

The Constitutional Court of the Republic of Lithuania

PROBLEMS OF LEGISLATIVE OMISSION IN CONSTITUTIONAL JURISPRUDENCE

Questionnaire

For the XIVth 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.?

A legal gap can be defined as a defect or a lacuna in the existing law (in the written law enacted by existing statutes)

In *Pantelides v. Metaforiki Eteria* (1979) 1 C.L.R. 794, it was held in relation to a statutory enactment which presented a lacuna that the Court was not entitled to read words in it. In the absence of a definition, the term "private motor-vehicles" in issue in that case, had to be interpreted in its ordinary and natural meaning. Therefore the said term, in its ordinary and natural meaning, could not include, motor-vehicles used for commercial purposes and for reward, and particularly could not include the type of motor-vehicles hired to the respondents; therefore, the trial Court wrongly approached the matter; and that, accordingly, its judgment was set aside.

In another case Azinas and The Republic (a recourse in respect of the applicants dismissal from the post of Registrar of Co-operative Societies), although there was provision for the appointment of a Commissioner of Co-operative Development in Law 1/60 (section 4) and applicant was so appointed by letter of the Chairman of Greek Communal Chambers dated 2.12.1960, yet no such provision existed anywhere either for the termination of his services or for dismissal. In the absence of such legislative provision the Court cannot fill the lacuna by correcting a glaring omission in the legislation.

The role of the judiciary is confined to ascertaining from the words that Parliament has approved as expressing its intention what that intention was, and to giving effect to it. Where the meaning of the statutory words is plain and unambiguous, it is not for the Judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient or even unjust or immoral.

It is for Parliament, not for the judiciary, to decide whether any changes should be made to the law as stated in the Acts, and if so, what are the precise limits that ought to be imposed.

In the Mental Patients Law there was no provision regarding persons incapable, by reason of mental disorder, of managing, and administering their property and affairs, who were not subject of confinement. This lacuna was filled by Law 62/70, by the addition of a new Part with the subhead “Administration of the Property and Affairs of Mental Patients not Subject to Confinement”.

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 is the supreme law of the Republic. No provision of the Constitution invalidates laws enacted, acts done or measures adopted by the Republic which are necessitated by the obligations of membership of the European Union, or prevents laws enacted, acts done or measures adopted by the European Union or by the Communities or by institutions thereof, or by bodies competent under the Treaties establishing the Communities, from having the force of law in the Republic. (Article 179)

Part II of our Constitution sets out a broad range of human rights, including all eighteen rights protected by the European Convention and its Protocols. These cover both individual and social rights such as the right to life, prohibition of torture or inhuman or degrading treatment or punishment, prohibition of slavery or forced or compulsory labour, the right to liberty and security of person, the fair and public hearing of civil and criminal trials, the right to privacy, the right to marry, the freedom of thought and expression, the right to property, the right to education and the right to effective remedy. Other rights include the right to a decent existence and social security, the right to work, the right to enter into any contract, the right to form and join trade unions, the right to strike, the right to address written petitions or complaints to the competent authorities for a remedy, and the right of equality before the law. Justice is guaranteed to any person without any direct or indirect discrimination. (Article 28).

Like many modern constitutions, that of the Republic provides for individual duties, such as the duty to contribute to the public burdens (Article 24.1) and the duty to serve a military service (Article 10.3 (b)), in addition to individual rights and liberties.

Legislative, executive and judicial authorities of the Republic are bound to secure within the spheres of their respective competence the efficient application of the provisions relating to fundamental rights and liberties. These rights cannot be regulated or restricted except by a law and for purposes expressly set out in the Constitution, for instance, where security of the Republic, constitutional order, public safety, public order or public health

is threatened. Remedies for the enforcement of the fundamental rights are provided in the Constitution.

“Article 61 of the Constitution provides that the legislative power of the Republic shall be exercised by the House of Representatives in all matters’ The House of Representatives may delegate its power to legislate to other organs or bodies in the Republic within the accepted principles of constitutional law.

¹ In the procedure of preparation of the draft questionnaire, the concept of the legislative omission set forth in the decision of the Constitutional Court of the Republic of Lithuania of 8 August 2006 was followed. The decision is attached to the draft questionnaire. In the said decision, legislative omission is understood as a legal gap prohibited by the Constitution (or any other legal act of higher power). Various aspects of the constitutional concept of the legal gap and legislative omission are revealed in Items 4.3–9.2 of Chapter II of the reasoning part of the said decision.

