PROBLEMS OF LEGISLATIVE OMISSIONS IN CONSTITUTIONAL JUSTICE

Questionnaire

For the XIV Congress of the Conference of European Constitutional Courts

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

1.1. The concept of the legal gap.

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

- Legal gap means the absence in legal regulation of a specific legal rule that should apply to factual circumstances, as well as uncertainties in legal regulation.

Legal gaps are different from cases in which social relations are not regulated at all, as such cases can be liquidated only by means of lawmaking activity.

Thus, legal gap is the incomplete legal regulation, as well as the uncertainty in legal regulation. The latter could be not only as a result of non-complete regulation of social relations, but also as a result of uncertainty of the content of legal rules.

- There are legal gaps in the national law such as legal uncertainty, legislative gaps, and, in some cases, mistakes of law. The latter appears in cases in which the law-making body:

a) Wrongly considers certain relations to be not subject to legal regulation,
b) Wrongly considers possible that laws can be made specific in the process of their implementation,
c) Wrongly leaves the solution of the issue to the discretion of the law practitioners.

The practice of the RA Constitutional Court indicates that legal gaps most often appear in the form of legal uncertainty. The latter is mainly the result of interpretation of legal provisions in the process of implementation of the law, especially, in the judicial practice, that is in conflict with the Constitution.

In a situation when legal uncertainty is a result of the interpretation of legal provisions in the process of implementation of the law that is in conflict with the Constitution, and this interpretation cannot directly become an object of constitutional control, we face the so-called reproduced gap. In order to abolish the latter, the RA Constitutional Court, while considering the issue of the constitutionality of normative acts, puts into practice the following legal means: the disputed norm is recognized unconstitutional on the basis of its interpretation given in the law-implementing process. For instance, the RA Constitutional Court in the final part of CCD-665 Decision made on November 16, 2006 gave the following formation: "… to recognize the second subparagraph of first paragraph of Article 160 of the Civil Procedure Code of the RA as contrary to the provisions of Articles 18 and 19 of the Constitution and invalid on the basis of the interpretation given to it by law-implementing practice".

- The national scientific legal doctrine considers the reason of appearance of legal gaps.

In terms of the causes of the gap, legal gaps can be initial or subsequent.

An initial gap occurs in such cases when circumstances demanding legal regulation were existing, but the legislator has missed them and has not included in the formulations of a normative legal act. A subsequent gap is the consequence of

newly-emerging relations in the object of legal regulation as a result of the development of the social sphere regulated having been influenced by the legislator's will. Thus, in some sense, the presence of further legal gaps is a regular phenomenon, though in such situations legal prognostication has to display itself.

Those causes are different in theory. They are as follows:

a) A legal act has been recognized unconstitutional by the Constitutional Court, but the competent law-making body doesn't act with enough efficiency, that is, during reasonable time it doesn't take measures to adopt a new act regulating legal relations used to be regulated by the act recognized unconstitutional,
b) When legislation doesn't meet the demands of the time because of the rise of new social relations,
c) When current legislation stays behind the constitutional regulation. This cause of legal gaps is very topical in our Republic in light of Amended Constitution. According to Article 117 of the Constitution amended by the referendum held on November 27, 2005, the National Assembly must, within a two-year period, harmonize the existing legislation with the Amended Constitution after the amendments to the Constitution come into force. The time-period prescribed by the Constitution is close to expiring, but the harmonization of the existing legislation with the amendments has been ensured only by around 10 percent. It means that the current legislation stays behind constitutional regulation almost by 90 percent,
d) When legal provisions are interpreted by the law-implementers, especially by the judiciary in such a manner that contradicts the Constitution. Such interpretation given by courts of general jurisdiction of the RA was the basis of application to the RA Constitutional Court submitted by the citizen disputing the constitutionality of Article 160 of the RA Civil Procedure Code. The latter had been implemented with such interpretation, which, according to the applicant, had deprived the people of the opportunity to dispute the legality of decisions of the National Assembly, orders of the

President of the RA, decisions of the Government, the Prime Minister, as well as of self-governing bodies of the RA. The RA Constitutional Court has found that the formulation of the disputed norm and the interpretation given to it in law-implementing practice impeded the exercise of the right of natural and legal persons to dispute the legality of certain acts in a judicial manner, and as a result, the whole institute of justice was undermined.

The Constitutional Court accepted for review one more application in September, 2007, where the provisions of Chapter 26 of the RA Civil Procedure Code were challenged. The provisions of that Chapter related to disputing the inaction, actions, and acts of state and self-governing bodies and their officials. According to the interpretation given to them by the courts of general jurisdiction, the above-mentioned provisions couldn't be implemented in regard to the challenging of actions and inaction of judges and courts, and a person has no right to challenge the inaction or action of judges and courts on the basis of that Chapter. According to the applicant, as a result of such interpretation in judicial practice he was deprived of exercising the right to judicial protection against the judge's inaction (the consideration of the case at the Constitutional Court is pending).

e) The legislator wrongly considers certain relations not subject to legal regulation,
f) The legislator wrongly considers possible that laws can be made specific in the process of their implementation,
g) The legislator wrongly leaves the solution of the issue to the discretion of the law practitioners.
h) When there are thorough discrepancies between acts that have the same binding power, and one of them "destroys" the other one,
i) The general character of legal norm's hypothesis,
j) Mobility of management relations,
k) The opportunity of occurring of new facts,
l) When necessary amendments aren't simultaneously made in laws while adopting a new law.

- The problem of real and alleged legal gaps is explored from the viewpoint that, in the administration of constitutional justice, legal gap has to be distinguished from the perceived legal gaps, legal vacuum, or the legislator's absolute silence.

