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The problems of legislative omission in constitutional jurisprudence

Paper from the Constitutional Court of Spain

Justice:
Law clerk: Juan Luis Requejo Pagés

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1. THE PROBLEM OF LEGAL GAPS IN SCIENTIFIC DOCTRINE.

For Spanish scientific doctrine the problem of legislative omissions is fundamentally a variant on the more general problem of relations between the legislator and the courts, which has been examined with particular attention being paid to the limits of the constitutional jurisdiction, focusing on the study of the operationality of the jurisdictional techniques available for the best guarantee of effectiveness of the Constitution without undermining the freedom of the democratic legislator. This approach is therefore very close to the German and Italian experiences, whose constructions in terms of dogma and jurisprudence have formed the basis of Spanish constitutional doctrine and jurisprudence for the definition of its own model[1].

1.1. and 2. The concepts of "legal gap" and "legislative omission"

In the wake of the Western European doctrine of Public Law, Spanish doctrine traditionally starts from the principle of the fullness of the legal code and, as a consequence, it considers the existence of legal gaps as being an anomaly of the system. The concept of "legal gap" is not confused with the absence of express regulation, merely with that which cannot be included by means of an implicit regulation that is judged in all cases where necessary. So, they lie outside of situations in which the anomaly is a consequence of the legitimate will to create a space free of the regulating code and those in which the non-existence of a specific formal rule is just an implicit condition for the application of a subsidiary rule.

The need for the absent rule is fundamental in the concept of legal gap and the decision regarding its presence is always the result of the interpretation of the higher rules of the legal code, in other words, of those from which a regulating mandate can be directed at those called upon to produce hierarchically lower rules. Anomalies that can be blamed on the legislator are therefore absences of regulation perceived as gaps by the interpreter of the Constitution, who

[1] The works of F. WESSEL, "Die Rechtsprechung des Bundesverfassungsgerichts zur Verfassungsbeschwerde", in *Deutsches Verwaltungsblatt* 6 (1952), pp. 161 et seq., and C. MORTATI, "Appunti per uno studio sui rimedi giurisdizionali contro comportamenti omissivi del legislatore", in *Raccolta di Scritti*, III, Giuffré, Milan, 1972, pp. 923 et seq. have formed an unavoidable reference. The originality of the direct and abstract control of unconstitutionality due to omission has aroused interest in Spain on account of Portuguese doctrine, particularly due to the work by J.J. GOMES CANOTILHO (among others, *Constituição dirigente e vinculação do legislador*, Coimbra Editora, Coimbra, 1982).

identifies in this a mandate of legislation neglected by the legislator. Thus are gaps distinguished, which are gaps noticed by the interpreter of the law which applies it in terms that can rationally be deduced from a systematic legislator and whose remedy by means of a regulation *ad casum* cannot seek to contradict it but instead, justly, to carry out it.

In a very broad sense, certainly, any non-existence of a specific rule for a particular case needing a regulation would constitute a gap. Starting from there, the logic of the regulating system and its integration mechanisms can make up for that lack by means of applying other rules; whether these be express rules provided for different cases but whose applicability to the case results from the actual dynamic of the system of referrals inherent to the regulatory system; or whether they be implicit rules deduced by the applier of the Law on the basis of formal rules. Only if integration is impossible does the gap appear as a problem for the creation of a perfect code of laws. It is at this point where the conceptualisation and the taxonomy of gaps give rise to the greatest dogmatic diversity. So, the classification of the gap as a "gap", "omission" or "deficient regulation" is in the end the outcome of a convention concerning concepts that is not always shared by all authors. As far as legislative omissions are concerned, Spanish juspublicist doctrine has focused on the phenomenon of what is known as "unconstitutionality by omission", thereby circumscribing the interest of legal gaps to those entailing breach of a constitutional mandate to legislate and confining itself to the possibilities of their jurisdictional remedy, in other words, framing the problem of legal gaps within that of the definition of the competence of the Constitutional Court.

There exists a certain unanimity in the idea that the Constitution can impose on legislators the obligation to legislate; also that non-observance of this mandate cannot be jurisdictionally sanctioned in the case of an absolute breach or omission, but it can be where there has been deficient compliance (relative omission). The question thus amounts to the classification of each specific case of unconstitutionality as an event of action (insufficient) or of omission (relative), on the understanding that the reaction towards absolute omissions is only possible if the Constitution then permits the self-application of any of its own rules[2]. But

[2] To gain an idea of the most relevant doctrinal positions on the subject, two papers can be pointed out: I. VILLAVERDE MENÉNDEZ, *La inconstitutionalidad por omisión*, McGraw-Hill, Madrid, 1997, and J.J. FERNÁNDEZ RODRÍGUEZ, *La inconstitutionalidad por omisión*, Civitas, Madrid, 1998. On the practice of the Constitutional Court, *cf.* L. AGUIAR DE LUQUE, "El Tribunal Constitucional y la

the real core of interest lies in the scope of the jurisdictional remedies against legislative omission contrary to the Constitution, for which the definition of the institutional position of the Constitutional Court with regard to the legislator and the legislative function is decisive.

1.3. The conception of the Constitutional Court as "positive" or "negative" legislator.

In the opinion of scientific doctrine, the Spanish Constitutional Court does not, in principle, perform the tasks of legislator. This was made clear by the Court itself in one of its earliest resolutions:

> "The Constitutional Court is the supreme interpreter of the Constitution, not legislator, and it can only be asked to pronounce on whether or not provisions accord with the Constitution." (Constitutional Court Judgment 5/1981, of 13 February 1981, Legal Grounds 6).

A pronouncement which, moreover, has to be administrated with special discretion and restraint, in that

> "the law, as the emanation of the popular will, can in principle only be repealed or modified by the representatives of that will, and it is only for the case in which the legal provision infringes the Constitution that this Court has been granted the power to annul it. This power can only be used, nevertheless, when so required by very serious and well-founded reasons; when a constitutional organ or substantial part thereof affirms the existence of such infringement, or when, if that infringement has not been declared, a judicial organ were to find itself in a situation of violating the Constitution because, being subject to the rule of law (section 117.1 of the Constitution), it lacks the authority not to apply it even though it considers it to be contrary to a higher rule, but earlier in time. When these well-founded and serious reasons do not exist, then respect for the legislator requires that this Court should refrain from making any higher pronouncement." (Constitutional Court Judgment 17/1981, of 1 June 1981, Legal Grounds 4).

The task of the Constitutional Court would thus match the figure of what is known as the "negative legislator". Nevertheless, the regulating nature of the Constitution — binding in

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función legislativa: el control del procedimiento legislativo y de la inconstitutionalidad por omisión", in *Revista de Derecho Político* 27 (1987), pp. 11 et seq.; Mª Á. AHUMADA RUIZ, "El control de constitutionalidad de las omisiones legislativas", in *Revista del Centro de Estudios Constitucionales* 8 (1991), pp. 169 et seq., and M. GÓMEZ PUENTE, *La inactividad del legislador: una realidad susceptible de control*, McGraw-Hill, Madrid, 1997.

all its aspects for all the constituted power, also for the legislator — and the assumption by the Constitution of the clause of the Social State as the structuring principle of the legal code — with the consequent exceeding of the liberal understanding of the Constitution as a rule that is strictly limiting of the action of the public authorities — has meant not just the inclusion in the constitutional text of specific mandates of legislative action but also the proclamation of a general duty of intervention in the social reality in order to accommodate it effectively to the ideal of the constitutional provisions[3]. From this it results that the guarantee of the Constitution (also the jurisdictional guarantee) involves the requirement of carrying out positive actions imposed by the Constitution-making power on the constituted legislator, in such a way that legislative silence where the Constitution stipulates action by the legislator leads to an unconstitutional omission which can only be put right by carrying out the omitted regulating activity.

The principle of division of powers and the jurisdictional nature of the Constitutional Court come together in the impossibility of the former omission being able to be remedied by one who is not the actual legislator. But the binding character of the Constitution and the full subjection by the legislator to the Constitution-making power will likewise result in the need that legislative silence contrary to the Constitution has to be corrected and redressed as far as possible; with, of course, the sanction of denouncement; but also with the integration of the legal gap in terms in which this is possible with the instruments that are within reach of the jurisdiction. Such is the difficult point of balance on which rests the constitutional foundation of the inevitable positive variant which the legislating function of the Constitutional Court has to take on in these cases.

Certainly, the clause of the Social State imposes on the Spanish Constitution a stamp that is a long way from that of 19th century liberal constitutionalism, but the "activism" of the Constitution-making power does not manage to convert the written expression of its will into a directing Constitution. Entirely to the contrary, the Court has always understood that

[3] Section 9.2 of the Spanish Constitution: "It is the responsibility of the public authorities to promote conditions ensuring that freedom and equality of individuals and of the groups to which they belong are real and effective, to remove the obstacles preventing or hindering their full enjoyment, and to facilitate the participation of all citizens in political, economic, cultural and social life."

> "the Constitution is a framework of coincidences sufficiently broad so that political options of a very different hue can fit inside it. The task of interpreting the Constitution does not necessarily consist of blocking the way to options or variants imposing one of them in an authoritarian way. This conclusion will have to be arrived at only when the unequivocal nature of the interpretation is imposed by the set of interpretive criteria. We mean to say that political options and those of government are not previously programmed once and for all in such a way that all that can be done hereafter is to develop that prior programme." (Constitutional Court Judgment 11/1981, of 8 April 1981, Legal Grounds 7)[4].

This starting position is to be found in the basis of a constitutional jurisprudence firmly inspired by the philosophy of self-restraint. Scientific doctrine agrees on the assessment that the Constitutional Court has not in general committed an excess of activism or, at the other extreme, the defect of passivity; instead, it has known how to administrate its competencies in terms of a respectful equilibrium with regard to the powers of the legislators. Such positive wisdom surely has to do with the efforts of the Court to identify the limits of its jurisdiction with those of the constitutional interpretation, in such a way that legislative omissions have only been the object of its consideration when it has been possible to produce a remedy for the gap without resorting to other components of the creation of Law that are inherent to the jurisdictional activity. In other words, the regulating carelessness of the legislator has managed to be remedied from the Court with the techniques of jurisdiction where this has been possible, and, in situations where this is inaccessible to it, confiding in the electoral judgment to censure these omissions.

