

1. Problems of Legislative Omission in Scientific Legal Doctrine

1.1. The Concept of the Legal Gap

Generally the opinion that one can come across in the scientific literature of Latvia concerning the legal gap is based on theses and conceptions that occur in German literature. One considers as the reason of imperfection of legal system, for example, continuous development of social relations, changes in technologies, economy and general social life, etc.

It is believed that a legal gap comes into existence at the moment when the legislator authorizes the applier of laws to make judgment using general provisions or ambiguous legal concepts (i.e. legal gaps *intra legem*). The legal gap also exists when the applier of laws has to make decision on its own, because, in the particular case, solution is not provided with any criterion by some positive considerations or legal norms. One can also speak of a legal gap in the case of legal silence, i.e. in the case of such legal imperfection when wording of a law does not contain any precise provision that could be applied in a particular case. Cases that are included into the applicable provision under verbal meaning of a law, but the provision, as to its meaning and objective, does not suit, can be considered as the legal gaps.

Imperfection appears, in accordance with sense of the concept of a gap, when the solution of the case can not be explained by a possible verbal meaning of a legal act.

Imperfection is not identical to legal silence, and it does not necessarily mean any legal gap. Absence of a certain legal regulation in a law does not mean that such regulation is objectively necessary from the point of view of legal system. It is considered that the legal gap may exist only in respect of judicially important situations of life.

One should not understand legal imperfection of law (*de lege ferenda*) as a legal gap. Prevention of such imperfections falls within the jurisprudence of the legislator only.

Controllable absence can be realized (on purpose).

The legal gap comes into existence if, taking into consideration the translation, no positive legal regulation is included in laws, although from the point of view of the legal system, such regulation is indispensable.

One distinguishes between the legal gap and gaps in laws. Gaps in laws – it is a case when not only one law is incomplete but the entire legal system requires regulation. At the same time it is indicated in regard of legal gap that legal system on its own is not considered to be as having no gaps because the notion of “legal gap” (imperfection of legal system) is not compatible with understanding with “open” legal system.

Kinds of legal gaps:

Open and hidden legal gaps.

Open – if there is no positive legal regulation included in a law regarding a particular situation of life, although it should have been included taking into consideration the “objective” of the respective law.

Hidden - if there is no positive legal regulation included in a law regarding a particular situation of live but the situation does not suit due to its meaning and objective because no peculiarities that are characteristic and important for the particular situations of life are taken into consideration (in this case the legal gap manifests itself as absence of limiting norm).

Initial legal gaps and subsequent legal gaps.

Initial – if the legal gap has existed at the moment of passing a law.

Initial legal gaps fall into two sub groups – conscious and unconscious.

Conscious – if the legislator has not fully regulated a particular field so that laws would develop in the way of case law and science, or there are references regarding “corresponding” application of a legal norm that regulates one question of jurisprudence to other questions of jurisprudence included in laws.

Unconscious – if the legislator, when passing a law, has not managed to regulate a group of some judicially relevant cases or has misbelieved that it has already been regulated by a law.

Subsequent – if the legal gap has appeared later (it has not existed when passing a law), for example, the legal gap that has occurred in the result of modification of different actual circumstances or evaluations that form the basis of the legal system, as well as the one that occurs in the case when, in the result of economic or technical development, there arises a question that could not have been anticipated by the legislator and which now has to be regulated within a law.

1.2. The Concept of Legislative Omission

In the scientific literature, one does not distinguish between legislative omission and legal gaps that would be in conflict of the Constitution, i.e. illicit legal gaps.

1.3. The Constitutional Court as a “Negative” or “Positive” Legislator

The mission of the Constitutional Court is to protect fundamental rights of persons against invasions might occur in relation to application of a particular legal act. When fulfilling this mission, the Constitutional Court plays a great role in qualitative improvement of national legal doctrine. Due to judgments of the Constitutional Court legal doctrine, especially doctrine of social law has developed considerably. At a certain extent judgments of the Constitutional Court that are publicly available and motivation included in the judgments has an impact on consciousness of the society.

