THE CONSTITUTIONAL COURT OF THE REPUBLIC OF SLOVENIA
SAMS

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PROBLEMS OF LEGISLATIVE OMISSION IN CONSTITUTIONAL JURISPRUDENCE

Questionnaire – The Constitutional Court of the Republic of Slovenia

(XIV Congress of the Conference of European Constitutional Courts)

1. PROBLEMATICS OF LEGAL GAPS IN THE SCIENTIFIC LEGAL DOCTRINE

1.1. The concept of the legal gap.

Provide with a short review of the positions of scientists and specialists of law of your country on legal gaps (how the legal gap is described, what are the sorts of legal gaps (for example, the indetermination of legal regulation, lacuna legis, legal vacuum, legislative omission, etc.); does the scientific legal doctrine consider the reasons of appearance of legal gaps, the problem of real and alleged legal gaps and the peculiarities of gaps in public and private law and positive and negative consequences of legal gaps, etc.?).

1. The definition of a gap in the law in Slovene legal theory

Among Slovene legal theorists, the issue of gaps in the law or legislative omissions has in particular been dealt with by Prof. Marijan Pavčnik, LLD, thus in this aspect the outline of Slovene theory mainly reflects his findings. Upon the issuance of a law or other formal legal source the law-framer can overlook those social relations that should otherwise be legally regulated (the initial gap in the law), or such a lack of legal regulation can appear after a formal legal source has already been formed (a subsequent gap in the law). The subjects of gaps in the law are those social relations that are not encompassed by general and abstract legal rules but which are of such import that they should be legally regulated. The matter also concerns gaps in the law when certain legal institutions are only partially regulated.[1]

The reason for the occurrence of a gap in the law is evident already due to the fact that social life is always more dynamic than formal legal sources and the possibility of supplementing or adjusting them by means of interpretation to the changing social conditions. In the event of a gap in the law the competent body (e.g. the court) must fill the gap in the law by an individual legal act (e.g. by a judgment). Prior to that, however, it must carefully consider whether a certain social relation should be the subject of legal

[1] M. Pavčnik, *Teorija prava* [A Theory of Law], Cankarjeva založba, Ljubljana (2001), p. 272.

regulation; the criterion which governs such consideration is identical with the starting point that is available to the framer of a formal legal source.[2]

2. The types of gaps in the law

Slovene legal theory deals with (a) planned (internal) gaps in laws, (b) classical gaps in the law or gaps in laws, (c) gaps in the law in the broader sense of the word, and (d) gaps in the law in the figurative sense of the word.[3]

(a) Internal gaps in laws refer to legally unregulated areas that the legislature has fully envisaged and also envisaged the manner of filling such. These primarily concern gaps in legal rules which are formed in the law to an extent such that they can normally be applied. They appear, e.g., in the norms of substantive criminal law when the legislature points to states of facts that are similar to those regulated by using words such as "particularly", "or in another prohibited manner". Such are filled by the *intra legem* analogy and they do not concern gaps in the law in the classical sense. The other type of such a gap is a gap in which the legislature willingly does not directly regulate a certain rule, institution, or even a larger or smaller area of a legal field. Such gaps are filled by statutory and legal analogy. Concerning certain unregulated relations in a law, in such a manner the legislature refers to another subject-matter which has already been regulated in the law. Such gaps in the law mainly appear in civil law.[4] The matter namely concerns the fact that by abstract legal rules the legislature cannot in advance envisage all possible concrete situations, thus the legislature provides for the filling of such gaps in the law by the application of the principle of equality.

(b) Classical gaps in the law or gaps in statutes are those gaps regarding which the law does not regulate a certain social relation although it should regulate such. In the event of such, the competent body (e.g. the court) must fill a gap in the law by an individual legal act (e.g. a judgment). The determination that the matter concerns a gap in the law is more convincing the more it succeeds in substantiating the following elements: (1) that the matter concerns an incompleteness of a formal legal source (e.g. a statute), i.e. incompleteness that is not intentionally unregulated due to the fact that it is a subject of free individual activity; (2) that the matter concerns an incompleteness which corresponds to the principles (starting-points) of legal regulation in a certain legally regulated community; and (3) that it concerns an incompleteness which is also an incompleteness in a certain narrower legal area (in the area of a legal field and in particular in the area of its constitutive parts, e.g. in the area of individual legal institutions). The filling of such gaps is essentially similar to the filling of the other type of internal gaps (i.e. those existing in civil law). Their difference only refers to the scope of a gap in the law.[5]

(c) Gaps in the law in the broader sense include legal institutions, groups of legal institutions, or even individual legal areas (e.g. property law relations or certain types of procedures) which a law does not define even in principle. The filling of gaps in legally unregulated areas is not the task of judges as it is a typical activity that falls within the

[2] *Id.*, pp. 272–73.
[3] M. Pavčnik, *Argumentacija v pravu* [Legal Argumentation], Pravna fakulteta in Cankarjeva založba, Ljubljana (2004), pp. 120–122.
[4] *Ibidem.*
[5] *Id.*, pp. 123–24.

competencies of the legislature and other norm-framers.[6] Such a problem was also faced by Slovenia when it decided to proceed on the path towards statehood.

(d) Gaps in the law in the figurative sense of the word include those gaps which are necessary consequences of the generality and abstract character of a law that cannot fully precisely envisage a legal decision in every concrete case, which is always unique and historically unrepeatable.[7] Here the matter particularly concerns indefinite and ambiguous concepts in connection with legal institutions and even legal areas which should be relatively definitely legally regulated (e.g. in the area of criminal law).[8]

Slovene legal theory also mentions the covered gaps in the law. Such exist when there is a statutory norm which, however, is contrary to an unwritten norm that stems from the principles of justice and a social interest, when the rule needs restriction, and when the scope of its application has to be restricted to what is required by its intention and legitimacy, when the legislature has "regulated too much" (which is solved by so-called teleological reduction).[9]

1.2. The concept of legislative omission.

Are the legal gaps which are prohibited by the Constitution (or legal regulation of higher power) distinguished in the scientific literature? What is the prevailing concept of legislative omission as a sort of the legal gap in the scientific legal doctrine?

The Constitution of the Republic of Slovenia (Official Gazette RS, Nos. 33/91-I, 42/97, 66/2000, 24/03, 69/04, and 68/06) does not explicitly prohibit gaps in the law. However, by interpretation of Article 2 of the Constitution (the principle of a state governed by the rule of law) it established that certain omissions of the legislature can entail unconstitutional gaps in the law which violate the principle of a state governed by the rule of law determined in Article 2 of the Constitution or the second paragraph of Article 3 of the Constitution (the principle of the separation of powers).

Also, theory agrees with the fact that certain legislative omissions are in terms of substance deficient to the extent such that the simultaneous filling of such would be arbitrary as there are no predictable and legally certain criteria on how to proceed in concrete cases. Such a type of gap in the law has already been designated by the Constitutional Court as an unconstitutional gap in the law. They concern unfillable gaps in the law for reason of which it is necessary that the disputable part of the law should appropriately be remedied (annuled or brought into conformity with the Constitution).[10]

However, in certain areas the existence of gaps in the law are to be excluded since filling such would be contrary to the principle of legal certainty. This particularly applies to the area of criminal law where the *nullum crimen, nulla poena sine lege praevia* principle and the *lex certa* principle (in relation to the legality principle determined in

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[6] *Id.*, pp. 128–131.
[7] M. Pavčnik, *Pravne praznine, glosa k osnutku Zakona o sodiščih* [Gaps in the Law, a Gloss to the Draft Courts Act], Pravna praksa, No. 286 (1993), p. 2.
[8] M. Pavčnik, *Argumentacija v pravu, op. cit., ibidem.*
[9] M. Pavčnik, *Teorija prava, op. cit.*, pp. 281–82.
[10] M. Pavčnik, *Argumentacija v pravu, op. cit.*, p. 125.

Article 28 of the Constitution) exclude the existence of gaps in the law.[11] In that area of law only the above-mentioned internal gaps may be filled, by means of the *intra legem* analogy.

Prof. Pavčnik asserts that the circumstance that the matter concerns incompleteness in the legal structure, which is the case when we deal with gaps in the law, entails already in itself legal incorrectness. In view of that, he maintains that in this respect every gap in the law is unconstitutional since it is evident that in such a manner we are facing a law which is in the scope of a gap in the law substantively indefinite and deficient. Concerning such, he refers to the principle of a state governed by the rule of law determined in Article 2 of the Constitution. Notwithstanding the above-mentioned, the author differentiates between gaps that can be filled by courts and gaps that are deficient such that their simultaneous filling would be arbitrary as there are no predictable and legally certain criteria on how to proceed in concrete cases. Only the latter type of gap in the law does he designate as unfillable, or as unconstitutional as determined by the Constitutional Court, in the event of which it is necessary that the disputable part of a law be appropriately legally remedied, i.e. annuled or brought in conformity with the Constitution.

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.

Being the guardian of the Constitution, the Constitutional Court stands next to the legislature. In a certain aspect we might address the superiority of the Constitutional Court in relation to the legislature, as the Constitutional Court (may) supervise the work of the legislature and prevent what is adopted by the legislature from becoming part of actual practice, and direct legal effects from being created. A broader perspective on the institutional position of the Constitutional Court points, however, to its (indirectly limited) inferiority as after all it is the legislative body, which in an extreme situation can amend the Constitution, such being the act that the Constitutional Court protects and which gives it power and the basis for its activities.

Decisions of the Constitutional Court are binding. Concerning their validity, they have the character of a law. Respect for Constitutional Court decisions is an indicator of the height and health of the legal culture of a particular society. Certainly the Constitutional Court may not take the role of the legislature, which would be inadmissible from the viewpoint of the separation of powers. The Constitutional Court rather appears as the negative legislature since by its decisions it annuls laws or usually their individual provisions, bearing in mind that such decisions have the force of law. In principle the Constitutional Court does not reach substantive positive decisions, does not determine the substance of laws, does not fill gaps in the law, but only remedies, or annuls the contents which are not in conformity with constitutional foundations and prevents unconstitutional provisions from creating legal consequences in the society.

However, the assertion that the Constitutional Court only decides what must be eliminated as unconstitutional from legal practice does not entail that thereby it in some manner does not indirectly determine the concrete substance of legal norms. The

[11] *Id.,* p. 274.

positive legislative activity of the Constitutional Court and its role as an active framer of substantive decisions nevertheless come to the fore regarding both supervising the constitutionality of statutes and their individual provisions and considering the general framework of the activities of the Constitutional Court.

The cases in which the Constitutional Court (allegedly) violates the Constitution refer to situations in which the Constitutional Court interferes with the working area of the legislative body. The Constitutional Court is not empowered to review whether a certain legislative regulation is substantively appropriate. The Constitutional Court may not determine the substance of laws only by positive statutory measures. Such a case concerns the strict judicial self-restraint principle, according to which the Constitutional Court may not carry out the role of a positive legislature. Substance is thus adopted by the legislature, while the Constitutional Court only reviews whether such substance is still within a constitutionally acceptable framework (the role of a negative legislature). In the event that the Constitutional Court establishes that the offered normative solution is not in conformity with the constitutional system, it is the task and exclusive competence of the legislature to substantively reform such.[12]

What is the prevailing concept of the mission of the Constitutional Court as a judicial institution in the scientific legal doctrine of your country? The Constitutional Court as a "negative legislator". The concept of the Constitutional Court as a "positive legislator". Problems of the influence of the jurisprudence of the Constitutional Court on law-making? Does the scientific legal doctrine consider the activity of the Constitutional Court when the Constitutional Court investigates and assesses legal gaps as well as the influences of the decisions of the Constitutional Court regarding filling in the said legal gaps?

The Constitutional Court is the highest body in the state empowered for the review of constitutionality and legality and for the protection of human rights. It is a negative legislature in particular in that by having the power to annul regulations it actually has the power to directly eliminate unconstitutional and unlawful regulations from the legal system. It appears as an indirect legislature, however, when it establishes the unconstitutionality and unlawfulness of individual regulations and their provisions and requires the competent bodies to remedy such incorrectness within a specified time-limit. In accordance with the second paragraph of Article 40 of the Constitutional Court Act (Official Gazette RS, Nos. 15/94, 51/07, and 64/07 – official consolidated text), it also has the power to determine in its decision which body is to implement a decision and in what manner. This entails that in certain cases it may replace a statutory rule with its own legal rule, which could in a certain sense also mean that it acts as a positive legislature. However, the possibilities of such positive legislation are, in regulations that deal with the competencies of the Constitutional Court, restricted to the minimum extent possible, but they are nevertheless needed in order for the Constitutional Court to effectively perform its function.

Legal theory is aware of the fact that particularly due to the abstract character of constitutional provisions certain moderate activism by the Constitutional Court is

[12] A. Teršek, *Ustavno sodišče – negativni zakonodajalec* [The Constitutional Court – Negative Legislature], Pravna praksa, No. 397 (1998), p. 31.

necessary so that it can correctly perform its function.[13] In this sense it differentiates between allowed and unallowed activism.[14] Not every constitutional activism is also political activism.[15] In this sense theorists question Constitutional Court decisions also when the matter concerns unconstitutional gaps in the law. In connection with the above-mentioned provision of the second paragraph of Article 40 of the Constitutional Court Act (i.e. the determination of the manner of the implementation of a Constitutional Court decision), moderate activism would refer to the application of this provision in order to temporarily regulate a certain societal situation by a norm made by the Constitutional Court (e.g. in the event of dealing with the temporary regulation of procedural rights of forcibly hospitalized mental patients – by determining an analogical application of appropriate provisions of the Criminal Procedure Act after an unconstitutional gap in the law was established – Decision No. U-I-60/03, dated 4/12-2003, Official Gazette RS, No. 131/03 and OdlUS XII/2, 93). The activism in such a case would, however, be considered as unallowed if the Constitutional Court permanently made such a statutory norm and prohibited the legislature from appropriately responding to such a decision.

Was the naming of the activity of the Constitutional Court as the one of "activism", "moderation" and "minimalism" reasoned on the basis of such decision)?

Certainly, having in mind the danger of activist decisions of the Constitutional Court, former Constitutional Court Judge Krivic wrote in his separate opinion in Decision No. U-I-201/96, dated 14/6-1996, Official Gazette RS, No. 34/96 and OdlUS V/2, 99, the following: "It is entirely incomprehensible in a democratic state governed by the rule of law that the Constitutional Court would fill possible gaps in the law established in any of these three regulations, which are according to their form and substance ‘almost of a constitutional nature’ (that actually the entire constitutional theory lists among the so-called substantive constitutional regulations), by its own decision (except when it perhaps concerns certain completely technical or from a political or democratic viewpoint fully neutral legal rules. … How can the Constitutional Court force the legislature, when it does not obey an order made by the Constitutional Court, to remedy an established gap in the law, to ‘fill’ it by proper norms which can only be adopted by it, the legislature. The first step of the Constitutional Court in the event of the establishment of a gap in the law is always (where constitutional courts fight such a problem – some of them even consider themselves to lack competence for such an effort) to establish an unconstitutional gap in the law by giving an order to the legislature to remedy such in an appropriate time-limit."