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.

What is the prevailing concept of the mission to 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 in 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 influence of the decisions of the constitutional court regarding filling in the said legal gaps? Was the naming of the activity of the constitutional court as the "activism", "moderation" and "minimalism" reasoned on the basis of such decisions?

The Constitution as it has been aforesaid is the supreme law of the Republic (Article 179).

It is the duty not only of the Supreme Constitutional Court but of all the courts of the Republic to apply it; and where any provision in the Constitution is clear and unambiguous there is no necessity or duty to refer such matter to the Supreme Constitutional Court.

It is only in cases of ambiguity in any Article of the Constitution that the Supreme Constitutional Court has exclusive jurisdiction to make any interpretation of the Constitution and not of any other statute (see Articles 149 and 180 of the Constitution).

Under section 29(1) of the Courts of Justice Law, 1960 (Law 14/60), every court in the exercise of its civil or criminal jurisdiction shall apply-

"(a) the Constitution of the Republic, the laws made thereunder and any other law becoming applicable by a Court;

(b) the laws saved under Article 188 of the Constitution subject to the conditions provided therein save in so far as other provision has been or shall be made by a law made or becoming applicable under the Constitution

(c) the common law and the doctrines of equity save in so far as other provision has been or shall be made by any law made or becoming applicable under the Constitution or any law saved under paragraph (b) of this section in so far as they are not inconsistent with, or contrary to the constitution."

Article 188, paragraph 1, of the Constitution provides that all laws in force on the date of the coming into operation of the Constitution shall, until amended or repealed, continue in force and shall be *"construed and applied with such modification as may be necessary to bring them into conformity with this Constitution"*.

Paragraph 4 of the same Article provides that -

"Any court in the Republic applying the provisions of any such law which continues in force under paragraph 1 of this Article, shall apply it in relation to any such period, with such modification as may be necessary to bring it into to accord with the provisions of this Constitution including the Transitional Provisions thereof".

The expression "modification" is defined in paragraph 5 of the same Article as including "amendment, adaptation and repeal".

By this express provision in the Constitution, the laws in force in the former Colony of Cyprus were saved, subject to "such modification as may be necessary to bring them into conformity" with the Constitution, and all Courts in the Republic were empowered to apply them accordingly (Article 188. 1 and 4).

Consequently, it was the duty of every court in the Republic in applying the provisions of any law in force on the date of the coming into operation of the Constitution to amend it, adapt it, or repeal it in such a way as to bring it into conformity with the provisions of the Constitution.

The power of adaptation given to the courts, which is a much wider power than that of amendment or repeal, is a power to adapt the law in such a way as not to be repugnant to, or inconsistent with, any of the provisions of the Constitution;

Moreover, the Supreme Court adjudicates on all matters of constitutionality of legislation referred to it by the President of the Republic or arising in any judicial proceedings including complaints that any law or decision of the House of Representatives or the Budget is discriminatory; also on matters of conflict or contrast of power or competence between state organs and questions of interpretation of the Constitution in cases of ambiguity.

Interpretation does, of course, imply in the interpreter a power of choice where differing constructions are possible. But our law requires the Judge to choose the construction which in his judgment best meets the legislative purpose of the enactment.

If the result be unjust but inevitable, the Judge may say so and invite House of Representatives to reconsider its provision. But he must not disregard the statute.

Unpalatable statute law may not be disregarded or rejected, merely because it is unpalatable. Only if a just result can be achieved without violating the legislative purposes of the statute may the Judge select the construction which best suits his idea of what justice requires Parliament makes and unmakes the law. The Judge's duty is to construe and to apply the law, not to change it to meet the Judge's idea of what justice requires.

The Judge must be therefore obedient to the will of Parliament as expressed in its enactments.

The role of the judiciary is confined to ascertaining from the words that Parliament has approved as expressing its intention what that intention was, and to giving effect to it. Where the meaning of the statutory words is plain and unambiguous, it is not for the Judges to invent fancied ambiguities as an excuse for failing to give effect to its plain meaning because they themselves consider that the consequences of doing so would be inexpedient or even unjust or immoral.

It should be noted here that since the enactment of the Administration of Justice (Miscellaneous Provisions) Law, 1964 (Law 33 of 1964) the powers and jurisdiction of the Supreme Constitutional Court and the High Court are vested in and are being exercised by the Supreme Court. Thus the division in the fields of jurisdictions of the Supreme Constitutional Court on the one hand and of the High court does no longer exist in this country.

