PROBLEMS OF LEGISLATIVE OMISSION IN CONSTITUTIONAL JURISPRUDENCE

For XIVth Congress of the Conference of European Constitutional Courts

RESPONSE OF THE CONSTITUTIONAL COURT OF GEORGIA

I. PROBLEMATICS OF LEGAL GAPS IN THE SCIENTIFIC LEGAL DOCTRINE

1.1-1.2. The concepts of the legal gap and the legislative omission

Georgian scientific legal doctrine does not provide an apparent distinction between the legal gap and the legislative omission. The legal gap exists when a certain relation is not regulated by any legal rule.

Georgian scientific works categorize two types of the gap in legislation: visible and invisible. The visible gap is not deliberately filled in. Such a gap is often called "intentional imperfection of law" (so called qualified silence of law-maker). In this case, no analogy may be applied. Those who apply law are not entitled to act against the will of law-maker.

There is another classification of legal gap: the ontological gap and the deontological one. The ontological gap implies the unconformity of a legal rule with what exists. The deontological gap implies the inconsistency of a legal rule with what should be.

Notably, there are two reasons for existence of legal gaps:

- Newly emerged public relations that are not present at the moment of the adoption of law and, therefore, law-maker is not able to predict them. It should be emphasized that legislation cannot keep up with paces of the development of dynamic public relations. Additionally, the procedure of making amendments to current laws is related to some complexities and may be delayed for a long period of time.
- Negligence committed at the time of drafting laws.

There is no reference to such gaps in the Constitution of Georgia. The Constitution does not prescribe the obligation of law-maker to draft perfect, flawless laws. Accordingly, there is no notion of "the gap in legislation forbidden by the Constitution". Georgian legislation does not lay down any definition of the legal gap and its types. In this case, law-maker offers the following solution in individual legal acts: to address an unregulated relation through applying analogy.

In line with the paragraphs 1 and 2 of Article 27 of the Georgian Law on Normative Acts, "In case if a private legal relation is out of the legal regulation, a legal rule applicable to govern an analogous relation is applied (analogy of law). If the analogy of law may not be applied, a legal relation must be regulated on the basis of an entire legal system and general principles".

The Civil Code of Georgia (Article 5) provides the same elucidation. The application of analogy in private law is necessitated by the obligation of courts to decide even in cases when a legal rule is absent or ambiguous. Taking into account specificities of public and private relations, it is established that analogy may be applied only in private law. It is very important to perfectly regulate legal relations in public law. Criminal law does not allow the application of analogy – *"nulla poena sine lege"*. Judge has not the right to fill in the gap in criminal legislation. Criminal law authorizes the application of analogy only in case if it brings in benefits for a person, for example, Article 32 (circumstances excluding wrongfulness not stipulated by law) and Article 38 (circumstances excluding guiltiness not stipulated by law) of the Criminal Code of Georgia allow analogy for the benefit of a person.

References to Legal Gaps in the Practice of the Constitutional Court of Georgia

The Constitution of Georgia does not make any references to the legal gaps. Accordingly, the Constitutional Court of Georgia is not competent to examine legal gaps and indicate ways how to fill in them.

It is ascertained in the Decree of the Constitutional Court of Georgia dated 27 October, 2006 (case *"Ziauddin Idigovi v Parliament of Georgia"*) that "the Constitutional Court of Georgia is not entitled to

consider the constitutionality of legal gaps. It adjudicates whether a valid normative act or its separate provisions are in compliance with the Constitution. It is beyond the limits of the constitutional control to examine unconstitutionality of inexistence of certain legal rule or the effectiveness of its application and, correspondingly, it is beyond the competence of an individual to submit such a constitutional claim before the Constitutional Court".

By the decision of the Constitutional Court of Georgia dated 20 September, 2002, the Court rejected the constitutional claim to be substantially considered and held that "to make amendments to a certain normative act is the competence of the body that adopted this normative act and it does not fall within the competence of the Constitutional Court to adjudicate the issue".

In the decision on admissibility of the Constitutional Court of Georgia dated 3 May, 2005 (case *"Nato Natroshvili and Others v Parliament of Georgia"*), the Court indicated that "it does not fall within the competence of the Constitutional Court of Georgia to consider the issue of the legal gap". In spite of it, the Constitutional Court of Georgia could not ignore the problematic related to the legal gap raised by the applicants. Consequently, this issue was more than once the subject of the consideration of the Court. "The Board of the Court finds that the legal recognition of the right and, at the same time, the non-appearance of the relevant legal rule ensuring the realization of this right makes the right a fiction. The problems raised by the applicants deserve to be of proper interest to relevant bodies in order to appropriately act within their competences. Only the perfect legal base and the timely and effective functioning of competent bodies makes is possible to benefit from the application of the certain right", it is noted in the decision of the Constitutional Court.

In the case *"Neli Nebieridze v Parliament of Georgia"* the constitutional claim of the applicant challenged the Georgian Law on the Recognition as the Victim of the Political Repressions of Citizens of Georgia and on the Social Protection of the Repressed Persons dated 11 December, 1997. The Law stipulates the re-establishment of the rights of the repressed persons but the paragraph 3 of Article 8 of the Law is read as follows: "the procedure of the re-establishment of the property rights of a rehabilitated person shall be defined by other law". The law mentioned was not passed that became the ground of the submission of the constitutional claim challenging the constitutionality of the paragraph 3 of Article 8 of the Georgian Law on the Recognition as the Victim of the Political Repressions of Citizens of Georgia and on the Social Protection of the Repressed Persons. Thus, the pretension of the applicant was conditioned by the non-adoption of the mentioned law. By the decision on admissibility dated 13 February, 2004, the Court rejected the claim to be substantially considered, however, the Court noted that the non-adoption of the certain law "poses serious problems to the re-establishment of the property rights of the repressed persons". The Court requested the Parliament to determine the procedure of the re-establishment of the property rights of a rehabilitated person.

