parties.[96]

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[92] Constitutional Review Chamber of the Supreme Court judgment of 2 December 2004 in matter no 3-4-1-20-04.
[93] Constitutional Review Chamber of the Supreme Court judgment of 31 January 2007 in matter no 3-4-1-14-06.
[94] Constitutional Review Chamber of the Supreme Court judgment of 30 April 2004 in matter no 3-4-1-3-04, paras 36 -38.
[95] Constitutional Review Chamber of the Supreme Court judgment of 15 July 2002 in matter no 3.4.1.7.02, paras 28-31.
[96] Constitutional Review Chamber of the Supreme Court judgment of 15 July 2002 in matter no 3.4.1.7.02, para 28.

In the so called utility works case, within concrete norm control procedure, the Supreme Court confined itself to the analysis of the norm relevant for the concrete dispute, and explained – also in the final step of proportionality test – that proceeding from the Constitution the norm should include an additional mechanism for the protection of the owners of registered immovables and should allow weighing of different interests.

It seems that the examination of legislative omission within proportionality test within abstract and concrete norm control procedures does not differ significantly in the practice of the Supreme Court.

The judgments of the Supreme Court related to review of Acts amending or repealing previously valid norms could be regarded as a separate category. This holds true in regard to both abstract and concrete norm control. Namely, on several occasions, when evaluating Acts repealing other legislation, the Supreme Court has in fact indirectly addressed the issue of legislative omission and has tried to avoid the creation of unconstitutional legislative gaps as a result of invalidation of existing norms. A good example in this context is the so called second case of election coalitions, where the Supreme Court analysed, what kind of legal situation would be created if the regulation entered into force pursuant to which election coalitions are prohibited in local elections, and the court came to the conclusion that this would entail disproportionate restrictions of the right to stand as a candidate and of the principle of local government autonomy and would bring about an unconstitutional situation.[97]

An unsuccessful attempt to avoid the creation of a legal gap was a judgment of the Administrative Law Chamber in a very complicated – in the procedural sense – case of Johannes Toom.[98] In this case Johannes Toom, who had lost the possibility of receiving medical assistance because the norm which had guaranteed him health insurance had been repealed, requested that the Act repealing the norm be declared unconstitutional due to conflict with the right to the protection of health, arising from Section 28 of the Constitution. In this case the Administrative Law Chamber of the Supreme Court considered it necessary to initiate a constitutional review procedure (although it did not do it itself) and to find out why the provision of the Health Insurance Act was in conflict with Section 28 of the Constitution. The Administrative Law Chamber, being the supreme administrative court of the country, could not itself ascertain necessary facts, thus it referred the matter back to the first instance administrative court. Although the first instance administrative court did initiate a constitutional review procedure, the matter was not adjudicated on the merits, as the Constitutional Review Chamber of the Supreme Court came to the conclusion that the administrative court had contested the constitutionality of irrelevant norms.

The Supreme Court itself, when repealing norms, has admitted that this would result in legal gaps that should be filled by the Riigikogu. Thus, in the judgment of the second case of resettlers the General Assembly pointed out that "[c]learly, there are several other issues that inevitably concur with the invalidation of Section 7(3) of PORA that need a legal solution. The valid regulation is not meant for application in a situation where, in 2006, Section 7(3) of PORA, the principles of which originate in clause 5) of the resolution of the Supreme Council of 20 June 1991, shall be declared invalid. The local governments resolving the practical issues of ownership reform need a clear legal regulation to be able to act in the new situation."[99]

[97] General Assembly of the Supreme Court judgment of 10 November 2003 in matter no 3-3-1-65-03 and Constitutional Review Chamber of the Supreme Court judgment of 31 May 2004 in matter no 3-4-1-7-04.
[98] Administrative Law Chamber of the Supreme Court judgment of 10 November 2003 in matter no 3-3-1-65-03 and Constitutional Review Chamber of the Supreme Court judgment of 31 may 2004 in matter no 3-4-1-7-04.
[99] General Assembly of the Supreme Court judgment of 12 April 2006 in matter no 3-3-1-63-05, para 30.

Since 2000 the Supreme Court has developed a substantial practice concerning bridging gaps in procedural law. When upon establishing the existence of gaps in substantive law the Supreme Court generally tries to describe the regulation required by the Constitution, which the legislator should pass to eliminate the gap[100], then in the case of gaps in procedural law the court has considered it possible to overcome the gaps through interpretation and drawing directly upon the Constitution[101]. For the protection of persons' procedural rights the Supreme Court has deducted from the Constitution the right of a legal person to have recourse to the courts for the protection of inviolability of ownership and possession, as well as re-opening of criminal and administrative court procedures in the cases when the European Court of Human Rights has established a violation of an individual's fundamental rights, the violation is continuing and material, and if the re-opening can remedy the legal status of the person[102].

The Sergei Brusilov case[103] is difficult to locate on the axis of procedural - substantive law, because in that case there was a double gap of law. In this case the Supreme Court exempted S. Brusilov from further serving the sentence drawing directly upon the constitutional requirement of alleviating the punishment and the principle of equal treatment, at the same time declaring unconstitutional the provision of the Penal Code Implementation Act that did not allow doing so. Also, as there was no procedure for hearing the petition of S. Brusilov, the Supreme Court decided from the beginning to hear the matter itself in order to guarantee the right to effective remedy, arising from the Constitution and from the European Convention of Human Rights.

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 in the legal regulation may and must be reorganised 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?*

In the judgment concerning the Act repealing Section 7(3) of the Republic of Estonia Principles of Ownership Reform Act the Supreme Court found the following:
"The legislator's omission or insufficient activity may be unconstitutional and the Supreme Court can ascertain the unconstitutionality of the legislator' omission within the constitutional review court procedure. In its earlier judgments the Supreme Court has deemed it possible for the President of the Republic to contest the omission of the legislator within abstract norm control, that is under Section 5 of the Constitutional Review Court Procedure Act.

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[100] E.g. the voters and the candidates must have a reasonable and effective alternative to local lists of national political parties; to solve the problems related to repealing of Section 7(3) of PORA it is necessary to draft an effective regulation, allowing the resettlers and the persons entitled to privatize unlawfully expropriated property to exercise their rights.
[101] General Assembly of the Supreme Court judgments of 22 December 2000 in matter no 3-3-1-38-00, paras 19-25, of 6 January 2004 in matter no 3-3-2-1-04 and of 6 January 2004 in matter no 3-1-3-13-03.
[102] *Ibid*.
[103] General Assembly of the Supreme Court judgment of 17 March 2003 in matter no 3—1-3-10-02.

