PROBLEMS OF LEGISLATIVE OMMISSION IN CONSTITUTIONAL JURISPRUDENCE

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1. The question of legal gaps in jurisprudence

As held by the Hungarian jurisprudence in agreement with the international professional literature, legal gaps arise from an imperfect unity of the legal system.

In a broad sense, a legal gap exists when it is impossible to establish beyond doubt which rule is applicable to the case in question. Under such circumstances, the law fails to make rules for a certain situation although it should have done (*original legal gap*) or should do so (*derivative legal gap*). Legal gaps result from the legislator's mistake, carelessness or tardiness.[1]

In the Hungarian jurisprudence, the following types of legal gaps are distinguished following the classification of Peczenik:[2]

- insufficiency: the law fails to make rules when it should do so,
- inconsistency: the law contains contradicting rules,
- indeterminacy: the rules of law are unclear,
- axiology legal gap: the rules of law contradict moral order.

Legal gaps can be resolved by the following tools:

- analogy: resolving the case in question based on a similar case to which there is an applicable rule;
- broad interpretation: interpreting the rule applicable to the similar case in a way expanding it to the present case as well;

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[1] MIKLÓS SZABÓ: *A jogdogmatika előkérdéseiről (On the Preliminary Questions of Legal Dogmatics).* Prudentia Iuris, Miskolc, 1996, p. 204.

[2] ALEKSANDER PECZENIK: *On Law and Reason.* Kluwer, Dordrecht, 1989, p. 24.

- exercising discretionary power when determining the facts of the case.[3]

According to another – even broader – definition, a legal gap exists when the norms (in force) issued by the bodies with legislative power do not contain any provision by which the judge could resolve the case in question.

As presented in a well founded study by Péter Mezei,[4] the following definition was given earlier in the Hungarian jurisprudence by Bódog Somló in his book entitled *Jogbölcsészet (Philosophy of Law)*, published in 1920: "Gaps in the law mean that the law needs to be completed".[5] Completion may be necessary for various reasons. When it is needed to make the law correct, it is a *correctness legal gap*, and when it is required to make the law applicable, it is an *applicability legal gap*.

According to Somló, applicability legal gaps can be of the following types: "When the judge can deduce the applicable norm by way of pure logics", it is a *logic legal gap*. An *alternative legal gap* is one where the law provides more than one applicable norms without specifying which one is to be used in resolving the particular case. The third type is termed as *judgement legal gap*, when the judge is to complete the law on the basis of moral judgement.

It may happen that a legal gap does exist but there is no legislative body empowered to fill the gap (in contrast with the previous cases where the judge may act), and therefore the gap remains in the legal rule. Such norms are typically the ones regulating the obligation of the supreme power. As the law excludes a legitimate resolution of the question, the legal gap may only be eliminated by a breach of law, i.e. in an illegitimate way. This is called an *absolute legal gap*.

Another internationally renowned representative of the Hungarian philosophy of law between the two world wars was Barna Horváth, who, in 1937, distinguished two types of legal gaps.[6] A *theoretical legal gap* is "the logical path between the legal norm and the legal case", existing in every case. As a result, both "creating a legal norm applicable to all cases" and

[3] MIKLÓS SZABÓ: *Jogi alapfogalmak (Basic Concepts of Law).* Prudentia Iuris, Miskolc, pp. 49–52.
[4] PÉTER MEZEI: A joghézag kérdése régen és ma (The Question of Loopholes Historically and Today). *Jogelméleti Szemle* (on-line journal), Budapest, 2002/2, http://jesz.ajk.elte.hu/mezei10.html
[5] BÓDOG SOMLÓ: *Jogbölcsészet (Philosophy of Law).* Prudentia Iuris 1, Miskolc, 1995, pp. 123–125.
[6] BARNA HORVÁTH: *A jogelmélet vázlata (Draft of the Theory of Law).* Szeged, 1937.

"applying the legal norm to a specific legal case by purely logical means" are impossible. A *practical legal gap* is "when the bridge built by conventional judgement and experience over a theoretical legal gap collapses from time to time". The latter category is an occasional but serious disturbance in legal practice.

The existence of legal gaps was proven by Horváth by the tool of syllogism. In his opinion, the legal norm contains a (first) premise (*propositio maior*), and the legal case contains a second premise (*propositio minor*). Logically, the second premise is missing from the legal norm, creating a legal gap. The gap can be filled by way of subsumption, i.e. by relating the legal case to the legal norm. This is to be done by the judge. As emphasised by Horváth, the law "can only be regarded as complete after filling the gap created by the theoretical legal gap, and the law thus completed becomes continuous as its gaps are all filled". By that, he has practically resolved the antagonism between the two categories.

The formalistic normative approach automatically denies the existence of legal gaps, saying that the legislator has done its work (i.e. the non-existence of a rule logically means that the conduct in question bears a legally neutral normative status).[7] This positivistic theory of law was followed by Gyula Moór. He held that "*not regulating a certain detail by the law does not mean a gap*". Accordingly, if the legislator failed to make rules for some situation in life when codifying an Act, this must have been done intentionally. However, when there is some change occurring after the promulgation of the statutory regulation which requires a different judgement as compared with the former cases, this can only be done – in Moór's opinion – by amending the relevant Act of Parliament rather than by judicial practice.

