

## **NATIONAL REPORT**

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

**For the XIVth 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.?)**

Traditional scientific doctrine of states with the evolved system of the positive law concerning the problem of the omissionship has been concentrated not at the research of gaps as such as that, but at the studying of the specific methods of their overcoming and preventing, all measures on improvement of the national legal system on the whole.

The Republic of Belarus as the sovereign state has a characteristic of the concise history from the point of view of the historical process. During this time period the national legal system has been formed and it is the substantial achievement on the path to the construction of the state ruled by law, the legal nihilism was overcome on the whole.

On the ground of the Constitution and the universally acknowledged principles of international law the systematization and the codification of the legislation was realized in Belarus, the modern legislative base was framed for the purposes of the political, economic and social transformations, the safeguarding of the right and liberties of citizens and their realization in practice.

At the present time the legislation of Belarus consists of more than forty thousand acts, it stipulates the higher demands to level of norm creating and law applying activities that the Constitutional Court noted in the Message on constitutional legality in the Republic of Belarus, 2006. The development of public relations entails revisions of the effective legislations, it explains in many cases the

fact that the legislation has not yet become the stable and system, it contains a lot of contradictions, unclear formulated provisions, and often there is no prognosis of consequence of normative acts.

The Constitutional Court had noted repeatedly in its messages that for the successive realization of the principle of the state ruled by law on the practice it is necessary for the acts of the current legislation to form up the based on the Constitution legal pyramid where there is the exclusion of contradictions and gaps.

The application of constitutional norms in the field of the right and liberties of citizens often depends on their reproduction in the acts of the current legislation, this fact violates the principle of direct action of the constitutional provisions. The legislation is lacking in the clearness as regards the strengthening of rights and responsibilities of citizens and juridical persons, the certainty in the determination of the correlation of the legal force of the acts of one and different levels, their consensus; it is observed the untimely revision of the legislation and the explanation of the conflict norms, contradictoriness of the practice of application, the excess of the scope of their competence by law making bodies. The Constitutional Court has specified in its decisions in the latest years the shortcomings of the national system of the legislation.

Scientific researches in the field in Belarus were concentrated above all at the studies of the process of the law-construction, the bases of the norm making process, the different stages of the norm making, the competence of the law making bodies. The omissionship of law is considered as one of the shortcomings of the process of the legal regulation and studied from the point of view of the manners of their filling, preventing, the ascertaining of the causes and conditions that bring about the omissionship in law and their removing.

Due to that the legal gap in the legal regulation could be defined as full or partial lack of the legal norm that is required for the efficient regulation of the public relations.

Consideration must be given to the omissionship in law as the integral phenomenon of any actively developing legal system. The gap in the strict juridical sense arises in the field of public relations that is regulated by law. The subject (area) of legal regulation here is the determinative element in the process of discovering of omissionship.

If law regulates public relations that fall under juridical influence in a tradition, the gap in those legal norms is discovered rather promptly, and there are here traditional manners of its removing. For example, the application of the analogy of statute and the analogy of law is the commonly used manner for overcoming the gaps by the court in the sphere of civil law, where the subject of regulation is the field of the law influence in a tradition.

If there are new relations of principle that were subject to no legal regulation before (for example, global net INTERNET, the establishment of the electronic mass-media, the informational threats etc.), the ascertained in the regulation gap can be removed, as a rule, only by law maker. In that way the most-used sharing the gap is

based on the subject of overcoming (filling) of the gap: by court or law maker. As the manner overcoming the gap is considered to be the subsidiary application of law.

The sorts of gaps on the purport: the constitutional gap; the legislation omission; the substance of law as the indetermination of legal regulation is related to the phenomenon of the omissionship.

### **On constitutional gap**

The term “constitutional gap” is subject to debates closely connected with the definition of the subject of the constitutional regulation (limits of constitutional regulation, including the ambit of human rights and standards etc.), the definition of which is sufficiently elaborated in scientific doctrine.

On the one hand, the Constitution is a juridical act, and there may be contradictions among the constitutional norms (or the versions of different constitutions) as any normative act. This issue about any provision to be regulated in the constitutional text shall be solved in the light of the definition, as above mentioned, of the subject of legal regulation. On the other hand, in respect to the problematic nature of omissionship the constitution as the act enshrines the principles that are common for all system of law on the whole, the commencement of law. In this sense the constitution as the body of basic principles of functioning of the society and the state can not be considered in respect to the omissionship.

The term “constitutional gap” is not used in decisions of the Constitutional Court.

### **Legislative omission**

The legislative omission (in the strict juridical sense) is the most-used group of the gaps for the system of the positive law. It can be filled in by the competent norm making bodies or overcome by the court in the presence of conditions by investigating the concrete case.

Law “On the normative legal acts in the Republic of Belarus” specifies the legislative gap as the lack of the legal norms that regulate the public relations, the necessity of regulation of which is stipulated by the essence and the substance of the effective legal system of the state, the principles and norms of the international law (Article 1).

The subject of studying in the Constitutional Court is mainly the omission for the remove of which it is necessary to alter or to amend the legislation by the authorized bodies. The Constitutional Court specifies the presence of such omissions in the legislation in its decisions and proposes the authorized body within reasonable terms to get rid of the gap in question.

Article 72 of the above mentioned Law envisages that the norm making bodies ascertaining the omissions in the normative acts that adopted (issued) these acts shall amend them by making the adequate alterations and addenda that remove the omissions.

For example the Constitutional Court specifies such sort of the omission as omission in statute in its Decision of 26 May 2000 No. D-98/2000 “On some issues of realization of Article 57 of the Constitution of the Republic of Belarus”.

At the same time, consideration must be given to discussion not on the legislative omissions in the system of the legislation “prohibited by the Constitution” (item 1.1.), but on the subject of the legal regulation and, particularly, the level of such a regulation. In some cases the text of the Belarusian Constitution specifies that the sphere of one or another relation is under the regulation of statute only (for example, the issues of citizenship (Article 10 of the Constitution); the definition of the objects of the exclusively property of the state (Article 13 of the Constitution); relations between the state and religious organizations (Article 16 of the Constitution); the status of the city of Minsk (Article 20) etc.

See:

Decision of the Constitutional Court of the Republic of Belarus of 15 September 2004 No. D-176/2004 “On legal regulation of recovery of injury caused to life or health of citizens due to liquidation of legal entities which are bound to effect payments in compensation for the specified injury”

Decision of the Constitutional Court of the Republic of Belarus of 3 April 2001 No. D-112/2001 “On the right of citizens to appeal to the court on the issues arising due to exercise of criminal procedure relations”

The legislative omission also can be overcome (sometimes must be overcome) by the court. The competence of the court is to find the omission and in spite of the presence of the omission to take all measures for the action proceeding and delivering of the specific decision, in other words the court must not refuse the applicant in the proceeding on the motive of the omissionship. The above mentioned Article 72 envisages that before making adequate alterations and (or) addenda in to normative legal acts, the overcoming of the omissions may be realized by the use of the institutions of the analogy of statute and the analogy of law.

The institutions of the analogy of statute and the analogy of law are the traditional manners for overcoming the legislative omission. The application of the analogy is the one-shot measure for filling in the gap in the system of law. Law enforcement bodies find the specific forms of the similarity of the legal situations and are abstracted from them express generally by the way of application of the analogy the specific type of the objectively similar public relations. The exactness of the conclusion by way of the analogy depends on the depth, the certainty, the completeness of knowledge about the comparing legal phenomena. The subject applying the analogy in law should foresee clearly all the system of law, be competent, should bear responsibility for its decisions. Due to that, possibly, in particular, the Constitutional Court often specifies the necessity of application by the

courts of the institution of the analogy or the necessity of filling in of the existing gap in law for the law maker in its decisions.

The analogy of statute in the strict juridical sense envisages the disposition of case on the basis of the statute that regulates the relations similar to the relations that the court examines.

The Civil Code of the Republic of Belarus envisages the application of the civil legislation on the analogy. In particular, it is envisaged that in cases when the relations that are regulated by the civil legislation are not strictly settled by acts of legislation or the agreement of parts, the norm of the civil legislation regulating the similar relation applies to this relations as this is in line with their essence.

As far as it was mentioned, the Constitutional Court in its decisions envisaged the possibility of use of the norms of statutes that regulate the relations similar to those under consideration.

See:

Decision of the Constitutional Court of the Republic of Belarus of 4 October 2006 No. D-196/2006 “On technical normative legal acts”

In its decisions in respect to the institution of the analogy of statute the Constitutional Court envisaged both the necessity of its application and the inadmissibility.

See:

Decision of the Constitutional Court of the Republic of Belarus of 15 July 2002 No. D-144/2002 “On securing the constitutional right of imprisoned convicts to judicial appeal against incurred to them penalties”

Decision of the Constitutional Court of the Republic of Belarus of 12 November 2002 No. D-151/2002 “On definition of notion “income” for purposes of qualification of unlawful entrepreneur activities while calling to criminal liability”

The institution of the analogy of law is characteristic for the Belarusian system of law to a lesser degree, this is explained by the prevalence of the normative approach both in scientific doctrine and in the law making and the law enforcement activities. In the context of the analogy of law it is possible both the application of the common principles of the branch and the commencement and the principles of law. The Civil Code of the Republic of Belarus contains the provisions according to which in case of impossibility of use of the analogy of statute, the rights and the obligations of the parties are established proceeding from the commencement and the sense of the civil legislation (the analogy of law).

