CONSTITUTIONAL COURT OF THE REPUBLIC OF MACEDONIA

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"PROBLEMS OF LEGISLATIVE OMISSION IN CONSTITUTIONAL JURISPRUDENCE"

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PROBLEMS OF LEGISLATIVE OMISSION IN CONSTITUTIONAL JURISPRUDENCE

Answers to the Questionnaire

1. PROBLEMATICS OF LEGAL GAPS IN THE SCIENTIFIC LEGAL 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 in determination 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.?)

In the legal theory of the Republic of Macedonia legal gaps are defined as social relations that are not regulated by a general legal norm, that is, as legal situations which the legislator has failed to envisage in advance. The reasons for the emergence of legal gaps are mainly explained with the changes in the relations in the society, especially when due to the fast dynamics of social relations the one that is authorised to adopt legal regulations is not in a situation to envisage all details of their further development. (Prof. Dr Stefan Gaber – *"Theory of the State and Law"*).

It is considered that legal gaps must exist since life is more complex than law, and especially since it always develops and changes faster than law. Hence, in theory two types of legal gaps are differentiated: *initial*, which have existed since the moment of adoption of the corresponding legal norms, which the law creator simply missed to govern, and *additional* which occur following the adoption of the legal norms, since new relations emerge which the legislator failed to envisage. ("*Legal Encyclopaedia"*)

1.2. The concept of legislative omission.

Are the legal gaps which are prohibited by the Constitution[1] (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?

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

What is the prevailing concept of the mission of the constitutional court as a judicial institution in the scientific 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 in 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?

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?

[1] In the procedure of preparation of the draft questionnaire, the concept of the legislative omission set forth in the decision of the Constitutional Court of the Republic of Lithuania of 8 August 2006 was followed. The decision is attached to the draft questionnaire. In the said decision, legislative omission is understood as a legal gap prohibited by the Constitution (or any other legal act of higher power). Various aspects of the constitutional concept of the legal gap and legislative omission are revealed in Items 4.3–9.2 of Chapter II of the reasoning part of the said decision.

In the legal system of the Republic of Macedonia, the Constitution is the highest legal act in the hierarchy of the legal acts. Such position of the Constitution in view of the other legal norms derives directly from the Constitution. Namely, under Article 51 paragraph 1 of the Constitution, in the Republic of Macedonia laws must be in accordance with the Constitution, while all other regulations must be in accordance with the Constitution and law. Under paragraph 2 of this article, everyone is obliged to observe the Constitution and the laws. These constitutional provisions are of key importance in the determination of constitutionality as a legal principle and that is as a principle of supremacy and priority of the Constitution. From these constitutional provisions derives the hierarchy of the legal acts, in the sense that all laws must be in accordance with the Constitution, and all other regulations must be in accordance with the Constitution and law. The Constitutional Court of the Republic of Macedonia does not assess the Constitution from the aspect of whether it has or does not have legal gaps since for the Constitutional Court, it is an act in view of which it appraises the conformity of the other, lower legal acts (laws and sub statutory acts).

As to the attitude of the Constitutional Court towards the Constitution, the Court gave its views in its **Resolution U.number.188/2001 of 24 October 2001,** with which it dismissed the initiative by a citizen to instigate proceedings for the appraisal of the constitutionality of the text of the Draft Amendments to the Constitution of the Republic of Macedonia. In the reasoning part of its Resolution, invoking its competence defined in Article 110 of the Constitution as well as the competence of the Assembly of the Republic of Macedonia to adopt and change the Constitution, the Constitutional Court pointed that:

“. . . the adoption and changing of the Constitution is within the sole competence of the Assembly of the Republic of Macedonia, so that the content and scope of the constitutional matter depends on the will of the constitution-maker.

The Constitutional Court does not have competence and may not appraise the Constitution as the highest legal act and expression of the political will of the subjects in the state. Namely, the Constitutional Court finds the Constitution as an act in view of which the Court appraises the constitutionality of all other lower acts. Hence the appraisal of the constitutionality of the text of the draft amendments to the Constitution is not within the competence of the Constitutional 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.

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, sub statutory 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 court investigates and assesses the constitutionality of gaps (legislative omission) in the legal regulation? Does the constitution provide for any special procedures for the investigation of legislative omission?