The latest study[8] in the Hungarian legal literature dealing with the problem of legal gaps contains the following classification:

1. By their origin, legal gaps can be "original" or "posterior". In case of an original legal gap, "despite its existence, a certain fact is not included in the statutory regulation". When such a case is found by the judge, the tool of interpretation is to be used in order to verify whether the omission of legislative duty was intentional or incidental. If it is established that codification of the given case was omitted intentionally, then the judge is not empowered to

[7] VANDA LAMM – VILMOS PESCHKA (chief ed.): *Jogi lexikon (Encyclopaedia of Law).* KJK-Kerszöv, Budapest, 1999, p. 301.

[8] PÉTER MEZEI: A joghézag kérdése régen és ma (The Question of Loopholes Historically and Today). *Jogelméleti Szemle* (on-line journal), Budapest, 2002/2, http://jesz.ajk.elte.hu/mezei10.html

fill the gap as this can only be done by way of legislation. Incidental omission may happen when an existing case is, by chance, not taken into account during legislation. In that case, the judge may employ analogy to deduce from an existing similar norm the rule necessary for resolving the case.

A posterior legal gap results from a situation where the phenomenon concerned did not exist at the time of legislation, but its subsequent occurrence has led to lawsuits requiring regulation of the phenomenon. Such changes may, on the one hand, result from the amendment of national law and international (or the European Union's) norms, treaties, and, on the other hand, they may be caused by everyday events. The gap should be filled first of all by amending the statutory regulations or by adopting new norms, but in exceptional cases judges may also act. This is only possible in case of partial legal gaps.

2. By their scope, legal gaps can be "complete" or "partial". In case of a complete legal gap, there is no provision at all pertaining to the case to be judged upon. A partial legal gap is one where an existing provision is incomplete.

The judge and the legislator are empowered to fill the gaps. Legislation may be used to eliminate any kind of legal gaps. The role of the judge is much more debated. Those who deny the very existence of legal gaps contest the judges' role as well. However, lawyers who insist on the contrary consider the judiciary to be the primary body designated to eliminate legal gaps.

As declared by László Sólyom, the first President of the Constitutional Court, the ideology of the role to be played by the Constitutional Court of Hungary is based on two pillars, i.e. the legal-political concept of the rule of law and the moral requirement of neutrality.[9] While fulfilling this role, with particular regard to the so-called "hard cases", the Constitutional Court has elaborated messages expanding beyond the realm of positive law, and it has even put forward concrete proposals for the political actors. Of course, when exercising its most important competence and power by the annulment of unconstitutional statutory regulations, the Constitutional Court acts as a "negative" legislator.

[9] LÁSZLÓ SÓLYOM: Az Alkotmánybíróság önértelmezése és Hans Kelsen. In. *Hans Kelsen jogtudománya*. (Self-interpretation of the Constitutional Court and Hans Kelsen. In: *Hans Kelsen's Jurisprudence)*. Gondolat Kiadó, Budapest, 2007, p 439.

The theory of the negative legislator was introduced by Kelsen in 1928 in a study published in French[10] and also in his presentation[11] held at the conference of the German Constitutional Law Association on 23-24 April, 1928. He contested those arguments against constitutional courts that – with reference to the division of powers – objected to a separate body intervening in legislation. Kelsen held that the constitutional court acted in a certain sense as a legislative body by adopting general norms rather than individual ones when annulling a statute; in other words, the constitutional court is a negative legislative body. Therefore, it is in fact not a court but one of the depositaries of the divided legislative power. This concept follows from an approach to the branches of power emphasising mutual control of each other by those branches. As the operation of the constitutional court prevents the accumulation of power in the hands of a single body, it does not contradict the requirement of, but even reinforces the division of powers.

2. Unconstitutionality in the form of omission based on the Constitution

2.1. The role of the Constitution in the legal system

Although the Constitution is formally an Act (Act XX of 1949 on the Constitution of the Republic of Hungary), its contents separate it from all other elements of the legal system. The Constitution is held by the Constitutional Court a unified and consistent system where no legal gap may exist. This principle is foreseen in Constitutional Court Decision 23/1990 (X. 31.) AB establishing the unconstitutionality of, and annulling capital punishment.

In the above decision, the Constitutional Court held the following: "Article 54 para. (1) of the Constitution stipulates that no one shall be arbitrarily deprived of life and human dignity. The wording of this prohibition, however, allowed for the possibility that someone shall be deprived of life and human dignity in a non-arbitrary way.