Regarding the common principles of law, the Constitutional Court in its Message on constitutional legality in the Republic of Belarus, 2002 specified a diversity of the common principle of law and norms strengthened in the Constitution that the law making and law enforcement bodies have take account of its activities: the constitutional principle of separation of powers and interaction of powers; the principle of proportion of restriction of individual rights and freedoms; the principle of granting equal economic possibilities for the economic entities of different forms of ownership; the principle of social partnership; the principle of sufficiency and completeness of legal regulation of public relations (the Constitutional Court adopted decisions on the basis of this principle both concerning the gaps in legal regulation and instances of unnecessary regulation of public relations in normative legal acts); the principle of access to justice; the principle of equality of all before the law; principle of equity; principle on informing citizens on decisions of state bodies and officials etc. The given principles have been realized in the grounded on them decisions of the Constitutional Court.

In addition, the Constitutional Court, by examining the case, specifies how should it be understand and applied the specific norm proceeding from the common principles of law.

See:

Decision of the Constitutional Court of the Republic of Belarus of 25 April 2001 No. D-115/2001 “On the conformity between the Constitution and Article 37 of the Administrative Code of the Republic of Belarus and of practice of its application”

It is necessary to mention that Belarusian legislation specifies the spheres where use of institutes of analogy of statute and analogy of law is impossible: in instances of calling to criminal or administrative liability the use of those institutes shall be prohibited (Article 72 of the Law in question).

### **Omission as legal indetermination**

Omission as legal indetermination shall presume that within the scope of legal regulation proposed by the legislator (other law making body) there are several variants of the solution.

The Constitutional Court pointed out more than once the indetermination or even contradictoriness in legislation and proposed the authorized bodies to get rid of it.

See:

Decision of the Constitutional Court of the Republic of Belarus of 28 December 2006 No. D-197/2006 “On improvement of provisions of Model regulations of a housing and building co-operative”

Decision of the Constitutional Court of the Republic of Belarus of 5 October 2000 No. D-103/2000 “On practice of application of decisions of the Constitutional Court of the Republic of Belarus of 2 July 1999 “On some issues of representation in court on civil cases”, of 13 December 1999 “On some issues of securing the citizens the constitutional right to legal aid in criminal proceeding”, of 4 July 2000 “On some issues connected with rendering legal aid to convicts” in part of realization of provisions of Article 62 of the Constitution”

### **Subsidiary application of law**

Subsidiary application of law assumes the use of the norms of law for regulation of social relations within the frames of several branches of legislation. Unlike application of law, for overcoming of gaps subsidiary application of the norms of law may have stable character that is envisaged by the legislator for the purposes of unity of legal regulation. For example, periods of limitations, notion “member of family”, issues of compensation of moral damage etc. may be used in several branches of law with regulation in one of them.

Decision of the Constitutional Court of the Republic of Belarus of 24 April 2003 No. D-156/2003 “On legal regulation of payment of national duty while examining labour disputes”

Decision of the Constitutional Court of the Republic of Belarus of 25 April 2001 No. D-115/2001 “On the conformity between the Constitution and Article 37 of the Administrative Code of the Republic of Belarus and of practice of its application”

Reasons for beginning of legal gaps in scientific doctrine shall be studied on the basis of problems, elimination from which shall promote the legislative process, the system of legislation, the law system on the whole. It may be specified both objective reasons of omissions – “lag” or “obsolescence” of the legislation as a result of new social relations or their modification: and subjective reasons – insufficiently strict or full specification of reality by the norms of law, inadequate elaboration of the act from the standpoint of legal technique, inaccuracy of the legislator etc.

It is necessary to take into account that equally with the omissions there is such a phenomenon as “qualified silence of legislator”. In this concrete case the legislator (law making body) fails to regulate social relations through legal norms consciously. For the Republic of Belarus this phenomenon is not typical, since the process of forming of primarily new legislation for last decades oriented the law making bodies first of all to issue effective normative legal acts.

## **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?**

If we consider the issue of the phenomenon of omission in the text of the Constitution of the Republic of Belarus from the point of view of strict terminology, then it is necessary to emphasize that the law maker while formulating the constitutional norms made no use of the term in question. In addition, it should be underlined that the constitutional norms find their stipulation in the texts of the laws and other normative legal acts, i.e. in the legislation, and the use of the term “legal gap” leads to the theory of differentiation of law and the law which is rather popular in Belarusian legal doctrine, especially from the stand-point of inalienability of human rights and freedoms, but, nevertheless, it is unclaimed in the countries with the system of positive law.

As for the national system of law, it seems that the use of the term “legal gap prohibited by the Constitution” is not correct enough. The most traditional and stable form of implementation of law is the law in the broad sense as the complex of normative legal acts issued by the competent bodies. Gap in legal regulation is revealing, first of all, as the omission in the legislation (definition of the given term is in the answer to item 1.1) and this term is the most common one in Belarusian scientific doctrine, law making and law application.

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

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

Under the Constitution of the Republic of Belarus the Constitutional Court shall have the right to verify the constitutionality of all normative legal acts in the state. Decisions of the Constitutional Court are directed, first of all, at securing the supremacy and realization of the norms of the Constitution. In accordance with the practice, very often it is carried out by way of “removing out” of legal turnover of the

norms or the acts of the legislation that are not in line with the Constitution. Thus, the Constitutional Court acts here, first of all, as “the negative legislator”.

See:

Judgment of the Constitutional Court of the Republic of Belarus of 1 June 1999 No. J-79/99 “On the conformity between the Constitution of the Republic of Belarus, international legal acts and part one of Article 182 of the Administrative Code of the Republic of Belarus”

Judgment of the Constitutional Court of the Republic of Belarus of 14 September 1999 No. J-88/99 “On the conformity between the Constitution, laws of the Republic of Belarus and explanation of the Main state tax inspection under the Cabinet of Ministers of the Republic of Belarus of 16 June 1995 “On return of excessively collected payments into the budget”

Judgment of the Constitutional Court of the Republic of Belarus of 13 May 1999 No. J-78/99 “On the conformity between the Constitution of the Republic of Belarus, international legal acts and part six of Article 209 of the Criminal Code of Procedure of the Republic of Belarus”

Decision of the Constitutional Court of the Republic of Belarus of 15 April 2004 No. D-172/2004 “On constitutionality of Provision on procedure of reception of citizens in Minsk city executive committee approved by Decision of Minsk city executive committee of 1 October 2002 No. 1430”

Judgment of 7 February 2002 No. J-137/2002 “On the conformity between the Constitution of the Republic of Belarus and Instruction on procedure of forming rent rates by legal entities of non-governmental form of ownership while renting non-residential buildings (premises)”

The Constitutional Court as a result of finding the verified act to be unconstitutional in order to avoid the gap that may entail more unfavourable consequences shall have the right to formulate on the grounds of the constitutional principles a temporary norm to be guided by law applying bodies. In this concrete case the Constitutional Court is a “positive legislator”.

In the majority of cases of revealing in the legislation of the gaps the Constitutional Court, according to the practice, shall propose the competent law making bodies the possible variants of meeting the gaps, by giving “the last word” for the Parliament or for another norm creating body.

See:

Decision of the Constitutional Court of the Republic of Belarus of 17 November 2000 No. P-104/2000 “On the right to amnesty of the convicts with respect to whom verdicts have taken no effect due to their cassation (protest)”

Decision of the Constitutional Court of the Republic of Belarus of 7 September 2005 No. P-188/2005 “On improvement of housing legislation related to concession of the living accommodations into ownership in place of living accommodations in a tenement-house that are found to be unfit for habitation”

The Constitutional Court shall also have the right to verify the constitutionality of law applying practice by way of verification of the acts of the Supreme Court and the Supreme Economic Court with the explanations to the lower courts on the application of the legislation.

See:

Judgment of the Constitutional Court of the Republic of Belarus of 9 June 1998 No. J-65/98 “On the conformity of point 38 of Ruling of the Plenum of the Supreme Court of the Republic of Belarus of 17 June 1994 No. 5 “On some issues of application by the courts of the legislation while settling labour disputes” with amendments made thereto by Rulings of the Plenum of the Supreme Court of the Republic of Belarus of 16 December 1994 No. 12 and of 28 June 1996 No. 8 to the Constitution and the laws of the Republic of Belarus”

Judgment of the Constitutional Court of the Republic of Belarus of 28 November 2001 No. J-132/2001 “On the conformity between the Constitution and provisions of points 20 and 21 of ruling of Plenum of the Supreme Court of the Republic of Belarus of 10 April 1992 No. 1 “On judicial practice on cases on bribery”

In scientific doctrine there is the universally acknowledged point of view that decisions of the Constitutional Court shall be the source of law and have direct effect on law making in the state. Legal position of the Constitutional Court expressed in its decision shall be taken into account by the legislator both while considering the concrete issue and exert further influence on the whole legal system. The Constitutional Court delivered more than 200 proposals on the improvement of the legislation, the majority of them were taken into account by law making bodies, first of all, by the Parliament.

As regards the activity of the Constitutional Court in revealing the gaps and in settling collisions, it should be noted that the Belarusian Constitution, few Constitutions have, fixes such a competence (right or obligation) of the Constitutional Court as control over the constitutionality of all normative legal acts. Thereby, it is presumed the active role of the Constitutional Court in support of due level of

functioning of the legal state mechanism. The recent tendency of increase of decisions of the Constitutional Court shall confirm this.

## **2. CONSOLIDATION OF CONTROL OF THE CONSTITUTIONALITY OF THE LEGISLATIVE OMISSION IN THE CONSTITUTION, THE CONSTITUTIONAL 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 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 constitutional court? The concept of the constitution as explicit and implicit legal regulation. Is constitution considered as law without gaps in the constitutional jurisprudence?**

The Constitutional Court shall have the right to verify all the pyramid of normative legal acts in the state.

