

Conference of European Constitutional Courts

PROBLEM OF LEGISLATIVE OMISSION IN CONSTITUTIONAL  
JURISPRUDENCE

Questionnaire  
for the XIV Congress of European Constitutional Courts

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

### 1.1. The Concept of Legal Gap

Like in other legislative systems, the institute of legal gap finds its place in the legal theory of Montenegro. Legal gap is defined as an event when no norm by its linguistic meaning refers to a specific case, but there is a social need for existence of such a norm, respectively for regulating such a case by a legal norm, for sake of social interest and the objective wanted to be achieved in that case. Some theoreticians, starting from the manner in which legal gap is solved, found their position on hypothesis that there are no legal gaps in law and that by respective way and means of explanation one may find which norm is applicable for a specific case. That is an older law school which understands that there are no gaps in law at all, that there might only be *fictitious gaps*. Namely, the event may be that a certain case is not regulated by a specific legal regulation, but one can not say that it is a gap, since that case is covered by higher, more abstract legal regulations. Thus one may come to the highest legal principles predominating in a specific legal system, for example principle of equity, and using this principle regulate legally all the cases in which there are no closer norms. In modern theory, however, it has been accepted that the gaps exist, as the legal order, respectively legislator may not include all that needs to be included, may not see everything that exists and that should be legally regulated; it is not possible, as life and reality, are very complex and because it is not possible to anticipate everything that will appear as new, therefore it may not be legally regulated; it is not possible because the life, and the reality, are dynamic.

In theory there are several classifications of legal gaps. Gaps occurring from the legal cause exist in the moment of adopting of legal regulation and they are called the initial (primary), whereas the legal gaps emerging owing to other reasons are created after the adoption of regulations and they are called subsequent (secondary) ones.

The gaps are also classified in *absolute and relative* ones. Absolute are those that cannot be filled in any longer, whereas the relative ones are those that may be filled in later, by adoption of legal regulation.

Competent for filling in the legal gaps are those authorities which create the legal norm, and indirectly also the courts which have the task to establish in unforeseen case the characteristic of that case and classify it under a certain norm. Such principle may not be applied to all the cases, and especially to „legal gap“.

## 1.2. The Concept of Legislative Omission

The legislative omission in scientific literature is classified as legal gap representing an absence of legislative regulation of social life. Some theoreticians call it „legal hollow“. Different from legal gap in narrow sense (for the purpose of this questionnaire) lack of legal regulation of an entire field can not be solved in the way presented in the above text. It can not be filled in by the courts; the activity of norm writer (legislator) is required here. A complete lack of social relations' regulation emerges in situations when social and state arrangement change on occasion of adopting the new constitution. By change of its state-legal status and harmonisation of legal system, Montenegro itself, has faced the possibility of occurrence of legislative omission. Previous legislature of joint state (The State Union of Serbia and Montenegro), namely, does not correspond with legal arrangement of Montenegro as an independent state. This legislative omission has been overcome by adoption of the Decision on Pronouncing the Independence of the Republic of Montenegro, on basis of which Montenegro will enforce and take over international agreements and accords concluded and ratified by the State Union of Serbia and Montenegro, which refer to Montenegro and which are in harmony with its legal order (item 2 of the Decision); following the adoption of respective regulations of the Republic of Montenegro they will be correspondingly applied as its regulations which on the day of coming of the Decision into force have been valid as the regulations of the State Union of Serbia and Montenegro, provided they are not conflicting the legal order and interests of the Republic of Montenegro. In mentioned way Montenegro has eliminated this type of legislative omission until the completion of its own legal system.

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

Wider theoretical question – do the constitutional courts within the implementation of their function of control of constitutionality of law perform a certain kind of legislative function and thus exceed the frames of court competence, primarily refers to effect of the decision of the constitutional court. The question of „legislative character“ of Constitutional Court's decision establishing the unconstitutionality or unlawfulness, is, in legal theory, a subject of deliberation from various standpoints.

In legal theory (of former Federal Republic of Yugoslavia) there are different understandings of „legislative character“ of the Constitutional Court, or decision of the Constitutional Court as a positive or negative legislator.

