The Constitutional Court of the Republic of Lithuania

PROBLEMS OF LEGISLATIVE OMISSION IN CONSTITUTIONAL JURISPRUDENCE

National Report

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1. PROBLEMATICS OF LEGAL GAPS IN THE SCIENTIFIC LEGAL DOCTRINE

1.1. The concept of the legal gap

In Lithuania, problems of legal gaps are the object of research not only by constitutional law, but also by the legal theory as well as by civil law. It is recognised in the national scientific legal doctrine that there might be legal gaps (*lacuna legis*) in the legal system [1]. It is noted that although law regulates particularly varied relations, life itself is always more diverse: it is impossible to create any such rules of behaviour, which would encompass all possible variants of human behaviour in all circumstances of life. Therefore, sooner or later it may come to light that *law does not regulate certain relations, which is a legal gap [2].*

Of course, there are differing opinions. It is maintained, that, purportedly, there cannot be legal gaps (if not only positive law is regarded as law) [3], while there exist only gaps in a law. Moreover, the authors who are considering this issue note that in the legal literature opinions have been expressed that there is not such a phenomenon as a legal gap (or a gap in a law), since absence of a legal norm means the permission by the legislator that the court act at its discretion. Such a view is substantiated by the principle that “law permits what it does not prohibit”. A conclusion is drawn that a legal gap is a result of our assessments, but not a concrete thing.

Various causes of appearance of legal gaps are pointed out in the national scientific legal literature. The cause of some legal gaps is the dynamics of life and the legislation lagging behind the social relation undergoing fast changes. Other causes are determined by imperfect legislation (law-making), insufficient modelling and prediction in drafting laws (legal acts), unawareness of the actual situation, in other words, mistakes of the legislator (other law-making entities) which might appear that the legislator (other law-making entity): (a) erroneously thinks that certain relations do not require regulation; (b) erroneously thinks that law may be particularised in the course of its application; (c) erroneously delegates the right to decide this issue to the institution which applies the law; (d) issues an unnecessary norm; (e) decides the issue not as it should be decided; (f) adopts legal norms of equal power, which radically contradict each other [4].

Some authors raise a question whether after the Constitutional Court of the Republic of Lithuania (hereinafter referred to as the Constitutional Court) adopts a ruling whereby certain legal regulation is recognised to be in conflict with the Constitution, there appears a legal gap. They provide the following argumentation. Under Paragraph 1 of Article 107 of the Constitution [5], a law (or part thereof) of the Republic of Lithuania or other act (or part thereof) of the Seimas, act of the President of the Republic, act (or part thereof) of the Government may not be applied from the day of official promulgation of the decision of the Constitutional Court that the act in question (or part thereof) is in conflict with the Constitution of the Republic of Lithuania. Article 72 of the Law on the

Constitutional Court provides that all state institutions as well as their officials must revoke the substatutory acts or provisions thereof which they have adopted and which are based on an act which has been recognised as unconstitutional. Decisions based on legal acts which have been recognised as being in conflict with the Constitution or laws must not be executed if they had not been executed prior to the appropriate Constitutional Court ruling went into effect. Thus, a conclusion is drawn that the Constitutional Court, as well as constitutional courts of other European states, having recognised a norm of a law or of a substatutory legal act as unconstitutional, virtually creates a certain vacuum [6] or simply a legal gap [7].

Certainly, sometimes it is emphasised that the Constitutional Court, unlike other constitutional courts, does not abolish the legal norm, but only points out that the application of the concrete norm is further impermissible. It is maintained that if this situation is assessed formally it could be possible to assert that after the Constitutional Court adopts a ruling there appear no gaps in law: if the situation is understood and explained in this way, the consequences which occur after the Constitutional Court adopts a ruling whereby a legal act is recognised as unlawful, i.e. as conflicting with the Constitution, are not given too much prominence. However, such formal assessment does not hinder one from drawing a conclusion that after the Constitutional Court adopts a ruling whereby this legal regulation is recognised as conflicting with the Constitution, there appear legal gaps, and this is one more cause of appearance of legal gaps [8].

In the legal scientific doctrine legal gaps are classified according to various criteria. Almost all authors distinguish *primary* and *secondary* legal gaps [9].

When due to imperfect legislation, failure to understand the issue or other reasons certain actually existing social relations are not a matter of legal regulation at all, there is *a primary legal gap* (this case is also called an evident legal gap). For example, in Lithuania, law did not regulate the relations linked with donation and transplantation of human tissues and organs for a long time.

When certain social relations have been regulated by legal norms, however, with changes in life there appear new situations, which have not been provided for and discussed in the law (or other legal act), there is *a secondary legal gap* (in this case it would be more expedient to speak about a gap in a law (or in another legal act), but not a legal gap). For example, under the legal regulation consolidated in the Civil Code, various objects of authors' rights were under protection, however, computer software and data bases were not an individual object of protection of authors' rights in the said code until 1994.

Legal gaps are also grouped as *accidental* and *non-accidental [10]*.

The accidental legal gap appears when the legislator does not regulate certain factual relations, since he is unaware of their existence. *The non-accidental legal gap* appears when the legislator, while being aware of the existence of certain factual relations, does not regulate them because of political, economic or other reasons. Of course, sometimes it is maintained that there simply cannot be any non-accidental legal gaps. For instance, it is maintained that one should not

confuse gaps in laws (or in other legal acts) with a situation, where the legislator (or other law-making subject) refrains from adopting a norm and gives it to understand that the issue is to be decided not by means of a law (or other legal act), but, for example, by means of moral norms [11].

According to the causes of their appearance, legal gaps may be grouped as:

1) *gaps that appeared due to insufficiently comprehensive legal regulation;* these are cases when a law (or other legal act) does not regulate a concrete relation;

2) *gaps which appeared due to insufficient legal explicitness;* these are cases where a law (other legal act) regulates a certain concrete case not clearly enough [12].

Besides, one indicates *axiological gaps* a specific type of legal gaps, i.e. cases when a law (or other legal act) regulates an issue in a way, which is unacceptable from the moral standpoint [13].

In the scientific legal doctrine, there is a prevailing approach that all legal gaps give rise to legal problems of some or other character, which must be solved [14]. The ways of solution, i.e. elimination of the legal gaps, may be varied ones.

In the opinion of some authors, it is possible to eliminate a gap in a law (or other legal act) only by specially issuing a law (or other legal act) for this purpose, while only the legislator (or other law-making subject) can do so [15]. These authors do not assent to the statement that legal gaps could be eliminated by means of acts of courts and administrative institutions, which are adopted in the course of solution of cases.

This position, which is to be related with the formal approach to legal sources, has not been a prevailing one lately. It is emphasised that, without disputing the right of the legislator (or other law-making subject) to eliminate the said gaps by adopting a new law, or by supplementing the valid law (or other legal act), still, it is also necessary to recognise the second way of elimination of the gaps, i.e. the application of a court precedent. If the right of the court to remove legal gaps is denied, then also an opportunity of application of analogy is denied, while in consideration of civil cases one cannot do without the said opportunity: in this case, a court, having confronted a legal gap, would not be able to decide the case, since elimination of legal gaps is not its prerogative, but that of the legislator (other law-making subject) [16].

In this context it also needs to be emphasised that the opportunities of the court to fill legal gaps by applying an analogy and construing law are not limitless. It is noted that it is recognised by the legal doctrine of a number of countries that analogy is impermissible and not tolerated in criminal law as well as in other branches of public law. Other limitations on application of an analogy are also known. It is generally recognised that a court is not permitted to apply an analogy and fill legal gaps, when it is related with limitation of basic human rights and freedoms. It is also recognised that all limitations of rights and freedoms are permitted only upon the basis of a law [17]. However, there are authors, who think that the analogy of a law could be applied even in

criminal law, however only in a way so that no pre-conditions be created for violation of the rights of the person [18].

Scientific works employ one more legal term, which is *a legal vacuum*. From the very start it used to be employed as a synonym of the legal gap [19]. It was maintained that this term does not have an independent meaning [20]. Later, on the grounds of the legal doctrine of foreign states, there appeared statements as to how the terms “legal gap” and “legal vacuum” are employed: the absence of a legal norm, which directly regulates the relation of the dispute, is understood as a legal gap, although the said relation belongs to the sphere of legal regulation, the elimination of which is possible either by way of law-making, or by applying an analogy. Meanwhile, a legal vacuum is a situation, where law does not regulate a certain sphere of social relations at all, i.e. when there is no law at all, and where it is possible to eliminate the vacuum by issuing respective laws.

Of course, there are authors in Lithuania, who deny the necessity of the term *a legal vacuum* in the legal science. In their opinion, the creation of a new term and search of the differences between the legal gap and the legal vacuum is hardly necessary. It is maintained that the legal vacuum is a primary legal gap, i.e. an absolute vacuum. The secondary gap is a relative legal vacuum, i.e. a situation (a form of the vacuum), where law regulates the relations, but it does so not sufficiently enough. In both cases the court must and can fill the legal gap by construing law, while deciding the case on the grounds on the general principles of law (those of justice, equality of rights, reasonableness, good faith etc.), and by applying an analogy [21].

1.2. The concept of legislative omission

Although, as mentioned, legal gaps cause problems in legal practice, as a rule, they are only a pre-condition to further develop the legal regulation. Meanwhile, *legislative omission, which is understood as a legal gap prohibited by law, first of all—by ius supremum (the Constitution)*, is something different.

It is noteworthy that the notion of legislative omission was issued into the legal circulation not by scientists, but by the Constitutional Court. It is noted in the legal literature: “The Constitutional Court decision of 8 August 2006 formulated the doctrine of legal gaps, *inter alia* of legislative omission, which is a legal gap prohibited by the Constitution” [22]. The fact that the concept of legislative omission had not been used in the legal literature does not mean that the issues related with legislative omission had not been researched. The recognition (by the doctrine) of the legal gap which is prohibited by the Constitution also means that the national legal doctrine is also considering the question as to how such unlawful legal gaps should be removed from the legal system, i.e. *as to what legal mechanism should be provided for in the legal system, which could help remove the legislative omission from the legal system.* It goes without saying, the

answer is that it is only the institution of constitutional review that can state the existence of the unlawfulness of the lack of legal regulation, i.e. legislative omission, which is prohibited by the Constitution: the legislator of other law-making institution cannot state the existence of the unlawfulness of the legal regulation (which is prohibited by the Constitution) by means of a law or other legal act adopted by the legislator, since then the meaning of the decision of constitutional cases would be negated in essence.

It is noteworthy that, as far back as in 1998 and later, the national legal doctrine articulated some *hints* that, purportedly, the institution of constitutional review should recognise legislative omission (this gap was not named precisely like this then) as conflicting with the Constitution [23]. Of course, in the beginning such hints were very timid, since, as it was mentioned, the attitude was prevalent for quite some time, where one thought that it was possible to eliminate the gap in a law (or other legal act) only by specially issuing a law (other legal act) for this purpose, while only the legislator (or other law-making subject) could do this.

While analysing the activity of the Constitutional Court in 1998, it was maintained: “The analysis of the norms of the Constitution and the Law on the Constitutional Court creates preconditions to assert that the Constitutional Court of the Republic of Lithuania, unlike the constitutional courts of other European states, does not have constitutional opportunities to assess that a legal gap, non-regulation of concrete social relations, is in conflict with the Constitution. It needs to be emphasised that in this respect the position of the Constitutional Court is generally unambiguous. Having confronted an obvious legal gap, the Constitutional Court states the peculiarities of its legal status and underlines that the removal of a legal gap is within the prerogative of the legislator, and on these grounds adopts a corresponding decision” [24]. Alongside, it was predicted that if the Constitutional Court continues to confront the issue of the legal gap in the future, these questions should fall within the scope of interest of the legislator, who could grant the Constitutional Court an opportunity to recognise the legal non-regulation as conflicting with the Constitution [25]. Later, the same author asserted that due to the fact that the issue of the legal gap is very important to the development of Lithuanian law, it would be expedient to grant the Constitutional Court the legal power to recognise that the legal non-regulation of corresponding social relations may be a pre-condition to recognise this situation as conflicting with the Constitution [26].