In Article 110 of the Constitution of the Republic of Macedonia, which defines the competence of the Constitutional Court, as acts that may be the subject of constitutional court appraisal expressly are noted the following: laws, collective agreements, other regulations and programmes and statutes of political parties. From this constitutional provision it derives that the subject of appraisal before the Constitutional Court may be regulations, that is, acts of the legislative power, executive power, units of local self-government and other holders of public mandates, if they regulate in a general manner rights and obligations of citizens. The appraisal of the constitutionality of these acts is within the sole competence of the Constitutional Court, since in the Republic of Macedonia only the Constitutional Court is a body carrying out constitutional-court control (constitutional review). The control of the constitutionality and legality of the normative acts is realised as an abstract and *a posteriori*, that is, it is possible only on valid acts. Preventive control is not envisaged as a possibility in the Constitution.

The Constitution of the Republic of Macedonia does not prescribe the explicit competence of the Constitutional Court to investigate and assess the constitutionality of the legal gaps (legislative omissions) in legal regulations, or in laws and sub statutory acts that are the subject of its assessment.

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.

As noted in the preceding answer, the Constitution of the Republic of Macedonia does not stipulate the competence of the Constitutional Court to investigate and assess the constitutionality of legal gaps. However, there is an opinion that such competence could be indirectly derived in such situations when in addition to the obligation to adopt a law the Constitution defines the time within which it must be adopted[2]. This for reasons that in such a situation, the failure of action on the part of the legislator creates an unconstitutional condition from the aspect of realisation of the supremacy of the Constitution. However, the Constitutional Court has no available means whatsoever that will make the legislator carry out his constitutional obligation to adopt certain law. Also, in situations when the law as a whole or parts of it are found to be unconstitutional by the Constitutional Court, that is, when a legal gap will be created with the decision by the Constitutional Court, the Court cannot impose directly to the legislative body an obligation to adopt a new law instead of the one that has ceased to be valid as the result of the decision by the Constitutional Court, nor indicate to it what should be the contents of the new law. Hence, the filling in of the legal gap that occurred as the result of the termination of validity of the unconstitutional law is a task for the legislator.

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 special 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 Constitutional Court is set forth by the Constitution. An act of the Court – the Rules of Procedure (which is a constitutional matter)[3], regulates the manner of work and the procedure before the Constitutional Court. Given that the Constitution does not provide for competence of the Constitutional Court to investigate and assess legal gaps, such competence is not provided for in the Rules of Procedure either. The

[2] As was the case when after the adoption of the 1991 Constitution the existing laws were to be harmonised with the new Constitution within certain time limits defined in the Constitutional Law for the Implementation of the Constitution.

[3] Article 113 of the Constitution of the Republic of Macedonia envisages that the manner of work and procedure before the Constitutional Court are governed by an act of the Court.

Rules of Procedure also does not stipulate a special procedure for the investigation of such gaps, or what kind of a decision the Court shall adopt after the establishment of the existence of a legal gap, that is, legislative omission.

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

3.1. Application to the constitutional court.

What subjects may apply to the constitutional court in your country? Can they all raise the question of legislative omission?

An initiative to instigate a procedure for the appraisal of the constitutionality and legality may be submitted by anybody (citizen, the Assembly of the Republic of Macedonia, the Government of the Republic of Macedonia, a legal entity, political party, association of citizens, public institution, local self-government unit, etc.), including the Constitutional Court which may by itself, upon its own initiative instigate proceedings for the appraisal of the constitutionality and legality, that is, upon its own initiative to appraise the constitutionality and legality of provisions that are included in the initiative. The submittal of the initiative for the appraisal of the constitutionality and legality is not connected with the existence of a legal interest of the submitter (petitioner), nor is it limited with certain time limits. In addition to *action popularis* as a fundamental mean for the protection of the constitutionality and legality, which is most often applied in practice, there are also other legal instruments with which a procedure is initiated before the Constitutional Court, depending on the concrete procedure, that is, competence of the Constitutional Court. Thus, the procedure for the protection of human rights and freedoms is initiated upon a request for the protection of human freedoms and rights; the procedure for taking away immunity of the President of the Republic is initiated upon a proposal by a competent body before which a request has been submitted for the instigation of a penal procedure; the procedure for the establishment of responsibility of the President of the Republic for violation of the Constitution and law is considered to be initiated from the date of submittal of the proposal by the Assembly of the Republic of Macedonia; a proposal for resolution of a conflict of competence may be made by any of the bodies among which the conflict occurred, as well as by any person that, as a result of the conflict of competence, is unable to exercise a right of his/her.

In the case-law of the Constitutional Court of the Republic of Macedonia initiatives have been most often made for the appraisal of the

constitutionality of laws, and constitutionality and legality of sub statutory acts and other regulations. For instance, out of a total of 240 submitted initiatives to the Constitutional Court of the Republic of Macedonia in 2006, 234 were initiatives for the appraisal of the constitutionality of laws and constitutionality and legality of sub statutory acts, and only 6 requests related to the protection of human freedoms and rights. In 195 cases (out of a total of 240 initiatives) citizens appeared as the submitters (petitioners).

