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Legislative Omission in Practical Jurisprudence of the Polish Constitutional Tribunal

1. Introductory remarks

Legislative omission implies a situation (behaviour of the lawmaker), where despite the existing and binding legal requirement (normative obligation) the lawmaker has not developed the required regulations or has enacted incomplete, insufficient regulations. In the first of the above described situations we have to do with so called proper omission (which is absolute, unconditional), whereas in the second case – with relative (partial) omission.

In Polish legal doctrine before 1989 the issue of legislative omission was usually overlooked and was not analysed in any extensive manner. In that period some authors noted the possibility of occurrence of gaps in legal regulations (especially legislative omissions). Nevertheless, according to the concept of unity (homogeneity) of the powers of the state and the resulting superiority of parliament in the system of state powers, they could not allow for any possibility of external control over the functioning of parliament, the effects of which could lead to pointing out any cases legislative omissions and their scope.[1] Owing to such circumstances they were more inclined to mention the possibility of occurrence of legislative omissions from the comparative law perspective.[2]

Therefore, the very phenomenon of gaps in legal regulations was actually noticed. Prior to the restitution of the concept of separation of powers and the establishment (restitution) of constitutional judicature, sufficient doctrinal and institutional conditions that would favour the analysis of this phenomenon from the point of view of compliance with (and application of) the constitution were not in place.

[1] See: S. Rozmaryn, *Konstytucja jako ustawa zasadnicza Polskiej Rzeczypospolitej Ludowej [The Constitution as the fundamental law of the People's Republic of Poland]*, Warsaw 1961, p. 189.
[2] L. Garlicki, *Sądownictwo konstytucyjne w Europie Zachodniej [Constitutional judicature in Western Europe]*, Warsaw 1987, p. 20.

The stipulation that constitutional control should embrace the phenomena (cases) of legislative omission remains in correlation with the so called positive reflex of particular power of the constitution, i.e. with its juridical effect, which requires complete positive implementation – also in terms of lawmaking – of constitutional requirements and obligations. Failure to implement or incomplete implementation of constitutional norms of an imperative or obliging nature most frequently appears under the guise of lawmaking inaction (including legislative omission). From the point of view of control over the application ("implementation") of the constitution it is essential to ascertain and to indicate the following elements: a) the identification of imperative or obliging constitutional norms and their legal consequences; b) the assessment of the degree and scope of their operation by the "sub-constitutional" lawmaker; c) the identification of the scope of regulations that have binding force subordinate to that of the constitution, within the scope of which constitutional requirements or obligations have failed to be fulfilled.

In all of the above indicated areas, the point of reference for the purposes of assessment consists of norms pertaining to the constitutional order. In the rulings of the Polish Constitutional Tribunal, as well as in the jurisprudence of other courts, the possibility of referral to provisions of the Constitution in confrontation with cases of inactivity (omissions) on the part of lawmaking bodies is recognised, and also the negative legal implications of situations of this kind are pointed out.

The jurisprudence of the Polish Supreme Court dating some years back (mainly from the decade of the 1990-ties) used to associate lawmaking omissions with the existence of "legal gaps". It regarded such phenomena as consisting of endogenous deficiencies of the system of division of competencies (between lawmaking bodies) being responsible for allowing the respective lawmaking omissions.[3]

For example, when assessing the fact of the failure of the Minister of National Defence to issue the required implementing regulation pursuant to the Act of 25 October 1991 on the universal obligations concerning national defence, the Supreme Court decided that the consequence of the lawmaking omission by the Minister of Defence resulted in the

[3] See: Judgment of the Supreme dated 20 April 1995, III AZP 8/95, OSNA No 17/1995, Item 211. The Supreme Court ruled, i.a. that: "If a legislative act foresees the issue of implementing provisions, which are not actually issued, the respective component of the legal system is incomplete, it contains either an instrumental gap (making it impossible to fulfil the premises of the legislative act), or – as in the case under consideration – a gap concerning the cohesion of the system of control over the activities in the sphere of financial actions."

requirement to apply the legal provisions existing before the adoption of the law authorising the Minister to issue such a regulation.[4]

The turning point in the jurisprudence of the Polish Supreme Court concerning omissions in lawmaking consisted of two judgements of that Court dating from January 6 and January 14, 1999. In the first of these rulings the Supreme Court found that the failure to issue the implementing regulations foreseen by a legislative act was a constitutional transgression, generating accountability of those responsible before the Tribunal of State.

