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The Constitutional Court of the Republic of Lithuania

## **PROBLEMS OF LEGISLATIVE OMISSION IN CONSTITUTIONAL JURISPRUDENCE**

### **Questionnaire**

For the XIV Congress of the Conference of European Constitutional Courts

#### **1. PROBLEMATICS OF LEGAL GAPS IN THE SCIENTIFIC LEGAL DOCTRINE.**

##### **1.1. The concept of the legal gap.**

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

Unfortunately, there are few authors from Bosnia and Herzegovina who have examined the concept of legal gaps. One can say that legal experts of this country base their positions on this subject on generally accepted theories that already exist on legal gaps. In the book *Theory of State and Law* (Sarajevo, 1998, page 326) Dr Fuad Muhic defines legal gaps as „*those legal situations which are not regulated by general or individual legal norms and which represent an interest to the social order. The order in turn has a need to subsequently regulate that gap. Legal gaps appear to be necessary for at least two reasons: because the life is incomparably richer than the very aspiration of the social order to be comprehensive and because the life itself makes the order powerless to*

*precisely predict every situation that is to occur; and because the very social order even if capable of predicting situations, is still not in possession of adequate and technical means to facilitate every individual regulation*". In legal theory of this country, in addition to basic meaning of concept "legal gap", there is also an issue of technical legal gap (covering situations where legal relations are not adequately incorporated in the norms) and legal gaps as to value (the understanding that norm regulates a certain social relations in an unjust or in some other deficient manner).

### **1.2. The concept of legislative omission.**

**Are the legal gaps which are prohibited by the Constitution <sup>1</sup> (or legal regulation of higher power) distinguished in the scientific literature? What is the prevailing concept of legislative omission as a sort of the legal gap in the scientific legal doctrine?**

We already mentioned the types of legal gaps examined in the law literature in Bosnia and Herzegovina in the previous answer. There are no other classifications of the legal gaps. There are no legal gaps which are prohibited by the Constitution.

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

**What is the prevailing concept of the mission of the constitutional court as a judicial institution in the scientific legal doctrine of your country? The constitutional court as a "negative legislator". The concept of the constitutional court as a "positive legislator". Problems of the influence of the jurisprudence of the constitutional court on law-making? Does the scientific legal doctrine consider the activity of the constitutional court when the constitutional court investigates and assesses legal gaps as well as the influence of the decisions of the constitutional court regarding**

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

**filling in the said legal gaps? Was the naming of the activity of the constitutional court as the one of "activism", "moderation" and "minimalism" reasoned on the basis of such decisions?**

A concept of mission of the Constitutional Court as judicial institution is not developed in scientific legal doctrine of our country.

Considering the jurisdiction of the Constitutional Court conferred to it by the Constitution of BiH, it can be concluded that the Constitutional Court, by exercising normative control, is not the body that creates Constitution or the law, rather body that, in exercising the role of protector of the Constitution and constitutionality, removes violations of the Constitution by eliminating unconstitutional laws i.e. laws and other regulations not in compliance with the Constitution from the legal system of the state of BiH. Viewed from this aspect, it can be concluded that the Constitutional Court has the role of the, so called, negative legislator.

On the other hand, the Constitutional Court has so far in its jurisprudence filled the legal gaps in the constitutional scheme. This is particularly seen in decision no. *U 5/98* relating to constitutionality of peoples, decision on the quality of laws as well as in decision on cases on Article IV(3)(f) when there is a dispute on whether certain law is destructive to the vital interest of some of the constituent peoples of BiH. In all these situations the Constitutional Court has done more than removing violations of the Constitution by removing inconsistent laws. The Constitutional Court developed principles and concepts which have constitutional status by virtue of its case-law and which constructively supplement the text of the Constitution.

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

**2.1. The constitution in the national legal system.**

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

The Constitution of BiH does not state *expressis verbis* that the Constitution is the highest legal act in the state. However, if we consider the text of Article VI (3) of the Constitution of BiH which reads:

*«The Constitutional Court shall uphold this Constitution.*

*a) The Constitutional Court shall have exclusive jurisdiction to decide any dispute that arises under this Constitution between the Entities or between Bosnia and Herzegovina and an Entity or Entities, or between institutions of Bosnia and Herzegovina, including but not limited to:*

.....

*- Whether any provision of an Entity's constitution or law is consistent with this Constitution.*

*Disputes may be referred only by a member of the Presidency, by the Chair of the Council of Ministers, by the Chair or a Deputy Chair of either chamber of the Parliamentary Assembly, by one-fourth of the members of either chamber of the Parliamentary Assembly, or by one-fourth of either chamber of a legislature of an Entity.*

*b) .....*

*c) The Constitutional Court shall have jurisdiction over issues referred by any court in Bosnia and Herzegovina concerning whether a law, on whose validity its decision depends, is compatible with this Constitution, with the European Convention for Human Rights and Fundamental Freedoms and its Protocols, or with the laws of Bosnia and Herzegovina; or concerning the existence of or the scope of a general rule of public international law pertinent to the court's decision.”*

as well as Article III (3)(b)

**“Article III(3)(b) Law and Responsibilities of the Entities and the Institutions:**

.....