The President of the Republic is entitled to contest the omission of the legislator if the norm not enacted should be a part of a contested legislation or when it is in substance related to a contested legal act. The norms that the President of the Republic has already promulgated in another Act can not be contested (see judgment of the Supreme Court of 2 December 2004 in constitutional review case 3-4-1-20-04 (RT III 2004, 35, 362), Sections 44-46).

Thus, in order to ascertain the admissibility of the petition it has to be assessed whether the lacking norms, referred to in the petition, should be a part of the contested Act or are in substance related thereto."

It can be concluded on the basis of this judgment that the Supreme Court does not discriminate between statutes and other legislation. Yet, some restrictions on the Supreme Court as the court for constitutional review arise from the object of review, limited by the Constitutional Review Court Procedure Act. Namely, the Supreme Court as the court for constitutional review does not exercise constitutional review of all legislation; instead it is confined to legislation of general application only (legislation containing general guidelines of behaviour for indeterminate number of addressees). The conformity of administrative legislation of specific application to the Constitution and legislation of general application is reviewed by administrative courts.

It proceeds from the referred judgment that in order to establish the existence of legislative omission the Supreme Court must first form an opinion on whether the lacking norms should be included namely in the contested Act. For that purpose the object of regulation of the Act has to be determined and viewed within the context of related legislation.

In paragraphs 20 and 21 of the judgment in the case of the Act repealing Section 7(3) of the Principles of Ownership Reform Act, the Constitutional Review Chamber of the Supreme Court stated the following:

"20. Most of the regulation of the procedure of the return of, compensation for and privatisation of unlawfully expropriated property is contained in the Principles of Ownership Reform Act and in the regulations issued by the Government of the Republic on the basis of the Act. Yet, some important aspects of the procedure of return of and compensation for property and privatisation procedure are regulated by other Acts. Thus, important rules of privatisation of dwellings are included in the Privatisation of Dwellings Act. Some aspects of the use of privatisation vouchers are regulated by the Privatisation Act.

21. If the problems referred to in the petition and the lack of procedural rules substantially impede the return of, compensation for and privatisation of property, the main objective of the contested Act – repeal of Section 7(3) of the PORA, which was declared invalid by the Supreme Court, and issue of transitory provisions necessary for the ordering of legal situation created as a consequence thereof – is not achieved. That is why the Chamber is of the opinion that the lacking regulation, referred to in the petition, should be a part of the contested Act or that it is, at least, in substance related to the Act.

Thus, the petition of the President of the Republic is admissible and if the lack of regulation, referred to in the petition, proves unconstitutional, the contested Act itself can be declared unconstitutional."

It appears from the referred judgment that one of the criteria on the basis of which the Supreme Court established legislative omission was whether the lacking regulation prevented the achievement of the primary objective of the contested Act. This approach does not seem to be very activist and it indicates

rather that had the President of the Republic contested a less important deficiency the Supreme Court would not have considered the petition admissible.

The Supreme Court explains the objective of the contested Act mentioning briefly also the legal gaps for the avoidance of which the concrete regulation was meant – to regulate the legal situation that arises upon revocation of Section 7(3) of the PORA and to stipulate transitory provisions. Furthermore, in the reasoning of the judgment the Constitutional Review Chamber describes very briefly the history of drafting of the contested statute. That would not be obligatory, as the introductory part of Supreme Court judgment already introduces the history of the contested Act.

So far the only case where the Supreme Court describes the criteria for establishing legislative omission in great detail is a case of abstract norm control. In the cases of concrete norm control where the Supreme Court has concluded that a regulation required by the Constitution is lacking, the court has acted quite similarly. For example, in the judgment in the case of AS Brolex Grupp and OÜ Dreiv Grupp[104] the Supreme Court examines thoroughly all legal acts that could offer protection to fundamental rights of legal persons in the case of seizure of documents. Also, the Supreme Court describes the existing but deficient procedural regulation in the judgment concerning review of Tiit Veeber's case[105] and in the judgment rendered concerning the administrative case of AS Giga[106].

At the same time examples could be given of such judgments where the legislative omission is established, but which do not describe what other legislation besides the norm under review the court analysed.[107] This approach could have been conditioned by the fact that the situation under review was regulated only by the legislation under review or that the court did not consider it necessary to describe its reasoning in detail.

There are cases in the Supreme Court practice where the court has avoided establishing legislative omission. Thus, in several earlier cases where the finding of legislative omission could have been discussed, the Supreme Court has invoked either legal clarity (two first cases of resettlers[108]) or unequal treatment (e.g. parental benefit case[109], Social Welfare Act case[110]).

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 combinations 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 or international justice and constitutional and supreme courts of other countries?*

[104] General Assembly of the Supreme Court judgment of 22 December 2000 in matter no 3-33-1-38-00, paras 20-24.
[105] General Assembly of the Supreme Court judgment of 6 January 2004 in matter no 3-1-3-13-03, para 30.
[106] General Assembly of the Supreme Court judgment of 6 January 2004 in matter no 3-3-2-1-04, para 24.
[107] Constitutional Review Chamber of the Supreme Court judgment of 30 April 2004 in matter no 3-4-1-3-04.
[108] General Assembly of the Supreme Court judgments of 28 October 2002 in matter no 3-4-1-5-02 and of 12 April 2006 in matter no 3-3-1-63-05.
[109] Constitutional Review Chamber of the Supreme Court judgment of 20 March 2006 in matter no 3-4-1-33-05.
[110] Constitutional Review Chamber of the Supreme Court judgment of 21 January 2004 in matter no 3-4-1-7-03.

The methodology of establishing legislative omission as an unconstitutional activity does not differ from the ordinary methodology of finding unconstitutionality, because the main issue is whether the activity of the legislator is required by the Constitution in the sphere in which the legislative omission is alleged to exist. Similarly with "ordinary" review of unconstitutionality, when establishing legislative omissions the Supreme Court uses first the grammatical and logical methods. If this interpretation does not bear fruit, the Supreme Court employs other methods of interpretation.