The legal science began to doubt as regards the statement of the doctrine that the Constitutional Court does not decide the question of legal gaps [27]. Taking account of the fact that the grounds of the consideration of the compliance of a legal acts with the Constitution is a legally reasoned doubt whether the entire legal acts or part thereof is in conflict with the Constitution according to the content of the norms, to the extent of regulation and the form, the author raised a question, whether the right to decide as regards (non-)compliance of gaps in laws with the Constitution could be derived from the assessment whether a concrete law (its provision) is not in

conflict with the Constitution “to the extent of the regulation”, since such non-regulation could violate the Constitution [28]. Of course, the author was not rash in making a conclusion that the court must decide the constitutionality issues of gaps. In his opinion, the situation is really complicated, since one confronts here two problems, which do not yield to a simple solution. The first problem is this: under the Constitution, the Constitutional Court decides not an issue of routine activity of institutions, but that of the compliance of acts adopted by the institutions with the Constitution, meanwhile, as a rule, it is impossible (with rare exceptions) simply to state that certain relations are to be regulated in one of valid laws (in particular, in which concrete law or an article thereof). The second problem is this: it is impossible to establish as to who is concretely responsible for (non-)adoption of the law—it is not clear as to what subject should prepare a draft law, by which the gap would be removed, and submit it to the legislature, nor is it clear who is responsible for failure to adopt the said law, if in the course of the deliberation on the law there appear disagreements as to what provisions there should be in the law, especially that the Constitution does not establish *expressis verbis* a duty to the Seimas to adopt some or other laws. It is emphasised that even in the situation where the Constitution clearly provides that certain social relations must be regulated by a law, there is not any formal basis to maintain that a certain legislator (the Seimas), but not the other legislator (the Nation), must do so.

The aforesaid author made an assumption that the statement of the existence of the gaps, which determine the violation of constitutional rights of persons, in Constitutional Court decisions would be significant for Lithuania as regards the protection of the persons and rights: by stating that the state violated, by means of a law, the constitutional rights of the person, the Constitutional Court would empower the court of general jurisdiction to adjudicate substantive and non-substantive damage to be paid by the state [29]. It was also noted that the practice of the Constitutional Court shows that this court not only *de facto* assesses gaps in laws, but also recognises them as conflicting with the Constitution [30].

1.3. The conceptions of the Constitutional Court or the corresponding institution which implements the constitutional control as a “negative” and “positive” legislator.

The beginning of scientific research of the mission of the constitutional court, it place in the system of other state institutions, is to be related with the name of M. Romeris (1880-1945), who was the father of the science of constitutional law in Lithuania. While analysing the legal preconditions of constitutional review, M. Romeris maintained that courts of general jurisdiction should not discharge this function, since it would not be in line with the nature and principles of the representative democracy, and he drew a conclusion that only a constitutional court with a special status could be the most realistic guarantee of the Constitution [31]. Such court would verify the constitutionality of laws and international treaties. According to M. Romeris, the constitutional court

would have to guide itself only by concrete constitutional provisions, but not by more general principles of law and those of the Constitution [32].

It needs to be emphasised that the scientific research of the problem of the mission of the constitutional court, its place in the system of other state institutions came back to life after the restoration of the Independence. It was established in the Constitution that was adopted by the 1992 referendum of the Nation that the control of the compliance of laws and other legal acts with the Constitution is executed by the Constitutional Court. From the very beginning of the activity of this court, the legal literature points out that the Constitutional Court ensures constitutional justice [33], that its functions are special ones—guaranteeing constitutional justice, which *inter alia* includes its right to annul laws and substatutory acts [34]. It is also emphasised that in guaranteeing constitutional justice, the Constitutional Court also is responsible for construction of constitutional norms, their uniform comprehension and the formation of the practice of uniform application of these norms [35].

The purpose of the Constitutional Court in the constitutional legal doctrine was (and is) formulated as guaranteeing of the supremacy of the Constitution, when this court decides whether laws and other acts of the Seimas are not in conflict with the Constitution, while acts of the President of the Republic and the Government are not in conflict with the Constitution or laws [36]. In other words, the obligation of the Constitutional Court to remove the unlawful provisions from the legal system was (and is) emphasised [37].

On the other hand, the extent of removal of these provisions was and is an issue in discussions of the constitutional scientific doctrine. For instance, in 2001, it was discussed as to what other acts of the Seimas the Constitutional Court can assess and whether the Constitutional Court can express its opinion regarding the acts the investigation into the compliance of which with the Constitution is not requested by the petitioner, which, however, fall within the jurisdiction of the Constitutional Court [38].

While assessing the activity of the Constitutional Court at the juncture of the 20th-21st centuries, it is emphasised that the Constitutional Court should be not a mere guarantor, but an efficient guarantor of the Constitution [39]. It was noted that the Constitutional Court must be not only restrained, but also active, that in case of need it can construe the Constitution not in a strict, but also in a liberal manner [40].

It is emphasised in the scientific doctrine (because of the “primordial” purpose of the Constitutional Court to remove unlawful provisions from the legal system) that the Constitutional Court is, as a rule, called the negative legislator [41]. Alongside, it is maintained: “The necessary presumption of negative legislation, and at the same time constitutional control, is the construction of the Constitution (text): the ‘primary’ function of the constitutional justice—assessment of the correspondence of the legal acts to the Constitution—presupposes the construction of the Constitution as an indistinguishable element of constitutional control. <…> The broad conception of

the Constitution, including not only the text of the constitutional document but also the constitutional jurisprudence currently makes its way in Lithuania. <…> A careful approach towards constitutional justice is sometimes supported by the fear of activism of judges. However *a certain* activism is an inevitable satellite of construction of the Constitution because it is an active and creative work. *Activism* could be combined with self-restriction of judges. It is their balance that guarantees the consistency of dynamics and stability of the constitution. <…> The more of the official constitutional doctrine there is, the easier it is to predict *the Constitutional Court*. The Constitutional Court with the help of the constitutional doctrine binds not only the subjects of the legislation, but also itself. That is—though not absolute—setoff of over-activism, one of the forms of self-restraining by the judges, and it guarantees that the construction of the Constitution and the decisions based on it will not be voluntaristic, inspired by individual attitudes, emotions or political calculation. It is important that when changing the composition of justices of the Constitutional Court this provision of the doctrine of self-restraining of judges not diminish" [42].

According to this approach, the Constitutional Court must reveal the legal content of the Constitution in the most comprehensive manner possible. It is emphasised that it is the revelation of the content of the Constitution and its construction which becomes the most important mission of the Constitutional Court [43]. Of course, there are also other opinions that assess such practice of the Constitutional Court negatively [44].

Therefore, the Constitutional Court is most often regarded not only as the "negative legislator" that removes anticonstitutional norms of ordinary regulation and thus corrects the system, but also as the official interpreter of the Constitution, as the one that reveals the content of the constitutional regulation in its jurisprudence, that constantly develops the constitutional system and directs further improvement of the whole legal system in a certain direction. It is noted that the Constitutional Court, as the "positive legislator" not only forms the official constitutional doctrine: while approbating a certain law as not conflicting with the Constitution, the Constitutional Court virtually sanctions the result of the activity of the legislator. In addition, sometimes, while choosing one of possible alternatives of construction of the disputed legal act, the Constitutional Court gives this act somewhat different meaning than the meaning granted to it by the previous practice of application of that act, and it holds that only if the legal act "is construed so", then it is not in conflict with the Constitution [45].

As mentioned, in the scientific doctrine the activity of the Constitutional Court in researching and assessing legal gaps is a new topic. The authors who tackle the activity of the Constitutional Court have considered the problems of investigation into the constitutionality of legal gaps in certain aspects in a number of articles, however, there has not been any comprehensive research on this issue.

Several problems of the constitutionality of legal gaps have attracted the attention of legal researchers. We shall give only a couple of examples.

For instance, it was noticed that the Constitutional Court itself resorted to certain measures so that its rulings' legal consequences regarding the appearance of the legal gap would be as mild as possible (one has in mind the rulings whereby certain legal regulation, *inter alia* legislative omission, was recognised as conflicting with superior legal regulation). Such a measure is the postponement of the official publishing of the ruling [46]. The law-making institution receives some time to correct the legal regulation until the entry into force of the ruling, thus one evades gaps in the legal regulation. Such practice received not only approval of constitutionalists, but their criticism as well. It is maintained that "in Lithuania, until the Constitutional Court ruling whereby certain legal regulation is recognised as conflicting with the Constitution has not come into effect (its official publishing and entry into force are postponed), in the legal sense this ruling does not oblige the legislator to resort to corresponding legislative actions. While postponing the official publishing of its own ruling, the Constitutional Court merely gives an opportunity to the legislator so that he harmonise the legal regulation with the requirements of the Constitution on his own initiative and thus he can 'forestall' the legal consequences which would appear after the Constitutional Court ruling comes into force" [47].

The legal literature has also considered another way, which would permit to evade legal gaps or other undesirable effects that could occur due to the abrupt removal of norms, which conflict with the Constitution, from the legal system. This is the revival of the legal norms which had been made no longer valid by those norms, which were recognised as anticonstitutional, after the Constitutional Court ruling comes into force [48]. The main argument for stating the revival of the legal norms which had been made no longer valid by those norms, which were recognised as anticonstitutional, is that "one has in mind not the powers of constitutional courts to bring back the power of the legal norm which had been abolished or amended by the anticonstitutional legal act, but revival of such norms as the legal effect of the decision whereby the unconstitutionality of the legal act which had abolished or amended the previous legal regulation is stated, which is directly provided for in the constitution (laws) of the state, or which appears *ipsi iure,* i.e. which is determined by the essence of the decision itself" [49]

Thus, the legal literature not only noted that the Constitutional Court has found constitutional possibilities to assess that a legal gap, i.e. legal non-regulation of concrete social relations, is in conflict with the Constitution, but also attempted to propose further guidelines for decision of issues of legislative omission. It is maintained that such expansion of the limits of the jurisdiction of the Constitutional Court is a phenomenon of jurisdictional discretion, which does not deviate from European tendencies [50].

The formulation of the official constitutional doctrine regarding investigation into legislative omission is to be regarded as one of the features of the activism [51] of the Constitutional Court in implementing the functions entrenched in the Constitution during last nine years. Of course, while assessing the activity of the Constitutional Court, some authors tend to speak about the "moderate

activism", others—about "coordination of activism and self-restraint", while some others—about the "activist type of functioning".

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

2.1. The constitution in the national legal system

The principle of supremacy of the Constitution is entrenched in Paragraph 1 of Article 7 of the Constitution, which provides that any law or other act, which is contrary to the Constitution, shall be invalid; this principle is also consolidated in various aspects in Paragraph 2 of Article 5 of the Constitution, which provides that the scope of power shall be limited by the Constitution; in Paragraph 1 of Article 6 thereof, which provides that the Constitution shall be an integral and directly applicable act; in Paragraph 2 of Article 6 thereof, which provides that everyone may defend his rights by invoking the Constitution; in Paragraph 1 of Article 30 thereof, which provides that the person whose constitutional rights or freedoms are violated shall have the right to apply to court; Paragraph 1 of Article 102 thereof, which provides that the Constitutional Court shall decide whether the laws and other acts of the Seimas are not in conflict with the Constitution and whether the acts of the President of the Republic and the Government are not in conflict with the Constitution or laws; in Paragraph 1 of Article 110 thereof, which provides that a judge may not apply a law, which is in conflict with the Constitution, etc.

The Constitutional Court, which, under the Constitution, enjoys the right to officially construe the Constitution, held in its rulings of 24 December 2002 and 29 October 2003:

"The principle of the supremacy of the Constitution means that the Constitution rests in the exceptional, highest, place in the hierarchy of legal acts, that no legal act may be in conflict with the Constitution, that no one is permitted to violate the Constitution, that the constitutional order must be protected, that the Constitution itself consolidates the mechanism permitting to determine whether legal acts (parts thereof) are not in conflict with the Constitution. In this respect, the principle of the supremacy of the Constitution, which is established in the Constitution, is inseparably linked with the constitutional principle of a state under the rule of law, which is a universal constitutional principle upon which the entire Lithuanian legal system and the Constitution itself are based. Violation of the principle of the supremacy of the Constitution would mean that the constitutional principle of a state under the rule of law is violated as well."