- There is no differentiation between legal gaps of public and private laws in the doctrinal research on legal gaps, consequently, their features aren't made specific.

- In doctrinal research on legal gaps, a problem often discussed in relation to the negative consequences of the latter is the overcoming of legal gaps. According to theorists, the legal system must not allow the existence of reproduced legal gaps that cannot be overcome and lead to a stalemate.
In theoretical literature, it is indicated, as a positive consequence of legal gaps, that judicial bodies acting as a negative legislator and overcoming legal gaps via interpretation meet regulation of legal relations more dynamically, which contributes to the development of legal regulation and leading lawmaking activity.

1.2. The concept of legislative omission.
Are the legal gaps which are prohibited by the Constitution (or legal regulation of higher power) distinguished in the scientific literature?

In scientific literature, legal gap isn't directly distinguished from the legal gap prohibited by the Constitution. But, it follows from research on the law-implementing practice of the RA Constitutional Court that the Constitutional Court, in its legal positions pronounced in a number of decisions, looked upon legal gaps found prohibited by the Constitution. In particular:

a) In CCD-630 Decision on April 18, 2006 the Constitutional Court has pronounced the following legal opinions.

" …

The constitutional court finds that, if expropriation is done without clear determination in legislation the constitutional requirements of restrictions of alienation and without taking them into consideration in practice, it will be not proportional interference to the right to the property.

….

The Constitution directly requires the expropriation procedure to be prescribed by law. By the way, that procedure shan't neglect all the guarantees for the protection of the right to property, provided by Article 31 of the Constitution of the RA. System analysis of the legal acts of the Republic of Armenia shows this problem still not to be solved clearly and in proper manner.

The Constitutional Court hold that in regards to the requirements of the Articles 3, 5, 8, 31, 43, 83.5 of the Constitution the Republic of Armenia should determine clearly by law the legal procedure of expropriation.

Legislative regulation of the expropriation should have as a base the initial provision, that the right to that property may be restricted or terminated only in cases prescribed in the Article 31 of the Constitution by providing the implementation of following constitutional requirements:

a. the requirement of substantiation of the existence of society and state needs,
b. the requirement of the existence exceptional prior public interest and its substantiation,
c. the requirement of providing fair balance between society and public needs and the requirements for protection of individual right to property provided by prior public interest. The last implies also person's proper and thorough awareness and possibility of effective judicial protection of rights in the context of comparison of different interests.

The law shall determine the procedure of expropriation by specifying:

a. the state agency taking decision on the alienation,
b. the procedure of providing prior equivalent compensation (in nature and/or monetary)for the alienated property,
c. the procedure of appeal the decision on the alienation of the property and procedure of alienation in case of disagreement on compensation price, other equivalent compensation and on other conditions connected to those,
d. the rights, obligations and restrictions of rights of the owner of alienated property,
e. the procedure of origination of new right and legal execution after the expropriation
f. Peculiarities of different ownership objects for lawful objectives etc.

If the property is alienating regardless of the fact that to what subject (state, community, natural or legal person) will pass the property in the future in a manner prescribed by law, the law shall determine such a regulation which would guarantee the use of mentioned property for society needs on the base of which the alienation has been done.

Meanwhile, the law shall prescribe that among the state (upon its entitled agency) and owner shall be concluded a contract on expropriation and equivalent compensation provided by prior public interest, in which bilateral obligations should be clearly stated coming from the abovementioned requirements and also a condition not to consider the compensation from such a contract as a taxable income.

…

The law must specify the definition of the public and state needs, how the fact, that the equivalent reimbursement is grounded only by prior public interest, should be motivated, what regulation should be the substantiation in order to inform the owner how he can appeal the submitted substantiation as presented in Articles 18

and 19, when the owner of the property finds out that there is "a fair balance" between the public interest and human rights protection necessity.

The following law should also correspond to the legal position expressed in a number of decisions of the European Court of Human Rights, according to which no legal rule can be considered "law", if it does not correspond to the legal definiteness principle (res judicata), i.e. it is not formulated clearly enough, which can help citizen hold his own position."

b) The Constitutional Court, in CCD-665 Decision on November 16, 2006 after a comparative analysis of the contents of appropriate provisions of Articles 14 and 15 of the RA Civil Code and Paragraph 1 of Article 160 of the RA Civil Procedure Code, found that the legislator has tried to create judicial procedures to guarantee implementing the provisions of Articles 14 and 15 of the RA Civil Code, but, as a result, has created such a situation when the provision of procedural law has become an obstacle to implementing a norm of substantive law. In Subparagraph 1 of the Paragraph 1 of Article 160 of the RA Civil Procedure Code, the legislator has enshrined the obligation of courts investigating civil and economic cases to admit and investigate applications concerning the recognition of acts of state and local self-government bodies and of their officials as invalid, which are in conflict with Law, and in the Subparagraph 2, it distinguished a group of legal acts whose determination of legality was practically out of judicial control.