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.

[13] P. Jambrek, *Ustavna demokracija* [Constitutional Democracy], Državna založba Slovenije, Ljubljana (1992), p. 341.
[14] M. Novak, *Delitev oblasti: medigra prava in politike* [The Separation of Powers: an Interplay between Law and Politics], Cankarjeva založba, Ljubljana (2003), pp. 166–180.
[15] M. Cerar, *(Ne)političnost ustavnega sodstva* [The (Un-)Political Character of Constitutional Judiciary]; in: M. Pavčnik, A. Mavčič (eds.), *Ustavno sodstvo* [Constitutional Judiciary], Cankarjeva založba, Ljubljana (2000), p. 370.

Present the model of the hierarchical pyramid of your national legal acts. The place and importance of the constitution in the national legal system. What concept of the constitution as the highest law is developed by the constitutional court? The concept of the constitution as explicit and implicit legal regulation. Is the constitution considered as law without gaps in the constitutional jurisprudence?

The hierarchy of legal acts is determined by Article 153 of the Constitution of the Republic of Slovenia, which deals with the conformity of legal acts. According to this provision, laws, regulations, and other general legal acts must be in conformity with the Constitution. Then, laws must be in conformity with generally accepted principles of international law and with valid treaties ratified by the National Assembly, whereas regulations and other general legal acts must also be in conformity with other ratified treaties. Regulations and other general legal acts must be in conformity with the Constitution and laws. Finally, individual acts and activities of state authorities, local community authorities, and bearers of public authority must be based on a law or regulation adopted pursuant to law.

Thus, the Constitution is the highest legal act. However, from the perspective of human rights protection, the fifth paragraph of Article 15 of the Constitution must also be considered. According to such, the Constitutional Court only ensures the minimum protection of human rights. If any provision of a legal act applying in Slovenia (e.g. in a treaty) provides broader protection or determines a right that the Slovene Constitution does not determine, the individual must be recognized the human right in the broader extent.

Case Law:

The hierarchy of legal acts was directly referred to also by the Constitutional Court in its case law. Consider the two decisions below.

The Constitutional Act on the Amendment to Article 80 of the Constitution of the Republic of Slovenia (Official Gazette RS, No. 66/2000) is not an individual act against which a constitutional complaint would be admissible. The petitioners' opinion that it is an individual general act is mistaken. By its substance the Constitutional Act on the Amendment to Article 80 of the Constitution of the Republic of Slovenia is an act of constitutional rank, as it supplements the Constitution (Act Amending the Constitution, Article 169 of the Constitution), and in its implementing part it ensures transition to the application of amended provisions (the second paragraph of Article 174 of the Constitution). In the hierarchy of general and abstract legal acts the Constitution is the highest act with which all general and individual acts must be consistent (Article 153 of the Constitution) (Order No. Up-353/00, dated 29/5-2001, www.us-rs.si).

The criterion of review in proceedings for the preventive review of treaties is only the Constitution, not also ratified and promulgated treaties. However, this does not mean that treaties may not define the contents of a constitutional norm. In connection with ensuring nuclear safety, what derives from certain treaties is the same obligation of the state as is determined in the first and second paragraphs of Article 72 of the Constitution. Individual aspects that constitute the concept of nuclear safety can thus be

defined by means of the mentioned treaties. Furthermore, in order to define the obligations of the state – given general legislation in the field of environmental law, from which the principle of compulsory subsidiary action by the state needs to be emphasized in the context of this case – the national law is relevant from the view of the individual elements of nuclear safety (Opinion No. Rm-2/02, dated 25/12-2002, Official Gazette RS, No. 117/02 and OdlUS XI, 246).

2.2. The expressis verbis consolidation in the constitution concerning the jurisdiction of the Constitutional Court to investigate and assess the constitutionality of legal gaps.

What legal acts (constitutional, organic laws, laws adopted by referendum, ordinary laws, regulations of the parliament, international agreements, laws of the subjects of the federation, substatutory acts, as well as laws adopted before coming into force of the constitution and other legal acts) are directly named as the object of the constitutional court?

Within the meaning of Slovene constitutional and statutory regulation, the subject of constitutional review is any valid regulation which is a composite part of the Slovene legal order. This was also confirmed by the following case law.

Case Law:

The Constitutional Court is a body of the Republic of Slovenia, the jurisdiction of which is determined in Article 160 of the Constitution. This article in the second paragraph determines the exceptional jurisdiction of the Constitutional Court to issue opinions on treaties before these become part of the internal law of the Republic of Slovenia. In all other cases the Constitutional Court is only empowered to review the constitutionality of regulations or other legal acts which are considered to be internal legal acts from the perspective of international law. Outside the jurisdiction determined in the second paragraph of Article 160 of the Constitution, the Constitutional Court is only empowered to review regulations which are a constitutive part of the legal system of the Republic of Slovenia (Order No. U-I-128/98, dated 23/9-1998, OdlUS VII, 173).

The Constitutional Court is not empowered to decide on regulations which are not part of the legal system of the Republic of Slovenia. Such publication in a secret gazette which is not accessible to the public cannot be considered to be in conformity with the constitutional provision on the publication of regulations (Order No. U-I-118/92, dated 22/10-1992, Official Gazette RS, No. 53/92 and OdlUS I, 73). The Constitutional Court is not empowered to review the constitutionality of a regulation that ordered the confiscation of the property of persons of German nationality since it ceased to be valid on 14 October 1946 and therefore did not become a part of the law valid in the Republic of Slovenia (Order No. U-I-99/94, dated 17/11-1994, OdlUS III, 127).

Does the constitution of your country establish expressis verbis that the Constitutional Court investigates and assesses the constitutionality of gaps (legislative omission) in the legal regulation? Does the constitution provide for any special procedure for the investigation of legislative omission?

The Constitution does not provide for the power of and the procedure for the Constitutional Court to establish and review the evaluation of the constitutionality of gaps in the law, but such is regulated by the Constitutional Court Act, which in Article 48 provides the following:

1) If the Constitutional Court deems a law, other regulation, or general act issued for the exercise of public authority unconstitutional or unlawful as it does not regulate a certain issue which it should regulate or it regulates such in a manner which does not enable annulment or abrogation, a declaratory decision is adopted on such.
(2) The legislature or authority which issued such unconstitutional or unlawful regulation or general act issued for the exercise of public authority must remedy the established unconstitutionality or unlawfulness within a period of time determined by the Constitutional Court.

There are no special statutory procedural provisions for the cases of gaps in the law. In connection with such, no "type" of regulation is explicitly mentioned. Therefore, within the meaning of Slovene constitutional and statutory regulation, the subject of constitutional review from the perspective of a gap in the law can be any valid regulation which is a constitutive part of the Slovene legal order.

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

The Constitutional Court as the official interpreter of the constitution.

The "official interpreter" of the Constitution is the constitution-framer; namely the Constitutional Court is not empowered to review norms of a constitutional character, but to interpret the Constitution in the procedure for deciding on cases falling within its jurisdiction.

Case Law:

The Constitutional Court is not empowered to review the Constitution or regulations of a constitutional character or statutory provisions which only entail the concretization of a norm of a constitutional character (Order No. U-I-32/93, dated 13/7-1993, OdlUS II, 68). The system of foreign currency deposits which the National Bank of Yugoslavia had guaranteed entailed the regulation of one of the issues of transition to the new constitutional system, which was also to be part of the substance of an agreement on legal succession and the assumption of obligations and claims of the former SFRY and the legal entities on its territory. Therefore, according to the assessment of the Constitutional Court, these norms have the character of norms of constitutional law, for the review of which the Constitutional Court is not empowered (Order No. U-I-332/94, dated 11/4-1996, OdlUS V, 42; see also Order No. U-I-184/96, dated 20/6-1996, OdlUS V, 104; Order No. U-I-384/96, dated 3/4-1997, OdlUS VI, 48).

The Constitutional Court is not empowered to interpret the Constitution in a special procedure, but interprets the constitutional provisions when and if this is necessary in the framework of deciding on cases which it is empowered to decide according to the Constitution and the law (Order No. U-I-251/97, dated 29/10-1997, OdlUS VI, 139).

Has the Constitutional Court revealed in more detail its powers, which are explicitly entrenched in the constitution, to investigate and assess legislative omission? What are the grounds for the conclusions about the implicit consolidation in the constitution regarding the competence of the Constitutional Court to investigate and assess the legislative omission? Has the Constitutional Court formed the doctrine of consequences of stating the existence of legislative omission? If yes, describe it.

As already mentioned, the Constitution does not include provisions on resolving cases of gaps in the law, but the Constitutional Court developed an appropriate doctrine while applying Article 48 of the Constitutional Court Act.

Case Law:

The time-limit for the enactment of a referendum decision: The National Assembly may not unnecessarily delay the fulfillment of the described obligation, but must fulfill it within a reasonable time - within the time which is necessarily required for the course of the legislative procedure. This requirement should also be inserted in the law which regulates a referendum - this law should bind the National Assembly to transpose the referendum decision into law within a specified time-limit (in relation to the decision as to the extent the legislature has a certain latitude for its own political judgment). There is no determined time-limit in the Referendum and Public Initiative Act for meeting this obligation. This gap in the law is in conflict with the provisions of the first paragraph of Article 90 of the Constitution, whereby the National Assembly is bound to the result of a referendum. The Constitutional Court thus required from the legislature to fill this gap in the law (Decision No. U-I-12/97, dated 8/10-1998, Official Gazette RS, No. 82/98 and OdlUS VII, 180).

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 assesses the constitutionality of legal gaps.

The powers of the Constitutional Court (provided for in the law which regulates the activity of the Constitutional Court or other legal acts (if it is not directly established in the constitution) to investigate and assess legal gaps in the legal regulation established in laws and other legal acts. Does this law (or other legal act) provide for any special procedures for investigation into legal omission? If yes, describe them briefly. What decisions, under this law or other legal act, does the Constitutional Court adopt after it has stated the existence of the legislative omission?

The law provides the possibility that the Constitutional Court evaluate whether the legislature omitted its duty regarding legal regulation which is determined in the Constitution. If the Constitutional Court deems a law, other regulation, or general act issued for the exercise of public authority unconstitutional or unlawful as it does not regulate a certain issue which it should regulate or it regulates such in a manner which does not enable annulment or abrogation, a declaratory decision is adopted on such (the first paragraph of Article 48 of the Constitutional Court Act). The legislature or authority which issued such unconstitutional or unlawful regulation or general act issued for the exercise of public authority must remedy the established unconstitutionality or

unlawfulness within a period of time determined by the Constitutional Court (the second paragraph of Article 48 of the Constitutional Court Act).

There are no special procedural provisions to be applied in the event of reaching a declaratory decision on an unconstitutional gap in the law. The Constitutional Court makes a decision following the same procedure as in other cases of the review of a regulation (e.g. a decision annulling an unconstitutional regulation etc.).

Already prior to the coming into force of the statutory basis on the basis of the Constitutional Court Act, the Constitutional Court reached a declaratory decision (Decision No. U-I-66/93, dated 2/12-1993, Official Gazette RS, No. 1/94 and OdlUS II, 113) in which it did not decide to annul the challenged statutory provision but only established its partial inconsistency with the Constitution without formal annulment, relying in the introduction of this new technique also on the similar practice of certain other European constitutional courts *(cf.* also Decision No. U-I-353/96, dated 9/10-1997, Official Gazette RS, No. 67/97 and OdlUS VI, 122).

Does the said law or legal act provide as to who and how must remove the legislative omission? Is it provided for in other laws and legal acts (for example, the regulation of the parliament)?

The Constitutional Court Act does not determine a procedure according to which the responsible norm-framer must remedy the established gap in the law.

Article 142 of the Rules of Procedure of the National Assembly determines that the proposer of a law may propose that the National Assembly discuss the draft law by the shortened procedure also in the event of amendments to laws related to proceedings before or decisions of the Constitutional Court.

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

3.1. Application to the constitutional court.

What subjects may apply to the Constitutional Court in your country? Can they all raise the question of legislative omission?

All applicants in the procedure for the constitutional review of a regulation (the review of the constitutionality of regulations and general acts issued for the exercise of public authority) can raise the question of the unconstitutionality of a gap in the law or of an omission of the legislature as follows:

– a petition may be lodged by anyone who demonstrates legal interest (the second paragraph of Article 162 of the Constitution, Article 24 of the Constitutional Court Act);

– a request may be submitted by: the National Assembly, one third of the deputies of the National Assembly, the National Council, and the Government (Article 23.a of the Constitutional Court Act);

– a request may also be submitted by a court which in the process of decision-making deems a law or part thereof which it should apply to be unconstitutional, and stays the proceedings (Article 156 of the Constitution and Article 23 of the Constitutional Court Act);

– a request may also be submitted by the following bodies: the ombudsman for human rights if he deems that a regulation or general act issued for the exercise of public authority inadmissibly interferes with human rights or fundamental freedoms; the information commissioner, provided that a question of constitutionality or legality arises in connection with a procedure he or she is conducting; the Bank of Slovenia or the Court of Audit, provided that a question of constitutionality or legality arises in connection with a procedure they are conducting; the State Attorney General, provided that a question of constitutionality arises in connection with a case the State Prosecutor's Office is conducting; representative bodies of local communities, provided that the constitutional position or constitutional rights of a local community are interfered with; representative associations of local communities, provided that the rights of local communities are threatened; national representative trade unions for an individual activity or profession, provided that the rights of employees are threatened (Article 23.a of the Constitutional Court Act);

– a proposal for issuing an opinion on the conformity of a treaty with the Constitution may, in the process of ratifying the treaty, be submitted by: the President of the Republic, the Government, or a third of the deputies of the National Assembly (the second paragraph of Article 160 of the Constitution and Article 70 of the Constitutional Court Act).

The question of the unconstitutionality of a gap in the law can also be raised in the event of deciding on a constitutional complaint, which the complainant may lodge due to the violation of a human right or fundamental freedom against an individual act by which a state authority, local community authority, or bearer of public authority decided on the rights, obligations, or legal benefits of an individual or legal entity, under the conditions determined by the Constitutional Court Act. In accordance with the second paragraph of Article 59 of the Constitutional Court Act, if the Constitutional Court deems that the challenged individual act is based on a potentially unconstitutional or unlawful regulation or general act issued for the exercise of public authority, it initiates proceedings for the review of the constitutionality or legality of such regulation or general act issued for the exercise of public authority and decides by applying the procedural provisions of the Constitutional Court Act that apply for the constitutional review of regulations.

3.2. Legislative omission in the petitions of the petitioners.

May the petitioners who apply to the Constitutional Court ground their doubts on the constitutionality of the disputed law or other act on the fact that there is a legal gap (legislative omission) in the said law or act?