In the constitutional jurisprudence the Constitution is understood not only as the legal act that takes the highest place in the system of legal acts; the Constitution is not only the text. In its rulings of 25 May 2004 and 13 December 2004 the Constitutional Court held: "<…>since it is

impossible to treat law solely as a text in which *expressis verbis* certain legal provisions and rules of behaviour are set forth, thus, also, it is impossible to treat the Constitution as a legal reality solely in its textual form. The Constitution may not be understood only as an aggregate of explicit provisions. <…> The Constitution as a legal reality is comprised of various provisions, the constitutional norms and the constitutional principles, which are directly consolidated in various formulations of the Constitution or derived from them. Some constitutional principles are entrenched in constitutional norms formulated expressis verbis, others, although not entrenched therein expressis verbis, are reflected in them and are derived from the constitutional norms, as well as from other constitutional principles reflected in these norms, from the entirety of the constitutional legal regulation, from the meaning of the Constitution as the act which consolidates and protects the system of major values of the state community, the civil Nation, and which provides the guidelines for the entire legal system. There may not exist and there is no contradiction between the constitutional principles and the constitutional norms—all the constitutional norms and constitutional principles form a harmonious system. It is the constitutional principles that organise all the provisions of the Constitution into a harmonious entirety, and thus do not permit the existence in the Constitution of internal contradictions or such an interpretation thereof which distorts and denies the essence of any provision of the Constitution, or any value entrenched in and protected by the Constitution. The constitutional principles reveal not only the letter, but also the spirit of the Constitution—the values and strivings entrenched in the Constitution by the Nation which chose certain textual form and verbal expression of its provisions, which defined certain norms of the Constitution, and which explicitly or implicitly established certain constitutional legal regulation. Thus, there may not exist and there is no contradiction not only between the constitutional principles and the constitutional norms, but also between the spirit of the Constitution and the letter of the Constitution: the letter of the Constitution may not be interpreted or applied in a manner which denies the spirit of the Constitution, which may be understood only when perceiving the constitutional legal regulation as an entirety and only upon the evaluation of the purpose of the Constitution as a social agreement and an act of the supreme legal power. The spirit of the Constitution is expressed by the entirety of the constitutional legal regulation, all its provisions—both the norms of the Constitution directly set forth in the text of the Constitution, and the principles of the Constitution, including those that originate from the entirety of the constitutional legal regulation and the meaning of the Constitution as an act which consolidates and protects the system of major values of the Nation, and which provides the guidelines for the whole legal system."

Under the Constitution, it is only the Constitutional Court that enjoys the powers to officially construe the Constitution and form the official constitutional doctrine. In Constitutional Court act the provisions—norms and principles—of the Constitution are construed. The Constitution is an integral act (Paragraph 1 of Article 6 of the Constitution), therefore, the official constitutional

doctrine is formed by following the fact that all provisions of the Constitution are interrelated not only formally, but also by their content: the content of some provisions of the Constitution determines the provisions of the other provisions thereof. In its acts the Constitutional Court held more than once that all provisions of the Constitution compose a harmonious system, that there is a balance among the values entrenched in the Constitution, that it is impermissible to construe any norm of the Constitution only verbatim, that it is impermissible to oppose any provision of the Constitution against other provisions of the Constitution, nor to construe any provision of the Constitution in a way so that the content of a certain other constitutional provision would be distorted or denied, since then the essence of the entire constitutional regulation would be distorted and the balance of constitutional values would be disturbed. The official constitutional doctrine *inter alia* reveals the content of various constitutional provisions, their interrelation, the balance of constitutional values, and the essence of the constitutional legal regulation as a whole.

In its ruling of 28 March 2008 and in the ruling of 9 May 2006, the Constitutional Court held that the development of the constitutional jurisprudence and the official doctrine formulated therein is characteristic of the fact that the official constitutional doctrine is not formulated all “at once” on any issue of the constitutional legal regulation, but “case after case”, by supplementing the elements (fragments) of the said doctrine, revealed in the previous constitutional justice cases, adopted in the acts of the Constitutional Court with other elements, which are revealed in the acts of the Constitutional Court adopted in the new cases of constitutional justice. The formation of the official constitutional doctrine (both as a whole and on every individual issue of the constitutional legal regulation) is not a onetime act but a gradual and consecutive process. This process is uninterrupted and is never fully finished. When formulating new provisions of the official constitutional doctrine, one reveals the variety and completeness of the legal regulation entrenched in the Constitution—the legal act of supreme law.

Thus, the official constitutional doctrine formulated in the jurisprudence of the Constitutional Court is a logical and consecutive continuation of the Constitution, and it has the power of the Constitution itself. It is through the constitutional jurisprudence that the Constitution, as the legal act having supreme legal power, becomes “living” law.

It has been held in the constitutional jurisprudence (rulings of 28 March 2006 etc.) that, under the Constitution, the Constitutional Court has the exclusive competence to investigate and decide on whether any act of the Seimas, the President of the Republic or the Government, as well as any act (part thereof) adopted by referendum is not in conflict with any act of greater power, *inter alia* (and, first of all) with the Constitution, namely: whether any constitutional law (part thereof) is not in conflict with the Constitution, whether any law (part thereof) and the Statute of the Seimas (part thereof) are not in conflict with the Constitution and constitutional laws, whether any substatutory legal act (part thereof) of the Seimas is not in conflict with the Constitution, constitutional laws, laws, and the Statute of the Seimas, whether any act (part thereof) of the

President of the Republic is not in conflict with the Constitution, constitutional laws and laws, and whether any act (part thereof) of the Government is not in conflict with the Constitution, constitutional laws and laws.

Thus, we see a clear hierarchy of legal acts: Constitution—constitutional laws—laws (and the Statute of the Seimas, which has the power of a law)—substatutory acts. This hierarchy of legal acts stemming from the Constitution is mandatory to all subjects of law; acts of lower power cannot be in conflict with legal acts of higher power. It is necessary to pay heed to the requirements of the hierarchical systems of legal acts also when laws or other legal acts are adopted by referendum.

It is noteworthy that on 13 July 2004, the Seimas adopted the Law on Supplementing the Constitution of the Republic of Lithuania with the Constitutional Act "On Membership of the Republic of Lithuania in the European Union" and Supplementing Article 150 of the Constitution of the Republic of Lithuania, by Article 1 whereof it supplemented the Constitution with the Constitutional Act "On Membership of the Republic of Lithuania in the European Union" as a constituent part of the Constitution (Article 150 of the Constitution). Under the said act, the norms of the European Union law shall be a constituent part of the legal system of the Republic of Lithuania and in the event of collision of legal norms, they shall have supremacy over the laws and other legal acts of the Republic of Lithuania.

While construing these provisions, in its ruling of 14 March 2006 the Constitutional Court held that these provisions mean the priority of EU law, if compared with the legal regulation established in Lithuanian national legal acts (regardless of what their legal power is), save the Constitution itself. Thus, the Constitutional Court confirmed once again that the Constitution has the supreme legal power with respect to all legal acts (including EU legal acts, which are a constituent part of the Lithuanian national system of legal acts).

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

It has been mentioned that Paragraph 1 of Article 102 of the Constitution provides that the Constitutional Court shall decide whether the laws and other acts of the Seimas are not in conflict with the Constitution and whether the acts of the President of the Republic and the Government are not in conflict with the Constitution or laws. The text of the Constitution does not establish *expressis verbis* that the Constitutional Court can state the presence or absence of legislative omission; nor does it provide for special procedures of investigation into legislative omission.

The Law on the Constitutional Court does not contain any provisions regarding investigation into the constitutionality of legislative omission, either.

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 is an institution of constitutional justice. In order that it could establish and adopt a decision whether the considered legal acts (parts thereof) are not in conflict with legal acts of higher power, the Constitutional Court enjoys constitutional powers to officially construe both the considered legal acts and the said legal acts of higher power. A different interpretation of the powers of the Constitutional Court would deny the constitutional purpose of the Constitutional Court itself.

The exclusive powers of the Constitutional Court to officially construe the Constitution, to present the official concept of the provisions of the Constitution—to form the official constitutional doctrine—stem from the Constitution itself. Under the Constitution, the concept of the provisions of the Constitution, the arguments set forth in the Constitutional Court rulings as well as in other acts of the Constitutional Court—conclusions and decisions—are binding on law-making institutions (officials) and those that apply law, including courts of general jurisdiction and specialised courts, which are established under Paragraph 2 of Article 111 of the Constitution (Constitutional Court decision of 20 September 2005 and ruling of 28 March 2006).

In the jurisprudence of the Constitutional Court (see the ruling of 25 January 2001, decisions of 6 May 2003, 13 May 2003, 16 April 2004, ruling of 13 December 2004 and decision of 8 August 2006) one follows the provision that the Constitutional Court enjoys the constitutional powers not only to hold that there is a legal gap, *inter alia* legislative omission, in the investigated legal act (part thereof) of lower power, but also to recognise, by means of its ruling adopted in the constitutional justice case, that such legal regulation is in conflict with legal acts of higher legal power, *inter alia* with the Constitution. The subjects pointed out in the Constitution who can dispute the compliance of legal acts (parts thereof), which were adopted by the Seimas, the President of the Republic, the Government, or that of legal acts (parts thereof), which were adopted by referendum, with legal acts of higher power, *inter alia* with the Constitution, also have the right to request the investigation into the constitutionality of the corresponding legal act regarding legislative omission.

In its 8 August 2006 decision, the Constitutional Court presented the concept of legislative omission: *the legal gap which is prohibited by the Constitution (or any other legal act of higher power) is legislative omission.*

Legislative omission means that in a legal act (part thereof) the corresponding legal regulation is not established, although, under the Constitution (or any other legal act of higher power, in whose respect the compliance of a legal act (part thereof) of lower power is assessed, it must be established in namely that legal act (namely that part thereof).

Legislative omission differs form other legal gaps also in that it is always the consequence of *the action of the law-making subject which has passed the corresponding legal act*, but not that of failure to act by the said law-making subject, as well as not the consequence of the action (even a lawful one) or failure to act by any other subject; for instance, a legal gap, where the regulation of social relations has never been started by means of any legal acts, although the need of their legal regulation exists, is not to be regarded as legislative omission; likewise, no legislative omission can appear also when the Constitutional Court recognises in the ruling adopted in a constitutional justice case that a certain legal act (part thereof) is in conflict with a legal act of higher power, *inter alia* the Constitution.

Thus, in the constitutional jurisprudence a distinction is made between *legislative omission as the consequence of the action of the law-making subject which passed a corresponding legal act* and the legal gaps which occurred because of the fact that one has not resorted to the necessary law-making actions at all, i.e. neither this, nor another law-making subject has passed a legal act designed for regulation of certain social relations and due to this these legal relations remained legally non-regulated. Under certain circumstances, namely when the Constitution requires that these social relations be legally regulated (and, sometimes, it explicitly indicates that they must be regulated by means of not any legal act, but a constitutional law or a law), the absence of such actions of lawmaking may indeed create preconditions for the appearance of an anticonstitutional situation, i.e. for such state of the social relations, when these relations are developed not on the basis of law, although, as mentioned, the Constitution requires that they be legally regulated. However, such legal regulation, and, to be more precise, its absence, is not legislative omission.

The Constitutional Court has noted that “detection” of legislative omission *par excellence* in a legal act (part thereof) of lower power, if it is necessary because of the logic of the investigated constitutional justice case, is sufficient grounds to recognise that this act (part thereof) (to the corresponding extent, i.e. to the extent that this act does not consolidate the legal regulation which is required by legal acts of higher power, *inter alia* (and, first of all, the Constitution) is in conflict with the Constitution (with other legal act of higher power).

In Constitutional Court acts (*inter alia* the decision of 16 April 2004, rulings of 29 December 2004, 19 January 2005, 16 January 2006, 28 March 2006, decision of 8 August 2006) various aspects of legislative omission as a phenomenon of legal reality have been revealed. In the Constitutional Court jurisprudence (*inter alia* the ruling of 25 January 2001, decisions of 6 May 2003, 13 May 2003, 16 April 2004, ruling of 13 December 2004 and decision of 8 August 2006) one follows the provision that the Constitutional Court enjoys not only the constitutional powers to state the existence of a legal gap, *inter alia* legislative omission, in the investigated legal act (part thereof) of lower power, but also, by means of its ruling adopted in the constitutional justice case,

to recognise that such legal regulation is in conflict with legal acts of higher legal power, *inter alia* the Constitution.

