PROBLEMS OF LEGISLATIVE OMISSION IN CONSTITUTIONAL JURISPRUDENCE

QUESTIONNAIRE FOR THE XIVth CONGRESS OF THE CONFERENCE OF EUROPEAN CONSTITUTIONAL COURTS

National Report

Constitutional Court of the
Czech Republic

Brno, 2007

1. PROBLEMATIC OF LEGAL GAPS IN THE SCIENTIFIC LEGAL DOCTRINE

1.1. The concept of the legal gap

Legal academic writing in the Czech Republic has not been, with one exception[1], concerned with the issue of legal gapss, and hence has not considered why those gaps have occurred. It is, however, natural that legal practitioners would comment on any areas that have been untreated or omitted by the legislator. These comments, however, do not contain a descriptive analysis of a "legal gap" as a phenomenon of legal theory, but rather perceive it only on the second level, as a stated fact[2].

1.2. The concept of legislative omission

With a reference to point 1.1., we must state that the provisions of Chapter Two of the Constitutional Act No. 1/1993 Coll., the Constitution of the Czech Republic, as amended (hereinafter referred to as the "Constitution"), which regulates the position of the legislative branch of power, does not regulate the subject of the decision-making of legislative assemblies, not even in the form of an abstract requirement as to the completeness, entirety, or comprehensiveness of the legal regulation adopted. Nor does ordinary law contain any such requirement that there would be no "legal gaps"; and the Constitutional Court in its decision has pointed to the insufficient legal treatment of the regulation of legislative practice[3]. The only regulation that at least partially treats the content and form of drafting legal regulations are the Government's Legislative Rules, which are not generally binding, and are mandatory only for ministries and other bodies of the central public administration[4].

The Czech Republic's legal order – *de lege lata* – not only does not provide a detailed analysis of "legal gaps", but does not even use that term. The consequence of that fact is that there is no provision of a generally binding law which would explicitly prohibit the occurrence of gaps in laws, or mandate a certain entity to fill in that hole.

Given the minimal legal usage of the term "legal gap", the prevailing theoretical concept of a legislative omission, as a "legal gap", is hard to define. Practically the only definition available in legal literature was given by V. Šimíček: "*An omission of the lawgiver can be defined as the unconstitutional inactivity of the lawgiver in a situation where the lawgiver is obliged to adopt a certain legal regulation, but fails to do so*."[5] Aside from the opinions of specialists, the Constitutional Court has also spoken of legislators' omissions, when it ruled that *"under certain conditions, the consequences of a gap (missing legal regulation) are unconstitutional, primarily in cases when the lawgiver decides to regulate a certain area, expresses that intention in the law, but fails to enact the foreseen regulation. The same conclusion applies in a situation when the Parliament has adopted the declared regulation, but it was abolished because it failed to meet constitutional criteria, and the legislator has not adopted a constitutionally conforming replacement, in spite of the Constitutional Court having given it a sufficient time-period"*[6].

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[1] Šimíček, V.: Opomenutí zákonodárce jako porušení základních práv, in Deset let Listiny základních práv a svobod v právním řádu České republiky a Slovenské republiky. Eds. B. Dančák, V. Šimíček, Brno 2001, p. 144-159

[2] E.g., Spáčil, J.: Může oprávněný držitel převést vlastnictví k věcí?, Právní rozhledy, 9/2000, or Kubišová, D.: Advokát jako správce konkurzní podstaty?, Bulletin Advokacie, 2/2002

[3] Decision Ref. No. Pl.ÚS 23/04, published under No. 331/2005 Coll.

[4] Art. 1 (1) of the Government's Legislative Rules (Government Resolution of 19 March 1998, No. 188)

[5] Sub. footnote 1)

[6] See Decision Ref. No. Pl. ÚS 20/05, published under No. 252/2006 Coll., for more, also see Decision Ref. No. Pl. ÚS 36/01, published under No. 403/2002 Coll.

1.3. The concepts of the Constitutional Court or the corresponding institution which implements the constitutional control, which performs constitutional control as a the positive or negative legislator

The Czech Republic's Constitutional Court is based on the principles of specialised and concentrated constitutional justice: specialised, because the authority to review the constitutionality of laws is not vested in any other public authority in the country; and concentrated, because it is an exclusive and solitary judicial body, as there is only one Constitutional Court. The basic foundation for a normative study of the Constitutional Court is Art. 83 of the Constitution, which stipulates that: "The Constitutional Court is a judicial body for protecting constitutionality." Furthermore, it is evident from the Constitution that the Constitutional Court is a judicial-type of body, but that it stands autonomously outside of the general court system, and, as the Constitutional Court has emphasised many times, neither is it another appellate level, nor is its job to make determinations concerning ordinary law, because primarily, it is a body for protecting constitutionality. As a judicial body, it does decide according to judicial methods, in line with formally prescribed procedural rules, but the only referential framework for its decision are the norms and principles of Constitutional Law, and qualified international treaties.

According to Art. 87 (1) (a) and (b) of the Constitution, the Constitutional Court may render decisions striking down laws or their individual provisions should they be in contradiction with the constitutional order or law. The constitutional order does not empower the Constitutional Court to create law, and hence it is perceived in the Czech Republic as a negative law-maker, i.e., a body entitled to abolish legal regulations, or their parts, that are in conflict with the above-mentioned norms[7]. The Constitutional Court itself has espoused the role of a negative lawmaker many times[8], and is perceived to be such, even in professional debates[9]. Although it fully accents the division of roles among the various branches of power in a rule-of-law state, in its case law, it does not see its role as the negative lawmaker as being peremptory, out of which it definitely cannot step. If providing protection to violated fundamental rights and freedoms so requires, the Constitutional Court need not limit itself to that role.[10]

The influence of the Constitutional Court's jurisprudence on lawmaking is then realised primarily on the level of the dichotomic relation of a "positive and negative legislator". When the Constitutional Court annuls a particular statute or its part, it often leaves clear legislative room for the lawmaker to enact a regulation which will conform to the Constitution[11]. In doing so, the lawmaker must proceed in such a way as to replace the

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[7] De facto, the Parliament is also a negative lawgiver, because, in the light of this argumentation, the Parliament is also vested with the power to annul laws (albeit its own).

[8] E.g., in Decision Ref. No. Pl. ÚS 42/03, published under No. 280/2006 Coll.; in Decision Ref. No. Pl. ÚS 34/03, published under No. 49/2007 Coll., in Decision Ref. No. Pl. ÚS 2/02, published under No. 278/2004 Coll., in Decision Ref. No. Pl. ÚS 41/02, published under No. 98/2004 Coll., and in Decision Ref. No. Pl. ÚS 21/01, published under No. 98/2004 Coll.

[9] E.g., Filip, J., Holländer, P., Šimíček, V.: Zákon o Ústavním soudu. Komentář, Prague, C.H.BECK, 2001, p. 226 – 289; or Pejšek, V: Nájemné z bytu ve světle aktuální judikatury, Právní rádce, 6/2006, p. 19

[10] Pl. ÚS 20/05, published under No. 252/2006 Coll.: "*Given these facts, the Constitutional Court cannot, acting in the noted role of the protector of constitutionality, restrict its function to being a mere "negative" lawmaker, and must, in order that the branches of power characteristic for a state of law based on respect for the rights and freedoms of a man and citizen (Art. 1 (1) of the Constitution), create room for observing fundamental rights and freedoms.*"

[11] A typical example is Decision Ref. No. pl. ÚS 16/99 published under No. 276/2001 Coll., the rationale of which says: *"... The Constitutional Court is aware of the legislative difficulty of addressing the constitutional deficits described above; yet, on the other hand, it is obliged to note that it has pointed to the unconstitutionality of the sub-issues in a number of its panel as well as plenary decisions, ... Hence, having considered all of the*

abolished norm by a norm with a wording that would comply with the derogation decision, within the bounds set out by the Constitutional Court.