Subparagraph 2 of Paragraph 1 of Article 160 of the RA Civil Procedure Code, stating that "The applications concerning the request to invalidate the acts, the solution of the issue on constitutionality of which is an exclusive power of the Constitutional Court in accordance with the Constitution, should not be an object of judicial trial", is legally indefinitely formulated. As research into decisions made by the first instance courts of general jurisdiction and cassation court indicates, judicial instances have interpreted the formulation in Subparagraph 2 of Paragraph 1 of Article 160 of the RA Civil Procedure Code without taking into account the provisions of Articles 14 and 15 of the RA Civil Code and Paragraph 1 of Article

100 of the Constitution. If the courts of general jurisdiction tried to reconcile the disposition of Subparagraph 2 of Paragraph 1 of Article 160 of the RA Civil Procedure Code with the contents of Paragraph 1 of Article 100 of the RA Constitution, it is obvious that the latter doesn't involve any provision based on which the citizen's applications can be rejected. Such rejection could be justified only if the Constitution gave to the Constitutional Court the authority to determine the legality of the above-mentioned legal acts, which exists in many countries. But, that authority is given to the courts of general jurisdiction by the legislation of the RA. Consequently, procedural norms should guarantee exercising authorities of courts, but not prevent from exercising them, creating a legal vacuum.

The presence of Subparagraph 2 of Paragraph 1 of Article 160 of the RA Civil Procedure Code with such formulation and interpretation given to it in law-implementing practice prevents natural and legal persons from exercising their right to dispute the legality of certain legal acts in a judicial manner, and, as a result, the whole institute of justice is undermined.

The RA Constitutional Court has notified that such interpretation of contents of Subparagraph 2 of Paragraph 1 of Article 160 of the RA Civil Procedure Code and the current position of the courts of general jurisdiction on implementing that provision do not guarantee the balance of powers, have caused a serious gap in judicial control over legal acts, and threaten the exercising of the right to a judicial protection of human rights and freedoms enshrined in Paragraph 1 of Article 18 of the Constitution of the RA. According to the Constitutional Court's assessment, it is inappropriate for a rule-of-law state to face situations in which the law and law-implementing practice exclude judicial control over legality of some legal acts on the basis of natural and legal persons' applications.

c) The Constitutional Court in CCD-690 Decision on April 9, 2007 has expressed, especially, the following legal position. "The purpose of legislative regulation of legal relations concerning the appeals in conformity with cassation procedure should not only to provide for imperative conditions relating to the

contents of appeals to cassation court, but also imperative requirement according to which, in case of appeal's returning, the decision should be motivated. Because of the absence of such requirement, decisions of Cassation Court relating to either accepting or returning the appeal are not in essence motivated."

At the same time, defining the precise and understandable contents of the word "shortcomings" in disputing Paragraph 3 of Article 231.1 of the RA Civil Procedure Code, and defining in the legislation the conditions, order and term relating to making the cassation appeal appropriate to the form ordered in Article 230 of the RA Civil Procedure Code will enlarge the trust in justice, the people will be given an opportunity to exercise their constitutional right to judicial protection in cassation court with efficiency and mostly guaranteed.

The Constitutional Court has found that the disputed provision of Paragraph 2 of Article 231.1 concerning the decision on returning the appeal within 10-day period, though the aim pursued, without such a provision, demanding the decision to be motivated, can't meet the requirements of the principles of fair balance, certainty, equality and the rule of law. According to the Constitutional Court's assessment, normative requirement for Cassation Court decisions on returning the appeal to be motivated is a necessary guarantee to ensure both the access to justice and the efficiency of judicial protection of person's constitutional rights. Consequently, the provisions of Paragraph 2 of Article 231.1 of the RA Civil Procedure Code not providing for the requirement the returning of appeal to be motivated, couldn't ensure the effectively exercising the right to judicial protection, enshrined in Articles 18 and 19 of the Constitution of the RA.

d) The RA Constitutional Court has the same legal position in CCD-691 Decision on April 11, 2007.

What is the prevailing concept of legislative omission as a sort of the legal gap in the scientific legal doctrine?

In the national law, the expression “legislative omission” is more often used with the following meaning: legislative omission is the absence of a concrete legal rule concerning the factual circumstances in the sphere of legal regulation.

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

What is the prevailing concept of the mission of the constitutional court as a judicial institution in the scientific legal doctrine of your country? The constitutional court as a “negative legislator”.

In the legal theory of our country, the “negative legislator” meaning of the Constitutional Court dominates. It is expressed in the following way:

a) Realizing subsequent abstract and concrete control, the Constitutional Court takes part in the law-making process in such a way that the RA Constitutional Court recognizes law or provision of law being in conflict with the Constitution, which means losing the legal force of it, automatically taking it out from the legal field,
b) The Constitutional Court, recognizing a legal act contrary to the Constitution, may decide on cases prescribed by law when the legal act loses its legal force, that is, stops being. In this sense, the Constitutional Court also displays itself as a negative law-making body.
c) Decisions of the Constitutional Court as a negative legislator are a source of law, which predetermine the legislative development. Article 9 of the Law of the RA “On Legal Acts” requires that laws adopted by the legislative body of the country not conflict with decisions made by the RA Constitutional Court.

It should be noted that the Constitutional Court's decisions not only are a source of law in general, but also are a source of constitutional law. The legal positions expressed in the Constitutional Court's decisions directed the amendments to the Constitution of the RA. Here is an example: as a result of such legal positions, the "rule of law" principle was enshrined in Article 3 of the RA Constitution instead of the "supremacy of statute" principle.

The concept of the constitutional court as a "positive legislator".

The concept of the Constitutional Court as a "positive legislator" is as follows:

a) Another direction of the Constitutional Court's participation in law-making process is the active assistance to the RA National Assembly to more actively and purposefully exercise its authorities and to positive law-making activity. Considering different sorts of cases, the RA Constitutional Court apply to the legislative body with concrete questioning on new legislative regulation indicating, as a rule, the essence, object and contents of such regulation (see inter alia the above-mentioned CCD-630 Decision). In the CCD-700 Decision, notifying the uncertainties in the Head 24 of the RA Civil Procedure Code and inconformity between the provisions of the above-mentioned Head and other legal acts, the Constitutional Court has mentioned that "such situation could be overcome by making legislative definiteness, but before it ensuring the interpretation and interconnected law-implementing practice of the provisions of Head 24 of the RA Civil Procedure Code within the authorities of the Cassation Court of the RA, guaranteeing effective judicial protection of suffrage right".