The Constitutional Court accepts a petition, which disputes a legal gap, *inter alia* legislative omission, which actually or allegedly is in a certain legal at (part thereof) (so that the Constitutional Court would be able to recognise, by means of its ruling, that the corresponding legal regulation is in conflict with legal acts of higher power, *inter alia* with the Constitution) only while following *certain conditions,* which are formulated in the constitutional jurisprudence, namely:

a) if laws or other legal acts (parts thereof) of lower power do not establish certain legal regulation, the Constitutional Court enjoys the constitutional powers to recognise that these laws or other legal acts (parts thereof) are in conflict with the Constitution or other legal acts of higher power in cases when due to the fact that this legal regulation is not established in precisely the investigated laws or other legal acts (precisely in the investigated parts thereof) the principles and/or norms of the Constitution and provisions of other legal act so higher power could be violated;

b) in cases when the law or other legal act (part thereof) disputed by the petitioner (investigated by the Constitutional Court) does not establish certain legal regulation which, under the Constitution (and in case of a substatutory legal act (part thereof) of the Seimas, and act (part thereof) of the Government or of the President of the Republic, then also—under laws) does not have to be established in precisely the disputed legal act (in precisely that part thereof), the Constitutional Court holds that in the case regarding the request of the petitioner there is no matter of investigation and this is the grounds to dismiss the instituted legal proceedings (if the corresponding petition was accepted at the Constitutional Court and the preparation of the constitutional justice case for the Constitutional Court hearing was begun) or to dismiss the case (if the constitutional justice case has been considered at the Constitutional Court hearing);

c) a legal gap, which appeared due to the fact that the Constitutional Court recognised certain legal regulation as anti-constitutional may not be held by the Constitutional Court as legislative omission, since one would have to state that it was the Constitutional Court which has constructed that legislative omission (Constitutional Court decision of 8 August 2006).

d) in addition, one has to take account of the fact how the said legal gap came into existence, i.e. whether it is legislative omission, which was created by a law-making action of the subject that passed the corresponding legal act (i.e. due to the fact that in the course of passage this legal act the relations which had to be regulated by precisely this legal act (by precisely that part thereof) were not regulated by precisely that legal act (precisely that part thereof)), whether this legal gap appeared because of other circumstance, for example, because the Constitutional Court recognised that the legal regulation established in a certain legal act (part thereof) of lower power is in conflict with the Constitution or other legal act of higher power. In other case there are no grounds to state the existence of legislative omission. Quite to the contrary, in this situation

under the Constitution the corresponding law-making subject (in case the corresponding social relations must be legally regulated) has a duty to amend the legal regulation which was recognised as unlawful so that the newly established legal regulation would not be in conflict with the corresponding legal act of higher power (and, first of all, with the Constitution).

It needs to be noted that after the Constitutional Court states the existence of legislative omission and recognises the legal act which does not contain the necessary legal regulation as conflicting with the Constitution, the removal of such legislative omission is a constitutional obligation of first of all that law-making subject, who constructed the said omission, while the Constitutional Court does not enjoy the powers to control how this obligation if fulfilled, i.e. whether or not its fulfilment is procrastinated. It was held in the Constitutional Court decision of 8 August 2006: "After the Constitutional Court has recognised by its ruling that a legal act (part thereof) of lower power is in conflict with a legal act of higher power, *inter alia* the Constitution, a constitutional duty arises to a corresponding law-making subject to recognise such legal act (part thereof) as no longer valid or, if it is impossible to do without the corresponding legal regulation of the social relations in question, to change it so that the newly established legal regulation is not in conflict with legal acts of higher power, *inter alia* (and, first of all) the Constitution. Until this has not been done, the corresponding legal gap (which, as emphasised in this Constitutional Court decision, is not legislative omission) persists. In order to remove it some time might be necessary. However, even the fact that this time might be quite lengthy, in itself does not mean that the Constitutional Court is granted the powers to investigate the compliance of the same legal act with respect to legal acts of higher power, *inter alia* the Constitution, which in the same aspect has already been investigated by the Constitutional Court in an earlier considered constitutional justice case, and upon investigation of which and entry into force of the corresponding Constitutional Court ruling the said legal gap precisely appeared."

In its decision of 8 August 2006, the Constitutional Court held that also institutions that apply law (i.e. not only law-making institutions), as well as courts (e.g., by making use of legal analogy, by applying general principles of law, as well as legal acts of higher power, first of all the Constitution, and by construing law) may remove legal gaps, including those which appear as the consequence of a Constitutional Court ruling whereby certain legal regulation is recognised as anti-constitutional. It is noted in the constitutional jurisprudence that courts can fill the legal gaps that are in legal acts of lower power only *ad hoc,* i.e., by this way of application of law the legal gaps are removed only as regards a particular social relation due to which the dispute is decided in the case investigated by the court. It is possible to completely remove legal gaps (as well as legislative omission) only when the law-making institutions issue respective legal acts. The courts cannot do this, they can fill the legal gaps that are in legal acts of lower power only *ad hoc*, since the courts administer justice, but they are not legislative institutions (in the positive and broadest sense of this term). The Constitutional Court noted that such limitation of opportunities of courts in this area is

especially evident when one confronts gaps in substantive law, however, that limitation does not deny an opportunity for courts to fill a legal gap, which is in a legal act of lower power, *ad hoc*.

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

As mentioned, the Constitution does not establish *expressis verbis* that the Constitutional Court can state the existence or absence of legislative omission; nor does it provide for any special procedures for investigation into legislative omission. The Law on the Constitutional Court, which regulates the activity of the Constitutional Court, other laws and legal acts do not establish this *expressis verbis,* either. This is consolidated only in the jurisprudence of the Constitutional Court, which is binding on all subjects of law.

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

3.1. Application to the constitutional court

Under Article 106 of the Constitution, the Government, not less than 1/5 of all the Members of the Seimas, and the courts, shall have the right to apply to the Constitutional Court concerning the conformity of the laws and other acts of the Seimas with the Constitution, not less than 1/5 of all the Members of the Seimas and the courts shall have the right to apply to the Constitutional Court concerning the conformity of acts of the President of the Republic with the Constitution and the laws, and not less than 1/5 of all the Members of the Seimas, the courts, as well as the President of the Republic, shall have the right to apply to the Constitutional Court concerning the conformity of acts of the Government with the Constitution and the laws.

It has been mentioned that the Constitution does not *expressis verbis* establish that the Constitutional Court may state the existence or non-existence of legislative omission; the Constitution does not provide for the investigation procedure of the legislative omission either. The official constitutional doctrine of investigation into legislative omission was formulated in the Constitutional Court jurisprudence which binding on subjects of law.

Thus, in their petitions, the subjects enumerated in Article 106 of the Constitution, under the official constitutional doctrine which is formulated in the jurisprudence of the Constitutional Court, may also raise the question of investigation and assessment of legislative omission. In this context, it is especially to be noted that under Paragraph 2 of Article 110 of the Constitution, the courts shall

apply to the Constitutional Court in cases when there are grounds to believe that the law or other legal act which should be applied in a concrete case is in conflict with the Constitution. Thus, the courts must first of all doubt the existence of the legislative omission in the legal act, and only then apply to the Constitutional Court specifying the arguments regarding which these doubts are grounded. In this context, it is to be particularly emphasized that until 15 October 2007, the Supreme Court of Lithuania has never applied to the Constitutional Court regarding the statement of legislative omission. In fact, there was a case, when in the case which was considered by the Supreme Court of Lithuania, the parties of the case asked the said court to apply to the Constitutional Court with a petition requesting to investigate whether a legal act was not in conflict with the Constitution because of the fact that it did not include the legal regulation which was necessary in that legal act, however, the said court refused to apply to the Constitutional Court substantiating it *inter alia* by the fact that neither the Constitution, nor other laws provide the Constitutional Court with the rights to oblige the Seimas to fill in the gap of the legal regulation (see the Supreme Court of Lithuania ruling of 11 April 2006, in criminal case No. 2K-316/2006). It needs to be noted that at the time when the Supreme Court of Lithuania adopted the said ruling, the Constitutional Court doctrine of legislative omission had already been effective for two years.

3.2. Legislative omission in the petitions of the petitioners

It has been mentioned that when applying to the Constitutional Court, in their petitions, the petitioners may provide the arguments which ground the conflict of the disputed legal regulation with the legal regulation of higher power due to the fact that namely in the legal acts which are disputed, one should establish the missing legal regulation. Neither the Constitution, nor the Law on the Constitutional Court establish the special requirements for such petitions, however, the said requirements are formulated in the jurisprudence of the Constitutional Court.

In the constitutional jurisprudence it is stated that in order that “the Constitutional Court accept to consider a petitioner wherein a real or alleged legal gap, *inter alia* legislative omission, is disputed, let alone that the Constitutional Court would be able by its rulings to recognize corresponding legal regulation as being in conflict with legal acts of higher power, *inter alia* the Constitution, it is necessary to follow certain conditions, which are defined in the jurisprudence of the Constitutional Court <…>, namely: if the laws and other legal acts (parts thereof) of lower power do not establish certain legal regulation, the Constitutional Court has constitutional powers to recognise these laws or other legal acts (parts thereof) as being in conflict with the Constitution or other legal acts of higher power in cases when due to the fact that the said legal regulation is not established in precisely the investigated laws or other legal acts (precisely in the investigated parts thereof), the principles and/or norms of the Constitution, the provisions of other legal acts of higher power might be violated; however, in the cases when the law or other legal act (part thereof), which

is disputed by the petitioner and which is investigated by the Constitutional Court, does not establish certain legal regulation which, under the Constitution (and if a substatutory act (part thereof) of the Seimas, and act (part thereof) of the President of the Republic or the Government is disputed—also under the laws) need not be established precisely in the disputed legal act (precisely in that part thereof), the Constitutional Court holds that the matter of investigation is absent in the case on the petition of the petitioner—this is the basis to dismiss the instituted legal proceedings (if a respective petition was accepted at the Constitutional Court and preparation of a constitutional justice case for the Constitutional Court hearing began) or to dismiss the case (if the constitutional justice case has already been investigated in the Constitutional Court hearing)" (see Constitutional Court decision of 8 August 2006).

It needs to be noted that the Constitutional Court has not received many petitions which dispute the legal gap (and legislative omission) which actually or allegedly is in a certain legal act (part thereof) because of the fact that it started stating legislative omission not so long ago, and only when the constitutional jurisprudence which is related to legislative omission came into existence, the applications of such kind could be submitted. Till 15 October 2007, only in seven rulings in total, the existence of legislative omission was stated, i.e. the disputed legal regulation was recognized as unconstitutional as it did not include the legal regulation which should have been established (see: Constitutional Court rulings of 14 January 2002, 4 March 2003, 3 December 2003, 12 December 2005, 13 November 2006, 9 February 2007 and 27 June 2007). In three more rulings, the existence of legislative omission was not stated, even though the petitioners requested to state it, thus, the requests of the petitions did not reach their objective (even though the cases were considered in essence) and the disputed legal regulation was recognized as being not in conflict with the Constitution (see: Constitutional Court rulings of 29 December 2004, 3 November 2005 and 16 January 2006). A number of petitions (or parts thereof, in which it was requested to state the existence of legislative omission) were not considered in essence at all (see: Constitutional Court decisions of 6 May 2003, 13 May 2003, 16 April 2004 and 8 August 2006 and Constitutional Court rulings of 25 January 2001, 13 December 2004 and 19 January 2005).

The petitioners grounded their petitions regarding the conflict of the legal gaps with the Constitution on various arguments. By the way, the notion "legislative omission" was mentioned for the first time in the Constitutional Court decision of 16 April 2004, and in the Constitutional Court decisions of 6 May 2003 and 13 May 2003, the basis of the doctrine of legislative omission were formulated without directly using the said notion.

How were the petitions regarding the constitutionality of the legal gaps grounded by the petitioners?

For example, the first time was when a group of Members of the Seimas requested to investigate whether the fact that Article 23 of the Statute of the Seimas did not include that upon

receiving the consent of the Seimas to bring a Member of the Seimas to criminal liability, the said Member may not be arrested in the buildings of the Seimas, was not in conflict with the Constitution. By its ruling of 25 January 2001, the Constitutional Court dismissed this part of the case.