By the decision on admissibility of the Constitutional Court of Georgia dated 15 March, 2004, the Court declined the claim to be considered in substance. The claim dealt with the non-compliance of the paragraphs 2, 3 and 4 of the №258 Presidential Decree on Several Measures aimed at the Improvement of the Situation regarding the Return of the Financial Resources Kept in Former State Commercial Banks to the Georgian People and the paragraph 6 of the Parliamentary Decree (dated 27 December, 2001) on the Ratification of the First Protocol of the European Convention for the Protection of Human Rights and Fundamental Freedoms with Article 21 of the Constitution of Georgia. Despite the fact that the Constitutional Court repeatedly considered the issue, it remained to be out of the legal regulation. By the Decree the Constitutional Court requested the Parliament of Georgia to draft and adopt appropriate laws together with the Georgian Government in a reasonable term to ensure the return of the money kept in the former state commercial banks to the people.

1.3. The concepts of the Constitutional Court or the corresponding institution which implements the constitutional control as a "negative" and "positive" legislator

As the Member of the Constitutional Court of Georgia, Mr. Justice Besarion Zoidze believes, "10 years of the functioning of the Constitutional Court demonstrated that the Court may actually be deemed the quasi-legislator". There is no better assistant to the legislator than the Constitutional Court. Although, the Constitutional Court does not pass laws but through abolishing unconstitutional acts it helps law-maker in establishing the right legislative will. Legislative activity is not only passing laws, it is much broader process and, as Montesquieu thought, serves to be the inner understanding of the spirit of law. Without it, it is impossible to establish the legislative will capable of fully foreseeing all the factors useful for the existence of law. The Constitutional Court refers to mistakes that law-maker has to pay attention to. This is, in no way, the intervention in the legislative activity. The Constitutional Court often establishes the intent of legislator but it cannot legislate. In this case, law-maker tends to be the executor of the will of the Court. Legislator is obligated to adopt laws. Then, it seems that law-maker is confined to the will of the Constitutional Court and it is reasoned by the function of the Court to scrutinize legal rules.

There were such cases in the Court practice when the Constitutional Court by its decision changed an unconstitutional legal rule so that it has acquired new sense. There are many instances when applicants claim some words or sentences to be declared unconstitutional. In case of the withdrawal of these words or sentences, legal rules retain the constitutional status. In fact, the Court changes legal rules. If the Court abolished the whole rule then legislator would be obliged to draft the new rule. Although, it is the common practice but the question is being raised: Do we follow the right practice or is it more reasonable to eliminate the whole rule and not only its part? Let's imagine that there exists such a discriminatory legal rule: "Men above 18 years and women above 20 years have the right to participate in elections". What can the Court judge when the applicant claims the words "and women above 20 years" to be withdrawn. The discriminatory part of the rule rests in the sense of these words but it does not exist without another part. Therefore, it must be given much thought how to formulate the subject-matter of dispute.

As a consequence, the Constitutional Court significantly influences establishment of the legislative intent and this peculiarity serves to be its indispensable feature. Because of legislatures are bound by the Constitution, it is supposed that they are bound by decisions of the Constitutional Court too.

It may be said that the Constitutional Court sets certain frames for law-maker within which to act. In other way the constitutional control would make no sense. On 18 May, 2005, the First Board of the Constitutional Court held in one of the cases: "In any case taxes must be fixed in the manner so that it does not allow some people to become wealthy at consumers' expenses and does not entail the derogation from the principles established by the Constitutional Court".

Defining the Importance of the Constitutional Jurisprudence while Filling in Gaps in Legislation

In the process of application of a law, in contrast with law-making process, any gap is excluded because it may be filled in by judge. Applying the law is a part of the entire law-making process. Logically, it is always possible to adopt a rule through legal system at the moment of delivering court decision. Court decisions have practical importance only in terms of being capable of filling in the gap in legislation or amending some relevant legal provisions.

Taking into account the fact that it is very difficult to regulate modern public relations, more and more important role is played by special literature that seeks to fill in gaps in legislation and facilitates the formation of general point of view about the sense of a certain legal rule. In Western democratic countries many court decisions are based on special literature and views of scientists working in the field of law. Any scientific point of view should be perceived as a recommendation, advice, which has no legitimate

status. The legal scientific teaching may not be regarded as the source of law. At the same time, it has a great significance in the process of applying law.

As to the question whether judges of the Constitutional Court examine the issue of legal gaps through scientific works, the answer to this question may be found in the work of the Member of the Constitutional Court, Mr. Justice Besarion Zoidze titled "Constitutional Control and Order of Values in Georgia". The publication of this work was financially supported by the German Technical Cooperation Society.

II. 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

Among the fundamental principles laid down in the Constitution, the special attention must be paid to the principle of the supremacy of the Constitution, in particular, according to the paragraph 1 of Article 6 of the Constitution, "the Constitution is the supreme law of the country. All other legal acts must be in conformity with the Constitution".