An applicant before the Constitutional Court may base his or her application on the standpoint that there is an unconstitutional gap in the law (an omission by the legislature). This also follows from the below mentioned case law.

Case Law:

The petitioners New Party and Vera Kramberger challenged the fifth paragraph of Article 13 of the Referendum and Public Initiative Act and pointed to the problem of discrimination in collecting signatures concerning disabled persons, old persons in elderly homes, ill persons, employees, and prisoners. The petitioner Vera Kramberger is of the opinion that the Referendum and Public Initiative Act contains a gap in the law as it does not determine which authority is competent to keep the records of voting rights, and at which places and within what time it is possible to sign a form of support (Order No. U-I-217/02, dated 20/11-2003).

The Constitutional Court held that the established unconstitutionality of certain provisions of Section 2 of Chapter II of the Referendum and Public Initiative Act in the part relating to the preliminary procedure, in particular the third and fifth paragraphs of Article 13 and Article 18, causes the inconsistency of the entire regulation of the preliminary procedure, such that the annulment of only certain provisions or merely the establishment of the unconstitutionality of gaps in the law is not possible. Therefore, it annulled the entire section of the act regulating the preliminary referendum. The Constitutional Court established that the third paragraph of Article 13 of the Referendum and Public Initiative Act does not precisely and clearly regulate the powers of the President of the National Assembly, the legal position of an initiator, and judicial protection against decisions of the President of the National Assembly. Filling the gap in the law by *mutatis mutandis* application of the Rules of Procedure does not suffice. The issues concerning the powers of the President of the National Assembly in relation to a filed initiative, and concerning judicial protection against his or her decisions, would still be insufficiently regulated, thus the adoption of a special regulation is required. Furthermore, the Referendum and Public Initiative Act is inconsistent with Article 38 of the Constitution, as the personal data of voters who supported an initiative to lodge a request for calling a referendum should no longer be part of the documents in a subsequent referendum procedure, or personal data protection should be ensured in some other manner. The Constitutional Court did not find a constitutionally admissible, i.e. legitimate, aim in the statutory regulation providing that voters who personally cannot come to an administrative unit due to illness, medical treatment, or disability cannot give their support to a request for calling a referendum. The manner in which voters give support to a request for calling a referendum should be more precisely determined, and should not in every case depend on instructions and directions given by the competent authority or the minister. The Constitutional Court established the inconsistency of the challenged regulation with Article 44, in conjunction with the third paragraph of Article 90 of the Constitution, as it did not find any legitimate reason for the limitation of the constitutional right which would prevent the statute from envisaging the possibility of giving support to a request for calling a referendum also for those voters who do not permanently reside in the Republic of Slovenia and are entered in the voting right register of citizens who do not permanently reside in the Republic of Slovenia. Also, as regards citizens who only temporarily reside abroad, or who are abroad during the time signatures are collected in support of a request for calling a referendum, and for that reason cannot give their personal support before the competent authority which keeps the voting right register, the Constitutional Court did not find a sound reason to substantiate the regulation according to which the mentioned citizens of the Republic of Slovenia could not exercise their right to referendums already in the preliminary procedure due to the fact that they are not in the Republic of Slovenia when signatures are being collected. Thus, the Constitutional Court held that the challenged regulation is

inconsistent with Article 44, in conjunction with the third paragraph of Article 90 of the Constitution. In accordance with the position that the statutory regulation of referendums must ensure an effective exercise of the right to referendum, the Constitutional Court held that the regulation of Article 18 of the Referendum and Public Initiative Act is incomplete and thus inconsistent with the principle of the determinacy of legal norms as one of the principles of a state governed by the rule of law determined in Article 2 of the Constitution. The statute should contain at least the crucial rules concerning the manner of submitting referendum questions, in particular in those cases in which what is proposed by a referendum question is how a certain issue must be regulated (the third paragraph of Article 18 and the fourth paragraph of Article 18 of the Referendum and Public Initiative Act). The Referendum and Public Initiative Act should contain provisions which would prevent the calling of a referendum where repeated initiatives would make it possible to establish unconstitutional intentions (Decision No. U-I-217/02, dated 17/2-2005, Official Gazette RS, No. 24/05 and OdlUS XIV, 6).

What part of the petitions received at the Constitutional Court is comprised of the petitions, wherein the incompliance of the act with the constitutional is related to the legislative omission?

The number of cases in which the application itself already raised the question of legislative omission is small.

What subjects, who have the right to apply to the constitutional court, relatively more often specify in their petitions the legislative omission as the reason of the act's being in conflict with the constitution?

From the data on the applications it follows that among the applicants which raise such a question, the individuals as petitioners for the judicial review of the constitutionality or legality of a regulation prevail.

Are there any specific requirements provided for as regards the form, contents and structure of the applications concerning the unconstitutionality of the legislative omission? If yes, describe them.

There are no special requirements regarding the form, substance, and structure of applications which separately concern the unconstitutionality of a gap in the law.

Are they established in the law which regulates the activity of the Constitutional Court or are they formulated in the constitutional jurisprudence?

From the view of the unconstitutionality of gaps in the law, the Constitutional Court Act does not have special provisions concerning the contents of an application; such requirements were also not formed in the case law of the Constitutional Court.

The Constitutional Court Act (the first paragraph of Article 24b) and the Rules of Procedure of the Constitutional Court (Official Gazette RS, No. 86/07; the Contents of Applications, I. The Contents of a Request, Item 1, The Contents of a Petition, Item 1) determine the mandatory contents of all applications for the review of regulations. This entails that the request (i.e. an application submitted by the National Assembly, one third of the deputies, the National Council, the Government, the ombudsman for human

rights, the information commissioner, the Bank of Slovenia, the General State Prosecutor's Office, representative bodies of local communities, and national representative trade unions) and a petition (i.e. an application submitted by any individual) for the initiation of proceedings for the review of the constitutionality and legality of a regulation or a general act issued for the exercise of public authority, must contain a statement of the nonconformity of a challenged act with the Constitution or the law, and a statement of reasons for such nonconformity.

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

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

Concerning this question, both the applicant and the Constitutional Court have a completely free hand in such. In accordance with Article 30 (the review of regulations) and Article 59 (proceedings upon constitutional complaints) of the Constitutional Court Act, the Constitutional Court can raise the question of the unconstitutionality of a gap in the law completely independently from the application if it has grounds for such in the application. According to Article 30 of the Constitutional Court Act, in deciding on the constitutionality and legality of a regulation or general act issued for the exercise of public authority, the Constitutional Court is not bound by the proposal of a request or petition. The Constitutional Court may also review the constitutionality and legality of other provisions of the same or other regulation or general act issued for the exercise of public authority for which a review of constitutionality or legality has not been proposed if such provisions are mutually related or if such is necessary to resolve the case. Furthermore, pursuant to the second paragraph of Article 59 of the same act, if the Constitutional Court deems that the challenged individual act is based on a potentially unconstitutional or unlawful regulation or general act issued for the exercise of public authority, it initiates proceedings for the review of the constitutionality or legality of such regulation or general act issued for the exercise of public authority and decides by applying the procedural provisions which regulate the constitutional review of regulations.

Case Law:

The complainant submitted a constitutional complaint against the order of the Supreme Court on the dismissal of a revision against the Higher Court order by which the decision of the court in the first instance rejecting the complainant's action which requested the retraction of the warning from the acting president of the managing board regarding the possibility of the termination of the employment contract in the event of a repeated violation of labor obligations. In the constitutional complaint he asserted the violation of rights determined in Articles 22 and 23 of the Constitution. He opined that the courts' position according to which an employee according to Article 204 of the Employment Relations Act does not have the right to judicial protection against the challenged warning, is incorrect. In the proceedings to examine the considered constitutional complaint, the Constitutional Court, on the basis of the second paragraph of Article 59 of

the Constitutional Court Act, initiated proceedings for the review of the constitutionality of Article 83 of the Employment Relations Act. The question namely was raised whether the mentioned statutory provision was unconstitutional, as it did not determine how long after the issuance of such warning it is possible on the basis of such warning and a new violation still to issue to an employee a regular notice of termination of his or her employment contract.

The Constitutional Court established that due to the fact that regarding the provisions of the Employment Relations Act which do not determine a period of time in which it is possible to give notice to an employee on the basis of a written warning and a new violation, it cannot be determined that they pursue any constitutionally admissible goal which would justify the interference with the human right to effective judicial protection, the first condition which is required by the Constitution in cases of the limitation of human rights (the third paragraph of Article 15 of the Constitution) is not fulfilled. Therefore, such provisions are inconsistent with the right determined in the first paragraph of Article 23 of the Constitution. As the matter concerns a case in which the legislature did not regulate a question which it should have regulated, annulment is not possible. Thus, on the basis of Article 48 of the Constitutional Court, the Constitutional Court reached a declaratory decision and determined for the National Assembly a time-limit in order to remedy the established unconstitutionality (Decision No. U-I-45/07 and Up-249/06, dated 17/5-2007, Official Gazette RS, No. 46/07).

3.4. Legislative omission in laws and other legal acts.

Does the Constitutional Court investigate and assess the gaps of legal regulation only in laws or in other legal acts as well (for example, international agreements, substatutory acts, etc.)?

The Constitutional Court may establish the existence of a gap in the law in the acts of all levels in the procedure for an abstract constitutional review.

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

In its case law the Constitutional Court has often dealt with cases of the so-called bare legislative authorization, when the legislature leaves the regulation of certain issues completely to executive acts, which is inconsistent with the principle of legality determined in the second paragraph of Article 120 of the Constitution. In a broad sense, these cases could also be referred to as legislative omissions.

Case Law:

The executive power (the Government and administrative authorities) may legally operate only on a substantive basis and in the framework of a law (the second paragraph of Article 120 of the Constitution) and not on the basis of its own regulations or even only on the basis of its own function in the system of the separation of powers. Such regulation is already required by the principle of the separation of powers (the second paragraph of Article 3 of the Constitution) into legislative, executive, and judicial power. Executive administrative authorities do not have the right to issue general norms without a substantive basis in the law. The principle that the executive power is bound by law (the second paragraph of Article 120 of the Constitution) thus excludes the possibility that the executive branch of government would without a statutory framework independently regulate also the issues that refer to the determination of criteria for co-financing investments in municipalities. The criteria for allocating funds relating to the co-financing of investments thus cannot only be left to the executive branch of power without a basis determined in statute. As the legislature failed to provide a statutory basis for the work of the executive power, the Constitutional Court established that the challenged Article 23 of the Financing of Municipalities Act was inconsistent with the principle of legality (the second paragraph of Article 120 of the Constitution). As the conditions determined in Article 48 of the Constitutional Court were fulfilled, the Constitutional Court issued a declaratory decision concerning such (Decision U-I-24/07, dated 4/10-2007, Official Gazette RS, No. 101/07).

The fourth paragraph of Article 30 of the State Prosecutor Act regulates that the Government determine the conditions, criteria, and scope of payments for increased scope of work or additional workload for individual state prosecutors and assistants to state prosecutors. The statutory authority contained in the fourth paragraph of Article 30 of the State Prosecutor Act is a bare authority. The legislature namely left it to the Government to independently regulate the entire issue of payment for increased scope of work without determining any measures or criteria. In addition, the legislature also did not determine a framework which would limit the Government in regulating this field. Such authority given to the Government is inconsistent with the second paragraph of Article 120 of the Constitution. Pursuant to the aforementioned constitutional provision, administrative bodies perform their work, thus also issue regulations, within the framework and on the basis of the Constitution and laws and do not have the power to issue regulations without a basis in the law. It follows from the aforementioned constitutional provision that when it authorizes the executive branch of power to issue executive regulations, the legislature must beforehand regulate the foundations of the subject which should be the subject of a regulation and determine the framework and guidelines for its more detailed executive regulation. Statutory provisions may not contain authorities on the basis of which executive regulations regulate subjects (contents) for which there is no basis in the law, and they especially may not allow the independent regulation of rights and obligations. The content of the fourth paragraph of Article 30 of the State Prosecutor Act is exactly such, whereby there is also no basis for such executive regulation in any other provision of the State Prosecutor Act. The State Prosecutor Act namely does not contain provisions regarding increased scope of work which would entail a normative framework and basis for issuing the executive regulation envisaged in the fourth paragraph of Article 30 of the same act. Therefore, the fourth paragraph of Article 30 of the State Prosecutor Act is inconsistent with the principle of legality determined in the second paragraph of Article 120 of the Constitution (Decision U-I-60/06, U-I-214/06, U-I-228/06, dated 7/12-2006, Official Gazette RS, No. 1/07 and OdlUS XV, 84).

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

How does the Constitutional Court substantiate its refusal to investigate and assess the constitutionality of a gap in legal regulation (absence of direct reference concerning such investigation in the constitution and the laws, the doctrine of "political questions", the respect to the discretion of the legislator in law-making; etc.)?

Among the manners of rejecting concerns about the existence of a gap in the law it is possible to mention cases in which the Constitutional Court substantiates the dismissal of an application by referring to the fact that the alleged unconstitutional gap in the law could be filled by interpretation of the law. Thus, it concerns cases of so-called gaps in the law that can be filled by courts themselves, and for that reason cannot be considered to be unconstitutional (see the case below). The Constitutional Court has so far not developed a political question doctrine.

Case Law:

In the text of Article 126 of the Pension and Disability Insurance Act, the persons determined in Article 23 are not mentioned either in indent 1 or indent 2. Following the explanations of the Pension and Disability Insurance Institute, the matter concerned an error in the procedure of adopting this law as there was allegedly no reason for revoking the right that had already been provided by the previously applying law.

The practical payment of compensation puts the persons eligible under Article 23 in the same position as those persons eligible under Articles 21 and 22, and thus it recognizes to insured persons lower compensation than possible only for special examples of insurance. The principles of a state governed by the rule of law (Article 2 of the Constitution) require that norms be defined in a manner such that they can be implemented, so that by interpretation it is possible to establish the contents of a regulation and that thereby the conduct of state authority is determined.

Gaps in the law can be filled by rules of interpretation. The interpretation of a gap in the law must remain within the framework of the purpose of the law and must not outgrow such so as to become an amendment thereof.

The regulation of a similar right in Article 111 and the manner of the inclusion of insured persons determined in Article 23 in Article 187 (which determines the date from which compensation is paid) prevent deciding on the right from being left to the full discretion of the Pension and Disability Insurance Institute. In view of such, despite the gap in the law that occurred due to the lack of reference to Article 23 in Article 126 of the Pension and Disability Insurance Act, the statutory regulation enables the insured persons and the implementer of this act to exercise the considered right in conformity with the intention of the law. Thus, the regulation is not inconsistent with the already mentioned Article 2 of the Constitution (Order No. U-I-54/96, dated 15/7-1999, OdlUS VIII, 192).

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

Can the Constitutional Court which does not investigate into legislative omission carry out the "related nature" investigation in constitutional justice cases? Are such investigations begun upon the request of a petitioner or on the initiative of the court? Were such investigations related to the protection of the constitutional rights and freedoms?