According to Radomir Lukić<sup>1[1]</sup>, acts used for establishing that a law is unconstitutional or that its annulment follows, undoubtedly have the character of purely-court act, and do not have any trait of general act, that is law. This standpoint is supported by three fundamental arguments: that the act of annulment of unconstitutional law is an individual, not general act, as it relates to one single specific law, that law is a typical act of creating of legal norms, whereas the court decision is an act of assessing that act; that adoption of a law has been defined by political standards, whereas the assessment of constitutionality of law has been defined by legal standards.

Also, Pavle Nikolić<sup>2[2]</sup> believes that constitutional court is not a law-making authority, even when it assesses the constitutionality of law. In his opinion court decision and work method of the constitutional court are not convenient for performing of legislative function. However, there have also been opposite standpoints. Thus Jovan Đorđević<sup>3[3]</sup> thinks courts to be the authorities which make decisions and their acts have the same value as those they assess to be in conflict with the constitution or to be unlawful. Court decisions „replace the law“ and are omni effective (*erga omnes*). His opinion is that, no matter that by its form it is «an individual act“ court's decision on annulment and cancellation of laws and other regulations is «a normative act». Normativity of that act is not reflected only in the fact that it discontinues the validity of unconstitutional and unlawful acts, but also for the consequences it may have on other regulations and individual acts.

Scientific and legal doctrine does not deal with question of activity of the constitutional court in research and filling in the legal omissions, since the Constitutional Court, according to the concept of the Constitution from 1992 does not have explicit competencies to assess and fill in the legal omissions.

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

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

In the legal system of Montenegro, Constitution is the supreme and fundamental legal act. The legal system of the Republic emerges from it, that is, it stands on the top of pyramid of general legal acts. Constitution is characterised by abstractiveness, principledness and generality of legal norms. Constitutional provisions are general, as the formulations are given in general terms and frequently they are not fit for immediate application – they lack precision which is

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<sup>1[1]</sup> Radomir Lukić – *Constitutionality and Legality, Belgrade 1966.*

<sup>2[2]</sup> Pavle Nikolić: *Constitutional Law, Belgrade, 1991.*

<sup>3[3]</sup> Jovan Đorđević: *Political System, Belgrade, 1977.*

provided in elaboration of constitutional provisions by laws and subordinate regulations.

Specificity of the constitution is reflected also in the fact that the constitutional provisions are not of the same character and do not have identical effect; they may be classified into three groups: immediately applicable constitutional provisions, constitutional provisions which require elaboration through laws and constitutional provisions which are neither immediately applicable, nor do they require elaboration by the law.

Only exceptionally the constitution consists of the immediately applicable provisions in subject matter that refer to civil rights and freedoms and to organisation and work of state authorities. The Constitution of Montenegro prescribes that freedoms and rights are effected on basis of the Constitution (article 4), and that law, in harmony with the constitution regulates the manner of realisation of freedoms and rights if that is required for their realisation, manner of establishing, organisation and competence of authorities of power and procedures before those authorities, if that is necessary for their functioning, system of local government and other issues of interest for the Republic (article 12).

All constitutional provisions which have not been immediately applied require legislative elaboration, in the way that the Constitution regulates the limits which must not be exceeded in the process of regulating.

By the Constitution of Montenegro from 1992, a legal principle of constitutionality was established according to which a law must be compliant with the Constitution; other regulation and general act must be compliant with the Constitution and law.

Hierarchy of general legal acts is the following: the Constitution, law and subordinate acts. The level of their abstractness increases towards the peak. Subordinate regulations are the least abstract and they regulate everyday, specific situations and relations. Laws are already at a higher level of abstractness, consisting of the conducts formulated in a more general manner. Finally, the highest level of abstractness is demonstrated by the constitution, as it represents a document from which emerges the entire legal system and it is limited to setting the frameworks in which other legal acts will concretise its abstract provisions to a lower or higher extent.