Upon establishing legislative omission the attention is predominantly paid to systematic method, in order to make sure that the regulation, the lack of which is alleged, is not included in some other statute or legislation not contested in the concrete case. In the so called Dwelling Act case, in relation to the right of the President of the Republic to contest legislative omission, the Supreme Court stated the following: "The President of the Republic can only assess Acts which have been submitted to him for proclamation. On the other hand, it is clear that not each norm has a determined place in the system of legal acts and that it is the legislator who is entitled to determine the structure of legislation of general application. […] [t]he President of the Republic is not entitled to contest the legislator's failure to act […]if the legislator has provided for the allegedly non-issued norms in some other Act"[111].

Also, teleological, i.e. both subjective-teleological (historical) as well as objective-teleological, interpretation plays an important role in the establishment of legislative omission. By examining the will of the legislator and the ideal aim of the statute the court is trying to ascertain whether the seemingly missing norm can still be found in the legal order by way of interpretation.

For example, in the Social Welfare Act case, where the issue was, indirectly, whether the social assistance offered by the state was in conformity with every person's right to sufficient state aid in case of need, the Supreme Court weighed, *inter alia*, the argument of excessive burden on state budget as one that should be taken into account when deciding on the amount of social benefits.[112] The balance of state budget and the financial situation of the state can be regarded as so called practical arguments that in turn amount to the most abstract level of objective-teleological interpretation. In the same case the Supreme Court referred to the International Covenant on Economic, Social and Cultural Rights, the European Social Charter (revised) and the Charter of Fundamental Rights of the European Union.

Furthermore, when examining legislative omission the Supreme Court has resorted to such arguments as references to Penal Codes of other countries (Poland, Spain, Latvia, Russian Federation), the UN International Covenant on Civil and Political Rights, and in more general terms, in relation to complete protection of the right of recourse to the courts, to the case-law of the European Convention for the Protection of Human Rights and Fundamental Freedoms. In the so called first case of election coalitions[113] the Supreme Court invoked, *inter alia*, the provisions of the European Charter of Local Self-Government.

Upon examining legislative omission the Supreme Court has not made reference to the application practice of the referred international instruments.

4.4. Additional measures.

[111] Constitutional Review Chamber of the Supreme Court judgment of 2 December 2004 in matter no 3-4-1-20-04.
[112] Constitutional Review Chamber of the Supreme Court judgment of 21 January 2004 in matter no 3-4-1-7-03.
[113] Constitutional Review Chamber of the Supreme Court judgment of 15 July 2002 in matter no 3-4-1-7-02.

Does the constitutional court, after having stated the existence of the legislative omission, and if it 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 Supreme Court has actively protected the rights of affected persons first and foremost in the cases of gaps in procedural law, described above. It is worth mentioning that besides overcoming procedural law gaps by interpretation, the Supreme Court also adjudicated the cases of Brusilov, Tiit Veeber and AS Giga on the merits, thus putting an end to the situation violating the fundamental rights of the persons.

It is also worth pointing out that the Chief Justice of the Supreme Court is entitled to discuss the emerged problems relating to the protection of fundamental rights, including the problems resulting from legislative omission, in his annual address before the Riigikogu.

4.5. The constitutional court investigates the 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 specific criteria of a possible regal 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?

As described above, there are three types of Supreme Court judgments. The first category are the judgments where the Supreme Court clearly states that the regulation has gaps[114], the second category is formed of those judgments where the court considers a norm to be unconstitutional because it does not stipulate what is required by the Constitution, without stating it in the reasoning that this amounts to legislative omission or legal gap[115]. The third group is formed of the cases where there was a legislative omission, in essence, but the court has found the lack of legal clarity[116] or unequal treatment instead[117][118]. In the first two categories of cases the Supreme Court has given the legislator a clear signal for fulfilling the established gap. In regard to the third category of cases the legislator may not realize that the problem actually boils down to a legal gap.

[114] See Constitutional Review Chamber of the Supreme Court ruling of 22 December 2000 in matter no 3-3-1-38-00, para 23.
[115] See Constitutional Review Chamber of the Supreme Court judgment of 30 April 2004 in matter no 3-4-1-3-04, paras 32-38.
[116] General Assembly of the Supreme Court judgments of 28 October 2002 in matter no 3-4-1-5-02 and of12 April 2006 in matter no 3-3-1-63-05.
[117] Constitutional Review Chamber of the Supreme Court judgment of 20 March 2006 in matter no 3-4-1-33-05.
[118] Constitutional Review Chamber of the Supreme Court judgment of 21 January 2004 in matter no 3-4-1-7-03.

The Supreme Court has advised the legislator how to bridge the legal gaps both within the abstract[119] and concrete[120] norm control. Although, as a rule, the advice of the Supreme Court to the Riigikogu has been very abstract, in certain cases the guidelines have been highly detailed[121].

In the cases of resettlers and in the utility works case the Supreme Court has considered it necessary to set a deadline to the legislator for elimination of the legal gap concurring with the invalidation of a norm. At the time of adjudicating the first case of resettlers the Supreme Court did not have a legal basis for doing this. Then the Supreme Court declared Section 7(3) of the PORA unconstitutional, without declaring it invalid, in the hope that the legislator will take steps and wishing not to create a legal gap. Four years later, when the legislator had done nothing about Section 7(3) of the PORA, the General Assembly of the Supreme Court declared the norm invalid, postponing the entry into force of its judgment – on the basis of Section 58(3) of the CRCPA – by six months. Also, in the utility works case the Supreme Court postponed the entry into force of the judgment by six months.

As described above, the Supreme Court has managed to effectively overcome gaps in procedural law by interpreting.

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

> *The conditional court, after it has stated the existence of the legislative omission in the reasoning part of the decision, in the resolution of the decision performs the following:*
> *a) recognizes the law (other legal act) as being in conflict with the constitution;*
> *b) recognizes 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 recognizes 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);*

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[119] E.g. the voters and the candidates must have a reasonable and effective alternative to local lists of national political parties; to solve the problems related to repealing of Section 7(3) of PORA it is necessary to draft an effective regulation, allowing the resettlers and the persons entitled to privatize unlawfully expropriated property to exercise their rights.