*b) The Entities and any subdivisions thereof shall comply fully with this Constitution, which supersedes inconsistent provisions of the law of Bosnia and Herzegovina and of the constitutions and law of the Entities, and with the decisions of the institutions of Bosnia and Herzegovina. (...)”*

it can be concluded that it is determined by the Constitution of BiH, though in an implied manner, that the Constitution of BiH is in fact the highest legal act in the state of Bosnia and Herzegovina.

Such position is maintained by theoreticians of the constitutional law in BiH. So for example, Prof Dr Kasim Trnka in book *Constitutional Law* (Sarajevo, 2000, page 21) states:”*All other legal acts in the country, from constitutions of the entities and the canton through all the laws and regulations, must be in compliance with the Constitution of BiH”.*

Constitutional Court took the same position. In its Decision on Admissibility and Merits no. *U 106/03* of 27 October 2004 in item 29 reads: “*Constitutional Court reiterates that*

*the Constitution of BiH is the highest form of general act of the state and shall have priority over all other law inconsistent with it.*

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

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

Article VI(3)(a) of the Constitution, *inter alia*, provides that the Constitutional Court shall have exclusive jurisdiction to decide whether any provision of an Entity's constitution or law is consistent with this Constitution of Bosnia and Herzegovina. Although the Constitution explicitly refers only to "provisions of the Constitution and laws of the entities" as subject to constitutional control, the Constitutional Court also reviews constitutionality of the laws of Bosnia and Herzegovina consistent with the general task of the Constitutional Court to uphold the Constitution of Bosnia and Herzegovina. The jurisdiction to review these acts represents an exclusive jurisdiction of the Constitutional Court.

Constitution of BiH does not recognize the concept of review of the constitutionality of legislative omissions. In fact it does not provide *expressis verbis* that the Constitutional Court shall examine and review the constitutionality of the legal gaps nor did it provide special actions for reviewing such omissions.

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

As stated in the previous answer, the Constitution of BiH in the part relating to jurisdiction of the Constitutional Court, did not provide for the Constitutional Court's jurisdiction to examine and review the omissions in the legislation. Considering this, it is not possible to answer the questions relating to interpretation of this type of jurisdiction as it was not provided for by the Constitution and so the Constitutional Court did not develop it further through its case-law.

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

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

There is no law on the Constitutional Court of Bosnia and Herzegovina. Constitution of Bosnia and Herzegovina does not provide that the law on the Constitutional Court will be adopted but rather that the Constitutional Court will adopt Rules of the Court. So, the only act, except for the Constitution of Bosnia and Herzegovina, regulating the work of the Constitutional Court are the Rules of the Constitutional Court of BiH which have the force of the organic law. These Rules, same as the Constitution of BIH, did not provide for any special procedures to review legal gaps nor did they specify the type of the decision adopted by the Constitutional Court in cases concerning legal gaps.

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

#### **3.1 . Application to the constitutional court.**

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

With the Constitutional Court one may file request for review of constitutionality of the law and constitution of the entities as well as the appeals against the judgments of any court in BiH. If this is the abstract review of the constitutionality, the request may be filed by: a member of the Presidency, by the Chair of the Council of Ministers, by the Chair or a Deputy Chair of either chamber of the Parliamentary Assembly, by one-fourth of the members of either chamber of the Parliamentary Assembly, or by one-fourth of either chamber of a legislature of an Entity. The Constitutional Court shall also have appellate jurisdiction over issues under this Constitution arising out of a judgment of any other court in Bosnia and Herzegovina. The Constitutional Court shall have jurisdiction over issues referred by any court in Bosnia and Herzegovina concerning whether a law, on whose validity its decision depends, is compatible with this Constitution, with the European Convention for Human Rights and Fundamental Freedoms and its Protocols, or with the laws of Bosnia and Herzegovina; or concerning the existence of or the scope of a general rule of public international law pertinent to the court's decision.

Also, an appeal may be filed with the Constitutional Court by any person claiming that a judgment or any other decision of any court has violated his/her rights safeguarded by the Constitution and European Convention.

The issue of initiating proceedings in the event of legislative omission is generally not regulated either by Constitution of BiH nor the Rules of the Constitutional Court of BiH. There is therefore no regulation as to who or what may raise the issue of legislative omission.