In the procedure of assessing the constitutionality of law the Constitutional Court has developed a concept of the constitution as prevalently explicit legal regulations, although the constitutional norms are sometimes too generalised and allow the possibility of different explanation.

Is the constitution considered to be a law without omissions in constitutional jurisprudence?

Already when defining the legal omissions (1.1.) it has been pointed out that legal order is not a limited and static system. The emergence of the new relations which have not been a part of former legal arrangement, also leads to a

certain constitutional omissions. Exactly the competence of the Constitutional Court, in protection of human rights is limited by the existing constitutional provisions which do not correspond to international protection of civil rights limited by the present constitutional provisions which do not correspond to international protection of human rights (provisions of European Convention on Human Rights and Basic Freedoms).

In its decisions U no. 60, 61 and 62/06 the court has claimed itself not competent for deciding on the constitutional complaint in which the violation of right to trial in a reasonable time limit granted by article 6 item 1 of the Convention was pointed out, since that right and its protection with the Constitutional Court has not been granted by the Constitution of the Republic of Montenegro (1992). Process conditions necessary for lodging the constitutional complaint and acting of the Constitutional Court have been defined by the provisions of the Constitution and law. The Court has assessed that in the specific cases they have not been fulfilled. Constitutional complaint has been normed as strictly formal legal means of protection of freedoms and rights stipulated exclusively by the Constitution. For that reason, when this legal institute is in question, the competence of the Court, too, is limited only to protection of freedoms and rights granted by the Constitution, therefore the Court may not meritoriously decide in those cases. That means that the Court has limited itself to deciding about the violation of those human rights which were exclusively regulated by the Constitution, but not also by the Convention.

2.2 *Expressis verbis* consolidation in the constitution concerning the jurisdiction of the constitutional court to assess the constitutionality of legal gaps.

In the Republic of Montenegro's Constitution there is no *expressis verbis* when the word is about the assessment of the constitutionality of legal gaps by the Constitutional Court.

The competence of the Constitutional Court, as an authority that protects constitutionality and legitimacy, has been stipulated by the provision of article 113 of the Constitution of the Republic of Montenegro, according to which the Constitutional Court also decides on compliance of law with the Constitution; compliance of other regulations and general acts with Constitution and law; establishes if the President of the Republic has violated the Constitution; decides on the constitutional complaints due to violation, by individual act or action, human and civil freedoms and rights set forth by the Constitution, when such protection is not within the competence of the Federal Constitutional Court and when no other court protection has been foreseen; it solves the conflict of competence between the administrative and court authorities, conflict of competence between these authorities and authorities of local government and the conflict of competence among the units of local government; it decides on compliance of acts of political party and association of citizens; it decides on

prohibition of the activity of political parties and associations of citizens; it decides on electoral disputes and disputes regarding the referendum, which are not within the competence of regular courts; it performs other affairs set forth by the Constitution. The Constitutional Court may decide about the constitutionality and legality of acts the validity of which has ceased, provided that not more than one year has elapsed from cessation of validity to instituting the proceedings and when the Constitutional Court establishes that law, other regulation or general act is not in harmony with the Constitution, respectively law, such law, other regulation or general act ceases to be valid as of the day of publishing the decision of the Constitutional Court (article 115).

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

In those legal processes, like ours is, in which there are no explicit regulations on filling in the legal gaps, possibility of their filling in is given implicitly, by explanation of essence of law, its spirit and objective.

Legal gaps (in narrow sense) in legal system of the Republic of Montenegro are filled in by regular courts in the process of application. The Constitutional Court has indirectly stated in its decisions the existence of legal gap, or unregulated condition of certain social relations in the way that the subordinate act, adopted pursuant to the law (senior legal act) that ceased to be valid, removed it from force, respectively established that such an act has not been in harmony with the Constitution and law. In this way legal gap (legal omission) has been implicitly stated. Filling in of such legal gap in wider sense is not done by the Constitutional Court. Application of the act which should be replaced by the regulation which would eliminate legal gap is made impossible by its decision. In these cases the Constitutional Court did not consider the consequences of legal gap, and it did not direct to them in its decisions.