Within the context of the supremacy of the Constitution, it is important to look through the paragraph 1 of Article 5 of the Constitution which imperatively mandates that state powers is exercised within the limits defined by the Constitution. Also, it is worthy to mentioning that the Constitution of Georgia adopted in 1995 lays down some obligations with respect to all individuals and legal entities. This provision is compulsory for citizens of Georgia and foreigners and stateless persons as well. Article 44 of the Constitution declares that each individual living in Georgia is obligated to address the requirements of the Constitution of Georgia and other legislation.

Each state and self-government agency and state officials must observe the supreme law of the country. The breach of the Constitution by the President, Government Members, the President of the Supreme Court, the Prosecutor General, the Chairman of the Chamber of Control and Members of the Council of the National Bank is the ground for raising the issue of their responsibility through the impeachment procedure (Article 64 of the Constitution).

The supremacy of the Constitution is ascertained in current Georgian legislation too. The Georgian Law on Normative Acts (Article 19) grants the first place to the Constitution and the Constitutional Law in the hierarchy of Georgian normative acts. Furthermore, Article 20 of the Law reiterates the provision stipulated by the paragraph 1 of Article 6 of the Constitution. However, this Law adds that the Constitution of Georgia prevails over other legal acts.
The Georgian Law on Normative Acts (paragraph 1 of Article 19) lays down the following hierarchy of Georgian normative acts according to their legal force:
1) Constitution of Georgia, Constitutional Law of Georgia;
1^1) Constitutional Agreement of Georgia;
2) Treaty and International Agreement of Georgia;
3) Organic Law of Georgia;
4) Law of Georgia, Regulation of the Parliament of Georgia, Decree of the President of Georgia;
5) Order of the President of Georgia;
6) Resolution of the Parliament of Georgia, Resolution of the Government of Georgia;
6^1) This provision is withdrawn (24.06.2004);
7) Resolution of the National Commission on Regulation of Energy of Georgia, Resolution of the National Commission on Communications of Georgia, Order of the Chairman of the Agency on State Purchases of Georgia, Order of the Minister of Georgia, Resolution of the Standard Commission on Accounting, Resolution of the Collegium of the Council on Audit Activity, Resolution of the Central Election

Commission, Order of the Head of the Special Service of State Protection, Order of the Head of the Special Service of Foreign Intelligence of Georgia;
7^1) This provision is withdrawn (30.03.2007);
7^2) Order of the Head of the Border Police of Georgia;
7^3) Order of the Head of the General Transport Administration;
7^4) Order of the Head of the Body of the Ministry of Energy of Georgia – National Gas and Oil Agency;
Resolution of the National Commission on Regulation of Oil and Gas of Georgia, and
8) Order of the Head of the Free Trade and Competition Agency;
8^1) Order of the Director General of the National General Accreditation Body - Accreditation Centre;
8^2) Order of the Director General of the National Agency on Standards, Technical Regulations and Metrology;
9) Order of the Head of the Service of Financial Monitoring of Georgia;
10) Resolution of the Professional Council of the National Professional Agency.

The principle of the supremacy of the Constitution is declared in some decisions of the Constitutional Court of Georgia. In the Decision dated 26 February, 2003, the Constitutional Court pointed that "not only general but also exceptional rules must be in compliance with the Constitution. Any exceptions from the general rule may be allowed by the Constitution itself".

It is remarked in the Decision of the Constitutional Court dated 25 May, 2004, that laws passed by the Parliament of the Autonomous Republic of Adjara must be in agreement of Georgian legal acts because the paragraph 1 of Article 6 of the Constitution of Georgia states: "the Constitution is the supreme law of the country. All other legal acts must be in conformity with the Constitution". In accordance with the paragraph 1 of Article 7 of the Georgian Law on Normative Acts, "a Georgian normative act is valid in the whole territory of Georgia, provided this normative act establishes otherwise, and is obligatory to be observed. In line with the paragraph 1 of Article 23 of the said Law, "taking into consideration the principle of the separation of powers, Georgian normative acts take precedence over normative acts of the Autonomous Republics of Adjara and Abkhazia". Article 24 of the mentioned Law is read as follows: "each normative act must be in conformity with the Constitution of Georgia and those normative acts that are adopted within the competence prescribed by the Constitution and have more prevailing legal force".

It should be emphasized that the Constitution of Georgia, establishing the supremacy of the Constitution, generally determines that "Georgian legislation is in line with general principles and rules of international law" (paragraph 2 of Article 6). The Constitution, of course, is deemed to be a part of legislation because, as the paragraph 3 of Article 5 of the Georgian Law on Normative Acts stipulates, Georgian legislation comprises of legislative acts and by-laws and, according to the paragraph 1 of the said Article, the Constitution of Georgia is a legislative act.

The Constitution of Georgia also renders the proper status to international treaties and agreements in the Georgian legal system; in particular, the paragraph 2 of Article 6 states that an international treaty or agreement of Georgia, if it is not in contradiction with the Constitution of Georgia and the Constitutional Agreement prevails over domestic normative acts.

The Georgian Law on International Treaties of Georgia defines the procedures of the conclusion, observation and termination of treaties of Georgia. Article 1 of the Law affirms that an international treaty of Georgia is concluded, observed and terminated in accordance with general principles and rules of international law, the Constitution of Georgia, other treaties and the present Law.

The Constitutional Court of Georgia is entitled to adjudicate and rule over the issue of the constitutionality of international treaties and agreements (sub-paragraph "e" of paragraph 1 of Article 89 of the Constitution of Georgia and paragraph "f" of Article 19 of the Georgian Organic Law on the Constitutional Court of Georgia). Despite the fact that international treaties and agreements of Georgia are

normative acts (Article 4 of the Georgian Law on Normative Acts), the exercise of the constitutional control over them serves to be the separate competence of the Constitutional Court in contrast with other normative acts. The separation of such competence of the Court is reasoned by the specificity of the constitutional control over international treaties and agreements. It may be called preliminary (preventive) constitutional control.