The submittal of initiatives for instigation of a procedure for the appraisal of the constitutionality of a law by the regular courts is regulated in Article 18 of the Law on the Courts, under which the court submits an initiative for the instigation of a procedure for the appraisal of the conformity of the law with the Constitution when in the procedure before the regular court there is a question about its conformity with the Constitution, for which that court notifies the immediately higher court and the Supreme Court of the Republic of Macedonia. In case the court (regular) considers that the law to be applied in the concrete case is not in accordance with the Constitution and the constitutional provisions cannot be applied directly, it will suspend the procedure until the Constitutional Court of the Republic of Macedonia makes a decision.

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 submitters of the initiative (petitioners) for the appraisal of the constitutionality and legality of the laws and sub statutory acts may in their initiatives challenge the constitutionality, that is, legality of the regulations due to legislative omissions in the act. Thus, for instance, it often happens that the petitioners in their initiatives note that the legislator has failed to regulate certain issue in the challenged act, that is, that there is a legal gap in the regulation of certain matter or that the legislator has not regulated completely certain issue, and according to the petitioner he should have regulated it in

certain manner, that is, with certain contents. In some initiatives, the petitioners dispute the laws, that is, other regulations or certain provisions therein due to lack of clarity, insufficient precision, that is, lack of definition of the legal norm. Given that most often citizens address the Constitutional Court of the Republic of Macedonia, in their initiatives they most often point to legislative omissions. However, we are not in a position to provide more concrete statistical data in this sense, given that the classification of the received initiatives is based on the submitter of the initiative, the type of the challenged act and the field it relates to, and not according to the statements in the initiative for possible legislative omissions or legal gaps.

Article 15 of the Rules of Procedure of the Constitutional Court of the Republic of Macedonia defines what the initiative for instigation of a procedure for appraisal of the constitutionality of a law and constitutionality and legality of a regulation or other general act should contain (designation of the law, regulation or general act, that is, separate provisions therein that are being disputed, the reasons for their challenge, the provisions of the Constitution, that is, the law that are violated by that act, and the name, that is, the name and the seat of the petitioner). This provision relates to the contents of any initiative for the assessment of the constitutionality or legality of laws or regulations, irrespective of the reasons for the challenge. Accordingly, there are no special conditions in terms of the form, content and structure of the petitions in which the petitioners invoke the unconstitutionality of the legislative omission.

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.

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, sub statutory acts, etc.)? Does legislative omission mean only a gap in the legal regulation that is in conflict with the constitution, or a gap in the legal regulation that is in conflict with legal regulation of higher power as well (for example, when an act of the government does not include the elements of the legal regulation which, under the constitution or the law which is not in conflict with the constitution, are necessary)? Is it possible to perceive legislative omission in the case of delegated legislation, when the notion “may” (“has the right”) is used while delegating, while the regulation established in the sub statutory act includes only part of said delegation?

As a rule, the Constitutional Court appraises the legal gaps in the laws. However, in a number of these cases the Constitutional Court by repealing the provisions of the law because they do not contain elements which according to the Court should be contained in a law only, has also repealed sub statutory acts since they have been adopted on the basis of legal authorisation which the Court has found to be in contradiction with the Constitution precisely because of the absence of these elements (for example, criteria for the exercise of the rights and freedoms, criteria and framework for the determination of certain remunerations, etc.). As a matter of fact, the largest number of cases in which the Court has found legal gaps are the cases of delegated legislation, that is, the provisions of the laws with which the holders of the executive power are delegated an authorisation to regulate certain issues, that is, relations, by a sub statutory act (most often to determine the amount of the compensation of costs, remuneration for issuing licenses, etc.). Thereby, the Constitutional Court has built a stance that the conditions and criteria on which depends the exercise of certain right or obligation of the citizens may be regulated only by a law, and not by a sub statutory act, so that in the cases when the legislator has not originally regulated these issues but has left them to be regulated by the executive power with a sub statutory act on the basis of legal authorisation, the Court has found such authorisation to be in disagreement with the Constitution, that is, with the constitutional principle of the rule of law and the division of powers. In almost all these decisions the Constitutional Court has concluded that the law is missing provisions that will define the criteria on the basis of which the sub statutory act would define the amount of the compensations and that consequently such legal provisions are in contradiction with the Constitution. In the constitutional case-law of the Constitutional Court of the Republic of Macedonia there are a number of such examples, but we note only a few of them from the more recent case-law of the Court:

1. With its **Decision U.no.172/2005 of 24 May 2006**, the Constitutional Court repealed Article 13 paragraph 4 of the Law on Postal Services (“Official Gazette of the Republic of Macedonia”, no.55/2002) which envisaged an authorisation for the Minister of Transportation and Communications to define the amount of the remuneration for the issuance of licenses for the performance of courier services. In the explanation of its Decision the Court stated that:

“From the analysis of this disputed provision and in the context of the other provisions of the Law on Postal Services, it arises that the legislator has envisaged, in this case, an authorisation for the Minister of Transportation and Communications to define the amount of the remuneration for the said license. However, the Law lacks criteria on the basis of which the competent minister would define the amount of this remuneration.