The Constitutional Court that exercises the constitutional review of statute inevitably participated in the legislative function. The Constitutional Court is considered to be a “negative” legislator, because the constitutional review process is limited to reviewing and if appropriate annulling laws passed by the legislator when it conflicts with the law of the constitution. To avoid the situation where the constitutional review abrogates the specific separation of powers between judicial review and the legislature, the Constitutional Court in a constitutional review avoids formulating the terms of the laws of the legislature. Thus there exists a mutual respect - the legislator respects the negative decisions of the constitutional review proceeding and the Constitutional Court respects the discretion of the legislator.

In a sort, the Constitutional Court fulfils the function of a “positive” legislator. This can frequently be observed in the cases when the Constitutional Court, with the means of its judgment, declare a certain norm as inoperative, but at the same time it establishes that a temporary legal regulation is indispensable until the legislator corrects its errors. There are judgments where the Constitutional Court holds that institutions and courts have to apply, in accordance with the constitution and international legal norms binding on Latvia, legal acts that are declared illicit (2006-03-0106) and observing what has been established by the Constitutional Court (2006-28-01) until the moment when the legislator corrects its mistakes.

The Constitutional Court, acting at a certain extent as a positive legislator, has indicated that in the case if needed and possible, the Constitutional Court can hold in the establishing part of the judgment that norms amended by the contested act that was declared by the Constitutional

Court as inadequate to legal acts of higher legal power retrieves their legal power (2005-12-0103; 2006-13-0103).

Although the Constitutional Court respects freedom of action of the legislator, it sometimes indicates what the legislator has to take into consideration when amending legal regulations.

2. Consolidation of Control of the Constitutionality of the Legislative Omission in the Constitution, Constitutional Jurisprudence and Other Legal Acts of the Country

2.1. The Constitution in the National Legal System

The Republic of Latvia Satversme (Constitution) in the hierarchy of legal acts of Latvia has the highest legal power.

Hierarchy of legal acts is established in accordance with their legal power. The legal power determines the supreme command of the legal act over inferior acts or, if on contrary – its subjection to superior acts.

Hierarchy of legal acts:

1. The Constitution of the Republic of Latvia;
2. Laws passed by the Saeima (Parliament), international legal acts ratified by the Parliament and laws on ratification of international treaties;
3. Regulations of the Cabinet of Ministers with validity of the law;
4. Regulations of the Cabinet of Ministers and international legal acts that are ratified at the level of Cabinet of Ministers;
5. Regulations binding on local governments.

2.2. *Expresis verbis* Consolidation in the Constitution Concerning the Jurisdiction of the Constitutional Court to Investigate and Assess the Constitutionality of Legal Gaps

The Satversme (Constitution) establishes the jurisdiction of the Constitutional Court, namely, in the frameworks of the jurisdiction established in the law, the Constitutional Court hears cases on compliance of laws with the Constitution, as well as other matters regarding which jurisdiction is conferred upon it by this law. The Constitutional Court is authorized to declare laws, acts or their parts as inoperative.

Section 1 of the Satversme establishes that The Constitutional Court shall be an independent judicial authority which within the jurisdiction specified in the Constitution of the Republic of Latvia and in this Law, shall adjudicate matters regarding the compliance of laws and other regulatory enactments with the Constitution, as well as other matters regarding which jurisdiction is conferred upon it by this Law.

Whereas Section 16 of the Constitutional Court provides that The Constitutional Court shall adjudicate matters regarding:

- 1) compliance of laws with the Constitution;
- 2) compliance of international agreements signed or entered into by Latvia (also until the confirmation of the relevant agreements in the *Saeima*) with the Constitution;
- 3) compliance of other regulatory enactments or parts thereof with the norms (acts) of a higher legal force;
- 4) compliance of other acts of the *Saeima*, the Cabinet, the President, the Speaker of the *Saeima* and the Prime Minister, except for administrative acts, with law;
- 5) compliance with law of such an order with which a Minister authorised by the Cabinet has suspended a decision taken by a local government council (parish council); and,

6) compliance of Latvian national legal norms with those international agreements entered into by Latvia that is not in conflict with the Constitution.