[120] In the so called utility works case the Supreme Court stated the following: "The Chamber finds that the general obligation to tolerate is constitutional, but upon imposing this obligation the legislator should have established more guarantees for the landowners.
The existing regulation prefers the rights of the owners of utility works, allowing to consider the rights of the owners of registered movables only when the utility works are no longer used for the intended purposes. At the same time the Act does not differentiate between utility works erected on a legal basis and those erected without a legal basis. Neither does the Act differentiate between utility works for which there is a manifest general interest (essential power transmission lines, heating lines, etc), and between the utility works for which there is no such interest. Neither does Section $15^2(1)$ allow to weigh the interest of an owner of a registered immovable to terminate or change the obligation to tolerate (e.g. to build a house on the present location of the utility works or start using the land as arable land) against the interest of an owner of a utility works that the latter remain where it is.
The unlimited obligation to tolerate utility works may prevent the purposeful use of registered immovables, it may also essentially decrease the market value of registered immovables and, in certain cases, render the possibility of selling registered immovables doubtful. The Chamber is of the opinion that a possibility to weigh interests must inevitably be a part of a constitutional regulation.
It should be possible to contest the obligation to tolerate also when the loss of the owner of a registered immovable is significantly bigger than a public interest or the interest of an owner of a utility works, for example when the obligation to tolerate prevents the purposeful use of the registered immovable and it would be possible to relocate the utility works without major additional expenses. Such a regulation would enable for a more flexible solution of the cases when an owner of a registered immovable holds that his or her rights are disproportionately prejudiced."

[121] See the preceding footnote.

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

Pursuant to Section 15(1)1) of the Constitutional Review Court Procedure Act The Supreme Court is empowered, upon adjudicating a matter, to declare legislation of general application, which has not yet entered into force, unconstitutional. Pursuant to subsection (1) of the same section the Supreme Court may declare failure to pass legislation of general application unconstitutional.

Having established legislative omission in the motivation of the judgment the Supreme Court has, in the decision part of the judgment, declared the Act under constitutional review unconstitutional in its entirety (abstract control) or in part (concrete norm control or abstract *a posteriori* control). As already referred to above, pursuant to the procedural law the Supreme Court, having established legislative omission in an Act which the President of the Republic has refused to promulgate, can only declare unconstitutional the Act in its entirety. That is, even if the regulation it *contains* is constitutional. As a rule, within a posteriori control the Supreme Court declares an Act under review unconstitutional to the extent that the Act does not contain regulation required by the Constitution[122].

In the cases of Tiit Veeber and AS Giga the Supreme Court did find a gap in procedural law, but having overcome the gap through constitution-conforming interpreting the court considered it possible not to declare relevant procedural code unconstitutional.

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 competence of the Supreme Court includes legislative omission, thus, there is no "related nature" investigation in the Estonian legal doctrine.

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 recognized 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 appear because of the decision whereby the law or other legal act is recognized

[122] See e.g. clause 1 of the decision of the utility works judgment: „To declare that Section 15^2(1) and Section 15^4(2) of Law of Property Act Implementation Act are unconstitutional to the extent that the owner of an immovable may not demand the removal of a utility works on any other basis but that the works are no longer used for their intended purpose.";
See the decision part of the first case of election coalitions` judgment: "To declare unconstitutional Local Government Council Election Act adopted on 27 March 2002 to the extent that it does not enable citizens' election coalitions to participate in local government council elections."

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 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).

Pursuant to Section 15(1)2) of the Constitutional Review Court Procedure Act the Supreme Court, having established the unconstitutionality of an Act or other legislation that has already entered into force, has only the following possibility: to declare legislation of general application or a provision thereof unconstitutional and invalid.[123] Pursuant to Section 58(3) of the same Act the Supreme Court has the right to postpone the entry into force of a judgment referred to in Section 15(1)2) for up to six months. The postponement of entry into force must be reasoned.[124] This possibility was created to avoid situations where the lack of a provision would create problems, and where it is clear that the legislator needs additional time for drafting the regulation that would conform to the Constitution.

The postponement of entry into force of a judgment establishing the unconstitutionality of an Act or of a provision thereof does not mean – pursuant to the Supreme Court practice – that the unconstitutional legislation may be applied before the judgment enters into force. Namely, in one of its judgments of 2004 the Civil Chamber has argued that although the Constitutional Review Chamber had postponed the entry into force of its judgment invalidating a provision of the Law of Property Implementation Act, obligating the owners of registered immovables to tolerate utility works[125], the contested provision must not be applied due to its unconstitutionality. The Chamber was of the opinion that although the legislator had not established rules for the payment of compensation for the obligation to tolerate utility works, the court still had to order the payment of compensation and had to determine the amount of compensation on the basis of analogy.[126]

To avoid declaration of unconstitutionality of legislation the Supreme Court has also resorted to the doctrine of so called constitution-conforming interpretation, setting out guidelines for those who have to apply the allegedly unconstitutional Act or a provision thereof on constitution-conforming interpretation of the Act or the provision. Thus, for example, in the so called Law of Succession Act case the General Assembly of the Supreme Court held that the regulation in the Law of Succession Act concerning compulsory portion must be interpreted to mean that bequeather's relative or spouse, who is incapacitated for work but who is not in need for assistance, is not entitled to inherit the compulsory part.[127] This interpretation dramatically diverged from the established way of interpreting the provision.

Instead of declaring an Act or a part of the Act unconstitutional and invalid, the Supreme Court has also employed a wording pursuant to which the court declares a provision unconstitutional and invalid to the

[123] Section 15(1)2) of the Constitutional Review Court Procedure Act: "(1) Upon adjudicating a matter the Supreme Court may:[…] 2) declare legislation of general application or a provision thereof, which has entered into force, unconstitutional and invalid."
[124] Section 58(3) of the CRCPA: "(3) The court is entitled to postpone the entering into force of a judgment referred to in clause 15(1) 2) for up to six months. Postponement of entering into force of a judgment shall be reasoned."
[125] Constitutional Review Chamber of the Supreme Court judgment of 30 April 2004 in matter no 3-4-1-3-04.
[126] Civil Chamber of the Supreme Court judgment of 29 October 2004 in matter no 3-2-1-108-04.
[127] General Assembly of the Supreme Court judgment of 22 February 2005 in matter no 3-2-1-73-04.

extent that it does not allow for constitutional treatment of persons. In such a case the Supreme Court, as a rule, gives guidelines for constitution-conforming interpretation of the provision, without amending the wording of the provisions. For example, in the so called first case of election coalitions the Supreme Court declared the Local Government Council Election Act unconstitutional only to the extent that it did not allow participation of citizens' election coalitions in local government elections.[128] The Chamber pointed out that declaration of unconstitutionality of the norms, which established the right of political parties and individual candidates to run as candidates and which had been contested by the Chancellor of Justice, would not entitle persons to form local citizens' election coalitions.

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

The impact of constitutional court judgments on the filling in of legal gaps has not been thoroughly researched[129]. Neither the Constitutional Review Court Procedure Act nor other legislation provide for further steps to be taken to eliminate a legislative omission. Thus, this amounts to the court's inability to check the enforcement of its judgments.