As the Constitutional Court is empowered to establish the unconstitutionality of gaps in the law or omissions by the legislature, such situations do not occur.

4. INVESTIGATION AND ASSESSMENT OF THE CONSTITUTIONALITY OF LEGISLATIVE OMISSION

4.1. Peculiarities of the investigation of legislative omission.

When answering these questions, indicate the constitutional justice cases with more typical examples. The peculiarities of the investigation of the legislative omission while implementing a priori control and a posteriori control.

The Slovene system of constitutional review does not regulate *a priori* control, with the only exception determined in the second paragraph of Article 160 of the Constitution (or Article 70 of the Constitutional Court Act) when in the process of ratifying a treaty, the Constitutional Court, on the proposal of the President of the Republic, the Government or a third of the deputies of the National Assembly, issues an opinion on the conformity of such treaty with the Constitution. The National Assembly is bound by the opinion of the Constitutional Court.

Do the problems of legislative omission arise also in the constitutional justice cases concerning the competence of public power institutions, the cases concerning the violated constitutional rights and freedoms, etc.?

Case Law:

The principles of a state governed by the rule of law were violated because the statute failed to regulate the transition of the legal status of citizens of other republics who had permanent residency in the Republic of Slovenia and in fact resided in its territory, to the status of aliens. As the statute failed to regulate in transitional provisions the further residence of citizens of other republics as aliens in the Republic of Slovenia, the principle of the protection of trust in law as one of the principles of a state governed by the rule of law was violated. The statute failed to regulate the transitional status of citizens of other republics who legally resided in the territory of Slovenia and who had their permanent residency registered, thus making their position less favourable compared to aliens who already had such status prior to the independence of the Republic of Slovenia. Due to the fact that there is no objective reason to justify the above-described discrimination, the omission of the legal regulation of the position of these persons also constitutes the violation of the constitutional principle of equality (Decision No. U-I-284/94, dated 4/2-1999, Official Gazette RS, No. 14/99 and OdlUS VIII, 22).

The peculiarities of the investigation and assessment of legislative omission in the constitutional justice cases concerning the laws which guarantee the

implementation of the rights and freedoms (civil, political, social, economical and cultural) of the person.

Case Law:

The right to vote is a positive right which requires the state to do something for its implementation. It is one of the human rights whose nature requires that the manner of its implementation be regulated by law. Without the appropriate statutory regulation, the right to vote could namely not be exercised at all. In accordance with the second paragraph of Article 15 of the Constitution, the legislature must regulate the manner in which the right to vote is exercised so that every citizen who has attained the age of eighteen years may in fact exercise the right to vote and the right to be elected. In Decision No. Up-305/98, dated 19/11-1998, OdlUS VII, 241, the Constitutional Court emphasized that election is a process which must be carried out and concluded in a certain continuous period of time and that therefore all tasks must be carried out within the time-limits precisely determined by law. Voters exercise their right to vote for the purpose of enabling the constitution of a representative body which must be constituted as soon as possible after the election in order to ensure effective exercise of power (in the case of a local election, local power). Also the regulation on the basis of which the Electoral Commission determines whether voting via mail was carried out in due time, must be adapted to this goal. A regulation according to which it could be proved by evidence gathered by the Electoral Commission itself during an unlimited period of time that voting was carried out in due time would endanger a legitimate election, which was carried out in due time, of a body which is being elected, and thereby it would bring uncertainty (possibly lasting for a longer time) to the functioning of state authorities or local community authorities and in the system of democratic power. Therefore, it is necessary that the rules which regulate such procedure be determined in a law in a clear manner such that they are immediately understandable.

The rules which regulate the manner of voting via mail entail the manner of exercising the right to vote. With reference to voting via mail, the National Assembly Elections Act and the Local Elections Act only determine by when voting has to be completed and that the result of voting via mail is determined by the Electoral Commission whereby the Electoral Commission takes into consideration ballot papers which arrived via mail by noon of the day following voting. Neither the National Assembly Elections Act nor the Local Elections Act contain any explicit provisions which would in more detail regulate the manner of voting via mail. Therefore it is also not regulated on what basis the Electoral Commission may determine whether ballot papers were posted in due time, which is one of the fundamental reasons for their validity in establishing the outcome of voting via mail. Due to the fact that neither the National Assembly Elections Act nor the Local Elections Act contain such rules, this entails a situation in which a certain issue which should have been regulated by law due to the manner of exercising a human right determined in the first paragraph of Article 43 of the Constitution, is not regulated. Such a gap in the law cannot be filled by the application of methods of analogy, as this could lead to different interpretations of the same statutory provision in equal cases, it could cause a greater number of disputes with reference to the protection of the right to vote, and thus extend election procedures. Thus, the goal of an election, i.e. the lawful election of a body which is to be elected and the constituting of this body as soon as possible in order to ensure the effective exercise of power would be endangered.

The statutory regulation of the manner of voting via mail must, regarding the above-mentioned take into account that the Electoral Commission, while determining the outcome of voting via mail (which must otherwise apply for determining all election results), must have at their disposal all documents from which credible results of the election can undoubtedly be determined. If the law does not regulate such, it is the case of an unconstitutional gap in the law which is as such inconsistent with the principle of legal certainty determined in Article 2 of the Constitution, in this case even more so, as it can significantly endanger the exercise of the right determined in the first paragraph of Article 43 of the Constitution. In view of the fact that voting via mail is in case of a local election partly regulated by the National Assembly Elections Act and partly by the Local Elections Act, the Constitutional Court could not establish the unconstitutionality for only one of the above-mentioned acts, as both are inconsistent with the Constitution. Due to the fact that the acts are inconsistent with the Constitution as they do not regulate a certain issue which they should have regulated regarding exercising the right to vote, on the basis of Article 48 of the Constitutional Court Act, the Constitutional Court adopted a declaratory decision and determined a one-year time-limit in which the established inconsistency must be remedied (Decision No. U-I-7/07 and Up-1054/07, dated 7/6-2007, Official Gazette RS, No. 54/07).

The Redress of Injustices Act does not determine that entitled persons according to this act have the right that the period during which their liberty had been deprived is included in the pension qualifying period at the latest from the day when they filed a request for the recognition of the status [of former political prisoner or post war fatality] or such right.

Such regulation causes unjust differences between entitled persons and thereby the violation of the constitutional principle that all are equal before the law (the second paragraph of Article 14 of the Constitution). Some entitled persons will not be able to enjoy the right which was granted to them by the act, for shorter or longer periods of time, some for as much as several years, while some will already enjoy the same right.

Especially those who invested great effort in order for their status or right to be recognized will be discriminated against, perhaps after a commission decided several times or the judicial review of administrative acts has been conducted several times; when it is finally proved that their claim had been justified from the very beginning, they will be deprived of enjoying the right all the time during which they were still attempting to have it recognised – without any objective reasons existing for such, which the legislature had justifiably taken into consideration, as it adopted the challenged regulation and in advance agreed to such discrimination between the entitled persons, i.e. it did not prevent such (Decision No. U-I-298/00, dated 5/4-2001, Official Gazette RS, No. 29/01 and OdlUS X, 66).

The peculiarities of the investigation of the legislative omission in the laws and other legal acts which regulate the organisation and activity of public power.

Case Law:

It was the duty of the legislature to not only determine the special rights of the Romany community, but also to regulate how these rights should be exercised in a manner so as to ensure the Romany community living in Slovenia the actual exercise of such special rights. Due to the fact that the fifth paragraph of Article 39 of the Local Government Act

is incomplete (entailing a gap in the law), the Constitutional Court established that the act is inconsistent with the Constitution. Regarding the fact that the autochthonous nature of the Romany community living in the territory of Novo Mesto Municipality was indisputably established, the Constitutional Court established that the Novo Mesto Municipality could on the basis of the existing regulation alone exercise its statutory obligation determined in the fifth paragraph of Article 39 of the Local Government Act and enable the Romany community to elect a representative to the Municipal Council at local election in autumn 1998. Due to the aforementioned reason, the Constitutional Court established that the challenged municipality statute is inconsistent with the Local Government Act, as it does not determine that the Romany community which is autochthonous in the territory of Novo Mesto Municipality has a representative on the Municipal Council (Decision No. U-I-416/98, dated 22/3-2001, Official Gazette RS, No. 28/01 and OdlUS X, 55).

The peculiarities of investigation and assessment of legislative omission in substantive and procedural law.

Case Law – Substantive Law:

Due to the fact that the legislature did not have an objective and sound reason not to regulate the appropriate protection for creditors of companies struck from the register in accordance with the Financial Operations of Companies Act, the challenged Article 1 of the Act Amending the Financial Operations of Companies Act is inconsistent with the second paragraph of Article 14 of the Constitution. The Constitutional Court adopted the position that the unlimited joint and several liability of the active members of the company struck from the register of companies as a special form of the disregard of a legal entity can be considered a measure that could appropriately protect a value determined by law – creditors and the security of legal transactions in general. The Constitutional Court established that it is not the only possible regulation of the protection of creditors of companies struck from the register of companies that is consistent with the Constitution. Regarding the above-mentioned, the Constitutional Court did not annul Article 1 but it established that it is inconsistent with the Constitution and required that the National Assembly remedy the established inconsistency within six months (Decision No. U-I-117/07, dated 21/6-2007, Official Gazette RS, No. 58/07).

Case Law – Procedural Law:

In Decision No. U-I-247/96, dated 22/10-1998, Official Gazette RS, No. 76/98 and OdlUS VII, 195, the Constitutional Court already called on the legislature to extend as soon as possible the time-limit for filing a request for the protection of legality determined in Article 559 of the Criminal Procedure Act. The new transitional provision of Article 20 of the Act Amending the Criminal Procedure Act, *inter alia*, determines that a request for the protection of legality may be filed again. However, it limited such only to instances of convictions on the basis of the exhaustively listed laws or exhaustively listed criminal offences. This primarily entails that the legislature did not extend the time-limit determined in Article 559 of the Criminal Procedure Act such as follows from the above-mentioned Constitutional Court decision. Furthermore, this entails that it did not entirely ensure to the entitled persons determined in Article 559 of the Criminal Procedure Act the possibility to again file a request for the protection of legality against all judicial decisions which became final prior to the implementation of the Criminal

Procedure Act, i.e. prior to 1 January 1995, and against court proceedings which were pending before the final decisions were rendered. Such regulation resulted in a considerable number of cases, which on one hand entail a gap in the law for the persons involved and thereby the violation of the principle of the equality of all before the law (the second paragraph of Article 14 of the Constitution), and on the other hand jeopardize their trust in the law, which is inconsistent with the principles of a state governed by the rule of law (Article 2 of the Constitution). Therefore, the Constitutional Court decided that the statutory regulation in force regarding the discussed part of the criminal procedure is inconsistent with Article 2 of the Constitution, as it still does not enable the abrogation of all decisions which were unjust for procedural and substantive reasons and were issued on the basis of regulations in force during and after the war, as well as the abrogation of such decisions in procedures involving extraordinary legal remedies, in the present case in a procedure involving a request for the protection of legality. Thus, the Constitutional Court could only issue a declaratory decision. Due to the fact that the legislature did not adopt a regulation in accordance with the second paragraph of Article 14 of the Constitution following the aforementioned decision of the Constitutional Court, the Constitutional Court also determined the manner of implementation of its decision (Decision No. U-I-24/04, dated 20/4-2007, Official Gazette RS, 40/07).

The peculiarity of investigation of legislative omission in private and public law.

Case Law – Public Law:

The Constitutional Court established that the Act Regulating the Status of Citizens of Other Successor States to the Former SFRY in the Republic of Slovenia did not enable citizens of other successor states to the former SFRY (hereinafter referred to as citizens of other republics) to also acquire a permit for permanent residence retroactively, i.e. from 26 February 1992, when they lost their permanent residence in the Republic of Slovenia through the revocation of their permanent resident status and their transfer to the register of aliens. As the principles of a state governed by the rule of law, and in particular the principle of legal certainty, require that the position of citizens of other republics must not remain legally unregulated, the Constitutional Court decided that the Act Regulating the Status of Citizens of Other Successor States to the Former SFRY in the Republic of Slovenia is inconsistent with the Constitution, as it does not recognize to citizens of other republics, who were on 26 February 1992 removed from the register of permanent residents, permanent residence status from the mentioned date. The Constitutional Court established that, due to the special legal position of citizens of other republics, the legislature should not define the established unconstitutional gap in the law in a different manner than to determine that the mentioned persons who have already acquired a permit for permanent residence are to be recognized permanent residence retroactively. Therefore, the Constitutional Court decided to determine the manner of the implementation of its decision in a manner such that by the permits for permanent residence that have already been issued to citizens of other republics, permanent residence status be established retroactively, i.e. from 26 February 1992, being the date of their removal from the register of permanent residents. Furthermore, it imposed on the Ministry of the Interior the obligation to issue, as an official duty, supplementary decisions on the establishment of permanent residence from 26 February 1992 onwards to all those citizens of other republics who had been on 26 February 1992 removed from the register of residents and who have already acquired

permits for permanent residence. The Constitutional Court decided that the principles of a state governed by the rule of law require special regulation of the position of citizens of other republics who were deported from the state due to their unregulated legal status. Therefore, it established the inconsistency of the Act Regulating the Status of Citizens of Other Successor States to the Former SFRY in the Republic of Slovenia with the Constitution also because it fails to regulate the acquisition of a permit for permanent residence by citizens of other republics who were removed from the register of permanent residents and who were imposed the measure of the deportation of an alien from the state due to their unregulated legal position under Article 28 of the Aliens Act. From the viewpoint of the principles of a state governed by the rule of law (Article 2 of the Constitution) and the principle of administrative bodies being bound by the framework of the Constitution and laws (the second paragraph of Article 120 of the Constitution), and in view of the special position of citizens of other republics, the act should define what the term *actually living* means according to the Act Regulating the Status of Citizens of Other Successor States to the Former SFRY in the Republic of Slovenia. Due to the loss of permanent residence in the Republic of Slovenia and their legal position being unregulated for a longer time, the citizens of other republics faced a variety of circumstances, thus it is necessary to prescribe criteria (a framework) for establishing if the condition of *actually living* is fulfilled in order to acquire a permit for permanent residence. Therefore, the Constitutional Court decided that Article 1 of the Act Regulating the Status of Citizens of Other Successor States to the Former SFRY in the Republic of Slovenia is in this part inconsistent with the Constitution. As the legislature did not have a justified reason for determining a short (preclusive) time-limit for filing an application for issuing a permit for permanent residence, the Constitutional Court annulled the challenged first and second paragraphs of Article 2, in the part in which a time-limit of three months was determined (Decision No. U-I-246/02, dated 3/4-2003, Official Gazette RS, 36/03 and OdlUS XII, 24).