The Constitutional Court is not authorized by the Constitution or any other legal act to assess the constitutionality of legal gaps¹. As well, the Constitution does not provide for any other special procedure for investigation of legislative omission.

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 does not investigate compliance of legal gaps with the constitution and it does not assess their legality. Thus, having concluded that a nonexistent norm, i.e. a legal gap is contested, the Board of the Constitutional Court refuses to initiate a case and it indicates, by reference to Article 16 and Part 2 of the Article 19 of the Constitutional Court Law, that that it is beyond the jurisdiction of the Constitutional Court to assess compliance of a nonexistent regulation with the Constitution. For instance, in the Judgment of July 21, 2001 on Refusal to Initiate a Case Due to the Application of Jēkabs Siliņš (application registration No. 75) the Council has indicated that the cases to be reviewed by the Constitutional Court are listed in the Article 16 of the Constitutional Court Law, which *inter alia* provides that the Constitutional Court shall review cases regarding compliance of laws with the Constitution. This article is to be interpreted together with Part 2 of Article 19 of the Constitutional Court Law that provides that any person, who holds that his/her fundamental rights, established by the Constitution, have been violated by applying a normative act, which is not in compliance with the legal norm of higher legal force, may submit a claim (an application) to the Constitutional Court. Thus the Constitutional Court investigates only legal regulations that are included in operative legal acts with legal acts with superior legal power.

2.4. Legal Regulations of the Constitutional Court Law or Other Legal Acts Regarding Jurisdiction of the Constitutional Court to Investigate and Assess Constitutionality of Legal Gaps

The Constitutional Court does not assess legal gaps.

3. Legislative Omission as Object of Investigation by the Constitutional Court

3.1. Application to the Constitutional Court

The right to submit an application to initiate a case regarding compliance of laws and international agreements signed or entered into by Latvia with the Constitution, compliance of other normative acts or their parts with the legal norms (acts) of higher legal force, as well as compliance of national legal norms of Latvia with the international agreements entered into by Latvia, which are not contrary to the Constitution, has:

- 1) the President;
- 2) the Parliament (*Saeima*);
- 3) not less than twenty members of the *Saeima*;
- 4) the Cabinet of Ministers;
- 5) the Prosecutor General;

¹ 85. In Latvia, there shall be a Constitutional Court, which, within its jurisdiction as provided for by law, shall review cases concerning the compliance of laws with the Constitution, as well as other matters regarding which jurisdiction is conferred upon it by law. The Constitutional Court shall have the right to declare laws or other enactments or parts thereof invalid. The appointment of judges to the Constitutional Court shall be confirmed by the *Saeima* for the term provided for by law, by secret ballot with a majority of the votes of not less than fifty-one members of the *Saeima*.

- 6) the Council of the State Control;
- 7) the Dome (Council) of a municipality;
- 8) the Ombudsman;
- 9) a court, when reviewing an administrative, civil or criminal case;
- 10) a judge of the Land Registry when entering real estate- or thus confirming property rights on it- in the Land Book;
- 11) a person whose fundamental rights established by the Constitution have been violated.

The right to submit an application to initiate a case regarding compliance of other acts (with an exception of administrative acts) of the *Saeima*, the President, the Chairperson of the *Saeima* and the Prime Minister with the Constitution and other laws, has:

- 1) the President of State;
- 2) the *Saeima*;
- 3) not less than twenty members of the *Saeima*;
- 4) the Cabinet of Ministers.

The right to submit an application to initiate a case regarding compliance with the law of an order by which a minister, duly authorized by the Cabinet of Ministers, has rescinded the binding regulations, issued by the Dome (Council) of a municipality belongs to the relevant Dome (Council).