However, in the practice of the Court there were events where by its interpretation of the Constitution and law the Court fills in the legal gaps in an indirect way, on occasion of assessment of constitutionality and legality of a general act. This means that the Court concretises by its position some general non-specific norm, on basis of which one could not derive a precise legal regulating. However, on occasion of concretisation of legal norm the Constitutional Court in its relation with legislator applies the principle of self-limitation, since, giving the meaning to a specific norm in a concrete legal situation, it does not change or amend that norm directly.

For example by its decision U br. 56, 57, 63/2000, dated 12 October 2000 the Court, deciding on competence of Board of Trustees of the Government of the Republic of Montenegro for the municipality Podgorica in adopting the changes of Detailed Master Plan, has indirectly determined the framework of competence

of the board of trustees of the Government of Montenegro, through the explanation of basic affairs and tasks it limited their function when adoption of a change of Detailed Master Plan is an issue. Namely, by the provision of article 51 paragraph 4 of the Law on Local Government it has been regulated that in case of dissolution of parliament the Government shall nominate a three members' board of trustees which shall, until constituting the newly elected parliament, perform basic activities and tasks from the scope of rights and duties of the parliament of the municipality providing for the implementation of freedoms and rights of citizens.

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

The Law on the Constitutional Court regulates the organisation of the Constitutional Court, proceedings before that court and legal effect of its decisions, but without special provisions which direct the Court to involve in the assessment of the relations which represent legal gaps.

The only provision which may be connected with legal gaps and activity of Constitutional Court is a procedural provision (article 10) according to which the Constitutional Court may establish by itself its procedure for a specific event, in harmony with general and procedural principles and nature of the procedure taking place before the Constitutional Court, if that is a situation when a certain issue has not been regulated in the Law on the Constitutional Court. In that way the Constitutional Court is authorised to fill in the procedural gap in the process of decision making.

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

#### 3.1. Application to the Constitutional Court.

Provision of article 114 of the Constitution regulates that everyone may initiate instituting the procedure for assessment of the constitutionality and legality. The proceeding before the Constitutional Court is instituted by the state authorities and judicial persons when they assess that their right or interest have been violated by an act the constitutionality and legality of which is disputed, as well as that the Constitutional Court itself may institute a procedure for assessment of the constitutionality and legality.

Law on the Constitutional Court of the Republic of Montenegro regulates that the procedure for assessment of the constitutionality and legality of general acts is instituted by petition of the petitioner from article 114 of the Constitution

and when the Constitutional Court, following the petition or on its own initiative, institutes the proceeding by a decision (article 21).

Participants in the proceeding before the Constitutional court are: state authority or judicial person when it assesses that its rights or interests have been violated by the act that is disputed; everyone on whose initiative the proceeding is instituted; the one who adopted law, other regulation and general act (hereinafter: general act), respectively the one who has adopted the individual act or the authority that has ordered performing of action which is the subject of assessment of constitutionality and legality; political party or association of citizens whose general act is disputed or the prohibition of whose operation is decided about; the one who submitted the constitutional complaint; courts and other authorities that accept, respectively reject the competence, as well as everyone who owing to accepting, respectively rejecting of authority could not implement its right; everyone after whose request the proceeding is instituted for deciding on electoral dispute and dispute in connection with referendum, as well as authority for implementing the election, respectively authority for implementing referendum in respect of the electoral activity of which the dispute is instituted (article 11 of the Law).

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

In practice of the Court there have been petitions to assess the constitutionality and legality of legal areas, respectively individual questions that have not been regulated by present legal regulations. In such cases the Court used to adopt the decisions that it is not competent to establish the compliance of general act with law and the Constitution in event when the one who adopted the act has not regulated or failed to regulate something. (U no. 51/06, 65/06, 33/04, 60/03 i 67/03, 17/05 and other). From these decisions it is clear that the Court on occasion of assessment of constitutionality and legality of general acts is not competent to decide on the level of regulation of legal relations, respectively on legal relations that have not been prescribed in disputed acts, to which the petitioners have been pointing. That means that the Court has indirectly stated the existence of legal (legislative) omission in these cases, but also that it is not competent to decide about it, but it directs to the competence of legislator.