In the second judgement indicated above the Supreme Court found, in turn, that "failure by the Council of Ministers to fulfil the duty stemming from its competence with regard to the issue of the regulations assuring the proper implementation of the legislative act (Article 146 Paragraph 4 Sub-Paragraph 1 and 2 in conjunction with Article 92 of the Constitution of the Republic of Poland) infringed upon the constitutional principles of functioning of the democratic state subject to the rule of law (Articles 2 and 7 of the Constitution of the Republic of Poland), and therefore it could constitute a transgression against the Constitution."

The Supreme Administrative Court, in turn, as the body exercising judicial control over the legality of operation of the public administration, decided that lawmaking omissions could lead to infringements of the law, including the violation of subjective rights.

When adjudicating on the failure to specify the rules governing the issuance of foreign exchange permits (pursuant to binding delegation set forth in Article 21 Paragraph 2 of the Act on Foreign Exchange Law of 1989) the Supreme Administrative Court decided, that the respective omission resulted in obstruction, hampering the judicial protection of the rights of interested parties.

A case of improper (reprehensible) lawmaking omission was encountered in the jurisprudence of the courts in connection with the Act of 24 January 1991 concerning veterans and certain victims of wartime and after-war repressions. This omission consisted of the failure (by the Prime Minister) to issue an implementing regulation, which was necessary in order to be able to grant veterans' rights. Furthermore, it also comprised the failure on the part of the Head of the Office for Veterans and Victims of Repression to issue an order concerning the list of concentration camps, the former inmates of which would be entitled to the formal granting of the status of a veteran.[5]

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[4] See: Resolution of the Supreme Court dated 31 May 1994, III AZP 1/94, OSNAPiUS No 5/1994, Item 73.

[5] See: L. Bosek, *Zaniechania prawodawcze jako przedmiot kontroli sądowej (analiza porównawcza)[Lawmaking omissions as the object of court control (comparative analysis)*, Biuro TK, Zespół Orzecznictwa i Studiów, [*Office of the Constitutional Tribunal, Jurisprudence and Studies Section*], Warsaw 2003, p. 31.

The Supreme Administrative Court found these omissions to be the cause preventing the actual realisation of enjoyment of substantive legal rights foreseen by legislation in the case of the respective citizens and qualified these legal gaps as a constitutional transgression.[6] The Supreme Administrative Court adopted an analogous stance with regards to the case of omission (lasting for five months) by the Minister for the Protection of the Environment, Natural Resources and Forestry, consisting of the failure to issue implementing regulations to the Act of 29 August 1997 concerning the amendment of the Law on the Protection and Maintenance of the Environment.[7] In the judgement passed on 16 November 2001 the Supreme Administrative Court (sitting in a panel of 7 judges) found the respective minister to be guilty of allowing the omission in contravention of the law.[8]

A legislative omission (in the strict meaning of the term, i.e. consisting of the failure to enact the respective legislative act) was found to be the case by the verdict of the Supreme Administrative Court sitting in a panel of 7 judges on 12 June 2000.[9] The Court confirmed the existence of the circumstance of failure to enact the provision of Article 52 Paragraph 5 of the Constitution of the Republic of Poland because of the failure to adopt a legislative act determining the possibility for Polish people living abroad to settle on the territory of the Republic of Poland following the prior establishment of their "Polish nationality" (the establishment of which required the legislative definition of the premises, based on which the "Polish nationality" could be decided upon). The Supreme Administrative Court stressed that the gap caused by the failure to pass the required legislative act resulted in shifting the risk of "legislative lawlessness" upon the individual. The Supreme Administrative Court concluded, therefore, that "the legislative omission of this kind was in contradiction with the principles of the democratic state based on the rule of law and could be qualified in terms of a constitutional transgression."