In Art. 89 (2), the Constitution stipulates that: *"Enforceable decisions of the Constitutional Court are binding on all authorities and persons"*, which means that they are binding upon both houses of the Parliament. In theory, however, there are two streams [of interpretation], each of which understands the word "decision" differently. The first[12] claims that the word "decision" only means the actual statement of the Court's decision, which is biding *erga omnes* in all cases, whereas the rationale is only binding for the Constitutional Court for its own precedential value; however, these opinions are refuted not only by the other interpretative stream[13], but also by the settled jurisprudence of the Constitutional Court[14] regarding this issue. In its oversight of norms, the rationales of its decisions state even the so-called "supporting reasons" which led the Court to its decision, on which it built its argumentation, and which should be followed. The Constitutional Court said the following with respect to "supporting reasons"[15]: *"The significance of emphasising "supporting reasons" is enhanced in cases when the regulation of the ordinary law of an issue assessed is not clear, even following the abolition of a statutory provision which is in violation of the constitutional order. That applies, above all, in cases when, even following the abolition of the statutory regulation, public authorities might apply the law in violation of the principles that led to the abolition of the statutory provision in the first place. That is why the Constitutional Court included, in the statement part of its decision, the fundamental constitutional principle (or, more precisely, its interpretative argumentation), which arises from a group of supporting reasons leading to a decision to propose the abolition of a statutory provision."*

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

In the national legal order of the Czech Republic, there is a document bearing supreme legal force, the Constitution of the Czech Republic, which defines the basic qualities and values by which the Czech Republic is governed and which it espouses. That does not, however, exhaust the list of national legal norms that are over the law. The Constitution, in its Art. 112 (1) defines the constitutional order, which comprises: *The Constitution, the Charter of Fundamental Rights and Basic Freedoms, constitutional acts adopted pursuant to this Constitution and constitutional acts of the National Assembly of the Czechoslovak Republic, the Federal Assembly of the Czechoslovak Socialist Republic, and of the Czech National Council which regulate the state borders of the Czech Republic, and constitutional acts of the Czech National Council adopted after 6 June 1992*. Constitutional Court justices are bound by that constitutional order in their decision-making[16]. The constitutional order constitutes the set of all of the above-mentioned constitutional acts.

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appeals it has made in the past to the executive and legislative powers, and having noted the state of work on the reform of the administrative justice system, it has decided to postpone the executibility of the decision striking down...".

[12] Mikule, V. – Sládeček, V.- O závaznosti rozhodnutí Ústavního soudu, Bulletin Advokacie, 8/1995, p. 35 ff; or Sládeček, V.: Parlament České republiky a Ústavní soud: zkušenosti uplynulých let, in Sborník – Deset let Ústavy České republiky, Prague, Eurolex Bohemia, 2003, p. 287 ff.

[13] Filip, J. - Holländer, P. - Šimíček, V.: ibid, p. 286 - 287

[14] Decision Ref. No. III. ÚS 200/2000; or the Decision in Pl. ÚS 2/03, published under No. 84/2003 Coll. ;

[15] Decision Ref. No. Pl. ÚS 45/04 published under No. 239/2005 Coll.

[16] Art. 88 (2) of the Constitution

In its case law, the Constitutional Court continuously points to the need to refuse an exclusive reading of the Constitution (i.e., the constitutional order) through the eyes of normativism, and, on the contrary, has repeatedly emphasised the view that natural law is the foundation of the principle of a rule of law state, by which the Czech Republic has undertaken to govern itself[17]. Due to its emphasis on the natural-law values contained in the body of constitutional law, the Czech Republic's Constitutional Court cannot consider the constitutional order to be anything other than free of gaps, for although its Justices abide by the constitutional laws, these exist within a natural-law framework, declared by the Constitution[18]. Should it therefore be necessary to do so, in order to maintain the protection of constitutionality, the Constitutional Court cannot surrender its basic function, but must find the means whereby it can protect those values.

2.2. THE EXPRESIS VERBIS CONSOLIDATION IN THE CONSTITUTION CONCERNING THE JURIDICITON OF THE CONSTITUTIONAL COURT TO INVESTIGATE AND ASSESS THE CONSTITUTIONALITY OF LEGAL GAPS

The Constitution establishes the decision-making powers of the Constitutional Court in Art. 87, according to which the Constitutional Court has jurisdiction:
a) to annul statutes or individual provisions thereof if they are in conflicts with the constitutional order;
b) to annul other legal enactments or individual provisions thereof if they are in conflict with the constitutional order, a statute;
c) over constitutional complaints by the representative body of a self-governing region against an unlawful encroachment by the state;
d) over constitutional complaints against final decisions or other encroachments by public authorities infringing constitutionally guaranteed fundamental rights and basic freedoms;
e) over remedial actions from decisions concerning the certification of the election of a Deputy or Senator;
f) to resolve doubts concerning a Deputy or Senator's loss of eligibility to hold office or the incompatibility under Article 25 of some other position or activity with holding the office of Deputy or Senator;
g) over a constitutional charge brought by the Senate against the President of the Republic pursuant to Article 65, paragraph 2;
h) to decide on a petition by the President of the Republic seeking the revocation of a joint resolution of the Assembly of Deputies and the Senate pursuant to Article 66;
i) to decide on the measures necessary to implement a decision of an international tribunal which is binding on the Czech Republic, in the event that it cannot be otherwise implemented;
j) to determine whether a decision to dissolve a political party or other decisions relating to the activities of a political party is in conformity with constitutional acts or other laws;
k) to decide jurisdictional disputes between state bodies and bodies of self-governing regions, unless that power is given by statute to another body;

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[17] E.g., in Decision Ref. No. Pl.ÚS 77/06, published under No. 37/2007 Coll., in Decision Ref. No. II.ÚS 386/04, or in Decision Ref. No. IV.ÚS 269/05

[18] Oath of a Constitutional Court Justice – Art. 85 (2) of the Constitution: "I pledge on my honour and conscience that I will protect the **inviolability of the natural rights of the individual** and the rights of any citizen, abide by constitutional laws, and make decisions according to my best conviction, independently, and impartially."

l) over remedial actions from a decision of the President of the Republic declining to call a referendum on the Czech Republic's accession to the European Union;
m) to determine whether the manner in which a referendum on the Czech Republic's accession to the European Union was held is in harmony with the Constitutional Act on the Referendum on the Czech Republic's Accession to the European Union and with the statute issued in implementation thereof.

Furthermore, the Constitutional Court decides on the congruency of an international treaty with the constitutional order, prior to the treaty's ratification. A treaty cannot be ratified until the Constitutional Court has rendered its decision.

Neither the Constitution of the Czech Republic nor any constitutional act within the constitutional order, however, establishes, *expressis verbis*, the authority of the Constitutional Court to examine and evaluate the congruency of "legal gaps" with the Constitution, and there is, therefore, no procedural norm that would regulate the steps to be taken by the court in such proceedings. We must, however, see that the Constitutional Court, in proceedings concerning the oversight of norms, must always evaluate their congruency with the constitutional order (or the law) and should it find a violation of the above-mentioned regulations, it may annul a legal norm, even without a specifically defined oversight authority or proceedings, because the general regulation is fully sufficient for the oversight of norms.

2.3. INTERPRETATION OF THE JURIDICITON OF THE CONSTITUTIONAL COURT TO INVESTIGATE AND ASSESS THE CONSTITUTIONALITY OF LEGAL GAPS

The task of the Constitutional Court is not to examine the purposefulness, suitability, or sensibility of a specific legal regulation, but exclusively to examine its congruence with the constitutional order. The Constitutional Court explained that its competences in overseeing norms do not extend exclusively to the wording of the legal regulation, but also to an evaluation of a "legal gap", which that wording may create (see Decision Ref. No. Pl. ÚS 36/01, published under no. 403/2002 Coll.); hence, an omission of the lawmaker that leads to an inequality that is unacceptable under the Constitution is unconstitutional.