In any case, jurisdictional techniques are sufficiently sophisticated today for obtaining the intervention of the Courts in territory traditionally reserved for the legislative power. The immediate legal force of the existing Spanish Constitution demanded a notable activity from the Constitutional Court in order to accommodate the preconstitutional legal code into the democratic system. This was particularly so in two aspects in which the Constitution-making power innovation has been most radical: fundamental rights and the territorial structure of the State. The actual task of purging the express repealing effects of the constitutional text was followed by a regulating situation that was in general certainly critical from the perspective of

[4] In other words, "in a system of political pluralism (section 1 of the Constitution) the function of the Constitutional Court is to set the limits within which the different political options can legitimately be raised, since, in general, it is clear that the existence of a single option is the negation of pluralism." (Constitutional Court Judgment 4/1981, of 2 February 1981, Legal Grounds 3).

the immediate carrying out of the constitutional provisions, since the need for the legislator to comply with the explicit mandates was combined with the requirement to make up for the gaps generated by the coming in to force of the Fundamental Rule, in other words, to comply with an implicit mandate guaranteeing the continuity of a perfect legal code, without any gaps in its content nor any gaps or fissures in its conception as a coherent and integrated system. The Constitutional Court took on that primary integrating task by means of the technique of interpretation in accordance with the preconstitutional legislation, which permitted the survival of those preconstitutional rules that were materially compatible with the Constitution, the democratic legislator thus gaining a period, in theory undefined, for the formal adaptation of the system of sources to the new order of values. Specifically, and as far as the territorial system is concerned, the urgency of a regulating body that would permit the insertion into the structure of the State of certain newly created territorial subjects (the Autonomous Communities) was attended to by the Court by resorting to interpretative techniques with a notable creative range, such as those which made it possible that the impossibility (at the beginning) and passivity (afterwards) of the central legislator when demarcating the scope reserved by the Constitution for its competence (establishment of a basic legislation) would not affect the exercise by the Autonomous Communities of their own competencies (development of that basic legislation). To achieve this, the Court proceeded to define the "basic legislation" as a material, identifiable and definable category starting from the existing preconstitutional legality[5].

In the field of fundamental rights, the effectiveness of the Constitution has wished to be ensured by its supreme interpreter from the very beginning. Notwithstanding the fact that this is the natural terrain in Spain for jurisdictional remedies with regard to unconstitutional legislative omissions, as we shall see, the specific nature of the Spanish system of rights and freedoms has meant that the Court has, if wished, been able to identify gaps in the actual text of the Constitution, contributing towards their integration without prejudice to its nature as a jurisdictional and constituted organ. This is been so inasmuch as section 10.2 of the Constitution provides that "the provisions relating to the fundamental rights and liberties recognised by the Constitution shall be construed in conformity with the Universal Declaration of Human Rights and international treaties and agreements thereon ratified by

[5] *Infra*, 3.6.

Spain". In other words, on this point the Constitution is a rule whose content has to be integrated with other rules via interpretative channels, in such a way that its contrast with these latter permits an identification of gaps and gaps liable for integration. So, for example, the Constitutional Court has been able to incorporate into law the effective legal protection acknowledged in section 24.1 of the Constitution (or to identify as a necessary part thereof) on the right to dual instance guaranteed by section 14.5 of the International Agreement on Civil and Political Rights (hence Constitutional Court Judgment 42/1982, of 5 July 1982).

All in all, and aside from the fact that it might be possible to identify fields in which the Constitutional Court has acted with a certain degree of activism, it can be said that, in general, it has always stayed within the limits permitted by the techniques of juridical interpretation. Authors such as Mª. Á. AHUMADA RUIZ[6] find in the paralegislative creation the limits of judicial activism acceptable in the democratic State and, as a consequence, they exclude the jurisdictional integration of legislative omissions where the necessary rule of law cannot be deduced from the constitutional principles and rules or, in general, when it is impracticable to resort to analogy (for example, in criminal matters or situations in which the legislative omission can only be interpreted as a deliberate exclusion). In general terms, it can be concluded that the Spanish Constitutional Court has kept itself reasonably within the terrain bounded by these limits.

2. CONSOLIDATION OF CONTROL OF CONSTITUTIONALITY OF THE LEGISLATIVE OMISSION IN THE CONSTITUTION, THE CONSTITUTIONAL JURISPRUDENCE AND OTHER LEGAL ACTS OF THE COUNTRY

2.1. The Constitution in the system of national law

The Spanish Constitution is the primary and fundamental Rule of the social and democratic State subject to the rule of law in which Spain is constituted (section 1.1 of the Constitution). The other rules of the legal code are strictly subordinated to it. In the case of national rules later than the Constitution, the hierarchical supremacy of the latter determines the validity of the former both in terms of their content and with regard to their juridical form and their procedure for being drawn up. In the case of preconstitutional national rules, the

[6] "El control de constitutionalidad de las omisiones legislativas", cit., p. 178.

effect of the Constitution obviously reaches as far as the material dimension, in such a way that their survival in the legal code — outside of cases of an express constitutional repeal — is perfectly possible so long as no material contradiction with the provisions of the Constitution is noticed.

The supremacy of the Constitution is therefore indisputable in the internal order. The presupposition of this supremacy, in other words, its binding character, is no less clear since

> "[…] the Constitution, far from being a mere catalogue of principles that are not immediately binding and not immediately to be complied with until they become the object of development by legal channels, is a juridical rule, the supreme rule of our legal code, and as such the citizens and all the public authorities, and so to therefore all the Judges and Magistrates making up the judiciary, are subject to it (sections 9.1 and 117.1 of the Constitution)." (Constitutional Court Judgment 16/1982, of 28 April 1982, Legal Grounds 1).

With all the particularities of the rules of International law and of the system of its relations with the national laws, the supremacy of the Spanish Constitution is also such with regard to the treaties and their derived rules that are incorporated into the internal code. This has been so affirmed by the Constitutional Court when pronouncing on the compatibility with the Spanish Constitution of the *Draft Treaty by which a Constitution for Europe is founded,* on the point in which the primacy of Community Law is rightly declared:

> "That the Constitution is the supreme rule of the Spanish legal code is a question which, though not expressly stated in any of its provisions, undoubtedly derives from the wording of a great many of them, among others its sections 1.2, 9.1, 95, 161, 163, 167, 168 and repealing provision, and is consubstantial to its condition of fundamental rule; supremacy or higher rank of the Constitution with regard to any other rule, and specifically towards international treaties, which we affirm in Declaration 1/1992 (Legal Grounds 1). So, the proclamation of the primacy of the Law of the Union by section I-6 of the Treaty does not contradict the supremacy of the Constitution." (Decree of the Constitutional Court 1/2004, of 13 December 2004, Legal Grounds 4).[7]

[7] It goes on: "Primacy and supremacy are categories that are developed in differentiated orders. The former, in that of the application of valid rules; the latter, in that of the regulatory procedures. Supremacy is founded on the hierarchical nature of a rule and for that reason is the source of validity of those which are ordered beneath it, with the consequence, therefore, of the invalidity of the latter if they contravene that which is imperatively provided for in the former. Primacy, on the other hand, is not necessarily founded on hierarchy but instead on the distinction between spheres of application of different rules, valid in principle, but in which one or more of them nevertheless has the capacity to

The binding character of the Constitution implies the effective juridical (and not just political) binding of the public authority to the constitutional provisions, which, in turn, list true mandates of Law and not just simple *desiderata*:

> "That the Constitution is precisely that, our supreme rule and not a programmatic or initial declaration is something that is affirmed in a way that is unequivocal and general in its section 9.1 where it states that 'citizens and public authorities are bound by the Constitution', this being a regulatory subjection or binding that is claimed in the present indicative, in other words, since its coming into force […]. Repeated decisions of this Court in that it is the supreme interpreter of the Constitution (section 1 of the Organic Law of the Constitutional Court, or LOTC) have declared the undoubted value of the Constitution as a rule. But if it is true that such value needs to be modified with regard to the [governing principles of social and economic policy, which section 53.3 of the Constitution defines as programmatic rules], there can be no doubting the immediate binding nature (in other words, without the necessity for the mediation of the ordinary legislator) of sections 14 to 38 [fundamental rights *stricto sensu*] […]. That the exercise of such rights has to be regulated by law alone and the need for the latter to respect their essential content imply that those rights already exist, with a binding nature, for all public authorities […] from the very moment that the constitutional text comes into force." (Constitutional Court Judgment 80/1982, of 20 December 1982, Legal Grounds 1).

This being the case, the binding character of the Constitution is imposed as a principle beyond the nuances that could result for the effective imperative nature of its provisions from the regulating structure of each of its specific mandates, in other words, of its configuration as finished rules or rules of final programming. All in all, the heterogeneity of the mandates and the regulating types contained in the Constitution finds itself reduced to unity in a system due to the jurisprudence work of its authorised interpreter. In the words of the Constitutional Court,

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displace others by virtue of their preferred or prevailing application owing to different reasons. All supremacy in principle implies primacy (hence its use on equivalent occasions, as in our Declaration 1/1992, Legal Grounds 1), unless the same supreme rule has, in some spheres, provided for its own displacement or non-application. The supremacy of the Constitution is thus compatible with systems of application which grant applicative preference to rules from codes of laws different from the national one always provided that the Constitution itself has made provision for this, which is precisely what occurs with the provision contained in its section 93, by means of which it is possible to transfer competencies derived from the Constitution to an international institution that is constitutionally qualified to issue regulations on matters that until then had been reserved for the constituted internal powers and for their application to them. In short, the Constitution has itself accepted, by virtue of its

> "[…] the Constitution is not the sum and aggregate of a multiplicity of unconnected mandates, but rather it is precisely the fundamental juridical order of the political community, governed and directed in turn by the proclamation of its section 1, in its paragraph 1, on the basis of which a coherent system has to result in which all its contents find the space and efficacy which the Constitution-making power wished to grant them.
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> […] the constitutional system is outside of any hierarchised conception, in a way that is more or less latent, among its 'dogmatic' and 'organic' contents. Fundamental rights and democratic structure are both expressions and support of the same and sole model of political community which, since its origins, is represented by the Constitution." (Constitutional Court Judgment 206/1992, of 27 November 1993, Legal Grounds 3).