In scientific doctrine there is the stable model of hierarchy of acts: 1) Constitution; 2) constitutional laws (laws on alteration, addenda, interpretation of the Constitution and their enforcement); 3) effective international treaties – a part of the effective legislation in the territory of the Republic of Belarus; 4) program laws; 5) codes and ordinary laws; decrees, edicts of the President; Rules of procedure and other acts of the Parliament; 6) normative resolutions of the Government; 7) decisions of the Central Electoral Commission; 8) normative acts of ministries, state committees, other state bodies; 9) acts of local Councils of deputies; 10) acts of executive and administrative bodies of local Councils of deputies.

This model is not an exhaustive one, but illustrates all the basic acts of the state. The Constitution shall have the supreme legal force. Laws, decrees, edicts and other acts of state bodies shall be promulgated on the basis thereof and in accordance with the Constitution of the Republic of Belarus. Where there is a discrepancy between a law, decree or edict and the Constitution, the Constitution shall apply (Article 137 of the Constitution). Legal acts or specific provisions thereof found in accordance with the procedure stipulated by the law to be at variance with the Constitution shall have no legal force (Article 7 of the Constitution).

Effect of the constitutional norms shall be both direct and after their concretization in other legislative acts that frequently determine the procedure of realization of the norms of the Constitution. Idea of direct effect of the norms of the Constitution finds its active confirmation in the constitutional doctrine and in constitutional practice.

Constitution is the basis for the development of all the legislation, as it contains the norms-principles, the principles of the basic branches and institutes of law; is the

juridical fundament for the norm making activities of the bodies of state power, differentiates their norm making competence; regulates the bases of norm making procedures, specifies the main types of normative acts and their relation on legal force; acts as the basis for systematization of the legislation and norm making technique.

As concerns the gaps in the Constitution, this issue is subject to consideration in the answer to the question 1.1.

## **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, substatory 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?**

Under Article 116 of the Constitution the Constitutional Court on the recommendations of the President of the Republic of Belarus, the House of Representatives of the National Assembly, the Council of the Republic of the National Assembly, the Supreme Court, the Supreme Economic Court, the Council of Ministers of the Republic of Belarus shall produce a ruling on:

- 1) the conformity of laws, decrees and edicts of the President of the Republic of Belarus, international contractual and other obligations of the Republic of Belarus to the Constitution of the Republic of Belarus and international legal acts ratified by the Republic of Belarus;
- 2) the conformity of instruments of interstate formations of which the Republic of Belarus is a part, edicts of the President of the Republic of Belarus issued in fulfillment of the laws, to the Constitution of the Republic of Belarus, international legal acts ratified by the Republic of Belarus, laws, decrees and edicts of the President of the Republic of Belarus;
- 3) the conformity of resolutions of the Council of Ministers of the Republic of Belarus, acts of the Supreme Court of the Republic of Belarus, the Supreme Economic Court of the Republic of Belarus, the Procurator-General of the Republic of Belarus to the Constitution of the Republic of Belarus, international legal acts ratified by the Republic of Belarus, laws, decrees and edicts of the President of the Republic of Belarus;
- 4) the conformity of acts of any other state body to the Constitution of the Republic of Belarus, international legal acts ratified by the Republic of Belarus, laws, decrees and edicts of the President of the Republic of Belarus.

According to Article 24 of the Code of the Republic of Belarus on judicial system and status of judges the Constitutional Court of the Republic of Belarus, by verifying the constitutionality of the challenged normative legal act shall find its conformity with the Constitution of the Republic of Belarus, international legal acts ratified by the Republic of Belarus, the laws, decrees, edicts of the President of the Republic of Belarus:

on the content of norms;

on the form of the normative legal act;

from the point of view of differentiation of the competence among the state bodies;

on the procedure of adoption, signing, publication and enforcement.

While considering the issues the Constitutional Court of the Republic of Belarus is not bound by the arguments and opinions of parties.

The Constitutional Court of the Republic of Belarus may also deliver its decision as regards the acts based on the act under verification or those that reproduce its certain provisions, if they were not mentioned in the proposal.

While verifying the act the Constitutional Court of the Republic of Belarus shall mean both its literal meaning and the meaning attached to it by the practice of application.

Thus, the Constitutional Court has *expressis verbis* competence to verify any normative legal acts, including as regards the presence of gaps in them that may be the ground for finding them to be unconstitutional, however, the Constitution of the Republic of Belarus establishes no *expressis verbis* with respect to special powers on assessment of just gaps in law. There is also no special procedure of consideration of this category of cases.

**2.3. Interpretation of the jurisdiction of the constitutional court to investigate and assess the constitutionality of legal gaps in the constitutional jurisprudence. The constitutional court as the official interpreter of the constitution. Has the constitutional court revealed in more detail its powers, which are explicitly entrenched in the constitution, to investigate and assess legislative omission? What are the grounds for the conclusions about the implicit consolidation in the constitution regarding the competence of the constitutional court to investigate and assess the legislative omission? Has the constitutional court formed the doctrine of consequences of stating the existence of legislative omission? If yes, describe it.**

Under the Constitution the right to normative interpretation of the constitutional norms shall have the Parliament (according to the composite procedure under Articles 97, 140 of the Constitution, by adopting the act if interpretation in the form of the constitutional law). The Constitutional Court shall exercise casual interpretation of the norms of the Constitution while considering the concrete case.

In addition, it is necessary to take into account that the casual interpretation by the Constitutional Court of the constitutional norms shall have more legal force than the normative interpretation of the Constitution by the Parliament, because according

to the competence of the Constitutional Court the acts of interpretation, as other laws of the Parliament, may be subject to verification by the Constitutional Court as regards their constitutionality.

In scientific researches dedicated to the powers of the Constitutional Court the issues of constitutional control concerning legislative omissions shall be considered in the aggregate powers of the Constitutional Court on improvement of the legislation on the whole, in the aspect of the role and place of constitutional justice in norm making process.

As for the doctrinal approach towards juridical consequences of finding legislative omissions by the Constitutional Court, this issue shall be solved in the course of the established model of constitutional process on the whole that is the subject of broad scientific researches.

Both in theory and in practice there are stable variants of models of legal situation after finding the act to be unconstitutional (juridical consequences). First of all, the constitutional norm may regulate relations directly without additional acts.

See:

Judgment of the Constitutional Court of the Republic of Belarus of 26 June 1998 No. J-68/98 “On the conformity between part two of Article 116 of the Code of laws relating to marriage and the family of the Republic of Belarus and the Constitution of the Republic of Belarus”

Secondly, relations regulated by the repealed act are under regulation not only of the constitutional norm (principle) but also of more general (in comparison with the repealed one) norm of the relevant branch.

See:

Judgment of the Constitutional Court of the Republic of Belarus of 7 February 2002 No. J-137/2002 “On the conformity between the Constitution of the Republic of Belarus and Instruction on procedure of forming rent rates by legal entities of non-governmental form of ownership while renting non-residential buildings (premises)”

Thirdly, regulation of legal situation may be in decision of the constitutional Court that makes concrete the relevant norms of the Constitution.

See:

Decision of the Constitutional Court of the Republic of Belarus of 11 January 2002 No. D-135/2002 “On the right to amnesty of the convicts with respect to whom effective sentences were subject to revision in the procedure of supervision”

Fourthly, there is an active use of the following form of development of the legislation (filling in gaps included): prerequisite of the Constitutional Court (proposal) for the authorized subject to alter, add or issue the relevant normative legal act and, thereby, to regulate public relations by the norm that is in line with the constitutional norm (that realizes the Constitution).

See:

Judgment of the Constitutional Court of the Republic of Belarus of 27 September 2002 No. J-146/2002 “On the conformity between the Constitution of the Republic of Belarus and part two of Article 6 of the Law of the Republic of Belarus “On procedure of exit and enter the Republic of Belarus of citizens of the Republic of Belarus”, point 13 of Rules of official registration of documents for leaving abroad of citizens of the Republic of Belarus, sub-item 25.1 of point 25 of Instruction on procedure of drawing up passport of a citizen of the Republic of Belarus for leaving abroad in part of fixing five-year term of effect of an obligatory note in passport of a citizen of the Republic of Belarus who is leaving abroad temporary”

Decision of 5 November 2002 No. D-149/2002 “On constitutionality of Decisions of Gomel oblast Council of deputies of 28 March 2002 No. 153 in part of use of increasing coefficients to the rates of single tax from individual entrepreneurs”

Decision of 14 February 2003 No. D-154/2003 “On constitutionality of Decision of Pinsk city Council of deputies of 27 December 2001 No. 104 “On budget of the city of Pinsk, 2002” in part of imposition of local due from users of infrastructure of city”

Those examples signify that application, understanding, concretization of constitutional requirements while examination of each case shall be the complex legal process. The result and juridical consequences in many respects shall depend on the fact, what public relations mediate the norms of the unconstitutional, to what extent they involve the system of law on the whole, what is the method of restoration of violated constitutional requirements that will be the relevant to both the letter and the spirit of the Constitution.

**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)?**

Legislative acts that regulate activities of the Constitutional Court, Rules of Procedure of the Constitutional Court shall not envisage directly the obligation of the Constitutional Court to examine and assess the gaps of legal regulation in the laws and in other legal acts.

At the same time, Article 22 of the Code of the Republic of Belarus on judicial system and status of judges, Article 7 of the Law “On the Constitutional Court of the Republic of Belarus” the Constitutional Court is granted the right to forward to the President of the Republic of Belarus, the chambers of the Parliament of the Republic of Belarus, the Council of Ministers of the Republic of Belarus, other state bodies according to their competence the proposals on the necessity of making alterations and addenda into the acts of effective legislation, adoption of new normative legal acts. The Constitutional Court shall also have the right to forward to the state bodies and to other organs other proposals as it follows from its competence.