According to the Georgian Organic Law on the Constitutional Court of Georgia, a priori (preventive) control can be exercised over those international treaties and agreements that are subject to ratification. Such control may take place before their ratification (paragraph 2 of Article 38 of the Law).

In consistency with Article 14 of the Georgian Law on International Treaties, except for treaties requiring to be ratified, it is obligatory to ratify those treaties: 1) that provide the admission of Georgia to an international organization or an interstate union; 2) that are of military character; 3) that concern the national territorial integrity or change of state boundaries; 4) that deal with receiving and granting loans by a state; 5) that require amendments to domestic legislation, the adoption of laws or equivalent legal rules necessary for the fulfillment of international obligations; 6) that require the ratification according to other legal acts.

Georgian legislation stipulates the exercise of both the a priori and a posteriori constitutional control over international treaties and agreements. It should be mentioned that the subsequent constitutional control may be exercised over the international treaties and agreements that are not subject to the ratification, also in the following cases: 1) within the term of 30 days from the refusal by the Parliament to denunciate or eliminate ratified international treaties or agreements or their certain provisions; 2) within the term of no less than 31 days and no more than 60 days from raising the issue of the denunciation or elimination of ratified international treaties or agreements before the Parliament of Georgia if the latter did not decide the issue in 30 days (paragraph 2 of Article 38 of the Organic Law).

The Constitutional Court may exercise the a priori (preventive) constitutional control over international treaties and agreements upon the request of no less 1/5 of the members of the Parliament and – the a posteriori constitutional control upon the request of the President of Georgia, the Georgian Government and no less than 1/5 of the Members of the Parliament.

The Plenum of the Constitutional Court is the right body to consider the constitutionality of international treaties and agreements. It should be emphasized that there has never been a case concerning the issue brought before the Court.

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

Objects of the Constitutional Control in Georgia

Different legal acts may become the object of the constitutional control in Georgia. The exercise of the constitutional control over these acts falls within different competencies of the Constitutional Court. In order to illustrate all those acts, it is reasonable to enumerate the competencies of the Constitutional Court.

The competency of the Constitutional Court is mainly defined by the Constitution of Georgia. The sub-paragraph “g” of paragraph 1 of Article 89 of the Constitution states that the Constitutional Court exercises its competencies delineated by the Constitution and the Organic Law.

According to the paragraph 1 of Article 89 of the Constitution of Georgia, the Constitutional Court of Georgia has the following competencies:

1) to adjudicate upon the constitutionality of the Constitutional Agreement, law, normative acts of the President and the Government, the higher state bodies of the Autonomous Republic of Abkhazia and the Autonomous Republic of Adjara;
2) to consider disputes on competencies between state agencies;
3) to consider the constitutionality of formation and activity of political associations of citizens;
4) to consider disputes on the constitutionality of provisions on referenda and elections as well as disputes on the constitutionality of referenda and elections on the basis of these provisions;
5) to consider the constitutionality of international treaties and agreements;
6) to consider, on the basis of a claim of a person, the constitutionality of normative acts in relation to human rights and fundamental freedoms enshrined in the Chapter 2 of the Constitution;
7) to consider disputes on violations of the Constitutional Law of Georgia on the Status of the Autonomous Republic of Adjara;
8) to exercise other powers determined by the Constitution and the organic law of Georgia.

Apart from the above mentioned competencies of the Constitutional Court, the Organic Law on the Constitutional Court of Georgia entitles the Constitutional Court to exercise other competencies such as:

1) Considering questions on the recognition of the powers of a member of the Parliament of Georgia, or on the premature termination of these powers (paragraph "g" of Article 19);

2) Considering questions on violations of the Constitution of Georgia by the President of Georgia, the President of the Supreme Court of Georgia, members of the Government of Georgia, the Prosecutor General, the President of the Chamber of Control and members of the Council of the National Bank (paragraph "h" of Article 19);

3) Considering the compliance of normative acts of the Supreme Council of the Autonomous Republic of Adjara with the Constitution of Georgia, the Constitutional Law on the Status of the Autonomous Republic of Adjara, the Constitutional Agreement, treaties and international agreements of Georgia and laws of Georgia (paragraph "j" of Article 19);

4) Considering the constitutionality of the law or other normative act being the basis on which courts of general jurisdiction should make decisions upon a request of these courts (paragraph 2 of Article 19).

All the afore-mentioned highlights that the main object of the constitutional control is a normative act. It may be a normative act of Georgia, the Autonomous Republic of Abkhazia and the Autonomous Republic of Adjara and a local self-government (government) body (officials). The list of normative acts is given by the Georgian Law on Normative Acts. As a final point, the constitutional control is exercised over the following normative acts:

- The Constitutional Agreement of Georgia,
- International Treaty and Agreement of Georgia,
- Organic Law of Georgia,
- Law of Georgia,
- Regulation of the Parliament of Georgia,
- Decree of the President of Georgia,
- Order of the President of Georgia,
- Resolution of the Parliament of Georgia,
- Resolution of the Government of Georgia,
- Resolution of the Council of the National Bank of Georgia,
- Resolution of the Standard Commission on Accounting,
- Resolution of the Collegium of the Council on Audit Activity,