3.2. Legislative Omissions in the Petitions of the Petitioners

The Constitutional Court accepts petitions on legal gaps and legislative omissions. These are not many and these are mainly constitutional complaints. The court receives in average 3 – 4 petitions a year. However, in accordance with the jurisprudence of the Constitutional Court provided for in the legal acts, the councils take a decision not to initiate case because Constitutional Court investigates only legal regulations that are included in operative legal acts with legal acts with higher legal power.

3.3. Investigation of legislative omission on the initiative of the Constitutional Court

The Constitutional Court does not initiate cases on its initiative. It is not commissioned to introduce a bill.

3.4. Legislative Omission in Laws and Other Legal Acts

The Constitutional Court does not assess legal gaps.

3.5. Refusal by the Constitutional Court to Investigate and Assess Legal Gaps

The Constitutional Court refuses to investigate legal gaps because of absence of direct reference concerning such investigation in the constitution and the laws.

By refusing to initiate a case the Council usually indicates that the cases to be reviewed by the Constitutional Court are listed in the Article 16 of the Constitutional Court Law, which *inter alia* provides that the Constitutional Court shall review cases regarding compliance of laws with the Constitution. This article is to be interpreted together with Part 2 of Article 19 of the Constitutional Court Law that provides that any person, who holds that his/her fundamental rights, established by the Constitution, have been violated by applying a normative act, which is not in compliance with the legal norm of higher legal force, may submit a claim (an application) to the Constitutional Court. Thus the Constitutional Court investigates only legal regulations that are included in operative legal acts with legal acts with higher legal power.

In the Judgment of the Case No. 2005-03-0306 the Constitutional Court has indicated that “the requirement for the legislator himself to solve all the issues connected with the life of the state, in the complicated conditions of the contemporary society has become unreal. The legislator has no possibility to decide in the legislative way all the issues to which regulation is the necessity. Such activity of the legislator very often would be belated, because the process of legislation is time consuming and ponderous. To secure a more efficient implementation of the state power, deviation from the requirement that the legislator has to solve all the issues is admissible. The above efficiency may be reached if the legislator in the process of legislature takes decisions on the most significant issues, but delegates elaboration of more detailed regulations and technical norms, necessary for implementation of the laws in practice, to the Cabinet of Ministers or other State institutions. The above procedure not only makes the process of legislation more effective, as the legislator does not have to spend time on solving technical issues, but also allows more quickly and adequately to react on the necessity of amending of normative regulation. In elaboration of technical norms the Cabinet of Ministers or other authorized State institutions are in most cases more competent than the legislator and the process of adopting of decisions is not so complicated.

[...]Provision that the law shall directly include authorization to issue the Regulations as well as the main direction of the Cabinet of Ministers Regulations follows from the requirement that the legislator himself has to solve the most important public life issues. Taking into account the fact that it is not purposeful to regulate all the issues in the legislative way, the legislator has at least to consider the issues. And authorization to regulate in a more detailed way this or that issue by the Cabinet of Ministers Regulations, testifies about accomplishing of the above. The legislator shall clearly point out what issues and in what way the Cabinet of Ministers is authorized to regulate.

The legal norm by which the legislator authorizes the Cabinet of Ministers to regulate the procedure of implementation or restrictions of the fundamental rights, determined in the Satversme, shall be clear and precise. Restriction of the fundamental rights of a person by referring to obscure or possible to misconstrue authorization of the legislator shall not be admissible.”

4. Investigation and Assessment of the Constitutionality of Legislative Omission

The Constitutional Court does not assess legal gaps and legislative omission. However, when assessing compliance of the contested provision with the legal act of a superior power, in the result of the judgment of the Constitutional Court a legal gap may occur. In order to avoid such situations, the not only the Constitutional Court provides a temporary regulation but sometimes also indicates how to act in a particular situation.