Case Law – Private Law:

The intention of the challenged provision is to allow registration in the land register in cases in which the owners of apartments do not have appropriate documents for such registration according to the Land Register Act. The Constitutional Court has no doubt that such cases do exist. If the owners are the first buyers, who bought the individual parts of buildings from the investors, the real estate cannot be encumbered by a lien pursuant to Article 254 of the Execution of Judgments in Civil Matters and Securing of Claims Act, since the condition for such securing is the submission of an appropriate document. However, the legislature did not determine that the owners of apartments must submit the original contract if they have it. The fact is that even if the statute included such a provision, the question of its effectiveness would be raised. The legislature also did not determine *mutatis mutandis* application of the individual provisions of Articles 109 through 123 of the Land Register Act, similarly as, e.g. in cases determined in the first paragraph of Article 136 the Land Register Act. Thus, in cases in which a new mortgage is instituted pursuant to the Basic Property Law Relations Act on the real estate registered in the land register under the conditions determined in the challenged provision, a vagueness concerning the order of precedence for the payment of the claim could arise. The Constitutional Court does not have the power to review the mutual consistency of statutes or statutory norms. It does have, however, the power to review whether internal contradictions within the legal system violate the principle of a state governed by the rule of law (Article 2 of the

Constitution). The discussed case does concern such contradiction. Two regulations of liens on real estate require the implementation of a suitable legal system that must be coherent and without contradictions. Only such a system can ensure constitutionality and legality on the basis of the principle of legal hierarchy and can operate as an integral whole composed of structures which are connected, which depend on each other, and are not in contradiction. In view of the fact that the land register is an original database on the rights to real estate, it is namely presumed that a registered legal status is accurate, i.e. that no one who relies on such status suffers detrimental consequences (Article 5 of the Land Register Act). Therefore, on the basis of the challenged regulation, a conflict of equivalent rights may occur concerning the order of precedence of lienholders. In addition, the general security of legal transactions guaranteed by the above-mentioned principle of trust in the rights registered in a land register is thus jeopardized. The provision which allows the registration of real estate in the land register without encumbrances established in conformity with the legal system in force is inconsistent with the principle of legal certainty, which is one of the principles of a state governed by the rule of law (Article 2 of the Constitution). In order to remedy the established unconstitutionality the legislature must regulate not only the question of the *registration in a land register* of a lien on real estate but also the questions of possible *non-registration* in cases in which the lien ceased to exist. In view of the fact that the discussed case concerns a gap in the law, which is inconsistent with the principle of legal certainty, it was also necessary to determine the manner of the implementation of the decision for the period until the established unconstitutionality is remedied. Thus, the Constitutional Court determined that until the established unconstitutionality is remedied the court may allow registration of ownership in cases determined in Article 7 of the Act Determining Special Conditions for Registering the Ownership of Individual Parts of Buildings in the Land Register only if the real estate was not subject to attachment for reason of securing a claim on money with a lien. In land-register proceedings, courts must themselves obtain the data on the (non)existence of the lien on the real estate, by inquiring at the competent court conducting execution proceedings (Decision No. U-I-8/00, dated 10/5-2001, Official Gazette RS, Nos. 35/2000 and 43/01).

4.2. Establishment of the existence of legal omission.

Specify the criteria formulated in the jurisprudence of the constitutional court of your country, on the grounds whereof gaps in the legal regulation may and must be recognized as unconstitutional.

The legal basis can be found in Article 48 of the Constitutional Court Act:

(1) If the Constitutional Court deems a law, other regulation, or general act issued for the exercise of public authority unconstitutional or unlawful as it does not regulate a certain issue which it should regulate or it regulates such in a manner which does not enable annulment or abrogation, a declaratory decision is adopted on such.
(2) The legislature or authority which issued such unconstitutional or unlawful regulation or general act issued for the exercise of public authority must remedy the established unconstitutionality or unlawfulness within a period of time determined by the Constitutional Court.

Does the constitutional court investigate only the disputed provisions of a law or other legal acts? Does the constitutional court decide not to limit itself with only

autonomous investigation of the content of the disputed provisions (or disputed act) but to analyse it in the context of the whole legal regulation established in the act (or even that established in the system of acts or the whole field of law)?

The Constitutional Court may on the basis of Article 30 (the review of regulations) or Article 59 (the procedure for examining a constitutional complaint) of the Constitutional Court Act raise a question of the (un)constitutionality of the gaps in the law independently from the applicant's application if there exists a basis in the application. In accordance with Article 30 of the Constitutional Court Act, in deciding on the constitutionality and legality of a regulation or general act issued for the exercise of public authority, the Constitutional Court is not bound by the proposal of a request or petition. The Constitutional Court may also review the constitutionality and legality of other provisions of the same or other regulation or general act issued for the exercise of public authority for which a review of constitutionality or legality has not been proposed, if such provisions are mutually related or if such is necessary to resolve the case. In addition, the second paragraph of Article 59 of the Constitutional Court Act determines that in cases in which the Constitutional Court deems that the challenged individual act is based on a potentially unconstitutional or unlawful regulation or general act issued for the exercise of public authority, it may abrogate or annul such by applying the procedural provisions which apply for the constitutional review of regulations.

See also the answer under paragraph 3.3.

Can the constitutional court investigate and assess legislative omission of the legal regulation that used to be valid in the past? Does the constitutional court state the existence of gaps in the legal regulation which used to be valid in the past, when it analyzes the development of the disputed provisions (disputed act)?

The Constitutional Court may do so by applying Article 47 of the Constitutional Court Act:

(1) If a regulation or general act issued for the exercise of public authority which ceased to be in force when a request or petition is lodged is challenged by the request or petition, and the consequences of its unconstitutionality or unlawfulness were not remedied, the Constitutional Court decides on its constitutionality or legality. In instances of regulations or general acts issued for the exercise of public authority, the Constitutional Court decides whether its decision has the effect of annulment or abrogation.
(2) If during proceedings before the Constitutional Court a regulation or general act issued for the exercise of public authority ceased to be in force in the challenged part or was amended, the Constitutional Court decides on its constitutionality or legality if an applicant or petitioner demonstrates that the conditions referred to in the preceding paragraph are fulfilled.

Does the constitutional court, when identifying the legislative omission, investigate and assess only the content and form of the legal regulation or also the practice of the implementation of the legal regulation?

When identifying gaps in the law or legislative omissions, the Constitutional Court has also taken into account the implementation or interpretation of the challenged regulation in practice.

Case Law:

For reason of respecting the age limit determined in the first paragraph of Article 39 of the Pension and Disability Insurance Act, insured persons with remaining work ability who assert their right to part-time work are not treated less favourably than insured persons who have reached the age determined in the third and fourth paragraphs of Article 39 of the Pension and Disability Insurance Act, since the discussed matter concerns an objectively different state of affairs. The regulation which, given a gap in the law which arose because a certain group of persons is not mentioned in one of the articles of the act, allows the users of the act to decide on the rights of such persons in accordance with the purpose of the act by means of appropriate interpretation, is not inconsistent with the Constitution. Limiting salary compensation for part-time work to a maximum of 50 % of the highest pension basis, which affects only one part of the insured persons, does not entail the unequal treatment of the insured persons, which is inconsistent with the Constitution, as the legislature had sound reasons for such differentiation. Reducing the rights which are already implemented does not entail the retroactive effect of a regulation in cases in which the rights are reduced for the period following the implementation of the statute (Order No. U-I-54/96, dated 15/7-1999, OdlUS VIII, 192).

Administrative bodies and the Supreme Court based their decision on the second paragraph of Article 13 and the first paragraph of Article 16 of the Aliens Act, as they interpreted Article 81 of the Aliens Act, with reference to which the Constitutional Court had already established in Decision No. U-I-284/94, dated 4/2-1999, Official Gazette RS, No. 14/99 and OdlUS VIII, 22, that the Aliens Act is inconsistent with the Constitution because of an unconstitutional gap in the law, in a manner inconsistent with the Constitution. Such interpretation of the Aliens Act, which is contained in the challenged decisions, placed the constitutional complainant in an unequal position compared to the aliens who were not citizens of other republics of the former SFRY who, however, had had permanent residence in the Republic of Slovenia when the Aliens Act had been implemented. The constitutional complainant's right to equality before the law determined in the second paragraph of Article 14 of the Constitution was thus violated, which is manifested as the violation of Article 22 of the Constitution (the equal protection of rights) in proceedings in which rights, obligations, and legal benefits of an individual are decided (Order No. Up-60/97, dated 15/6-1999, OdlUS VIII, 292).

4.3. The methodology of revelation of legislative omission.

Describe the methodology of revelation of legislative omission in the constitutional jurisprudence: what methods and their combinations does the constitutional court apply while revealing legislative omission? How much importance falls upon grammatical, logical, historical, systemic, teleological or other methods of interpretation in stating the existence of legislative omission?

The Constitutional Court does not apply any special methodology. The same procedure as in other cases applies.

Does the constitutional court, while investigating and assessing legislative omission, directly or indirectly refer to the case-law of the European Court of

Human Rights, the European Court of Justice, other institutions of international justice and constitutional and supreme courts of other countries?

Case Law:

A constitutive part of the right to judicial protection is the right to a trial without undue delay, which ensures everyone who takes part in judicial proceedings as a party to proceedings the right to assert their rights within a reasonable time. In this sense this right is one of the essential conditions of the effective exercise of all other human rights. Its aim is to ensure the effectiveness of judicial protection: delayed judicial protection can nullify its effects. If judicial protection is delayed, the affected person is in the same position as if there were no judicial protection ("*justice delayed is justice denied*").

The right to a trial within a reasonable time is also ensured by the first paragraph of Article 6 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as ECHR). Therefore, upon the review of the challenged provisions of the Judicial Review of Administrative Acts Act, the Constitutional Court must also consider the case law of the European Court of Human Rights, according to which the effective judicial protection of the right to a trial within a reasonable time is ensured only if it also comprises protection that affords just satisfaction awarded to persons whose rights were violated in already concluded proceedings. In addition, the Constitutional Court must consider the fifth paragraph of Article 15 of the Constitution, which provides that no human right or fundamental freedom regulated by legal acts in force in Slovenia (the ECHR also being such a legal act) may be restricted on the grounds that the Constitution does not recognize that right or freedom or recognizes it to a lesser extent. In view of the case law of the European Court of Human Rights, the fourth paragraph of Article 15 of the Constitution must be interpreted so that it requires that within the framework of the judicial protection of the right to a trial without undue delay, also the possibility to claim just satisfaction in cases in which a violation has already ceased must be ensured. Just satisfaction resulting from the violation of the right to a trial within a reasonable time in the sense applied by ECHR does not entail compensation in the classical sense, according to the criteria of civil liability for material or non-material damage, which also applies to compensation according to Article 26 of the Constitution. It concerns satisfaction whose primary purpose is compensation for the omission of the positive duty of the state to ensure a system or organization of proceedings that would enable the individual to obtain a decision of the court within a reasonable time.

In view of the fact that although the Judicial Review of Administrative Acts Act with reference to the second paragraph of Article 157 of the Constitution regulates the judicial protection of the right to a trial without undue delay, but does not contain special provisions adjusted to the nature of the above-mentioned right that would enable the claiming of just satisfaction in the event that the violation of the right to a trial within a reasonable time ceased, it is inconsistent with the fourth paragraph of Article 15 of the Constitution in conjunction with the first paragraph of Article 23 of the Constitution (Decision No. U-I-65/05, dated 22/9-2005, Official Gazette RS, No. 92/05 and OdlUS XIV, 72).

4.4. Additional measures.

Does the constitutional court, after having stated the existence of the legislative omission, and if it is related to the protection of the rights of the person, take any action in order to ensure such rights? If yes, what are these actions?

In accordance with the second paragraph of Article 40 of the Constitutional Court Act, if necessary the Constitutional Court determines which authority must implement the decision and in what manner. It follows from the case law of the Constitutional Court that on the basis of the above-mentioned provision, the Constitutional Court may temporarily, until the established unconstitutionality is remedied, also determine a manner for filling the established unconstitutional gap in the law in practice.

Case Law:

The Constitutional Court established that the legally unregulated status of the position and rights of patients during involuntary commitment in closed wards of psychiatric hospitals entails an unconstitutional gap in the law which is inconsistent with the principle of legal certainty (Article 2 of the Constitution). In addition, the challenged statutory regulation is also inconsistent with the third paragraph of Article 51 of the Constitution, which requires that the legislature determine cases in which compulsory medical treatment is allowed. In order to protect the rights of patients, the legislature should clearly determine the cases and conditions which allow the use of coercive and restrictive measures. In addition, certain supervision (supervisory mechanisms) over the use of such measures should be foreseen. Due to the fact that the Constitutional Court established that the Non-litigious Civil Procedure Act does not regulate certain important questions which refer to the involuntary commitment of patients in the closed wards of psychiatric hospitals, it established the unconstitutionality of Articles 70 through 81 of the Non-litigious Civil Procedure Act in accordance with Article 48 of the Constitutional Court Act.

In the discussed decisions the Constitutional Court also decided that until the established inconsistency is remedied, the following must be ensured in procedures for the involuntary commitment of persons to a mental institution:

- an *ex officio* counsel must be appointed for an involuntarily committed person upon the commencement of proceedings; and
- the notification of detention that the authorised mental institution is obliged to submit to the court must contain reasons substantiating the necessity of involuntary commitment (Decision No. U-I-60/03, dated 4/12-2003, Official Gazette RS, No. 131/03 and OdlUS XII, 93).

The aim of the proceedings for the execution of judgements in civil matters cannot be that the creditor's claim is paid-off regardless of the means used (not from the property of a debtor but instead from the property of a third party). If, nevertheless, in the proceedings for the execution of judgements in civil matters the rights of a third party are interfered with, the effective protection of their rights must be guaranteed. In addition to the regulation of the objection of a third party in cases in which a third party who demonstrated with a high degree of probability their right that prevents execution (e.g. demonstrates their ownership right by an authentic document) and the court conducting proceedings would not consider the substance of their objection, the regulation of the deferral of execution determined in the first paragraph of Article 73 of the Execution of

Judgements in Civil Matters and the Securing of Claims Act, which does not provide that the probability of the existence of the right which prevents execution as an independent condition for the deferral of execution must be demonstrated, does not guarantee an appropriate protection of the rights of third parties and is therefore inconsistent with the first paragraph of Article 23 of the Constitution. The challenged regulation entails an inadmissible interference with the rights of third parties which is not proportionate to the pursued goal, i.e. ensuring effective execution.

The Constitutional Court thus established that the challenged provision of the first paragraph of Article 73 of the Execution of Judgements in Civil Matters and the Securing of Claims Act is inconsistent with the Constitution and required that the legislature remedy the established inconsistency within six months of the publication of the decision in the Official Gazette RS. The Constitutional Court issued a declaratory decision and not a decision on annulment because the annulment of the challenged provision would cause that a third party could not be granted the deferral of execution (the first paragraph of Article 48 of the Constitution). The legislature must remedy the established inconsistency with the Constitution in a manner that takes into account the reasons of the discussed decision.