Nevertheless, when judging the constitutionality of the legal permissibility of capital punishment, the provision applicable is Article 8 para. (2) of the Constitution, which was introduced by Section 3 para. (1) of Act XL of 1990 passed by the Parliament on 19 June 1990 and entering into force on 25 June 1990, replacing the former Article 8 para. (2) promulgated on 23 October 1989. Under Article 8 para. (2) of the Constitution, in the

[10] HANS KELSEN: "La garantie jurisdictionnelle de la Constitution (La justice constitutionelle)", *Revue de droit public et science politique*, XXXV, pp. 197-257.
[11] Wesen und Entwicklung der Staatsgerichtsbarkeit. Berlin-Leipzig, W. de Gruyter, 1929.

Republic of Hungary regulations pertaining to fundamental rights and duties are determined by law; such law, however, may not restrict the basic meaning and contents of fundamental rights.

The Constitutional Court found that the provisions in the Criminal Code and the related regulations quoted before concerning capital punishment breached the prohibition against limiting the essential contents of the right to life and human dignity. The provisions relating to the deprivation of life and human dignity by capital punishment not only impose a limitation upon the essential contents of the fundamental right to life and human dignity, but also allow for the entire and irreparable elimination of life and human dignity or of the right ensuring these. Therefore, the Constitutional Court has established the unconstitutionality of these provisions and declared them null and void" (ABH 1990, 88, 92.).

In his dissenting opinion attached to the above decision, Péter Schmidt held that Articles 8 and 54 of the Constitution contain elements contradicting each other. However, it follows from the majority opinion that no such contradiction may exist in the Constitution.

The principle of unity (closed nature) of the Constitution was explicitly elaborated in the concurring opinions attached to Decision 48/1991 (IX. 26.) AB examining the status of the President of the Republic (ABH 1991, 217, 242). This principle emerged subsequently in Decision 36/1992 (VI. 10.) AB, too, examining the appointing powers of the President of the Republic.

"The Constitutional Court interprets the Constitution not only in proceedings specifically requesting it, but in every procedure reviewing the constitutionality of legal rules. Thus the meaning of specific provisions of the Constitution emerges only in the process of ever newer interpretations in which the Constitutional Court considers both the unique features of the case at hand and its own previous interpretations. The propositions formed on the basis of individual interpretations – such as the requirements of affirmative action or the limits of the restriction of fundamental rights – are further interpreted and refined by the Constitutional Court in the process of their application. The focus of the interpretation of a given constitutional provision may shift but the interpretations must give rise to a system without contradictions" (ABH 1992, 207, 210).

2.2. The definition of law

Sources of law and their hierarchy

Under Article 32/A para. (1) of the Constitution, the Constitutional Court shall review the constitutionality of laws and perform duties referred into its jurisdiction by Acts of Parliament. According to Section 1 of Act XXXII of 1989 on the Constitutional Court

(hereinafter: ACC), the competence of the Constitutional Court covers (among others) the constitutional examination of laws and other legal acts of State administration.

Section 1 of Act XI of 1987 on Legislation (hereinafter: AL) provides for the following statutes: Act of Parliament, government decree, decrees by the members of the Government, and local government decree. This is the list laying down the foundations of the hierarchy of sources of law. However, this list is incomplete; the statutory decrees issued until 23 October 1989 by the Presidential Council of the People's Republic (as a collective body acting as the head of state) form part of the system of law in force. These statutory decrees share the same position in the hierarchy of law as Acts of Parliament, having regard to the fact that they may only be amended or repealed by an Act of Parliament.

Although not contained in the Act on Legislation, the decrees issued by the President of the National Bank of Hungary are laws, too, as the issuing of such decrees is allowed by Article 32/D para. (4) of the Constitution. Bearing in mind the fact that under this Article, the decrees issued by the President of the National Bank of Hungary are not contrary to any Act of Parliament, they are on the same level as government decrees in the hierarchy of law. This is explicitly referred to in the Minister's reasoning added to Act LXI of 2002 amending the Constitution (and empowering the President of the National Bank of Hungary to issue decrees). "There is no hierarchical link between Government decrees and the decrees issued by the President of the National Bank of Hungary, as both legislators may only create laws within their own competence, and their duties are clearly separated in the Constitution".

As pointed out by the Constitutional Court in several decisions, there is no difference in respect of the hierarchy of law between the Acts of Parliament adopted by qualified majority and those passed by simple majority.[12] This principle was first established in Decision 4/1993 (II. 12.) AB as follows: "…in the system of the Constitution as in force, the scope of two-third majority statutes cannot be traced back to a theoretical basis; (...) these Acts of Parliament do not have a special status in the hierarchy of law as, according to the Constitution, all Acts of Parliament – to be passed by any rate of majority – are of equal status" (ABH 1993, 48, 63).

[12] Statements to the contrary are not unknown in the legal literature: ANDRÁS JAKAB: *A jogszabálytan főbb kérdéseiről (On the Main Questions of the Theory of Statutes)* Unió, Budapest, 2003, p. 73.