This conception of the regulating Constitution as a systematic whole is the presupposition of the possibility of unconstitutional legislative omissions: the legal gaps that produce situations incompatible with the constitutional order cannot be a consequence of an oversight by the Constitution-making power, but are instead an effect of non-observance of some of the regulating mandates directed by him to the constituted powers and, in particular, to the legislator.

2.2. The *expressis verbis* consolidation of the jurisdiction of the Constitutional Court to investigate and assess the constitutionality of legal gaps in the Constitution

The Spanish Constitution does not expressly provide that the jurisdiction of the Constitutional Court should include the examination and sanctioning of legal gaps. According to sections 95, 161 and 163 therein, the Constitutional Court is competent for hearing direct appeals and judicial appeals against laws and rules with force of law; for hearing appeals for protection against administrative and judicial resolutions that are injurious of fundamental rights; for hearing conflicts of territorial competency; requirements concerning the compatibility with the Constitution of treaties possibly signed by the State; and, finally, for hearing other matters attributed to it by an organic law.

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section 93, the primacy of the Law of the Union in the sphere proper to that Law, as is now expressly acknowledged in section I-6 of the Treaty." (*loc. ult. cit.*).

From the Constitution, therefore, the jurisdiction of the Court extends at all times to rules, not to their absence. Moreover, it does not do so for any rule; or, more precisely, it only does so for any rule for very specific motives. This means that, in principle, the Constitutional Court is competent for monitoring the constitutionality of rules with rank and value of law (on an exclusive basis in the case of rules subsequent to the Constitution and in accordance with the ordinary courts for the case of preconstitutional rules). In reality, with regard to these rules it holds what is known as "monopoly of rejection", since all the courts are obliged to judge the constitutionality of the law which they have to apply to the specific case, though they cannot fail to apply or they cannot cancel a law which, being post-constitutional, they judge to be contrary to the Constitution; instead, they can only limit themselves to questioning its validity before the Constitutional Court, which has sole competence for invalidating post-constitutional laws that are contrary to the Fundamental Rule.

The remaining rules of the legal code, in other words, those with value or rank below that of law, can only be the object of jurisdiction of the Constitutional Court if they violate certain constitutionals provisions: either those which guarantee fundamental rights and public freedoms; or those which define the scope of competence proper to the Central State and to the different Autonomous Communities. In the first case, the infringing rules, resolutions or acts shall be able to be arraigned before the Constitutional Court, once the pertinent judicial channels have been exhausted, via an appeal for protection; in the second case, the controversy over competence shall be able to give rise to the establishment of a constitutional conflict.

2.3. Construction of the jurisdiction of the Constitutional Court to investigate and assess the constitutionality of legal gaps in the constitutional jurisprudence.

The suitability of the constitutional jurisdiction for the examination of legal gaps finds itself opposed by a serious difficulty of principle, which is that of the nature of the possible object of that jurisdiction. As the Constitutional Court warned early on, in its Judgment 11/1981, of 8 April 1981,

> "If the distinction is admitted between a rule as mandate and legal text as a tangible sign by means of which the mandate is manifested or the communication

> medium that is used for making it known, the conclusion at which one arrives is that the object of the constitutional process is basically the latter and not the former." (Legal Grounds 4).

So, the Court cannot pronounce other than on what results positively from the text of the rules and it cannot consider that which the text omits or is silent about. This of course makes it impossible to examine and monitor absolute omissions. In terms of relative silences, the Constitutional Court Judgment 26/1987, of 27 February 1987, stated that

> "[…] to declare the unconstitutionality of a rule because it is 'not regulated' therein would effectively imply invading legislative competencies. To complete what is regulated by the Law, and this is the conclusion that would be arrived at if objection were to be accepted, is not a function which this Court can take on since it corresponds to the legislator." (Legal Grounds 14).

A radical affirmation which jurisprudence itself has nevertheless not failed to qualify, even in pronouncements that are much earlier than that quoted above, which, with the perspective of time, has ended up by becoming reduced to an exception. Indeed, the Constitutional Court Judgment 24/1982, of 13 May 1982, had already admitted the possibility of the figure of unconstitutionality by omission, defining it as that which

> "only exists when the Constitution imposes on the legislator the need to issue rules of constitutional development and the legislator fails to do so." (Legal Grounds 3).

Along these same lines, the Constitutional Court Judgment 98/1985, of 29 July 1985, emphasised that

> "it is obvious that it is not possible to deduce the unconstitutionality of a rule due to not regulating a particular matter unless, as has been said, there exists an express constitutional mandate, aimed moreover at that rule and not at a different one." (Legal Grounds 3).

Hence the need for regulations which do not have to result only from conditional regulating mandates but also from those which respond to the structure of the rules of final programming, in other words, mandates of result. In the Spanish case, typical rules of this kind are those known as "governing principles of social and economic policy", a sort of

subjective “proto-laws” which only become such when and under the terms in which the legislator develops them. Concerning these principles, which are true mandates for the legislator, the Court has said that their nature

> “[…] makes it improbable that any legal rule at all can be regarded as unconstitutional by omission, in other words, due to failing to heed, considered on its own, the mandate given to the public authorities and in particular to the legislator, in which each one of these principles is in general materialised.” (Constitutional Court Judgment 45/1989, of 20 February 1989, Legal Grounds 4).

Hence the mere improbability of forming principles into the sole cause of a censure of unconstitutionality on the legislator, but the perfect suitability of them for assisting that judgement from other constitutional rules, since

> “[it cannot] be excluded that the relation between some of those principles and fundamental rights (specifically that of equality) would make an examination of this kind possible […], nor, above all, that the governing principle be used as a criterion for deciding on the constitutionality of a positive action by the legislator, when this is materialised in a rule having a notable impact on the constitutionally protected entity. The need to act at all times *toto systemate perspecto*, which […] taken to its extreme would to a large degree deprive the constitutional mandate of a large part, if not all, of its force understood in its just terms, cannot be an obstacle to examining from the perspective of this a rule or set of rules which, on their own, determine important aspects of the juridical system of the protected entity.” (*loc. ult. cit.*).

In short, the competency of the Court for examining and determining the constitutionality of legal gaps derives from its most characteristic competence inherent to it, namely, that of ensuring respect for the constitutional rules by the constituted powers and guaranteeing the regulatory effectiveness of the Constitution-making power will. An assurance which is sought for all the constitutional rules; also for those which are confined to the limitation on results. All the more so, as is obvious, for conditional rules and, in particular, for that in which equality is established as a structuring principle for all the rules of the legal code (section 14 of the Spanish Constitution) and specifically those which proclaim fundamental rights and public freedoms.

2.4. Consolidation of the jurisdiction of the Constitutional Court to investigate and assess the constitutionality of the legal gaps in the law which regulates the activity of the Constitutional Court.

Nor does the Organic Law of the Constitutional Court refer *expressis verbis* to the competence of the Court for the examination and determination of the infringing legislative silences of the Constitution. But the figure of omission is not entirely unknown to it as a possible object of its jurisdiction, though it only directly contemplates the omission of public authorities other than the legislator.

Indeed, following the recent reform of the Organic Law of the Constitutional Court [LOTC] by means of Organic Law 6/2007, of 24 May 2007, the appeal for protection in the defence of fundamental rights can now have as its object, in addition to the "provisions, juridical acts or via de facto channels" of the Government and the administrative authorities (section 43.1 LOTC) and the "acts" of the judicial organs (section 44.1 LOTC), also the omissions of the latter and the former, such that up to this reform consideration was given just to judicial omissions. The fact that this might concern objections whose immediate aim is the action or omission of the executive and judicial powers does not exclude the possibility of a mediated control of the legislative power, all the more so as the Chamber or the Section of the Constitutional Court which hears the appeal for protection can conclude that the injury to the fundamental rights occasioned by the administrative or judicial action or omission is in fact based on the law applied to the case, in which event a question on the constitutionality of that law would have to be brought before the Plenary Session of the Constitutional Court and would be tried in Judgment prior to the resolution on the protection process (section 55.2 LOTC). Consequently, via these channels, the control of constitutionality of legislative omissions that have given rise to administrative or judicial omissions that are injurious of fundamental rights is possible.

The Organic Law of the Court also disciplines the constitutional process of what are known as *negative conflicts*, which have the aim of guaranteeing the constitutional system for the distribution of competencies between the State and the Autonomous Communities. Those who are eligible to introduce it are private individuals or the Government of the country. The former can do so always provided that they have tried in vain to get the Administration of the State or that of an Autonomous Community to decide on their claims, with one and another

invoking their respective incompetency for the purpose (section 68 LOTC). The Government, for its part, can consider negative conflict after having required an Autonomous Community to exercise the authorities inherent to its competencies (section 71 LOTC).

In both cases, the Court has to resolve on the basis of an omission of the administrative authorities. However, as in the event of indirect protection against laws, it is possible for administrative inactivity to be based on an omission of the legislator. This is so particularly in the case of the requirements brought by the national government, since those brought by private individuals can, if upheld, only conclude with the Constitutional Court stating, in Judgment, which one is the competent Administration (section 70 LOTC). On the other hand, those of the government that are upheld will end by Judgment setting down "a period within which the Autonomous Community must carry out the required duty" [section 72.3 a) LOTC]. The reference to the Autonomous Community and not just to its Administration could lead to the conclusion that, with the autonomous administrative inactivity being based on the non-existence of the necessary legal (autonomous) coverage, the Court can compel the exercise of the corresponding legislative competence by the Assembly of the Autonomous Community.