For instance, the Constitutional Court, when indicating that the legal regulation recognized as illegitimate shall stay operative for a definite period of time, i.e. until the mistake of the legislator will be corrected, it has implied to the legislator that the legislator has to find a solution for the situation where rights of houseowners and pre-revolution tenants would be observed. Moreover, one is also given time to eliminate lacuna in order to create – as the Court has indicated in the establishing part of the judgment – a more efficient mechanism for observation of arbitrariness of those house owners who seek to evict tenants or cash in a higher rent in an unlawful way.

Disregarding the fact that the Constitutional Court observes the principle of power division and does not interfere with activities of the legislator, it has indicated in several judgments what the legislator should take into consideration, for example, the Constitutional Court, in several judgments (judgment of August 30, 2000 in the Case No. 2000-03-01, judgment of March 22, 2005 in the Case No. 2004-13-0106) held that the legislator has to assess periodically the situation in the state and has to decide on concretization of restrictions and determination of terms.

Although no conclusion on that whether the obscure provision should be considered as legislative omission is included in judgments of the Constitutional Court, it has assessed clarity of a provision. Thus in the judgment No. 2006-12-01 the Constitutional Court has indicated that laws and legal regulations have to be both, comprehensible enough and prospective, i.e. formulated precisely enough so that a person, in the case of necessity and having had a corresponding consultation, could regulate his or her behaviour. But at the same time the Constitutional Court has indicated that it is not always possible to define a regulation clear enough. In these cases it is necessary to find out its exact meaning by applying legal regulations. It is not correct to stick to the verbal meaning of the provision only. If legislator, when expressing its will in words, has not done it precisely or comprehension of rights has developed or changed, one has to take into account the actual will of the legislator.

4.8. Means of 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

The most common means are recognition of the provision as being in conflict with the constitution and at the same time providing that the provision becomes invalid with a delayed date, which means that the court gives the legislator time to improve legal regulations and correct mistakes.

During the period when the contested provision that is in conflict with the Constitution still remains valid, the court passes temporary regulation. Thus, for instance, there are judgments where the Constitutional Court holds that institutions and courts have to apply, in accordance with the constitution and international legal norms binding on Latvia, legal acts that are declared illicit (2006-03-0106) and observing what has been established by the Constitutional Court (2006-28-01) until the moment when the legislator corrects its mistakes. The Constitutional Court has indicated that in the case if needed and possible, the Constitutional Court can hold in the establishing part of the judgment that norms amended by the contested act that was declared by the Constitutional Court as inadequate to legal acts of higher legal power retrieves their legal power (2005-12-0103; 2006-13-0103).

Thus, in the judgment of April 11, 2007 in the case No. Nr. 2006-28-01, when determining the time when the contested provision shall become invalid, the Constitutional Court indicates that “the legislator requires time to improve legal regulation, because the contested regulation ensured achieving the legitimate objective, i.e. efficient administration of taxes. If the contested shall be recognized as invalid before the legislator passes a more lenient regulation, reaching of a particular legitimate aim is threatened. This means that there would be no disciplinary regulation and each tax payer could submit source document (evidences) at any moment. This situation that would be established in the case if there would be no regulation at all concerning this field would be even more in conflict with the Constitution compared to the existent situation. The Constitutional Court has repeatedly held that [...]: in the above situation it is admissible that the regulation that is in conflict with the Constitution, remains valid so that the legislator would be able to find a solution for the situation where one observes interests of both – society and certain tax payers.

Simultaneously the Constitutional Court takes into account the fact that administrative courts are authorised to adjudicate a case by applying directly the regulations of the Constitution in each particular case. But in order to ensure that decision of tax administration would not create invasion of rights that persons are provided for by the Constitution until the contested regulation would become effective, the contested norm has to be applied during the above period of time by observing *inter alia* what is specified in this judgment of the Constitutional Court.”

5. Consequences of the Statement of the Existence of Legislative Omission in Constitutional Court Decisions

The Constitutional Court does not assess legal gaps and legislative omission. However, according to Article 32 of the Constitutional Court Law a judgment of the Constitutional Court shall be binding on all state and municipal institutions, offices and officials, including the courts, also natural and juridical persons.