This rule has been repeated by the Constitutional Court in several decisions. The most detailed elaboration can be found in Decision 31/2001 (VII. 11.) AB: "The modification of the Constitution by Act XL of 1990 has significantly changed this solution of public law. The category of Act of Parliament with constitutional force was abolished and replaced by the Constitution providing for the adoption of Acts of Parliament with two-third majority in certain fields of constitutional regulation. According to the amendment of the Constitution coming into force on 25 June 1990, the Acts of Parliament adopted by simple or by two-third majority are on the same hierarchical level (which was not the case in respect of Acts of Parliament with constitutional force). According to the Constitution, those Acts of Parliament are only different from other Acts of the Parliament having regard to the fact that they are adopted by a qualified majority" (ABH 2001, 258, 260–261).

However, beyond any doubt, there are hierarchical links between the individual Acts of Parliament, too. Namely, Acts of Parliament based on international treaties are on a higher hierarchical level than other Acts. This is verified by the competence of the Constitutional Court to examine the violation of international treaties, by virtue of which Acts of Parliament based on internal law may be annulled if they violate an Act of Parliament promulgating an international treaty.

The definition of law in the jurisprudence of the Constitutional Court

In the terminology used by the Constitutional Court, the term "law" does not correspond with the list under Section 1 of the Act on Legislation. As far as posterior constitutional examination is concerned, the Constitutional Court holds all norms (provisions with a normative content) to be "laws", performing their constitutional examination.

This is the position of principle taken in Decision 42/2005 (XI. 14.) AB examining the constitutionality of a legal conformity resolution issued by the Supreme Court. "The Constitutional Court has interpreted on several occasions its own competence related to the constitutional examination of laws as granted in Article 32/A para. (1) of the Constitution. It has established that only a single competence of the Constitutional Court follows from the Constitution itself, namely, the posterior constitutional examination of legal norms, however, that is mandatory and comprehensive [Decision 4/1997 (I. 22.) AB, ABH 1994, 41, 49]. It is mandatory because the rules of the ACC pertaining to posterior constitutional examination are based on the provisions of the Constitution, thus the competence of posterior constitutional examination may not be "reduced" by a simple amendment of the Act. (...) On the other hand, the comprehensive nature of the competence of posterior constitutional examination follows from the Constitution, and consequently this competence applies to all norms" (ABH 2005, 504, 510). As established in the same decision, "The Constitutional Court has considered its competence of posterior abstract constitutional examination to result from (and to be protected by) the Constitution and to be applicable to all norms (provisions with a normative content)" (ABH 2005, 504, 511).

2.3. The role of the Constitutional Court in the examination of legal gaps

Under Section 49 para. (1) of the ACC, if an unconstitutional omission of legislative duty is established by the Constitutional Court *ex officio* or on the basis of a petition by any person because the legislator has failed to fulfil its legislative duty mandated by a law, and this fact has given rise to an unconstitutional situation, it shall call upon the organ in default to perform its duty by a specific deadline.

According to the above definition, the Constitutional Court does not examine all legal gaps; it shall only conduct an examination on the merits when the lack of legal regulation results in an unconstitutional situation. It often happens that the issue raised in the petition does not justify the establishment of unconstitutional omission as the questions left open in the norm have been addressed and resolved in the judicial practice. In such cases, the Constitutional Court does not conduct an examination on the merits but bears reference to the above fact.

"As pointed out by the Constitutional Court in many of its decisions, the individual interpretation of laws, the resolution of difficulties occurring in the judicial practice, and the elaboration of a unified judicial practice fall outside the scope of the Constitutional Court's competence and they are the duty of ordinary courts (Decision 35/1991 (VI. 20.) AB, ABH 1991, 175-176.; Decision 57/1991 (XI. 8.) AB, ABH 1991, 276-277.; and Decision 1115/B/1993 AB, ABH 1994, 644). As established by the Constitutional Court in Decision 1/1995 (II. 8.) AB in accordance with the above consistent practice, "The interpretation of the definitions used in Acts of Parliament, their explanation in the normative texts, and the elaboration of the contents of these definitions are the duties of the judiciary" (ABH 1995, 63).

Likewise, no omission is established by the Constitutional Court when it only raises questions of reasonability and justice but no constitutional issue [Decision 26/1993 (IV. 29.) AB, ABH 1993, 196, 203].

The types of omissions

The Constitutional Court has interpreted in a broad sense its competence under Section 49 of the ACC, distinguishing six types of omissions in its practice.

I Unconstitutional failure to perform a legislative duty arising from a concrete statutory authorisation

As established by the Constitutional Court *(ex officio)* in the case summed up in Decision 155/B/1990 AB (ABH 1990, 198), the Minister of the Interior had failed to perform the legislative duty vested upon him by Government Decree 1/1971 (II. 8.) Korm. (where he should have regulated the use of flats for the purpose of official service), which fact resulted in violating the petitioner's rights. In the procedure, the Minister of the Interior made an unsuccessful reference to having regulated the issue in a ministerial order as it was not a law within the meaning of the AL, and therefore, by issuing an order the Minister failed to meet the obligation specified in the Government Decree.