In the CCD-678 Decision the Constitutional Court has stated: "the RA Constitutional Amendments set out new requirements for guaranteeing freedom and independence of mass media. In order to secure those the National Assembly has an obligation to revisit and to harmonize with the Constitution the Law "On Television and Radio", adopted on October 9, 2000, the Law "On Mass

Information", adopted on December 13, 2003, the Law "Rules of Procedure of the National Assembly" and correspondent provisions of other Laws related to the issue. The comparative analysis of the above-mentioned Laws demonstrates that the legal guarantees of establishment of the Public TV and Radio Company in accordance with the RA international obligations are not sufficient and complete. The issue requires speedy system solution as the problem is not fully solved by Constitutional review of this or the other provision of a particular law. Specifically, the international practice regarding the object of review shows that the formula of solving the issue in principle is providing maximum publicity to the activities of the legislature under the condition of functional and structural guarantee of independence of mass media, including the public media. As to the selection of legitimate form, it is the responsibility of the legislature. In any case, while selecting any form existing in international practice, there shall be legal guarantees in order not to endanger the wide publicity of the activities of the legislature and the existence of political pluralism in the practice of public broadcaster. While solving this issue the RA National Assembly shall follow the RA international obligations and shall be led by Articles 27, 83.2 of the RA Constitution, as well as by provisions of Recommendation R (96) 10 of the Committee of Ministers of the Council of Europe, its Explanatory Memorandum, Recommendation 1641 (2004) 1 on Public Service Broadcasting of the Parliamentary Assembly."

The Constitutional Court in the CCD-652 Decision assessing the constitutionality of disputed provision has mentioned that in such a case "the cause of not ensuring the citizen's constitutional right is not circumstanced with the constitutionality of Paragraph 3 of Article 290 of the Criminal Procedural Code, but it is the result of legislative norms' indefiniteness and law-implementing practice, therefore, it is advisable to bring General Prosecutor's and Council of Chairmen of the RA attention to the motivating part of this decision in order to ensure the exercising applicant's constitutional right in the manner prescribed by law".

Another example is the CCD-703 Decision on June 10, 2007 on the case on challenging the 149-A decision dated May 19, 2007 of the Central Electoral

Commission on the election of the deputies to the RA National Assembly under proportional system. The Constitutional Court, on contradictions and indefiniteness found at the end of the investigation of the case, has especially mentioned: "… Notwithstanding certain improvements of the RA Electoral Code, there were inconsistencies and other shortcomings in the Code and other RA legislative acts that create problems in the organization of pre-election processes and effective judicial protection of the suffrage right. For instance, Paragraph 3 of Article 40 of the Electoral Code stipulates that "The decisions, actions (inaction) of the Central Electoral Commission, with the exception of decisions on election results, may be challenged in an Appellate court." Such norm considered the importance and peculiarity of a complaint, the necessity also to ensure greater confidence towards the examination of those complaints in a collegial manner and towards the judicial act, as in accordance with part 8 of the same Article "The courts shall adjudicate on complaints regarding the decisions and actions (inaction) of the electoral commission within the timeframe set out by Paragraph 7 of this Article. Such court decisions shall be final and shall enter into force from the moment they are publicized." Basically, election disputes shall be settled in the procedure of special appeal proceedings also in the Appellate court. Meanwhile, the RA Civil Procedure Code did not prescribe such an opportunity for the Appellate court, which made it impossible to challenge the RA CEC's decisions and actions (inaction) in the procedure of special appeal proceedings in the Appellate court under the procedures prescribed by the RA Electoral Code."

The Constitutional Court has notified "that not only should the RA National Assembly eliminate the mentioned legislative inconsistencies, but it should also consolidate the legal grounds of the institution of special appeal proceedings, by further clarifying the procedure and peculiarities of such proceedings."

The Constitutional Court has also found that "Article 40^{1}, stipulating the procedure for reviewing appeals (complaints) and suggestions by the electoral commissions, which largely contains formal requirements towards those documents, is also imperfect in the RA Electoral Code. Meanwhile, for effective

supervision of election processes and increase of public confidence towards elections, legislative amendments need to lead to a clear normative requirement set especially for procedural review of complaints (appeals) and suggestions and, thereof justified decision-making by electoral commissions. It will create ponderable prerequisites to enhance the responsibility of those commissions, if necessary, to challenge those decisions in the court, and, in the processes conditioned by election results, also to guarantee the effective judicial protection of the constitutional rights of individuals".

Problems of the influence of the jurisprudence of the constitutional court on law-making? Does the scientific legal doctrine consider the activity of the constitutional court when the constitutional court investigates and assesses legal gaps as well as the influence of the decisions of the constitutional court regarding filling in the said legal gaps?

Yes. A standpoint has especially been expressed in science, according to which the problem concerning the implementation of the decisions made by the constitutional justice bodies' legal positions to be taken into account as a source of law, has an exceptional importance for ensuring the constitutionality of laws and other normative acts. There must be displayed a differenced approach to that issue according to the sorts of legal acts and the forms of control, defining the whole mechanism for legal consequences and implementation of the decision.

According to Article 67 of the RA Law "On the Constitutional Court", the Constitutional Court after the end of every year within a month publishes a report on the situation of implementing its decisions. It is sent to appropriate bodies of state and local self-governance.