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

In situations when the Constitutional Court assessed a specific provision, and the word was about the act adopted pursuant to a former law, the Court used to decide that the entire act is not compliant with the Constitution and law, respectively it has indirectly stated that in legal order, owing to failing to adopt the regulations there is a „legislative omission“.

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

Legislative omission occurs mainly when the word is about laws that have not been adopted within the time limit defined by the Constitutional Law for Implementation of the Constitution, whereas the legislative omission due to lack to adopt other regulations emerges when these regulations are not adopted in harmony with provisions of law for the implementation of which adoption of these regulation is prescribed. Overcoming the legislative omission is done by extending the validity of former regulations. Such event exists in mentioned situation, application of the law of State Union and other situations when the legislator found it appropriate, as well as with subordinate acts the adoption of which requires time necessary for harmonisation of legal system. Should the time limits for adoption of new regulations expire the Court has taken the position that these regulations do not cease to be valid by expiration of time limits for their harmonisation, but only on basis of the decision of the Court that they are not in harmony with the Constitution; this way the Court has avoided the emergence of legislative omissions.

Thus, for example in subject U no. 47/98, of 20 March 2000, the Court adopted a decision by which it has established that the Law on Deliberation on Usurpation of the Socially Owned Land („Official Journal of the Republic of Montenegro”, no.12/65, 35/67 and 13/71) is not in harmony with the constitution from 1992 and that its validity ceases. The Constitution grants the right of property and no one may be denied the right of property nor that right may be limited, except when that is required by public interest set forth by the law or on basis of the law, with compensation that may not be lower than the one on the market (article 45) and that the right of property and freedom of doing business may be limited by the law, respectively ordinance with power of law, in period of emergency, immediate danger of war or state of war (article 48). The right of property granted by the Constitution, as assessed by the Constitutional Court, does not include also the socially owned property which is not any longer included in provisions of the Constitution. Since the Constitution does not consist of the fundament for regulating of the socially owned property, and thus its protection, these issues may not be regulated by laws either, and for that reason the Court has established that the disputed Law, in its entirety, is not compliant with the Constitution.

### 3.5. Refusal by the Constitutional Court to investigate and assess legal gaps.

The Constitutional Court, as noted in item 3.2, deciding in numerous cases in which the petitioners referred to legal gaps, has taken the position that the Court is not competent to assess legal relations which have not been prescribed by the act which is the subject of constitutional-court assessment (U no17/05), to

establish the need of change of a specific norm (U no 43/03); to assess the level of regulation, respectively unregulated condition of specific relations (U no 33/04).

### 3.6. Initiative of the investigation of the „related nature”

What is understood by the «related nature» ?

If the related nature is explained as a possibility of solving the specific case before the Constitutional Court on basis of abstract regulations, we may present the situation when the Court in an instance of violation of right to access to the court assessed that there is a right granted by the Constitution to equal protection which consists in itself also the right to access to the court, no matter that this right has not been defined as such in the Constitution.

In course of the procedure of adopting the new constitution of Montenegro, the court has submitted to the Parliament the suggestions pertaining to legal gap. Adequate constitutional protection of freedoms and rights has been the subject of suggestions the Court has forwarded to the Parliament, initiating the creation of basis for effective protection of rights granted by European Convention on Human Rights and Basic Freedoms.

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

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

Through the court practice of the Constitutional Court it has been demonstrated that more recently the problem of legislative omission emerges in issues of protection of freedoms and rights. Certain rights granted by the Convention on Human Rights and Freedoms are not contained in the Constitution, thus the Constitutional Court the competence of which is to protect rights granted by the Constitution may not decide about them. By the Law on the Constitutional Court it has been regulated that the procedure for deciding on violation of law in course of election of president and members of the Government, president and justice of the Constitutional Court, justice of regular court and other justices, is instituted by a complaint that may be lodged by the president of the Republic, candidate who believes that his/her right has been violated in course of the elections or Club of Envoys in the Parliament of the Republic (article 48). However, this Law does not regulate the issues relating to protection of human rights of certain categories of incumbents of public functions, like, for example, election and discharge of justices, ombudsman etc, what also represents a legislative omission. That is why the Constitutional Court in subjects U no.103/03 and 105/03, from 2003 rejected the complaint lodged against the decision on election of Ombudsman (protector of human rights and

freedoms). The Court has established not to be competent to extend its competence to electoral procedure of other functionaries, including Ombudsman.