Decision 21/1991 (VI. 5.) AB (ABH 1991, 404) was built upon a similar theoretical basis, establishing an omission by the Government failing to regulate the acquisition of ownership of arable land by foreigners despite being authorised to do so under the Act on Arable Land. As a special feature of the case, the Government had in fact adopted such rules but they were annulled with *pro futuro* effect by Constitutional Court Decision 12/1990 (V. 23.) AB (ABH 1990, 160) due to a violation of the hierarchy of sources of law. As the Government had failed to adopt a new law within the specified deadline, the Constitutional Court established the omission.

II Failure of the legislator to perform a legislative duty following from a provision in the Constitution

Under Article 50 para. (2) of the Constitution, the courts shall review the legality of public administration decisions. Decision 32/1990 (XII. 22.) AB (ABH 1990, 145) established an unconstitutional omission in respect of Council of Ministers Decree 63/1981 (XII. 5.) MT allowing the judicial review of public administration decisions within a specific scope only. As stated in the above decision, the provisions of the Council of Ministers Decree "were not unconstitutional regarding their contents, but the fact that reviewing was only allowed in the case of public administration decisions listed in the law concerned was contrary to the Constitution. Having regard to Section 3 item d) in the AL, this unconstitutional situation may only be eliminated by the adoption of a new Act of Parliament allowing judicial review in a constitutional way."

III Failure to adopt an Act of Parliament specified in the Constitution and necessary for the enforcement of a fundamental right. The Constitution defines several fields to be regulated (on the highest level) in Acts of Parliament. Failure by the Parliament to act as required results in the Constitutional Court establishing an unconstitutional omission of legislative duty.

An example for such a case is Decision 37/1992 (VI. 10.) AB (ABH 1992, 227). Under Article 61 para. (4) of the Constitution, a majority of two-thirds of the votes by the Members of Parliament present is required to pass

an Act on the supervision of public radio, television and the public news agency, as well as on the appointment of the directors thereof, on the licensing of commercial radio and television, and on the prevention of monopolies in the media sector. However, until 1996 the Parliament failed to adopt a comprehensive Act on radio and television.

Likewise, under Article 68 para. (5) of the Constitution, a majority of two-thirds of the votes by the Members of Parliament present is required to pass an Act on the rights of national and ethnic minorities. Decision 35/1992 (VI. 10.) AB (ABH 1992, 204) established an unconstitutional omission as the representation of national and ethnic minorities had not been regulated to the extent and in the manner required by the Constitution.

IV Failure to perform a legislative duty needed for the enforcement of a subjective right. The legislator shall meet its obligation to legislate even in the lack of a concrete mandate by a law if it recognises that there is an issue requiring statutory determination within its scope of competence and responsibility.

As established by the Constitutional Court in Decision 22/1990 (X. 16.) AB, "…the Council of Ministers failed to provide for legislation concerning the settlement of questions related to honouring the vouchers issued for persons detained by the United States of America as prisoners of war and compulsorily deposited at the National Bank of Hungary, thus causing an unconstitutional omission" (ABH 1990, 83).
In the reasons of the above decision, the Constitutional Court pointed out the following: "The requirements of protecting both the constitutional order and the citizens' rights impose an obligation on the Council of Ministers to perform its legislative duty – if necessary – even without a specific authorisation. Section 7 of the AL provides in accordance with the Constitution that the Council of Ministers shall issue decrees within its competence specified in the Constitution and on the basis of authorisations given in Acts of Parliament or statutory decrees. Under Section 17 in the AL, even the cases are specified when a law shall be adopted as required by changes in the socio-economic situation, by the need to regulate the citizens' rights and duties, or for the resolution of conflicts of interests. It follows from the statutory regulations quoted before that the Council of Ministers should have adopted a law in the period elapsed since 1946, when the compulsory depositing of vouchers issued for prisoners of war was ordered, and in particular after Government Decree 13.110/1948 (XII. 24.) Korm. was repealed by Council of Ministers Decree 86/1987 (XII. 29.) MT, lifting the restriction on the enforcement of claims.
The legislative duty of the Council of Ministers follows – without a specific statutory authorisation – directly from Article 35 para. (1) of the Constitution as quoted before" (ABH 1990, 83, 86).

V It is a special case of unconstitutional omission when the Parliament fails to amend an Act of Parliament which has become unconstitutional by way of an amendment of the Constitution. The normative acts which form part of the legal system shall be in line with the

provisions of the Constitution as in force, and not merely with the order in force at the time of adopting the law.

As determined by the Constitutional Court in Decision 2/1993 (I. 22.) AB, the provisions governing referendums in the Referendums Act enacted prior to the 1989 amendment of the Constitution are not compatible with the new constitutional requirements based on the principle of the division of powers. Exercising its authority under Section 21 para. (7) of the ACC, the Constitutional Court determined *ex officio* on the basis, but exceeding the scope of the relevant petition that an unconstitutional situation had arisen by an omission to act and, consequently, the Parliament was summoned to fulfil its duty of legislation (ABH 1993, 33, 39).