Nevertheless the procedure applicable to the institution of a recourse before the Supreme Constitutional Court and pleadings relating thereto, have been retained and have to be followed in the case of a recourse under Article 146, before the present Supreme Court

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.

Present the model of the hierarchical pyramid of your national legal acts (for example, in the Republic of Lithuania no national legal acts may be in conflict with the Constitution, while laws and other legal acts adopted by the Seimas or acts of the Government or the President of the Republic may not be in conflict with constitutional laws etc). 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?

Constitutional provisions are the paramount law and supersede and prevail every any other legal provision or regulation inconsistent with them.

In a modern society with perplexed needs and many problems it is not only permissible but it has been a common practice for the legislature to enact a law and leave the particulars for its implementation and carrying out of the Law to be supplemented by subordinate legislation. Such a course is presumed to be included in the will of the people as expressed through the particular law of its elected representatives—(*The Police v. Hondrou*, 3 R.S.C.C. 82). The subordinate legislation must not be beyond the bounds of the enabling enactment. The subordinate legislation, in order to be valid, must be therefore intra vires the statute which authorised the making of it, its content should always be within the ambit of the enabling enactment.

International treaties, conventions bilateral agreements concluded by the Council of Ministers acquire the force of law once approved by a law made by the House of Representatives and followed their publication in the official gazette;. They have superior force to any municipal law on condition that such treaties, conventions and agreements are applied by the other party thereto.

They override any provisions of municipal law to the extent that it conflicts with any of them.

Article 169 of our Constitution provides as follows

Subject to the provisions of Article 50 and paragraph 3 of Article 57-

(1) every international agreement with a foreign State or any International Organization relating to commercial matters, economic co-operation (including payments and credit) and modus vivendi shall be concluded under a decision of the Council of Ministers;

(2) any other treaty, convention or international agreement shall be negotiated and signed under a decision of the Council of Ministers and shall only be operative and binding on the Republic when approved by a law made by the House of Representatives whereupon it shall be concluded

(3) treaties, conventions and agreements concluded in accordance with the foregoing provisions of this Article shall have, as from their publication in the official Gazette of the Republic, superior force to any municipal law on condition that such treaties, conventions and agreements are applied by the other party thereto.

Ratification by the legislature incorporates the treaty or convention, as the case may be, into domestic law by virtue of the legislative power vested in the House of Representatives (Article 61)

The Convention for example on the Legal Status of Children Born out of Wedlock which was ratified by Law 50/79 and validly concluded under Art. 169 of the Constitution, acquired superior force to any municipal law and, therefore, under Article 9 of the Convention, a child born out of wedlock has the same right of succession in the estate of his father and his father's family, as if he had been born in wedlock, provided that a paternal affiliation is established, pursuant to Articles 3-5 of the Convention. Consequently, it supersedes the relevant provisions of Cap. 195 and Cap. 278, which are incompatible with it. It must be pointed out that Law 50/79 did not amend or repeal the

aforementioned provisions of Cap 195 and Cap-278, but vested Art. 9 with superior force enabling it to supersede such provisions.

It has to be noted that statutes may not be directly challenged by persons whose interests are affected by their provisions. Legislative provisions may be declared unconstitutional by a competent court only incidentally, where the legality of an administrative act stemming from such a law is challenged before it (incidental control).

As far as European law is concerned, It has been ruled several times by the European Court of Justice that EU law is superior to national laws.

Recently a judgment was issued by the Cyprus Supreme Court, which ruled that the Constitution of Cyprus is superior to European law.

The judgment was issued following an appeal by the Attorney-General against a decision by a first instance court which had denied that a Framework decision on the European Arrest Warrant had supremacy over the Constitution of Cyprus. Further to this development, the government has initiated a procedure for amending the Constitution, in order to establish the supremacy of the European *acquis communautaire* over the Constitution of Cyprus.

Our Constitution has been therefore amended giving superiority to the European Law. A new clause has been inserted which effectively exempts EU law, or EU law requirements from being compliant with the constitution (although they generally are, anyway. This clause provides in essence that *no provision of the Constitution invalidates laws enacted, acts done or measures adopted by the Republic which are necessitated by the obligations of membership of the European Union, or prevents laws enacted, acts done or measures adopted by the European Union or by the Communities or by institutions thereof, or by bodies competent under the Treaties establishing the Communities, from having the force of law in the Republic.*

Since Cyprus's membership of the *European Union*, national courts could refuse to apply legislation that contravened EU law. European union Law confers rights and obligations not only on European Union institutions and member states but also on citizens and therefore it is possible for citizens to take actions concerning breaches of European Union law before national courts.