According to the Court, the left possibility without a concrete legal framework to define the amount of the remuneration for a license leaves a room for interference of the executive power into the legislative power, and they are clearly differentiated in the system of division of powers by the Constitution. Concomitantly, such defect of the challenged provision leaves a room for arbitrariness and unequal treatment of the persons under objective and equal conditions to exercise their right to a license.

Hence, the Court found that the authorisation arising from the disputed provision does not have a constitutional ground given that the Law on Postal Services does not contain parameters for the determination of the amount of the remuneration, as a result of which the challenged provision of paragraph 4 Article 13 of the Law is not in conformity with the principle of division of state powers into legislative, executive and judicial, as the fundamental value of the constitutional order of the Republic of Macedonia, under Article 8 paragraph 1 line 4 of the Constitution. Namely, the act that is adopted by the minister on the basis of the given legal authorisation to define the amount of the remuneration without any legal framework, is not a sub statutory act of the minister to work out a legal provision for the purposes of its enforcement, as provided for in Article 56 paragraph 1 of the Law on the Organisation and Work of the Bodies of State Administration ("Official Gazette of the Republic of Macedonia", nos. 58/2000 and 44/2002), but leads to rights and obligations for citizens, which may be defined by a law only, to be defined with an act of the minister".

2. With its **Decision U.no.44/2005 of 21 September 2005**, the Constitutional Court repealed Article 19 paragraph 5 of the Law on Preventing Corruption ("Official Gazette of the Republic of Macedonia", nos. 28/2002 and 46/2004) which provided for an authorisation of the Minister of Justice to adopt an act for the definition of the criteria for damage compensation.

In the explanation of the Decision the Court stated that:

"Given the noted constitutional and legal provisions, the Court found that the challenged provision of Article 19 paragraph 5 of the Law on Preventing Corruption is an authorisation for which there is no constitutional ground that would enable the minister to adopt an act for the determination of the criteria for damage compensation. This especially since the Law does not contain the grounds and the framework within which the Minister of Justice would define the criteria regarding this issue.

Starting from the fundamental value of division of the state powers into legislative, executive and judicial, the minister as a functionary managing one of the bodies of the executive power may not have an authorisation in the legislative power. The given authorisation to the minister to define criteria for damage compensation without grounds and a framework contained in the

Law, means interference into the legislative power which is separated from the executive power, that is, deviates from the general principle of the division of powers into legislative, executive and judicial."

3. With its **Decision U.no.49/2006 of 13 December 2006**, the Constitutional Court repealed Article 22 paragraph 6 of the Law on Public Debt ("Official Gazette of the Republic of Macedonia", no.62/2005) and the Book of Tariffs for commission for the issuance of state guarantees ("Official Gazette of the Republic of Macedonia", no.30/2006), adopted by the Minister of Finances of the Republic of Macedonia.

In the explanation of the Decision the Court stated that:

"From the noted and other legal provisions it arises that the subject of regulation by the Law on Public Debt, inter alia, are the procedure, issuance, servicing, right to collection and termination of state guarantees. Within these frameworks, except for defining the state guarantee, the legislator also defined that the issuance of a state guarantee is within the competence of the Ministry of Finances, that is, that on behalf of the Republic of Macedonia the Minister of Finances signs an agreement for the issuance of a state guarantee or a letter of guarantee to foreign or domestic creditors upon previously adopted law on the issuance of a state guarantee, that is, upon a decision by the Government of the Republic of Macedonia, depending on whether it concerns a foreign or a domestic creditor.

Furthermore, from these provisions, and from the Law as a whole, it arises that the commission for the issuance of a state guarantee is mentioned by the legislator only in one provision and that is in the provision that is being disputed by the initiative. This indicates that not only did the legislator fail to define what is implied under this notion in the sense of this Law, but he also did not define that a commission is charged for the issuance of a state guarantee from the holders of the public debt, but the possibility for collection is simply left to be defined by the Book of Tariffs for the adoption of which under the challenged provision of law is authorised the Minister of Finances. In addition, the Law does not provide for any criteria, that is, a framework for the determination of the amount of the commission, so that the determination of its amount is entirely left to the book of tariffs of the Minister of Finances, whereby in this respect he/she also has an unlimited, or so-called discretionary right.