#### **3.2. Legislative omission in the petitions of the petitioners.**

**May the petitioners who apply to the constitutional court ground their doubts on the constitutionality of the disputed law or other act on the fact that there is a legal gap (legislative omission) in the said law or act? What part of the petitions received at the constitutional court is comprised of the petitions, wherein the incompletion of the act with the constitution is related to the legislative omission? What subjects, who have the right to apply to the constitutional court, relatively more often specify in their petitions the legislative omission as the reason of the act's being in conflict with the constitution? Are there any specific requirements provided for as regards the form, contents and structure of the applications concerning the unconstitutionality of the legislative omission? If yes, describe them. Are they established in the law which regulates the activity of the constitutional court or are they formulated in the constitutional jurisprudence?**

The issue of legislative omission in the case-law of the Constitutional Court is the issue which does not directly appear as the subject of examination within abstract jurisdiction of the Constitutional Court. To be more particular, the applicants, to date, did not raise the issue of legislative omissions *expressis verbis* as such. From among the cases before the Constitutional Court, which could be characterized as legislative omissions examples, one can include those cases that deal with the issue of conformity of provisions of the law with the European Convention and articles of the Constitution providing human rights protection. For example, in case no. **U 14/05** (relating to issue of old foreign currency savings accounts) Chair of House of Representatives of the Parliamentary Assembly of BiH filed a request for review of constitutionality of the Law on Establishing and Settling Internal Obligations of the Federation of BiH (*Official Gazette of F BiH* no. 66/04), Law on Establishing and Manner of Settling of Internal Debt Arising (*Official Gazette of Republika Srpska* no. 63/04) and Law on Settling of the Internal Debt arising under old Foreign currency saving of the Brcko District (*Official Gazette of Brcko District of BiH* no. 27/04). The request contested the constitutional grounds for adoption of challenged laws at the level of entity and Brcko District claiming that the jurisdiction for adoption of challenged laws is exclusive jurisdiction of the state of Bosnia and Herzegovina). Inter alia, the applicant claimed that Article II(3)(k) of the Constitution of BiH guarantees right to property and Article III of the Constitution of BiH provides that foreign policy,

monetary policy, financing of international obligations of Bosnia and Herzegovina fall under jurisdiction of the institutions of Bosnia and Herzegovina. The issue of old foreign currency savings accounts represent, in the opinion of the applicant, obligation of Bosnia and Herzegovina assumed by International agreements or Agreement on Succession, meaning **that Bosnia and Herzegovina is under obligation to resolve this problem in an unified manner on the entire territory**<sup>2</sup>.

In case no. **U 17/06** the applicant did not request review of constitutionality on the grounds of existence of legislative omission, but it claimed that certain provisions of the law are not in compliance with Article 6 of European Convention. The present case involved issue forwarded to the Constitutional Court by the Supreme Court of Federation of BiH pursuant to Article VI (3)(c) of the Constitution of BiH and referred to review of constitutionality of Articles 152-157 of the Law on Offences violating Federal Regulation (*Official Gazette of F BiH* no. 9/96 and 29/00). The present case involved legal situation in which one law provides certain legal remedy (request for court protection), i.e. access to court and also instructs that the procedure for exercising that legal remedy provided for by another law is complied with while that law does not contain the procedure to exercise that legal remedy.<sup>3</sup>

Neither the Constitution of BiH nor the Rules of the Constitutional Court of BiH provide for review of constitutionality of the legislative omissions as special category. Thus there are no special conditions in terms of the form, contents or the structure of the request relating to unconstitutionality of the omission in the legislation.

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

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<sup>2</sup> Decision on Merits no. U 14/05 of 2 December 2005

<sup>3</sup> Decision on Admissibility and Merits no. U 17/06 of 29 September 2006

There are certain decisions that can be isolated that relate to issue of legal omissions although that issue was not raised in the request or the appeal. We shall now more closely describe the decisions in cases *U 17/06* and *U 14/05* already referred to earlier, which represent decisions from the abstract jurisdiction of the Constitutional Court.

In decision *U 17/06* the Constitutional Court concluded that Articles 152-157 of the Law on Offences violating Federal Regulations are not in compliance with Article II (3)(e) of the Constitution of BiH and Article 6 para 1 of the European Convention. Reasons of the decision provides: *“The Constitutional Court holds that Articles 152 to 157 of the challenged Law provide only a formal possibility of using an extraordinary remedy - a request for the protection of legality. However, these provisions do not stipulate the effective court proceedings to be conducted as regards this remedy and thus there has been an infringement of the principle of legal certainty, which requires that the state concerned must provide clear and specific norms available to everyone so that its citizens are able to bring their conduct into line with those norms and that the competent authorities must act accordingly and secure to all citizens the exercise of their constitutional rights which include, inter alia, the right of access to court within the right to a fair trial under Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention. The Constitutional Court reiterates that a fair and public hearing in “the determination of criminal charges” within the meaning of Article 6(1) of the European Convention is available in proceedings conducted under the challenged Law only if the mentioned extraordinary remedy can be exercised, as the previous proceedings are conducted by authorities which do not have the character of an independent and impartial tribunal that can provide a fair and public hearing.”*

The reasoning of decision no. *U 14/05* is based on the failure of Bosnia and Herzegovina to, when property rights of the owners of old foreign currency savings accounts are concerned, take all necessary measures to secure those persons the right to exercise their right to property under Constitution of Bosnia and Herzegovina and European Convention. Bosnia and Herzegovina failed to make legislative and institutional

framework for unified solution to this problem on the entire territory of Bosnia and Herzegovina.