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 decisions? Does the parliament promptly react to the decisions of the constitutional court, when the legislative omission is stated? 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?*

Pursuant to Section 152 of the Constitution, in a court proceeding, the courts shall not apply any law or other legislation that is in conflict with the Constitution. The judgment by which a valid law is not applied is declarative in nature, because according to the second sentence of Section 149(3) and Section 152(2) of the Constitution it is only the Supreme Court who is competent to render binding judgments on unconstitutionality.[130] When reviewing constitutionality of an Act or other legislation of general application the court for constitutional review has an obligation to render a judgment.[131] There is no doubt that such a judgment has certain legislative effect. When repealing a provision of general application the constitutional court assumes the position of the legislator and avails itself of the right which is essential to the constitutional review.

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[128] Constitutional Review Chamber of the Supreme Court judgment of 15 July 2002 in matter no 3-4-1-7-02.

[129] Juridica No 6 of 2006 at pp 414-422 under the title "Põhiseaduslikkuse järelevalve kohtu mõju seadusandjale [The impact of constitutional review court on the legislator] features an article presenting in brief the Bachelor's Theses of Ralf Järvamägi defended in the spring of 2006.

[130] Constitutional commentary, p 635.

[131] Pursuant to Section 15 of the Constitutional Review Court Procedure Act the Supreme Court, upon adjudicating a matter, may declare legislation of general application, which has not yet entered into force, unconstitutional; declare legislation of general application, which has entered into force, or a provision thereof, unconstitutional and invalid; declare failure to pass legislation of general application unconstitutional; declare the contested legislation of general application or failure to pass legislation of general application was unconstitutional at the time when the petition was filed; or dismiss the petition. Thus, the Supreme Court has several different possibilities for establishing a constitutional situation – it all depends on the decision part of the Supreme Court judgment.

When the conflict of an Act, which has not yet entered into force, with the Constitution is found, the President of the Republic shall not promulgate this Act, the Act will not acquire legal effect and the legislator shall be under the obligation to eliminate the conflict with the Constitution. When the Supreme Court establishes in the reasoning of its judgment that an Act which has already entered into force is unconstitutional, the court must – in the decision part of the judgment – declare the Act invalid in its entirety or in part.[132] One can conclude that the aim of partial invalidation is to leave the legal act in its entirety in force.

If, upon weighing different values, the constitutional review court has come to the conclusion that a norm does not fit into the legal order, it has the duty to eliminate such a provision, to correct the legislator's error. This obligation of the Supreme Court – to act as a negative legislator – arises from Section 152(2) of the Constitution. The head of the legal department of the Chancellery of the Riigikogu has expressed the following opinion. "[a]s the Supreme Court has the possibility to declare invalid an Act or a provision thereof which is in conflict with the Constitution, one can admit that the Supreme Court judgments have the effect equivalent to that of law, terminating the validity of an Act. Nevertheless, the judgment does not become a law or *prima facie* source or law".[133]

Because of the binding nature of court judgments the legislator must respect the guidelines of behavior stipulated in these and take constantly into account in subsequent activities. Thus, the constitutional court guarantees that fundamental rights and freedoms are independent actors in political life, actors that affect the politics but are unaffected by the politics.[134]

No specific procedure for deliberations about the enforcement of constitutional court judgments has been enacted. In its legislating process the Riigikogu adheres to the Constitution. Section 102 of the Constitution establishes that laws shall be passed in accordance with the Constitution. A member of the Riigikogu, a faction of the Riigikogu, a committee of the Riigikogu, the Government of the Republic and the President of the Republic (for amendment of the Constitution) have the right to initiate laws; in addition, the Riigikogu has the right, on the basis of a resolution made by a majority of its membership, to propose to the Government of the Republic to initiate a bill desired by the Riigikogu (Section 103 of the Constitution).[135] The procedure for passing laws is provided by the Riigikogu Rules of Procedure Act (Section 104(1)). The Constitution prescribes the requirement of a majority of the Riigikogu membership in regard to constitutional laws.[136]

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[132] Instead on declaration on invalidity of legislation of general application the constitutional court judgment may include binding interpretations, i.e. the rule will remain in force but the court shall set out the right way to interpret it to avoid conflict thereof with the Constitution in the future. Besides binding interpretations the Supreme Court can also give legal directions concerning subsequent behaviour of the legislator. Legal directions always require that the legislator take active steps, rectify the legal situation, yet the court has refrained from prescribing concrete norms.

[133] Riigikogu VII, VIII ja IX koosseis. Statistikat ja kommentaare [VII, VIII and IX composition of the Riigikogu. Some statistics and commentaries]. Tallinn: Riigikogu Kantselei 2004, p 310.

[134] M. Hartwig. Konstitutsioonikohtute roll ja asend põhiõiguste ja vabaduste tagamisel. Põhiõiguste ja vabaduste tõlgendamine. – Konstitutsioonikohtud põhiõiguste ja vabaduste kaitsel [The role and position of constitutional courts in guaranteeing fundamental rights and freedoms. Interpretation of fundamental rights and freedoms. – Constitutional Courts in the protection of fundamental rights and freedoms]. Tartu 1997, p 30.

[135] It appears from the statistics concerning the Riigikogu that in between 1992-2003 the majority of the bills were initiated by the Government of the Republic. Riigikogu VII, VIII ja IX koosseis. Statistikat ja kommentaare [VII, VIII and IX composition of the Riigikogu. Some statistics and commentaries]. Tallinn: Riigikogu Kantselei 2004, p 172.