In its case-law, the Constitutional Court has yet to formulate a doctrine that it would use as a theoretical foundation in assessing legislative omissions. The doctrinal principle is more represented by that to which the above-mentioned article of Vojtěch Šimíček refers[19].

Even without a doctrine, however, there are two variants by which to address an omission by the legislator, which the Constitutional Court has used in its case-law and partially summarised in Decision Ref. No. Pl. ÚS 3/06, published under No. 149/2007 Coll. It distinguishes between authentic and inauthentic gaps. It found an inauthentic gap unconstitutional in Decision Ref. No. Pl. ÚS 36/01, published under No. 403/2002 Coll., as being a gap: *"the contents of which is the incompleteness of written law (its absence) in comparison with an explicit regulation of similar cases, i.e., incompleteness from the point of view of the equality principle, or from the point of view of general legal principles"*, and struck down the related provisions. The Constitutional Court, however, considers the abolition of a legal regulation or its part to be an *ultima ratio* solution, and prefers using a different solution, which it used and applied in its Decision Ref. No. Pl. ÚS 48/95, when it *"normatively filled a gap created by the inequality of legal regulation, by providing an interpretation of the relevant statutory regulation in a manner in conformance with the*

[19] sub. 1)

Constitution". The Constitutional Court has not defined an authentic legal gap, but in theory it sets it out as the intentional omissive conduct of the lawmaker in cases when the State is to fulfil its protective function with respect to third persons and is failing.

2.4. THE ESTABLISHMENT OF THE AUTHORITY OF THE CONSTITUTIONAL COURT, EITHER IN THE LAW WHICH REGULATES THE ACTIVITY OF THE CONSTITUTIONAL COURT OR IN OTHER LEGAL ACT, TO INVESTIGATE AND ASSES THE CONSTITUTIONALITY OF "LEGAL GAPS"

As has been stated in Chapter 2.2, no part of the constitutional order stipulates explicitly whether, or how, and with what consequences, the Constitutional Court is to evaluate legislative omissions.

A legal gaps may be reviewed primarily in proceedings concerning review of norms (abstract as well as specific). Legal gaps must, however, be addressed by the Constitutional Court even in proceedings concerning constitutional complaints, proceedings concerning disputes over powers, or in proceedings on electoral matters, and others. In proceedings concerning the review of norms, the Constitutional Court either strikes down a norm (if something is missing in it, in violation of the Constitution), or attempts to interpret it in conformity with the Constitution[20], or fills the gap by ordering the direct petition of the constitutional order[21].

When striking down a legal norm, the Constitutional Court only specifies the constitutional deficiencies of which the abolished legal norm suffered, and how to perceive the specific legal regulation such that it would be in conformity with the Constitution. Thereby the Constitutional Court defines the fundamental elements of a structure on which the lawmaker can implement a new legal regulation (Decision Ref. No. Pl. ÚS 36/05 published under No. 57/2007 Coll.; Decision Ref. No. Pl. ÚS 15/04 published under No. 45/2005 Coll.; or Decision Ref. No. Pl. ÚS 3/94 published under No. 164/1994 Coll.).

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

3.1. Petition to the Constitutional Court

Proposal for the nullification of an act or its part

The Act on the Constitutional Court specifies a group of entitled entities that have standing to file an petition for the abolition of a statute or its individual provisions[22]. A statute does not mean solely a legal act adopted by the Parliament in line with the legislative procedure set by the Constitution, but also a statutory measure of the Senate, as the Act on the Constitutional Court explicitly states in Sec. 64 (6). A proposal for the abolition of a statute or its individual provisions must be supported by the claimant's claim, describing the nature of the incongruence of a specific legal norm with the constitutional order. Implicitly, it can be inferred that if a claimant who has standing to file perceives the incongruence in the absence

[20] The Constitutional Court prefers an interpretation of the challenged provisions in line with the Constitution rather than their abolition (see Decisions Ref. no. Pl. ÚS 42/03, published under no. 280/2006 Coll. and Decision Ref. No. 48/95, published under No. 121/1996 Coll.)

[21] For more on this, see Decision Pl.ÚS 33/2000, published under No. 78/2001 Coll.

[22] A provision means any part of a text of a legal regulation with a normative content. Hence, it is an expression containing any linguistic instruments the purpose of which is to express a legal norm, or any of the components of its statement of facts (Decision Ref. No. Pl. ÚS 24/94, published under No. 80/1995 Coll.)

of a positive legal regulation, it is up to the Constitutional Court to review this claim as to unconstitutionality (having reviewed the other requisite details of the petition). According to the law, an petition to the Constitutional Court may be made by:

a) The President.
The President, as an executive body, is vested with this power, in order that the system of checks and balances of various powers within the State be balanced. A proposal for the abolition of a statute or its individual provisions must, however, be supported by constitutional-law argumentation, and the room for its petition is significantly narrower than with the other presidential safeguard against normative acts of the Parliament, the suspensive veto. Unlike with a presidential veto, which does not need to be strictly based on the legal shortcomings of a bill, this is a not very commonly used power of the head of state[23].

b) A group of at least 41 Deputies or 17 Senators
The standing of a group of Deputies or Senators to file an petition is another safeguard against the potential unconstitutionality of legal acts with the force of law. The claimant is always a group of lawgivers, not specific members, and their number has been set so as to afford protection to the opinions of a parliamentary minority, without providing standing to individual members of Parliament and their political defiance.

c) Panel of the Constitutional Court
A panel of the Constitutional Court has this power in connection with a decision concerning a constitutional complaint. Should the panel conclude, in connection with deciding a constitutional complaint, that an act or another legal regulation or their individual provisions, the petition of which led to the situation giving rise to a constitutional complaint, violates a constitutional act, or a statute, in the case of a different legal regulation, it shall suspend the proceedings and propose that the plenary would nullify that legal regulation.

d) Plenary of the Constitutional Court
This is a hypothetical competence[24], as the standing of the plenary could only be used in deciding about a constitutional complaint that had not been decided by a panel.

e) The Government
Its standing is exceptional and only concerns proceedings on measures to implement the decision of an international court under Sec. 118 of the Act on the Constitutional Court. Should an international court rule that a public authority has breached an obligation arising for the Czech Republic from an international treaty, especially if this intervention breached the human right or fundamental freedom of a natural or legal person, and provided that the breach consists of an applicable legal regulation, the Government shall submit an petition to the Constitutional Court for the abolition of that legal regulation or its specific provisions, provided it is unable to ensure the abolition or change otherwise.

f) A person who has submitted a constitutional complaint
A person who has submitted a constitutional complaint has standing to file that petition only in cases when the fact challenged in his/her complaint occurred due to the petition of the challenged provisions of a legal regulation under the conditions stipulated in Sec. 74

[23] Since the establishment of the Czech Republic, the President has only submitted ten applications for review.
[24] This has yet to be used.

of the Act, or a person who submitted an petition for the renewal of proceedings under conditions stipulated in Sec. 119 (4) of the Act.

g) A person who has submitted an petition for the renewal of proceedings
If the Constitutional Court ruled in a criminal matter in which an international court found that an intervention by a public authority violated a human right or a fundamental freedom in contravention of an international treaty, an petition for the renewal of proceedings can be filed against such a decision of the Constitutional Court, under the conditions stipulated by this Act. With the petition for the renewal of proceedings, an petition for the striking down of an act or another legal regulation, or their specific provisions may be filed, the petition of which led to the fact constituting the subject of the petition for the renewal of proceedings, provided that the claimant claims that it violates a constitutional act or a statute, in the case of a different legal regulation.

h) Court
A general court also has standing to file an petition for the abolition of a statute or its particular provision, provided that the court concludes that an act, which is to be applied in the matter before it, violates the constitutional order or, as has been was implied by the Constitutional Court's case law[25], violates an international human rights treaty.