Hence, taking into consideration what has been noted, as well as the contents of the disputed legal provision, according to the Court the right, that is, the authorisation of the Minister of Finances stipulated in the disputed Article 22 paragraph 6 of the Law to define a book of tariffs for the commission for the issuance of a state guarantee is not in the function of operationalisation, that is, working out of separate legal provisions in the sense

of their further explanation, further specification or further regulation for the purposes of their enforcement, but finally leads to determination of rights and obligations, concretely determination of an obligation for the holders of public debt in the sense of this law to pay a commission for the issuance of a state guarantee, which is not allowed. This especially since in the specific case the legislator has not defined the obligation for charging the commission in a clear and precise manner, nor has he defined criteria and standards for the determination of its amount and the other elements, but all these issues are left to be only completely defined by the sub statutory act of the Minister of Finances, which is actually made by the challenged Book of tariffs.

Therefore, according to the Court, in such a situation with the defined authorisation of the Minister of Finances in the disputed Article 22 paragraph 6 of the Law, the legislator allows interference of the executive into the legislative power, as a result of which it assessed that the disputed provision is not in accordance with Article 8 paragraph 1 lines 3 and 4, Article 51 and Article 96 of the Constitution."

Taking into consideration the fact that the Minister of Finances, on the basis of Article 22 paragraph 6 of the Law adopted the Book of Tariffs for commission for the issuance of state guarantees which it found not to be in harmony with the said provisions of the Constitution, the Court assessed that due to the same reasons the Book of Tariffs is also not in agreement with the noted provisions of the Constitution, and also with Articles 56 and 61 of the Law on the Organisation and Work of Bodies of State Administration."

For these reasons, in 2006 the Constitutional Court of the Republic of Macedonia intervened in a number of laws, such as: the Law on Construction ("Official Gazette of the Republic of Macedonia", no.51/2005), the Law on Urban Planning ("Official Gazette of the Republic of Macedonia", no.51/2005), the Law on Enforcement ("Official Gazette of the Republic of Macedonia", no.35/2005), the Law on the Environment ("Official Gazette of the Republic of Macedonia", no.53/2005), the Law on Mediation ("Official Gazette of the Republic of Macedonia", nos.60/2006 and 22/2007) and other laws in different fields.

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 case when the Constitutional Court refuses to investigate and assess legal gaps, in its explanation it most often invokes the competence of

the Constitutional Court to decide on the constitutionality and legality of regulations that are in the legal order, that is, provisions that are envisaged and contained in the laws, and that the Constitutional Court has no competence to decide on what the law did not contain, and should contain, in the opinion of the petitioner.

With such explanation recently in the case **U.no.209/2006** with the **Resolution of 20 November 2006** the Constitutional Court dismissed the initiative of a citizen challenging the Law on Enforcement as a whole, for a reason that it did not contain provisions guaranteeing the right to an appeal against individual acts, that is, enforcement orders of the enforcement agent. In the explanation of the Resolution the Court noted that:

"From the said constitutional and legal norms it arises that the Constitutional Court of the Republic of Macedonia within the frameworks of its constitutionally defined competences decides on the constitutionality and legality of the regulations that are in the legal order, and within these frameworks it may assess the constitutionality of the provisions of the Law on enforcement that are set forth and contained in the Law, but it does not have the competence to decide on what this law did not contain, and should contain, to which as a matter of fact refers the petitioner in the said initiative.

Starting from the initiative challenging the constitutionality of the Law on Enforcement from the aspect that it does not provide for provisions as the submitter of the initiative believes it should contain, and as a result of that it was in contradiction with the Constitution, and given the noted constitutional and procedural provisions, the Court assessed that the conditions for dismissing the initiative are met."

In another case, with its **Resolution U.no.44/2003 of 25 June 2003**, the Court dismissed the initiative for the appraisal of the constitutionality of Article 9 of the Law on Changing the Law on Serving in the Army of the Republic of Macedonia ("Official Gazette of the Republic of Macedonia", no.98/2002).

The submitter of the initiative – the Autonomous Union of the Employees in the Defence – believed that by erasing one article of this law on the part of the legislator a legal gap occurred which endangered the legal and social safety of the employees in the Army of the Republic of Macedonia since they were brought in a situation not to have the right to a salary and remunerations in a period of three months, when the application of the system of salaries and remuneration of salaries was to commence. The initiative proposed that the Court restore the validity of the erased article of the Law.