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

The Constitutional Court itself may institute the procedure for assessment of the constitutionality and legality (article 114 paragraph 3). When the Constitutional Court institutes the procedure for the assessment of constitutionality and legality of general act by its own initiative, the procedure is considered to be instituted as of the day of adoption of the decision on instituting the proceeding (article 23 paragraph 4 of the Law on Constitutional Court). Besides, the Law regulates that in the procedure for the assessment of constitutionality and legality of general act the Constitutional Law is not limited by the petition of the petitioner, respectively submitted initiative, and should the petitioner, respectively the party that submitted the initiative withdraw from the proposal, respectively initiative, the Constitutional Court shall, should it find the foundations, continue the proceedings.

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

Establishing the unconstitutionality of an act and failing to adopt the new one causes a legislative omission. The decision by which the Constitutional Court established the unconstitutionality and unlawfulness of an act is published in „Official Journal of the Republic of Montenegro” and it is also served upon the competent authorities; this way the Constitutional Court indirectly indicates that there is a legislative omission in legal order.

The Constitutional Court of the Republic of Montenegro in its numerous decisions has referred to the practice of European Court for Human Rights, as on the general principles, but not when the legislative omission was an issue.

#### 4.4. Additional Measures.

When the unconstitutionality of an act is stated (item 4.3.), and the legislative omission emerges, a possibility has been granted that in harmony with provisions of articles 70 and 71 of the Law on Constitutional Court, a change of individual act may be requested in a certain time limit. Everyone whose right has been violated by a final or absolute individual act, adopted pursuant to law or other regulation and general act, which by the decision of the Constitutional Court was established not to be in harmony with the Constitution and Law, is entitled to request the competent authority to change that individual act within six months as of the day of publishing the decision in the Official Journal of the Republic of Montenegro. Should it be established that by the change of individual act it is not possible to remove the consequences emerged due to the enforcement of

unconstitutional and unlawful act, the Constitutional Court can rule these consequences to be removed by returning to previous condition, compensation of the damage or in some other way.

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 of the Republic of Montenegro does not involve in the assessment of the very omission or gap and does not monitor the destiny of relations that have not been regulated.

#### 4.7 The «related nature» investigation and decisions adopted.

Already in item 3.6. it was explained that the Constitutional Court in certain procedures has used related nature of certain constitutional principles with the principles of European Convention on Protection of Human Rights and Basic Freedoms. So the Court, assessing the constitutionality of the Law on Court Fees and the Law on Litigation Procedure, in pointing out the violation of right to access the court assessed that there exists a violation of Constitutionally granted right to equal protection which consists in itself also the right to access the Court although the right of access to court has not been defined as such in the Constitution. In explanation of these decisions the Court referred, although it did not have the competencies to assess the provisions of the law in relation to general rules of international law, to the provision of article 6 of European Convention on Protection of Human Rights and Basic Freedoms which, *inter alia*, regulates that everyone, in course of deciding on his/her civil rights and duties or on criminal charges against him/her, is entitled to an equitable and public debate in reasonable time limit before the independent and impartial court, formed pursuant to law, and the provision of article 13 regulating that everyone whose rights and freedoms granted by this Convention have been violated are entitled to an effective remedy before the national authorities, no matter if the violation has been done by the persons who have acted *ex officio*.

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.

Legal consequences of decision of the Constitutional Court by which it established the unconstitutionality of a law, respectively unconstitutionality of regulations, result in legal gaps, which emerge after removing these acts in their entirety or of some of their provisions from the force.