In some cases the Constitutional Court's decisions are not rightly and fully understood and implemented by the law-making and law-implementing subjects, which don't allow to successively abolish the legal gaps on the base of the Constitutional Court's decisions. Therefore, in such circumstances the above-mentioned annual report, where the situation of constitutional legal relations in

country is circumstantially analyzed, is a serious and important legal means to ensure the full-fledged influence of the Constitutional Court's decisions on the abolishing the legal gaps.

Was the naming of the activity of the constitutional court as the one of "activism", "moderation" and "minimalism" reasoned on the basis of such decisions?

On the basis of the decisions mentioned in this report the functioning of the Constitutional Court could be assessed as an "active" functioning.

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

2.1. The constitution in the national legal system.

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

According to Republic of Armenia Constitution, the Constitution is on the top of the hierarchical pyramid of national legal acts. Article 6 of the RA Constitution stipulated that the latter "…shall have supreme legal force and the norms thereof shall apply directly". The RA Law "On Legal Acts" just repeats the aforementioned constitutional provisions, stipulating at the same time, that "the Constitution of the Republic of Armenia and amendments thereto are normative legal acts" (p. 4 Article 8 of the Law).

In accordance with the aforementioned Article 6 of the RA Constitution, the International Treaties of the Republic of Armenia hold the second position of the hierarchical pyramid of the RA legal acts. Paragraph 4 of the mentioned Article stipulates that "… [t]he international treaties are a constituent part of the legal

system of the Republic of Armenia. If a ratified international treaty stipulates norms other than those stipulated in the laws, the norms of the treaty shall prevail. The international treaties not complying with the Constitution can not be ratified".

The Decisions and Conclusions of the Constitutional Court of the Republic of Armenia hold the next level in the hierarchical pyramid of the RA legal acts, which, in accordance with Article 11, paragraph 2 of the RA Law "On Legal Acts" "shall conform to the Constitution of the Republic of Armenia, the RA Law "On the Constitutional Court".

Nevertheless, it is due to mention that the experience of the recent years witnesses that Decisions and Conclusions of the RA Constitutional Court shall conform only to the RA Constitution and there is no constitutional duty to put them in dependence of the RA Law "On Legal Acts", as the provisions of the latter also may be considered (and actually has been considered) as object of constitutional control. For example, at May 11, 2007 Constitutional Court of the Republic of Armenia held the Decision on the Case concerning the determination of the issue regarding the conformity of the second sentence of Article 68, paragraph 15 of the RA Law "On the Constitutional Court", of Article 230, paragraph 1, subparagraph 4.1, Article 231.2, paragraph 1, subparagraphs 1-3 of the RA Civil Procedure Code with the Constitution of the Republic of Armenia (DCC-701).

The Laws of the Republic of Armenia are on the next level of the hierarchical pyramid of the RA legal acts. In accordance with Article 6 of Constitution, "[t]he laws shall conform to the Constitution. Other legal acts shall conform to the Constitution and the laws". Provisions of Article 9, paragraph 2 of the RA Law "On Legal Acts", establishing that "[t]he laws shall conform to the Constitution and shell not contradict the Decisions of the Constitutional Court of the Republic of Armenia…" are quite important for this matter. The same Article stipulates also that "the Laws may be adopted in the form of Codes… ", as well as, that "In the field of legal relations, regulating by the Code all other Laws shell conform with the Codes" (paragraphs 5 and 6 accordingly).

The Resolutions of the National Assembly of the Republic of Armenia follow the Laws of the Republic of Armenia.

The Orders and Decrees of the President of Republic hold the next position in the hierarchy of national legal acts. Article 56 of the RA Constitution stipulates that "[t]he President of the Republic shall issue orders and decrees, which shall not contradict the Constitution and laws of the Republic of Armenia and shall be subject to implementation throughout the territory of the Republic".

Decisions of the Central Bank of the Republic and Decisions of Regulatory Commissions, adopted under their authorities directly stipulated in the law hold the specific position in the normative legal pyramid of the Republic of Armenia. Decisions of the Government of the Republic of Armenia are in the following level of the hierarchy of normative legal acts of the Republic of Armenia.

Decisions of the Prime-Minister of the Republic of Armenia hold the last position in the hierarchy of national legislative acts.

The place and importance of the constitution in the national legal system. What concept of the constitution as the highest law is developed by the constitutional court?

In accordance with Article 6, paragraph 1 of the Constitution of the Republic of Armenia (as amended in 2005), "The Constitution of the Republic shall have supreme legal force and the norms thereof shall apply directly".

The final paragraph of the considering Article sets forth, that "[t]he normative legal acts shall be adopted on the basis of the Constitution and laws and for the purpose of the ensuring their implementation".

The Article 8, paragraph 1 of the RA Law "On Legal Acts" stipulates that "[t]he Constitution of the Republic of Armenia sets forth principles of legal regulation in the territory of the Republic of Armenia. The Constitution of the Republic of Armenia is the legal basis for the Legislation of the Republic of Armenia". Paragraph 4 of the same Article stipulates that the Constitution of the Republic of Armenia as well as amendments thereto is normative legal acts".

According to the mentioned Article 8 of the RA Law “On Legal Acts”, the Constitution of the Republic of Armenia or amendments thereto are adopted by referendum.

What concept of constitution as the highest law is developed by the constitutional court?

Analysis of the last 10 years’ experience of the Constitutional Court witnesses that the Constitution is considered as Supreme Law having, basically, all-sufficient character.

The concept of the constitution as explicit and implicit legal regulation.