Within this jurisdiction, the Constitutional Court took a position that *“it shall have jurisdiction to, in the procedure arising under appellate jurisdiction (exclusive jurisdiction of the Constitutional Court) carry out review of constitutionality under Article VI(3)(c) of the Constitution of Bosnia and Herzegovina if necessary”*.<sup>4</sup> It essentially involves the situations in which decisions of the courts were legal but unconstitutional since the laws, based on which they were adopted, are not in compliance with the Constitution. Constitutional Court found the grounds for such type of jurisdiction primarily in its task to protect human and constitutionally guaranteed rights. Constitutional Court has, in such decisions, in addition to allegations as to violation of the constitutional rights, also examined the quality of the law as it is exactly the very ambiguity of the law that led to human rights violations in the first place. In certain cases the lack of certain quality of law was reflected in the fact that the disputed laws failed to regulate certain legal relation.

The fundamental question raised in one case before the Constitutional Court, no. AP 1125/05 was the issue of non-acquittal of the persons that committed the criminal offense in the state of mental incompetence. Constitutional Court adopted decision<sup>5</sup> in this case and concluded: *“there is a violation of the right to personal freedom and safety when the appellant is prevented from having the decision on pronouncing safety measure of treatment and hospitalization reviewed upon his request. Constitutional Court has in addition found violation of the right under Article 5 para 1(e) and para 4 of the European Convention when valid laws fail to precisely define possibility, conditions, manner and procedure for pronouncing, extension or termination of measure of mandatory treatment or hospitalization in adequate health institution to persons who committed the criminal offense in the state of mental incompetence as well as an access to court for review of legality of detention which leaves room for arbitrary application of the law.”*

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<sup>4</sup> Decision of the Constitutional Court no U 106/03 of 26 October 2004, item 34

<sup>5</sup> Decision of the Constitutional Court no. AP 1125/05 of 16 January 2007

Constitutional Court referred to the following in reasoning of its decision:

*“There is no special regulation in the Republika Srpska which would regulate possibility, conditions, manner and procedure for pronouncing, extension or termination of measure of mandatory treatment or hospitalization in adequate health institution to persons who committed the criminal offense in the state of mental incompetence. Additionally, this issue is not examined by the Law on Protection of Persons adopted in 2004 after new criminal regulations entered into force, nor does that law contain adequate provisions on which authority, under which conditions and in what procedure may pronounce, extend or terminate measure to these persons. It does not provide the right to appeal against the decision on pronouncing, extension or termination of this measure and it does not stipulate effective right to access to court within meaning of Article 5 para 4 of the European Convention.*

*Additionally, neither the Law on Enforcement of Criminal Sanction regulates this issue although it was amended in 2004. Provision of the Law on Enforcement refers only to cases when criminal acts were committed in the state of considerably reduced mental capacity. The only provision regarding those persons who committed criminal offense in the state of mental incompetence relate to the issue who is competent to define the institution in which the safety measure of hospitalization and treatment of the person who committed criminal offense in the state of mental incompetence will be held.*

*Having all in this in mind, the Constitutional Court finds that there is no adequate legal framework in Republika Srpska that provides those person the protection of their rights under Article 5, para 1(e) of the European Convention and that Criminal Code o RS, Criminal Procedure Code of RS, Law on Protection of Persons and Law on Enforcement all fail to comply with the requirements under Article 5 para 1(e) of the European Convention with respect to those persons.*

*Constitutional Court finds that it is not its task to determine whether the competent legislator will commence with amendments of existing or adoption of new regulations that would secure the protection of the rights of the appellant or other persons who*

*committed criminal offenses in the state of mental incompetence but that is the exclusive task of the competent legislator or adequate bodies of enforcement authorities. However, Constitutional Court points out that the competent authorities are obligated to urgently assume adequate legislative and other measures to ensure that conviction of persons who committed criminal offense in the mental incompetence state is “legal” as required by Article 5 para 1(e) of the European Convention, as well as that the persons who have that right, in reasonable time intervals, initiated proceedings before the “court” within meaning of European Convention, for review of “legality” of pronounced measure and its extension, as required by Article 5 para 4 of European Convention with all guarantees referred to by the Constitutional Court in its decision.”*

In decision no. U 106/03<sup>6</sup> the issue raised was the issue of legal protection of the persons accused for customs offenses and access to court within scope of Article 6 of European Convention. In this case, the Constitutional Court concluded: *“It follows that the legislation for the determination of responsibility for fines under the Law on Customs Offences and the arrangements for seeking court protection under Article 153 of the Law on Offences Violating Federation Regulations contain a legal gap when it comes to persons who have been accused of committing customs offences in cases where the amount of a fine is below the minimum referred to in Article 153 of the Law. The Constitutional Court concludes that the gap of this kind, which deprives persons of common guarantees anticipated by the rule of law (guaranteed under Article I.2 of the Constitution of Bosnia and Herzegovina and relevant procedural law) when facing criminal charges, deprives legal regulations of their fundamental quality of a law... Moreover, the Constitutional Court holds that the legislation in the present case lacks the necessary legal quality equivalent to the non-compliance with the requirements under Article 6 paragraph 1 of the European Convention. However, the Constitutional Court recalls that the Constitutional Court is the highest general act of a State and it has priority over any other law that is inconsistent with it.”* Further, in item 35 of the decision, the Constitutional Court stated *“that it pointed out to an identical problem and omission on the part of the legislator in the Republika Srpska in 2001 (in case no. U*