Legal notion of the constitutionality has two forms: formal and substantial ones. The constitutionality in its formal meaning requires law and subordinate regulations to be compliant with the Constitution when the form is concerned, and in substantial meaning that the legal norms shall be substantially harmonized with the Constitution. On occasion of assessment of the constitutionality it is possible to dispute both the formal and the substantial constitutionality of regulations. Formal compliance of laws and other legal acts with the constitution assumes the existence of written constitution, as the supreme legal act as well as the hierarchy of legal regulations. On occasion of assessment of formal constitutionality the subject that adopts legal act is assessed, as well as the procedure on basis of which the legal act is being adopted and the form of legal act, what is regulated by the legal act of higher legal power. The exception is the Constitution as the only legal act that independently regulates the competence for its adoption, procedure of adoption and the form of constitutional act.

Therefore formally constitutional (legal) is only such legal act which has been adopted by the competent authority in the procedure set forth for adoption of that legal act and provided that the legal act corresponds to the type of regulation that authority adopts.

Substantial notion of the constitutionality requires substantial (material) compliance of provisions contained in lower legal acts with the Constitution.

So, in the event of the so called formal unconstitutionality the consequences of the decision of the Constitutional Court are replacing the law in its entirety from the force, whereas in substantial (material) one, unconstitutional, respectively unlawful cassation may be full or partial.

So, the Constitutional Court, deciding on the constitutionality of the Law on Changes and Amendments of Labour Law („Official Journal of the Republic of Montenegro”, no. 79/04) and the Law on Social and Children Protection („Official Journal of the Republic of Montenegro”, no.79/04) established that these laws are not compliant with the Constitution for the reasons of formal unconstitutionality and they ceased to be valid in their entirety. Namely, the Court, starting from the fact that disputed laws regulate the way of realisation of Constitutionally granted freedoms and rights of citizens established that in the procedure of the adoption of those laws the Parliament was bound to adopt them by a majority vote of the total number of members of the parliament, pursuant to the provision of article 83 item 2 of the Constitution, not contrary to that provision, as had been done in this specific event.

Even with partial cassation, respectively removing from the force of only some provisions of the law, difficulties may emerge due to change of the meaning of the provisions that remain in force. In these cases the Constitutional Court does not have the constitutional and legal authorizations to make up the decisions cancelled, as that would be out of its competence and it would enter the domain of legislative competence.

Also, the Constitutional Court, according to the constitutional solutions from 1992, does not even have the possibility to adopt the so called interpretative rejecting decisions, which may be adopted, to mention just some, by the constitutional courts of Germany, Italy, Austria, which, refusing to establish the unconstitutionality of law give such interpretation of the constitution and law which is kept in legal order, but in the meaning attributed to it by the constitutional court. That means that such law remains in the legal order, but it may be applied according to the sense and meaning attributed to it by the constitutional court. By different typology of decisions of the constitutional court a possibility is created to correct the violations of the principle of equality and to avoid the emergence of legal gap by failing to annul (abolish) the unconstitutional law and the legislator is made liable to correct the unconstitutional condition.

Different from the former constitutional solutions, the constitutions of the Socialist Republic of Montenegro from 1963 and 1974, stipulated that, should the constitutional court establish that the republican law is not compliant with the constitution, the parliament was bound to harmonize such law with the constitution within six months, as of the day of publishing the decision of the constitutional court, and should it fail to do so the law, respectively those provisions which are not in harmony with constitution, are removed from force as the court will establish by its own decision. In that period the effect of the decisions of the constitutional court has been regulated depending on the act that was the subject of a special dispute. When a law has been the subject of control of constitutionality, the constitutional court, following the special procedure of decision making, did not adopt cassatory decision, but two special decisions which had a specific legal character and different effect in relation to the unconstitutional law. The first decision of the court, by which it established the unconstitutionality of the law had effect only towards the legislative authority, that is it was binding the competent parliament to remove that unconstitutionality within the constitutional time limit, but that law had still been in force. Should the competent parliament fail to harmonize the law with the constitution in defined time frame, the court would establish by second decision that such law, respectively some of its provisions, cease to be valid as of the day of publishing the decision of the Constitutional Court in the Official Journal, and as of that moment the cessation of validity is being established.