The Court dismissed the initiative with the following explanation:

"Considering the initiative the Court assessed that it is not competent to decide on it since pursuant to Article 110 paragraph 1 lines 1 and 2 of the Constitution of the Republic of Macedonia, the Constitutional Court decides on the conformity of laws with the Constitution and on the conformity of other regulations and collective agreements with the Constitution and laws. Under this constitutional provision, the Constitutional Court is not competent to make changes and supplements to the laws and other regulations nor is it within its competence to assess the constitutionality of provisions that are not in the legal order.

On the other hand, pursuant to Article 68 paragraph 1 line 2 of the Constitution, the Assembly of the Republic of Macedonia adopts laws and gives authentic interpretation of laws, and consequently the Assembly has the exclusive right to make changes and supplements to them.

Given that the initiative requests that the Constitutional Court by means of repealing the challenged article of the Law restore the validity of Article 254 of the Law on Serving in the Army of the Republic of Macedonia, for which it is not competent, pursuant to Article 28 paragraph 1 line 1 of the Rules of Procedure of the Constitutional Court of the Republic of Macedonia, the Court decided as in item 1 of this Resolution."

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?

4. INVESTIGATION AND ASSESSMENT OF THE CONSTITUTIONALITY OF LEGISLATIVE OMISSION

4.1. Peculiarities of the investigation of legislative omission.

The peculiarities of the investigation of the legislative omission while implementing *a priori* control and a *posteriori* control. Do the problems of legislative omission arise also in the constitutional justice cases concerning the 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 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 Constitutional Court of the Republic of Macedonia has no *a priori* competence, that is, preliminary competence.

In connection with these questions we point that the constitutional case-law does not provide a possibility to draw conclusions about the peculiarities of investigation into the constitutionality of legislative omissions in all the said fields. We regard as more specific cases those relating to the exercise of human freedoms and rights, more specifically when the subject of appraisal before the Constitutional Court are legal provisions for the exercise of some special aspect of equality of citizens and non-discrimination. If the law defines some special rights or privileges for one category of legal subjects, and at the same time owing to the failure to further regulate the corresponding relation, it excludes some other category of legal subjects which otherwise belong to the same situation in which that rights is ensured, such failure is considered to be unconstitutional in an indirect way – due to the consequence that the absence of a corresponding norm produces.

As an example for this from the constitutional case-law we note the **Decision U.no.120/1998 of 10 March 1999**, with which the Constitutional Court repealed a number of provisions from the Law on Denationalisation (“Official Gazette of the Republic of Macedonia”, no.20/1998). Among them was repealed the provision which defined the subject of denationalisation, that is, which noted the forceful regulations on the basis of which the property had been taken away after 2 August 1944. In the procedure the Court found that the legislator did not note in this provision all the forceful regulations on the basis of which the property had been taken away and took a stance that the selective approach to the determination of the subject of denationalisation, not including all the regulations with which property had been taken away from citizens by force, may bring the citizens in an unequal position in terms of citizens who are and citizens who are not given their taken away property back. As a matter of fact, the Court assessed that such approach in the assessment for return of the taken away property violated the constitutional principle of equality of citizens before the Constitution and laws, and consequently the Court assessed that Article 2 of the Law was not in conformity with Article 9 paragraph 2 of the Constitution. On the basis of this Decision by the Constitutional Court the legislator later removed the found omission and changed and supplemented the Law on Denationalisation in line with the noted decision by the Constitutional Court.

4.2. Establishment of the existence of legislative omission.

Specify the criteria formulated in the jurisprudence of the constitutional court of your country, on the grounds whereof gaps in the legal regulation may and must be recognized 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 analyzes 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 practise of the implementation of the legal regulation?

When assessing the conformity of the laws and other regulations with the Constitution, the Constitutional Court of the Republic of Macedonia always in the constitutional court analysis takes as a starting point the disputed provisions of the law (the other legal act that is being disputed), but thereby it does not limit itself only to their contents but investigates the law as a whole, and even the wholeness of the corresponding legal area. In connection with the implementation issue, the Constitutional Court in a number of its resolutions has given a stance that it is not competent to assess the implementation of the legal regulation in practice.

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 of international justice and constitutional and supreme courts of other countries?

Under the Constitution of the Republic of Macedonia, the sense and meaning of the principle of constitutionality and legality, the protection of which is within the competence of the Constitutional Court, is to make sure that the laws are in conformity with the Constitution and the other regulations and general acts in conformity with the Constitution and laws, and not with

international acts that have been ratified or acceded by the Republic of Macedonia.