VI Unconstitutional omission is established by the Constitutional Court in case of a failure to provide for the harmonisation of international law and domestic law, violating a fundamental right.

The Constitutional Court established an omission of legislative duty when examining the procedure of the Joint Committee handling the cases of compensation for damage caused by the Soviet troops and their members in performing their duties while stationed in Hungary. It was established that the main cause of unconstitutionality was the lack of a national law by which the Joint Committee was bound by the results of taking evidence (in a civil procedure) when passing its decision [Decision 30/1990 (XII. 15.) AB, ABH 1990, 128, 134].

It is a different competence that is exercised by the Constitutional Court when examining whether a national law is in violation of an international treaty (Sections 44 to 47 of the ACC). In such cases the Constitutional Court either annuls the national norm (if it is on the same or on a lower hierarchical level as the law promulgating the international treaty), or sets a deadline, summoning the legislator to eliminate the contradiction (if the national norm is of a higher hierarchical position). Nevertheless, the contents of such summons are similar to the establishment of the omission with a significant difference: an omission may only be established upon the occurrence of an “unconstitutional situation”, while issuing summons is subject to “the violation of an international treaty”. Therefore, different norms are applied in the two cases mentioned above: in the case of an omission it is the Constitution, while in the case of summons it is the international treaty violated that is used as a norm.

Establishment of omission due to the lack of guarantees

The Constitutional Court has not elaborated a uniform practice for the case when the laws fail to provide for (adequate) guarantees. Some decisions have established the unconstitutionality of such situations and annulled the relevant provisions. The same position is taken in Decision 9/1992 (I. 30.) AB when annulling the institution of protest on legal grounds "as the introduction of the safeguards conceptually required for legal remedy is precluded by the legal unity function of protest on legal grounds". As established in the same decision, the violation of the fundamental value of the rule of law enumerated in the Constitution is in itself a ground for declaring a certain legal rule unconstitutional (ABH 1992, 59, 65).

Decision 37/1992 (VI. 10.) AB annulling the Council of Ministers Decree regulating public television has similar contents. As explained in the reasons, the contents of the Council of Ministers Decree "is unconstitutional not because it entrusts the Government with the supervision (...) of the Hungarian [State] Radio and Hungarian [State] Television but because it does not contain any financial, procedural or organisational regulation which would preclude the possibility of the Government using its power to assert (...) a controlling influence on programming" (ABH 1992, 227, 232).

The same solution is applied in Decisions 47/1994 (X.21) AB and 28/1995 (V. 19.) AB [both dealing with the reallocation of budgetary appropriations and finding it unconstitutional that the Government had reallocation rights in respect of the public television and the courts] as well as in Decision 35/2002 (VII. 19.) AB examining the Act on Sports (and annulling certain provisions in the Act due to the lack of guarantees for the transfer of data).

As another theoretical possibility, the Constitutional Court may also leave the law without proper guarantee unchanged while establishing the fact of an unconstitutional omission. According to Decision 32/2004 (IX. 14.) AB, "an unconstitutional situation has resulted from the failure of the legislator to include provisions guaranteeing the secrecy of voting in the regulations on voting at foreign representations. The Constitutional Court called upon the legislator to meet its legislative duty (...)" [ABH 2004, 446, 456].

The same was established in Decision 22/2005 (VI. 17.) AB dealing with the size of single-member constituencies: "As the present statutory regulations do not contain the guarantees necessary for the enforcement of Article 71 para. (1) of the Constitution, the Constitutional Court has *ex officio* established that through an omission of its legislative duty, the Parliament

has caused an unconstitutional situation by not fully providing for the statutory conditions securing enforcement of the constitutional requirements resulting from the principle of equal voting rights enshrined in Article 71 para. (1) of the Constitution" [ABH 2005, 246, 259].

3. Examining the cases of unconstitutional omission

3.1. Initiating the procedure

Under Section 49 of the ACC, anyone may initiate the establishment of an unconstitutional omission, which may also be examined by the Constitutional Court *ex officio*. In the practice of the Constitutional Court, the term "anyone" means natural and legal persons with legal capacity (Decision 35/B/1990 AB, ABH 1990, 257).

The establishment of an omission may not be initiated by a constitutional appeal or a judicial motion. Under Section 48 para. (1) of the ACC, anyone may lodge a constitutional appeal with the Constitutional Court for the violation of his or her rights guaranteed by the Constitution if the injury is consequential to the application of the unconstitutional rule of law and if he or she has exhausted all other possible legal remedies or no further legal remedies are available.

Consequently, since it is a precondition for lodging a constitutional appeal that the unconstitutional law has been applied against the appellant, no successful appeal can be filed on the basis of an unconstitutional omission [Decision 1044/B/1997 AB, ABH 2004, 1160, 1176; Decision 986/B/1999 AB, ABH 2005, 889, 900; Decision 276/D/2002 AB, ABH 2006, 1369, 1373; and Decision 3/2007 (II. 13.) AB, ABK February 2007, 83, 84]. It may not be claimed in a constitutional appeal that the court should have applied a norm which can be derived from the Constitution but which has not been adopted. In such cases, legal remedy can be provided by the Constitutional Court rejecting the constitutional appeal and *ex officio* establishing an unconstitutional omission.