An petition for striking down a legal regulation other than an act, or parts thereof.
These regulations mean, above all, the regulations of the government, regulations of central state administrative authorities, generally binding regulations and decrees of the regions, and generally binding regulations and decrees of the municipalities, provided that they are in violation of the constitutional order of the law. The conditions for the exercise of this right do not differ from the petition for the striking down of an act, with respect to the panels and plenary of the Constitutional court, the person who filed a constitutional complaint, or the person who filed an petition for the renewal of proceedings; but, the lawmaker did not grant this right to general courts, as the judges – in line with the Constitution – are only bound by international treaties and the law in their decision-making, and thus they do not need to apply a defective sub-statutory legal regulation, in making a decision about a matter. The right to file an petition has been given to:

a) The Government
The right to file such an petition is seen as complementary, as the Government has its own mechanisms to annul these legal regulations, as the supreme collective body of the executive branch of power, which binds all members of the government with its resolutions.

b) A group of at least 25 Deputies or 10 Senators,
Standing to file an petition for the striking down of a sub-statutory legal regulation is given to a group of a reduced number of members of either house, in comparison with the requirement for an petition to annul an act. The purpose of this standing probably lies in the intention of the framers of the Constitution to enhance the possibility of overseeing the legality (and, *de facto*, the supra-legality) of sub-statutory norms by the Parliament, without disrupting the structure of the division of powers, i.e., that any interference by the

[25] The Constitutional Court interpreted Art. 95 (2) of the Constitution, stating that a general court is obliged to present to the Constitutional Court for consideration even a matter in which an act, which is to be applied in its resolution, violates a ratified and announced international treaty on human rights and fundamental freedoms (Decision No. 36/01, published under No. 403/2002 Coll.)

legislative power in the acts adopted by the executive power would not be direct, but would be overseen by the judicial power.

c) Panel and Plenary of the Constitutional Court, in connection with deciding a constitutional complaint,

d) A person who has filed a constitutional complaint

e) A person who has submitted an petition for the renewal of proceedings

f) A Regional Assembly
This power enables the representatives of a higher territorial self-governing unit to defend themselves against any sub-statutory legal regulations issued by the executive that may interfere with the constitutionally guaranteed right of the citizens of the region to self-governance, and to exercise, at the same time, effective oversight over the legal regulations issued by municipalities.

g) The Ombudsman
The Ombudsman is responsible for protecting persons from the actions of authorities and other institutions, should they be in violation of the law or not comply with the principles of a democratic state observing the rule of law and good governance, whether through their action or inaction. The Ombudsman thereby contributes to the protection of fundamental rights and freedoms; however, his powers do not extend to the Parliament, the President, and the Government, the Office of the Auditor General, intelligence services, authorities involved in criminal proceedings, offices of the state prosecutor, and the courts.

h) Ministry of the Interior
Should a generally binding regulation of a municipality or a region be in violation of the law, the Ministry of the Interior first asks to municipality to remedy the situation, and, should it fail to do so, the Ministry can suspend the effects of the regulation and file an petition to the Constitutional Court for the striking down of that regulation.

i) Director of a Regional Authority
The directors of regional authorities are granted the same powers as the Ministry of the Interior, but their power only extends to the regulations issued by municipalities.

j) Assembly of a municipality
This is the obverse power to the one that a region has to the sub-statutory legal regulation of a municipality, as the assembly of a municipality may apply for the abolition of a legal regulation of the region to whose territorial district it belongs (when the potential violation of the law concerns the municipality directly).

Individual Constitutional Complaint
This is the most frequently used means to protect constitutionally guaranteed fundamental rights and freedoms of natural or legal persons. It can, however, be used only accessorily, in connection with a legislative omission, i.e., in connection with an petition to launch proceedings concerning the review of norms, or to classify, as a very theoretical possibility, a legislative omission of the lawgiver as “another intervention by a public authority”. According to the Act on the Constitutional Court, an petition can be filed by:

a) a natural or legal person claiming that by an authoritative decision in proceedings, to which that person was a party, or by a measure or another intervention of a public authority, that person's fundamental right or freedom guaranteed by the constitutional order was breached, or

b) the assembly of a municipality or higher territorial self-governing unit claiming that a constitutionally guaranteed right of a territorial self-governing unit to self-governance was breached by an illegal intervention by the State.

3.2. Legislative omission in the petitions of the petitioners

As was stated above, the main forum for the examination of the existence of a potential omission of the legislator is a procedure concerning the review of norms. Whether the review of norms is concrete or abstract, it always constitutes the realisation of the basic function of the Constitutional Court, i.e., the protection of constitutionality, even from those omissions of a legislator that may constitute a constitutional deficit in a norm adopted by it, or even a direct interference in the rights of persons protected by the Constitution. Naturally, arguments of legislative omissions will be more frequent in petitions for a specific review of norms (by general courts or individuals), because in the case of petitions for abstract review (by the President, or a group of Deputies or Senators), the claimants usually have another mechanism available by which to fill such a "legal gap".

In the event of constitutional complaints with an accessorial petition for the review of norms, two options open up for the claimant. The first is to claim the unconstitutionality of a legislative omission, where the intervention by a public authority lies in the authority applying the deficient norm having failed to provide sufficient protection to the constitutional rights of the claimant, in spite of the absence of a legal regulation (e.g., by interpretation). As the challenged intervention caused a breach of the claimant's rights, the Constitutional Court can annul the decision (or another measure) of the specific authority, and in the rationale of its decision provide such guidelines as would suffice to constitute a foundation for a new decision that would comply with the Constitution.

The other possibility is for the claimant to describe in his petition this legislative omission (i.e., the legislator's omissive conduct) as the intervention by a public authority, without the consequent issuance of a decision or another action by public authorities. At the same time, he must specify which of his constitutional rights were thereby breached, and of what that intervention consists. In that case, the Constitutional Court would have to assess the very existence of the claimed legislative omission and quantify the measure of its impact on the protected rights and freedoms of the claimant. The Constitutional Court has, however, already ruled[26] that legislative activity cannot constitute such an intervention. Should the Constitutional Court, however, conclude that - *a contrario* – legislative inactivity can constitute such an intervention, it could, in line with its powers, prohibit the relevant authority from continuing in the breach of rights and freedoms (which constitutes, on the factual level, an appeal for filling a legal gap by the legislator).

If the subject and the basis of an petition for the review of norm is a legislative omission, this fact must naturally be reflected in the petition. But as there is no specific

[26] Decision Ref. No I. ÚS 92/94 - Legislative activity, as well as the issuance of a generally binding legal regulation by a central administrative authority, if issued within that authority's scope of powers and competences, cannot be considered an intervention by a public authority, not even in cases when – as the claimant claims – its provisions breach his fundamental rights of a citizen.

procedure before the Constitutional Court to review a legislative omission, no special requirements for an petition challenging a legislative omission have been set. Such an petition, therefore, must meet the general requirements of the Act on the Constitutional Court[27], as well as special requirements if the submission is a constitutional complaint[28].

As the regulation of the procedural aspects of the work of the Constitutional Court does not know the term legislative omission, complaints challenging the unconstitutionality of a legislative omission are not frequent (only a per mille of petitions)[29].

3.3. INVESTIGATION OF A LEGISLATIVE OMISSION ON THE INIATIVE OF THE CONSTITUTIONAL COURT

Proceedings before the Constitutional Court are governed by the dispositive principle, and one is therefore launched only upon the petition of the person authorised to submit one. A small exception is the proceedings on the review of norms (see part 3.1.), when a panel or plenary of the Constitutional Court has standing to file, should it conclude, in connection with its decision-making on a constitutional complaint, that the law or its particular provision is in violation of the constitutional order or an international treaty (which applies even to conflicts of another legal regulation with the law). In this case, however, the legal norms concerned, which are the object of constitutional review, must have been applied in the legal relation giving rise to the consequences which are the facts specified in the constitutional complaint. The Constitutional Court has thus not been bestowed with the power to launch proceedings *ex officio*, not even in its potential examination of a legislative omission. If an applicant has submitted an petition that the Constitutional Court did not reject, the Court shall only be bound by the petition of the petition in its decision-making, and may therefore examine other circumstances of the case[30]. Hence, it could be imagined that the Constitutional Court could identify a legislative omission, even in a case where the claimant did not explicitly refer to it in the rationale of his claim[31].