- Resolution of the Central Election Commission,
- Resolution of the National Commission on Regulation of Energy of Georgia,
- Resolution of the National Commission on Communications of Georgia,
- Order of the President of the National Bank of Georgia,
- Order of the Head of the Service of Financial Monitoring of Georgia,
- Order of the Chairman of the Chamber of Control,
- Order of the Chairman of the Agency on State Purchases of Georgia,
- Order of the Head of the Free Trade and Competition Agency,
- Order of the Head of the Body of the Ministry of Energy of Georgia – National Gas and Oil Agency,
- Order of the Minister of Georgia,
- Order of the Head of the Special Service of State Protection,
- Order of the Head of the Special Service of Foreign Intelligence of Georgia,
- Order of the Director General of the National General Accreditation Body - Accreditation Centre,
- Order of the Director General of the National Agency on Standards, Technical Regulations and Metrology,
- Order of the Head of the Body of the Ministry of Interior of Georgia – the Border Police,
- Order of the Head of the General Transport Administration,
- Order of the Professional Council of the National Professional Agency,
- Constitution of an Autonomous Republic,
- Constitutional Law of an Autonomous Republic,
- Law of an Autonomous Republic,
- Regulation of the Supreme Representative Body of an Autonomous Republic,
- Resolution of the Supreme Representative Body of an Autonomous Republic,
- Resolution of the Government of an Autonomous Republic,
- Order of the Minister of an Autonomous Republic,
- Resolution of the Supreme Election Commission of an Autonomous Republic,
- Decision of the Assembly of a local self-government (government) body,
- Decision of the Executive Body (Government) of a local self-government (government) body,
- Resolution of the Government of the City of Tbilisi (local self-government (government) body),
- Order of the Executive (Mayor), (local self-government (government) body).

Georgian relevant legislation provides for an individual legal act to become the object of the constitutional control. In accordance with the paragraph "g" of Article 19 of the Organic Law on the Constitutional Court of Georgia, the Constitutional Court considers questions on the recognition of the powers of a Member of the Parliament of Georgia or on the premature termination of this power. In this case, the object of the constitutional control is the decree of the Parliament regarding the recognition of the powers of a Member of the Parliament of Georgia or on the premature termination of this power. The Constitutional Court considered 7 constitutional claims concerning the issue.

Acts of officials may be subject to the constitutional scrutiny. In conformity with the paragraph "h" of Article 19 of the Organic Law on the Constitutional Court of Georgia, the Constitutional Court considers questions on violations of the Constitution of Georgia by the President of Georgia, President of the Supreme Court of Georgia, Members of the Government of Georgia, Prosecutor General, President of the Chamber of Control and Members of the Council of the National Bank.

The original Constitution of Georgia adopted in 1995 authorized only the Constitutional Court to exercise constitutional control, but as a result of 2004 February constitutional amendments, some of the powers to exercise constitutional control appeared in the arsenal of the competencies of the President of Georgia. Pursuant to the article 73 (3) of the Constitution of Georgia "The President of Georgia shall be authorised

to suspend or abrogate acts of the Government and the bodies of the executive power, if they are in contradiction with the Constitution of Georgia, international treaties and agreements, laws and normative acts of the President." According to this constitutional norm, it can be said, that it is within the powers of the President of Georgia to exercise constitutional control regarding acts of the Government and the bodies of the executive power. This statement is also enshrined in the legislation. In particular, article 7(4) of the law on "The Structure, Proxy and Activity Rule of the Government of Georgia" is literally repeating the contents of the article 73 (3) of the Constitution of Georgia.

The above mentioned legal norm is not the only one in the Georgian legislation, which gives powers to the President of Georgia to exercise constitutional control. Similar norm was enshrined in the Law on the Status of the Autonomous Republic of Adjara" adopted on 1st of July of 2004. In particular, the article 15 (5) of the mentioned act states, that the President of Georgia is authorized to halt functioning of an act of the Government of the Autonomous Republic of Adjara or declare it void if it contradicts with the Constitution, this law, international treaties and agreements of Georgia, laws or legal acts of the President of Georgia. Article 18 of the same law gives the identical authority to the President of Georgia regarding the acts of the Head of the Government of the Autonomous Republic of Adjara.

Forms of Constitutional Control

The Constitutional Court of Georgia is conferred with the powers to exercise different forms of constitutional control. All the powers of the Constitutional Court, except one, are exercised through a posteriori control. It can exercise the preventive control (a priori) only regarding the international agreements and conventions.

The *a posteriori* control is exercised by the Court through abstract as well as through concrete control form. In all cases the constitutional control is facultative. The Georgian legislation does not acknowledge the mandatory control mechanism.

Decisions of the Constitutional Court are always conclusive, pursuant to the article 89 (2) of the Constitution. Normative acts or their parts declared unconstitutional lose legal force from the moment of the issuance of an applicable decision of the Constitutional Court. Therefore, the Georgian legislation does not establish the consultative control mechanism either.

The Constitutional Court of Georgia is also conferred with the power of formal control, meaning it can consider not only the validness of an act or of its provisions in relation to the Constitution, but also can examine whether the procedure of the consideration, adoption and entry into force of a normative act is in line with the requirements established by the Constitution.

2.3 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 Constitutional Court of Georgia does not have the concrete power to consider legal gaps existing in the Constitution or in other normative acts. In theory, it is possible, during the consideration of the case that the Constitutional Court state in its decision that there is a gap in the law, but existence of the gap may not be the basis for applying to the Court. The Constitutional Court is authorized to consider only the constitutionality of legal acts. For instance, in one of the rulings the Constitutional Court stated that "the consideration of the issue of the legal gap is not within the jurisdiction of the Constitutional Court".