This is what has happened most recently in the case judged upon in Decision 37/2007 (VI. 12.) AB. The petitioner lodged a constitutional appeal claiming that by decreasing the period of resurrection from 15 years to 10 years, the Act on Social Security Pension did not guarantee protection of the expectation related to the resurrection of the widow's pension. The Constitutional Court judged upon the merits of the constitutional appeal as in the appellant's case the provision in question had been applied at the court, but it was established that the deadline for the resurrection of the widow's pension cannot be derived from the Constitution. However,

due to the complete lack of transitory (guaranteeing) provisions, the Constitutional Court established an unconstitutional omission (ABK June 2007, 511).

Under Section 38 para. (1) of the ACC, upon noticing the unconstitutionality of a law or other legal act of state administration applicable in the judgment of a case, the judge hearing that case shall suspend the case in court and file a petition initiating Constitutional Court proceedings. In that framework, however, no examination of unconstitutional omission may be initiated. As established by the Constitutional Court among other points in Decision 540/B/1997 AB, "parallel to suspending the court procedure, posterior examination of the unconstitutionality of a law, i.e. the procedure under Section 1 item b) of the ACC can be initiated. Section 38 of the ACC does not empower the judge to initiate, in his or her judicial capacity, elimination of the unconstitutional omission, i.e. the procedure under Section 1 item e) of the ACC parallel to suspending the procedure before him or her" (ABH 1999, 584, 585).

3.2. Examination of form and contents

As a principal rule, the Constitutional Court is bound by the petition, and it may only examine (the lack of) the rule contested by the petitioner. The Constitutional Court judges upon the petitions on the basis of their contents; if the petitioner requests the establishment of an omission, then the petition is judged upon by the Constitutional Court acting in this capacity. Therefore, there are no special formal requirements concerning the petition; the petitioner must indicate the omission and specify which provision of the Constitution is violated by the omission. As the Constitutional Court may also examine omissions *ex officio*, it is not bound by the petition when acting in this capacity.

Here, the Constitutional Court examines whether or not an unconstitutional omission exists in terms of contents, and therefore the examination covers the whole legal system.

Under Article 31/A para. (1) of the Constitution, protection of the President of the Republic from criminal prosecution shall be granted by a separate Act of Parliament. Up to the present day, however, no *separate* Act of Parliament has guaranteed protection of the President of the Republic. Decision 195/E/2000 AB (ABH 2001, 1116) examined whether an unconstitutional omission by the Parliament could be established due to the above. As pointed out by the Constitutional Court, a "separate Act of Parliament" is not a formal requirement, and it does not necessarily require the adoption of an individual norm under such title. The protection required in a "separate Act of Parliament" may be guaranteed by the legislator by granting special rules in existing laws.

Following the above arguments, the decision did not establish the existence of an unconstitutional omission as under Section 137 para. (1) item b) of the Criminal Code, the President of the Republic is an official person, and official persons enjoy a higher level of protection under criminal law than other persons (typically it is a qualifying circumstance implying the imposition of a more severe penal sanction when the victim is an official person). It was also established in the above decision that the felony of riot as defined in Section 140 of the CC is meant to protect the performance of constitutional duties by the President of the Republic. Therefore, the Constitutional Court rejected the petition seeking establishment of an unconstitutional omission.

Likewise, Decision 45/2000 (XII. 8.) AB rejected the petitions seeking establishment of an unconstitutional omission by the Parliament not having adopted a comprehensive Act against discrimination. The Constitutional Court holds that "the »sectoral division« of anti-discrimination regulations does not, in itself, result in an unconstitutional situation. The multi-level system of anti-discrimination legislation, implemented in certain larger fields and branches of law connected to the general constitutional rule, is not unsuitable for guaranteeing effective action against discrimination. Naturally, there can be gaps in the regulations; the fragmented rules may not provide a provision for certain cases qualifying as specific forms of discrimination. This is to be established by the Constitutional Court on the basis of an appropriate petition or by acting *ex officio*" (ABH 2000, 344, 347). It should be noted that later on the Parliament adopted such a comprehensive Act in 2003.

4. Constitutional Court decisions establishing an unconstitutional omission

The fact of omission and its substantial elements, furthermore, the deadline for the legislator to remedy the omission are established in the holdings of the Constitutional Court's decision. The reasons of the decision set out the arguments based on which the omission has been established by the Constitutional Court.