3.4. Legislative omission in laws and other legal acts

As has been stated above, in proceedings concerning the review of norms, the Constitutional Court reviews both statutes, for their incongruence with the constitutional order, and other legal regulations, if they are not in line with the constitutional order or the law. But as the Constitutional Court ruled in its Decision Ref. No. Pl. ÚS 35/04, published under No. 301/2005 Coll.: "*The Constitutional Court ... has the power to annul even a rule of a lesser*

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[27] Sec. 34 (1) and (2) of the Act on the Constitutional Court:
"(1) Applications to launch proceedings shall be submitted to the Constitutional Court in writing. An application must indicate who is making it, what case it concerns, and what its object is, and must be signed and dated. Furthermore, an application must contain a truthful rendering of the decisive facts, a specification of the evidence on which the claimant relies, and it must make evident what the claimant wishes to be done; the application shall also contain other requisite details set by this statute.
(2) An application to initiate proceedings shall be submitted in such a number of copies that one copy would be left for the court and one copy could be delivered to each party or acceding party specified in the application.".

[28] A constitutional complaint may only be submitted as a subsidiary measure, once all other legal remedies afforded by the laws of the Czech Republic have been exhausted. In addition to the general requisite details of an application, a constitutional complaint must therefore contain a copy of a decision about the last remedy, must be submitted within 60 days of the delivery of that decision to the claimant, and must also contain a claim against an intervention by public power into the claimant's constitutional right or freedoms.

[29] But most of this fraction of applications are rejected (e.g., Decision Ref. No. II. ÚS 567/01 or Resolution Ref. No. I. ÚS 138/03)

[30] In assessing congruence or incongruence of an act or its provisions with the Constitution and constitutional acts, the Constitutional Court of the Czech Republic is only bound by the petition, but not its rationale. From that arises the obligation of the Court to examine also other circumstance of the challenged provision which are relevant for assessing its constitutionality. (Decision Ref. No. Pl. ÚS 16/93)

[31] E.g., in Decision Ref. No. Pl. ÚS 3/06, published under Ref. No. 149/2007 Coll.

legislative force than an act, but always only for its incongruence with the constitutional order or laws. The Constitution does not give the Constitutional Court the right to abolish sub-statutory legal regulations of a lesser legal force for their incongruence with sub-statutory norms of a greater legal force or even for incongruence with a sub-statutory norm of a greater legal force. In terms of the abstract review of norms, the Constitutional Court thus is not a universal guardian of the congruence of a hierarchically built legal order on all its levels." This shows implicitly that the Constitutional Court is first and foremost the guardian of constitutionality, even in assessing the legality of sub-statutory norms. Its exceptionality does not consist of the fact that another body would not be able to asses the congruence of a lower-force regulation with a regulation of a higher legal force[32], but in the fact that the framers of the Constitution made it the only legitimate public authority with the power to derogate. This concept of the principle of concentrated legitimacy is, on the one hand, a safeguard of the separation of powers in a state governed by the rule of law, and on the other hand it guarantees the exercise of the right to self governance, including the immanent control of the results of that right, in the form of judicial oversight. We can therefore imagine that an omission of an authority gifted with the power to issue a specific sub-statutory legal act will correspond to the power of the Constitutional Court to identify such an omission, evaluate it, and draw the consequences foreseen by the Constitution and the Act on the Constitutional Court. This possibility is, however, only theoretical, because in practice the Constitutional Court has not yet examined the inactivity of a lawgiver in the issuance of sub-statutory norms.

3.5. REFUSAL BY THE CONSTITUTIONAL COURT TO INVESTIGATE AND ASSESS LEGAL GAPS

The law grants the possibility to the Constitutional Court to refuse an petition before its starts examining its merits, i.e., practically, prior to being able to identify the existence of a legislative omission. The Constitutional Court rejects an petition if that petition does not comply with the legal requirements that would allow a decision on the merits to be issued, and the institute of refusal can be applied in all proceedings before the Constitutional Court.

The Act on the Constitutional Court enumerates conclusively the reasons for which a Justice-Rapporteur can reject an petition:

- When the applicant fails to remedy flaws in the petition within the time-period appointed[33]
- When the petition is submitted after the time-period specified for its submission by this Act (primarily in proceedings concerning constitutional complaints, in which an petition for their initiation needs to be submitted within 60 days of the delivery of a decision on the last legal remedy available)

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[32] Incongruence between two sub-statutory norms and the relationship of a defective sub-statutory norm to the law can be addressed even by a judge of a general court in carrying out a specific review of norms, and he is not bound by such norms in his decision-making. Although this judge may identify a defective norm, he cannot subsequently propose to the Constitutional Court that it abolish that norm, because a general-court judge is not obliged to apply a defective norm in order to achieve a just resolution of a specific matter.

[33] In most cases, it concerns the absence of legal representation or the absence of a specification of the rights and freedoms guaranteed by the Constitution. A typical rationale of a refusal: *"The Justice-Rapporteur could not grant the claimant's request to extend the time-period for the removal of defects, as it considered a 7-day period adequate, having taken into account the fact that the claimant submitted his constitutional complaint at the end of the sixty-day period…. The statutory sixty-day period is, according to the Justice-Rapporteur, fully sufficient for the submission of a compete and flawless* constitutional complaint, and its factual *extension by granting further time-periods to supplement it or remedy defects should be exceptional*.". (Decision II. ÚS 406/07).

- In the event of an petition submitted by a person evidently unauthorised to file it (only a person enumerated specifically by the law for the specific type of procedure may be the claimant)
- In the event of an petition which the Constitutional Court is not entitled to deliberate upon[34], or
- When the petition is inadmissible (especially in the petition of the principle of subsidiarity, litispedence, and the obstacle of a matter having already been decided)[35]

The Act on the Constitutional Court also sets out the reasons for which a petition may be refused by a panel:

- A clearly unsubstantiated petition[36],
- Should it find, with respect to an petition to launch proceedings on the review of norms, proceedings concerning the congruence of international treaties with constitutional acts, proceedings on irregularities in the carrying out of a referendum on EU accession, or proceedings on renewing proceedings, any of the above-mentioned reasons for refusal.

3.6. Initiation of investigation of a "related nature"

If a legal regulation governing the procedural steps of the Constitutional Court in particular types of proceedings does not know the institute of "proceedings to review a legislative omission", that institute cannot be applied. As was emphasised earlier, a legislative omission (whether in the form of a legal gap or in the form of an omission by the lawgiver) is, in the practice of the Constitutional Court, rather a matter relating to the breach of a fundamental right or freedom than a separate subject of examination.

For that reason, too, the Constitutional Court does not resort to the review of a "related nature", when it does not have the opportunity to launch proceedings concerning the review of a legislative omission, because its task is to review constitutionality, which it exercises in proceedings entrusted to it by the framers of the constitution. The launch of proceedings of a related nature is not possible in principle, because it would mean proceeding *infraudem legis*, i.e., circumventing the purpose of the law.

A circumvention of the purpose of the law would naturally not occur in a situation when a panel of the Constitutional Court concludes, in assessing a particular Constitutional

[34] E.g., on the review of the decision-making activity of arbitration courts (see, e.g., Decision Ref. No. II.ÚS 805/06, III. ÚS 460/01, Ref. No. II. ÚS 574/01, or Ref. No. II. ÚS 455/01)

[35] The obstacles of proceedings having already been launched, *res judicata* and litispedence, apply in general to all types of proceedings; the principle of subsidiarity is applied in proceedings concerning constitutional complaints, which means, for the claimant, that prior to the submission of an application, it must exhaust all other procedural remedies granted to it by the legal order for the protection of his rights.