[136] Section 104(2) of the Constitution:
The following laws may be passed and amended only by a majority of the membership of the Riigikogu: 1) Citizenship Act; 2) Riigikogu Election Act; 3) President of the Republic Election Act; 4) Local Government Election Act; 5) Referendum Act; 6) Riigikogu Procedure Act and Riigikogu Administration Act; 7) Remuneration of the President of the Republic and Members of the Riigikogu Act; 8) Government of the Republic Act; 9) Institution of Court Proceedings against the President

The legislator has a duty to enforce constitutional court judgments. At that the legislator has the following possibilities: prevention, co-ordination/concording and inactivity (see below under the next question).[137]

We can most probably speak of prevention in the cases when the court establishes unconstitutionality, but by the time the matter is heard the Riigikogu has already amended the regulation.[138] Still, the Supreme Court must proceed the matter until the end, irrespective of the legislator's activities.[139] Also, in relation to court practice concerning legislative omission there have been cases when the Supreme Court has established unconstitutionality of a norm at the time when the norm was no longer in force. Thus, for example in the Social Welfare Act case[140] the court declared in the decision part of the judgment that Section 22(4) of the Social Welfare Act, in the wording in force since 1 January 2000, was partly unconstitutional. The Act amending the Social Welfare Act was passed on 7 August 2003 and it entered into force on 5 September 2003. Had the Riigikogu not preventively amended the Act, the Supreme Court judgment could be termed a very activist one.[141]

Another possibility for the legislator to act is co-ordination. Through this the legislator achieves a situation where the legislation it passes will be in conformity with the opinion of the constitutional court. This means fitting political will within the framework established by the Constitution in its purest form. When examining the practice of co-ordination it becomes very clear that the theoretical view that the Supreme Court can significantly influence the legislator's behavior, yet it can not fully replace the legislator and enact new regulation, holds true. In everyday life, the co-operation between the court for constitutional review and the legislator should function in the following way: first the Supreme Court finds that a provision is unconstitutional and declares it invalid and the Riigikogu shall handle the problem immediately after the court has rendered its judgment. Furthermore, the court may, with a good reason, postpone the entry into force of its judgment, and in that case the Riigikogu must react promptly enough and pass the constitution-conforming regulation within the term set by the court.[142]

An example of the legislator's coordinating activity is the much discussed first case of election coalitions[143], where the Supreme Court satisfied the petition of the Chancellor of Justice and declared the Local Government Council Election Act, passed on 27 March 2002, unconstitutional to the extent that it did not allow citizen's election coalitions to participate in local government council elections. This judgment is a good example of how a Supreme Court judgment has forced the legislator to act. The judgment entered into force on 15 July 2002 and as soon as on 30 July 2002 the Riigikogu passed the

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of the Republic and Members of the Government Act; 10) National Minorities Cultural Autonomy Act; 11) State Budget Act; 12) Bank of Estonia Act; 13) State Audit Office Act; 14) Courts Administration Act and court procedure Acts; 15) Acts pertaining to foreign and domestic borrowing, and to proprietary obligations of the state; 16) State of Emergency Act; 17) Peace-Time National Defence Act and War-Time National Defence Act.

[137] See Ralf Järvamägi, Põhiseaduslikkuse järelevalve kohtu mõju seadusandjale [The impact of the constitutional review court on the legislator]. Juridica 6/2006, pp 416-419.

[138] A right arising from Section 15(1)5) of the Constitutional Review Court Procedure Act.

[139] Before the new CRCPA which entered into force on 2002, such regulation did not exist on the level of law.

[140] Judgment of 21 January 2004 in matter no 3-4-1-7-03.

[141] B. Aaviksoo. Kohtuliku aktivismi kontseptsioon. Kohtulik aktivism Eesti Vabariigi Riigikohtu põhiseaduslikkuse järelevalve praktikas 1993 – 2004. Magistritöö. Tartu Ülikool, [Concept of judicial activism. Judicial activism in the constitutional review practice of the Supreme Court of the Republic of Estonia. Master's Thesis. Tartu University], 2005, p 88. About procedural and substantial aspects of judicial activism see *ibid*., p 38.

[142] Ralf Järvamägi, Põhiseaduslikkuse järelevalve kohtu mõju seadusandjale [The impact of the constitutional review court on the legislator]. Juridica 6/2006, pp 417-419.

[143] Constitutional Review Chamber of the Supreme Court judgment of 15 July 2002 in matter no 3-4-1-7-02.

Local Government Council Election Act Amendment Act.[144] It is also explained in the explanatory letter to the bill of the Local Government Council Election Act Amendment Act (1135 SE I) that it was necessary to initiate the law proceeding from the Constitutional Review Chamber of the Supreme Court judgment of 15 July 2002 no 3-4-1-7-02. The reason behind such quick reaction was the fact that it was necessary to guarantee the local government council elections on 20 October 2002 in full conformity with the letter and spirit of the Constitution. To serve that end it was necessary to enact appropriate regulation that would guarantee that the representative body of local government is sufficiently representative, i.e. that persons and groups of persons having actual support of the people are not kept off from running as candidates in the elections.[145] The passed regulation was of historic nature, as late in 2004 the Chancellor of Justice addressed the Supreme Court again and with the same problem. The General Assembly of the Supreme Court rendered a new judgment in the so called second case of election coalitions[146] on 19 April 2005. Then the Supreme Court satisfied the petition of the Chancellor of Justice in part, and declared Section 70^1 of the Local Government Council Election Act invalid.

Depending on the duration the coordination, activities of the legislator could be categorized into urgent, ordinary and slow ones.[147] The urgent cases are those in which the legislator has enforced the constitutional review judgments especially promptly and with particular precision[148]; ordinary cases are those where the time lapsed is in correlation with the complexity of the problem, and slow cases are those where the period of coordination was manifestly too long, i.e. the Riigikogu expresses the lack of political will to address the problem pointed out by the Supreme Court[149]. An example of slow activity of the legislator is the utility works case[150] and the related issues[151].

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[144] B. Aaviksoo argues in her Master's Thesis, that this is the case which has had the biggest repercussions among the constitutional review cases of the Supreme Court. It resulted in the debate in the media on policy formulation by the Supreme Court and on the limits of competence appropriate for a constitutional court; at the Riigikogu sessions the Supreme Court was directly accused of interfering into politics. B. Aaviksoo. Kohtuliku aktivismi kontseptsioon. Kohtulik aktivism Eesti Vabariigi Riigikohtu põhiseaduslikkuse järelevalve praktikas 1993 – 2004. Magistritöö. Tartu Ülikool, [Concept of judicial activism. Judicial activism in the constitutional review practice of the Supreme Court of the Republic of Estonia. Master's Thesis. Tartu University], 2005, p 88. About procedural and substantial aspects of judicial activism see *ibid*., p 84.

[145] Kohaliku omavalitsuse volikogu valimise seaduse muutmise seadus. Eelnõu (1135 SE I) seletuskiri [Local Government Council Election Act Amendment Act. Explanatory letter to the bill (1135 SE I)]. Available at: http://web.riigikogu.ee/ems/saros-bin/mgetdoc?itemid=022050001&login=proov&password=&system=ems&server=ragne1. (17.04.2006).

[146] General Assembly of the Supreme Court judgment of 19 April 2005 in matter no 3-4-1-1-05.