On basis of the Constitution of the Socialist Republic of Montenegro from 1963, in event when it establishes that the regulation is not in conflict with the Constitution or republican law, but in its application it is given the meaning opposite to the Constitution and republican law, the Constitutional Court had a competence to establish by its decision the meaning which corresponds to the Constitution and law, what means that it had the authorization to adopt the so called interpretative rejecting decisions.

The Constitution from 1974 did not contain the authorization for the Constitutional Court to establish the meaning of law.

Bearing in mind that the competence of the Constitutional Court is strictly formally based the subject of legislative omission does not belong to its interference. State authorities competent for adopting the regulations and creation of a complete legal system by their activities in the procedure of adoption and after it, monitor this problematic with the objective of filling in the legislative omissions in certain act and overcoming the legal omission in certain social field.

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

### 5.1. Duties arising to the legislator.

Some of the elements of the constitutional court's procedure and effect of the decisions on the constitutionality of laws and other acts have been prescribed by the Constitution of the Republic of Montenegro, but one number of these questions is elaborated by the Law on the Constitutional Court of the Republic of Montenegro. Thus it is prescribed that, when the Constitutional Court establishes that a law, other regulation or general act is not compliant with the Constitution respectively law, that law, other regulation or general act is removed from the force as of the day of publishing the decision of the Constitutional Court. In order to have the decision of the Constitutional Court produce a legal effect it has to be published, because the legal consequences of such decision are attributed as of the moment of its publishing.

As for the execution of the decisions of the Constitutional Court, the Constitution of the Republic of Montenegro in article 116 paragraph 2 stipulated that these decisions are generally binding and executive. That understands the duty of state and other authorities, companies, institutions, as well as all other subjects, to execute the decisions of the Constitutional Court in scope of their rights and duties.

These decisions also bind those legal and physical persons that have not participated in the constitutional-legal proceeding. In that, the obligatory effect is given only to the resolution (dispositive) of the decision, not to all the positions of the Court and reasoning of the Court is taken into consideration in the process of making decision, which is presented in explanation.

The decisions of the Constitutional Court are also absolute, because the same subject matter could not be a subject of repeated proceeding before the Constitutional Court, and the decisions are not a subject of legal remedies, although the Constitution of the Republic of Montenegro does not consist of the provision about the absoluteness of these decisions.

The execution of decisions of the Constitutional Court is realised, primarily, in the procedure of enforcement of laws, other regulations and general acts. Courts and other state authorities or authorities which perform public authorizations execute decisions of the Constitutional Court by deciding on

subject matter from their own competence in harmony with these decisions, excluding the enforcement of the regulations which, according to the decision of the Constitutional Court, ceased to be valid.

However, as needed the Government provides for the execution of decisions of the Constitutional Court, in manner and according to the procedure prescribed by the act of the Government. Only by the execution of decision of the Constitutional Court one may say that unconstitutional or unlawful act has been removed from legal order, respectively that the principle of protection of constitutionality and legality and strengthening of legal state has been enforced.

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

## 6. WHEN DRAWING CONCLUSIONS.

From the above, a conclusion may be drawn that the fundamental role of the Constitutional Court is to perform the control of constitutionality and legality, which, in relation to normative activity, is characterised by explicit competence of the Court to establish the unconstitutionality of a law, respectively unlawfulness of other general acts, which cease to be valid as of the day of publishing the decision of the Constitutional Court. It means that the Constitutional Court does not have other means (techniques) of decision making among which it would be able to choose an adequate form for deciding, like interpretative or declarative decisions are, or possibility of giving to legislator of certain time limit to harmonise established unconstitutionality or unlawfulness (so called decisions with reserve). Besides, the Constitutional Court, as already stated, does not have authorizations for the assessment of legislative omissions, respectively their filling in, therefore it does not have a respective practice in this field.

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