The compatibility of the legislation of Cyprus for the taxation of "imported" second-hand cars with Article 90 of the EC Treaty was considered for the first time by the Supreme Court of Cyprus in the *Case 1161/2004 Trifillis v The Customs Excise Department*. The Supreme Court of Cyprus accepted the submissions of the applicant and declared that the legislation of Cyprus is incompatible with Article 90 of the EC Treaty.

Where a national court is required to apply provisions of community law in a case before it, it may stay the proceedings and ask the Court of Justice for clarification as to the validity of the Community instrument at issue and or the interpretation of the instrument and of the Treaties. The objective of this preliminary ruling procedure is to secure a uniform interpretation of community law throughout the European Union. In Cyprus the obligation to make reference to the ECJ regarding questions of the validity of the applicable secondary Community law rests with the Supreme Court of Cyprus.

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, sub statutory 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 control? Does the constitution of your country establish the *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 procedures for the investigation of legislative omission?

The Supreme Constitutional Court is modelled on similar judicial institutions existing in many European countries, and it is a Court exercising constitutional and administrative jurisdiction.

The jurisdiction of the Supreme Constitutional Court is laid down in the Constitution. The paramount consideration when exercising its said jurisdiction is how best to serve the interests of justice and at the same time to perform as effectively as possible its mission under the Constitution.

There is no *expressis verbis* consolidation in the constitution concerning the jurisdiction of our constitutional court to investigate and assess the constitutionality of legal gaps.

The President and the Vice President of the Republic have been entrusted by the Constitution with a right of recourse to the Supreme Constitutional court that any law or decision of the House of Representatives or any specified provision thereof is repugnant or inconsistent with any provisions of the Constitution. In this respect recourse should be instituted before promulgation of the law or decision in question. (Article 140)

If the Supreme Constitutional Court is of the opinion that such law or any provision thereof is repugnant or inconsistent with any provisions of the Constitution such law or such provision thereof shall not be promulgated. This is an example of judicial *a priori control* of the legislature (preventing it from entering into force before a review of its constitutionality) at the instance of the President and Vice president of the Republic.

An administrative act may have its authorization or basis in a specific legislative enactment. Such an administrative act may be the subject of a recourse under Article 146 of our Constitution. .Provided however that such an act is not performed in excess or abuse of powers it can only be declared to be invalid if it were to be established that the

relevant legislation on which it is based or from which it springs is itself invalid or unconstitutional. A declaration of unconstitutionality of a legislative provision entails also the annulment or the invalidation of a particular administrative act or decision stemming from such legislation.

It should be noted here that the said Article 146 of the constitution can be invoked to review an administrative decision, an act or omission, in the domain only of public and not of private law.

Legislative and judicial functions are not within the province of Article 146 of the Constitution.

It should be also noted that Article 179 of the Constitution contains mandatory provisions to the effect that no act or omission of any organ authority or person in the Republic exercising executive power or any administrative function shall be in any way repugnant to, or inconsistent with, any of the provisions of the constitution or invalidate laws enacted, acts done or measures adopted by the Republic which are necessitated by the obligations of membership of the European Union, or prevents laws enacted, acts done or measures adopted by the European Union or by the Communities or by institutions thereof, or by bodies competent under the Treaties establishing the Communities, from having the force of law in the Republic.

Again it has to be noted that it is for the House of Representatives, not for the judiciary, to decide whether any changes should be made to laws as stated in statutes, and if so, what are the precise limits that ought to be imposed.

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. 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.

It is only in cases of ambiguity in any Article of the Constitution that the Supreme Constitutional Court has exclusive jurisdiction to make any interpretation of the Constitution and not of any other statute (see Articles 149 and 180 of the Constitution).

At first sight, the text of Article 11.6 of the Constitution, when considered only from the point of view of its wording, might be treated as supporting the view that any renewal of the remand orders, should have been made by the same Judge. In view of the fact though that every provision of the Constitution has to be construed in a manner rendering it workable, and in view, also, of the fact that many combinations of circumstances might render it impossible to take a suspect for a renewal of his remand in custody, before the same Judge who decided originally concerning the need to detain him, it has been held that Article 11.6 of the Constitution, when applied having in mind not only its strict letter but, also, its substance, does not exclude the renewal by a Judge of a remand order which was earlier made by another Judge (*Christos Evangevrahimis and others*, (1973) 2 C.L.R. 222).