The Constitutional Court, while verifying the constitutionality of the challenging normative legal act, shall find its conformity with the Constitution, international legal acts, ratified by the Republic of Belarus, laws, decrees and edicts of the President of the Republic of Belarus as regards the content of norms, the form of the normative act, from the view point of power differentiation among state bodies, the procedure of adoption, signing, publication and enforcement (Article 11 of the given Law).

The limits for settling the disputes before the Constitutional Court shall be specified by the Constitutional Court (point 29 of the Rules of Procedure of the Constitutional Court of 18 September 1997).

Thus, the legislation allows the possibility to study and to make evaluation by the Constitutional Court of the gaps of legal regulation made in the laws and in other legal acts.

The Constitutional Court while fixing the fact of the gap shall form its legal position. More detail consideration of decisions of the Constitutional Court is in answer to item 2.3.

As regards the issue of the subject of elimination of the gap in the legislation and the ways of its removal, there is no direct regulation. However, one should bear in mind that the whole system of the current legislation, including local normative legal acts, shall be based on the Constitution. The norms of the Constitution shall have direct effect. It means that the Constitution has priority in all cases, including omissions in legislation, i.e. where this is no adoption of the law in the in the progress of the constitutional norms or the law is not brought into line with the Constitution.

Decrees, as part three of Article 101 of the Constitution requires, must be issued by force or specific necessity. If there is the possibility during the session to adopt the law and declare it to be urgent, then, in the opinion of specialists of the constitutional law, one shall spare the right of the President to take the acts in

question. Making proposals for the President to issue the decree must be deeply well-thought-out and well-grounded, where all the other variants for the settlement of the problem are excluded. At the same time, owing to the status, the President shall have the right to issue legal acts that secure implementation of the Constitution and the laws, in all the cases where there is the absence of other appropriated mechanisms, including for the purposes of meeting the gaps due to inactivity of the legislator.

It should be emphasized that sometimes it may be the necessity of filling in the gaps that must be settled by the laws. Here is also a direct specification in the Constitution. In this case it is possible to issue the decree that will be effective till coming into legal force of the relevant law, i.e. here we may speak about decrees of temporary nature and the presence of the institute of legislative veto.

It is necessary once again to make reference to Article 72 of the Law “On normative legal acts of the Republic of Belarus” that stipulates that the norm making bodies (officials) ascertaining the omissions in the normative acts that adopted (issued) this acts shall make alterations or addenda in them that remove the omissions. Before making the relevant alterations and (or) addenda, overcoming of omissions may be carried out by way of use of institutes of analogy of statute and analogy of the law.

By force of Article 77 of the given Law on the basis of control, supervision and verification of realization of normative legal acts, analysis of complaints norm making bodies (officials) and other authorized special bodies (persons) shall define the quality, lawfulness and effectiveness of normative legal acts.

The Rules for preparation of draft normative legal acts approved by Edict of the President of the Republic of Belarus of 11.08.2003 No. 359 “On measures concerning improvement of norm making activities” shall be the normative ground for preparation of draft acts.

The given Rules shall specify the peculiarities of the procedure of preparation of draft normative legal acts of the President of the Republic of Belarus, the House of Representatives and the Council of the Republic of the National Assembly of the Republic of Belarus, the Council of Ministers of the Republic of Belarus, ministries, other republican state bodies, the National Bank, the National Academy of Sciences, of Belarus, local Council of deputies, executive and administrative bodies, content and technical juridical requirements for their drawing.

By studying the legislation, including international treaties of the Republic of Belarus, that is related to the subject of legal regulation of a draft law, its elaborators shall reveal contradictions, omissions and other deficiency in the acts under examination (point 25 of the given Rules). There shall be the analysis of the legislation, including international treaties of the Republic of Belarus that is related to the subject of legal regulation of a draft law, as well as practice of its application. Moreover, there shall be specified the presence of contradictions and omissions in the legislation, out-of-dated, ineffective norms, reasons of inadequately effective current norms, the most rational methods of removal from shortcomings of legal regulation of the relevant social relations (point 26 of the Rules).

The National Centre of legislative activities under the President of the Republic of Belarus shall study the practice of application of normative legal acts and shall carry out prognosis of effectiveness of their application.

### **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?**

Under Article 116 of the Constitution of the Republic of Belarus the competence, organization and procedure of activities of the Constitutional Court shall be specified by Law.

In accordance with Article 22 of the Code of the Republic of Belarus on judicial system and status of judges the Constitutional Court shall consider cases on the appropriate proposals of the initiators.

Proposals to review the constitutionality of an enactment may be submitted to the Constitutional Court by the President of the Republic of Belarus, the House of Representatives, the Council of the Republic, the Supreme Court of the Republic of Belarus, the Supreme Economic Court of the Republic of Belarus, the Council of Ministers of the Republic of Belarus.

Other state bodies, public associations and also citizens shall apply to the bodies or persons empowered to submit an application for review of the constitutionality of an enactment.

The limits of deciding of the issues raised before the Constitutional Court shall be defined by the Constitutional Court (point 29 of the Rules of Procedure of the Constitutional Court of the Republic of Belarus of 18 September 1997).

Accordingly, the provisions of the Constitution and the laws give the Constitutional Court the possibility to study and evaluate the omissions of the legal regulation in the laws and other normative legal acts.

#### **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 in compliance 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 content of the application to the Constitutional Court on the review of the constitutionality of the act is stipulated in the Article 47 of the Law “On the Constitutional Court of the Republic of Belarus”. In particular, in such application it should be: the grounds for consideration of the issue by the Constitutional Court; the position of a party and its legal basis with reference to the appropriate legislative provisions. In practice the applicants often indicates in the application on the existence of the omission, legal ambiguity of the legal regulation.

See:

Decision of the Constitutional Court of the Republic of Belarus of 24 June 1999 No. D-82/99 “On some issues connected with regulation of the procedure and conditions of payments of shares in house building co-operatives”

Decision of the Constitutional Court of the Republic of Belarus of 17 November 2000 No. D-104/2000 “On the right to amnesty of the convicts with respect to whom verdicts have taken no effect due to their cassation (protest)”

As for the number of the applications it should be noted that in the significant number of application of the authorized subjects they concern about the constitutionality of the act as it was mentioned before. In this case decisions on the constitutionality of the omissions are in much lesser part of the applications. Evaluation of the legal regulation on the presence of the omission in the legislation mostly is given by the Constitutional Court.

See:

Decision of the Constitutional Court of the Republic of Belarus of 23 May 2002 No. P-59/2002 “On the right of disposal by the citizens of the their private property owned dwellings in the separate cantonment”

The subjects who apply to the Constitutional Court on the issues of omission and legal ambiguity are different: Parliament, President, Supreme Economic Court.

Example:

Upon the application of the Supreme Economic Court – Judgment of the Constitutional Court of the Republic of Belarus of 24 September 1998 No. J-71/98 “On the conformity between the Constitution, laws of the Republic of Belarus and point 25 of the List of types of payments to which no dues on state social insurance are calculated approved by the Ministry of social protection and the Ministry of

labour of 19 June 1996, sub-items 5.2, 5.3 of the Instruction on the procedure of collection and accounting of insurance dues to the Fund of social protection of the population of the Republic of Belarus approved by the Board of the Fund of social protection of the population of the Republic of Belarus of 12 April 1994, sections 9, 10, 11 of the Instruction on statistics of the size of the workers and wage approved by the Ministry of statistics and analysis of 19 December 1994”.

Upon the application of the President – Judgment of the Constitutional Court of the Republic of Belarus of 11 December 1998 N J-74/98 “On the conformity between the Constitution of the Republic of Belarus and part three of Article 404 of the Code of Criminal Procedure of the Republic of Belarus”

Upon the application of the House of Representatives of the National Assembly – Judgment of the Constitutional Court of the Republic of Belarus of 23 July 1999 No. J-86/99 “On the conformity of the Provision on the methods and conditions of towing, storage and realization of vehicles which obstruct interyard territory, impede for cleaning streets and roads, adopted by decision of Minsk urban executive committee of 28 December 1995 No. 783, and point 7.3 of decision of Minsk urban executive committee of 9 December 1998 No. 1330 "On the methods of parking of vehicles, maintaining of the roadway net and interyard territory" to the Constitution and the laws of the Republic of Belarus”.

There are no special requirements (on the form, content and structure) to the application on the check of the constitutionality of the legislative omission.

### **3.3. Investigation of legislative omission on the initiative of the constitutional court.**

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

The Constitutional Court manifests the initiative on finding and eliminating of the omissions during the studying the applications of the authorized subjects even if there is no issue on the omission raised in the application.

As a motive can be defined the situation that existence of the omission in the legislation leads to the discrimination of the lawful rights and freedoms of citizens to its violations (citizens can not realize empowered to them rights, facilities, its realization became more difficult) and sometimes abuse from the part of citizens. Also the omission does not allow to secure in full range the interests of the state.

See:

Decision of the Constitutional Court of the Republic of Belarus of 27 October 1999 No. D-89/99 “On some issues connected with regulation of the procedure of payment for public utilities”

Decision of the Constitutional Court of the Republic of Belarus of 7 September 2005 No. D-188/2005 “On improvement of housing legislation related to concession of the living accommodations into ownership in place of living accommodations in a tenement-house that are found to be unfit for habitation”

Also as a motive of finding and eliminating of the omission in the form of legal indetermination serves the fact that omission leads to the difficulties in the application in practice of the legal norms, lack of uniformity in the regulation of the legal relations and as a result – to the multiple petitions of citizens to different state bodies.