In any case, the experience of almost thirty years of constitutional jurisdiction has not led to any background pronouncement within the field of negative conflicts. Claims have, on the other hand, repeatedly been made for a reform of the Organic Law of the Court that would widen the eligibility of the governments of the Autonomous Communities for bringing such processes against the Government of the State. With this reform, backed by the nationalist parties of some Autonomous Communities, a remedy would be sought against the passivity of the Central State in processes for the transfer of competencies to the Autonomous Communities; processes which have been fundamental for the rate at which the autonomous State is effectively shaped, based on the decentralisation of the competencies of the unitary preconstitutional State among a plurality of Autonomous Communities set up by virtue of the existing Constitution. None of these reform initiatives has so far prospered.

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

3.1. Application to the Constitutional Court.

In order to file *appeal for protection* — the object of which, as has been said, are injuries to fundamental rights caused by provisions, acts or omissions of the executive and judicial powers, or, if they do not take on the rank or value of laws, of the legislative power as well — the persons directly affected, the Ombudsman and the Public Prosecutor's Office are eligible to do so (section 46 LOTC). The former include both natural and legal persons, national and foreign, along with public and private bodies, at all times, of course, depending on the right or freedom invoked.

The *appeal of unconstitutionality* or direct and abstract control of laws and rules with the value of law — a category which includes decree-laws (urgent governmental legislation), legislative decrees (delegated governmental legislation), international treaties and regulations of the legislative houses (section 27.1 LOTC) — can only be filed within a period of three months following the date of their official publication, by the President of the Government, the Ombudsman, fifty Deputies of Congress (national lower House), fifty Senators (upper national House), the Governments and Legislatives Assemblies of the Autonomous Communities [section 162.1 a) of the Spanish Constitution].

The so-called *question of unconstitutionality* is an incidental and specific proceeding whose object coincides with that of the appeal of unconstitutionality and which can only be brought before the Constitutional Court by the ordinary Judges and Courts who doubt the constitutionality of a rule with value of law on whose validity depends the finding of the judicial process in which they have to apply (section 163 of the Constitution).

As well as *negative conflicts* — mention of which has already been made[8], and which can be filed by individuals and the central government — the Organic Law of the Court considers two other process of conflict: *positive conflict*, conceived for resolving disputes over competencies between the State and Autonomous Communities or between two or more Autonomous Communities (it can be brought by the corresponding Executives and will concern provisions, resolutions or infralegal acts) and *conflict between constitutional organs of the State*, which have as their object possible disputes regarding their respective duties between the Government of the country, the Houses making up the "Cortes Generales"

[8] *Supra*, 2.4.

(national parliament) and the General Council of the Judicial Power (administrative organ of government of the ordinary Judges and Courts).

In 1999 a constitutional process was introduced into the Organic Law of the Court that was unknown in the Constitution: the so-called *conflict in defence of local autonomy*, which has the object of defence against laws and legal rules of the autonomy constitutionally guaranteed to local bodies. In the case of individual laws, the eligibility corresponds to the municipality or to the province that are its sole targets; otherwise to a certain number of municipalities or provinces in accordance with the territorial and populational criteria set down in the actual Organic Law of the Court (section 75 ter.1 LOTC).

Finally, the process for the *declaration on the constitutionality of international treaties* is today the only control procedure existing in Spanish law[9]. Its object is the treaties which the State seeks to enter into; and those eligible for bringing it are the Government of the State and both Houses of the national Parliament. A pronouncement contrary to compatibility of the treaty with the Constitution implies the impossibility of incorporating it into internal law without a reform of the constitutional text or a renegotiation of the treaty.

3.2. Legislative omission in the petitions of the petitioners

The players in the constitutional processes can base their claims of unconstitutionality on any circumstance which they judge to be contrary to the constitutional mandates. Among them is also the existence of a legal gap attributable to the legislator. This is clearly the case in the event of appeal for protection following the reform of 2007, as has already been said[10], since the omission directly attributed to the judicial or administrative resolution being appealed against for protection can have its origins in a prior legislative omission which would have to be redressed in an incidental proceeding necessarily referring to the legal text in which the gap was noticed. This would confirm the fact that absolute omissions do not have any channel for redress; only partial or relative ones can have this, in other words, those

[9] The previous control of constitutionality of organic laws, created by the Law governing the Court in its original version, was eliminated by Organic Law 4/1985, of 7 June 1985.
[10] *Supra*, 2.4.

referring to a regulating text, the sole possible object of a control of constitutionality, as has already been asserted by Constitutional Court Judgment 11/1981, of 8 April 1981[11].

The legislative omission therefore constitutes the basis for claims of unconstitutionality rather than its object. In the experience of the Spanish Constitutional Court, the object of the claims thus based are usually acts of application of legal rules which are attributed an infringement of the principle of equality or injury to fundamental rights. In the first case, by exclusion of subjects or circumstances which present identity of reason with the subjects or the circumstances benefiting from the attention of the legislator; in the second, by omission of the necessary legislative activity for the exercise of a fundamental right. This type of invocation, as well as being based on appeals for protection, are also usually done in questions of unconstitutionality brought by ordinary judges and courts who have to apply laws which, by omission or default, are supposedly injurious of the principle of equality. There is no specific data regarding the invocation of this particular variable of the principle of equality in law, but it can be stated in general that, following the right to effective judicial protection and to procedural guarantees, the principle of equality is the second most invoked principle in claims for constitutional protection[12]. In the direct appeal, for its part, the reference to legislative omissions is also habitually linked to objections based on the violation of the principle of equality and non-discrimination.

As far as conflicts of competencies between the State and the Autonomous Communities are concerned, they are not suited to this kind of approach, given their nature of being positive conflicts, in other words, conceived for the preservation of own competencies against an outside intromission. All in all, the technique of legislative omissions has, as already stated[13], initially served to make up for the legislative inactivity of the State in defining the regulating bases which, in certain matters, constitute the necessary presupposition for the exercise by the Autonomous Communities of their legislative competencies for development.

[11] Cited *supra*, 2.3.
[12] In the year 2006, the right to effective judicial protection and procedural guarantees was invoked in 89.22 percent of appeals for protection, while the principle of equality was invoked in 17.14 percent. The figures for 2005 were 87.41 and 16.66 percent, respectively.

The negative variant of conflicts of competence, better accommodated for denouncing improper legislative omissions, as has been said, does not fall within the range of the Autonomous Communities[14] and a case has never occurred in which the Central Government denounced the legislative inactivity of an Autonomous Community.

3.3. Investigation of the legislative omission in the case when it is not required by the petitioner

With constitutional protection being in defence of equality, the natural territory for the examination of possible regulatory omissions contrary to the Constitution lies in that jurisprudence in which examples can be found accrediting the fact that the Court, obliged at all times to confine itself to claims brought before it and prevented from reconstructing or reconfiguring petitions for protection by means of altering the grounds on which appellants file their claims, can indeed technically redefine the terms in which the grounds of the petition are set out and, above all, identify the ultimate origin of the injury denounced before it, which is very often localised by the plaintiff in a rule which he criticises on account of what it prescribes and not, on the other hand, what it improperly fails to prescribe. In other words, the Court can identify the cause of the injury in the system of rules (warning of the absence of a necessary rule) and not in a particular rule.

An example of this procedure was the approach given by the Court to the petition resolved by the Constitutional Court Judgment 67/1998, of 18 March 1998:

> "As declared in Constitutional Court Judgment 74/1997, 'the legislator, exercising his freedom of regulatory configuration, can, in criminal terms, freely choose between protecting or otherwise the children in family crises against breach by their parents of the care obligations incumbent upon them and judicially declared, but, once this choice has been made, non-matrimonial children cannot be left outside of the protection without committing a discrimination for reasons of birth, which is prohibited in section 14 of the Constitution' (Legal Grounds 4). For this motive, it can be said that, in a certain way, the object of the present petition for constitutional protection is fundamentally the omission of the legislator, since it is not the rule expressly contained in section 487 bis of the Criminal Code then in force which, by itself and considered in isolation, can be regarded as being contrary to the right of

[13] *Supra*, 1.3.
[14] *Supra*, 2.4.

> equality but its imperfection, due to failing to contemplate that which, having of necessity to be included by the legislator, was nevertheless omitted, thereby giving rise to a discrimination by default, injurious to the fundamental right to equality of the child of the present appellant for constitutional protection." (Legal Grounds 5).

These gaps are not attributable to the ordinary court that has applied the law but rather to the legislator himself, in such a way that on occasions, and particularly in the criminal field, the courts cannot avoid the discrimination caused by legislative silence. In the case that has just been cited, indeed, the Constitutional Court affirmed that

> "While in other suppositions of discrimination by default the judicial organs can correct and redress the violation of equality of the rule, whether by means of an interpretation of it in accordance with the Constitution, or by declaring its nullity or raising the question of unconstitutionality if it has the value of law (section 163 of the Constitution and 27 LOTC), when dealing with criminal provisions these possibilities of judicial action in many cases become legally non-viable. On the one hand, because the fundamental right to the principle of criminal legality […] prohibits analogous interpretations *in malam partem* of criminal types, as well as their extensive application to conducts not expressly provided for therein, at the time of being committed (for all, Constitutional Court Judgment 34/1996). On the other hand, because if a question of unconstitutionality has been raised […] this would not have been admitted […], because the verdict on the case did not depend on the constitutional validity of that provision since, by virtue of section 25.1 of the Constitution, the Judgment would likewise be absolving.
>
> It is thus inferred that the judicial organs, submitted to the rule of law (section 117.1 of the Constitution) and, with special rigour, to the principle of criminal legality (section 25.1 of the Constitution), were limited to confirming that the conduct being denounced did not fall within the type regulated in the said provision of the Criminal Code, as a consequence issuing the corresponding absolving Judgment. For this reason, judicial resolutions were the only presupposition necessary for individualising *ad casum* the discrimination produced by the legislator, in such a way that, only instrumentally, via the absolving verdict, was an actual and effective injury produced to the right to equality of the child of the claimant for constitutional protection." (Legal Grounds 6).

This is a concrete and effective discrimination which only the Constitutional Court can redress by means of upholding the protection, though neither can the original and abstract discrimination be corrected with a questioning of the defective law before the Plenary session

of the actual Court, for the same reasons as are put forward in the cited text for justifying the fact that a judicial question had not been admitted.