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

The 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? Does the

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

The jurisdiction of the Supreme Constitutional Court is to determine whether a law in question is constitutional or unconstitutional, and not to lay down what the law ought to be or to fill a lacuna. It is not the duty of any court to fill any legal lacunae.

The principle of separation of State powers is a central feature of our Constitution. The application of the doctrine requires, subject to express exceptions laid down in the Constitution, that each of the three coordinate powers of the State, namely, the Legislative, Executive and Judicial, should operate separately and independently the one from the other.

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?

Paragraph 1 of Article 146 of the Constitution reads as follows :—

'The Supreme Constitutional Court shall have exclusive jurisdiction to adjudicate finally on a recourse made to it on a complaint that a decision, an act or omission of any organ, authority or person, exercising any executive or administrative authority is contrary to any of the provisions of this Constitution or of any law or is made in excess or in abuse of powers vested in such organ or authority or person'.

It is well settled that only final administrative executory acts or decisions could be made the subject matter of a recourse under Article 146 of the Constitution.

In accordance with paragraph 2 of Article 146 , a recourse may be made by a person whose existing legitimate interest, (which he has either as a person or by virtue of being a member of a Community), is adversely and directly affected by such decision or act or omission.

Under paragraph 3 of Article 146 of the Constitution a recourse shall be made within seventy - five days from the date when the decision or act was published or, if not published and in the case of an omission, when it came to the knowledge of the person making the recourse.

The provisions of paragraph 3 of Article 146 are mandatory and the Court, therefore, is always watchful to enquire whether recourse is filed in time, in view of the said provisions.

.Article 146.4 provides that:

" Upon such a recourse the Court may, by its decision—(a) confirm, either in whole or in part, such decision or act or omission; or (b) declare, either in whole or in part, such decision or act to be null and void and of no effect whatsoever; or (c) declare that such omission, either in whole or in part ought not to have been made and that whatever has been omitted should have been performed."

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 of the fact that there is a legal gap (legislative omission) in the said law or act? What part of the petitions received at the constitutional court is comprised of the petitions, wherein the incompletion of the act with the constitution is related to the legislative omission? 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? 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. Are they established in the law which regulates the activity of the constitutional court or are they formulated in the constitutional jurisprudence?

It is clear from the wording of paragraph 1 of Article 146 that acts of legislative nature do not come within its ambit.

Therefore the word omission as envisaged in paragraph 1 of article 146 means an omission of administration and not a legislative omission.

Thus an alleged legislative omission cannot be the subject-matter of a recourse under Article 146 of our constitution..

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

Does the constitutional court begin the investigation of the legislative omission ex officio of 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.

Non applicable in our judicial system, as acts of legislative nature or legislative omissions cannot become the subject-matter of a recourse under Article 146 of our constitution. No legal basis exists for declaring a national law invalid in abstracto on the ground of a conflict with constitution or community law.

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, sub statutory acts, etc.)? 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 of 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 sub statutory act includes only part of said delegation?

Not applicable in our judicial system, as acts of legislative nature or legislative omissions cannot become the subject-matter of recourse under Article 146, nor subordinate legislation.

Subordinate regulations, by their very nature do not constitute an executory administrative act but are regulatory acts of legislative content and therefore of a general application.

In effect delegated legislation cannot be challenged by a recourse under Article 146 of the Constitution.

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.)?

As it was abovementioned , in our judicial system a judge does not make law .

The Court *does refuse* to consider and assess the constitutionality of the absence of a legal regulation. Such matter is not within its jurisdiction.

Our Constitutional Court does not have the power to compel or require the government to consider amending a declared unconstitutional provision. The ultimate decision on the content of legislation remains vested in Parliament.

Upon recourse under Article 146, an administrative or an executive act, omission or decision will be annulled if it contravenes any provisions of the Constitution.

Issues though of constitutionality are not normally determined unless it is absolutely necessary to a decision of a case and unless the constitutionality of a law is specifically challenged. The Court will not examine or determine such questions in abstracto. A national act which conflicts with the Constitution or Community law could simply be set aside in a concrete dispute.