See:

Decision of the Constitutional Court of the Republic of Belarus of 24 June 1999 No. D-82/99 “On some issues connected with regulation of the procedure and conditions of payments of shares in house building co-operatives”

Decision of the Constitutional Court of the Republic of Belarus of 5 September 2000 No. D-101/2000 “On the payment for using of the dwellings and technical maintenance of the housing stock”

While examining the legislative omissions during studying of the motions on its own initiative, Constitutional Court starts with the point that appropriate legal regulation of the shall contribute to the more full realization and protection of the rights and freedoms of citizens along with bringing of the practice in accordance with the legislation.

See:

Decision of the Constitutional Court of the Republic of Belarus of 13 July 2001 No. D-125/2001 “On procedure of drawing up the right of ownership to the flat in the house of a housing and building co-operative”

The interpretation of the articles of the Constitution along with analysis of the legal situation in whole, including al complicated array of the circumstances of the case, is stipulated in the reasoning part of the decision

See:

Decision of the Constitutional Court of the Republic of Belarus of 26 April 2000 No. D-97/2000 “On the necessity to improve land legislation concerning the rights of members of gardening associations who are owners of plots of land”

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

The Constitutional Court for many times has noted that for the successful becoming of the Republic of Belarus as a state ruled by law it is very important that acts of the acting legislation shall form the constructed on the basis of the Constitution legal pyramid which does not contain any contradictions and omissions. In accordance with the Constitution the Constitutional Court has the right to review the constitutionality of the whole mass of the normative legal acts in the state. Therefore, it has the right to examine any normative legal act on the issue of presence of the omissions in it. In the practice of the constitutional jurisprudence one can find the examples of examining by the Constitutional Court of the facts of existence of the omissions on the majority of the types of acts which form the normative legal pyramid.

International treaties:

Decision of the Constitutional Court of the Republic of Belarus of 23 February 2006 No. P-181/2007 “On the improvement of the legal regulation of the order of homologation (nostrification) of the documents on education”

Codes

Decision of the Constitutional Court of the Republic of Belarus of 7 September 2005 No. D-188/2005 “On improvement of housing legislation related to concession of the living accommodations into ownership in place of living accommodations in a tenement-house that are found to be unfit for habitation”

Laws

Decision of the Constitutional Court of the Republic of Belarus of 24 April 2003 No. D-156/2003 “On legal regulation of payment of national duty while examining labour disputes”

Decision of the Constitutional Court of the Republic of Belarus of 12 May 2005 No. D-185/2005 “On the taxation of compensation for moral injury”

#### Resolutions of the Government

Judgment of the Constitutional Court of the Republic of Belarus of 29 March 2006 No. J-194/2006 “On the conformity between the Constitution, other laws of the Republic of Belarus, international treaties of the Republic of Belarus and Resolution of the Council of Ministers of the Republic of Belarus of 18 December 1992 No. 758 “On conditions of awarding pensions for certain categories of workers of aviation of air test crew” in part of pension security of air stewards/stewardesses of civil aviation”.

#### Acts of ministries and administrations

Decision of the Constitutional Court of the Republic of Belarus of 26 August 2005 No. P-141/2005 “On the measures on the protection of the constitutional rights lawful interests of citizens in the field of the protection of the environment”.

#### Decisions of local councils of deputies and executive and administrative bodies

Decision of the Constitutional Court of the Republic of Belarus of 12 January 2006 No. D-191/2006 “On legal regulation of relations connected with passage of citizens in city public transport in case of alteration of rates for transportation of passengers”.

Decision of the Constitutional Court of the Republic of Belarus of 14 February 2003 No. D-154/2003 “On constitutionality of Decision of Pinsk city Council of deputies of 27 December 2001 No. 104 “On budget of the city of Pinsk, 2002” in part of imposition of local due from users of infrastructure of city”.

The norm making body (official) has the right to delegate a part of its norm making powers to other norm making bodies (officials) if it does not contradict with the Constitution and other legislative acts of the Republic of Belarus. In the normative legal act on the delegation of powers shall be named the body (official) and the term on which the powers are delegated along with the other conditions of the delegation. The state body (official) while adopting (enacting) of the normative legal act in accordance with the procedure of realization of the delegated powers is bound to refer to the normative legal act by which it was delegated the corresponding powers (Article 55 of the Law “On the normative legal acts of the Republic of Belarus”).

As for the issues of the delegation of the powers, in practice is possible various situations in delegating of the powers caused by the omission.

1. Delegation of the powers is performed on the issue which falls within the exclusive competence of the delegating body. In this respect adopted by the body to which such powers were delegated normative legal acts are void only because of the fact that such delegation was normatively forbidden, even if on its content mentioned normative legal acts does not contradicts with the acting legislation.

See:

Decision of the Constitutional Court of the Republic of Belarus of 1 December 2005 No. P-157/2005 “On constitutionality of the delegation by local Councils of deputies of the powers on increasing (reducing) of the rate of the estate tax by the local executive bodies”.

2. Delegation of the powers is performed legally, however, the act, adopted in pursuance of delegation by the competent body itself was omissible due to its imperfection.

Decision of the Constitutional Court of the Republic of Belarus of 12 July 2005 No. D-139/2005 “On fixing the ultimate rate of the due from users”

3. Delegation is performed legally in the way of charge on the adoption of the appropriate legal act, however the performer either failed to complete the charge and by that had created the omission or carry out it in the part and as well had created by that the omission in the legal relations. The situation described in the question chiefly fall into this case

See:

Decision of the Constitutional Court of the Republic of Belarus of 13 July 2001 No. D-125/2001 “On procedure of drawing up the right of ownership to the flat in the house of a housing and building co-operative”

Decision of the Constitutional Court of the Republic of Belarus of 23 February 2006 No. P-181/2007 “On the improvement of the legal regulation of the order of homologation (nostrification) of the documents on education”

It is clear that it is impossible fully to avoid the situations with the delegation by the norm making bodies of the part of their powers to the other bodies, and authorize them on the deciding of certain issues is impossible. It is predetermined both established traditions of the national legislation and the principle of the legislative retrenchment and some other things. At the same time the Constitutional Court hold that the delegation by the Parliament or by the Government of the powers

to other bodies on the issues that involve the rights, freedoms and duties of citizens it shall be expedient to determine the limits of such regulation in by-laws. This shall make it possible to exclude the cases of adoption of decisions that do not to the full meet the aims of the legislative regulation.

### **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.)?**

The order and basis of the refusal of the Constitutional Court in considering of the application of the review of the constitutionality of the act are stipulated in the Law "On the Constitutional Court of the Republic of Belarus".

In particular, the Constitutional Court refuse to consider the application if: 1) the application is submitted by a body or person having no authority to do so 2) the application does not meet the requirements set out in Law "On the Constitutional Court of the Republic of Belarus" on the issues of the content of the application 3) the application does not fall within the competence of the Constitutional Court 4) the constitutionality in whole or in part of the international treaty or other enactments mentioned in the application has already been reviewed by the Constitutional Court and, since that review, there has been no change in the Constitution or other legal rules which served as the basis for the Court's decision 5) a matter dealt with in the international treaty or other enactment whose constitutionality is disputed is not provided for in the Constitution and the means of properly resolving it cannot be derived from the general principles and meaning of the Constitution 6) a party has not remedied formal shortcomings in an application for review of the constitutionality of an enactment (Article 49 of the mentioned Law).

There are no other grounds for the refusal stipulated in the legislation. If during the consideration of the case the omission in the legislation is discovered then the Constitutional Court shall deliver the decision aimed on the filling in or overcoming of the omission. The existing practice of the constitutional justice does not know the examples of refusal in the studying and evaluation of the legislative omission during the hearings of the concrete case because of the absence of the direct links on the suchlike research or some "political issues" etc. The Constitutional Court formulates its position on the basis of the norms of the Constitution.

### **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?**

The activity of the Constitutional Court is mainly control over the conformity of the normative legal acts to the Constitution. During the process of the considering of the case the Constitutional Court form its legal position on the point of the constitutionality of the act: finds the act to be constitutional or unconstitutional. In this case as it was mentioned before the Constitutional Court has the authority to check the constitutionality of all the normative legal acts. On the existing practice more often “derive” from the legal tour norms and acts of the legislation which contravene with the Constitution.

In this respect it is important to take into account that according to the Code of the Republic of Belarus on judicial system and status of judges and the Law “On the Constitutional Court of the Republic of Belarus” in its consideration of issues, the Constitutional Court shall not be bound by the arguments and opinions of the parties concerned. The Constitutional Court may also deliver its decision on enactments based on an enactment already reviewed or reproducing certain provisions of that enactment, even if they are not referred to in the application.

As for the protection of the rights and freedoms of citizens, it is important to note that the majority of the decisions of the Constitutional Court are aimed on the realization or elimination of the barriers towards the realization of the constitutional rights and freedoms of citizens.

#### **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 organization and activity of public power. The peculiarities of investigation and assessment of legislative omission in substantive and procedural law. The particularity of investigation of legislative omission in private and public law. The particularity of investigation of legislative omission in the verification of the constitutionality of international agreements. When answering these questions, indicate the constitutional justice cases with more typical examples.**

The Constitutional Court exercise mainly consecutive (posteriori) constitutional control. Exception is made for the international treaties before its

ratification by the Parliament. According to the provisions of the Code of the Republic of Belarus on judicial system and status of judges and the Law “On the Constitutional Court of the Republic of Belarus” the Constitutional Court shall not be entitled to undertake a review or analysis draft enactments whose constitutionality it may be called upon to consider.

The Constitutional Court considers the cases of different categories both connected with the evaluation of the omissions in the legislation and not connected with the mentioned problem. Majority of them are aimed on the security of the constitutional rights and freedoms of citizens.