Later, the Panevėžys Regional Administrative Court requested to investigate whether Article 18 of the Law on Levies to the extent holding the Republic of Lithuania Law on Stamp Duty as no longer valid, however, not providing as to how one had to return or compensate a bigger stamp duty paid previously (under the Law on Stamp Duty which had been in effect before coming into force of the Law on Levies) was not in conflict with the Constitution. In its decision of 6 May 2003, the Constitutional Court emphasized that the Constitutional Court also enjoys the constitutional powers to investigate the compliance of the laws (parts thereof) of the Seimas, the Government, the President of the Republic in which certain legal regulation is not established with the Constitution and/or laws in the cases when due to the fact that the said legal regulation has not been established in particularly those laws (parts thereof) the Constitution and/or laws might be violated, as well as that the Constitutional Court also enjoys the constitutional powers to investigate the compliance of the substatutory acts (parts thereof) of the Seimas, the Government, the President of the Republic in which certain legal regulation is not established with the Constitution and/or laws in the cases when due to the fact that the said legal regulation has not been established in particularly those substatutory legal acts (parts thereof) the Constitution and/or laws might be violated. Having held that the petitioner disputed the fact that the law or another disputed legal act (part thereof) indicated by him has not established certain legal regulation, but the said legal regulation under the Constitution (or under the laws, too, in case one disputes a substatutory legal act of the Seimas, the Government or the President of the Republic) did not have to be established in that particular disputed legal act (part thereof), the Constitutional Court held that in the case on the request of the petitioner the matter of investigation was absent and it dismissed the case in that part thereof.

Later, various petitioners (the Supreme Administrative Court of Lithuania, a group of Members of the Seimas, the Vilnius Regional Administrative Court) raised the question of incompliance of various acts (the Law on State Social Insurance, the Statute of the Seimas etc.) with the Constitution due to absence of a certain legal regulation therein, however, the Constitutional Court, on the grounds of the same arguments as in its decision of 6 May 2003, by its decisions of 13 May 2003 and 16 April 2004 and ruling of 13 December 2004 dismissed the case or part thereof (and if the petition was not yet accepted—refused to accept the petition). By its ruling of 19 January 2005, the Constitutional Court dismissed a part of the case subsequent to the petition of a group of Members of the Seimas, the petitioner, requesting to investigate whether the disputed legal regulation did not include legislative omission on the grounds that the disputed legal regulation was recognized as null and void, and under the Law on the Constitutional Court, the

Constitutional Court has the right, on this ground, to dismiss a case if not a court, but other petitioner applied with the petition.

The Third Vilnius City Local Court requested to investigate, whether the Law on Remuneration for Work of State Politicians, Judges and State Officials to the extent that, according to the petitioner, it did not establish any legal regulation of remuneration of judges replacing the legal regulation which had been recognized as being in conflict with the Constitution by the Constitutional Court ruling of 12 July 2001 was not in conflict with the Constitution. The Constitutional Court, having formulated a rather exhaustive doctrine of legislative omission in its ruling of 8 August 2006, emphasized that the Constitutional Court, by recognizing the legal regulation being in conflict with the Constitution in the previous case and creating preconditions for such legal gap to appear, may not recognize this gap, as the result of the activity of the Constitutional Court, as legislative omission in the other, latter, case, as otherwise the duty of the Constitutional Court itself to recognize a legal regulation as being in conflict with the Constitution would be denied. On these grounds, the Constitutional Court dismissed the commenced legal proceedings.

It has been mentioned that in three rulings of the Constitutional Court the existence of legislative omission was not stated, even though the petitioners requested to state it, thus, the petitions did not reach their objective (even though the cases were considered in essence) and the disputed legal regulation was recognized as being not in conflict with the Constitution (see: Constitutional Court rulings of 29 December 2004, 3 November 2005 and 16 January 2006). In its ruling of 29 December 2004, subsequent to the petitions of the Šiauliai City Local Court, the Klaipėda City Local Court, the Panevėžys Regional Court and Panevėžys City Local Court, the Marijampolė District Local Court and the Alytus District Local Court, the petitioners, requesting to state *inter alia* the existence of legislative omission in the aspect that the disputed legal acts did not include the legal regulation, in the course of application of which preconditions should have been created to persons to apply to court, the Constitutional Court held that the overall legal regulation created sufficient conditions to persons to apply to court, thus, in the disputed legal acts there was not any legislative omission. In its ruling of 16 January 2006, subsequent to the petitions of the Šiauliai District Local Court, the Vilnius City Second Local Court, the Vilnius City Third Local Court and the Panevėžys City Local Court, the petitioners, requesting to state *inter alia* the existence of legal omission in the aspect that the disputed legal acts did not include the legal regulation, in the course of application of which preconditions should have been created to persons to apply to court, the Constitutional Court held that the overall legal regulation created sufficient conditions to persons to apply to court, while namely in the disputed legal acts there was not any legislative omission. In its ruling of 3 November 2005, which was adopted subsequent to the petitions of the Supreme Administrative Court of Lithuania and the Vilnius Regional Administrative Court, the petitioners, requesting to investigate whether certain provisions of the Law on Tobacco Control

were not in conflict with the Constitution because of the fact that they did not provide for the right of the case investigating court, taking account of the actual circumstances mitigating the liability, to impose a milder fine than the lowest limit of the sanction provided for in the said law (it needs to be emphasized that such formula was used only by the Supreme Administrative Court of Lithuania), the Constitutional Court held that the said provisions, to the specified extent were not in conflict with the Constitution, since the overall legal regulation created sufficient conditions for the court to particularize the fines taking account of the actual circumstances mitigating the liability.

Thus, the questions of the conflict of legal gaps with the Constitution were mostly raised by courts, even though sometimes this argument was also used by groups of Members of the Seimas.

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

It has been mentioned that till 15 October 2007, only in seven rulings in total, the existence of legislative omission was stated, i.e. the disputed legal regulation was recognized as unconstitutional as it did not include the legal regulation which should have been established (see: Constitutional Court rulings of 14 January 2002, 4 March 2003, 3 December 2003, 12 December 2005, 13 November 2006, 9 February 2007 and 27 June 2007).

All the said cases were brought subsequent to the petitions of courts or groups of Members of the Seimas. It also needs to be noted that in all these cases, the Constitutional Court stated the existence of legislative omission after it had assessed the legal regulation disputed by the petitioner, even though the petitioners did not directly request to recognize unconstitutionality of the disputed provisions regarding legislative omission, and grounded their conflict with the Constitution on different arguments.

It needs to be noted that the main arguments on the grounds of which the existence of legislative omission was held, and the acts in which the existence of legislative omission was stated were recognized as being in conflict with the Constitution were such that without establishing the lacking legal regulation namely in those acts, the Constitution and/or the laws would be violated. In addition, none of these Constitutional Court rulings named legislative omission *expressis verbis*—the Constitutional Court just recognized the legal regulation as in conflict with the Constitution because it did not establish certain legal regulation which should have been established.

For example, in its ruling of 14 January 2002 which was adopted in the constitutional justice case in which a group of Members of the Seimas was the petitioner requesting to investigate the compliance of the provisions of the laws which regulated *inter alia* the relations of formation of the budget with the Constitution, the Constitutional Court decided *inter alia* to recognize that the Republic of Lithuania Law on Approving the Financial Indicators of the 2001 State Budget and Budgets of Local Governments (wording of 19 December 2000) to the extent that it did not specify allocations for each state higher school separately conflicted with Paragraph 3 of Article 40 of the

Constitution and the principle of separation of powers entrenched in the Constitution, and that the said law to the extent that it did not indicate separately the allocations to perform the state functions transferred to local governments conflicted with Paragraph 2 of Article 120 of the Constitution. In this ruling, the Constitutional Court formulated the official constitutional doctrine of formation of the budget and its implementation, under which the Law on State Budget must separately specify allocations for each programme established in the laws and/or each subject, and held that allocations had not been established in the disputed provisions, although such establishment was required by the Constitution.

In its ruling of 4 March 2003, which was adopted in the constitutional justice case where two groups of Members of the Seimas and the Kaunas Regional Court, the petitioners, requested to investigate the compliance of the provisions of the legal acts which regulated *inter alia* the restitution relations of the real property which was nationalized by the occupation government, with the Constitution, the Constitutional Court decided *inter alia* to recognize that Paragraph 1 of Article 2 of the Law on the Restoration of the Rights of Ownership of Citizens to the Existing Real Property (wording of 15 January 2002 and wording of 29 October 2002) to the extent that it no longer contained the provision which used to be in Item 5 (wording of 13 May 1999) of the same paragraph, under which it used to be established that the rights of ownership to the real property were to be restored to the citizens of the Republic of Lithuania to whom the property had been transferred by testament (house testament) or agreements (of purchase and sale, gift, or by another written document) while disregarding the form and procedure established by the law, also the citizens, who had been bequeathed property by testament by successors to the rights of the property, was in conflict with Articles 23 and 29 of the Constitution as well as the constitutional principle of a state under the rule of law. In the law which regulated the restitution relations of the real property which was nationalized by the occupation government, the Constitutional Court found that the legal regulation which had to be established was missing, as the preconditions were created to violate the rights of ownership of certain persons by restricting, without the legal ground, the restoration of their rights of ownership of the unlawfully nationalized real property and, thus, groundlessly excluding the said persons from other persons.

In its ruling of 3 December 2003, which was adopted in the constitutional justice case where the Supreme Administrative Court of Lithuania and the Vilnius Regional Administrative Court, the petitioners, requested to investigate the compliance of the provisions of the legal acts, which regulated pensionary relations, with the Constitution and laws, the Constitutional Court decided *inter alia* to recognize that Paragraph 1 of Article 32 (wording of 21 December 2000) of the Law on State Social Insurance Pensions to the extent that it was established that persons who had reached the age entitling to an old age pension and older disabled persons who, after granting of a state social insurance disability pension, received income from which the obligatory state social pension insurance contributions were calculated and paid, or who received state social insurance

sickness benefits (including those paid by the employer for the days of sickness), motherhood, motherhood (fatherhood) or unemployment benefits, if they had the obligatory state social pension insurance period entitling to a disability pension, should be paid the basic part of the granted state social insurance disability pension, and which did not establish that the whole granted and previously paid state social insurance disability pension should be paid, was in conflict with Article 52 of the Constitution and the constitutional principle of a state under the rule of law. In the Law on the State Social Insurance Pensions, the Constitutional Court found that the legal regulation which had to be established was missing, since one violated the rights of the pensioners to whom the state social insurance disability pensions of a certain size were granted and paid, while after the Amendments to the Law on the State Social Insurance Pensions came into force, only a part of it (the basic part of the granted state social insurance disability pension) was paid.

In its ruling of 12 December 2005, which was adopted in the constitutional justice case where the Mažeikiai District Local Court, the petitioner, requested to investigate the compliance of the certain provisions of the Law on the Reorganisation of Joint-stock Companies “Būtingės nafta”, “Mažeikių nafta” and “Naftotiekis” with the Constitution, decided *inter alia* to recognize that Paragraph 2 (wording of 4 June 2002) of Article 4 of this law to the extent that it did not establish any other means to protect the ownership rights of the small shareholders which would compensate the losses that they could have due to the fact that the provisions of Article 19 of the of the Law on Securities Market were not applicable while concluding and implementing the agreements specified in this paragraph, was in conflict with Paragraph 2 of Article 23 of the Constitution and the constitutional principle of a state under the rule of law. In the said law, the Constitutional Court found that the legal regulation which had to be established was missing, because the ownership rights of the small shareholders were violated.

In its ruling of 13 November 2006, which was adopted in the constitutional justice case where a group of Members of the Seimas and the Vilnius Regional Administrative Court, the petitioners, requested to investigate the compliance of the provisions of the legal acts which regulated the citizenship relations of the Republic of Lithuania with the Constitution and laws, the Constitutional Court decided *inter alia* to recognize that Paragraph 3 (wording of 17 September 2002) of Article 17 of the Law on Citizenship, to the extent that it did not establish the requirement to renounce the held citizenship of another state when implementing the right to citizenship of the Republic of Lithuania, was in conflict with Paragraph 2 of Article 12 of the Constitution. In the said law, the Constitutional Court found that the legal regulation which had to be established was missing, because the constitutional requirement that under the Constitution, in Lithuania, double citizenship is tolerated only in individual, exceptional cases.