In considering the question of constitutionality of a statute the Court is guided by certain well established principles governing the exercise of judicial control of legislative enactments.

A rule of precautionary nature is that no act or legislation will be declared void except in a very clear case or unless the act is unconstitutional beyond all reasonable doubt.

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

No "related nature" investigation in constitutional justice cases.

Issues of constitutionality are not normally determined unless it is absolutely necessary to a decision of a case and unless the constitutionality of a law is specifically challenged. The Court will not examine or determine such questions in abstracto. A national act which conflicts with the Constitution or Community law could simply be set aside in a concrete dispute. It should be noted that the State, legal entities of the public sector and local authorities are liable for acts or omissions of their organs which, although in compliance with a formally adopted domestic law, contravene a European Community law, provided that the adopted national law infringes a person's right directly protected by the EU law.

The Constitutional Court does not abrogate the law which it finds unconstitutional, but only *declares* that such law or a provision within such law is not in conformity with the constitution: Such provisions *declared* unconstitutional remain in full force till substituted by new provisions enacted by the Parliament.

Our Constitutional Court does not have the power to compel or require the government to consider amending the declared unconstitutional provision. The ultimate decision on the content of legislation remains vested in Parliament.

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

4.1. Peculiarities of the investigation of legislative omission.

The peculiarities of the investigation of the legislative omission while implementing a priori control and a *posteriori* control. 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.? 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. The peculiarities of the investigation of the legislative omission in the laws and other acts which regulate the organisation and activity of public power. The peculiarities of investigation and assessment of legislative omission in substantive and procedural law. The particularity of investigation of legislative omission in private and public law. The particularity of investigation of legislative omission in the verification of the constitutionality of international agreements. When answering these questions, indicate the constitutional justice cases with more typical examples.

As it has been previously mentioned the President and the Vice President of the Republic have been entrusted by the Constitution with a right of recourse to the Supreme Constitutional court that any law or decision of the House of Representatives or any specified provision thereof is repugnant or inconsistent with any provisions of the Constitution . In this respect a recourse should be instituted before promulgation of the law or decision in question. (Article 140).

A priori control is limited as stated above. We have mainly a posteriori and concrete control, not abstract. There are no «peculiarities»

If the Supreme Constitutional Court is of the opinion that such law or any provision thereof is repugnant or inconsistent with any provisions of the Constitution such law or such provision thereof shall not be promulgated. This is an example of judicial *a priori control* of the legislature (preventing it from entering into force before a review of its constitutionality).at the instance of the President and Vice president of the Republic

Again, it has to be noted that statutes may not be directly challenged by persons whose interests are affected by their provision. Legislative provision may be declared unconstitutional only incidentally, where the legality of an administrative act stemming from such a law is challenged (incidental control). When annulling an administrative decision on the ground that it is based on certain legislative provisions declared to be

unconstitutional, those provisions are not and cannot be annulled by the Court acting under Article 146 of the Constitution. They remain in force until repealed or amended by the ordinary legislative machinery.

It is the constitutionality of a statute applied in a given case that the Constitutional Court reviews. The Constitutional Court can remedy the petitioner's grievance only inasmuch as it prohibits the application in the given case of the statute judged unconstitutional.

It is not therefore within the jurisdiction or competence of the Constitutional Court to annul laws on the ground of unconstitutionality.

4.2. Establishment of the existence of legislative 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. Does the constitutional court investigate only the disputed provisions of a law or other legal act? 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)? 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)? Does the constitutional court, when identifying the legislative omission, investigate and assess only the content and form of the legal regulation or also the practise of the implementation of the legal regulation?

Again, it has to be noted that statutes may not be directly challenged by persons whose interests are affected by their provision. Legislative provision may be declared unconstitutional only incidentally, where the legality of an administrative act stemming

from such a law is challenged (incidental control). When annulling an administrative decision on the ground that it is based on certain legislative provisions declared to be unconstitutional, those provisions are not and cannot be annulled by the Court acting under Article 146 of the Constitution. They remain in force until repealed or amended by the ordinary legislative machinery.

It is the constitutionality of a statute applied in a given case that the Constitutional Court reviews. The Constitutional Court can remedy the petitioner's grievance only inasmuch as it prohibits the application in the given case of the statute judged unconstitutional.

It is not therefore within the jurisdiction or competence of the Constitutional Court to annul laws on the ground of unconstitutionality.

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? 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?

No methodology as such of revelation of legislative omission exists.