In particular, the Constitutional Court repeatedly addressed to the problem of realization of the constitutional right of citizens of the judicial protection, including the right to the qualified legal assistance.

See:

Judgment of the Constitutional Court of the Republic of Belarus of 19 June 1998 No. J-66/98 “On the conformity between the Constitution of the Republic of Belarus and Article 246 of the Administrative Code of the Republic of Belarus”.

Judgment of the Constitutional Court of the Republic of Belarus of 24 June 1998 No. J-67/98 “On the conformity between Article 267 of the Administrative Code of the Republic of Belarus, point 2 of Ruling of the Plenum of the Supreme Court of the Republic of Belarus No. 7 of 20 September 1990 "On the practice of the examination by the courts of the Republic of Belarus of the complaints against the actions of the bodies and officials in connection with imposition of administrative penalties" and the Constitution of the Republic of Belarus”.

Decision of the Constitutional Court of the Republic of Belarus of 4 July 2000 No. D-100/2000 “On some issues connected with rendering legal assistance to convicts”.

Decision of the Constitutional Court of the Republic of Belarus of 5 October 2000 No. D-103/2000 “On practice of application of decisions of the Constitutional Court of the Republic of Belarus of 02 July 1999 “On some issues of representation in court on civil cases”, of 13 December 1999 “On some issues of securing the citizens the constitutional right to legal aid in criminal proceeding”, of 04 July 2000 “On some issues connected with rendering legal aid to convicts” in part of realization of provisions of Article 62 of the Constitution”.

Decision of the Constitutional Court of the Republic of Belarus of 15 June 2007 No. D-200/2007 “On right of individual persons to legal aid in the administrative process”.

The Constitutional Court has examined also many cases connected with the problems in the legislation, aimed at realization of personal, political, social, economic, cultural rights of citizen.

See:

Judgment of the Constitutional Court of the Republic of Belarus of 27 September 2002 No. J-146/2002 “On the conformity between the Constitution of the Republic of Belarus and part two of Article 6 of the Law of the Republic of Belarus “On procedure of exit and enter the Republic of Belarus of citizens of the Republic of Belarus”, point 13 of Rules of official registration of documents for leaving abroad of citizens of the Republic of Belarus, sub-item 25.1 of point 25 of Instruction on procedure of drawing up passport of a citizen of the Republic of Belarus for leaving abroad in part of fixing five-year term of effect of an obligatory note in passport of a citizen of the Republic of Belarus who is leaving abroad temporary”

Besides from the imperfection of the legislation the omissions in the given category of cases are determined also by high level of generalizing of the constitutional principles while formulating of the constitutional rights and freedoms. In this connection often the situation occurred when the existing right was difficult to realize by the citizen due to the lack of necessary mechanisms or the procedure in the acting acts of legislation.

See:

Decision of the Constitutional Court of the Republic of Belarus of 5 January 2005 No. D-182/2005 “On legal regulation of procedure and conditions of return of shares for persons withdrawn from organizations of citizens having built”.

In its decisions the Constitutional Court had considered the omissions in the acts of legislation, which regulates the sphere of public power, in particular the issues of the competence and limits of the authorities of the bodies of state power and administration.

See:

Decision of the Constitutional Court of the Republic of Belarus of 10 April 2002 No. D-140/2002 “On setting of fixed sums of incomes tax while renting out living accommodation in the city of Minsk”.

Decision of the Constitutional Court of the Republic of Belarus of 23 May 2002 No. D-142/2002 “On decisions of Minsk city executive committee concerning suspension of taking documents for indexation of cheques “Zhiljo” (“Dwelling”)”.

Decision of the Constitutional Court of the Republic of Belarus of 9 October 2002 No. D-147/2002 “On the constitutionality of setting of local due from natural persons while crossing by them of the border of the Republic of Belarus through control-crossing points”.

As it follows from the mentioned above examples the Constitutional Court had examined the omissions both in material and procedural law, in public and private law.

While examining the constitutionality of international treaties the Constitutional Court starts from the Article 8 of the Constitution, according to which the Republic of Belarus shall recognize the supremacy of the universally acknowledged principles of international law and ensure that its laws comply with such principles. In this case concluded international treaties shall be in conformity with the Constitution.

#### **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 practice of the implementation of the legal regulation?**

Because the Constitution and laws do not contain the provisions which deal with the special procedures of considering the constitutionality of the omissions in the legislation, criteria of its evaluation in whole fit to the general approaches to the definition of the constitutionality of the normative legal acts. In this case the basis criterion is the violation of the rights and freedoms of citizens, guaranteed by the Constitution because of the presence in the legislation of the omissions or the acts which violates or diminish them.

There were the examples in the practice of constitutional jurisprudence of the Republic of Belarus when the Constitutional Court had analyzed the development of the normative base of the regulation of the separate legal relations in the historic perspective, having in mind and including the omissions of the past which influenced

both on the adopted in future normative legal acts and on the law enforcement practice which went on the wrong way under influence of the concrete omissions.

See:

Judgment of the Constitutional Court of the Republic of Belarus of 29 March 2006 No. J-194/2006 “On the conformity between the Constitution, other laws of the Republic of Belarus, international treaties of the Republic of Belarus and Resolution of the Council of Ministers of the Republic of Belarus of 18 December 1992 No. 758 “On conditions of awarding pensions for certain categories of workers of aviation of air test crew” in part of pension security of air stewards/stewardesses of civil aviation”.

#### **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?**

The methodology of the definition (disclosure, consideration, evaluation etc.) of the legislative omission is traced to the process of cognizing of the law in whole and present itself the use of the same general devices, means and resources. In particular one can speak about the common methods and devices of the materialistic dialectics (analysis and synthesis, induction and deduction, analogy, comparison, system structural approach, movement from concrete to the abstract and from abstract to concrete etc.) It impossible not to mention as positive means an scientific definitions, which present itself cognized by the legal science objective regularity, which also acts as the specific methods of the cognition and has substantial methodological meaning (for example in the given case the definition of analogy).

As for the methods mentioned in the question 4.3 (grammatical, logical, historical, systematic, and teleological) according to the scientific doctrine the given methods shall be referred to the process of the interpretation of the norms of law. Doctrinal approaches presuppose the provision according to which interpretation can not substitute the omission in law. Interpretation presupposes the understanding of the meaning of the norm (understanding the will of the legislator) without changing of its content. Interpretation can not be evaluated as a method of substituting of the omission in the legal regulation, because the process of interpretation exists a priori while application of every legal norm. By means of interpretation of the norm one can discover the existence of the omission in law.

While examining by the Constitutional Court of the phenomenon of omission widely is used the popular means of analysis of the legal text – understanding of the lexical meaning of the text, application of the logic and semantic analysis of the legal text, evaluation of the historical and social conditions during the drafting and adopting of the normative legal act its goals, understanding of the place of the norm in the system of law, use of the logical expertise while interpretation of the legal opinion, elements of the deontic logics etc.

The Constitutional Court while examining of the possibility of the existence of the omission, besides the interpretation of the norm, is simulating the concrete life situation and is making the following conclusions:

1. Social relations fall within the sphere of legal impact namely the subject of the legal regulation is lawful 2. existing legal norm really does not cover the sphere of social relations which it should cover.

While evaluating of the possibility of the existence of the omission in law the Constitutional Court chiefly consider the national legal system in whole. In case of the propositions on substituting of the omission (variants of the substitution) the Constitutional Court starts from the norms of the standards of the international law, examines the legal regulation in different countries, takes into account international experience of the legal regulation.

It is necessary to note that the Constitutional Court in its decisions in particular those which cover rights and freedoms of citizens repeatedly pointed on the necessity to secure the conformity of the norms of the national legislation to the international legal documents. We speak about the documents as Universal declaration of human rights, International covenant on civil and political rights, International covenant on economic, social and cultural rights, Convention on the rights of the child, Convention on the status of refugees, number of ILO conventions, European convention on the protection of human rights and fundamental freedoms and its protocols, a number of conventions and agreements within the frameworks of the CIS, and bilateral interstate and intergovernmental agreements.

See:

Judgment of the Constitutional Court of the Republic of Belarus of 1 December 1998 N J-73/98 “On the conformity between the Constitution of the Republic of Belarus and part five of Article 92 of the Code of Criminal Procedure of the Republic of Belarus”.

Judgment of the Constitutional Court of the Republic of Belarus of 13 May 1999 No. J-78/99 “On the conformity between the Constitution of the Republic of Belarus, international legal acts and part six of Article 209 of the Criminal Code of Procedure of the Republic of Belarus”.

Judgment of the Constitutional Court of the Republic of Belarus of 9 July 1997 N J-57/97 “On the conformity of point 3 of Section III "Final Clauses" of the Law of 17

May 1997 "On introduction of amendments and alterations in the Criminal Code and the Code of Criminal Procedure of the Republic of Belarus" to the Constitution and the International Covenant on Civil and Political Rights".

Judgment of the Constitutional Court of the Republic of Belarus of 11 December 1998 N J-74/98 "On the conformity between the Constitution of the Republic of Belarus and part three of Article 404 of the Code of Criminal Procedure of the Republic of Belarus".

#### **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?**

In accordance with the Article 22 of the Code of the Republic of Belarus on judicial system and status of judges the Constitutional Court shall be entitled to submit to the President of the Republic of Belarus, the chambers of the Parliament of the Republic of Belarus, Council of Ministers, other state bodies, according to their competencies, proposals as to the necessity of bringing into the act of the legislation of the alterations and (or) addenda, and as to adoption of new enforceable enactments. The Constitutional Court shall furthermore be entitled to submit to state and other bodies other proposals deriving from its powers.