In its ruling of 9 February 2007, which was adopted in the constitutional justice case where the Supreme Administrative Court of Lithuania, the petitioner, requested to investigate the compliance of the provision “candidates to members of the municipal council may be nominated by

a party" of Paragraph 1 of Article 34 (wording of 21 December 2006) of the Law on Elections to Municipal Councils to the extent that, according to the petitioner, it granted to political parties exceptional rights to nominate candidates to members of municipal councils, with the Constitution, the Constitutional Court decided *inter alia* to recognize that the said paragraph to the extent that after the legislator had chosen only the proportionate system of elections to municipal councils, he had not established that permanent residents of administrative units of the territory of the Republic of Lithuania could be elected to the councils of respective municipalities even by being included in the lists of candidates to the members of municipal councils that are drawn by entities other than political parties, was in conflict with Paragraph 2 of Article 119 of the Constitution. In the said law, the Constitutional Court found that the legal regulation which had to be established was missing, because one violated the rights of the permanent residents of administrative units of the territory of the Republic of Lithuania to be elected to the councils of the corresponding municipalities by being included in the lists of candidates to members of the municipal councils, which were drawn not by the political parties.

In its ruling of 27 June 2007, which was adopted in the constitutional justice case where a group of Members of the Seimas, the Supreme Administrative Court of Lithuania, the Klaipėda Regional Administrative Court, the Klaipėda Regional Court and the Klaipėda City Local Court, the petitioners, requested to investigate the compliance of Government of the Republic of Lithuania Resolution No. 1269 “On the Planning Scheme (General Plan) of Curonian Spit National Park” of 19 December 1994 with certain provisions of the Constitution and the Law “On the Procedure of Publication and Coming into Force of Laws and Other Legal Acts of the Republic of Lithuania”, the Constitutional Court decided *inter alia* to recognize that the Law “On the Procedure of Publication and Coming into Force of Laws and Other Legal Acts of the Republic of Lithuania” (wording of 6 April 1993) to the extent it did not establish that the legal acts (parts thereof) of especially large size and complex structure, *inter alia* such which include graphic parts of especially large size, regarding the publication of which very big technical problems would appear, could officially be published not in the official gazette “Valstybės žinios”, but in other sources and/or in other ways, as well as to the extent that it did not establish that the said legal acts (parts thereof) of especially large size and complex structure, even if it is required to officially announce them in the official gazette “Valstybės žinios”, could be officially published in special editions of the official gazette “Valstybės žinios”, was in conflict with Paragraph 2 of Article 7 of the Constitution and with the constitutional principle of a state under the rule of law. It needs to be noted that in this ruling, the Constitutional Court, on the grounds of the doctrine formulated in its previous jurisprudence that Constitutional Court, having established that the provisions of a law the compliance with the Constitution of which is not disputed by the petitioner but by which the social relations regulated by the disputed law are interfered with conflict with the Constitution, must state so, decided to investigate the compliance of the Law “On the Procedure of Publication and Coming into Force of

Laws and Other Legal Acts of the Republic of Lithuania", in whose regard the compliance of the disputed legal regulation had to be investigated, but which itself, however, was not disputed by the petitioner, with the Constitution. In the said law, the Constitutional Court found that the legal regulation which should have been established was missing, because the constitutional requirements of official publication of legal acts were violated.

3.4. Legislative omission in laws and other legal acts

It has been mentioned that in its jurisprudence, the Constitutional Court has formulated the doctrine of the basis of investigation of legislative omission.

The Constitutional Court has the right, as well as the duty, to state the existence of legislative omission in all the legal acts, whose control is within its jurisdiction.

In the constitutional jurisprudence, it has been held that "if the laws (parts thereof) do not establish certain legal regulation, the Constitution Court enjoys the constitutional powers to investigate the compliance of these laws (parts thereof) with the Constitution in the cases when due to the fact that the said legal regulation has not been established in particularly those laws (parts thereof) the principles and/or norms of the Constitution might be violated. The Constitutional Court also enjoys the constitutional powers to investigate the compliance of the substatutory acts (parts thereof) of the Seimas, the Government, the President of the Republic in which certain legal regulation is not established with the Constitution and/or laws in the cases when due to the fact that the said legal regulation has not been established in particularly those substatutory legal acts (parts thereof) the Constitution and/or laws might be violated".

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

The Constitutional Court refuses to investigate and assess legal gaps when there are no grounds of the investigation of legislative omission, i.e. when the Constitutional Court cannot state that the legal acts investigated by it must include certain legal regulation which should have been established namely in the said legal acts and that such non-establishment violates the provisions of the Constitution.

In addition, the Constitutional Court, having recognized the legal regulation being in conflict with the Constitution in its previous case and having created preconditions for a legal gap to appear, may not recognize that this legal gap as the result of the activity of the Constitutional Court is legislative omission in another, subsequent case, because the obligation of the Constitutional Court itself to recognize the legal regulation to be in conflict with the Constitution would be denied.

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

It has been mentioned that the Constitutional Court investigates whether the disputed legal acts include legislative omission—the gap which is prohibited by law (and first of all, the Constitution). It has also been mentioned that in all the cases, in which the existence of legislative omission was stated, the Constitutional Court did that on its own initiative, i.e. it stated legislative omission after it had assessed the legal regulation disputed by the petitioner, even though the petitioners did not directly request to recognize unconstitutionality of the disputed provisions regarding legislative omission, and grounded their conflict with the Constitution on different arguments. The Constitutional Court does not initiate any investigation of the "related nature".

4. INVESTIGATION AND ASSESSMENT OF THE CONSTITUTIONALITY OF LEGISLATIVE OMISSION

4.1. Peculiarities of the Investigation of Legislative Omission

Under the Constitution and the Law on the Constitutional Court, the Constitutional Court decides only on the compliance of the effective legal acts or the legal acts which are no longer valid with the Constitution and laws, i.e. it performs *a posteriori* constitutional control. The exception is the constitutional control of the international treaties of the Republic of Lithuania which may be implemented both *a priori* and *a posteriori*.

Under the Constitution, the Constitutional Court has exceptional competence to investigate and decide whether any act of the Seimas, the President of the Republic and the Government, as well as any act (paragraph thereof) which was adopted by referendum is not in conflict with any other act of higher power, *inter alia* (and first of all) with the Constitution, namely: whether any constitutional law (part thereof) is not in conflict with the Constitution, as well as whether the Statute (part thereof) of the Seimas is not in conflict with the Constitution and constitutional laws, whether any substatutory legal act (part thereof) of the Seimas is not in conflict with the Constitution, constitutional laws and laws, the Statute of the Seimas, whether any act (part thereof) of the President of the Republic is not in conflict with the Constitution, constitutional laws and laws, and whether any act (part thereof) of the Government is not in conflict with the Constitution, constitutional laws and laws.

Paragraph 1 of Article 64 of the Law on the Constitutional Court establishes that the grounds for the consideration of a case concerning the compliance of a legal act with the Constitution in the Constitutional Court shall be a legally justified doubt that the entire legal act or part thereof is in conflict with the Constitution according to:

1) the content of norms;

2) the extent of regulation;

3) form;

4) the procedure of adoption, signing, publication, and entry into effect, which is established in the Constitution.

The ground to consider the case regarding the compliance of a legal act with the Constitution is submission of the application of the form established in the Law on the Constitutional Court at the Constitutional Court under the established procedure.

Article 30 of the Law on the Constitutional Court establishes the limits of consideration of the constitutional justice case: the Constitutional Court shall decide only legal issues.

The Constitutional Court may state the existence of legislative omission in the acts investigated by it in the cases when due to the fact that the said legal regulation is not established namely in the investigated laws or other legal acts (namely in the investigated parts thereof), the principles and/or norms of the Constitution and the provisions of other legal acts of higher power may be violated.

In this context, it also needs to be noted that the Constitutional Court held that under the Constitution, the Constitutional Court has the powers to investigate also the compliance of the legal acts which were adopted prior to the entry into force of the Constitution with legal acts of higher legal power, *inter alia* with the Constitution, however, the Constitutional Court has powers to investigate the compliance of only those legal acts which had not lost their validity before the entry into force of the Constitution (Constitutional Court decision of 17 January 2007).

Thus, the Constitutional Court may not state the existence of legislative omission in those legal acts which had been adopted prior to the entry into force of the Constitution and which had not lost their validity before its entry into force.

Under Paragraph 3 of Article 105 of the Constitution, the Constitutional Court shall present conclusions whether *inter alia* international agreements of the Republic of Lithuania are not in conflict with the Constitution. The Constitutional Court has not formulated the constitutional doctrine on the question, whether it states the existence of legislative omission in the international agreements.

The Constitutional Court investigates legislative omission by following the conditions established in its own jurisdiction. These conditions are as follows.

First condition: if the laws or other legal acts (parts thereof) of lower power do not establish certain legal regulation, the Constitutional Court has the constitutional powers to recognize these laws or other legal acts (parts thereof) as being in conflict with the Constitution or other legal act of higher power in the cases when due to the fact that the said legal regulation is not established namely in the investigated laws or other legal acts (namely in the investigated parts thereof), the principles and/or norms of the Constitution and the provisions of other legal acts of higher power may be violated.

Second condition: in the cases when the law (investigated by the Constitutional Court) or other legal act (part thereof) disputed by the petitioner does not establish certain legal regulation which, under the Constitution (and if one disputes a substatutory legal act (part thereof) of the Seimas, an act (part thereof) of the Government or of the President of the Republic—also under the laws) does not have to be established namely in that disputed legal act (namely in that part thereof), the Constitutional Court states that in the case regarding the petition of the petitioner there is no matter of investigation, which is the grounds to dismiss the instituted proceedings (if the corresponding petition was adopted at the Constitutional Court and the constitutional justice case was started to prepare for the Constitutional Court hearing) or to dismiss the case (if the constitutional justice case has already been considered at the Constitutional Court hearing).

Third condition: the legal gap which appeared due to the fact that the Constitutional Court recognized certain legal regulation as unconstitutional may not be regarded by the Constitutional Court as legislative omission, because one should state that the Constitutional Court constructed the said legislative omission itself (Constitutional Court decision of 8 August 2006).

Fourth condition: one must take account of the fact, how the said legal gap appeared, i.e. if it is legislative omission created by a law-making action of the subject that created the corresponding legal act (i.e. due to the fact that when issuing the said legal act, the relations which had to be regulated namely in that legal act (namely in that part thereof), were not regulated namely in the said legal act (this part thereof)), or if this legal gap appeared due to other circumstances, for example, due to the fact that by its ruling, the Constitutional Court recognized a certain legal regulation established in the legal act (part thereof) of lower power as being in conflict with the Constitution or with other legal act of higher power. In other case, there are no grounds to state the existence of legislative omission; quite the contrary, under the Constitution, in this case the corresponding law-making subject (if the corresponding social relations must be legally regulated) has a duty to replace the legal regulation which has lost its power so that the newly established legal regulation would not be in conflict with the corresponding legal act of higher power (and first of all, with the Constitution).

The Constitutional Court has not formulated any other doctrinal provisions by now.

4.2. Establishment of the existence of legislative omission

Under the Constitution and Law on the Constitutional Court, usually the Constitutional Court has to investigate the compliance of only the legal regulation which is specified in the petitions of the petitioners, i.e. disputed legal regulation, with the Constitution and laws.

However, as it has already been mentioned, till 15 October 2007, only in seven rulings in total the existence of legislative omission was held, i.e. the disputed legal regulation was recognized as unconstitutional as it did not include the legal regulation which should have been

established (see: Constitutional Court rulings of 14 January 2002, 4 March 2003, 3 December 2003, 12 December 2005, 13 November 2006, 9 February 2007 and 27 June 2007), and in all those cases, the Constitutional Court stated the existence of legislative omission after it had assessed the legal regulation disputed by the petitioner, even though the petitioners did not directly request to recognize the unconstitutionality of the disputed provisions regarding legislative omission, and grounded their conflict with the Constitution on other arguments (Constitutional Court rulings of 14 January 2002, 4 March 2003, 3 December 2003, 12 December 2005, 13 November 2006 and 9 February 2007) or they did not request in general to investigate the legal regulation, in which the Constitutional Court, while implementing constitutional control, later stated the existence of legislative omission (Constitutional Court ruling of 27 June 2007).