The above indicated ruling of the Supreme Administrative Court was subsequently referred to in the judgment of the Constitutional Tribunal of 13 May 2003.[10] In that judgment the Constitutional Tribunal criticised the failure of the legislator to enact the constitutional requirement contained in Article 52 Paragraph 5 of the Constitution. The Tribunal not only

[6] Judgement of the Supreme Administrative Court of 21 December 1999, V SAB 147/99 (unpublished), with approving gloss by J. Borkowski, PiP [Państwo i Prawo?] 2000, folio 7, p. 111.
[7] Journal of Laws - Dz. U. 1997, No 133, Item 885.
[8] Judgement concerning the case OSA 7/01, published (together with approving gloss by M. Pawłusiewicz) in: OSP 2003, No 1, Item 13.
[9] IV SA 1108/99, OSNA 2002, No 4, Item 147.
[10] SK 21/02, OTK ZU No 5/2003, Item 39.

ascertained the existence of the respective omission, but also pointed at the necessity to apply other legislative provisions (covering a broader scope of regulation).[11]

The issue of legislative omission has become the subject of attention in Poland on the part of the Codification Commission (for the civil law) in the context of regulation of the principles governing civil liability of the organs of public authority. The Commission proposed that pursuant to Article 417 § 4 of the Civil Code, the courts should have the capacity to decide, whether failure to issue a necessary normative act (lawmaking omission) violated a legal obligation. It is characteristic that the Commission confirmed the obligation to fulfil the requirement set upon the legislator (lawmaker) by the provisions of the Constitution. Nevertheless, in keeping with its core competence (and scope of tasks), it abstained from formulating any suggestion of entrusting the Constitutional Tribunal with any control function with respect to lawmaking omissions.

2. Lawmaking omissions in the jurisprudence of the Polish Constitutional Tribunal

Two currents may be observed in the formulation of rulings of the Polish Constitutional Tribunal in the light of a review of its jurisprudence. In the main (principal) current, the Constitutional Tribunal remains faithful to the claims that it performs (at most) the role of a "negative legislator", i.e. one that points out the unconstitutionality and the resulting legal "inefficacy" of normative provisions that are in conflict with the Constitution. In its side current, which is less official and less pronounced, such rulings can be found, which concern incomplete regulations (from the point of view of the requirements of the Constitution) and in which the Constitutional Tribunal takes a stance concerning the lawmaking omissions existing there.

The very notion of "lawmaking omission" has not been unequivocally and precisely defined in the jurisprudence of the Polish Constitutional Tribunal. Nevertheless, in some judgements there is an attempt to describe the phenomenon of "lawmaking omissions". For example, the judgement of the Constitutional Tribunal of 24 October 2001 may be indicated, where the Tribunal has assumed in its justification that a legislative omission consists of "a given issue being consciously left outside the scope of legal regulation by the legislator."[12]

The definition quoted here is characterised by certain generality. Its most controversial element consists of the feature of "the given issue being consciously left outside the scope of

[11] In the described case these were provisions covering a broader scope than in the law on foreign nationals.
[12] SK 22/01, OTK ZU No 7/2000, Item 216.

legal (legislative) regulation by the legislator". The Tribunal did not specify more precisely how the indicated requirement could be understood. In particular: is it a case of occurrence of intentionally assumed lack of regulation of the given issue (which could be associated with the notion of intentionality in criminal law), or, is it sufficient that there is neglect on the part of the legislator consisting of the acceptance of the possibility of "insufficient regulation" of certain issues, despite the obligation to provide their normative regulation, resulting from a higher ranking legal act being in force, which assumes (comprises) such an obligation.