In accordance with its jurisdiction the Constitutional Court is stating its position as regards the most complicated legal problems that frequently remain without their settlement in other state bodies. The mentioned activity is realized both by the adoption of the official decisions and by way of addressing to the competent bodies with the stating of the analysis of the situation and concrete propositions on the overcoming of the limitations in the concrete sphere of legal relations.

See:

Decision of the Constitutional Court of the Republic of Belarus of 1 September 2003 No. P-84/2003 "On the constitutionality of the norms of laws on the amnesty and its application"

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

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

**criteria of a possible legal regulation and recommended deadlines for the adoption of the amendments)?**

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

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

Based on the set practice of the realization by the Constitutional Court of the its authorities if while examining the case the omission will be found then in future while evaluation of the issue of the constitutionality of the studied norm the Constitutional Court in the reasoning part note that to the norm making bodies on the existence of the omission with the proposition to regulate this legal situation along with the other conclusions about his legal position. Accordingly, the Constitutional Court not only study the omissions that were discovered by him during the hearings of the case but makes the efforts on its elimination.

See:

Decision of the Constitutional Court of the Republic of Belarus of 18 March 2003 No. P-74/2003 “On the definition of the term “income” on the sale of the foreign currency”.

In this case as a rule the Constitutional Court note to the competent norm making bodies the necessary criteria of the legal regulation and possible options of solution, including the terms of adoption of the correspondent alternations.

See:

Decision of the Constitutional Court of the Republic of Belarus of 15 June 2007 No. D-200/2007 “On some issues connected with rendering legal assistance to convicts”.

The Constitutional Court also always had paid most intent attention on the terms of filling in the omissions and other ways of improving of the situation.

See:

Judgment of the Constitutional Court of the Republic of Belarus of 11 December 1998 N J-74/98 “On the conformity between the Constitution of the Republic of

Belarus and part three of Article 404 of the Code of Criminal Procedure of the Republic of Belarus”.

In some decisions the Constitutional Court pointed out its position considering this or that understanding of the norm of law, to secure in practice conformity of the legal regulation to the constitutional goals, principles and norms along with its uniform application.

See:

Decision of the Constitutional Court of the Republic of Belarus of 12 November 2002 No. D-151/2002 “On definition of notion “income” for purposes of qualification of unlawful entrepreneur activities while calling to criminal liability”.

Also the Constitutional Court in its decisions as it was mentioned before has pointed on the necessity of filling of the omission by the courts by way of using of the analogy of statute or analogy of law.

See:

Decision of the Constitutional Court of the Republic of Belarus of 15 July 2002 No. D-144/2002 “On securing the constitutional right of imprisoned convicts to judicial appeal against incurred to them penalties”.

Decision of the Constitutional Court of the Republic of Belarus of 17 November 2000 No. D-104/2000 “On the right to amnesty of the convicts with respect to whom verdicts have taken no effect due to their cassation (protest)”.

As for other models of the solution of the situation of filling the omissions, they are disclosed in the answer to the question 2.3.

#### **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.**

In accordance with the Article 22 of the Code of the Republic of Belarus on judicial system and status of judges normative legal acts which were found by the judgment of the Constitutional Court to be in variance with the Constitution of the Republic of Belarus or normative legal acts, which have higher in comparison with them legal power shall be considered to be void in whole or in its particular part since the moment of introduction in them of the respective alterations and (or) addenda or adoption of the new normative legal acts.

Finding of the normative legal act or its separate provisions to be in variance with the Constitution or the normative legal acts which have higher in comparison with them legal power shall be considered as a basis for the annulment of the provisions of other normative legal acts which are based on such normative legal act or its separate provisions or reproducing of it or contained this provisions. The provisions of such normative legal acts shall not be used by the courts, other bodies and officials.

In the reasoning part the Constitutional Court formulates its position:

- a. Can find the law (other normative legal act) to be at variance with the Constitution;

See:

Judgment of the Constitutional Court of the Republic of Belarus of 7 February 2002 No. J-137/2002 “On the conformity between the Constitution of the Republic of Belarus and Instruction on procedure of forming rent rates by legal entities of non-governmental form of ownership while renting non-residential buildings (premises)”.

- b. Can find the part of the normative legal act to be at variance with the Constitution;

See:

Judgment of the Constitutional Court of the Republic of Belarus of 13 May 1999 No. J-78/99 “On the conformity between the Constitution of the Republic of Belarus,

international legal acts and part six of Article 209 of the Criminal Code of Procedure of the Republic of Belarus”.

c. The act could be left in power to avoid the omission in law and to point to the subject of nor making the term (or the complex of events) during (on the arriving of which ) which shall be amended the respective legal regulation;

See:

Judgment of the Constitutional Court of the Republic of Belarus of 27 September 2002 No. J-146/2002 “On the conformity between the Constitution of the Republic of Belarus and part two of Article 6 of the Law of the Republic of Belarus "On procedure of exit and enter the Republic of Belarus of citizens of the Republic of Belarus", point 13 of Rules of official registration of documents for leaving abroad of citizens of the Republic of Belarus, sub-item 25.1 of point 25 of Instruction on procedure of drawing up passport of a citizen of the Republic of Belarus for leaving abroad in part of fixing five-year term of effect of an obligatory note in passport of a citizen of the Republic of Belarus who is leaving abroad temporary”

d. The norm maker can be imposed to fill the omission in the law

See:

Decision of the Constitutional Court of the Republic of Belarus of 19 July 2002 No. P-66/2002 “On the stipulation of the minimum rate of the alimony vindicated from the parents of minors”

e. The Constitutional Court has no authorities to interfere into the law enforcing practice of the courts but it can as it was mentioned before to find to be unconstitutional the judicial practice as well as the resolutions of the plenums of the ultimate courts which in big degree influence the practice as well as to bring bound for the consideration propositions to the ultimate courts in cases of discovering of the incorrect judicial practice.

See:

Judgment of the Constitutional Court of the Republic of Belarus of 28 November 2001 No. J-132/2001 “On the conformity between the Constitution and provisions of points 20 and 21 of ruling of Plenum of the Supreme Court of the Republic of Belarus of 10 April 1992 No. 1 “On judicial practice on cases on bribery”.

Judgment of the Constitutional Court of the Republic of Belarus of 9 June 1998 No. J-65/98 “On the conformity of point 38 of Ruling of the Plenum of the Supreme Court of the Republic of Belarus of 17 June 1994 No. 5 "On some issues of

application by the courts of the legislation while settling labour disputes" with amendments made thereto by Rulings of the Plenum of the Supreme Court of the Republic of Belarus of 16 December 1994 No. 12 and of 28 June 1996 No. 8 to the Constitution and the laws of the Republic of Belarus”.

f. As for the authorities of the Constitutional Court of this point as it was mentioned before the Constitutional Court have no authorities to interfere into the law enforcing practice of the courts. In this case it is stipulated the following order in accordance with the Article 112 of the Constitution: If, during the hearing of a specific case, a court concludes that an enforceable enactment is contrary to the Constitution, it shall make a ruling in accordance with the Constitution and raise, under the established procedure, the issue of whether the enforceable enactment in question should be deemed unconstitutional.

g. The formulated in the question situation is not characteristic to the decisions of the Constitutional Court. As it was mentioned before if during the examination of the case the Constitutional Court will discover the omission, afterwards while evaluation of the issue of constitutionality of the examined norm the Constitutional Court point to the norm making bodies on the existence of the omission and proposes to adjust the given legal situation together with the other conclusion on its legal positions.

See:

Decision of the Constitutional Court of the Republic of Belarus of 27 October 1999 No. D-89/99 “On some issues connected with regulation of the procedure of payment for public utilities”.

h. It could be possible the other models of legal adjustment of the situation with omissionship. For example, the Constitutional Court point on the omission in the legislation, propose to the norm making bodies to fill it as well as defines the term since which the legislation without the omission will come into force. The term in this case is indicated more early then the delivered by the Constitution Court decision with the aim to secure the more full protection of the constitutional rights.

As a rule the given model is used in case when all the legal preconditions existed for the regulation of the legal relations properly, and the competent bodies failed to accomplish their duties.

See:

Decision of the Constitutional Court of the Republic of Belarus of 15 September 2004 No. D-176/2004 “On legal regulation of recovery of injury caused to life or health of citizens due to liquidation of legal entities which are bound to effect payments in compensation for the specified injury”.

Decision of the Constitutional Court of the Republic of Belarus of 5 October 2001 No. D-128/2001 “On application of the rule of retrospectivity of more soft law to the persons who were recognized till 1 January 2001 to be specially dangerous recidivists”.

#### **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.**

As it was mentioned before the Constitutional Court while examining the normative legal act considers the issue of the constitutionality of the act. The peculiarities of the constitutional jurisprudence and vivid cases are mentioned in the answer to the question 4.1.

#### **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).**

The Constitutional Court has formed during its activities the appropriate practice of the use of the methods of the legal technique aimed on the adjusting of the legal situation in the case when the Constitutional Court had found the reviewed act unconstitutional and had “removed” it from the legal turnover, acting in this situation as a negative legislator.

As for the mentioned in the question 4.8 examples, is important to note that the Constitutional Court has used such form of preventing of negative consequences for

the legal regulation in connection with the finding of the reviewed act to be unconstitutional as postponement of the official publishing of the constitutional court decision, temporary action of the act, temporary action of the act, which was found unconstitutional, reinstatement of the acted before legal regulation.

See:

Judgment of the Constitutional Court of the Republic of Belarus of 27 September 2002 No. J-146/2002 “On the conformity between the Constitution of the Republic of Belarus and part two of Article 6 of the Law of the Republic of Belarus "On procedure of exit and enter the Republic of Belarus of citizens of the Republic of Belarus", point 13 of Rules of official registration of documents for leaving abroad of citizens of the Republic of Belarus, sub-item 25.1 of point 25 of Instruction on procedure of drawing up passport of a citizen of the Republic of Belarus for leaving abroad in part of fixing five-year term of effect of an obligatory note in passport of a citizen of the Republic of Belarus who is leaving abroad temporary”.