3.4. Legislative omissions in the laws and other legal acts

If, in accordance with the statements accompanying this point in the *Questionnaire*, it has to be understood that that interesting aspect is whether the Spanish Constitutional Court is competent for examining any legal gaps or only legislative ones which result in an infringement of the Constitution, it has to be said that, in principle, the only gaps relevant for the constitutional jurisdiction are those noticed in the laws when there exists an express or implicit constitutional mandate of legislation, on the one hand, and when the judicial and administrative omissions are injurious of the fundamental rights, on the other.

The category of laws once again has to be understood as including international treaties and parliamentary regulations; in general, all rules immediately subordinated to the formal Constitution.

Administrative omissions contrary to a mandate of regulation or action contained in a law are not, in principle, indictable before the constitutional jurisdiction, outside of the case, also once more, in which they thereby lead to an infringement of rights susceptible to being safeguarded via the route of constitutional protection.

As far as the technique of delegated legislation is concerned, governmental default in the development of the legislative authorisation is not, in theory, constitutionally relevant; though the excess (*ultra vires*) would be, in that the constitutional authorisation of the Government for exercising the delegation of the legislative power is strictly confined to the terms agreed by the delegating law.

3.5. Refusal of the Constitutional Court to investigate and asses legal gaps

As has been repeated in these pages, the Spanish Constitutional Court only examines those legislative gaps which derive from breach of a constitutional mandate of legislation.

> "it is obvious that it is not possible to deduce the unconstitutionality of a rule due to not regulating a specific matter unless, as has been said, there exists an express constitutional mandate, aimed moreover at that rule and not at a different one." (Constitutional Court Judgment 98/1985, of 29 July 1985, Legal Grounds 3).

Technically there is no gap and, therefore, nor is it appropriate to exercise the constitutional jurisdiction, when legislative inactivity is the result of the legitimate exercise of the political option which is open to the legislator within the framework of an open and non-directing Constitution[15].

3.6. Initiative for examination of the "related nature"

As this section of the *Questionnaire* is understood, the "related nature" or reason of identity between a supposition contemplated in a rule and another that is not contemplated or is excluded from it lies at the basis of any judgment of equality and is therefore fundamental for the identification of a partial legal gap or one by default. In this sense, the initiative for its examination corresponds to the claimant denouncing discriminating treatment, since it falls to him to provide a *tertium comparationis* and demonstrate the identity of reason which imposes equal treatment for the supposition that is excluded or not contemplated in the rule applied to his prejudice.

In a certain sense, the reason of identity that is discerned between the basic legislation (the issuing of which by the State could not be as immediate as that required by the decentralisation process initiated with the coming into force of the Constitution) and the preconstitutional regulations which materially accorded with the profiles of that legislation permitted the Constitutional Court to authorise the Autonomous Communities to exercise their legislative competencies for development of the bases set by the State without having to wait for the State to pass laws of formal bases. In this case, the initiative for the construction of that category of material bases corresponded to the Court itself, whose doctrine is summarised in the Constitutional Court Judgment 24/1985, of 21 February 1985:

[15] *Supra*, 1.3.

> […] the notion of 'bases' must be understood as a material notion, and as a consequence the basic criteria, whether or not they are formulated as such, as those which are rationally deduced from the existing legislation; from this material notion of 'base' it is inferred that the essential aspect of its concept is its content; for that reason, although the Cortes [national Parliament] will have to establish what has to be understood by basic, if necessary it will be this Court that is competent for deciding it, in its capacity as supreme interpreter of the Constitution; when the matter is regulated by preconstitutional rules, and until the corresponding law is passed, the Government can infer what the bases of those rules are, always provided that this is possible without the deduction being merely apparent and that it becomes converted into a true work of innovation, and without prejudice to the fact that such a deduction would always arise bound by a certain provisionality and would be pending for the legislator to confirm or revoke it: and finally, it happens that in some matters certain decisions and actions of an apparently circumstantial kind, which have the aim of the immediate regulation of concrete situations, can undoubtedly have a basic nature due to the interdependence of these throughout national territory." (Legal Grounds 8).

4. INVESTIGATION ON THE CONSTITUTIONALITY OF LEGISLATIVE OMISSION

4.1. Particularities of the examination of legislative omissions

It has already been said[16] that since 1985 the sole prior control of constitutionality existing in Spain is that having international treaties as its object. The then disappeared *a priori* control of the constitutionality of organic laws had demonstrated a suitable procedure for the determination of relevant legislative omissions and for which the Court would specify how the defects of gaps that had been noticed ought to be put right by the legislator, a necessary condition for the constitutional conformity of the draft regulation being considered.

A paradigmatic example of the above was the pronouncement of the Court in relation to the law on decriminalisation of the voluntary interruption of a pregnancy in certain situations, where it stated the specific points which had to be the object of legislative attention:

> "From the constitutional point of view, the Draft bill, by declaring abortion to be non-punishable in certain cases, demarcates the scope of the criminal protection of the *nasciturus* […]. For that reason, once the constitutionality of such situations has been established, it is necessary to examine whether the regulation contained in the […] Draft bill sufficiently guarantees the result of weighing up the goods and rights in conflict carried out by the legislator […].

[16] *Supra*, 3.1.

> And this is so because […] the State has the obligation to guarantee life, including that of the *nasciturus* (section 15 of the Constitution), by means of a legal system that would imply an effective protection thereof, which, as far as possible, requires that the necessary guarantees be established so that the efficacy of that system does not become diminished beyond what is demanded by the purpose of the new provision.
>
> "[…] The legislator should therefore provide that the checking of the de facto situation in cases of therapeutic or eugenicist abortion, and the carrying out of the abortion, be done in public or private health centres, authorised for the purpose, or that any other solution should be adopted that he considers appropriate within the constitutional framework.
>
> […] Finally, as is obvious, the legislator can adopt whatsoever solution within the constitutional framework, since it is not the task of this Court to replace the action of the legislator, though it does have the task, in accordance with section 79.4 b) of the LOTC, to point out modifications which in its opinion — and without excluding other possibilities — would permit the processing of the draft to be pursued by the competent organ." (Constitutional Court Judgment 53/1985, of 11 April 1985, Legal Grounds 12).

In this type of control is it evident that the jurisdictional intervention is less "aggressive" from the perspective of the separation of powers in that it will always be only the actual legislator who puts right the gap pointed out by the Court, the latter thereby being limited to a role as mere assistant in the exercise of an *in fieri* regulation on which only the legislative power can provide — subject, if it decides to do so, to legislating under the terms pointed out by the Court, though being entirely free to repudiate its initial legislating intention.

The examination of the legislative omissions on the occasion of an *a posteriori* control of constitutionality offers, as far it is concerned, the particular feature that the Court then operates on a text or on a system that are the finished expression of a legislative will which its creator regards as perfect and from which individual juridical acts will already have resulted on occasions. These acts furthermore permit the *in concreto* testing of the anti-juridical effects of legislative omissions which are perhaps not discernable in the abstract dimension characteristic of the constitutional trial of the law; and of course they permit calibration of the scope which the jurisdictional intervention has to have with which redress is sought for the injury occasioned by the silence of the legislator, which will be fundamental for the option for some of the techniques that are customary in this field: unconstitutionality without nullity, deferred nullity, conditioned nullity, jurisdictional inclusion of the circle of subjects or

situations excluded by the legislator, etc. In all cases, jurisdictional intervention in the events has an inevitable and more immediate materially legislative component. More noticeable here is the dimension of criticism which the trial of constitutionality then takes on, less discernible in the prior control, where only intentions are judged, not perfect acts of will.

The greater incisiveness in the legislative function when the trial, *a posteriori*, concerns its result has to lead to the especially responsible exercise of the constitutional jurisdiction. The Spanish Court therefore confines its competence to the examination and solution of those legislative omissions which imply the breaking of a constitutional mandate for development of the Constitution-making power will, it being understood that such a mandate effectively exists (and not a simple authorisation or, beyond that, a duty subject to appreciations of opportunity — thus, reserves of law) when failure to heed them would be prejudicial to the system of rights and freedoms or the configuration of the constituting and necessary elements of the State.

4.2. Verification of the existence of legislative omissions

As has been repeatedly stated, the unconstitutional legislative omission is solely that which results "when the Constitution imposes on the legislator the need to issue rules of constitutional development and the legislator fails to do so" (Constitutional Court Judgment 24/1982, of 13 May 1982, Legal Grounds 3). In order to confirm its existence the Constitutional Court must first of all accredit the need for legal rules of development of the Constitution; afterwards identify the existence of such rules and, in their absence, to confirm the reality of a neglected legislation mandate. The first does not offer any major difficulty in the case of fundamental rights — many of them of strict legal configuration, but always of immediate applicability (Constitutional Court Judgment 80/1982, of 20 December 1982, Legal Grounds 1) — as demonstrated by the solution adopted by the Court when resolving on a petition for protection brought by someone who could not exercise conscientious objection to military service due to the fact that the pertinent procedure had not been legally regulated:

> "The fact that conscientious objection is a right which, for its development and full efficacy, requires the *interpositio legislatoris* does not signify that it can be demanded only when the legislator has not developed it, in such a way that its

> constitutional recognition would have no consequence other than that of establishing a mandate directed at the legislator without the possibility in itself of protecting individual claims. As this Court has repeatedly stated, the constitutional principles and the fundamental rights and freedoms are binding on all the public authorities […] and they are the immediate origin of rights and obligations rather than being mere programmatic principles […].
>
> It is true that when operating with this reserve of legal configuration the constitutional mandate may not, until the regulation is produced, have no more than a minimal content, which in the present case would have to be identified with the provisional suspension of incorporation into the ranks, but that minimal content has to be protected since otherwise […] a radical negation would occur of a right which enjoys the highest constitutional protection in our legal code. Delay in complying with the Constitution imposes on the legislator cannot injure the right acknowledged therein." (Constitutional Court Judgment 15/1982, of 23 April 1982, Legal Grounds 8).