[147] R. Järvamägi. Põhiseaduslikkuse järelevalve kohtu mõju seadusandjale [The impact of the constitutional review court on the legislator]. Juridica 6/2006, p 419.

[148] Constitutional Review Chamber of the Supreme Court judgment of 15 July 2002 in matter no 3-4-1-7-02.

[149] In this context the judgments in the so called resettlers' cases could be referred to as examples (General Assembly of the Supreme Court judgments of 28 October 2002 in matter no 3-4-1-5-02, of 12 April 2006 in matter no 3-3-1-63-05 and of 6 December 2006 in matter no 3-3-1-63-05), as in these cases the legislator, in fact, was continuously active and in the autumn of 2006 even passed an Act, by which it tried to regulate the situation and prevent the entry into force of the postponed invalidating judgment of the Supreme Court, and which was successfully contested by the President of the Republic (Constitutional Review Chamber of the Supreme Court judgment of 31 January 2007 in matter no 3-4-1-14-06).
The issue of the resettlers' property is now regulated – due to the fact that the date of entry into force of the Supreme Court judgment has expired and the President of the Republic refused to promulgate legislator's Act with the same content – by the Supreme Court judgment rendered in the second case of resettlers. An effective regulation providing for the procedure for the return of resettlers' property, the lack of which was pointed out by the Supreme Court in the so called third case of resettlers, was not yet been drafted.

[150] Constitutional Review Chamber of the Supreme Court judgment of 30 April 2004 in matter no 3-4-1-3-04.

[151] See reply to question 4.8.
On 26 March 2007 The General Part of Civil Code, Law of Property Act, Law of Property Act Implementation Act, Building Act, Planning Act and Immovables Expropriation Act Amendment Act entered into force, by which the statements of the Supreme Court concerning the provisions of Law of Property Act Implementation Act, which the court had declared unconstitutional or invalid in the utility works case, were introduced into the Law of Property Act Implementation Act.

In addition to the requirement that the legislator must enforce the Supreme Court judgments promptly or within reasonable time, the Supreme Court itself has been empowered to postpone the entry into force of its judgment which invalidates legislation of general application, which has already entered into force or a provision thereof, by up to six months.[152] The aim of this regulation is to give the legislator time for making necessary amendments.[153] The postponement of entry into force of a judgment must be reasoned. This possibility can be used, as a rule, when it is clear that the legislator needs more time for drafting a new constitution-conforming Act or if the sudden disappearance of a provision would create problems.[154]

The legislator's failure to enforce constitutional review judgments explicitly shows the inability of the court to have control over the execution of its judgments. There can be several reasons for such inactivity. Among the cases related to legislative omission the so called resettlers' cases are the most obvious examples of long-lasting inactivity on the legislator's part[155].

On 28 October 2002 the General Assembly of the Supreme Court declared Section 7(3) of the Republic of Estonia Principles of Ownership Reform Act unconstitutional. Although the Supreme Court did not question the reform-policy decision of the Riigikogu on principles, its judgment still put an obligation on the legislator to bring the referred provision into conformity with the principle of legal clarity. The case is a special one also because the Riigikogu has very seriously tackled this problem. This is demonstrated by two bills intended to amend Section 7(3) of the Republic of Estonia Principles of Ownership Reform Act. The explanatory letters to the first bill (1290 SE; dated 15 January 2003) and to the second bill with the same content (15 SE II; dated 1 April 2003) are identical and both specify in a separate paragraph that the Supreme Court judgment must be enforced and Section 7(3) of the Principles of Ownership Reform Act must be amended. Thus, the initiators of the bill and the legislator recognized the Supreme Court judgment and undertook to enforce it. The problem was not that the judgment was not accepted, the problem concerned reaching agreement on how to enforce it. On 12 April 2006 the General Assembly of the Supreme Court rendered a judgment by which it declared Section 7(3) of the Principles of Ownership Reform Act invalid and provided that the judgment would enter into force on 12 October 2006 on the condition that by that time an Act amending or repealing the provision has not entered into force. With the aim of enforcing the Supreme Court judgment of 12 April 2006, the Riigikogu passed, on 14 September 2006, the Act on the Repeal of Section 7(3) of the Principles of Ownership Reform Act, which the President of the Republic refused to promulgate on 20 September 2006. On 27 September 2006 the Riigikogu passed the same Act again, unamended. On 4 October 2006 the President of the Republic filed a petition with the Supreme Court requesting that the court declare the Act on the Repeal of Section 7(3) of the Principles of Ownership Reform Act unconstitutional. This meant that by the time set out in the General Assembly of the Supreme Court judgment an Act amending or repealing Section 7(3) of the Principles of Ownership Reform Act had not entered into force, and that on the basis of the General Assembly of the Supreme Court judgment of 12 April 2006, Section 7(3) of the Principles of Ownership Reform Act was invalid as of 12 October

[152] Section 15(1)2) of the Constitutional Review Court Procedure Act: "(1) Upon adjudicating a matter the Supreme Court may:[…] 2) declare legislation of general application or a provision thereof, which has entered into force, unconstitutional and invalid."
Section 58(3) of the CRCPA: "(3) The court is entitled to postpone the entering into force of a judgment referred to in clause 15(1) 2) for up to six months. Postponement of entering into force of a judgment shall be reasoned."

[153] At the same time the postponement of entry into force of a judgment establishing the unconstitutionality of an Act or of a provision thereof does not mean – pursuant to the Supreme Court practice – that the unconstitutional legislation may be applied before the judgment enters into force (see above under 4.8.).

[154] See General Assembly of the Supreme Court judgment of 12 April 2006 in matter no 3-3-1-63-05, paras 28-31.

[155] See also the opinion, expressed above, that this can be regarded as the legislator's very slow and in the end unsuccessful cooperating activity.

2006. In its judgment of 6 December 2006 the General Assembly held that the consequence of the invalidity of Section 7(3) of the Principles of Ownership Reform Act was that the unlawfully expropriated property of the persons who had resettled to Germany on the basis of agreements concluded with the German state, was subject to return, compensation for or privatization to tenants pursuant to general principles and general procedure established in the Principles of Ownership Reform Act.

There are no direct mechanisms to guarantee that the Riigikogu meet the obligations arising from the Supreme Court judgments.[156] In regard to some matters the Supreme Court has had the possibility to show consistency, i.e. to continuously deal with one and the same issue until a result of decisive importance for the legal system is achieved. The three cases of resettlers[157] are a vivid example of this.