The Constitutional Court's decision on the established inconsistency with the Constitution does not entail that courts will not be able to decide on motions of third parties for the deferral of execution in proceedings for the execution of judgements in civil matters until such inconsistency is remedied. Pursuant to the second paragraph of Article 40 of the Constitutional Court Act, the Constitutional Court determined the manner of the implementation of the decision. It regulated the deferral of execution in proceedings for the execution of judgements in civil matters upon the motion of a third party as one of the possible manners by which third parties are guaranteed effective protection of rights in such proceedings until the legislature remedies the established inconsistency with the Constitution. When deciding on the motion of a third party for deferral, until the inconsistency is remedied, the courts will have to consider not only the probability of the demonstrated damage but also the second criteria, i.e. the probability of the existence of the alleged right of the third party. They will have to weigh not only the gravity of the detrimental consequences which may be caused by the execution, but also the probability of the existence of the right which prevents execution, i.e. if the right which prevents execution was demonstrated with very high probability an appropriately milder review of the second condition, i.e. detrimental consequences, should be applied. However, if a third party demonstrates with significant probability that they will suffer irreversible damage if the execution is carried out immediately, a milder test of the probable demonstration of a right, by applying the criterion determined in the first paragraph of Article 64 of the Execution of Judgements in Civil Matters and Securing of Claims Act, will be sufficient for deciding on the deferral of execution (Decision No. U-I-110/03 and Up-631/03, dated 14/4-2005, Official Gazette RS, No. 46/05 and OdlUS XIV, 21).

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

The subject of review of the Constitutional Court are challenged provisions and provisions with reference to which the Constitutional Court initiates proceedings *ex*

officio on the basis of Articles 30 or 59 of the Constitutional Court Act (see the answer under paragraph 3.3.).

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

In cases in which the Constitutional Court establishes the unconstitutionality of a gap in the law or a legislative omission (pursuant to Article 48 of the Constitutional Court Act), it may require the legislature to appropriately fill the gap.

Case Law:

The Constitutional Court established that provisions of the Criminal Procedure Act do not provide such procedural guarantees to persons whose detention is being decided by a court. The court may order and extend detention without giving affected persons the right to be heard and without giving them the opportunity to learn of the facts and evidence against them (Articles 202, 203, 205, 207, and 361 of the Criminal Procedure Act). The affected persons have the right to inspect the court file only when the investigation has begun (the fifth paragraph of Article 128 in conjunction with Article 144 of the Criminal Procedure Act); if the affected person has a legal representative, the legal representative may inspect the file after the justified prosecutor has filed a request for criminal prosecution (Article 73 of the Criminal Procedure Act). In the decision to order detention the court only has to give a brief explanation of the reasons for detention (the second paragraph of Article 202 of the Criminal Procedure Act). Prior to a decision rendered by a court in the second instance, the state prosecutor always has the opportunity to give his or her opinion on the matter, yet the detainee is not informed of this opinion (the first paragraph of Article 377 in conjunction with the first paragraph of Article 403 of the Criminal Procedure Act).

Since the procedure for deciding on the ordering, extension and lifting of detention due to the danger of reiteration regarding a person whose detention is being decided does not provide for the guarantees provided by the Constitution, it is inconsistent with the Constitution. If the provisions of the Criminal Procedure Act which regulate the procedure for deciding on detention - with the exception of the second paragraph of Article 202 of the Criminal Procedure Act – were annuled, this would entail that the courts could no longer order detention. Thus, applying Article 48 of the Constitutional Court Act, the Constitutional Court only established that such provisions are unconstitutional and determined a period of time within which the legislature must remedy the above-mentioned unconstitutionality. In addition, the Constitutional Court annuled the part of the provision of the second paragraph of Article 202 of the Criminal Procedure Act which determined the content of the statement of reasons of a decision on detention.

The Constitutional Court adopted the position that from the perspective of procedural law, the legislature must regulate this matter such that with regard to the danger of

reiteration a special hearing is envisaged, where judges decide between the statements made by the state prosecutor on one hand, and those made by the defendant on the other, and when in doubt the judges will rule in favour of the defendant, i.e. that there is no danger of reiteration.

The annuled provision of the second paragraph of Article 202 of the Criminal Procedure Act can be replaced by defining the content of the decision in accordance with the standpoints contained in this decision. The legislature will have to regulate the procedural matter in detail, with regard to which the Constitutional Court draws attention to the constitutional requirement that, first, every interference with the right to personal liberty must be determined by procedural law and, second, in such procedure all constitutional guarantees apply, as they stem from the fact that the person is entrusted to the judiciary only because they must enjoy judicial guarantees which cannot be provided by the executive branch of power (the second paragraph of Article 20 of the Constitution). This *habeas corpus* logic would make no sense if the judicial branch of power followed the same logic as the executive branch generally does, i.e. foremost following the principle of efficiency and not ensuring procedural guarantees (Decision No. U-I-18/93, dated 11/4-1996, Official Gazette RS, No. 25/96 and OdlUS V, 40).

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

The Constitutional Court may, for example, apply the second paragraph of Article 40 of the Constitutional Court Act – regarding determining the manner of implementation (see above).

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

It is a declaratory decision of the Constitutional Court in accordance with the above-mentioned Article 48 of the Constitutional Court Act:

(1) If the Constitutional Court deems a law, other regulation, or general act issued for the exercise of public authority unconstitutional or unlawful as it does not regulate a certain issue which it should regulate or it regulates such in a manner which does not enable annulment or abrogation, a declaratory decision is adopted on such.
(2) The legislature or authority which issued such unconstitutional or unlawful regulation or general act issued for the exercise of public authority must remedy the established unconstitutionality or unlawfulness within a period of time determined by the Constitutional Court.

See also the answer under paragraph 2.2.

The constitutional court, after it has stated the existence of the legislative omission in the reasoning part of the decision, in the resolution of the decision performs the following:

a) recognizes the law (other legal act) as being in conflict with the constitution;

Case Law:

Decision No. U-I-160/03, dated 19/5-2005, Official Gazette RS, No. 54/05 and OdlUS XIV, 28:

Disposition:

1. Radiotelevizija Slovenija Act (Official Gazette RS, Nos. 18/94, 29/94, 88/99, 90/99, and 79/01) is inconsistent with the Constitution.

2. The legislature must remedy the established inconsistency within nine months of the publication of the decision in the Official Gazette RS.
…

Decision No. U-I-298/00, dated 5/4-2001, Official Gazette RS, No. 29/01 and OdlUS X, 66:

Disposition:

1. It is not consistent with the Constitution that the Redress of Injustices Act (Official Gazette RS, No. 59/96) does not determine that rightful persons according to this act have the right that the period during which their liberty had been deprived is included in the pension qualifying period at the latest from the day when they filed a request for the recognition of the status or the right.

2. The National Assembly must remedy the inconsistency from the previous paragraph within nine months of the publication of this decision in the Official Gazette RS.

b) recognizes the provisions of the law (other legal act) as being in conflict with the constitution;

Case Law:

Decision No. U-I-66/93, dated 2/12-1993, Official Gazette RS, No. 1/94 and OdlUS II, 113:

Disposition:

1. The eighth paragraph of Article 92 of the Execution of Judgements in Civil Matters Procedure Act (Official Gazette SFRY, Nos. 20/78, 6/82, 74/87, 57/89, 20/90, and 27/90) is inconsistent with the Constitution:

- inasmuch as it fails to limit the execution of claims for legally stipulated maintenance and compensation for damage caused by a convicted person by a criminal offence in the same manner as determined in the first paragraph of Article 93 of the same act;
- inasmuch as it fails to determine that claims for legally stipulated maintenance are also levelled with claims which are levelled with them in the first paragraph of Article 93 of the same act.

Decision No. U-I-24/04, dated 20/4-2007, Official Gazette RS, No. 40/07

Disposition:

1. Article 20 of the Act Amending the Criminal Procedure Act (Official Gazette RS, No. 101/05) is inconsistent with the Constitution.

2. The National Assembly must remedy the established inconsistency within six months.

3. Until the inconsistency established in the first paragraph of this disposition is remedied, the rightful persons determined in Article 559 of the Criminal Procedure Act (Official Gazette RS, No. 63/94) may regardless of the time-limit determined in the third paragraph of Article 421 of the Criminal Procedure Act (Official Gazette RS, Nos. 63/94, 70/94 – corr., 72/98, 6/99, 66/2000, 111/01, 56/03, 116/03 – official consolidated text, 43/04, 96/04 - official consolidated text, 101/05, 8/06 - official consolidated text, and 14/07) file a request for the protection of legality against judicial decisions which became final prior to 1 January 1995, i.e. before the implementation of the Criminal Procedure Act (Official Gazette RS, No. 63/94), and against judicial proceedings pending before such final decisions.

c) leaves the act (provisions thereof) to be in effect and at the same time recognizes the failure to act by the legislature (other subject of law-making) as unconstitutional by specifying the time period in which, under the constitution, the obligatory legal regulation must be established;

Case Law:

Decision No. U-I-48/06, dated 22/6-2006, Official Gazette RS, No. 69/06 and OdlUS XV, 57:

Disposition:

1. The first paragraph of Article 126 of the Personal Income Tax Act (Official Gazette RS, Nos. 54/04, 56/04 – corr., 62/04 – corr., 63/04 – corr., 80/04, 139/04, 17/05 – official consolidated text, 53/05, 70/05 - official consolidated text, 115/05, 21/06 - official consolidated text, 47/06, and 59/06 - official consolidated text) is inconsistent with the Constitution.

2. The National Assembly must remedy the established inconsistency by 31 December 2006.

d) states the duty of the legislator (other subject of law-making) to fill in the legal gap (by specifying or without specifying the filling in of the legal gap);

Case Law:

Decision No. U-I-117/07, dated 21/6-2007, Official Gazette RS, Nos. 38/07 and 58/07:

Disposition:

1. Articles 1 and 3 of the Act Amending the Financial Operations of Companies Act (Official Gazette RS, No. 31/07) are inconsistent with the Constitution.

2. Articles 2 and 4 of the Act Amending the Financial Operations of Companies Act are annuled.

3. The National Assembly must remedy the established inconsistency with the Constitution determined in the first paragraph of the disposition within six months of the publication of the decision in the Official Gazette RS.

4. Until the unconstitutionality determined in the first paragraph of the disposition is remedied, procedures for claims against companies which were struck from the register of companies without being liquidated after the implementation of the Act Amending the Financial Operations of Companies Act may not be initiated. During this period the statute of limitations does not run regarding claims.

5. Until the unconstitutionality determined in the first paragraph of the disposition is remedied, the claims of creditors against companies which were struck from the register of companies without being liquidated as determined in the fourth paragraph of the disposition bear interest in accordance with the key interest rate of the European Central Bank.

6. Judicial and administrative procedures initiated against partners of companies which were struck from the register of companies before the implementation of the Act Amending the Financial Operations of Companies Act continue and conclude according to the Financial Operations of Companies Act (Official Gazette RS, Nos. 54/99, 110/99, and 93/02).

e) states the existence of a gap in the legal regulation and points out that it may be filled in by general or specialized courts;

With reference to this question, attention must be drawn to the fact that in cases in which the Constitutional Court issues declaratory decisions in accordance with the first paragraph of Article 48 of the Constitutional Court Act, it also determines a time-limit by which such inconsistency must be remedied addressed to the body which issued the unconstitutional or unlawful act. Therefore, the situation in which the Constitutional Court simply determines that an unconstitutional gap in the law should be filled by general or specialized courts alone cannot arise. The Constitutional Court may, however, in such cases apply the authorisation determined in the second paragraph of Article 40 of the Constitutional Court Act and determine the course of procedure of courts which in individual cases decide on relations regarding which the gap in the law had been established, during the period until the established unconstitutionality is remedied.

Case Law:

Decision No. U-I-468/06, dated 17/5-2007, Official Gazette RS, No. 46/07:

Disposition:

1. The Local Elections Act (Official Gazette RS, Nos. 72/93, 7/94, 33/94, 70/95, 51/02, 72/05, 100/05 – official consolidated text, 121/05, 22/06 - official consolidated text) is inconsistent with the Constitution as it does not determine that persons who are related or have some other similar relationship to candidates cannot be members of electoral committees.

2. The National Assembly must remedy the established inconsistency within one year of the publication of the decision in the Official Gazette RS.

From the reasoning of the decision:

Due to the fact that the Local Elections Act is inconsistent with the Constitution, as it does not regulate certain issues which it should have regulated (an unconstitutional gap in the law), the Constitutional Court adopted a declaratory decision in accordance with Article 48 of the Constitutional Court Act and determined that the legislature must remedy the established inconsistency within one year. The established inconsistency should be remedied such that the legislature determines a circle of persons who cannot be members of electoral committees because they are related or have some other similar relationship to candidates.

In view of the fact that a declaratory decision was issued, the question of the legal interest of the petitioner could be raised, but the Constitutional Court could not deny the petitioner legal interest. The challenged statutory provision is inconsistent with the Constitution. In view of that, the court will have to decide in proceedings initiated by the petitioner whether in the disputed case the appearance of an unfair election in fact transformed into a violation of the petitioner's right to be elected.

f) obligates courts of general jurisdiction and specialized courts to suspend the consideration of the cases and not to apply the existing legal regulation until the legislator (other subject of law-making) fills in the gap;

Case Law:

Decision No. U-I-284/94, dated 4/2-1999, Official Gazette RS, No. 14/99 and OdlUS VIII, 22:

Disposition:

1. The Aliens Act (Official Gazette RS, Nos. 1/91-I, 44/97, and 50/98) is inconsistent with the Constitution for failing to determine the conditions for acquiring a permanent residence permit by the persons referred to in the second paragraph of Article 81 upon the expiry of the time-limit in which they could apply for citizenship of the Republic of Slovenia, if they did not do so, or after the date the decision rejecting the granting of citizenship became final.

2. The first paragraph of Article 16 of the Aliens Act is not inconsistent with the Constitution.

3. The legislature must remedy the established inconsistency determined in the first paragraph of the disposition within six months of the publication of this decision in the Official Gazette RS.

4. Until the established inconsistency determined in the first paragraph of the disposition is remedied, a measure of deportation referred to in Article 28 of the Aliens Act may not be ordered against citizens of other republics of the former Socialist Federal Republic of Yugoslavia if they had permanent residency and actually lived in the Republic of Slovenia on the day of the plebiscite, i.e. on 23 December 1990.