The Constitution is considered as a source of explicit legal regulation. Nevertheless, the Constitutional Court has considered the Constitution as a source of implicit legal regulation in several decisions.

Is the constitution considered as law without gaps in the constitutional jurisprudence?

As it was mentioned above, the Constitutional Court considers the Constitution as a Supreme Law having all-sufficient character, which basically has no omission. Possible variant readings and shortcomings of the Constitution, according to the Constitutional Court, are not defects of the Constitution as a Supreme Law having, basically, all-sufficient character, but are defects and shortcomings of its text. Nevertheless, even the interpretation of the Constitution as a Supreme Law having all-sufficient character, which basically has no omission, does not exclude possible institutional and functional omissions, which can not be overcome in the result of the simple interpretation of constitutional provisions. For example, the RA Constitutional Court has no power either for the abstract interpretation of the RA constitutional provisions, or for determining disputes on competence, arising between different bodies of state power: this situation may result in existence of irresolvable functional omissions in Constitution.

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

What legal acts are directly named as the object of the constitutional control?

In accordance with Article 100, paragraphs 1 and 2 of the Constitution of the Republic of Armenia the Laws, Resolutions of the National Assembly, Decrees and Orders of the President of the Republic, Decisions of the Prime Minister and bodies of the local self-government, as well as international treaties of the Republic of Armenia are objects of constitutional control.

Does the constitution establish expressis verbis that the constitutional court investigates and assesses the constitutionality of gaps (legislative omission) in the legal regulation?

Provisions of the Constitution of the Republic of Armenia don't establish expressis verbis that the Constitutional Court has an authority to investigate and assess the constitutionality of gaps (legislative omission) in the legal regulation.

Does the constitution provide for any special procedures for the investigation of legislative omission?

The Constitution of the Republic of Armenia provides for no special procedures for the investigation of legislative omission.

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

The constitutional court as the official interpreter of the constitution.

Neither the Constitution nor the legislation of the Republic of Armenia provides possibility for the direct abstract interpretation of provisions of the Constitution by

the Constitutional Court. The Constitutional Court interprets provisions of the Constitution in the framework of the considering cases.

Has the constitutional court revealed in more detail its powers, which are explicitly entrenched in the constitution, to investigate and assess legislative omission?

No, since in the Constitution there is no explicitly entrenched power of the Constitutional Court to investigate and assess legislative omission.

What are the grounds for the conclusions about implicit consolidation in the constitution regarding the competence of the constitutional court to investigate and assess the legislative omission?

Article 93 of the Constitution of the Republic of Armenia stipulates that "[t]he Constitutional Court shall administer the constitutional justice in the Republic of Armenia", which, in accordance with Article 92, paragraph 2 of the Constitution is actually the highest court instance in the Republic of Armenia for matters of constitutional justice. Article 1 of the RA Law "On the Constitutional Court" provides for a very important provision on the status of the Constitutional Court, stipulating that "[t]he Constitutional Court is the highest body of the constitutional justice which provides supremacy and direct enforcement of the Constitution in the legal system of the Republic of Armenia". Paragraph 2 of the said Article sets forth that "[i]n the course of administering of constitutional justice the Constitutional Court is independent and follows only the Constitution".

According to Article 5 ("Main Principles of Case Review in the Constitutional Court") of the RA Law "On the Constitutional Court", the Court acts, basing to the principle of ex officio clarification of the circumstances of the case, which essence is clarified in Article 19 of the mentioned Law, according to which "[t]he Constitutional Court clarifies all the circumstances of the case in ex-officio without limiting itself with the motions, suggestions, evidences and other materials of the case brought by the Participant of the Constitutional Court trial".

Such conception of the role and place of the Constitutional Court on the matters of implementation of constitutional legality in the state, as well as of implementation of supremacy and direct action of the Constitution in the legal system of the Republic of Armenia is implicitly proved its powers to investigate and assess the legislative omissions.

Has the constitutional court formed the doctrine of consequences of stating the existence of legislative omission? If yes, describe it.

The Constitutional Court of the Republic of Armenia in many cases, investigating issues concerning consequences of reveal of existence of legislative omission hold the principal position that the existence of legislative omissions has direct negative influence to the realization of constitutional rights and freedoms and prevents the establishment of rule of law and democratic state.

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

The powers of the constitutional court (provided for in the law which regulates the activity of the constitutional court or other legal acts (if it is not directly established in the constitution)) to investigate and assess legal gaps in the legal regulation established in the laws and other legal acts.

The law regulating the activity of the Constitutional Court or other legal acts of the Republic of Armenia does not set forth explicitly any power of the Constitutional Court to investigate and assess legal gaps in the legal regulation established in the laws and other legal acts. Nevertheless, several provisions of the RA Law “On the Constitutional Court” suggest that the Constitutional Court has such authority. For example, it is established in Article 63 of the Law that “[w]ith

regard to the issue of constitutionality of the act the Constitutional Court evaluates the act and the existing law-application practice" (Paragraph 1). Article 68, paragraph 7 of the Law stipulates that the Constitutional Court determining whether the normative legal acts are in conformity with the Constitution or not, proceeds, in particular, from the following factors: "the necessity of protection and free exercise of human rights and freedoms enshrined in the Constitution, the grounds and frames of their permissible restriction"; "the principle of separation of powers as enshrined in the Constitution", "the permissible limits of powers of state and local self-government bodies and their officials", and " the necessity of ensuring direct application of the Constitution".

Does this law (or other legal act) provide for any special procedures for investigation into legal omission? If yes, describe them briefly.

The RA Law "On the Constitutional Court" provides for no special procedures for investigation of legal omissions. Legal omissions are investigated only in general way of norm control of legislative or other normative legal acts, which are objects of the constitutional control.