An administrative or an executive act or decision which contravenes any of the provisions of our Constitution or which is contrary to the provisions of any law will on a recourse under Article 146 be declared null and void. No act of legislation will be

declared void except in a very clear case or unless the act is unconstitutional beyond reasonable doubt.

In addition to legal proceedings that can be brought directly under Article 146 before the Supreme court of Cyprus, for the specific purpose of obtaining a judgement annulling a decision act or omission of the state, a party to judicial proceedings whether civil or criminal or on appeal can raise as an issue a question of unconstitutionality of the provisions of law which are contrary to human rights provisions of the Constitution and also a question whether it is contrary to the provisions of any convention ratified by the Republic . In this context reference to the case law of the European court of human rights, the European court of justice and other constitutional and supreme courts of other countries can be made.

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?

No additional measures.

Our constitutional Court does not have the power to compel or require the Legislature to consider amending a declared unconstitutional provision. The ultimate decision on the content of legislation remains vested in the House of Representatives.

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

Is a gap of 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)?

Does the constitutional court set forth in the reasoning part of its decision how the legal regulation is to be understood so that it would not include the legislative omission, by this essentially changing the existing legal regulation (actually by supplementing it)?

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?

Various articles of the Constitution have been judicially considered in numerous cases.

A court can only interfere with the validity of legislation if the legislative enactment concerned is clearly unreasonable and arbitrary.

In the case Argiris Mikrommatis and the Republic (Minister of Finance and Another)

2 R.S.C.C., 125, and in reference to Article 28, it was said that the term 'equal before the law' in paragraph 1 of Article 28 does not convey the notion of exact arithmetical equality but it safeguards only against arbitrary differentiations and does not exclude reasonable distinctions which have to be made in view of the intrinsic nature of things. Likewise, the term 'discrimination' in paragraph 2 of Article 28 does not exclude reasonable distinctions. Classification is for government or legislative judgment. It becomes a judicial question only when it has been drawn and is then subjected to the relevant constitutional tests. Where objects, persons or transactions essentially dissimilar are treated uniformly, discrimination may result.

Under Article 146 the Court can deal with the constitutionality of an enactment only to the extent to which such issue is relevant to the validity of the administrative act, decision or omission, which is the subject-matter of the recourse; but it cannot decree the unconstitutionality of an enactment as such.

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

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;**
- b) recognizes the provisions of the law (other legal act) as being in conflict with the constitution; c) leaves the act (provisions thereof) to be in effect and at the same time recognizes the failure to act by the legislator (other subject of law-making) as unconstitutional by specifying the time period in which, under the constitution, the obligatory legal regulation must be established;**
- 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);**
- 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;**
- 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;**
- g) states the existence of the gap in the legal regulation without drawing direct conclusions or establishing any assignments;**
- h) applies other models of assessment of legislative omission.**

Our constitutional court might declare a legislative provision as being in conflict with the constitution. It might recognize a certain legislative omission as unconstitutional but it leaves the duty on the legislator to fill in a legal gap.

Provisions declared unconstitutional remain in full force till substituted by new provisions enacted by the the House of Representatives. Our constitutional Court does not have the power to compel or require the Legislature to consider amending a declared unconstitutional provision. The ultimate decision on the content of legislation remains vested in the House of Representatives.

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 peculiarities of decisions adopted in such cases. When answering this question, point out the constitutional justice cases with more typical examples.

Non applicable.

As it was abovementioned under Article 146, the Constitutional Court can deal with the constitutionality of an enactment only to the extent to which such issue is relevant to the validity of the administrative act, decision or omission, which is the subject-matter of a recourse; but it cannot decree the unconstitutionality of an enactment as such.

Instances of contravention of constitutional provisions may be given here.

- It has been held that Rule 32 of the Trade Marks Rules 1951 is unconstitutional, as being contrary to Article 30.1 of the Constitution and contrary to the rules of natural justice, because the Registrar of Trade Marks becomes thereunder a litigant and a judge in his own cause and because he constitutes in a way a judicial committee or exceptional Court.

Rule 32 reads as follows :

"If the Registrar objects to the application (for registration) he shall inform the applicant of the objections in writing and unless within two months the applicant applies for a hearing or makes a considered reply in writing to those objections he shall be deemed to have withdrawn his application."

Article 30.1 of the Constitution provides :

"No person shall be denied access to the Court assigned to him by or under this Constitution. The establishment of judicial committees or exceptional Courts under any name whatsoever is prohibited."