The Kelsen'ian formula of the "negative legislator" has been reflected, i.a. in the verdict of the Constitutional Tribunal of 7 August 1998,[13] in which the Tribunal stated that the "object of proceedings before the Constitutional Tribunal (...) could consist exclusively of a normative act (its specific provision), on the basis of which a court or a public administration body had issued a final decision concerning freedoms, rights or obligations laid down in the Constitution. The consequence of the possible establishment by the Constitutional Tribunal of inconsistency with the Constitution would consist of the elimination of the questioned provision from the legal system. Therefore the Tribunal performs the role of a <<negative legislator>>, but it does not have any lawmaking prerogatives."

The same line of thought was presented in the ruling of the Constitutional Tribunal of 4 July 2000, in which the following argument was put forward: "In its essence, the complaint leads to the demonstration of the omission on the part of the lawmaker, who did not establish in the legislative act in question any provisions instituting two instances of proceedings before the Supreme Administrative Court. (...) The task of the Constitutional Tribunal is to rule on cases concerning the consistency of normative acts with the Constitution in order to eliminate provisions that are inconsistent with the Constitution (...), elimination from the binding legal order of the norm of Article 57 Paragraph 1 of the act on the Supreme Administrative Court shall in no case generate an effect in the form of introduction of two-instances of administrative judiciary"[14]

The position of the Constitutional Tribunal, which highlights the view concerning the inadmissibility of control of lawmaking omissions by the Tribunal has also found expression in judgements bringing to the ultimate end any proceedings concerning cases other than those initiated by means of filing a constitutional complaint.

[13] Ts 83/98, OTK ZU No 5/1998, Item 86.
[14] This view was formulated before the introduction of two instances in proceedings before the administrative judicature, which was introduced together with the establishment of regional (voivodeship) administrative courts.

For example, in the judgement of 2 July 2002, the Constitutional Tribunal dismissed the petitions of the Civil Rights Ombudsman requesting the establishment of non-constitutionality of the regulation concerning the conditions for granting financial support to students of full time studies (university level), pointing out that: "the purpose of the petition is not to demonstrate the deficiency of the regulation itself, but rather of what has been omitted there – the rules governing the granting of support to students studying according to a different system than that of full-time studies".[15] The Constitutional Tribunal "distanced itself" therewith from exercising control over gaps in legal regulations. It ascertained that it had no competence with regards to control over gaps in normative provisions. According to the opinion of the Tribunal, "in the case of a gap ..., pursuant to Article 4 Paragraph 2 of the Act on the Constitutional Tribunal, (it) can only convey its comments to the competent bodies in order for it to be eliminated, as a necessary means of assuring cohesion of the legal system in the Republic of Poland".

This view continues to be upheld in the jurisprudence of the Constitutional Tribunal of the period following the entry into force of the Constitution of the Republic of Poland of 2 April 1997 and the presently binding Act on the Constitutional Tribunal adopted in 1997.[16]

A. Control over constitutionality and incomplete normative regulations

Incomplete normative acts consist of legal regulations, which from the point of view of the principles (and obligations) formulated in the text of the Constitution are characterised by a too narrow scope of application, or such, which due to the object and purpose of regulation, omit substantial content.

By embracing incomplete regulations in the scope of its control, the Constitutional Tribunal indirectly includes lawmaking omissions within the focus of its attention (and control), and at least their consequences in the form of "gaps in the law".