Surprisingly, the activism of the Constitutional Court has also shown itself in exercising the competence related to omissions. This competence had logically derived from supposing that after establishing an unconstitutional situation by the Constitutional Court, the legislator was to eliminate the omission, and the Constitutional Court was not expected to undertake the responsibility of legislation.[13] However, in practice, the institution of establishing omissions has been applied in a much more varied way. The Constitutional Court has used this competence for imposing positive requirements to legislate. "This facet of omissions is loved by the »activists«" wrote László Sólyom, ex President of the Constitutional Court.[14]

[13] LÁSZLÓ SÓLYOM: *Az alkotmánybíráskodás kezdetei Magyarországon (The Early Days of Constitutional Court Practice in Hungary).* Osiris, Budapest, 2001, p. 332.
[14] LÁSZLÓ SÓLYOM: Az Alkotmánybíróság önértelmezése…(Self-interpretation of the Constitutional Court...), p. 437.

In the case of a failure to perform a legislative duty deriving from a normative authorisation, the Constitutional Court is going to do nothing else but establish the omission of legislation, and it shall not give any guidance on the contents of the norm to be adopted. In such cases, the reasons of the decision refer to the nature of the unconstitutional situation caused by the failure to legislate.

At the same time, when *lacuna legis* is established, the Constitutional Court also bears reference to what the contents of the norm to be adopted should be. In such cases, the unconstitutional situation is namely caused by the lack of a provision with a specific content (typically making it impossible to exercise one of the fundamental rights); that is why it is necessary for the Constitutional Court to set, in the holdings of the decision, positive requirements for the legislator in respect of how to regulate certain issues.[15] An example for this is the Constitutional Court providing that the judicial review of public administration decisions be regulated by allowing the court to judge upon the merits of the decision. Similar decisions show that the Constitutional Court has clearly overstepped the role of negative legislation.

When setting a deadline for performing the legislative duty, the Constitutional Court takes into account first of all the severity of the unconstitutional situation, the constitutional legal remedies available under the transitional period, furthermore – as a matter of course – the rules of procedure of the relevant legislative body, the obligations of prior negotiations resulting from the nature of the law to be adopted, and the workload of the legislative body. The deadline set by the Constitutional Court shall be interpreted strictly in particular in the cases (...) when, together with the establishment of the omission, the Constitutional Court keeps in force – for various reasons – certain statutory provisions the unconstitutionality of which has been established [Decision 47/1997 (X. 3.) AB, ABH 1997, 324, 325].

5. The duty of the legislator upon the establishment of an omission

The legislator shall be bound, without any right of discretion, to adopt a norm eliminating the unconstitutional situation within the deadline specified in the Constitutional Court decision establishing the omission. This duty is based, on the one hand, on Section 49 para. (2) of the

[15] LÁSZLÓ SÓLYOM: Az Alkotmánybíróság önértelmezése…(Self-interpretation of the Constitutional Court...), p. 436.

ACC providing that the body in default shall meet its legislative duty within the specified deadline. This responsibility of the legislator is of an objective nature.[16]

Neither the Standing Orders of the Parliament, nor the rules of procedure of the Government contain specific rules for the implementation of Constitutional Court decisions establishing omissions; such omissions shall be remedied in the framework of ordinary legislation.

A failure to meet the obligation of legislation has no legal sanction. In the legal literature, there are various ideas regularly raised with a view to enforcing Constitutional Court decisions establishing an omission. According to "gentle" opinions, turning to the general public or petitioning the President of the Republic can be a solution[17], while other opinions would even accept the dissolution of the Parliament in case of a failure to perform the legislative duty on time.[18] Under Article 25 para. (1) of the Constitution, the President of the Republic may propose the adoption of Acts of Parliament, thus having an important opportunity to remedy unconstitutional omissions of legislative duty.[19] However, in fact, this right is rarely exercised by the President of the Republic; since the transformation of the political regime in Hungary, only one Act of Parliament has been initiated by the President of the Republic (Act V of 1991 on exercising general amnesty). Finally, some authors hold that, bearing in mind the nature of this competence, there is no need to enforce decisions establishing an omission, and it would be hard to find any effective solution complying with the both provisions and the principles of the Constitution.[20]

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[16] DÁNIEL KARSAI: A mulasztásos alkotmánysértés (Violating the Constitution by Way of Omission). *Multa Rogare I*, 2002, p. 53–55.

[17] DÁNIEL KARSAI: A mulasztásos alkotmánysértés szankciórendszere (The System of Sanctions Pertaining to Unconstitutional Omission). *Jogtudományi Közlöny* 2003/2, p. 94.

[18] KÁROLY TÓTH: Alkotmánysértő Országgyűlés? In. *Ünnepi kötet Schmidt Péter egyetemi tanár 80. születésnapja tiszteletére* (Parliament in Breach of the Constitution? In: *A Complimenting Edition to Commemorate the 80th Birthday of Professor Péter Schmidt*). Rejtjel, Budapest, 2006, pp. 392–395.

[19] TÍMEA DRINÓCZI – JÓZSEF PETRÉTEI: *Jogalkotástan (The Theory of Legislation).* Dialóg Campus, Budapest – Pécs, 2004, p. 207.

[20] PÉTER TILK: *Az Alkotmánybíróság hatásköre és működése* (C*ompetence and Operation of the Constitutional Court).* PTE ÁJK, Pécs, 2002, p. 208.