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<sup>6</sup> Decision on Admissibility and Merits no. U 106/03 of 27 October 2004

*19/00) which should have been the signal to the legislative authorities to undertake positive action and amend the law in question in order to harmonize it with the constitution. The said problem is still pending resolution. For these reasons, the Constitutional Court holds it necessary that the Government of the Federation of Bosnia and Herzegovina, through the Parliament of the Federation of Bosnia and Herzegovina, should undertake certain steps in that regard and harmonizes the Law with the Constitution of Bosnia and Herzegovina, taking into due consideration the reasons adduced herein.”*

Therefore, although the Constitutional Court lacks *expressis verbis* jurisdiction to review legal gaps in these decision, the Court on his own initiative, examined quality of the laws. The issue of legal gaps appeared to be the reason that caused low quality of the laws.

#### **3.4. Legislative omission in laws and other legal acts.**

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

As already stated, the Constitution of Bosnia and Herzegovina provided for the Constitutional Court of BiH to examine only the laws as evident from Article VI (3)(a) which reads:

*“The Constitutional Court shall uphold this Constitution.*

*a) The Constitutional Court shall have exclusive jurisdiction to decide any dispute that arises under this Constitution between the Entities or between Bosnia and Herzegovina*

*and an Entity or Entities, or between institutions of Bosnia and Herzegovina, including but not limited to:*

*(...)*

*- Whether any provision of an Entity's constitution or law is consistent with this Constitution.*

*(...)"*

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

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

There were no similar cases in the case-law of the Constitutional Court to date.

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

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

We have said earlier that the Constitutional Court dealt with issue of legislative omissions through review of quality of the laws (item 3.3.). In those cases, the review of legislative omissions commenced upon initiative of the court and referred to issues of constitutional rights and freedoms.

#### **4. INVESTIGATION AND ASSESSMENT OF THE CONSTITUTIONALITY OF LEGISLATIVE OMISSION**

##### **4.1. Peculiarities of the investigation of legislative omission.**

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

Legislative omission problem in the case-law of the Constitutional Court appeared exactly in those cases concerning violation of the rights protected and guaranteed by the Constitution and European Convention.

##### **4.2. Establishment of the existence of legislative omission.**

**Specify the criteria formulated in the jurisprudence of the constitutional court of your country, on the grounds whereof gaps in the legal regulation may and must be recognized as unconstitutional. Does the constitutional court investigate only the disputed provisions of a law or other legal act? Does the constitutional court decide not to limit itself with only autonomous investigation of the content of the disputed provisions (or disputed act) but to analyse it in the context of the whole legal regulation established in the act (or even that established in the system of acts or the whole field of law)? Can the constitutional court investigate and assess legislative**

**omission of the legal regulation that used to be valid in the past? Does the constitutional court state the existence of gaps in the legal regulation which used to be valid in the past, when it analyzes the development of the disputed provisions (disputed act)? Does the constitutional court, when identifying the legislative omission, investigate and assess only the content and form of the legal regulation or also the practise of the implementation of the legal regulation?**

Article 32 of the Rules of the Constitutional Court: During the decision-making procedure, the Constitutional Court shall examine only those violations that are stated in the request/appeal.

In decision of the Constitutional Court no. U 17/057 the applicant requested the review of constitutionality of only certain provisions of the Law on Establishing the Company for the Transmission of Electric Power in BiH (Official Gazette of BiH, No. 35/04). However, the Constitutional Court carried out review of constitutionality of contested provisions accompanied by short review of the Law in whole, as evident from item 20 of the decision: *“The present law, including its contested provisions, represents an instrument of “control of the use of property”. This Law was published in an Official Gazette. The provisions of the Law, including the contested ones, were drawn up with sufficient clarity and precision, therefore all those to which they refer can understand the consequence of its actions. As stated in Article 1 and 2 of the present Law, “The objective of the Law is to establish a single transmission company and to ensure a continuous supply of electricity at defined quality standards for the enjoyment of the citizens of Bosnia and Herzegovina. The Law is intended to facilitate the creation of an electric energy market in Bosnia and Herzegovina and its integration into regional energy markets and regional energy development activities. The Law is based on existing international practices and applicable Directives of the European Union (and their implementation in European Union Member States.) It clearly follows from the aforementioned that the Law was adopted in the public and general interest. Moreover, the Constitutional Court finds that the contested provisions of the relevant Law in itself*

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<sup>7</sup> Decision on Admissibility and Merits no U 17/05 of 26 May 2006

*represent disproportionality between the “means employed and the objective sought to be achieved”. In accordance with the aforementioned, the Constitutional Court concludes that the contested provisions of the relevant Law do not violate the constitutional right to property arising under Article II(3)(k) of the Constitution of Bosnia and Herzegovina and Article 1 of Protocol No. 1 to the European Convention.”*

Article 17 of the Rules of the Constitutional Court reads as follows:

*“A request shall be inadmissible in any of the following cases*

.....