[36] Clear lack of substantiation is not a mere formal defect of an application for which the Justice-Rapporteur could himself refuse the application. An application which is finally assessed as clearly unsubstantiated is subjected to examination (which may nearly reach the level of an examination of the merits of the matter), so that it is evident that the contents of the application clearly do not correspond to the purpose of proceedings before the Constitutional Court. Although this is done in simplified proceedings, the rejection of such an application must be made by a unilateral decision of the panel. The reason for refusing an application for it being clearly unsubstantiated often is the requirement for the review of the factual or legal grounds of the conclusion made by public authorities, or concerning legal issues which the Constitutional Court addressed in the past and has not granted similar applications.

Complaint, that the petition of a certain legal norm has breached fundamental rights or freedoms guaranteed by the Constitution (here, due to a legislative omission) and would suggest to the plenary that the norm be abolished. In these proceedings on the review of a norm, it is still the constitutionality of the norms that is being reviewed, and the review of the existence of a legislative omission is only accessorial, if it is related to the subject matter and purpose of the proceedings. The proposal of a panel of the Constitutional Court to conduct proceedings to review a norm, which constitutes an exception from the rule that such proceedings must be initiated by external petitions, must be interpreted very restrictively[37].

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

In order for a legislative omission to be identified, three possible situations must be reviewed. These situations play a fundamental role in determining the specific level of the insufficiency in a legal norm, its subsequent impact on interests guaranteed by the Constitution and protected through the Constitutional Court's work, and finally, in formulating the evaluation of the constitutionality of such a legislative insufficiency and the installation of a situation compliant with the Constitution, as foreseen by the constitutional order.

1. The legal regulation contains a regulation of one group of legal relations, giving rise to rights of the entitled entities, but does not regulate similar legal relations that would give rise to positive effects for another group of entities, whereby the principle of equality is breached (see Decision Ref. No. Pl. ÚS 36/01, published under No. 403/2002 Coll.). The object of review will then be the issue as to whether one group of legal relations was indeed omitted, and with what consequences.

2. The legal regulation contains a regulation of one group of legal relations, giving rise to obligations of the entitled entities, but does not regulate similar legal relations with negative effects for another group of entities, whereby the principle of equality is breached again, this time reversed (putting at a disadvantage a group which must apply that legal regulation).

3. The legal regulation does not exist, although it should[38]. Such an omission is absolute, and it is up to the Constitutional Court to infer, by using tools of interpretation, how this situation impacts on interests protected by the Constitution, and respond, depending on the type of proceedings in which the situation is reviewed.

The existing case law of the Constitutional Court indicates that the factor indicating the unconstitutionality of a legislative omission has thus far always been the existence of an "undue inequality"[39] giving rise to a differing approach to two or more groups of persons, where such an approach is not warranted by the public interest or actions for the public good[40].

In reviewing legislative omissions, we cannot study only the absence of legal regulation as such, but – as the Constitutional Court emphasised repeatedly – in reviewing the

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[37] See the dissenting opinion of Justice Eliška Wagnerová in Decision Ref. No. Pl. ÚS 15/94

[38] This situation can be inferred from decision Ref. No. Pl. ÚS 20/05; i.e., if the lawmaker undertook to enact a certain legal regulation (by an authorisation to issue a legal regulation, granted in an act), but would fail to enact such regulation.

[39] E.g., Decisions ÚS ČR No. 234/2002 Coll., No. 405/2006 Coll., and No. 47/2007 Coll.

[40] Compare the Czech Constitutional Court Decision announced under No. 132/1994 Coll.: "If the State provides, in order to ensure its functioning, fewer advantages to one group than another one, it can only do so in the interest of the public and for the wellbeing of the public."

constitutionality of a certain provision (or its absence), the broader circumstances must be seen, and the specific norm must be evaluated within the entire context of the relevant legal regulation.

In terms of the temporal aspects of the examination and evaluation of the constitutionality of legislative omissions, it is important to state that the review of a legal regulation is limited[41] to the time-period that it is in force; and should the act, another legal regulation, or their particular provisions, the abolition of which is being sought, cease to be valid while the proceedings on their review before the Constitutional Court are in process, the proceedings shall be stopped (by a resolution of the plenary). The Constitutional Court has, however, permitted two exceptions from this legal principle. The first concerns proceedings reviewing norms upon the petition of a general court because, as the Constitutional Court stated in its Decision Ref. No. 38/06: *"The Constitutional Court holds that by refusing to provide help to a general court, by making a decision as to the constitutionality or unconstitutionality of the law applied, the irresolvable situation of an artificial legal vacuum would be created, and has found the decision of the general court, on the unconstitutionality of the provisions applied, to be in violation of the Constitution, for being in violation of the principle of concentrated constitutional justice*." Another exception was the situation when the author of a norm replaces the abolished legal norm during the proceedings with a new norm, but this change is purely of a formal nature, and the material substance remains the same or similar. In its Decision Ref. No. Pl.ÚS 50/04 (published under no. 154/2006 Coll.), the Constitutional Court noted in this regard: *"If the Constitutional Court accepted that process and stopped the proceedings..., it would mean, in the case at hand, denying the purpose and meaningfulness of an abstract review of norms."*. The procedural practice has been established[42] that in those cases the Constitutional Court decides by a resolution to admit a change in the petition.

Legal instruments available to the Constitutional Court in responding to a legislative omission –

Abolition of a legal regulation or its part

Sec. 70 (1) of the Act on the Constitutional Court – "*Should the Constitutional Court conclude, after having conducted proceedings, that an act or its particular provisions are contrary to constitutional law, or that another legal regulation or its particular provisions are contrary to constitutional law or the law, it shall decide, by rendering a decision, that the act or another legal regulation or their particular provisions shall be abolished as at the date appointed by the Court in its decision*.".

The authority of the Constitutional Court of the Czech Republic is therefore direct; the Constitutional Court does not render declaratory decisions about the unconstitutionality of a legal regulation or its part, but abolishes the defective norm itself, with *ex nunc* effects (its decision then applies *pro futuro*). In the examination of a legislative omission, the incongruence with a constitutional act does not, however, automatically mean that a legal gap would constitute derogatory reasons *sui iuris,* and that the Constitutional Court does not look for a causal nexus between the gap and the interests protected by the Constitution. A legislative omission is the cause, due to the existence of which a conflict occurred, between the legal norm being evaluated and the value declared by constitutional acts. That norm is then abolished with a reference to its incongruence with the formal expression of the

[41] Sec. 67 (1) of Act No. 182/1993 Coll., on the Constitutional Court
[42] E.g., Decision Ref. No. Pl. ÚS 8/02 or Decision Ref. No. Pl. ÚS 49/03

protected value (i.e., a specific article of a constitutional act). The law, however, does not impose on the Constitutional Court the obligation to directly specify the constitutional norms with which the challenged regulation is incongruent; the Constitutional Court, however, does do so in its derogatory decisions, as it holds that the recipients of its decisions should know the criteria according to which a legal norm was found not to conform with the Constitution.

Bridging by interpretation

In its decisions, the Constitutional Court has repeatedly stressed that the principle of the interpretation of an act or its part in conformity with the Constitution takes precedence over its abolition, and that all public authorities are obliged to interpret and apply law with a view to the requirement of the protection of fundamental rights and freedoms.

As was cited in Part 2 of this questionnaire, in a situation when a certain provision of a legal regulation allows for two different interpretations, with one being in line with constitutional laws and international treaties by which the Czech Republic is bound, and the other not, there is no reason to abolish that provision; on the contrary, all state authorities are obliged to interpret that provision in a manner conforming to the Constitution (see Decision Ref. No. Pl. ÚS 5/96, or Decision Ref. No. Pl. ÚS 48/95, published under No. 121/1996 Coll.). Of the many conceivable interpretations of an act, only that interpretation must always be used which respects constitutional principles (if that interpretation is possible), and that act can only be abolished for its unconstitutionality if that provision cannot be applied without constitutionality being breached (the principle of the minimisation of interference into the responsibilities of other public authorities).