In the judgement of 3 December 1996 the Polish Constitutional Tribunal determined dogmatically (in terms of positive law) the premises for control of incomplete regulations. The following passage was included in the reasoning part justifying the respective judgement: "The Constitutional Tribunal does not have the competence to adjudicate on omissions by the legislator consisting of the lack of issuance of a legislative act, even if the obligation to adopt

[15] See: Justification of the judgement concerning the case U 7/01, OTK ZU No 4/A/2002, Item 48.
[16] See, for example: rulings concerning the cases P 10/05, OTK ZU No 10/A/2005, Item 127; SK 20/05, OTK ZU No 4/A/2007, Item 38.

it should stem from constitutional norms. In the case of a legislative act that has been passed and is in force, the Constitutional Tribunal is vested with the competence to assess its constitutionality also from the point of view of whether its provisions do not lack such regulations, without which, owing to the nature of the regulation subject to such an act, it might give rise to any doubts of a constitutional nature. The allegation of non-constitutionality may therefore concern both such matters, which the legislator has actually regulated in the given act, and also such issues, which have been omitted in that act, despite the fact that in order to comply with the Constitution they should have been regulated."[17]

In the judgement of 24 September 2001[18] the Constitutional Tribunal distinguished between a legislative omission and incomplete regulation (lawmaking omission). As construed by the Tribunal, a legislative omission consists of "a given issue being completely left out of the legal regulation by the legislator". In the case of lawmaking omission the element of intentional behaviour of the lawmaker is not decisive; what is important, however, is that the lawmaker, when determining the legal norms governing a given sphere of relations, "has done it in an incomplete way, regulating it only fragmentarily". The lawmaking omission is particularly significant in the sphere of public law; its existence leads to the situation that an organ of public authority is unable to act in the case of such omission, taking into account the requirement of legality (Article 7 of the Constitution of the Republic of Poland). In the sphere of private law, which is characterised by extensive freedom of behaviour of the subjects under such law (participants in legal intercourse), the issue of lawmaking omission must be treated with much greater flexibility (in terms of legal consequences of such omission).

At that time the Tribunal found the lawmaking omissions as "not being the object of cognition on the part of the Constitutional Tribunal". With regards to incomplete regulations, however, the Constitutional Tribunal adopted a stance allowing the review of their consistency with the Constitution. In this case it argued that "whereas parliament was entitled to a very broad field subject to its decisions, as to which matters should be regulated by way of legislation, so once such a decision is made, the regulation of the respective matter must be enacted with due respect for the constitutional requirements".

[17] See. Justification of the judgement concerning the case K 25/95, OTK ZU No 6/1996, Item 52.
[18] Concerning the case SK 22/01, OTK ZU No 7/2001, Item 216 with gloss by B. Wierzbowski, Przegląd Sejmowy (Parliamentary Review) 2002, No 4, page 74.

The scope of reflection concerning incomplete regulations and the control of their constitutionality comprises the problem of constitutional points of reference, i.e. the most frequent benchmarks for the control of constitutionality.

In the practice of the Polish Constitutional Tribunal the most frequent benchmark consists of the constitutional principle of equality and equal treatment.[19]

Applying the constitutional principle of equality and equal treatment as the control benchmark, in the judgement of 19 May 2003 the Constitutional Tribunal has expressed the view that the object of infringement of the principle of equal treatment consists of "the lack of specific regulation – the same, similar or close to it – with regards to a certain category of subjects. This particular omission is of a discriminating nature and only the appropriate change of regulations broadening the scope of subjects enables to eliminate the unequal treatment in the analysed sphere of legal relations." [20]

The second frequent category of cases of relative lawmaking omission (incomplete regulation) in the jurisprudence of the Polish Constitutional Tribunal consists of the cases of the lack of inter-temporal regulation. The respective judgments concerned, for example, the Act on the renting of residential apartments,[21] the amending act to the law on value added tax on goods and services (concerning the rules governing the calculation of VAT tax),[22] the right of access to court adjudication in anti-monopoly cases.[23]

In the judgement of 9 June 2003 the Constitutional Tribunal found a violation of the Constitution due to the lack of regulation of the situation of those entities, whose cassation appeal of last resort had been dismissed by the Supreme Court, despite the fact that the Constitutional Tribunal had previously ruled on the unconstitutionality of the legal provision applied by the courts.