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

3.1. Applying to the Constitutional Court

Pursuant to the article 89 (1) of the Constitution of Georgia there are two forms of applying to the Court: a constitutional claim and a constitutional submission. Pursuant to the article 19(1) of the Organic law on the Constitutional Court of Georgia, the Constitutional Court on the basis of a constitutional claim or a submission is authorized to consider and decide on the conformity of the Constitutional Agreement, normative resolutions of the Parliament, normative acts of the President, the Government and of the Adjarian and Abkhazian supreme state bodies, as well as of the adoption, signature, publication and entry into force of Georgian legal acts and resolutions of the Parliament with the Constitution of Georgia. The Constitutional Court considers only the conformity of normative acts. As to individual legal acts, they are claimed in courts of general jurisdiction.

The Constitutional Agreement
The Constitutional Agreement regulates the relationship between the State of Georgia and the Apostle Autocephalous Orthodox Church of Georgia, which should be in conformity with universally recognized international standards of human rights and fundamental freedoms.

Laws of Georgia
Pursuant to the Law on Normative Acts, organic law shall be adopted only on those issues, regulation of which is subject to organic law pursuant to the Constitution. As to the laws of Georgia, they can be adopted on all issues that fall within the competencies of the Government, except for those instances where the Constitution states otherwise. The Constitutional Court can consider not only the conformity of the contents of law with the Constitution but also of its adoption, signature, publication and entry into force with the Constitution.

Normative Resolutions of the Parliament of Georgia
Non-normative resolutions of the Parliament are only those ones that concern staff and personnel issues. Subsequently, the object of the consideration of the Constitutional Court can be normative resolutions adopted by the Parliament of Georgia.

Normative Acts of the President of Georgia
Pursuant to the Law of Georgia on Normative Acts, normative acts of the President include: Presidential Decree and Order. A Decree of the President of Georgia is a normative act of the same force as the law and it is adopted by the President in only those cases that are established by the Constitution. In particular, these are the ones adopted in cases of state emergency and in particular cases involving taxation and budgetary issues. The main act of the President is an order. An individual order is the one by which the President grants office to the Member of the Government, to the judge of courts of general jurisdiction and to the Member of the Constitutional Court. The President of Georgia, as a High Commander-in-Chief of the armed forces, issues an order, which can be normative as well as individual legal act.

Normative Acts of the Government of Georgia
Normative act of the Government is a resolution. Resolution of the Government of Georgia is adopted on the basis and for execution of the Constitution, laws and normative acts of Georgia.

Normative Acts of Supreme bodies of the Government of Abkhazian and Adjarian Autonomy
Pursuant to the Law on Normative Acts, normative acts of supreme bodies of the Government of the Autonomous Republics of Adjara and Abkhazia include: the Constitution of an Autonomous Republic, laws of an Autonomous Republic, and resolutions of the Supreme Council of an Autonomous Republic.

The constitutionality of these acts are examined only regarding their contents, because rules of the adoption, issuance and entry into force of these acts are not defined by the Constitution of Georgia.

Disputes between State Bodies regarding their Competencies

The Constitution defines the issues that fall in the exclusive competencies of state supreme bodies, including the Parliament of Georgia, the President and the competencies of other state bodies. The competence of a state body must be violated by a normative act. Disputes about competencies among state bodies are considered by the Board of the Constitutional Court. The relief of the constitutional claim concerning the competencies among state bodies results in the invalidation of the normative act, by which the competency of a state body was violated, from the moment of their issuance.

Constitutionality of Formation and Activity of Citizens' Political Union

The formation and participation in the activities of a political party or a political union is the constitutionally guaranteed right of citizens. At the same time, the Constitution establishes certain limitations. The formation and activity of public and political associations aiming at overthrowing or forcibly changing the constitutional structure of Georgia, infringing upon the independence and territorial integrity of the country or conducting propaganda of war or violence, provoking national, local, religious or social animosity, shall be impermissible. In case of the non-conformity with the mentioned limitations the act may be deemed unconstitutional.

Disputes about the Constitutionality of Elections and Referenda

Elections and referenda are significant forms of the exercise of direct democracy. Rules of holding referenda are established by the Constitution and the Organic Law. The Constitution defines the set of issues on which holding referenda is allowed. The Constitution also defines the set of issues, which shall not be decided through referendum – adopting or annulling a law, amnesty or pardon, ratification or denunciation of international agreements, also those issues that limit human rights and fundamental freedoms.

The Constitutional Court considers the constitutionality of referendum. If a constitutional claim concerns the constitutionality of scheduling referendum, the consideration time period should not exceed 15 days from the day when claim was submitted. As to the constitutionality of holding referendum, the consideration of the claim should not exceed 30 days from the admission of a case for the examination in substance. The prolongation of this time limit is allowed in special circumstances by the decision of the Chairman of the Constitutional Court. The constitutional claim concerning referendum is considered on special session.

The Constitutional Court considers constitutional claims concerning scheduling and holding elections and the constitutionally guaranteed election rights.