Legal gaps can therefore, in certain cases, be eliminated by a suitable interpretation. The Constitutional Court did so, e.g., in its Decision Ref. No. 3/06, published under No. 149/2007 Coll., when it explained that an instrument to suppress the consequences of the omission of a lawmaker was in this case available already on the level of sub-constitutional law, by means of the standard interpretation rule *analogie legis,* which enables the evaluation of a situation that is not explicitly evaluated by norms, according to a rule embodied in a norm for similar cases, of a related nature.

Identification of a legislative omission without a direct response from the Constitutional Court

A situation can be imagined when the Constitutional Court would examine a specific matter and detect an area in which a positive legal regulation is missing. If it, however, does not identify any points of contact with the substance of the proceedings at hand, i.e., for example with the breach of fundamental rights, it can express its conviction as to the existence of such a deficit, but will certainly not mention that deficit among the supporting reasons of its decision. Should an omission of a legislator not cause negative effects in relation to the constitutionally guaranteed rights and freedoms, the Constitutional Court is not entitled to examine it any further[43].

Providing an interpretative guideline for general courts

In this point, there is a close connection to the bridging of a legislative omission, as stated above. In Art. 89 (2), the Constitution states that executable decisions of the Constitutional Court are binding for all bodies and persons. That, of course, applies to general courts, which are the first level of the institutional hierarchy of the protection of

[43] E.g., in Ref. No. II. ÚS 567/01, the Constitutional Court rejected a constitutional complaint against the legislative inactivity of the State because the claimed omissions of the legislators in themselves did not fall within the competence of the Constitutional Court to deliberate on the complaint.

fundamental rights and freedoms. The contents of their obligation to find the law – according to the opinion of the Constitutional Court published under No. 32/1997 Coll. – "*does not, however, mean only that direct, specific, and explicit instructions should be found in the text of a statute, but also the obligation to find out and formulate what a specific right is, even in cases when it means interpreting abstract norms, constitutional principles, the provisions of the Charter, and the obligations arising from international treaties. Space for that interpretation and its significance is undoubtedly greater in cases when statutory regulations are being applied that are not entirely adequate, but are not, in their essence, contrary to the constitution. Of the many possible interpretations of a statute, the one which respects constitutional principles must be applied in all cases".*

The Constitutional Court is not a part of the system of general courts and cannot, therefore, formally act as their supreme instance, by the opinion of which all lower instances are bound as their "official duty". Due to its exclusive position outside of the general justice system, the Constitutional Court can all the more work through the persuasiveness of its arguments, in which it provides an interpretation that conforms to the Constitution, and which general courts should follow. They should follow it in order that they would live up to the requirements of a rule of law state and of finding justice in their decision-making. The incongruence of their steps with the guidelines set out by the Constitutional Court's case law could lead to their decisions being overturned by the Constitutional Court. Furthermore, in proceedings on the review of norms, not only the dictum of the Constitutional Court's decision is biding, but also the arguments given in its rationale, which de facto emphasises the interpretation which the Constitutional Court finds to be in conformity with the Constitution.

In the rationale of its decisions, the Constitutional Court sets out clear interpretative boundaries, and inhibitors of the divergent steps of general courts, so that they could be applied[44]. A call for a constitutionally-conforming interpretation has also touched upon the topic of legislative omissions, when in its decision published under No. 16/2007 Coll., the Constitutional Court identified the absence of a statutory regulation, but did not examine it any further, pointing to the fact that, in the situation at hand, the right is not being entirely denied: *"[General] courts would, even in that case, in the absence of a legal regulation, essentially have to grant protection to this right, otherwise they would commit a denial of justice (the principle of the denegationis iustitiae being prohibited.) The conditions of the exercise of this right and its limits would then have to be addressed by case-law, case by case.*"

Postponing the executibility of a derogatory decision of the Constitutional Court

The Constitutional Court does have the power to annul a legal regulation even retroactively (*ex tunc*), but has thus far not made such a decision. A derogatory decision then takes effect, in line with Sec. 58 (1) of the Act on the Constitutional Court, once published in the Collection of Statutes, unless the Constitutional Court rules otherwise. In general, this means that the effects of a decision can be postponed, as will be described below. It would, however, be appropriate to note that the Constitutional Court can rule that a decision will be executable even before it is announced in the Collection of Statutes, because in the formulation used in the text of the Act, the lawmaker permitted the Constitutional Court to move along the entire time axis, not only in the direction of *pro futuro*. That option is, however, considered exceptional and must be warranted by the threat of an intervention in the rights and freedoms even greater than would be the disruption of the principle of legal certainty caused by proceeding thus.

[44] E.g., decisions of the Constitutional Court published under Ref. No. 32/1997 Coll., or under No. 452/2006 Coll.

When the Constitutional Court strikes down a legal norm (whether for reasons related to a legislative omission or otherwise), it creates a "cavern" in the legal order, which it cannot fill with normative text, even one that would be in conformity with the constitution, as that power is granted exclusively to the legislative branch of power. Hence, the Constitutional Court, accenting the principle of a thorough separation of powers in a state, leaves legislative activity to the Parliament. In doing so, it considers whether the time granted to the lawmaker to fill the gap is proportionate to the seriousness of the unconstitutional situation created by the norm that is being abolished. This time-period then serves the lawmaker in responding with an adequate legislative solution to the Constitutional Court's decision. The postponing of the executibility of a derogative decision is then connected to an estimate of a time-period appropriate for the enactment of a legal regulation which is in conformity with the Constitution; the time-period will differ according to the type and extent of the norm being abolished (the usual time-period given is one year[45]), but if it is a norm with a great impact on the entire society, or large units or whole regulations, the time-period may be longer[46].

Alternative forms of the statement of the decision

Given that the Constitutional Court builds on the maxim that an interpretation of a legal norm such that it would conform to the Constitution should take precedence over that norm's abolition, its interpretation, which it preferred to the derogation of a legal regulation or its part, is binding. To enhance the interpretative nature of its decision, the Constitutional Court has decided to issue so-called interpretative statements.

Interpretative statements – decisions evaluating the inactivity of the Parliament

The Constitutional Court used this kind of a statement of a decision to point to an obviously unconstitutional situation, in spite of not being able to grant a petition and to abolish the challenged legal regulation. In its Decision Ref. No. 20/05, the Court therefore, aside from denying and rejecting a part of the petition, supplemented the statement of the decision with its claim concerning the unconstitutional situation, which was not challenged by the petition, but which was found unconstitutional by the Constitutional Court during the proceedings[47]. The Court stated that *"under certain conditions, the consequences of a gap (missing legal regulation) are unconstitutional, especially in cases when the lawmaker decides to regulate a certain area, declares this intention in the law, but does not enact the*

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[45] E.g., Decision Ref. No. Pl. ÚS 42/04, published under No. 405/2006 Coll. or Decision Ref. No. Pl. ÚS 27/97, published under No. 160/1998 Coll.

[46] In its Decision Ref No. Pl. ÚS 16/99, published under No. 276/2001 Coll., the Constitutional Court postponed executibility by an entire 18 months and stated, about that, in its rationale – for the lawmaker: " ... *the above-mentioned deficits of constitutionality cannot be .... sensibly resolved by partial derogations. ... Similarly, the Constitutional Court is aware of the legislative difficulty in resolving the constitutional deficits stated above; but, on the other hand, it must be noted that it has pointed to the unconstitutionality of the sub-issues in a number of its panel and plenary decisions, when it noted, above all, that it is not the Court's task to substitute for a non-existent Supreme Administrative Court, to interpret regular law, especially administrative law, and to grant judicial protection as the only judicial instance. Hence, having considered all of the appeals it has made in the past with respect to executive and legislative powers, and having taken into account the status of work on the reform of the administrative judicial system, the Court has decided to postpone the executibility of its decision to annul, until 31 December 2002. In doing so, the Constitutional Court is convinced that a greater time-period is required for a change this fundamental, which means that the enactment of the new regulation is the task for this legislative assembly."*

[47] This additional statement read: *"The long-term inactivity of the Parliament of the Czech Republic, consisting of its failure to enact a special legal regulation setting out cases in which a lessor may unilaterally increase rent, payments for any services provided in connection with the use of an apartment, and to change other terms of a lease agreement, is unconstitutional and in breach of Art. 4 (3), Art. 4 (č), and Art. 11 of the Charter of Fundamental Rights and Freedoms, and Art. 1 (1) of the amendment Protocol 1 to the Convention on the Protection of Human Rights and Fundamental Freedoms."*

foreseen regulation. The same conclusion applies in cases when the Parliament has adopted the declared regulation, but it was abolished because it did not comply with the constitutional criteria and the lawgiver has failed to enact a substitute that would conform with the Constitution, in spite of the Constitutional Court granting it a sufficient time-period (18 months). Furthermore, the legislator has remained inactive, even after the expiration of that time-period, and has not adopted the required legal regulation to this date (more than 4 years later).