The problem of lawmaking omission appeared also in the judgment of 19 December 2002 with regards to claims concerning so called "property abandoned to the East of the border on the river Bug" [former property of persons repatriated from former Polish territory taken over by the Soviet Union – translator's comment].[24] The Constitutional Tribunal found that the legislator (both chambers of Parliament – the Sejm and Senate) had violated the

[19] For example, compare the following judgements of the Constitutional Tribunal: 23 September 1997, K 25/96, OTK ZU No 3-4/1997, Item 36; 6 May 1998, K 37/97, OTK ZU No 3/1998, Item 33; 30 May 2000, K 37/98, OTK ZU No 3/2000, Item 112; 30 September 2002, K 41/01, OTK ZU No 5/2002, Item 61; 6 January 2003, K 24/01, OTK ZU No 1/2003, Item 1; 26 February 2003, K 1/01, OTK ZU No 2/2003, Item 15.
[20] K 39/01, OTK ZU No 5/2003, Item 40.
[21] Judgement of 3 December 1996, K 25/96, OTK ZU No 6/1996, Item 499.
[22] Judgement of 25 June 2002, K 45/01, OTK ZU No 4/2002, Item 46.
[23] Judgement of 12 June 2002, P 13/01, OTK ZU No 4/2002, Item 42.
[24] Judgement of 19 December 2002, K 33/02, OTK ZU No 7/2002, Item 97.

constitutional limits of lawmaking discretion; it also decided that on the grounds of the constitutional principle of protection of private property and other property rights (Article 64 of the Constitution) the lawmaker is under the "positive obligation to enact provisions and procedures granting legal protection to property rights". With regards to the issue of pay increases for nurses, foreseen in the controversial Act of 22 December 2000, The Constitutional Tribunal, *obiter dicta,* ascertained the violation of constitutional standards (Article 2, Article 7, article 32 of the Constitution) consisting of the failure of the legislator to develop "legislative instruments assuring the adequate flow of funds to the entities that were charged with the obligation to execute the law".

B. Jurisprudence of the Constitutional Tribunal concerning "relative lawmaking omissions" (incomplete regulations) as the point of departure for de lege ferenda stipulations

In the existing jurisprudence of the Polish Constitutional Tribunal the lawmaking omission was construed as any complete or partial failure to implement a regulatory obligation specified by the law.

The connotation of the notion of "lawmaking omission" adopted by the Tribunal focuses around the consistency between the lawmaker's behaviour and the constitutional benchmark, applied as the premise for the evaluation of the behaviour of the lawmaker.

In the sphere of control of constitutionality of the lawmaker's deeds it is natural to distinguish between active behaviour, resulting in the establishment of provisions of the law, and lawmaking omissions, i.e. situations of absence of the required lawmaking acts.

An important question for proceedings before constitutional courts (tribunals) emerges in this context: Are the procedures applied to proceedings by such organs adequate to the needs of adjudication on the issues of lawmaking omissions? In particular, this question concerns the assessment of the occurrence of "absolute omissions" (comprehensive ones). Also in the case of "absolute omissions" (i.e. confinement to fragmentary regulations, contrary to the constitutional requirement of comprehensive regulation) the doubt may arise, whether the applied procedure of proceedings of the Constitutional Tribunal is an optimum one, and whether the mode of adjudication is sufficiently stimulating to enhance the clearing of "relative omissions" (fragmentary regulations)?

C. The issue of the legal basis (admissibility) of control of lawmaking omissions by the Polish Constitutional Tribunal

Literal interpretation of Article 188 of the Constitution, determining the scope of cognition of the Constitutional Tribunal, does not directly lead to the embracement by such scope of the control of constitutionality of lawmaking omissions. There is a need, therefore, to seek supporting justifications, which would point at the need for adequate grounds and admissibility of control of this type, first of all in relation to relative omissions.