- Articles 6 and 28 of our Constitution provide subject to certain conditions and Qualifications against discriminatory treatment and for equality before the Law .On a recourse under Article 146, the Court held that in addition of the wife's labour to that of her husband for purposes of income tax amounted to discrimination of sex and therefore was contrary to the Constitution.

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. 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.

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

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. "Revival" of previously effective legal regulation. Other models of the decision are chosen (describe them)

It is not within the jurisdiction or competence of the Court to annul laws on the ground of unconstitutionality or to give decisions on constitutionality of general application, or to fill any gaps by the declaration of pieces of legislation as unconstitutional.

So far as the lower Courts are concerned, all questions of alleged unconstitutionality should be treated as issues of Law in proceedings, subject to revision on appeal in due course.

No act of legislation will be declared *void* except in a very clear case or unless the act is unconstitutional beyond all reasonable doubt.

It is a cardinal principle that if at all possible the Courts will construe the statute so as to bring it within the law of the Constitution.

The judicial power does not extend to the determination of *abstract* questions: It is not the habit of the Court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case:

The Court will not formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied. In cases involving statutes, portions of which are valid and other portions invalid, the Courts will separate the valid from the invalid and throw out only the latter unless such portions are inextricably connected:

Under Article 146 the Constitutional Court can deal with the constitutionality of an enactment only to the extent to which such issue is relevant to the validity of the

administrative act, decision or omission, which is the subject-matter of a recourse; but it cannot decree the unconstitutionality of an enactment as such.

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? Does the regulation of the parliament provide how the questions are considered concerning the implementation of the constitutional court decisions? 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? How is it ensured that the parliament would implement the duty which has appeared due to the decision of the constitutional court? What are the powers and role of the constitutional court in this sphere?

Our constitutional Court does not have the power to compel or require the Legislature to consider amending a declared unconstitutional provision. The ultimate decision whether it will promptly respond to such declared unconstitutional legislation and reformulate the content of such legislation remains solely vested in the House of Representatives.

A country with a Constitution likes ours, where there is a strict separation of powers, the legislative power is solely exercised by the House of Representatives. This, however, does not prevent the House of Representatives from delegating its power to legislate in respect of prescribing the form and manner of, and the making of other detailed provisions for, the carrying into effect and applying the particular provisions within the framework laid down by such law.

Laws and decisions of the House of Representatives shall be adopted by a simple majority of the members of the House present. They shall be promulgated within 15 days if the President does not return them for reconsideration. The Constitutional Law, with the exception of its articles contained in Annex III, may be modified by a majority comprising at least two-thirds of its members .

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? Do the acts regulating the activity of these subjects provide how the said subjects implement the constitutional court decisions? Do the said subjects promptly react to the decisions of the constitutional court, wherein the legislative omission is stated? Are there any cases when these subjects disregarded the decisions of the constitutional court concerning the legislative omission? 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?

See our answers to questions 5.1 and 4.2 above

6. WHEN DRAWING CONCLUSIONS 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?

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.

Non- applicable

DRAWING CONCLUSIONS in regard to the exercise of judicial control of legislative enactments in Cyprus.

Legislative, executive and judicial authorities of the Republic are bound to secure within the spheres of their respective competence the efficient application of the provisions relating to fundamental rights and liberties. These rights cannot be regulated or restricted except by a law and for purposes expressly set out in the Constitution, for instance, where security of the Republic, constitutional order, public safety, public order or public health is threatened.

In considering a question of constitutionality of a statute, the Supreme Court of Cyprus has to be guided by certain well-established principles governing the exercise of judicial control of legislative enactments.

- no act of legislation will be declared void except in a very clear case, or unless the act is unconstitutional beyond all reasonable doubt. In other words a Law is presumed to be constitutional until proved otherwise “beyond reasonable doubt”.
- The Courts are concerned only with the constitutionality of legislation and not with its motives, policy or wisdom, or with its concurrence with natural justice, fundamental principles of government or spirit of the Constitution.

- It is a cardinal principle that if at all possible the Courts will construe the statute so as to bring it within the law of the Constitution.
- The judicial power does not extend to the determination of abstract questions, viz., the Courts will not decide questions of a constitutional nature unless absolutely necessary to a decision of the case.
- In cases involving statutes, portions of which are valid and other portions invalid, the Courts will separate the valid from the invalid and throw out only the latter unless such portions are inextricably connected.