What decision, under this law or other legal act, does the constitutional court adopt after it has stated the existence of the legislative omission?

In such cases, the Court adopts decisions on the inconsistency of relevant provisions with the Constitution of the Republic of Armenia (See, in particular, Decisions DCC-630 and DCC-690 of the RA Constitutional Court mentioned in the abovementioned Paragraph 1.2).

Does the said law or legal act provide as to who and how one must remove the legislative omission?

There is no such provision, directly established in the Law. Nevertheless, specific provisions of the RA Law “On the Constitutional Court” may serve as a legal basis for it.

For example, according to Article 68, paragraphs 15-17 of the RA Law “On the Constitutional Court”: “If in accordance with Paragraph 3 of Article 102 of the Constitution the Constitutional Court finds that declaring invalid the challenged general act or any provision of it from the time of the announcement of the Court decision are unconstitutional and will inevitably cause such hard consequences for the public and for the state that it would harm the legal security expected from the annulment of the given general act, then the Constitutional Court has the right to declare the act as unconstitutional and at the same time to postpone the period of invalidation of the act.

In this case the act is considered constitutional before being invalidated.

The postponing of the invalidation of the general legal act shall be proportionate to the period of time, which provides possibility and is necessary for taking measures for preventing the consequences described in Subparagraph 1 of Paragraph 15 of this Article.

The decision on the postponing must be adopted with consideration of real prevention of inevitable and harmful consequences for the public and for the state and in order to avoid more essential harm to the basic human and citizenry rights and freedoms”.

In accordance with Article 68, paragraph 11 of the mentioned Law: “[t]he relevant provisions of the other acts that provided the implementation of the acts determined as invalid are annulled together with the challenged act”.

Is it provided for in other laws and legal acts (for example, the regulation of the parliament)?

It is due to mention that Article 9 of the RA Law “On Legal Acts” stipulates that “[t]he laws shall conform to the Constitution and shall not contradict the Decisions of the Constitutional Court of the Republic of Armenia…”

It must also be mentioned that appropriate provisions of the RA Criminal Procedure Code and the RA Civil Procedure Code provide for reopening of criminal and civil cases, if the law applied in the appropriate case has been declared unconstitutional by the Constitutional Court.

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

3.1. Application to the constitutional court.

What subjects may apply to the constitutional court in your country?

According to Article 101 of the RA Constitution, an application to the Constitutional Court may be filed by the President of the Republic - in cases stipulated in Clauses 1, 2, 3, 7 and 9 of Article 100 of the Constitution, the National Assembly – in cases stipulated in Clauses 3, 5, 7 and 9 of Article 100 of the Constitution, at least one-fifth of the total number of the deputies - in cases stipulated in Clause 1 of Article 100 of the Constitution, the Government - in cases stipulated in Clauses 1, 6, 8 and 9 of Article 100 of the Constitution, bodies of the local self-governance on the issue of compliance to the Constitution of the state bodies' normative acts violating their constitutional rights, every person in a specific case when the final judicial act has been adopted, when the possibilities of judicial protection have been exhausted and when the constitutionality of a law provision applied by the act in question is being challenged, courts and the Prosecutor General on the issue of constitutionality of provisions of normative acts related to specific cases within their proceedings, the Human Rights' Defender – on the issue of compliance of normative acts listed in clause 1 of Article 100 of the Constitution with the provisions of Chapter 2 of the Constitution, candidates for the President of the Republic and Deputies – on matters listed in Clauses 3.1 and 4 of Article 100 of the Constitution.

Can they all raise the question of legislative omission?

No. Only those subjects who can file the application to the Constitutional Court in cases stipulated in Clause 1 of Article 100 of the Constitution. They are the President of the Republic, at least one-fifth of the total number of the deputies,

bodies of the local self-governance, natural and legal persons, courts and the Prosecutor General, the Human Rights' Defender.

3.2. Legislative omission in the petitions of the petitioners.

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

Yes, they may.

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

Within the time-period from July 1, 2006, up to September 15, 2007, the 83 applications on non-conformity of legal acts to the Constitution had been filed by the subjects who had right to file an application to the Constitutional Court, in 14 of which the unconstitutionality had been justified on the legal gap basis.

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

Legal acts, being in conflict with the Constitution on the basis of legal gap, were mainly disputed by individual complaints. During the above-mentioned time-period (individuals were given the right to constitutional justice on July 1, 2006) 448 individual complaints had been filed, 25 complaints of which have been accepted for investigation. In 13 applications of the accepted ones the unconstitutionality of legal acts were grounded on the basis of legal gap.

Are there any specific requirements provided for as regards the form, contents and structure of the applications concerning the unconstitutionality of the legislative omission? If yes, describe them. Are they established in the law which activity of the constitutional court or are they formulated in the constitutional jurisprudence?

No.

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

Yes. It is stipulated by the provisions of the RA Law "On the Constitutional Court". Especially, according to Article 19 of the Law "The Constitutional Court clarifies all the circumstances of the case in ex-officio without limiting itself with the motions, suggestions, evidences and other materials of the case brought by the Participant of the Constitutional Court trial."

According to Paragraph 1 of Article 63 of the Law "With regard to the issue of constitutionality of the act the Constitutional Court evaluates the act and the existing law-application practice."