In the existing commentaries to constitutional regulations, in correlation with the norms set by the Act of 1 August 1997 on the Constitutional Tribunal, first of all the provisions of Article 2 and Article 7 of the Constitution have been singled out.[25] The principle of legalism seems to be particularly useful here (Article 7 of the Constitution), in the light of which the organs of public authority should operate on the basis and within the limits of the law. In a situation, where a constitutional provision imposes the obligation to undertake lawmaking activities, constituting the condition of complete implementation of the constitutional norm, it seems that the control of compliance with the constitution should cover the performance by the lawmaker of a constitutional requirement. The purposefulness of such control is prominent especially in those cases, where the enactment of the constitutional requirement conditions the ability to enjoy benefits, the scope and forms of which ought to be specified by the lawmaker, who is obliged to define them. Otherwise, the confidence of the addressees of constitutional norms (and their "beneficiaries") in the constitutional forebodings, would be undermined, and thereby confidence in the state and in the law that it enacts would be destroyed (which is in collision with the content of Article 2 of the Constitution).

It follows from the formulation of Article 188 in conjunction with Article 7 of the Constitution that it is not possible to presume the control competencies of the Constitutional Tribunal. For this reason, therefore, the object of control on the part of the Tribunal, which is realised pursuant to Article 188 of the Constitution, can only consist of binding normative acts, and within their framework – of lawmaking omissions of partial scope (relative

[25] Z. Czeszejko-Sochacki, L. Garlicki, J. Trzciński, *Komentarz do ustawy o Trybunale Konstytucyjnym [Commentary to the Act on the Constitutional Tribunal]*, Warsaw 1999, p. 11.

omissions). Article 188 does not provide any grounds for control concerning proper omissions (gaps in the law, cases of a complete absence of any normative act).

Owing to the reasons raised above, the claim of non-constitutionality may be referred to partial gaps in legal regulation, undermining the completeness of regulations serving the implementation of a constitutional imperative, as well as to norms (provisions) of the law, which the lawmaker should repeal in order to assure consistency with the Constitution.

It is not admissible, however, to control complete lawmaking omissions, i.e. conditions, where there is a total absence of regulation. Article 188 of the Constitution does not allow to make the object of control out of a "gap in the law" – in every case the control must refer to an existing binding normative act.

In the Polish legal system – in the context of lawmaking omissions – there is a certain inconsistency in terms of the structure of the system. On the one hand, in Article 77 Paragraph 1, the Constitution establishes liability for damages in case of illegal action or failure to act in compliance with the law on the part of public authorities. On the other hand, taking into account the formulation of Article 188 of the Constitution, the legislator of the constitutional system does not allow for control in terms of consistency with the Constitution of "gaps in the law", which result from absolute lawmaking omissions. The formulation of Article 188 allows at most – and even then indirectly – the review of constitutionality of relative lawmaking omissions. It is not without significance that only a judgement of the Constitutional Tribunal concerning the inconsistency with the Constitution of a relative lawmaking omission can open the way to effective claims for damages generated by lawmaking omission contravening the law.

A sideline theme of deliberations on the admissibility of the control of constitutionality of lawmaking omissions consists of the issue of use being made by the Polish Constitutional Tribunal of the possibility to pass signalling resolutions concerning lawmaking omissions (failures and gaps in the law).

Conclusions

The phenomenon of legislative omissions (gaps in the law, incompleteness of legal regulations) deserves more in depth doctrinal reflection. It is a phenomenon that is just as undesirable as it is impossible to preclude *a limine.*

The Polish Constitutional Tribunal, on the grounds of the broadly conceived regulation contained in Article 188 in conjunction with Article 2 and Article 7 of the Constitution of the

Republic of Poland extensively draws on the possibility to adjudicate on matters of so called relative lawmaking omissions, i.e. partial gaps in binding normative acts (and those reviewed in terms of their consistency with the Constitution). Moreover, somewhat on the margins of *in merito* judgements, it avails itself of opportunities to signal (based on Article 4 Paragraph 2 of the Act on the Constitutional Tribunal) "gaps in the law", constituting the consequences of lawmaking omissions. The point of reference for the exercised control of constitutionality of (relative) omissions consists, as a rule, of the constitutional norms that stipulate obligations (or outright requirements), or ones that are at least programmatic, which require positive lawmaking acts in order to be implemented.