As far as the identification of the necessary legal rules is concerned, these can be any of those existing in the legal code and not strictly those which, on account of their name or specific object, might in appearance be suitable for that function of constitutional development. This means that the determining factor is that such development has been verified, not the manner or the regulatory technique with which it has been carried out. Not even the time in which the legal rule of development was introduced into the code of laws, since the preconstitutional legality can perfectly well perform this task. So, in the situation of conscientious objection that has just been cited, for example, the Court considered the possibility of regarding the objection procedure set down in a Decree of 1976 as being applicable, but finally it judged it to be insufficient. Along these same lines, the preconstitutional legal system regulating the exercise of the right of assembly was considered in its day to be partially usable:

> "[…] the right of assembly regulated in section 21 of the Spanish Constitution has repealed that of the same nature of Law 17/1976 due to their being incompatible with each other, though the same thing does not occur with the adjectival aspect, consisting of the procedural steps, […] since as section 21 does not regulate them, in order to determine the aspects not contemplated therein, the contents of sections 53.1 and 81 of the Constitution will have to be turned to in the future, creating the appropriate organic Law, though, due to not having been used so far by the legislator, the legislative gaps has to be rectified in order not to render the right ineffective, with the application of the specific preconstitutional legislation, in a literal manner, or adapting it, *mutatis mutandis* to the provisions or principle arising from the Constitution, and whose content

> can be accepted by the hypothetical post-constitutional legislator." (Constitutional Court Judgment 36/1982, of 16 June 1982, Legal Grounds 3).

It is only if the legal regulation for development did not exist that one could speak of a mandate for the unconstitutionally neglected legislator. This would at all times lead to the Court censuring the legislator, though not necessarily to the censuring of the applier of the insufficient legal regime, since deficiencies of formal law can be put right by means of their application *ad casum* (respecting, of course, the limitations that might be imposed on this point by a reserve of law), in such a way that when it comes to determining the scope of a legal gap a distinction needs to be drawn between the formal-abstract level, on the one hand, and the material-concrete level, on the other. The omission noticed in the former may not occur in the latter, such that not all acts of application of insufficient legality have to suffer that same defect, attributable to the legislator and with its consequences being confined solely to him.

The Constitutional Court Judgment 184/2003, of 23 October 2003, provides a good example of the above. In it, the Court considered that the legal regime of authorisation of telephone tappings was constitutionally insufficient, but also, given the additional guarantees dispensed in the particular case by the judicial authority, the situation could occur in which that insufficiency did not signify, in addition to the breach of a mandate directed to the legislator, the autonomous and specific infringement of a fundamental right. In the words of the Constitutional Court Judgment 49/1999, of 5 April 1999, Legal Grounds 5:

> "If, in spite of the non-existence of a law that would satisfy the generic constitutional demands for juridical security, the judicial organs, to which section 18.3 of the Constitution refers, had acted within the framework of investigation of a serious infringement, for which telephone tapping would clearly have been necessary, adequate and proportional and would have been agreed with regard to the persons presumably involved in it, furthermore respecting the constitutional demands arising from the principle of proportionality, then it could not be understood that the Judge has violated the right to secrecy of telephone communications by virtue of the mere absence of that law."

4.3. Methodology for the discovery of legislative omissions

The methodology for the stated end is the typical one proper to juridical interpretation, though the particular nature of legal gaps confers greater relevance on systematic and

teolological methods. Given the interpretative relevance of international treaties signed by Spain on the subject of human rights[17], the doctrine of the international courts competent in this field constitutes a fundamental methodological model for the identification of gaps that are discernible from the strictly national perspective. So, the cited Constitutional Court Judgment 184/2003, of 23 October 2003, ends by accepting the reality of a legislative gap which the national courts believed had been corrected with jurisprudence and which, according to the Strasbourg Court, has to be remedied with the intervention of the legislator:

> "We have acknowledged the insufficiencies suffered by the regulation contained in section 579 of the Criminal Procedure Law in the light of the demands of section 18.3 of the Spanish Constitution, interpreted pursuant to section 8 of the European Convention on Human Rights and the jurisprudence of the European Court of Human Rights following the mandate of section 10.2 of our Constitution. Other insufficiencies aside […], it is obvious […] that the provisions of that legal principle do not cover contemplating 'the case of interlocutors listened to "at random" in their capacity as "necessary participants" of a telephone conversation recorded by the authorities in application of their provisions.' (Judgment of the European Court of Human Rights of 16 February 2000, case *Amann c. Switzerland*, § 61).
>
> The above reasoning highlights the existence of a situation which does not accord with the requirements of forecastability and certainty in the field of the fundamental right to secrecy of communications recognised in 18.3 of the Spanish Constitution […]" (Legal Grounds 7).

4.4. Additional measures

On the understanding that the "principal measure" will be the confirmation and formal declaration of the existence of a legislative gap, additional measures will have to be directed towards correcting it. Independently of what will be stated later on in relation to the verdicts agreed by the Court in cases of unconstitutional legislative omissions[18], the most radical measure within its scope is that which consists of ensuring the effectiveness of the constitutional provision needing the improperly omitted legislative action. In the case of conscientious objection to military service, the non-existence of a legal discipline regulating its exercise led the Court to ensure at least a minimal content of that right: the provisional

[17] *Supra*, 1.3 *in fine*.
[18] *Infra*, 4.6.

suspension of incorporation into the ranks until the corresponding procedure had been established:

> "In order to comply with the constitutional mandate it is therefore necessary to declare that the conscientious objector has the right to have his incorporation into the ranks postponed until the procedure can be shaped that could confer the full realisation of his right to object […].
>
> Nevertheless, it does not fall to this Court to determine the form in which said suspension or postponement has to be granted, and so it cannot proceed, as the appellant claims […], to the adoption of adequate measures so that the Ministry of Defence and its subordinate organs can grant a stay of incorporation into the ranks of the fourth class a).
>
> […] Consequently, this Court accepts that the granting of the protection that is claimed is lawful, without thereby prejudging in the slightest the later situation of the appellant, which shall be determined solely by the legislation which, in compliance with the constitutional provision, defines the right to conscientious objection." (Constitutional Court Judgment 15/1982, of 23 April 1982, Legal Grounds 8 and 9).

To the degree, therefore, that the legislative intervention, which is necessary for the exercise of the right in its fullness, is not indispensable for a minimum effectiveness of a content, also minimum, of the right in question, the Court proceeds to make possible the immediate applicability of a right that is in itself "unfinished" or imperfect, but which is sufficient in this minimal expression as an instrument for freedom.

4.5. Suppositions in which the Constitutional Court examines legislative omissions as part of the examination of cases of constitutional justice, but without resolving on their constitutionality

The considerations which the legislative omissions deserve of the Court that are noticed in its work of trying cases are not always reflected in the findings of its decisions, no matter how fundamental the legal grounds are on which its pronouncements are based. These being grounds which, in that they constitute doctrine of the supreme interpreter of the Constitution (section 1.1 of the Organic Law of the Constitutional Court), are binding on all the ordinary courts (section 5.1 of the Organic Law of the Judicial Power). But, as is obvious, they have to concern omissions which do not lead to an infringement of the Constitution (an event that would not excuse a decision in the finding, even declaratory or formal), but instead to its

perfectible development or execution. It is thus a matter of exceptional situations, almost bordering the limit of trials of opportunity or of technical quality of laws, prohibited to the Constitutional Court (thus, Constitutional Court Judgments 142/1993, of 22 April 1993, Legal Grounds 9; and 341/1993, of 18 November 1993, Legal Grounds 2).

Constitutional Court Judgment 245/1991, of 16 December 1991, provides a good example of this kind of perfective trials, which do not confine themselves to censuring the legislator but instead seek to confirm that the result according to the Constitution can be reached in the present circumstances of the legal code, though it could be achieved more easily if the legislator were to adopt certain provisions. In that case, this would be with a reform of the procedural legislation that would permit the execution of Judgments of the Court of Strasbourg declaring infringement by Spain of the rights and freedom recognised in the Rome Convention. This is an execution that is perfectly realisable by means of an appeal for constitutional protection — which safeguards the right of the affected party — though the more appropriate channels would be that of a review of the judicial processes. According to that Constitutional Court Judgment 245/1991,

> "It is true that a proper coordination of the international obligation taken on by the State and of the internal constitutional framework which rigorously monitors the effectiveness of fundamental rights ought to be accompanied by proper procedural measures […]. In this regard, in order to properly coordinate the monitoring of the right recognised in the Convention and the monitoring of the fundamental right recognised in the Constitution, the legislative power would have to establish suitable procedural channels via which it would be possible to coordinate, with regard to the organs of the Judicial Power, the efficacy of the resolutions of the European Court of Human Rights in those situations in which, as occurs in the present case, an infringement of fundamental rights has been declared in the imposition of a criminal sentence that is still in the process of execution. Until such reforms are established, this Court cannot withdraw from hearing the alleged infringement of the right to a fair trial with all guarantees, given that this concerns a fundamental right that is protectable under the Constitution, and the violation of the fundamental right is only susceptible to effective relief by means of the loss of the effects of the original condemnatory decision." (Legal Grounds 5).

So, these are not calls to the legislator to redress a regulatory unacceptable situation, but are only for the perfection of a system that accords with the Constitution but which could be improved. They do not appeal so much to the strict regulating responsibility of the legislator

(only involved when his inactivity is equivalent to infringement of the Constitution) as to his best institutional zeal in the commitment to the excellence of the system. Along these lines are also to be found resolutions such as the Constitutional Court Judgment 108/1986, of 29 July 1986, in which the Constitutional Court advises the legislator to replace a rule in view of the risk of a possible unconstitutional application of it, but it is conclusive when it affirms that this risk does not in itself compromise the validity of the law:

> "The existence and even the probability of that risk, created by a provision which makes possible, though not necessary, an action contrary to the spirit of the Constitutional Rule, seems to make its replacement advisable, but this is not sufficient grounds for declaring its invalidity since it is a constant doctrine of this Court that the validity of the law has to be preserved when its text does not prevent an interpretation in line with the Constitution." (Legal Grounds 13).

4.6. Resolution on legislative omission in the finding of the decision of the Constitutional Court

The constitutionally relevant legislative omission, in other words, that which creates a regulatory situation contrary to the Constitution, cannot be other than an object of a *decisum* of the Constitutional Court once this has been confirmed.