It needs to be noted that the main arguments, on the grounds of which one stated the existence of legislative omission, while the acts, in which one stated the existence of legislative omission, and which were recognized as being in conflict with the Constitution, were such that without establishing the missing legal regulation namely in those acts, the Constitution or/and laws would be violated. In addition, in the said Constitutional Court rulings, legislative omission was not named *expressis verbis:* the Constitutional Court just recognized the legal regulation as in conflict with the Constitution, as it did not establish certain legal regulation which should have been established.

It has also been mentioned that, under the Constitution, the Constitutional Court has the powers to investigate also the compliance of the legal acts which were adopted prior to the entry into force of the Constitution with legal acts of higher legal power, *inter alia* with the Constitution, however, only of those legal acts which had not lost their validity before the entry into force of the Constitution (Constitutional Court decision of 17 January 2007). Thus, the Constitutional Court may not state the existence of legislative omission in the legal acts which were adopted before the entry into force of the Constitution and which had lost their validity before its entry into force, however, it may state the existence of legislative omission of the legal regulation which is no longer effective (Constitutional Court ruling of 27 June 2007).

It needs to be noted that under Paragraph 1 of Article 64 of the Law on the Constitutional Court, the Constitutional Court investigates the compliance of the disputed legal regulation with the Constitution and laws only according to the contents of the norms, extent and form of the regulation, as well as according the procedure of adoption, signing, announcement or coming into force which is established in the Constitution, but it does not investigate it according to the practice of implementation of this legal regulation.

4.3. The methodology of revelation of legislative omission

While investigating the compliance of the disputed legal regulation with the Constitution and laws in the aspect that it lacks the legal regulation which is necessary to be established, the Constitutional Court applies the same methods of construction as in other cases.

The Constitutional Court follows the principled provision that the Constitution may not be interpreted only verbatim by applying the sole linguistic (verbal) method. When interpreting the Constitution, one must apply various methods of interpretation of law: systemic, the one of general principles of law, logical, teleological, the one of intentions of the legislator, the one of precedents, historical, comparative, etc. (Constitutional Court rulings of 25 May 2004 and 13 December 2004). The Constitutional Court applies the same methods of construction of law also while investigating legislative omission (Constitutional Court decision of 8 May 2007).

While discussing the influence of the jurisprudence of the European Court of Human Rights, one is to note that the Constitutional Court has emphasized more than once that the jurisprudence of the European Court of Human Rights as a source of construction of law is also important to construction and application of Lithuanian law (it has been noted for the first time in the Constitutional Court ruling of 8 May 2000). The same can be said as regards the jurisprudence of the Court of Justice of the European Communities and the Court of First Instance of the European Communities (it has been noted for the first time in the Constitutional Court ruling of 21 December 2006). The experience of these courts may have influence also while investigating legislative omission.

4.4. Additional measures

Upon stating the existence of legislative omission, the Constitutional Court usually does not take any additional measures, save one case which has already been mentioned in this report. Such measure is the postponement of the official publication of the ruling. This measure is necessary so that the legal consequences of the Constitutional Court rulings, whereby a certain legal regulation, *inter alia* legislative omission, was recognized to be in conflict with the Constitution, regarding the appearing of the legal gap would be as mild as possible. When the Constitutional Court postpones the official publication of its ruling, the law-making institution gets the time necessary to adjust the legal regulation before coming into force of the ruling, thus, one avoids the gaps of legal regulation. Such practice was not only approved of, but also criticized by the constitutionalists. It is to be emphasized that in Lithuania, before coming into force of the Constitutional Court ruling (its official publication and coming into force are postponed), whereby a certain legal regulation is recognized as being in conflict with the Constitution, this ruling, from the legal point of view, does not oblige the legislator to take up any legislative actions. By postponing the official publication of its ruling, the Constitutional Court only provides the legislator with the possibility to harmonize the legal regulation with the requirements of the Constitution on his own

initiative and, thus, “to forestall” the legal consequences which would arise upon coming into force of the Constitutional Court ruling.

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

The Constitutional Court has the powers to investigate and assess the constitutionality of legislative omission in constitutional justice cases.

4.6. Assessment of legislative omission in the resolution of the constitutional court decision

The Constitutional Court, after it has finished the investigation of the case on the compliance of a legal act with the Constitution, adopts one of the following decisions:

1) recognizes that the legal act is not in conflict with the Constitution and laws;

2) recognizes that the legal act is in conflict with the Constitution and laws.

Under Paragraph 2 of Article 71 of the Law on the Constitutional Court, in the second case it shall be specified, what concrete articles of the Constitution or provisions thereof or what concrete laws are with which the legal act is in conflict. In the case when part of the legal act was recognized as being in compliance with the Constitution or laws, while another part was recognized as being in conflict with the Constitution or laws—this is precisely specified in the Constitutional Court ruling.

The Constitutional Court follows the said rules also after it states the existence of legislative omission. The resolutions of the Constitutional Court rulings always exactly specify which concrete legal regulation, the existence of legislative omission whereof was stated, is in conflict with the Constitution and laws.

It needs to be noted that usually one uses the formula that the disputed legal regulation “to the extent that it does not” or “to the extent that it does not establish” is in conflict with the Constitution and laws. It has been mentioned that the existence of legislative omission was stated only in seven rulings, i.e. the disputed legal regulation was recognized as unconstitutional as it did not include a certain legal regulation which had to be established: the resolution parts of most Constitutional Court rulings specify a particular provision of the law that is in conflict with the Constitution (see: Constitutional Court rulings of 4 March 2003, 3 December 2003, 12 December 2005, 13 November 2006 and 9 February 2007), while in others—the whole legal act that is in conflict with the Constitution (see: Constitutional Court rulings of 14 January 2002 and 27 June 2007) (see more: sub-chapter 3.3 of this report).

4.7. The “related nature” investigation and decisions adopted

It has been mentioned that the Constitutional Court investigates and assesses legislative omission. It has also been mentioned that in all the cases in which the existence of legislative omission was stated, the Constitutional Court did that on its own initiative, i.e. it stated the existence of legislative omission after it had assessed the regulation disputed by the petitioners, even though in their petitions the petitioners had not directly requested to recognize the unconstitutionality of the disputed provisions due to legislative omission and grounded their incompliance with the Constitution on other arguments. The Constitutional Court does not initiate any investigation of the “related nature”.

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

The Constitutional Court has resorted to measures so that the legal consequences of the Constitutional Court rulings, whereby a certain legal regulation, *inter alia* legislative omission, was recognized as being in conflict with the Constitution, regarding the appearance of the legal gap would be as mild as possible. The Constitution does not directly provide for any legal means which would allow to avoid legal gaps or other undesirable results which may arise due to immediate removal of the norms which are in conflict with the Constitution from the legal system, so, the Constitutional Court had to find a way of solving the problem and it decided to postpone not the date of the deficient legal norms becoming null and void, as the constitutional courts of most states do, but to postpone the official publication and coming into force of its own ruling.

It has been done so for the first time by the Constitutional Court ruling of 24 December 2002, which was adopted after investigating the case on the constitutionality of the provisions of the Law on Local Self-Government. In this ruling, the Constitutional Court stated that it has the powers to decide, while taking account of the circumstances of the concrete case, when its ruling has to be officially published. In addition, the Constitutional Court emphasized that the rulings which are related to the protection of the constitutional human rights and freedoms, shall be in all cases officially published immediately. Upon recognizing certain provisions of the Law on Local Self-Government as being in conflict with the Constitution, the Constitutional Court noted that they are related with most other provisions of this law in a systemic manner, thus, if the Constitutional Court ruling were officially published immediately after its public announcement during the Constitutional Court hearing, there would appear a vacuum in the legal regulation concerning local self-government, which would in essence disrupt the functioning of local self-government mechanism and state administration. Taking account of the fact that in order to remove this

vacuum in the legal regulation, some time was necessary, the Constitutional Court established that this ruling was to be officially published in the official gazette “Valstybės žinios” upon the expiration of two months of its announcement in the public hearing of the Constitutional Court.

In its ruling of 19 January 2005, the Constitutional Court set forth more exhaustive reasoning of the postponing of the coming into force of the rulings: “The Constitutional Court may postpone the official publishing of its ruling if it is necessary to give the legislator certain time to remove the *lacunae legis* which would appear if the relevant Constitutional Court ruling was officially published immediately after it had been publicly announced in the hearing of the Constitutional Court and if they constituted preconditions to basically deny certain values protected by the Constitution. The said postponement of official publishing of a Constitutional Court ruling (*inter alia* a ruling by which a certain law (or part thereof) is recognized as contradicting to the Constitution) is a presumption arising from the Constitution in order to avoid certain effects unfavourable to the society and the state, as well as the human rights and freedoms, which might appear if a relevant Constitutional Court ruling was officially published immediately after its official announcement in the hearing of the Constitutional Court and if it became effective on the same day after it had been officially published.”

The next time of postponement of the official publication of a Constitutional Court ruling was when the Constitutional Court had considered the case on the compliance of the provisions of the Law on the Amount, Sources, Terms and Procedure of Payment of Compensation for the Real Property Bought Out by the State, and on the Guarantees and Preferences Which are Provided For in the Law on the Restoration of Citizens' Rights of Ownership to the Existing Real Property with the Constitution (Constitutional Court ruling of 23 August 2005). Having recognized the provisions of this law, under which the Government was assigned to establish the amount, terms and procedure of payment of compensation as being in conflict with the Constitution, the Constitutional Court held that if these provisions were officially published immediately after its public announcement during the Constitutional Court hearing, these provisions could not be applied from the day of official publishing of this ruling of the Constitutional Court. In such a case there would have appeared such indeterminacies and gaps in the legal regulation of restoration of the rights of ownership to the existing real property due to which the restoration of the rights of ownership to the existing real property would have been disturbed in essence or even it would have been temporarily discontinued. The Constitutional Court emphasized that there appeared a duty to the legislator to respectively amend and/or supplement the law so that its provisions be in compliance with the Constitution and that the restoration of the rights of ownership to the existing real property be not disturbed or stopped and that it be not discontinued: in order that the state could, properly and in time, fulfil the obligations undertaken by it, this process had to be consistent and continuous. By postponing the official publication of the ruling in the official gazette “Valstybės žinios” of 30 December 2005, in this case, the Constitutional Court not only took account of the fact

that a certain time period was needed in order to make the changes to the laws, but also of the fact that the fulfilment of the state financial obligations to the persons to whom the rights of ownership to the existing real property were restored was related to the formation of the State Budget and corresponding redistribution of state financial resources.

It needs to be noted that in its ruling of 9 May 2006, the Constitutional Court held that after this Constitutional Court ruling was officially published, from the day of its official publishing the articles (parts thereof) of the Law on Courts (wording of 24 January 2002 with subsequent amendments and supplements), which had been recognized as being in conflict with the Constitution by this Constitutional Court ruling, shall no longer be applicable, that the process for the appointment, promotion, transfer or judges or their dismissal from office established in the Constitution might be disturbed. In order to avoid that, the legislator had a duty to fill in the occurred vacuum of the legal regulation immediately. The Constitutional Court also held that the said vacuum of the legal regulation could be completely eliminated only after the Seimas had made the corresponding amendments and/or supplements of the Law on Courts, by heeding the constitutional concept of the special institution of judges provided for by law specified in Paragraph 5 of Article 112 of the Constitution and other constitutional provisions (*inter alia* by taking account of their construction provided in this Constitutional Court ruling and other acts of the Constitutional Court). Should more time be necessary for that, the Seimas had a duty to establish by law a temporary legal regulation, on the grounds of which and by taking account of the concept of the constitutional status of the special institution of judges provided for by law specified in Paragraph 5 of Article 112 of the Constitution, as well as of its powers and the formation provided for in this Constitutional Court ruling and other provisions of the Constitution, a provisional special institution of judges would have been formed. It would have had the powers to advise the President of the Republic on the appointment, promotion, transfer of judges or their dismissal from office, until the legislator, by taking account of the concept of the constitutional status of the special institution of judges provided for by law specified in Paragraph 5 of Article 112 of the Constitution, as well as of its powers and formation provided for in this Constitutional Court ruling and other provisions of the Constitution, regulated these relations in the amended Law on Courts. However, the coming into force of this Constitutional Court ruling was not postponed.