*8. the challenged general act is no longer in force.”*

It follows that the Constitutional Court examines only the constitutionality of the acts in force.

#### **4.3. The methodology of revelation of legislative omission.**

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

Depending on the case, the Constitutional Court uses different methods of interpretation.

Article II (2) of the Constitution of BiH reads:

*“The rights and freedoms set forth in the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocols shall apply directly in Bosnia and Herzegovina. These shall have priority over all other law.”*

Pursuant to this Article, the Constitutional Court pursues and refers to case-law of the European Court for Human Rights in addition to the case-law of the constitutional courts of other countries.

#### **4.4. Additional measures.**

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

Decisions of the Constitutional Court shall be final and binding for all subjects it refers to. Failure to enforce decisions of the Constitutional Court, pursuant to the Criminal Procedure Code of BiH, shall represent criminal offense. The Constitutional Court determines in its decision the manner and time limit for its enforcement. The authority obligated to enforce the decision is also obligated to report on the measures taken to enforce the decision. In the event of failure to enforce or delay in enforcement, the Constitutional Court adopts ruling establishing that decision is not enforced which is then forwarded to the competent prosecutor.

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

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

The legislative omissions are examined in decisions of the Constitutional Court as one of the elements within examination of the constitutionality. The legal gap is stated in the reasoning of the decision and legislator is advised of the need to adopt legal framework

that would secure protection of human and constitutionality guaranteed rights. Constitutional Court does not offer recommendation to the legislator as to how to avoid these legal omissions. The legislator is obligated by the decision to enforce the same pursuant to given instructions without additional recommendations as to its enforcement.

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

The Constitutional Court did not to that to date.

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

As already stated, the Constitutional Court notes the existence of legislative omission or other legal gap in reasoning of its decision without giving details that such gap is filled when regular court apply general legal principles.

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

In general, Constitutional Court does not have exhaustive model for reviewing and rectifying legislative omissions.

**4.6. Assessment of legislative omission In the resolution of the constitutional court decision.**

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

- a) recognizes the law (other legal act) as being in conflict with the constitution;**
- b) recognizes the provisions of the law (other legal act) as being in conflict with the constitution;**
- c) leaves the act (provisions thereof) to be in effect and at the same time recognizes the failure to act by the legislator (other subject of law-making) as unconstitutional by specifying the time period in which, under the constitution, the obligatory legal regulation must be established;**
- d) states the duty of the legislator (other subject of law-making) to fill in the legal gap (by specifying or without specifying the filling in of the legal gap);**
- e) states the existence of a gap in the legal regulation and points out that it may be filled in by general or specialized courts;**
- f) obligates courts of general jurisdiction and specialized courts to suspend the consideration of the cases and not to apply the existing legal regulation until the legislator (other subject of law-making) fills in the gap;**
- g) states the existence of the gap in the legal regulation without drawing direct conclusions or establishing any assignments;**
- h) applies other models of assessment of legislative omission.**

It was stated earlier that Rules of the Constitutional Court did not provide for special type of decision to be taken by Constitutional Court after the existence of the legal gaps is established. Therefore, there is no particular conclusion of the Constitutional Court in this regard. The issue of legal effect of decisions of the Constitutional Court is regulated by Article 63 of the Rules of the Constitutional Court. This Article regulates legal effect of decisions regardless of the “type” of its inconsistency with the Constitution.

This Article reads as follows:

***“Article 63***

*1. The Constitutional Court shall, in the decision granting a request, decide on its legal effect (ex tunc, ex nunc).*

*2. In a decision establishing incompatibility under Article VI.3 (a) and VI.3 (c), the*

*Constitutional Court may quash the general act or some of its provisions, partially or entirely.*

*3. The quashed general act or its quashed provisions shall cease to be in force on the first day following the date of publication of the decision in the Official Gazette of Bosnia and Herzegovina.*

*4. Exceptionally, the Constitutional Court may by its decision establishing the incompatibility under Article VI.3 (a) and VI.3 (c) of the Constitution, grant a time-limit for harmonization, which shall not exceed six months.*

*5. If the established incompatibility is not removed within the time-limit referred to in paragraph 4 of this Article, the Constitutional Court shall, by a further decision, declare that the incompatible provisions cease to be in force.*

*6. The incompatible provisions shall cease to be in force on the first day following the date of publication of the decision referred to in paragraph 4 of this Article in the Official Gazette of Bosnia and Herzegovina.”*

In its decision U 17/06, referred to earlier, the Constitutional Court concluded that Articles 152-157 of the Law on Offences violating Federal Regulations are not in compliance with Article II (3)(e) of the Constitution of BiH and Article 6 para 1 of the European Convention. The Parliament of the Federation of Bosnia and Herzegovina was ordered, in accordance with Article 63(4) of the Rules of the Constitutional Court of Bosnia and Herzegovina, to bring Articles 152, 153, 154, 155, 156 and 157 of the Law on Minor Offences Violating Federation Regulations (*Official Gazette of the Federation of Bosnia and Herzegovina*, No. 9/96 and 29/00) into line with Article II(3)(e) of the Constitution of Bosnia and Herzegovina and Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms. Therefore, the Constitutional Court decided that legal provisions are not in compliance with the Constitution of BiH (b) however it leaves challenged provisions in effect and gave

Parliament of the Federation of BiH a maximum time limit of 6 months to amend them (c).