In addition, in relation to the cases of resettlers, the Supreme Court has availed itself of a softer possibility of expressing its opinion – namely the annual addresses of the Chief Justice of the Supreme Court before the Riigikogu on the judicial organization, administration of justice and uniform application of laws. Thus, the Chief Justice has pointed out in his reports of 2005 and 2006 that the referred Principles of Ownership Reform Act was a lasting source of concern for the Estonian state. After the report presented to the Riigikogu on 31 May 2007, when answering to specifying questions, the Chief Justice said the following: "There are no legal obstacles to the completion of ownership reform also in regard to the property of resettlers to Germany pursuant to general principles and general procedure. All disputes can be solved on the basis of existing laws by the courts, on a case-to-case basis." Further, he added that "[p]erhaps the society has not fully acknowledged the fact that the ownership reform must be completed pursuant to general principles and general procedure. That is, making no exceptions in regard to those who resettled to Germany. This is a general legal regulation and it is up to the legislator to decide whether to enact a special regulation or not. It is difficult for me to predict from this rostrum the amount of work for the courts, because more than 15 years have lapsed, the terms have expired, some people have passed away, the property has been destroyed. It is no longer the same situation as in 1990, 1991, 1992, and in my opinion it would be very difficult today to establish a legal regulation, which would rectify all the errors and heal all the wounds retroactively. But the legislator always has the possibility to return to this topic and to create such regulation. Then the Supreme Court shall check whether the regulation is on conformity with the Constitution or not."[158]

5.2. Duties arising to other subjects of law-making (for example, the Head of State, the Government).

> *Does the statement of existence of legislative omission in a decision of the constitutional court mean the duty of other law-making subjects to properly fill in such 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?*

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[156] See in this respect L. Kalm. Konstitutsioonikohtu otsuste täitmine. Konstitutsioonikohtute organisatsioon ja tegevus. Ettekanded [Enforcement of judgments of constitutional court. Paper presented at conference „Organisation and activities of constitutional courts"]. Tartu 1995, p 106 ff.

[157] General Assembly of the Supreme Court judgments of 28 October 2002 in matter no 3-4-1-5-02, of 12 April 2006 in matter no 3-3-1-63-05 and of 6 December 2006 in matter no 3-3-1-63-05.

[158] Available at: http://www.riigikogu.ee/?op=steno&stcommand=stenogramm&date=1180601593&toimetatud=0&toimetamata=1&paevakord=371#pk371

The finding of legislative omission by the Supreme Court in its judgment would also mean a direct obligation for other subjects of law-making to properly fill in the gap in legal regulation.[159]

It has to be born in mind, though, that pursuant to the Constitution the legislative power is vested in the Riigikogu (Section 59 of the Constitution). If there is a norm delegating relevant authority the President of the Republic may issue decrees (Section 78(7) of the Constitution), the Government of the Republic may issue regulations and orders on the basis of and for the implementation of law (Section 87 (6) of the Constitution)[160]. Local government council or government may issue regulations as legislation of general application[161].

In the cases relating to legislative omission the Supreme Court has not – so far – exercised the constitutional review of legislation ranking lower than Acts (see also reply to 3.4.).

6. CONCLUSIONS

> *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 decisions influence the law-making in such cases?*

It can be concluded that the examination of legislative omission has not yet become a typical procedure for the Supreme Court. Neither does the number of such cases constitute a significant amount of constitutional review judgments of the Supreme Court. Thus, this activity is not a very important one for the Supreme Court today.

Although the Constitutional Review Court Procedure Act forms a reasonable legislative basis for the Supreme Court as the court for constitutional review by for evaluating legislative omission, one of the factors inhibiting the development of judicial practice on this issue is perhaps the fact that our own legal doctrine on legal gaps and legislative omission is still in the process of forming. At the same time there is nothing to prevent the Supreme Court itself from founding the bases of the doctrine by its leading judgments.

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[159] Restrictions for the Supreme Court as the court for constitutional review arise on the basis of objects of review, limited by the Constitutional Review Court Procedure Act. Namely, the Supreme Court as the court for constitutional review does not exercise review of all legislation, instead it is confined to legislation of general application only (legislation containing general guidelines of behaviour for indeterminate number of addressees). The conformity of administrative legislation of specific application to the Constitution and legislation of general application is reviewed by administrative courts. As for the possibilities to review the constitutionality of gaps in statutes as well as in other legal acts and to establish a conflict with the higher-ranking legislation see reply under 3.4.

[160] If the Riigikogu is unable to convene, the President of the Republic may, in matters of urgent state need, issue decrees which have the force of law, and which shall bear the counter-signatures of the Chairman of the Riigikogu and the Prime Minister (Section 109(1) of the Constitution). The Constitution, the Acts set out in Section 104 of the Constitution, laws which establish state taxes, and the state budget shall not be enacted, amended or repealed by a decree of the President of the Republic (Section 110 of the Constitution).

[161] Section 7(1) of the Local Government Organisation Act. Whereas the legislation passed by a council or government is valid in the administrative territory of the local government (subsection 3). All local issues shall be resolved and managed by local governments, which shall operate independently pursuant to law (Section 154(1) of the Constitution).

So far the court has reviewed legislative omission primarily within the proportionality test. In some cases this has been done through the review of conformity with the principles of legal clarity and equal treatment. The established opinion in the judicial practice of the Supreme Court - that in the case of concrete norm control it can only assess the constitutionality of a norm which has decisive importance for the resolution of the dispute, and that in the case of abstract norm control it can assess whether the norms referred to in the petition should have belonged namely into the contested Act - quite reasonably balances the extent to which the Supreme Court can interfere into the process of legislating.

At the same time, on the basis of the legislative omission cases adjudicated so far, it can be argued that the legislator is not very willing to follow the guidelines given by the Supreme Court and to promptly eliminate unconstitutional gaps in legislation. In the politically sensitive questions the legislator can be said to have procrastinated.

In principle, the enforcement of the Supreme Court constitutional review judgments should be guaranteed by the authority of the Supreme Court as the court entitled to render final interpretations of the Constitution. In practice, in most cases the Supreme Court lacks possibilities to influence the enforcement of its judgments by the Riigikogu. The Chief Justice's annual address before the Riigikogu can not be regarded an effective measure for the guarantee of the enforcement of the Supreme Court judgments.

Thus, it can be argued that the Supreme Court judgments, which have declared legislative omission unconstitutional, have had a modest impact on the law-making process.