In the existing jurisprudence of the Polish Constitutional Tribunal the judgements establishing the occurrence of lawmaking (legislative) omission have most frequently been framed as so called **rulings on interpretation**. As a rule, they have been verbalised in the form of statements of the kind: "inconsistent in terms of the scope, in which it omits …". For this reason, therefore, the phrase "legislative omission" has become an alternative denotation for the relative legislative omission.

Reflection on the legal nature of rulings of this kind (i.e. rulings identifying lawmaking omissions) leads to the conclusion that such rulings are of the declaratory kind. After all, such a ruling does not create any new state of affairs (any new situation) in the legal system. It establishes (identifies), however, the circumstances of the previous absence of action (omission) on the part of the lawmaker, determines the limits of such omission and enables future action by the lawmaker consisting of the undertaking of regulatory measures that were absent prior to the passing of the respective ruling. Hence, a *sui generis* actualisation of the constitutional obligation of the lawmaker occurs, concerning the enactment of the constitutional obligations identified by the Tribunal, which are a legal consequence of obliging (or: programmatic) constitutional norms and of the principle of superiority of the Constitution, as well as the "positive reflex" of the particular binding force of the Constitution.

The scope of reflection also comprises the issue of the extent, to which adjudication with regards to "lawmaking omissions" is possible only on the grounds of constitutional norms that are clearly obliging (obliging constitutional powers). For example, such norms are similar to the regulation provided in Article 15 Paragraph 2 of the Constitution ("the basic territorial subdivision of the state taking into account the social, economic or cultural bonds and assuring the territorial units the ability to perform public functions is determined by legislative act"). Furthermore, it needs to be considered how far such adjudication may also

be based on constitutional programmatic norms (of the type: “labour is subject to protection by the Republic of Poland”, or: “public authorities provide the citizens with universal and equal access to education”).

It seems that the answer to the question formulated above should be as follows. In the case of failure of realisation of constitutional obligations, the Constitutional Tribunal not only may adjudicate, but should indeed single out the existing lawmaking omissions. Otherwise, the categorical constitutional obligation (e.g. in the form of the clause: “shall be determined by legislative act”) would remain without effective constitutional sanction; it would become an empty and ineffective declaration of intentions of the lawmakers of the constitutional system.

The situation is somewhat different in the case of programmatic norms. It is possible to believe that when referred to in a petition or complaint, they may also “empower” the Constitutional Tribunal to adjudicate on lawmaking omissions. The passing of any such ruling, however, must each time be preceded by the establishment, whether the respective programmatic norm (or its essential normative element) may be realised only by passing the “omitted” regulation. The lack of such a finding (and its convincing justification) ought to be regarded as a significant barrier preventing the adjudication on a lawmaking omission.

The rulings of the Constitutional Tribunal establishing the existence of lawmaking default (omission) have above all the effect of ascertainment. It should be regarded that the basic addressee of the provisions of such a ruling consists of the competent lawmaking organ, which is responsible for the failure to act (lawmaking omission). As a rule, it is the same organ as the one that issued the normative act “affected” by the lawmaking omission indicated in the respective ruling. As the ruling ascertaining the existence of a “lawmaking omission” is of the interpretative kind, it may be assumed that the controlled normative act remains in the state of conditional consistency with the Constitution; the condition for the establishment of full and unconditional compliance consists of the elimination of the omission by the appropriate supplementation of the controlled normative act.

The ascertaining nature of rulings of the Constitutional Tribunal concerning gaps in legal regulations (legislative omissions) – analysed in terms of legal consequences – boils down, therefore, to the determination of scope and confirmation in the respective ruling of the Constitutional Tribunal (with consequences close to the generally binding interpretation of the Constitution) of the constitutional requirement (obligation) stemming from the constitutional norm referred to as the benchmark for the control undertaken by the Tribunal in the adjudicated case.