The instruments provided for the Constitutional Court by its governing law for the administration of the effects of its pronouncements of unconstitutionality is very limited when it comes to the law[19], since its section 39.1 is confined to providing that the declaration of unconstitutionality of a legal rule will imply its nullity. As is obvious, such an economic provision shows itself to be particularly insufficient when the unconstitutionality is preached with a silence. This is also the case if one starts from the principle that the object of the constitutional process is the written text rather than the rule or rules that might be deduced therefrom, as was initially maintained by the Constitutional Court (Constitutional Court Judgment 11/1981, of 8 April 1981, Legal Grounds 4). Nevertheless, the practice of close to thirty years has altered many aspects of this field, where matters have rightly reached the point

[19] This is not so in the case of unconstitutionality of acts, infralegal provisions or omissions by administrative and judicial authorities that infringe fundamental rights, since section 55.1 LOTC allows the Judgment upholding an appeal for protection to declare the nullity of the infringing act or provision, in addition to formally recognising the injured right or freedom, and to re-establish for the appellant the entire enjoyment of his right "with the adoption of the appropriate measures for its

in which the specific reality of constitutional infringements by omission has come to be imposed, the logic of which has moderated the rigour of the bare provisions of the Organic Law of the Court.

Between the extreme types of (A) the declaratory findings of unconstitutionality/nullity and (B) those of constitutional conformity of the legal wording is to be found an entire series of intermediate pronouncements[20].

First of all, *interpretative pronouncements*, which, by means of interpretation in accordance with the legal wording, permit unconstitutionalities due to defect or apparent tacit exclusions to be corrected. So, Constitutional Court Judgment 73/1997, of 11 April 1997, declared the unconstitutionality of an autonomous legal provision "in that it omits the requisite set down in the basic rule" of the State. Unconstitutionality of the wording, therefore, but not its nullity; perhaps nullity of the rule implicit in that wording which excluded the application of a State rule, now perfectly applicable following the pronouncement of the Court, which would have removed the obstacle to that end which could have been implied by the (excluding) silence of the autonomous legislator.

What are known as *adjunct and reorienting Judgments* of the legal wording permit redress of the constitutional infringement caused by an excluding legislative silence annulling the rule that is only partially including. This was the case, for example, with Constitutional Court Judgment 103/1983, of 22 November 1983, which, annulling the reference to widows as beneficiaries of a certain public benefit, produced the effect of including widowers, who had been improperly excluded by omission. It is evident that the redress of the discrimination caused by this omission could equally well have extended to the elimination of the benefit in favour of widows and, in a certain sense, such a possibility implies a protection of principle against a certain risk of judicial activism, all the more so as it ought to correspond to the legislator to take the ultimate decision on the fate of a benefit undoubtedly established on the basis of material or budgetary provisions and which may not be in keeping with the demands

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conservation, as the case might be".

[20] Among the different systematisations that have been the object of these resolutory variants, that of Javier JIMÉNEZ CAMPO in *Las tensiones entre el Tribunal Constitucional y el legislador en la Europa actual* (Eliseo Aja, editor), Ariel, Barcelona, 1998, pp. 171 et seq. (181 et seq.) is the one

deriving from the necessity to include a new category of individual in the circle of beneficiaries. For that reason, there is no lack of reasons for defending the fact that, in these cases, the most appropriate thing seems to be the simple declaration of unconstitutionality accompanied by a requirement to the legislator to redress the omission that has been noticed. This was what was done in the Constitutional Court Judgment 96/1996, of 30 May 1996. It is a different case when the rule does not establish a benefit but instead imposes a burden or duty, since the only acceptable solution in that case would surely be to annul the partial imposition, not to generalise it.

The *dissociation of the duality of unconstitutionality/nullity* has shown itself to be the most suitable expedient for the jurisdictional sanction of unconstitutional legislative omissions. In spite of the literal wording of section 39.1 LOTC, the Constitutional Court pleaded that duality for the first time in its Judgment 45/1989, of 20 February 1989, in which it declared discriminating treatment dispensed to married couples, in contrast to common-law marriages, under the personal taxation system, to be unconstitutional. For the Plenary Session,

> "the connection between unconstitutionality and nullity founders, among other situations, in those cases in which the reason for the unconstitutionality of the provision lies not in an textual determination of it but in its omission.
>
> […] the provisions […] declared unconstitutional formed part of a legal system whose full accommodation to the Constitution cannot be achieved by means of the simple annulment of those rules, since the sanction of nullity, as a strictly negative measure, is manifestly incapable of reordering the system of Personal Income Tax under terms compatible with the Constitution. The infringement of the constitutional principle of equality could not in this case be redressed by the pure and simple extension to contributors included in family units of the legal system established for the taxation of those who are not in that situation, since, as is obvious, such a hypothetical compensation would not just be to deny constitutional legitimacy […] which the joint subjection to the tax in principle has, but, in the current regulating framework, it would lead to results that are in turn irrational and incompatible with equality, in that other parts of the legal system (notably the system of deductions) have not been affected by the lack of unconstitutionality and they therefore remain in force, once the Law has been purged of the contaminated provisions.
>
> On the basis of this Judgment, therefore, it falls to the legislator to carry out the pertinent modifications or adaptations in the legal system of the tax, for which he shall use his own freedom of regulatory configuration, which, as we have

followed here.

> pointed out, cannot be either unknown nor be replaced by the Constitutional Court, for which, in a process such as that which is now concluding, it merely corresponds to assess conformity or disconformity with the Constitution of the provisions on trial […], whose constitutional illegitimacy, no matter what the formula used (nullity or simple unconstitutionality), makes its application to the fiscal year 1988 juridically impossible, since the tax corresponding to him, though accrued, cannot be settled and payable in accordance with provisions that are contrary to the Constitution." (Legal Grounds 11).

This impossibility of *pro futuro* application of the legal system, which was nevertheless not annulled, forced the immediate reaction of the legislative power, which did not tarry in promoting a reform in accordance with the doctrine of the Court and which could be capable of being applied to the immediate fiscal year.

In other situations, on the contrary, the inclusion of the legislative gap can indeed be achieved with the cooperation of the judicial organs. This occurs in the already cited cases of Constitutional Court Judgment 184/2003, of 23 October 2003[21], in which, admitting the reality of an omission by the legislator, its correction by the courts was encouraged until the latter had legislated as appropriate. Moreover, the idea was rejected of also declaring the nullity of the defective legal text rather than just its unconstitutionality:

> "This is precisely the point about the present case in which the control of constitutionality […] concerns a provision with a core or content that is constitutionally valid but insufficient, in other words it concerns a defect of law. The exercise by this Court of its purging task regarding rules contrary to the Constitution would, as appropriate, culminate in a declaration of unconstitutionality due to defect in the legal provision […] which would aggravate the same defect — the lack of juridical certainty and security — by producing a greater gap. The constitutionally relevant interests which are safeguarded by section 579.3 of the Criminal Procedure Law would find themselves entirely unprotected in that such a declaration could entail at least the obligation on the public authorities not to apply the rule suffering from unconstitutionality. In this way, and in the context of a process of protection in which the main claim of the appellants has now been satisfied, we cannot but warn that the result of unconstitutionality that would be arrived at would enter into conflict with the same requirements of section 18.3 of the Spanish Constitution, since we would be leaving the legal code bereft of any legal authorisation for tapping telephone communications, thus aggravating the lack of juridical certainty and security of the situations ruled by section 579 of the Criminal Procedure Law until the legislator completes the provision redressing its

[21] *Supra*, 4.2.

> deficiencies via an express and true rule. It falls to the legislator, in the use of his freedom of regulatory configuration proper to his legislative power, to remedy the situation by completing the legal provision. As we have said on other occasions, […] that situation must be arrived at as soon as possible, and it is the duty of the legislative task of the Spanish parliament to do so within the shortest possible time (Constitutional Court Judgments 96/1996, of 30 May 1996, Legal Grounds 23; 235/1999, of 20 December 1999, Legal Grounds 13).
>
> And although we have declared on numerous occasions that it is not the task of this Court to make a positive definition of what the possible modes of constitutional adjustment might be, not even provisionally, until the necessary intervention from the legislator takes place, it shall indeed fall to it to make up for the insufficiencies that are stated, which it has been doing on the subject of telephone tappings, as we have said, since the unification and consolidation of its doctrine by the Constitutional Court Judgment 49/1999, […] doctrine that is applicable to third parties and is binding on all organs of the ordinary jurisdiction. As stated in section 5.1 of the Organic Law of the Judicial Power, the decisions of this Court in all manner of processes are binding on all Judges and Courts, who have to interpret and apply the laws and regulations in accordance with the constitutional provisions and principles interpreted by this Court" (Legal Grounds 7).

The risk stated by Javier JIMÉNEZ CAMPO[22] in these pronouncements of unconstitutionality without nullity, which do not usually specify whether the redress of the unconstitutionality has to fall to the legislator alone or also *pro tempore* to the Judicial Power, by analogy, is thus averted.

In general, and outside of the case that has just been cited of Constitutional Court Judgment 45/1989, the invocations to the legislator to correct the omission that has been noticed "within a reasonable length of time" (*vgr.* Constitutional Court Judgment 96/1996, of 30 May 1996) are not being heeded with the expected diligence. This Court does not, on the other hand, have further resources in this regard than to appeal to the institutional responsibility of the legislator, since it has no formulas open to it like those at the disposal of the Austrian Court on the matter of conditioning and linking up in time of annulling pronouncements. Even if there is always the possibility of new pronouncements on the defective law (on the occasion of specific acts of application against which appeals for protection can be filed) which would permit going back over the steps of a previous

[22] Ob. cit., p. 187.

declaration of mere unconstitutionality and then decreeing the nullity that was avoided earlier on. This has never been the case.