In decision U 14/05, the Constitutional Court established that the Law on Settlement of Obligations on the Basis of Old Foreign Currency Savings of the Brčko District of Bosnia and Herzegovina and the provisions of, respectively, the Law on Establishment and Mode of Settlement of the Internal Obligations of the Federation of Bosnia and Herzegovina and the Law on Establishment and Mode of Settlement of the Internal Obligations of the Republika Srpska that concern the old foreign currency savings are not in compliance with Article III of the Constitution of Bosnia and Herzegovina. Bosnia and Herzegovina, and not Entities and Brcko District, within its jurisdiction within meaning of Article II (5)(a) of the Constitution of BiH, with a goal to meet obligations under Annex 6 of General Framework Agreement is competent to enact a legislative framework for resolving the issue of old foreign currency savings in a unified manner for all citizens of Bosnia and Herzegovina. By its decision, the Constitutional Court annulled challenged provisions in accordance with Article 63 para 2 of the Rules of the Constitutional Court of Bosnia and Herzegovina (the annulled provisions shall cease to have effect on the following day after the date of publication of this Decision in the *Official Gazette of Bosnia and Herzegovina*) and ordered the Parliamentary Assembly of Bosnia and Herzegovina to adopt a law regulating the issues of old foreign currency savings payment within 3 months after the date of publication of this Decision in the *Official Gazette of Bosnia and Herzegovina*.

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

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

This text already addressed the issue of assessment of quality of the laws in the appeals of the Constitutional Court and legal gaps within it. (item 3.3.)

**4.8. Means of the legal technique which are used by the constitutional court when it seeks to avoid the legal gaps which would appear because of the decision whereby the law or other legal act is recognized as being in conflict with the constitution. What means of the legal technique are used by the constitutional court when it seeks to avoid the legal gaps which would appear because of the decision whereby the law or other legal act is recognized as being in conflict with the constitution? Postponement of the official publishing of the constitutional court decision. Establishment of a later date of the coming into force of the constitutional court decision. Statement by the constitutional court that the investigated act complies with the constitution temporarily, at the same time specifying that in case that the act is not amended till certain time, it will be in conflict with the constitution. Recognition of the act as being in conflict with the constitution due to the legislative omission, without removing such act from the legal system. Interpretation of the act (provisions thereof) which complies with the constitution, in order to avoid the statement that the act (provisions thereof) is in conflict with the constitution due to the legislative omission. "Revival" of previously effective legal regulation. Other models of the decision are chosen (describe them).**

Constitutional Court did not develop any special legal techniques to avoid legal gaps that could appear because of decision, after it establishes law or other legal act not in compliance with Constitution of BiH.

As already referred, Article 63 of Rules of Constitutional Court provides that annulled general act and provisions of the law cease to be in effect the next day from the publishing of decision of Constitutional Court (on non-compliance with constitution of law or provision of law) in Official Gazette of Bosnia and Herzegovina which is done in practice. There are no special methods to postpone official publishing of the decision and its date when it becomes legally binding in the case-law of the Constitutional Court of BiH.

There is only one example in the case-law of the Constitutional Court when Constitutional Court acted to fill in the legal gap that appeared after the inconsistency of the provisions of the law with the Constitution of BiH was established. In its Decision on

Admissibility and Merits no. U 44/01 of 24 February 2004, the Constitutional Court established that a part of Article 11 of the Law on Territorial Organization and Local Self-Government and the title itself of the Law on the Town of Srpsko Sarajevo as well as its Articles 1 and 2 with respect to the names: Town of Srpsko Sarajevo, Srpski Drvar, Srpski Sanski Most, Srpski Mostar, Srpsko Goražde, Srbinje, Srpski Ključ, Srpska Kostajnica, Srpski Brod, Srpska Ilidža, Srpsko Novo Sarajevo, Srpski Stari Grad and Srpsko Orašje are not consistent with the Constitution of Bosnia and Herzegovina. The National Assembly of the Republika Srpska was ordered, pursuant to Article 63 para 2 of the Rules of Procedure of the Constitutional Court of Bosnia and Herzegovina, to harmonize Article 11 of the Law on Territorial Organization and Local Self-Government and the title itself of the Law on the Town of Srpsko Sarajevo as well as its Articles 1 and 2 with the Constitution of Bosnia and Herzegovina, within a period of three months after the date of publication of the present Decision in the Official Gazette of Bosnia and Herzegovina. This Decision was not enforced within given time limit so that Constitutional Court adopted on 22 September 2004 decision U 44/01 establishing that Decision of the Constitutional Court of Bosnia and Herzegovina no. U 44/01 of 27 February 2004 was not enforced within given time limit of three months from its publishing in the Official gazette of Bosnia and Herzegovina and that those provisions cease to be valid as of the date of publishing this Decision in the Official Gazette of Bosnia and Herzegovina. In this case at hand, and having regard to the Constitutional Court took account *“of an undisputed fact that a legal gap occurred when the contested provisions ceased to be in force, the need for an uninterrupted functioning of the town and the municipalities whose names have been determined by the provisions of the laws that ceased to be in force, the need for compliance with the General Framework Agreement for Peace in Bosnia and Herzegovina and the inter-Entity municipal demarcations, the need for distinguishing the names of towns and municipalities from similar names of towns and municipalities in the territory of the Federation of Bosnia and Herzegovina and the inability of application of former laws in respect of all names”*, the Constitutional Court has by its decision U 44/01 of 22 September 2004 established temporary names for the cities until inconsistencies established in Decision of Constitutional Court U 44/01 of 27 February 2004 are removed. This decision reads:

*“Given the temporary character of this Decision and with the aim of avoiding legal chaos on the territory of the Republika Srpska pending adoption of an appropriate law by the legislative bodies of the Republika Srpska in accordance with Decision of the Constitutional Court No. U-44/01 of 27 February 2004, and taking into account the fact that the contested provisions ceased to be valid, the Constitutional Court points out that, in the view of its overall constitutional role as a guardian of the Constitution of Bosnia and Herzegovina, it did not assume the role of a legislator in the present case.”*

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

### **5.1. Duties arising to the legislator.**

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

The decisions of the Constitutional Court shall be final and binding. Every physical and legal person shall be obligated to respect them. (Article 74 of the Rules of Constitutional Court).

Article 239 of Criminal Code of Bosnia and Herzegovina reads that an official person in the institutions of Bosnia and Herzegovina, institutions of the entities and institutions of the Brcko District of Bosnia and Herzegovina, who refuses to enforce the final and enforceable decision of the Constitutional Court of Bosnia and Herzegovina or Court of Bosnia and Herzegovina or Human Rights Chamber of Bosnia and Herzegovina, or if he

prevents enforcement of such a decision, or if he prevents the enforcement of the decision in some other way, shall be punished by imprisonment for a term between six months and five years.

This also relates to Parliament. However, it needs to be noted that in Bosnia and Herzegovina considering its complex system<sup>8</sup>, Parliament of Bosnia and Herzegovina and, Parliament of Federation of Bosnia and Herzegovina and National Assembly of Republika Srpska all act as legislative authorities. In addition there are three constitutional courts: Constitutional Court of Bosnia and Herzegovina, Constitutional Court of Federation of Bosnia and Herzegovina and Republika Srpska. When we refer to the state level and relation between the Parliament of Bosnia and Herzegovina and Constitutional Court of Bosnia and Herzegovina, particularly with respect to the enforcement of the decisions of the Constitutional Court, the regulations of the state parliament do not provide the type of decisions to be taken when Constitutional Court's decisions are enforced in general. That is the case as well with the Constitutional Court's decision itself that concerns the issue of legal gaps. The Rules of the House of Peoples of the Federation of Bosnia and Herzegovina<sup>9</sup> in the part that is entitled "*Rights and duties of the House of Peoples towards Constitutional Court of Bosnia and Herzegovina*" regulates this relation only in terms of other regulation and general act. However, the issue of enforcement of decisions of the Constitutional Court of Bosnia and Herzegovina is not regulated by these Rules. With respect to enforcement of decisions of the Constitutional Court of Federation of Bosnia and Herzegovina, Article 250 of the Rules provides as follows: "*Decision of the Constitutional Court of Federation establishing that the law is inconsistent with the Constitution of Federation forwarded to House of Peoples, shall be transferred by the Chair of House of Peoples to the competent working bodies and representatives. Chair of House of Peoples shall place the proposal of conclusion arising under decision of the Constitutional Court of Federation on the*

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<sup>8</sup> Constitution of Bosnia and Herzegovina provides that Bosnia and Herzegovina shall consist of the two Entities, the Federation of Bosnia and Herzegovina and the Republika Srpska. In addition, international arbitration award established Brcko District as a unique administrative unit of local self-government.

<sup>9</sup> Parliament of the Federation of Bosnia and Herzegovina consists of two chambers: House of Representatives and House of Peoples

*agenda of the first following session of the House of Peoples. House of Peoples shall decide on taking any necessary measures with regard to enforcement of decision of the Constitutional Court of Federation of Bosnia and Herzegovina.”* However, as is evident from this provision, type of decision to be adopted by the Parliament to help enforce decisions of the constitutional courts is not given.

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

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

Same answer as given in the previous item.

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

We stated on several occasions throughout this questionnaire that Constitutional Court does not have *expressis verbis* jurisdiction to review legislative omissions. Constitutional Court examined legislative omission within scope of quality of law review. If the basic task of the Constitutional Court is considered, which is the protection human and rights

guaranteed by the Constitution, the review of legislative omissions through quality of law review may be called an important activity as any other activity of the Constitutional Court contributing to protection of human and constitutionality guaranteed rights.

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