Order No. U-I-375/02, dated 12/2-2004, www.us-rs.si:

In this case the Constitutional Court did not establish a violation of the Constitution. In the reasoning of the decision it stated the following:

The petitioners do not allege that the courts applied the challenged provision in a manner such that they find it to be inconsistent with the Constitution. The Constitutional Court cannot decide that the courts did so only because the administrative authorities applied it in such a manner. Judges may not apply executive regulations if they deem them to be inconsistent with the Constitution or law. The Constitution namely authorizes judges and requires from them that upon deciding on rights and obligations they may themselves eliminate such executive regulations (i.e. *exceptio illegalis*). If a judge deciding some matter deems that regarding the manner of establishing what share of the value of nationalized property amounts to the indexed value of the paid compensation, there exists a gap in the law which cannot be filled by methods of interpretation, they must stay the proceedings and initiate proceedings before the Constitutional Court (Article 156 of the Constitution). The gap in the law is namely unconstitutional if it cannot be filled by methods of interpretation.

g) states the existence of the gap in the legal regulation without drawing direct conclusions or establishing any assignments;

In view of the powers of the Constitutional Court of the Republic of Slovenia, the situation in which a court establishes the existence of a gap in the law "*without drawing direct conclusions or establishing any assignments*" cannot arise because according to the second paragraph of Article 48 of the Constitutional Court Act, the Constitutional Court always determines a period of time within which the authority which issued such unconstitutional or unlawful regulation or general act issued for the exercise of public authority must remedy the established unconstitutionality or unlawfulness. However, in the case law of the Constitutional Court there is one such case, i.e. Order No. U-I-168/97, dated 3/7-1997, OdlUS Vi, 103, in which the petitioner challenged the statutory provision which the Constitutional Court had already established to be inconsistent with the Constitution (Decision No. U-I-18/93, dated 11/4-1996, Official Gazette RS, No. 25/96 and OdlUS V, 40) and determined that the legislature must remedy the established unconstitutionality within a certain period of time. The National Assembly did not remedy the established unconstitutionality within the determined period of time, and therefore the petitioner filed another similar petition in which he proposed that the Constitutional Court annul the statutory provision which it had already established to be inconsistent with the Constitution. In this case, the Constitutional Court decided that the expiry of the period of time in which unconstitutionality should have been remedied cannot by itself influence the

Constitutional Court's decision, as all the reasons for which the provisions could not be annuled previously still exist, and thus it dismissed the petition for the review of the constitutionality as unfounded.

Case Law:

Order No. U-I-168/97, dated 3/7-1997, www.us-rs.si:

Disposition:

The petition for the review of the constitutionality of item 3 of the second paragraph of Article 201 of the Criminal Procedure Act (Official Gazette RS, No. 63/94) and the provisions of the Criminal Procedure Act which regulate the procedure for deciding on the ordering, extension, and cancellation of detention, is dismissed.

h) applies other models of assessment of legislative omission.

Other "*models*" of the assessment of gaps in the law or legislative omissions do not exist.

4.7. The "related nature" investigation and decisions adopted.

What is typical for the "related nature" investigation carried out in the constitutional justice cases by the constitutional court which does not investigate the legislative omission? The particularities of decisions adopted in such cases. When answering this question, point out the constitutional justice cases with more typical examples.

Due to the fact that the Constitutional Court has the power to decide on the unconstitutionality of gaps in the law or legislative omissions, such situations do not arise (the same as in paragraph 3.6.).

4.8. Means of the legal technique which are used by the constitutional court when it seeks to avoid the legal gaps which would appear because of the decision whereby the law or other legal act is recognized as being in conflict with the constitution.

What means of the legal technique are used by the constitutional court when it seeks to avoid the legal gaps which would appear because of the decision whereby the law or other legal act is recognized as being in conflict with the constitution? Postponement of the official publishing of the constitutional court decision. Establishment of a later date of the coming into force of the constitutional court decision.

In accordance with the second paragraph of Article 40 of the Constitutional Court Act, if necessary the Constitutional Court determines which authority must implement the decision and in what manner. It follows from the case law of the Constitutional Court that on the basis of the above-mentioned provision the Constitutional Court may temporarily, until the established unconstitutionality is remedied, also determine a manner for filling the established unconstitutional gap in the law in practice.

Statement by the constitutional court that the investigated act complies with the constitution temporarily, at the same time specifying that in case that the act is not amended till certain time, it will be in conflict with the constitution.

There has not been such a case in the hitherto case law of the Constitutional Court.

Recognition of the act as being in conflict with the constitution due to the legislative omission, without removing such act from the legal system.

A declaratory decision issued in accordance with Article 48 of the Constitutional Court Act does not entail that the challenged act is annuled.

Case Law:

The right to vote is a positive right which requires the state to do something for its implementation. It is one of the human rights whose nature requires that the manner of its implementation be regulated by law. Without the appropriate statutory regulation, the right to vote could namely not be exercised at all. In accordance with the second paragraph of Article 15 of the Constitution, the legislature must regulate the manner in which the right to vote is exercised so that every citizen who has attained the age of eighteen years may in fact exercise the right to vote and the right to be elected. In Decision No. Up-305/98, dated 19/11-1998, OdlUS VII, 241, the Constitutional Court emphasized that election is a process which must be carried out and concluded in a certain continuous period of time and that therefore all tasks must be carried out within the time-limits precisely determined by law. Voters exercise their right to vote for the purpose of enabling the constitution of a representative body which must be constituted as soon as possible after the election in order to ensure effective exercise of power (in the case of a local election, local power). Also the regulation on the basis of which the Electoral Commission determines whether voting via mail was carried out in due time, must be adapted to this goal. A regulation according to which it could be proved by evidence gathered by the Electoral Commission itself during an unlimited period of time that voting was carried out in due time would endanger a legitimate election, which was carried out in due time, of a body which is being elected, and thereby it would bring uncertainty (possibly lasting for a longer time) to the functioning of state authorities or local community authorities and in the system of democratic power. Therefore, it is necessary that the rules which regulate such procedure be determined in a law in a clear manner such that they are immediately understandable.

The rules which regulate the manner of voting via mail entail the manner of exercising the right to vote. With reference to voting via mail, the National Assembly Elections Act and the Local Elections Act only determine by when voting has to be completed and that the result of voting via mail is determined by the Electoral Commission whereby the Electoral Commission takes into consideration ballot papers which arrived via mail by noon of the day following voting. Neither the National Assembly Elections Act nor the Local Elections Act contain any explicit provisions which would in more detail regulate the manner of voting via mail. Therefore it is also not regulated on what basis the Electoral Commission may determine whether ballot papers were posted in due time, which is one of the fundamental reasons for their validity in establishing the outcome of voting via mail. Due to the fact that neither the National Assembly Elections Act nor the

Local Elections Act contain such rules, this entails a situation in which a certain issue which should have been regulated by law due to the manner of exercising a human right determined in the first paragraph of Article 43 of the Constitution, is not regulated. Such a gap in the law cannot be filled by the application of methods of analogy, as this could lead to different interpretations of the same statutory provision in equal cases, it could cause a greater number of disputes with reference to the protection of the right to vote, and thus extend election procedures. Thus, the goal of an election, i.e. the lawful election of a body which is to be elected and the constituting of this body as soon as possible in order to ensure the effective exercise of power would be endangered.

The statutory regulation of the manner of voting via mail must, regarding the above-mentioned take into account that the Electoral Commission, while determining the outcome of voting via mail (which must otherwise apply for determining all election results), must have at their disposal all documents from which credible results of the election can undoubtedly be determined. If the law does not regulate such, it is the case of an unconstitutional gap in the law which is as such inconsistent with the principle of legal certainty determined in Article 2 of the Constitution, in this case even more so, as it can significantly endanger the exercise of the right determined in the first paragraph of Article 43 of the Constitution. In view of the fact that voting via mail is in case of a local election partly regulated by the National Assembly Elections Act and partly by the Local Elections Act, the Constitutional Court could not establish the unconstitutionality for only one of the above-mentioned acts, as both are inconsistent with the Constitution. Due to the fact that the acts are inconsistent with the Constitution as they do not regulate a certain issue which they should have regulated regarding exercising the right to vote, on the basis of Article 48 of the Constitutional Court Act, the Constitutional Court adopted a declaratory decision and determined a one-year time-limit in which the established inconsistency must be remedied (Decision No. U-I-7/07 and Up-1054/07, dated 7/6-2007, Official Gazette RS, No. 54/07).

Interpretation of the act (provisions thereof) which complies with the constitution, in order to avoid the statement that the act (provisions thereof) is in conflict with the constitution due to the legislative omission.

Case Law:

The subject of the discussed petitions is Article 19 of the Act Amending the Guarantee Fund of the Republic of Slovenia Act. The petitioners challenged the aforementioned provision inasmuch as it did not ensure the right to severance payment also retroactively, i.e. to all employees whose employment was terminated due to the insolvency of an employer after the implementation of the Compulsory Composition, Bankruptcy, and Liquidation Act, and not only to employees whose employment was terminated after the implementation of the Amended Guarantee Fund of the Republic of Slovenia Act.

The Constitutional Court dismissed the petitions and in the reasoning of the decision established by means of interpretation that the alleged gap in the law did not exist.

The legislature regulated special, additional rights of employees whose employment was terminated due to the insolvency of an employer by the Act Amending the Guarantee Fund of the Republic of Slovenia Act of 1997. The act ensured that such employees

receive payment of at least a certain part of their claim against their insolvent employers from a special fund. The legislature regulated such employees' rights retroactively, from the implementation of the Compulsory Composition, Bankruptcy, and Liquidation Act onwards. It is a special, additional protection of employees which is necessary because of the particularity of their position in the event of the insolvency of their employer, when the employer does not have sufficient financial means to repay all its obligations and the employees as a particularly vulnerable group of employers' creditors have to be specially protected, i.e. due to their weaker position they must be ensured privileged treatment compared to other creditors. Such regulation also followed the requirements of ILO Convention No. 173 on the Protection of Workers' Claims (Employer's Insolvency) (Official Gazette RS, No. 11/01, IT, No. 4/01), the requirements determined in Article 25 of the European Social Charter (amended) (Official Gazette RS, No. 24/99, IT, No. 7/99), and the requirements determined in Council Directive 80/987/EEC on the approximation of the laws of the Member States relating to the protection of employees in the event of the insolvency of their employer (OJ 1980, No L 283/23; OJ 1987, No L 66/11).

However, the challenged Article 19 of the Amended Guarantee Fund of the Republic of Slovenia Act did not regulate one new, additional right of employees. The right to severance payment, to which the aforementioned provision refers, has already been regulated in the general labour-law regulation, in Article 36f of the Employment Relations Act, which as a general regulation guaranteed to redundant employees the right to severance payment. It follows from the explanations of the Ministry, the Government, and the Fund that there existed contradictory positions in practice regarding the question whether also redundant employees who were dismissed within the framework of compulsory composition and bankruptcy, respectively, i.e. in the event of the insolvency of the employer, are entitled to severance payment, which caused ambiguity and an unregulated legal situation. The position adopted in the case law of the Higher Labour and Social Court and later also the Supreme Court was that in such cases employees were not entitled to severance payment. By adopting Article 19 of the Amended Guarantee Fund of the Republic of Slovenia Act, the legislature, faced with different positions in theory and practice, as well as the adopted position in the case law regarding this question, apparently wanted to resolve the ambiguity and uncertainty regarding the right to severance payment in the event of the insolvency of the employer such that in the above-mentioned provision it clearly provided that also in such cases employees are entitled to severance payment. This does not entail, however, that only Article 19 of the Amended Guarantee Fund of the Republic of Slovenia Act established anew a legal basis for the severance payment of employees whose employment was terminated due to the insolvency of the employer. In fact, this provision had an explanatory nature and functioned in connection with Article 36f of the Employment Relations Act, which had already been in force when the Compulsory Composition, Bankruptcy, and Liquidation Act was implemented, and thus from then onwards it has been a relevant legal basis for the right to severance payment also for employees whose employment was terminated due to the insolvency of the employer. It is namely apparent that also these employees are redundant employees within the meaning of Chapter III of the Employment Relations Act, due to the fact that their employment was terminated for urgent operational reasons, among which Article 29 of the Employment Relations Act determines not only technological, organisational, or structural reasons which contribute to the greater efficiency of the employer, but also authoritative measures and economic reasons.

The insolvency of the employer, compulsory composition, the need for the rationalisation of production, and within this framework also the reduction of the number of employees within the scope of financial reorganisation (Article 49 in conjunction with Article 51 of the Compulsory Composition, Bankruptcy, and Liquidation Act) are most certainly economic reasons on the part of the employer, and employees dismissed for such reasons are redundant employees whose employment was terminated for urgent operational reasons. Article 51 of the Compulsory Composition, Bankruptcy, and Liquidation Act indeed contained a special regulation on the termination of the employment of such redundant employees, different than the general regulation of Chapter III of the Employment Relations Act, however, regarding the right to severance payment, it did not contain any special rule which would annul the general regulation of Article 36f of the Employment Relations Act. Therefore, also for cases involving the termination of employment of permanently redundant employees in the event of the insolvency of the employer, the general rule determined in the third paragraph of Article 36f of the Employment Relations Act must be applied regarding their right to severance payment. It is a question of the application of one of the fundamental legal rules of interpretation, i.e. the rule *lex specialis derogat legi generali*. The Constitutional Court cannot review whether courts correctly and appropriately interpreted statutory norms, it emphasized, however, that it is not allowed to apply such interpretation (although it might have been possible by applying only certain methods of interpretation) which would be inconsistent with the Constitution, manifestly erroneous, or arbitrary.

Employees thus already before the implementation of the Amended Guarantee Fund of the Republic of Slovenia Act had the right to severance payment also in cases in which their employment was terminated due to insolvency of the employer. Therefore, the petitioners' allegations that severance payment is not guaranteed to such employees already from the implementation of the Compulsory Composition, Bankruptcy, and Liquidation Act onwards, are not substantiated (Order, No. 138/00, dated 10/4-2003, Official Gazette RS, No. 40/03 and OdlUS XII, 33).

The Denationalization Act is not inconsistent with the Constitution for failing to regulate the questions relating to the rights of legal entities with reference to returning nationalized property, due to the fact that in denationalization proceeding these questions can be resolved by *mutatis mutandis* application of Articles 9 and 14 of the Denationalization Act, which apply to natural persons and religious communities as legal entities. Furthermore, the legal succession of legal entities is reviewed according to the general regulations of corporate law for individual types of legal entities (Decision No. U-I-225/96, dated 15/1-1998, Official Gazette RS, No. 13/98 and OdlUS VII, 7).

The reasoning according to which a longer time is needed before a referendum is carried out because it is necessary that the gap in the law be filled regarding the manner of voting and the manner of determining results is irrelevant, as in Decision No. U-I-201/96, dated 14/6-1996, Official Gazette RS, No. 34/96 and OdlUS V, 99, the Constitutional Court already established which interpretation of the Referendum and Public Initiative Act regarding the manner of voting, determining results, and the fact that the National Assembly is bound by the outcome of the referendum, is consistent with the Constitution in cases of multiple referendums on mutually exclusive questions. In addition, at the session held on 1 October 1996 the National Assembly adopted the Act on the Manner of Voting and on the Establishment of the Outcome of the Referendum

Vote on the Electoral System, which regulates precisely these questions (Decision No. U-I-34/96, dated 7/11-1996, Official Gazette RS, No. 68/96 and OdlUS V, 147).