One more way of solving the considered problem is consolidated in the ruling of 9 February 2007, in which the Constitutional Court, after recognizing that the provisions of the Law on Elections to Municipal Councils were in conflict with the Constitution, did not postpone the date of publication of its ruling, but just established when and to what kind of relations one should start applying the said ruling.

It has already been mentioned that the Lithuanian constitutionalists have considered the problem of revival of the legal regulation which had been valid before [52], however, in the practice of the Constitutional Court this measure is not applied.

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

5.1. Duties Arising to the Legislator

Under Paragraph 1 of Article 107 of the Constitution, *inter alia* a law (or part thereof) of the Republic of Lithuania or other act (or part thereof) of the Seimas may not be applied from the day of official promulgation of the decision of the Constitutional Court that the act in question (or part thereof) is in conflict with the Constitution.

Constitutional Court rulings have the power of law and are binding to all state institutions, courts, all enterprises, establishments, and organisations as well as officials and citizens. The power of the rulings of the Constitutional Court is comparable to the power of the Constitution. Thus, the Constitutional Court ruling, in which a law or other act of the Seimas is recognized as being in conflict with the Constitution due to the existence of legislative omission is also binding to the Seimas—the representation of the Nation—which adopted the said law or act. A duty arises to the legislator to establish a necessary legal regulation so that the Constitutional Court ruling would be fully implemented. It needs to be noted that the power of the Constitutional Court ruling to recognize a law or legal act as unconstitutional due to the existence of legislative omission may not be overcome upon repeatedly adopting the same law or legal act.

Paragraph 1 of Article 181² of the Statute of the Seimas establishes that when a ruling of the Constitutional Court enters into force which states that a law (or a part thereof) or any other act (or a part thereof) adopted by the Seimas is not in compliance with the Constitution or a constitutional law, the Committee on Legal Affairs or, by the advice thereof, any other Seimas Committee must, not later than within 3 months, prepare and submit to the Seimas for consideration a draft amending the law (or a part thereof) or any other act (or a part thereof) adopted by the Seimas which the Constitutional Court has declared that it is not in compliance with the Constitution. When preparing these drafts, one is to take into consideration the gaps, inconsistencies in legal regulation, other shortcomings and arguments set forth in the ruling of the Constitutional Court (Paragraph 2 of Article 181² of the Statute of the Seimas).

It has been mentioned that till 15 October 2007, only in seven rulings in total, the existence of legislative omission in the laws was stated. It needs to be noted that the Seimas reacted not in all the cases and not always properly to the decisions adopted in the said constitutional justice cases.

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

Under Paragraph 1 of Article 107 of the Constitution, an act of the President of the Republic, act (or part thereof) of the Government may not be applied from the day of official promulgation of the decision of the Constitutional Court that the act in question (or part thereof) is in conflict with the Constitution. The said law-making subjects must establish the necessary legal regulation so that the Constitutional Court ruling would be implemented.

It has been mentioned that till 15 October 2007, in seven rulings in total, the existence of legislative omission only in the laws was stated.

6. CONCLUSIONS

1. The official constitutional doctrine which is formulated in the jurisprudence of the Constitutional Court is logic and coherent continuation of the Constitution, which has the power of the Constitution itself. Namely through the constitutional jurisprudence that the Constitution, as the legal act which has the highest legal power, becomes “living” law.

2. Not scientists, but the Constitutional Court introduced the notion “legislative omission” into the legal circulation.

3. In the doctrine of the Constitutional Court, legislative omission is understood as a legal gap, which is prohibited by law, first of all *ius supremum* (the Constitution). In this, legislative omission, as a prohibited legal gap, is different from other legal gaps which, even though they raise problems in the legal practice, usually are only a precondition for improving the legal regulation.

4. In the doctrine of the Constitutional Court, legislative omission is different from other legal gaps also because of the fact that it is always the result of the action of the subject of law-making which issued the corresponding legal act and not of its failure to act, as well as not the consequence of the action (even a lawful one) or failure to act by any other subject; for example, the legal gap where one has not even started to regulate certain public relations by some legal acts, even though there is a need to regulate them lawfully, is not to be considered as legislative omission; likewise, legislative omission may not appear after the Constitutional Court, in the ruling which was adopted in a constitutional justice case, recognizes that a certain legal act (part thereof) is in conflict with the legal act of higher power, *inter alia* the Constitution.

5. Even though neither the Constitution, nor the Law on the Constitutional Court *expressis verbis* provide that the Constitutional Court may and must state the existence of legislative omission, the doctrine of the Constitutional Court—the living Constitution—states such a right and duty. This right and duty of the Constitutional Court was established while seeking to better ensure the rights and freedoms of persons—after all, legislative omission, as the legal gap which is

prohibited by the Constitution may create preconditions and even conditions to violate the rights and freedoms of persons.

6. The Constitutional Court states the existence of legislative omission when the legal act (part thereof) does not establish the corresponding legal regulation, even though, under the Constitution (or any other legal act of higher power, in whose respect the compliance of the investigated legal act (part thereof) of lower power is assessed), it must be established namely in that legal act (namely in that part thereof).

7. Investigation and statement of the existence of legislative omission is to be considered as an important measure of the constitutional control which is implemented by the Constitutional Court. Thus, the fact that by now there have not been many rulings adopted in which the Constitutional Court stated the existence of legislative omission does not deny these constitutional justice cases and the significance of the rulings which were adopted in them. These rulings contributed to the improvement of the quality of the legal system, drew the attention of all law-making subjects to the legal consequences of unconstitutional failure of regulation and obliged to start correcting such mistakes.

8. The experience of the Constitutional Court of the Republic of Lithuania proves that statement of the existence of legislative omission and formulation of the duty to correct the legal regulation contributes to better protection of the rights and freedoms of a person.

Notes and references

1. See: Mikelėnienė D., Mikelėnas V. *Teismo procesas: teisės aiškinimo ir taikymo aspektai*. Vilnius: Justitia, 1999, pp. 155–160; Vansevičius S. *Valstybės ir teisės teorija*. Justitia: Vilnius, 2000, pp. 241–243. In the opinion of E. Kūris, gaps in ordinary law is a common phenomenon (in the legal system only the constitution is regarded as law with no gaps), see.: Kūris E. Konstitucija kaip teisė be spragų. – *Jurisprudencija*, 2006, t. 12 (90), p. 11.
2. Mikelėnienė D., Mikelėnas V. Op. cit., pp. 155–160; Vansevičius S. Op. cit., pp. 241–243.
3. Vaišvila A. *Teisės teorija*. Antrasis leidimas. Vilnius: Justitia, 2004, pp. 395–400.
4. Vansevičius S. Op. cit., pp. 241–243.
5. The texts of the Constitution, of the Law on the Constitutional Court, of acts adopted by the Constitutional Court can be found in Lithuanian and English at the Internet website *www.lrkt.lt* and in this report the references to the sources of their publishing will not be separately pointed out.
6. Žilys J. Constitutional Court and the Development of Lithuanian Law. – *Constitutional Justice: The Present and the Future*. Vilnius: The Constitutional Court of the Republic of Lithuania, 1998, pp. 243–291; Žilys J. Kai kurios Lietuvos teisės kūrimo problemos ir Konstitucinis Teismas. – *Jurisprudencija*, 1999, t. 12 (4), pp. 58–68.

7. Staugaitytė V. Konstitucijai prieštaraujančių teisės aktų pašalinimo iš teisės sistemos atidėjimas Lietuvos ir užsienio valstybių konstitucinių teismų praktikoje. – *Jurisprudencija*, 2006, t. 2 (80), pp. 100–111.
8. Žilys J. Constitutional Court and the Development of Lithuanian Law. – *Constitutional Justice: The Present and the Future,* pp. 243–291; Žilys J. Kai kurios Lietuvos teisės kūrimo problemos ir Konstitucinis Teismas. – *Jurisprudencija*, 1999, t. 12 (4), pp. 58–68.
9. Mikelėnienė D., Mikelėnas V. Op. cit., pp. 155–160; Vansevičius S. Op. cit., pp. 241–243.
10. Mikelėnienė D., Mikelėnas V. Op. cit., pp. 155–160.
11. Vansevičius S. Op. cit., pp. 241–243.
12. Mikelėnienė D., Mikelėnas V. Op. cit., p. 272.
13. Ibid., p. 272.
14. Vansevičius S. Op. cit., pp. 241–243; Mikelėnienė D., Mikelėnas V. Op. cit., pp. 155–160.
15. Vansevičius S. Op. cit., pp. 241–243.
16. Mikelėnienė D., Mikelėnas V. Op. cit., pp. 155–160.
17. Ibid., pp. 155–160
18. Vaišvila A. Op. cit., pp. 395–400.
19. Žilys J. Constitutional Court and the Development of Lithuanian Law. – *Constitutional Justice: The Present and the Future,* 1998, pp. 243–291; Žilys J. Kai kurios Lietuvos teisės kūrimo problemos ir Konstitucinis Teismas. – *Jurisprudencija*, 1999, t. 12 (4), pp. 58–68; Vaišvila A. Op. cit., pp. 395–400.
20. Mikelėnienė D., Mikelėnas V. Op. cit., pp. 155–160.
21. Ibid., pp. 155–160.
22. Kūris E. Konstitucija kaip teisė be spragų. – *Jurisprudencija*, 2006, t. 12 (90), pp. 7–14
23. Žilys J. Constitutional Court and the Development of Lithuanian Law. – *Constitutional Justice: The Present and the Future,* 1998, pp. 243–291.
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25. Žilys J. Constitutional Court and the Development of Lithuanian Law. – *Constitutional Justice: The Present and the Future,* 1998, pp. 243–291; Žilys J. Kai kurios Lietuvos teisės kūrimo problemos ir Konstitucinis Teismas. – *Jurisprudencija*, 1999, t. 12 (4), pp. 58–68.
26. Žilys J. *Konstitucinis Teismas – teisinės ir istorinės prielaidos*. Vilnius: Teisinės informacijos centras, 2001, pp. 153–160.
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28. Ibid.
29. Ibid.
30. P. Ragauskas gives an example, illustrating that in its ruling of 4 March 1999, the

Constitutional Court, when assessing the provisions of Paragraph 2 of Article 3 of the Republic of Lithuania Law “On the Assessment of the USSR Committee of State Security (NKVD, NKGB, MGB, KGB) and Present Activities of the Regular Employees of This Organisation”, and stating that “the fact that in Part 2 of Article 3 of the Law (as in the Law and the Law on the Enforcement of the Law in general) no individuals’ right to appeal to court against the adopted decisions concerning them and against whom the occupation restrictions are applied is provided for is to be assessed as contradiction to Part 1 of Article 30 of the Constitution”, recognised the gap left by the Seimas as conflicting with the Constitution (of course, from the formal point of view it was not the gap itself, but that article of the law, which created preconditions for the appearance of the gap, i.e. which provided for a possibility to adopt a decision, the appeal against which with a court was not provided for).

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33. Žilys J. Lietuvos Respublikos Konstitucinis Teismas: įkūrimo prielaidos ir vaidmuo užtikrinant konstitucinį teisingumą valstybėje. – *Konstitucinis Teismas ir konstitucingumo garantijos Lietuvoje*. Vilnius: Lietuvos Respublikos Konstitucinis Teismas, 1995, pp. 10–18.
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39. Kūris E. Judges as Guardians of the Constitution: “Strict” or “liberal” Interpretation? – *The Constitution as an Instrument of Change*, pp. 191–213.
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45. See: Entretien avec E. Kūris – *Cahiers du Conseil constitutionnel,* 2007, No. 23, p. 54.
46. See: Stačiokas S. Lietuvos Respublikos Konstitucinio Teismo aktų vykdymas ir jų poveikis teisinei sistemai. – *Konstitucinė jurisprudencija*, 2006, Nr. 3, pp. 311–324; Staugaitytė V. Konstitucijai prieštaraujančių teisės aktų pašalinimo iš teisės sistemos atidėjimas Lietuvos ir užsienio valstybių konstitucinių teismų praktikoje. – *Jurisprudencija*, 2006, t. 2 (80), pp. 100–111.
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