The constitutionality of scheduling elections shall be considered within 15 days from the submission of the claim. Constitutional claim regarding presidential elections shall be considered within 17 days from the submission, as to other types of claims concerning elections shall be considered within 30 days after the admission of a case for the examination in substance (This can be prolonged by the Chairman of the Constitutional Court in special circumstances by not more than 30 days)

Constitutionality of Normative Acts adopted in relation to the Second Chapter of the Constitution

The second chapter of the Constitution of Georgia concerns human rights and fundamental freedoms, the protection mechanism of which is the Constitutional Court. When submitting a claim to the Constitutional Court, one should take into account whether the disputed act is a normative one. In relation to the second chapter of the Constitution, the Constitutional Court may consider the constitutionality of Georgian normative acts, as well as of normative acts of the Autonomous Republics of Adjara and Abkhazia and of local self-government bodies. It should also be clarified whether there is a violation of a norm of the

second chapter or whether it can be violated in future. The constitutionality of the claims received in relation to the second chapter of the Constitution is considered by the Board of the Constitutional Court.

Constitutionality of the International Agreements and Conventions
The Constitution of Georgia and legislation establishes only one instance of *a priori* constitutional control regarding the constitutionality of international treaties and agreements that are subject to the ratification. In this case a constitutional submission is received by the Court and the ratification is not permissible until the final decision of the Court. The constitutional control is also exercised in relation to already ratified international treaties and agreements.

Constitutionality of the recognition of the powers of a member of the Parliament of Georgia, or of the premature termination of these powers
The issue of the recognition of the powers of a Member of the Parliament of Georgia or of the premature termination of the powers is decided by the Parliament through an individual legal resolution. The recognition of the powers of a Member of the Parliament constitutes recognition of him/her as a member, whereas the premature termination constitutes the termination of office in accordance with the requirements of the article 54 of the Constitution of Georgia. It is within the powers of the Constitutional Court to consider the constitutionality of the mentioned resolution.

Issue of violation of the Constitution of Georgia by the President of Georgia, the President of the Supreme Court of Georgia, the Member of the Government, the Procurator General, the President of the Chamber of Control and Members of the Council of the National Bank.
The Constitution of Georgia establishes the impeachment procedure against the President of Georgia, the President of the Supreme Court of Georgia, the Member of the Government, the Prosecutor General, the President of the Chamber of Control and against the Members of the Council of the National Bank. If the issue of the termination of office is raised with an accusation of the violation of the Constitution, the conclusion of the Constitutional Court is necessary. The mentioned issue is considered by the Board of the Constitutional Court on special session.

Apart from the above mentioned it is within the jurisdiction of the Court to consider **disputes regarding the Constitutional Law of Georgia on the Status of the Autonomous Republic of Adjara.** Additionally, **the compatibility of normative acts of the Supreme Council of the Autonomous Republic of Adjara with the Constitution of Georgia, the Constitutional Law on the Status of the Autonomous Republic of Adjara, the Constitutional Agreements, international treaties and agreements and legal acts of Georgia.**

Submissions of Courts of General Jurisdiction
Pursuant to the article 19 (2) of the Organic Law of Georgia on the Constitutional Court of Georgia, if the court of general jurisdiction throughout the consideration of the case concludes that the law or the normative act which the court shall apply for deciding a case, wholly or partly contravenes with the Constitution, it shall terminate proceedings and apply to the Constitutional Court. The case shall be reopened after the decision of the Constitutional Court. The recognition of a law or a normative act as unconstitutional does not constitute the invalidation of prior judgments and decisions made by the court on the basis of these acts; it only terminates the execution of decisions in accordance with established rules of procedural law. Submissions of courts of general jurisdiction are valid if they are submitted in accordance with the article 42(2) of the Organic Law on the Constitutional Court of Georgia by decision of the judge or the panel of judges who are considering the case. Submissions of courts of general jurisdiction should have legal basis and should be substantiated. It is the prerogative of the Constitutional Court to consider submissions of courts of general jurisdiction.

3. 2. Legislative omission in the petitions of petitioners

The article 89 of the Constitution of Georgia defines wide circle of subjects who have the right to apply to the Constitutional Court. According to this norm, the claimant can be: the President of Georgia, not less than one fifth of the members of the Parliament, courts of general jurisdiction, supreme representative bodies of the Abkhazian and Adjarian Autonomies, the Public Defender and legal entities.

The Organic Law on the Constitutional Court of Georgia regulates in what instances the above mentioned subjects may dispute the violation of the Constitution. Pursuant to the article 39, the following have the right to submission of a claim on the constitutionality of a normative act: citizens of Georgia, individuals or legal persons living in Georgia, if they think that there is a violation of their rights and freedoms guaranteed in the second chapter of the Constitution or may be in future. According to the law, there are two instances when a constitutional claim may be submitted to the Constitutional Court by citizens of Georgia and by individuals and legal persons living in Georgia: If they think that their rights and freedoms guaranteed in the second chapter of the Constitution have been violated or their violation is real in the nearest future. Therefore, if he/she believes that while being involved in certain legal relationship his/her rights may be violated, he/she can submit a constitutional claim. Thus, a claimant can dispute the constitutionality of a certain act, but he/she cannot point on legal gaps in his/her claim. However, there are certain instances in the practice of the Constitutional Court, when a claimant disputed the constitutionality of legal gaps. In particular, on 22 February of 1997 a claim was submitted to the Constitutional Court by citizens – I. Kirakosian and S.Vartanian (altogether 11 claimants). According to the claimants, the articles 46 and 47 of the Law on Entrepreneurship were in contradiction with the article 21(1) of the Constitution of Georgia. At the same time, they thought that it was necessary to fill in the legal gap through legislative means because the disputed norm was not allowing for appeal of the decision made by the general meeting of the shareholders. It should be mentioned that there are only few instances when claimants pointed on the existence of legal gaps in their claims.