"Revival" of previously effective legal regulation.

Case Law:

The Constitutional Court suspended the fifth paragraph of Article 39 of the Prevention of Corruption Act by Order No. U-I-296/05, dated 3/11-2005. In view of the fact that the Prevention of Corruption Act ceased to apply and will only apply until the inconsistency determined in the first paragraph of the disposition of this decision is remedied, the Constitutional Court did not review the constitutionality of its provisions. With regard to the reasons that supported the suspension of the implementation of the fifth paragraph of Article 39 of the Prevention of Corruption Act, the application of the above-mentioned provision had to be excluded during the period of the extended application of the Prevention of Corruption Act. The Constitutional Court excluded from application also Articles 40 through 43 of the Prevention of Corruption Act. On the basis of those provisions it would be necessary to elaborate and adopt integrity plans. As the Incompatibility of Holding Public Office with Profitable Activity Act does not envisage such plans, and the Prevention of Corruption Act will only be applied until the inconsistency is remedied (expected to take no more than six months), their elaboration would be meaningless.

This entails that for a certain time after this decision is issued, the provisions of the Prevention of Corruption Act will still apply (except those that the Constitutional Court annuled). The Constitutional Court decided to determine a relatively short time-limit in which the established unconstitutionality must be remedied also due to the fact that certain allegations of the applicants regarding the inconsistency of the Incompatibility of Holding Public Office with Profitable Activity Act with the Constitution could also refer to the provisions of the Prevention of Corruption Act. Therefore, it is the responsibility of the legislature to remedy the established unconstitutionality as soon as possible and to ensure the implementation of the Incompatibility of Holding Public Office with Profitable Activity Act (Decision No. U-I-57/06, dated 29/3-2007, Official Gazette RS, Nos. 100/05, 46/06, and 33/07).

The Constitutional Court decided on the constitutionality of individual provisions of the Judicial Service Act, the State Prosecutor Act, the State Attorney Act, the Public Sector Wage System Act, and the Ordinance on Officials' Salaries, and thus regarding the salary position of judges, state prosecutors, and state attorneys. It rendered a declaratory decision. Until the unconstitutionality established by this decision is remedied, officials' salaries, except for officials' salaries in local communities, are to be calculated and paid in accordance with the regulations on the basis of which they were calculated and paid until 1 March 2006, as well as on the basis of individual decisions issued on the basis of such regulations (Decision No. U-I-60/06, U-I-214/06, and U-I-228/06, dated 7/12-2006, Official Gazette RS, No. 1/07 and OdlUS XV, 84).

Other models of the decision are chosen (describe them).

There are no other models of decisions.

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

5.1. Duties arising to the legislator.

Does the statement of the existence of legislative omission in a decision of the constitutional court mean a duty of the legislator to properly fill in such gap of legal regulation?

Yes, in cases involving the determination of a period of time in accordance with Article 48 of the Constitutional Court Act. The duty of the legislature to fill a gap in the law follows from Article 2 (the principle of a state governed by the rule of law) and Article 3 of the Constitution (the principle of the separation of powers). In addition, the Constitutional Court Act in the third paragraph of Article 1 determines that the decisions of the Constitutional Court are binding.

Does the regulation of the parliament provide how the questions are considered concerning the implementation of the constitutional court decisions?

Yes, the implementation of decisions of the Constitutional Court is regulated by the Rules of Procedure of the National Assembly. Pursuant to Article 142 of these Rules, the proposer of a law may propose that the National Assembly discuss the draft law by the shortened procedure in the event of amendments to laws related to proceedings before or decisions of the Constitutional Court.

See also the answer under paragraph 2.4.

Does the parliament promptly react to the decisions of the constitutional court, wherein the legislative omission is stated? Are there cases when the parliament disregarded the decisions of the constitutional court concerning the legislative omission?

As a general rule, the National Assembly reacts promptly, however, every year there remain several cases of established unconstitutionality that are not remedied. The Constitutional Court calls special attention to such cases in its annual report.

Are there cases when the parliament disregarded the decisions of the constitutional court concerning the legislative omission?

Yes, among cases regarding which the National Assembly did not remedy unconstitutionality, there are also several cases concerning gaps in the law or legislative omission.

How is it ensured that the parliament would implement the duty which has appeared due to the decision of the constitutional court?

If the National Assembly does not carry out its duties, this entails the violation of Articles 2 and 3 of the Constitution.

What are the powers and role of the constitutional court in this sphere?

If the legislature does not respect a time-limit which the Constitutional Court determined on the basis of Article 48 of the Constitutional Court Act, the Constitutional Court may in the event of the repeated review of such regulation establish that the legislature violated Articles 2 and 3 of the Constitution. If possible, also an intensification of sanctions is allowed.

Case Law:

The case in which the Constitutional Court in a repeated review intensified the sanction:

The Constitutional Court decided by Decision No. U-I-17/94, dated 13/10-1994, Official Gazette RS, No. 74/94 and OdlUS III, 113, that Article 51 of the Compulsory Composition, Bankruptcy and Liquidation Act, which as a method of financial reorganisation of a company also determined the reduction of the number of employees employed with a debtor, is inconsistent with the Constitution because the legislature did not regulate the rights of employees whose employment is terminated on the basis of this provision with a special law in compliance with the second paragraph of Article 8 of the same act. This decision required that the legislature adopt such a law within six months of its publication in the Official Gazette RS. In the reasoning of the decision it drew attention to the fact that the rights of redundant employees of insolvent companies must be regulated retroactively, from the day of the implementation of the Compulsory Composition, Bankruptcy and Liquidation Act. The time-limit for remedying the unconstitutionality expired on 31 May 1995.

The first applicant in his request of 28 June 1995 alleged that the legislature did not respect the Constitutional Court decision. In the opinion of the applicant a gap in the law thus arose, as the Constitutional Court adopted the standpoint that the rights of employees in cases determined in Article 51 the Compulsory Composition, Bankruptcy and Liquidation Act were not regulated by the Employment Relations Act, which determines the rights of redundant employees, whereas employees who lose or have lost their jobs due to the commencement of compulsory composition procedure are not protected by a special act with retroactive effect, as such act was not adopted. The applicant therefore again alleged the violation of the principle of a state governed by the rule of law (Article 2 of the Constitution). In addition, he alleged that by not respecting the Constitutional Court decision the legislature undermined the authority of the Constitutional Court. He proposed that Article 51 of the Compulsory Composition, Bankruptcy, and Liquidation Act be annuled.

The third paragraph of Article 161 of the Constitution determines that the legal consequences of Constitutional Court decisions be regulated by law. In addition, the second paragraph of Article 48 of the Constitutional Court Act determines that the legislature must remedy the established unconstitutionality within a period of time determined by the Constitutional Court. In the discussed case, the legislature did not respect the statutory provision based on the constitutional provision, although it is one of the fundamental rules of a state governed by the rule of law (Article 2 of the Constitution) that legality must be respected first by the legislature itself. Such conduct of the legislature is unfortunately not an isolated example. Also in cases No. U-I-104/92, dated 7/7-1994, Official Gazette RS, No. 45/1 and OdlUS III, 86; U-I-42/94, dated 6/10-1994, Official Gazette RS, No. 67/94 and OdlUS III, 97; U-I-48/94, dated 25/5-1995,

Official Gazette RS, št. 37/95 and OdlUS IV, 50; and U-I-47/94, dated 19/1-1995, Official Gazzete, No. 13/95 and OdlUS IV, 4, the legislature did not remedy the established unconstitutionality in six laws reviewed within the period of time determined by the Constitutional Court, and the delays still exist at the time of the present deciding**.** It is thus not an isolated coincidental oversight of this obligation or a minor delay caused by unforeseeable circumstances: the National Assembly clearly already in planning its work does not comply with the rule that it is necessary to remedy an established unconstitutionality within the determined period of time.

The legislature thereby gravely violated the principle of a state governed by the rule of law, as well as the principle of the separation of power (the second paragraph of Article 3 of the Constitution).

Respecting the principle of the separation of powers, namely, entails not only that none of the branches of power interferes with the competencies of another branch, but also that none of them neglects activities which they are obliged to perform within their sphere of activities - especially when such an obligation has been imposed by a judicial decision. The Constitutional Court, in compliance with its constitutional function, is all the more obliged to draw attention to such, in view of the fact that the Constitution, understandably, does not envisage such violations of fundamental rules for exercising power in compliance with the principles of a state governed by the rule of law, and thus also no systemic measures against it.

In the discussed case, the gravity of the unconstitutionality is that much greater because - as follows from the statutory text - the legislature should have at the same time as at the implementation of the Compulsory Composition, Bankruptcy and Liquidation Act, and the challenged Article 51, separately enacted the special rights of employees, and that the delay has already lasted since January 1994, thus at the time of this deciding of the Constitutional Court, already for 22 months, of which it was warned by the submission of the request of the applicant in 1994, by Decision No. U-I-17/94 of the same year (cited above), and the time-limit to remedy the unconstitutionality determined in this decision, which expired on 31 May 1995. The legislature was informed of a new request for the abrogation of Article 51 on 5 September 1995, and did not answer it. On the other hand, special importance is attributed to the unconstitutionality by the fact that it is a case of a legal position regarding which it is highly probable that it may cause difficult to remedy harmful consequences to individuals.

All these signs indicate that it is not simply a delay in adopting a planned law. The Constitutional Court must, on the contrary, in cases in which it encounters the above-mentioned statutory situation on the basis of both requests in the new procedure to review constitutionality, also count upon the possibility that the legislature does not intend to adopt, or will not adopt, the planned and mandated law.

As regards the above-mentioned, the Constitutional Court, upon reviewing a new petition, decided that Article 51 of the Compulsory Composition, Bankruptcy and Liquidation Act on the termination of employment as a measure for financial reorganisation cannot be applied until the statutory provisions on the special rights of employees enter into force, as determined in the second paragraph of Article 8 of the same act. Such decision was rendered on the basis of the *mutatis mutandis* interpretation of the first sentence of Article 43 of the Constitutional Court Act by

applying the interpretation *a maiori ad minus*: according to this provision the Constitutional Court may annul a law, it may, as this is a less grave interference than annulment, also suspend (temporarily excludes it from application) in cases – as in the present case – of endangered constitutional values that cannot be protected in a usual manner. In the present case, the Constitutional Court chose such exceptional manner of deciding because according to the constitutionally established unconstitutionality of a law, the legislature did not do anything to remedy the established unconstitutionality of a statutory regulation which interferes with important constitutional values (especially the principles of a state governed by the rule of law and a social state), and the annulment of a deficient statutory provision is not possible or does not make any sense. Also suspension of a disputable statutory provision will have certain negative consequences (temporary impossibility of the use of one of the methods of compulsory composition), however, respecting the principle of proportionality, the Constitutional Court nevertheless decided on it because in its judgement it is the mildest means by which it can be achieved that constitutional values are respected regarding the persons affected by the established unconstitutional statutory regulation, and at the same time respecting the principle of the separation of powers (Decision, No. U-I-114/95, dated 7/12-1995, Official Gazette RS, No. 8/95 and OdlUS IV, 20).

A case in which the Constitutional Court decided that an intensification of the sanction was not possible:

The petitioner challenged the statutory provision which the Constitutional Court had already established to be inconsistent with the Constitution and determined that the legislature must remedy the established unconstitutionality within a certain period of time. In had already reasoned in the first decision why it decided to render a declaratory decision.

The National Assembly did not remedy the established unconstitutionality within the determined period of time, and therefore the petitioner filed another similar petition in which he proposed that the Constitutional Court annul the statutory provision which it had already established to be inconsistent with the Constitution. In this case, the Constitutional Court decided that the expiry of the period of time in which unconstitutionality should have been remedied cannot by itself influence the Constitutional Court's decision, as all the reasons for which the provisions could not be annuled previously still exist, and thus it dismissed the petition for the review of the constitutionality as unfounded (Order, No. U-I-168/97, dated 3/7-1997, OdlUS VI, 103).

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

Does the statement the existence of legislative omission in a decision of the constitutional court mean the duty of other law-making subjects to properly fill in such gap of legal regulation?

In cases in which in establishing a gap in the law by a declaratory decision the Constitutional Court determines a time-limit in which the legislature should remedy the unconstitutional gap in the law within the meaning of Article 48 of the Constitutional Court Act, the Government has legislative initiative (the second paragraph of Article 2 of the Government of the Republic of Slovenia Act).

Do the acts regulating the activity of these subjects provide how the said subjects implement the constitutional court decision?

No, however, in cases of not respecting Constitutional Court decisions, the legislature violates Article 2 or 3 of the Constitution, respectively.

Do the said subjects promptly react to the decisions of the constitutional court, wherein the legislative omission is stated?

As a general rule, the norm-givers do react promptly, however, every year there remain several cases in which an unconstitutionality established by a Constitutional Court decision has not been remedied.

Are there any cases when these subjects disregarded the decisions of the constitutional court concerning the legislative omission?

Yes. The Constitutional Court draws special attention to such cases in its annual report.

How is it ensured that the said subjects would properly implement such duty? What are the powers and role of the constitutional court in this sphere?

A duty of the legislature to fill a gap in the law follows from Article 2 (the principle of a state governed by the rule of law) and Article 3 of the Constitution (the principle of the separation of powers). In addition, the Constitutional Court Act in the third paragraph of Article 1 determines that the decisions of the Constitutional Court are binding.

If the legislature does not respect a time-limit which the Constitutional Court determined on the basis of Article 48 of the Constitutional Court Act, the Constitutional Court may in the event of the repeated review of such regulation establish that the legislature violated Articles 2 and 3 of the Constitution. If possible, also an intensification of sanctions is allowed (see above).

6. WHEN DRAWING CONCLUSTIONS concerning the experience of the constitutional court of your state regarding consideration of cases by the Constitutional Court related to legislative omission, answer the following questions: is it possible to consider such investigations as an important activity of the constitutional court (explain why), does the constitutional court have sufficient legal instruments of such investigation and how do the constitutional court decisions influence the process of law-making in such cases?

Consideration of such cases falls within the jurisdiction of the Constitutional Court. Every year the Constitutional Court treats several cases of such nature. The established case law of the Constitutional Court is based on Article 48 of the Constitutional Court Act. Before 1991, the Constitutional Court did not have jurisdiction to review the constitutionality of gaps in the law. As follows from the hitherto case law, the existing mechanisms for carrying out such proceedings as a general rule suffice. The positive influence of such constitutional decisions on legislative procedures is undisputable, although the legislature occasionally complies with the intention of such constitutional decisions with a certain delay.

***Note**: If possible, present the statistical data about the considered cases related to legislative omission and their relation with other cases together with the national report.*

The number of cases that involve gaps in the law is small compared to the number of all resolved cases, whereby the Constitutional Court does not have a special register of cases related to the review of the constitutionality of gaps in the law or legislative omissions.