Accordingly, the only framework and boundaries within which the Constitutional Court ranges in the assessment of the conformity of the laws with the Constitution and the conformity of other regulations and acts with the Constitution and laws, are the Constitution and the laws of the Republic of Macedonia. The Constitutional Court is normatively–legally limited to base its decisions solely on provisions contained in the European Convention for Human Rights or on the case-law of the Court in Strasbourg. However, the opinions and views expressed in the case-law of the European Court for Human Rights on certain legal institutes and issues are used and stated as arguments for clarification or further explanation, that is, interpretation of the same or similar issues that are resolved before the Constitutional Court and in that manner they have a corresponding impact on the decision-making.

4.4. Additional measures.

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

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

Is a gap of in legal regulation (legislative omission) stated in the reasoning part of the ruling of the constitutional court and is the attention of the legislator (other subject of law-making) drawn to the necessity to fill in the gap (legislative omission); is an advice set forth to the legislator (other subject of law-making) on how to avoid such deficiencies of legal regulation (are there any specified criteria of a possible legal regulation and recommended deadlines for the adoption of the amendments)?

Does the constitutional court set forth in the reasoning part of its decision how the legal regulation is to be understood so that it would not include the legislative omission, by this essentially changing the existing legal regulation (actually by supplementing it)?

Does the constitutional court state the existence of legislative omission or other gap in the legal regulation in the reasoning part of its decision and does it specify that such inexistence of the legal regulation is to be filled in when courts of general jurisdiction apply the general principles of law?

Does the constitutional court apply other models of assessment and filling in legislative omission?

The Constitutional Court notes the existence of the legislative omission or another gap in the legal regulation in the reasoning part of its decision, without thereby giving any direct suggestions or pieces of advice whatsoever to the legislative body for its filling in, and certainly not deadlines for changing the existing regulation. However, through the establishment of what composes the defect of the provisions that are the subject of assessment before the Constitutional Court, in a certain way the attention of the legislator is indirectly drawn to what the norm should contain.

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

The constitutional court, after it has stated the existence of the legislative omission in the reasoning part of 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);

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.

As a rule, having established the existence of a legislative omission in the reasoning part of the decision, the Constitutional Court repeals or invalidates the law (other legal act) which is in contradiction with the Constitution, that is the law, while in the explanation it notes the existence of a gap in the legal regulation without drawing direct conclusions or determining some tasks.

However, we have also found an example in the case-law in which the Court directly indicated the obligation to adopt a new act after an annulling decision by the Constitutional Court. Namely, with its **Decision U.number.217/1995 of 25 October 1995** the Constitutional Court annulled the Decision on Adopting the Changes and Supplements to the Detailed Urban Plan of the 4th Urban Unit of the City of Ohrid, adopted by the Assembly of the Ohrid Municipality on 13 April 1995.

The reason for the annulment was that the Court assessed that the disputed decision had not been made in the procedure stipulated by law.

In the explanation of its Decision the Court dwelled on the legal effect of an annulling decision by the Court:

"Given the consequences on the assessed act, the legal effect of the decisions by the Constitutional Court is expressed as termination of the validity of the unconstitutional act and creation of a legal gap in the place of those norms that are assessed to be in contradiction with the Constitution and law. The decision of the Constitutional Court may not be the source of the law in the same manner as the assessed legal norm, since neither the form not the contents correspond to such purpose. However, the decision of the Constitutional Court is a specific source of the law with that that it contains commandment in the legal sense, that is with the very fact that with its contents it exerts influence on the contents of the objective legal order in the manner that it takes away the legal compulsoriness to the unconstitutional and illegal general legal norms and eliminates them as rules of social conduct. That means that the decision of the Constitutional Court even in this case is a source of the law in negative sense by obliging the adopter of the act and the other subjects to respect the created legal gap until it is filled in with the adoption of new legal norms that are in conformity with the Constitution and law.

In this concrete case, it obliges to adopt a new decision which will be preceded by the entire procedure envisaged by law, whereby what is ensured is the reinforcement of the legal effect from the decisions of the Constitutional Court on the appraisal of the constitutionality and legality."

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.

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

After the Republic of Macedonia became independent, the 1991 Constitution of the Republic of Macedonia, more specifically the Constitutional Law on its Enforcement envisaged that the existing federal regulations be taken on as regulations of the Republic of Macedonia, and that the laws that were not in harmony with the provisions of the Constitution would be harmonised within a period of one year from the date of the proclamation of the Constitution. Due to the absence of a more reinforced legislative activity for the adoption of new and harmonisation of the existing laws, in practice laws from the former SFRY as well as a number of laws enacted by the Socialist Republic of Macedonia which were not in conformity with the new constitutional system were implemented. That was the reason for citizens to request in a number of initiatives that the Constitutional Court repealed these laws as laws that were not in conformity with the new Constitution.