3.3 Investigating legal gaps on the initiative of the Constitutional Court

The existing legislation does not grant the powers to the Constitutional Court to investigate the legal gap on its own initiative, when this is not required by the claimant. However, the Constitutional Court factually is not constrained in examining legal gaps. The practice of the Constitutional Court has showed that in certain instances when it identifies legal gaps the Court recommends to the Parliament of Georgia to fill in the gap. For instance, in the case of *Citizen Oleg Svintradze v. the Parliament of Georgia* the Parliament was asked to consider introducing an amendment to the article 422 (1) of the Criminal Procedure Code.

With its decision of 19 February 2004 on the admissibility on the case of N. Nebieridze the Constitutional Court refused to consider the case in substance, but in the resolution part the Court asked the Parliament to define rules for the repatriation of rehabilitated persons' property rights.

By the decision on the admissibility of 15 March 2004 the Court refused to consider in substance the case, which dealt with the constitutionality of articles 2, 3 and 4 of the N258 Presidential Order of 2n July 2002 and the article 6 of the Resolution of the Parliament of Georgia on the ratification of the 1st protocol of European Convention for the Protection of Human Rights with the article 21 of the Constitution of Georgia. In the mentioned decision the Court asked the Parliament to draft and adopt relevant legal acts which would ensure the repayment to depositors of funds deposited in the former state-owned commercial banks.

In the case of *V. Darbaidze, N. Tsimakuridze and others v. the Parliament of Georgia* the claimants were not rejecting that the relevant legal relationship should have been regulated by legal acts, they were

disputing the existing form of regulation. Concerning the case, the Board of the Constitutional Court stated that if the legal acts have certain gaps it can be filled in through legislative amendments.

3.4 Legislative omissions in laws and legal acts

The Constitutional Court considers constitutional claims only in relation to the constitutionality of normative acts. However, throughout the consideration of a case, if the Court identifies certain legislative omission in legal acts it can give recommendations to the Parliament. As was mentioned above, it is within the powers of the Constitutional Court to consider the conformity of legal norms with the Constitution (as the Constitution is the supreme law of the state and all other acts should be compatible with it).

3.5 Refusal of the Constitutional Court to investigate and assess legal gaps

The refusal of the Constitutional Court to investigate and assess legal gaps is not founded on specific circumstances, as it does not have the powers of investigating and assessing the legislative omissions. However, in spite of this, there are cases in practice when the Constitutional Court, during consideration of a case, pointed on the existence of a legislative omission and as the Court does not have function of a positive lawmaker, it only asked the Parliament to correct the omission.

IV. INVESTIGATION AND ASSESSMENT OF THE CONSTITUTIONALITY OF LEGISLATIVE OMISSION

4.1 Peculiarities of investigation of legislative omission

The powers of the Constitutional Court of Georgia are established by the Constitution, by the Organic Law on the Constitutional Court of Georgia and by the Law on Constitutional Proceedings. The mentioned normative acts define all the issues the consideration of which is within the powers of the Court. The relevant articles of the mentioned acts do not confer the power to the Constitutional Court to conduct investigations of legislative omissions, consider their constitutionality and conduct *a priori* or *a posteriori*, concrete or abstract constitutional control. Pursuant to the article 16(1)(d) of the Law on Constitutional Proceedings, a constitutional claim should refer the articles of the Constitution which a claimant thinks are contravened by the disputed act. Therefore, the Constitutional Court examines the conformity of a disputed act with the Constitution, but it exceeds the powers of the Court to consider the constitutionality of inexistence of the norm (legal omission) regulating certain legal relationship.

If the object of the petition is an existence of a legal omission than the Court will not admit the case to be examined. For instance, in one case the object of the claim was that the law of Georgia on Higher Education contained legal omissions. The Court declared the case inadmissible and stated that it is not in the jurisdiction of the Court to consider the constitutionality of a legal omission.

Cases of the Constitutional Court

In the case of *Mr. K. Dzagania v. the Parliament of Georgia*, the claimant was asking to declare unconstitutional the N13 resolution adopted on 14 of August 2004 by the National Commission on Regulation of Energy. The case was declared inadmissible by the Court. However the Court stated that it identified faults in the methodology used for establishing gas tariffs, which were harming suppliers and consumers' interests. Despite the fact that the Court did not admit the case for the examination in substance it stated in the resolution part of the decision about the omission and asked the Government and the Commission to take necessary steps for filling in the omission.

It is worth mentioning the admissibility decision of the Court on the case in which a Russian citizen, refugee from Chechnia Mr. Ziudan Idigov required the Court to admit the case into consideration and

declare unconstitutional a range of articles of the Law of Georgia on Refugees, which did not contain any rule on the basis of which he could receive relevant documents to go to the third country. The Court did not take the case into consideration as the case was concerning inexistence of norms and not existence of anticonstitutional norms. At the same time, in the decision on admissibility the Court pointed to the Government and the Parliament to take necessary steps in their respective competencies in order to enhance the legal base for ensuring the realization of the rights of refuges to go out of the country. These types of recommendations of the Constitutional Court are not mandatory.

The peculiarities of investigation of legislative omissions in various spheres of legislative regulation

As to the part of the questionnaire which concerns the investigation of legislative omissions in various spheres of legislative regulation, it should be mentioned that as long as the Constitutional Court does not have any positive obligations to investigate legislative omissions and to exercise control on its remedies, therefore, neither on legislative level nor in judicial practice the investigation of legislative omissions is not characterized by special peculiarities.