Judgment of the Constitutional Court of the Republic of Belarus of 21 September 2006 No. J-195/2006 “On the conformity between the Constitution, laws and other acts of legislation of the Republic of Belarus of Resolution of 5 January 2002 No. 2/1/1/1/2 "On making alterations and addenda into Provision on composition, rates and procedure of exemption from the sums of author's fees and other incomes of natural persons" adopted by ministries on taxes and dues, economy, finance, statistics and analysis, culture of the Republic of Belarus”.

Judgment of the Constitutional Court of the Republic of Belarus of 23 July 1999 No. J-86/99 “On the conformity of the Provision on the methods and conditions of towing, storage and realization of vehicles which obstruct interyard territory, impede for cleaning streets and roads, adopted by decision of Minsk urban executive committee of 28 December 1995 No. 783, and point 7.3 of decision of Minsk urban executive committee of 9 December 1998 No. 1330 "On the methods of parking of vehicles, maintaining of the roadway net and interyard territory" to the Constitution and the laws of the Republic of Belarus”.

It is necessary to name other models which are used by the Constitutional Court to avoid appearance of the omissions in law.

a. In particular, the Constitutional Court in its decision can point out that the legal relations shall be regulated instead of the act, which was excluded from the sphere of action because of its unconstitutional character by the act of more higher legal force in the same sphere of legal regulation.

See:

Judgment of the Constitutional Court of the Republic of Belarus of 7 January 2002 No. J-137/2002 “On the conformity between the Constitution of the Republic of Belarus and Instruction on procedure of forming rent rates by legal entities of non-governmental form of ownership while renting non-residential buildings (premises)”.

Judgment of the Constitutional Court of the Republic of Belarus of 14 September 1999 No. J-88/99 “On the conformity between the Constitution, laws of the Republic of Belarus and explanation of the Main state tax inspection under the Cabinet of Ministers of the Republic of Belarus of 16 June 1995 "On return of excessively collected payments into the budget”.

b. Also the omission can be filled directly with the norm of the Constitution – the act of direct action (as it was mentioned before numerous decisions of the Constitutional Court were dedicated to the securing of the principle of direct action of the Constitution).

See:

Judgment of the Constitutional Court of the Republic of Belarus of 1 December 1998 N J-73/98 “On the conformity between the Constitution of the Republic of Belarus and part five of Article 92 of the Code of Criminal Procedure of the Republic of Belarus”.

c. The Constitutional Court can propose to the norm making body in which competence falls the legal regulation of the respective relations to fill the omission in the legislation and to point in what way shall be regulated the given legal relation.

See:

Decision of the Constitutional Court of the Republic of Belarus of 4 October 2006 No. D-196/2006 “On technical normative legal acts”.

Decision of the Constitutional Court of the Republic of Belarus of 29 July 2002 No. D-144/2002 “On securing the constitutional right of imprisoned convicts to judicial appeal against incurred to them penalties”.

## **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?**

According to the Article 10 of the Law “On the Constitutional Court of the Republic of Belarus” the judgments of the Constitutional Court within its area of competence shall be binding throughout the territory of the Republic of Belarus for all state bodies, enterprises, institutions, organizations, officials and citizens. The judgments the Constitutional Court shall be considered by the bodies and individuals to whom they are addressed to. Those bodies and individuals must reply to the Constitutional Court within the time specified by it, unless otherwise stipulated in the present Law. Any refusal to consider a judgment of the Constitutional Court or evasion of the obligation to do so, any non-observance of time limits and any failure to enforce or inappropriate enforcement of a judgment of the Constitutional Court shall entail liability in accordance with the legislation of the Republic of Belarus.

As for the regulation of this issue in the acts of the Parliament, in the Rules of Procedure of the House of Representatives and in the Rules of Procedure of the Council of the Republic of the National Assembly of the Republic of Belarus is not stipulation of the consideration of the issues of realization decisions of the Constitutional Court of the Republic of Belarus.

At the same time it should be mentioned that the decisions aimed on the filling of the omissions in the legislation, are considered and implemented by the Parliament. There is no special procedure of implementation of the decisions of the Constitutional Court. In this respect it is necessary to note that constitutional provisions on the obligatory nature of the execution of the decisions of the Constitutional Court shall act. In this case the authority of the Constitutional Court, its adjusted and reasoning of its legal positions, which is expressed in this or that decision, chiefly contribute to the execution of its decisions. The analysis of the decisions adopted in 1994—2006 says that more than 70% of the propositions of the Constitutional Court that was the authority of the legislator on the implementation were realized in the laws. Many of the propositions of the Constitutional Court are included in the draft law program of the Republic of Belarus on 2006—2010 for further implementation.

## **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?**

As it was mentioned before if the Constitutional Court while examining the case will discover the omission in the legislation it adopts the decision in accordance with its competence, aimed on the filling (overcoming) of the omission.

In the acts which regulates the activity of the President of the Republic of Belarus, Government of the Republic of Belarus other bodies of state power and administration does not contain the mechanisms and procedures of the realization of the decisions of the Constitutional Court of the Republic of Belarus. As a rule, the decision is aimed at the changing or the adoption of the normative legal act and is going within the framework of the norm making process.

Examples:

After three months after the day of adoption of the decision of the Constitutional Court of the Republic of Belarus of 24 June 1999 No. D-82/99 “On some issues connected with regulation of the procedure and conditions of payments of shares in house building co-operatives” the Council of Ministers has adopted the Resolution of 22 September 1999 N 1469 “On some issues of the organization and activities of the house building co-operatives”.

After eight months since the day of adoption of the Decision of the Constitutional Court of the Republic of Belarus of 4 October 2006 No. D-196/2006 “On technical normative legal acts” was adopted the Edict of the President of the Republic of Belarus of 16 July 2007 No. 318 “On the order of promulgation and informing of general public of the technical normative legal acts”.

As for the disregard of the decisions of the Constitutional Court on the omission issues by other bodies it is necessary to note that such examples occurred in the beginning of the activities of the Constitutional Court, when the constitutional control was a new phenomenon in law and the system of public power. On the contemporary stage of the activity such cases are very rare.

**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?**

### **Conclusion**

The carried out research shall be considered as an essential sphere of the activity of the Constitutional Court because the development in the state which is accompanied with the search of the means and methods, aimed not only of the full realization of the norms of the Constitution, realization of the constitutional principles but also on the improvement of the national legal system on the whole.

As it was mentioned before recently the system of law in Belarus is based on the huge massif of the legislation and the demands to the level of the norm making and law enforcement activity is increasing.

In Belarus as in all the contemporary states the Constitution defines the organization and cooperation of the institutions of power, relations between the state and society, system of the national law and legislation.

The most important direction of the political and legal development of Belarus as the other countries of the countries of new democracies is the constitutional process, which conditioned intensive state building. One of the features of the named process – strengthening of the constitutional control both over the conformity with the Constitution of the national legislation and international treaties of the Republic of Belarus.

The Constitutional Court repeatedly noted in its Messages, that the majority of the legislative acts was adopted in accordance with the norms of the Constitution and international law standards. The created legal base shall make it possible for all branches of state power to realize their powers, to secure the protection of the rights, freedoms and lawful interests of citizens.

The Constitution stipulates the provision about the mutual accountability of the state and citizens. The state has the right to bring to charge the citizens who violates the law in its turn the citizens due to the provisions of the Articles 1, 59 and others of the Constitution has the right to expect that the state will perform the legal regulation in accordance with the stipulated by it rules. In this connection in the opinion of the Constitutional Court shall be strengthened the liability of the officials for the securing of the legality both in law creation and law enforcement.

The Constitutional Court repeatedly has stressed that for the successful becoming of the Republic of Belarus as a state ruled by law it is very important that acts of the acting legislation shall form the constructed on the basis of the Constitution legal pyramid which does not contain any contradictions and omissions. On the opinion of the Constitutional Court important role in the norm making process plays the principle of adequacy and completeness of the legal regulation of the social relations.

As for the legal instruments for the given mentioned above research, the Constitutional Court during its work has formed fairly wide legal practice on the given problem.

The activity of the Constitutional Court on finding and elimination of the omissions in the legislation is performed on different directions. The main of them – adoption of the decisions which are directed at the different state bodies within the frameworks of the competence of the Constitutional Court to submit the propositions on the improvement of the legislation (part 8 of the Article 22 of the Code of the Republic of Belarus on judicial system and status of judges, Article 7 of the Law “On the Constitutional Court of the Republic of Belarus”). Also of the elimination of the omissions are aimed separate provisions of the adopted by the Constitutional Court judgments on the issues of the constitutionality of the normative legal acts.

At the same time, one has to take into account the additional possibilities of the Constitutional Court on the improvement of the legislation. In particular, the proposals in the form of letters signed by the Chairman of the Constitutional Court can be prepared and sent to the respective norm making bodies within the limits of the right on submitting of the propositions on the improvement of the legislation, although they can not be considered as the decisions of the Constitutional Court. Also, specialists of the Secretariat considers the motions and applications of citizens and legal entities, including those which contain the examples of the omissions in the legislation, and give respective consultations and recommendations of the legal character.

On the contemporary stage of the development of the Belarusian state the Constitutional Court sees as its duty to promote in forming of such legal order of functioning of the democratic social state ruled by law, in which in fact are secured the constitutional rights and freedoms of the person as the supreme goal and value of the state, optimal balance of the interest of the society, citizen and the state on the basis of kindness, equality and justness.