Thus, for instance, with its **Decision U.no.18/1999** the Constitutional Court repealed a number of articles of the Law on Non-contentious Procedure ("Official Gazette of the Republic of Macedonia", no.19/79). In most of the disputed articles the Court intervened only in parts in which it found terminological non-harmonisation with the new constitutional order. In the Resolution for initiation of a procedure for the appraisal of the constitutionality of these articles in the Law, the Court expressed the following view:

". . . according to the opinion of the Court, there may be a well-founded question as to the conformity of these articles in the Law with the

Constitution of the Republic of Macedonia only in the part relating to the use of the terms "SFRY", and not the whole articles, as considered by the submitter of the initiative. This for reasons that the rules for the determination of the territorial competence of the courts in the Republic of Macedonia in the procedures regarding the said legal conditions and relations defined in these articles of the Law refer to and in practice have been applied and are still applied also to the nationals of the Republic of Macedonia, so that in a possible intervention by the Court in view of the whole articles, a legal gap would be created with regard to the territorial competence of the courts of the Republic of Macedonia on these issues. On the other hand, it is not disputable that pursuant to Article 98 paragraph 5 of the Constitution it is the right of the legislator to regulate by law the competence (material and territorial) of the courts in the Republic of Macedonia, in addition to the other issues, as a result of which the Court assessed that in the other parts the said provisions are not in disagreement with the Constitution".

That means that in the concrete case, through the intervention of the Constitutional Court were repealed only parts of certain articles in the Law on Non-contentious Procedure, but the Law as a whole remained to be valid and implemented, since otherwise it would have created a legal gap and impossibility for the citizens to exercise their rights in the procedures for the regulation of personal, family, property and other legal relations that are of undisputed nature, and to which applies the Law on Non-contentious Procedure.

In the case with the Law on Administrative Disputes ("Official Gazette of the SFRY", nos. 4/77 and 36/77) which dated from the time of former SFRY, with its **Resolution U.no.43/1998 of 3 July 2002**, the Constitutional Court initiated a procedure for the appraisal of the constitutionality of the Law as a whole. However, in order to avoid the emergence of a legal gap in this sphere, the Constitutional Court postponed the final decision-making on the case until the adoption of the new Law on Administrative Disputes.

Also, in the case **U.no.224/1998** in which a number of articles of the Law on the Protection of the Monuments of Culture were disputed ("Official Gazette of SRM", no.24/1973), the Court put off the final decision-making on the case until the adoption of the new Law on the Protection of Cultural Heritage ("Official Gazette of the Republic of Macedonia", no.20/2004) whereby it was avoided to have a legal gap in the sphere of the protection of the cultural heritage of the Republic of Macedonia.

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

5.1. Duties arising to the legislator.

Does the statement of the existence of legislative omission in a decision of the constitutional court mean a duty of the legislator to properly fill in such gap of legal regulation? Does the regulation of the parliament provide how the questions are considered concerning the implementation of the constitutional court decisions? Does the parliament promptly react to the decisions of the constitutional court, wherein 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?

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

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

In connection with these questions we indicate that pursuant to Article 86 of the Rules of Procedure of the Constitutional Court of the Republic of Macedonia (“Official Gazette of the Republic of Macedonia”, no.80/1992), the decisions of the Constitutional Court are executed by the adopter of the law, the other regulation or the general act which is annulled or repealed with the decision of the Court. Pursuant to Article 87, the Constitutional Court follows the execution of its decisions and if need be will request from the Government of the Republic of Macedonia to ensure their execution.

From these procedural provisions it may be concluded that the establishment of existence of a legal gap in a decision by the Constitutional Court as a rule presupposes an obligation for the legislator, that is, the adopter of the sub statutory acts, to appropriately fill in such gap in the legal regulation. This especially in the cases when a legal gap occurs with the repealing or annulling decision of the Constitutional Court, as a result of which the law, that is, regulation cannot be applied in practice, which requires a rapid intervention by the legislator. However, the Constitutional Court has no available means to

make the legislator carry out this obligation of his, nor to point to him what contents the new law, that is, act should have. Hence, the filling in of the legal gap that occurred as the result of the termination of validity of the unconstitutional law is the task of the legislator, that is, the adopter of the act.

6. WHEN DRAWING CONCLUSIONS concerning the experience of the constitutional court of your state regarding consideration of cases by the Constitutional Court related to legislative omission, answer the following questions: is it possible to consider such investigations as an important activity of the constitutional court (explain why), does the constitutional court have sufficient legal instruments of such investigation and how do the constitutional court decisions influence the process of law-making in such cases?

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