This evaluating statement[48] can be understood as a forceful appeal to the legislative power to exercise its powers in this specific matter and fill a gap in the legal order, which arose due to its omissive conduct.

Revival of the Previous Legal Regulation

Only for the sake of completeness, we should add that the abolition of a legal regulation does not automatically revive the previous legal regulation. On the contrary, once a legal norm is abolished, a vacant spot remains in the legal order, because there are no legal grounds for the "resuscitation" of the previous legal situation that was replaced with the – now repealed - norm.

The principle of "not reviving" the previous legal regulation is based on two reasons. The first is the structure of the legal order, which does not automatically replace legal norms by former legal norms, and does not know that institute. The other is the constitutionally embodied principle of the division of powers in a state, whereby the power to make legislation vests primarily in legislative power, thereby eliminating an automatic initiation of an *ex lege* legal regulation (once a norm has been struck down by the Constitutional Court), but also the initiation of legal regulation by the judiciary, as here represented by the Constitutional Court. If the possibilities of derogation were used to their full, the Constitutional Court could theoretically, by striking down abolishing provisions, install the previous legal regulation, thereby putting itself in a position which does not befit it.

We can conclude by saying that the revival of a legal regulation is not possible in the Czech Republic and would be hard to apply, in focusing on the derogation of a "missing part of the legal order".

Individual constitutional complaints in relation to legislative omissions

The Constitutional Court decides about constitutional complaints against an authoritative decision or another intervention of a public authority interfering with constitutionally guaranteed rights and freedoms. Another intervention of public power may consist of the omissive conduct by the lawmaker, although the Constitutional Court has not yet decided on the merits of such a constitutional complaint.

A fundamental change compared to the "traditional" constitutional complaint is the fact that the substance of the challenged unconstitutionality does not reside in the improper petition of a legal norm, by the petition of which the public authority applying it could breach the claimant's fundamental rights, but of the fact that the legal regulation does not exist at all.

[48] A so-called additive type of dictum, the use of which by the Czech Constitutional Court was recommended by Justice Eliška Wagnerová in her dissenting opinion in Decision Ref. No. ÚS Pl. 15/04 in November 2004, but which has not yet been used by the Constitutional Court.

The claimant then has two options. The first is to file a constitutional complaint directly, without exhausting all of the procedural remedies to protect his right, which is a condition stipulated by the law. Theoretically, the Constitutional Court could accept that constitutional complaint, but given its thorough adherence to the principle of self-restraint[49], its acceptance would probably have to be related to the continuation of a breach of fundamental rights. The other option is to file an petition before a general court to initiate proceedings and then file an appeal – because a general court, being bound by the law, could not grant a right which the law does not know. Only then could a constitutional complaint follow. This more complicated process contains a number of safeguards. The proceedings before a general court may show that this is not a case of a legislative omission and that it can grant the claimant's petition; also, it is possible for the general court to ascertain the legislative omission and provide protection to the rights that are at stake, by directly applying the Charter; and, last but not least, we should mention a situation when the Constitutional Court strikes down a challenged decision due to an "omission by the lawmaker", and general courts then – led by the Constitutional Court's interpretation – will be able to provide protection to the claimant's rights more easily. This is, however, sheer speculation, as the Constitutional Court has yet to decide in such a matter.

5. Consequences of the statement of the existence of legislative omission in Constitutional Court decisions

The lawmaker is obliged to fill a gap in the legal order created due to its inactivity, within the boundaries set out for it by the Constitutional Court in its case law[50]. Generally speaking, if one of the branches of state power exercises its rights too intensively, or on the contrary (which is our topic), does not exercise its power and does not fulfil its tasks, the constitutional mechanism of checks and balances must be applied, which rectifies this off-balance situation.

A standard solution therefore is when the legislative power accepts the appeal of the Constitutional Court and remedies a legislative omission by a new legal regulation. This legal regulation then does not suffer from the ailments of the previous legal regulation, and if the interpretation offered by the Constitutional Court is respected, only norms which conform to the Constitution are adopted.

But the lawmaker does not always listen carefully to the decisions of the Constitutional Court, and it is even possible that, even after an appeal by the Constitutional Court, contained in several of its rulings, the legislature does not enact the required legal regulation[51]. There are two possible ways to respond to that situation.

1. Due to the decision of the Constitutional Court, protection is provided to the rights of natural or legal persons by general courts, without a positive legal regulation being issued by the lawgiver[52]. This is a way to create law by judicial decision-making.

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[49] For more on this, see e.g., the resolution of the Constitutional Court in Ref. No. I. ÚS 264/03

[50] See Art. 89 (2) of the Constitution: "(2) Executable decisions of the Constitutional Court are binding for all bodies and persons."

[51] For example, in the area of regulated rent, on which the Constitutional Court ruled in its Decisions Ref. No. Pl. ÚS 3/2000, announced under No. 231/2000 Coll., Ref. No. Pl. ÚS 8/02, announced under Ref. No. 528/2002 Coll.), or Ref. No. Pl. ÚS 2/03, announced under Ref. No. 84/2003 Coll.

[52] The Constitutional Court proceeded thus in its Decision Ref. No. Pl. ÚS 20/05, published under No. 252/2006 Coll., in which it stated: "*The Supreme Court and other general courts make a mistake in refusing to provide protection to the rights of natural and legal persons who have turned to them requesting justice, if they reject their applications with only a formalistic rationale and a reference to the inactivity of the lawmaker (non-*

2. In the event of a legislative omission ascertained and objected to in deliberations concerning a specific constitutional complaint, and should the State carry on in its omissive legislative conduct, an action against the State could be considered, concerning its liability for damages under the Statute on Liability for Damages Caused in the Discharge of Public Power by a Decision or Improper Official Process, which the Constitutional Court would interpret extensively. An analogy with Community law would speak in favour of this model (the omission of a country to implement a directive).

The above can also be applied to the legislative omissions of entities other than the Parliament, if the Constitutional Court is entitled to review the results of their normative work.

6. Summary

In concluding, we can state that although the Constitutional Court of the Czech Republic has encountered the theme of legislative omissions several times during the Court's existence, it does not constitute a major part of the Court's activities.

The Constitutional Court has not been vested with any specific procedural rights to examine, evaluate, or eliminate legislative omissions, and hence, these omissions are only confronted with those procedural institutes that are available to the Constitutional Court. Similarly, the existence of a legislative omission alone has not yet been a reason for the Court to derogate a legal norm or grant an individual constitutional complaint.

An omission of a lawmaker, which has caused a constitutionally defective situation, is not examined in isolation, but always in connection with other circumstances and facts, in order for the Constitutional Court to be able to live up to its primary mission – the protection of constitutionality as such. To ensure that function, the framers of the constitution entrusted it with relatively great powers, which the Court could exercise even with respect to legislative omissions, without thereby prejudicing constitutionality. It is evident that in order for the Constitutional Court to ensure its main mission, it must be able to create protective instruments on its own, and its decision-making in relation to legislative omissions shows that it intends to fulfil its function as the protector of constitutionality.

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existence of the relevant legal regulation), even after the Constitutional Court, as the protector and overseer of constitutionality, opened up a way to them in its decisions."