4.7. Examination and decisions relating to "related nature"

It is understood that this section, like that of No. 3.6, refers to situations of excluding omission with discriminating results. Confining ourselves, as required by the explanatory text of the *Questionnaire*, to situations in which the Court examines these cases when it is not aware of legislative omissions, it has to be repeated that their typical context is that of appeal for protection in defence of the constitutional principle of equality. This is terrain in which the redressing possibilities of the Court are much greater than in that of jurisdiction on the law[23]. Properly speaking, there is no risk here of any legislative activism on the part of the Constitutional Court, given that the discriminating omission, in that it is not contained in the applied law, will be that itself which, as well as infringing that constitutional principle, also infringes a perfect or non-defective law, to which a deficient or mutilating application will have been given.

If by the expression "related nature" one is referring to the possibility of the Court enlarging the object of the processes that it hears, the Organic Law only permits it to extend its pronouncements of unconstitutionality to rules included in that same law which shelters that which is directly subjected to its judgment, always provided that there exists a "connection or consequence" between them (section 39.1 LOTC).

4.8. Juridical techniques used by the Constitutional Court for preventing the appearance of legal gaps as a consequence of decisions declaring one or another juridical rule to be contrary to the Constitution

The Spanish Constitutional Court does not have any of the remedies exemplified in the *Questionnaire*. Indeed, it cannot cut off the *horror vacui* with the postponement of the official publication of its Judgments, nor can it delay in time the annulling effects of a pronouncement of unconstitutionality or subject its effectiveness to a condition that is dependent upon the legislative will.

The Organic Law of the Court has a notable impact on the annulling scope of the declaration of unconstitutionality, to the point that its invalidating effects are in reality properly *ex nunc*, given that the acts of application of the unconstitutional legal rule are in the end only revisable due to the effect of the principle of retroactivity of absolving or favourable criminal or sanctioning provisions (*apud section* 40.1 LOTC). The declaration of unconstitutionality thus ends up being a prohibition of application *pro futuro* of a defective legislation whose effects are subjected to a very aggravated process of revision.

All in all, the Court has taken pains over the prudent exercise of its institutional responsibility when the annulling logic of its governing law would have been able to produce more disturbing effects for the legal code than those that would have been caused by the survival of an unconstitutional law. As is the case in financial or budgetary matters, accredited by the same text of Constitutional Court Judgment 45/1989, cited earlier, and very clearly that of Constitutional Court Judgment 13/1992, of 6 February 1992, in which the unconstitutionality of several budgetary items was declared:

> "The annulment of such budgetary items could imply serious harm and disturbance […] to the general interest, affecting consolidated juridical situations, and particularly the economic and financial policy of the State. Moreover such budgetary items refer to economic periods that are now closed and whose effects have expired. Given the above circumstances and as was already done in Constitutional Court Judgment 75/1989, the claim from the Government of Catalonia can be regarded as satisfied by means of the declaration of unconstitutionality of those budgetary items that have invaded its competencies, without any need to annul the said budgetary items and far less the subsidies that have already been granted by virtue of them. On account of all this, the scope of the general effects of the agreed declaration of unconstitutionality is confined to future budgetary periods subsequent to the date of publication of this Judgment in the 'Official State Gazette'." (Legal Grounds 17).

Nevertheless, the combination of this technique with data regarding the worrying delay of the Court in resolving on processes that it hears (in some cases as many as ten years have passed between the initiation of the process and its completion by Judgment) produces very disturbing consequences for the model of control of constitutionality. Because, of course, the resolutory judgment is always that of specifying what the true object of its trial is, given the

[23] *Supra*, note 19.

inevitable regulatory succession experienced by the legal code in the interim and the very likely repeal or modification of the rule being appealed against, which frequently requires veritable displays of techniques of transitory law in order to determine the scope which an annulling pronouncement might have. But, in addition, the fact that the legislator, particularly in the economic field, can have the security of his decisions being able to be declared unconstitutional in the medium or long term, but not annulled, can generate a sensation of impunity which would end up by limiting the effectiveness of the Constitution in the economic and financial fields. For that reason, it is unavoidable that corresponding to the institutional responsibility which leads the Court to exercising that formula would be the responsibility of the governing majority, which does not have to give warning of any gap that might exist in that technique but instead of any censure that there might be in it.

In a terrain that is also especially sensitive to insecurity and the legal gap as is that of environmental legislation, the Court has worked out solutions like that of its Judgment 195/1998, of 1 October 1998, in which an annulling effect was proposed until a new law could be passed:

> "Inasmuch as the Autonomous Community does not exercise the competence which we acknowledge to it in this Judgment, the immediate nullity of Law 6/1992 could provoke an environmental deprotection of the zone with serious harm and disturbances to the general interest at stake and affecting consolidated juridical situations and actions.
>
> […] In order to avoid these consequences, the declaration of unconstitutionality of Law 6/1992 must not entail the immediate declaration of nullity, whose effects are deferred to the moment when the Autonomous Community issues the pertinent provision in which the Santoña Marshes are declared to be a natural space protected under any of the figures provided for in law." (Legal Grounds 5).

Evidently, in these cases the harm caused by inactivity is suffered only by the legislator who is finally competent, in such a way that the risk of delay (the risk of the gap now having been averted) is unlikely to become materialised.

In the end, the principle of fullness of the legal code is in all cases subject to the risk of the gap which might occasion an annulling constitutional judgment, since the possible revival

of the Law repealed by the annulled rule will always have an effect. It will nevertheless be granted that such a consequence in reality constitutes the danger that it is wished to avert when speaking of the risks of a regulatory gap. Properly speaking, there will never be such a gap but instead the restoration of an earlier regulatory order and, necessarily, the review of the data of the reality shaped according to the annulled rule. That process of review and restoration is what is truly disturbing and uncomfortable.

5. CONSEQUENCES OF THE VERIFICATION BY THE CONSTITUTIONAL COURT OF THE EXISTENCE OF LEGISLATIVE OMISSIONS

5.1. Duties for the legislator

The verification by the Constitutional Court of a redundant legislative gap in an infringement of the Constitution does not on its own imply the imposing on Parliament of a duty to legislate, but rather the formal admonition to comply with an obligation that is pending. Beyond the censure going hand in hand with that formality, the Court does not have the instruments for forcing legislative activity, though it can encourage it to a greater or lesser degree depending on the solutions within its range or transitory ones stated in the Judgment in order to make up for the gap that has been noticed. If the gap can be filled in with a judicial intervention by means of analogy then the legislator is not likely to feel a peremptory need to fill the gap with a specific law. In other words, if the legislative omission has not been verified in terrain marked out by a reserve of law, and as a consequence the unconstitutional regulatory situation caused by the gap can be redressed with the cooperation of the Judicial Power, then there has to be a minimal interest from the legislator with regard to complying with his duty. The situation of the cited Constitutional Court Judgments 245/1991, of 16 December 1991, and 184/2003, of 23 October 2003, fits this pattern perfectly[24].

If, on the other hand, the transitory solution can lead to effects regarded as undesirable for the legislator and are avoidable only with his formal willingness, then the normal thing would be to draw up a law early on that will do away with the gap. This was the case that occurred in Spain with Constitutional Court Judgment 15/1982, of 23 April 1982[25], which, in providing for the suspension of incorporation into the ranks of those who invoked their right

[24] *Supra*, 4.5 and 4.2, respectively.
[25] *Supra*, 4.2.

to conscientious objection until a proceeding had been issued that would regulate its exercise, provoked the pertinent reaction from the legislator[26].

So, outside of the case in which the solution worked out by the Court as transitory until the zeal of the legislator *per se* could be excited, the Court has no other instrument open to it for guaranteeing the indemnity of the Constitution than confidence in the sense of the actual institutional responsibility of Parliament.

5.2. Duties of other regulating powers

As has just been said, unless prevented by a reserve of law, it is feasible for the legislative omission to be able to be compensated with judicial intervention, a situation in which such a possibility leads — by virtue of the subjection of the Judicial Power to the Constitution (supreme rule of immediate application) and of the prohibition of *non liquet* — to a duty for the courts.

For its part, if the subject under consideration permits this, it is likewise possible for the Government to make up for the gap created by the legislator by means of issuing a decree-law, in other words, in the exercise of its own legislative power, to which it can resort solely for reasons of urgency and with the exclusion of certain fields, as provided for in section 86 of the Spanish Constitution[27]. Nevertheless, unlike what occurs with the Judicial Power, here there is no juridical duty to regulate, which remains for the sense of opportunity and convenience of the Executive.

6. CONCLUSIONS

Confining the conclusions of these pages to the three points stated in the explanatory text of the *Questionnaire* the following can be stated:

[26] Law 48/1984, of 26 December 1984, regulating Conscientious Objection and the Substituting Social Service.

[27] A decree-law cannot affect the laws of the basic institutions of the State, the rights, duties and freedoms of citizens, the system of Autonomous Communities nor the general electoral law. The governmental decree must in all cases be endorsed by the Congress of Deputies (Lower House) within a period of thirty days.

— Situations of legislative omissions that matter here (non-observance of mandates of redundant legislation in unconstitutional regulating situations due to rendering the immediate effectiveness of fundamental rights impossible or, more generally, their constitutional development) can today be regarded as overcome — at least in its coarsest manifestation (absolute omissions) — after thirty years of application of the Constitution in all fields. In general, the willingness of the legislative power to make up for the shortcomings pointed out by the Court has been notable, whether due to awareness of one's own responsibility, or due to the desire to avoid the effects of transitory solutions conceived by the Court as a means for filling in the detected gap.

— Relative omissions, or situations of defective or insufficient legislation, primarily located in the sphere of the principle of equality and non-discrimination, constitute relatively common phenomena in ordinary legislation. So too are cases of the defective legislative regulation of the guarantees of the intervention of the public authority in the terrain of freedom. The technique which the Court has for their correction basically involve either the imposition of the cooperation of the Judicial Power for the integration of the defective rule by means of analogy or the connection of the formal declaration of unconstitutionality with certain effects that are actually annulling which, administrating the removal of the effect produced by the deficient rule, impede its application *pro futuro*, thereby forcing the legislator to exercise his legislative power.

— The provisions of the Organic Law of the Constitutional Court do not offer the richness of other models of compared Law, the Court having worked out via its jurisprudence the technical resources that has so far suited it.

Madrid, October 2007