According to Paragraph 7 of Article 68 of the Law "the Constitutional Court shall determine whether the legal acts referred to in the application are in conformity with the Constitution or not, proceeding from the following factors:

1) The type and the form of the legal act;
2) The time when the act was adopted, as well as whether it got into force in compliance with established procedures;

3) The necessity of protection and free exercise of human rights and freedoms enshrined in the Constitution, the grounds and frames of their permissible restriction;
4) The principle of separation of powers as enshrined in the Constitution;
5) The permissible limits of powers of state and local self-government bodies and their officials;
6) The necessity of ensuring direct application of the Constitution".

The followings could be mentioned as cases of more importance.

1) CCD-630 Decision on April 18, 2006 (See the reasoning of the Court above, in point 1.2)
2) CCD-665 Decision on November 16, 2006, where the applicant mentioned that the decision made by the first instance court of general jurisdiction on the rejection of the application had deprived him of the opportunity to exercise the right to judicial protection of his rights and freedoms. To his mind, the indefinite formulation of Subparagraph 2 of Paragraph 1 of Article 160 of the RA Civil Procedure Code is the cause of such deprivation and the above-mentioned provision in practice is certainly implemented against the right to judicial protection. Such uncertainty of the law is in conflict with the principle of rule of law state enshrined in the RA Constitution. (See the reasoning of the Court above, in point 1.2).
3) In CCD-690 Decision on April 9, 2007, the applicants mainly based their positions on the following:

"Everyone shall have a right to protect his/her rights and freedoms by any means not prohibited by the law, everyone shall be entitled to effective legal remedies before public bodies, everyone shall have a right to restore his/her violated rights … in a fair public hearing under the equal protection of the law and fulfilling all the requirements of justice by an independent and impartial court within a reasonable time". In spite of the mentioned rights, the disputed provisions being formulated without enough definiteness, not deriving from the

general logic of the civil procedure legislation, don't give an opportunity to a person to agree its behavior with the above-mentioned provisions and with efficiency protect its constitutional rights in a judicial manner. According to the applicants, the disputed provisions are also in conflict with the requirement of legal certainty on the ground that such provisions don't constitute a procedure formulated with enough definiteness on acceptance of a cassation appeal. (See the reasoning of the Court above, in point 1.2).

The Constitutional Court concluded that the disputed provisions were in conflict with Articles 3, 6, 18 (Paragraphs 1 and 2) and 19 (Paragraph 1) of the Constitution on the basis that it didn't involve any normative requirement concerning the decision on returning the appeal to be motivated

4) The Constitutional Court had the same approach in the CCD-691 Decision on April 11, 2007.

3.4. Legislative omission in laws and other legal acts.

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

According to Clauses 1 and 2 of Article 100 of the RA Constitution, the Constitutional Court shall, in conformity with the procedure defined by law, determine the compliance of the laws, resolutions of the National Assembly, decrees and orders of the President of the Republic, decisions of the Prime Minister and bodies of the local self-government with the Constitution, prior to the ratification of international treaties determine the compliance of the commitments stipulated therein with the Constitution. Consequently, the issue relating to the gap in the legal regulation theoretically could be investigated and assessed while deciding on the constitutionality of these acts. During the activity of the Constitutional Court, there occurred only one case in which this issue was

investigated while deciding the constitutionality of sub-legislation. It was 1151-N Decision on August 1, 2002 made by the RA Government.

Does legislative omission mean only a gap in the legal regulation that is in conflict with the constitution, or a gap in the legal regulation that is in conflict with legal regulation of higher power as well (for example, when an act of the government does not include the elements of the legal regulation which, under the constitution or the law which is not in conflict with the constitution, are necessary)?

If some elements of legal regulation are absent in the act with lower power, but must be present according to the act with higher power, which is not in conflict with the Constitution, then such legislative omission is recognized contrary to both the Constitution and the act having higher power.

Is it possible to perceive legislative omission in the case of delegated legislation, when the notion “may” (“has the right”) is used while delegating, while the regulation established in the substatutory act includes only part of said delegation?

From the practice of the RA Constitutional Court, it is worth mentioning CCD-630 Decision of April 18, 2006. The Constitutional Court on the Government’s disputed decision has mentioned therein: “The disputed decision of the RA Government in its content proclaims the goals to exercise particular actions. The task is not to evaluate the type and legal content of the goals. The question is what the legal foundation for that decision is. Preface of the decision says: "In conformity with Article 218 of Civil Code of the Republic of Armenia and Article 104 of Land Code of the Republic of Armenia and for the implementation of the development programs in Yerevan decides..." There is no any other substantiation. The decision mentions such legislative provisions, which cannot be sufficient basis for the expropriation of property. It is important that in Part 2 of Article 218 of RA Civil Code is determined that: "The state agency empowered to make decisions on

the expropriation and also the procedure for preparation and making of these decisions shall be determined by a statute." The existent of such a provision in the legislation is an evidence for the necessity to regulate those questions in the level of statute. And this is necessary to provide legislative guarantees for the protection of the right to the property. But the investigation of the case shows that such statute has not been adopted in RA legal system yet."

In this context, it is also worth mentioning the Paragraph 11 of Article 68 of the RA Law "On the Constitutional Court", according to which the relevant provisions of the other acts that provided the implementation of the acts determined as invalid are annulled together with the challenged act.

3.5. Refusal by the constitutional court to investigate and assess legal gaps.

How does the constitutional court substantiate its refusal to investigate and assess the constitutionality of a gap in legal regulation (absence of direct reference concerning such discretion of the legislator in law-making, etc.)?

If the application corresponds to the requirements stated by the RA Law "On the Constitutional Court", the Constitutional Court has to accept that application, investigate and assess the constitutionality of a gap in legal regulation.

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

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

No. The attribute of legal gaps is that the factual circumstances, about which the normative orders are absent, are in general regulated, the legislator in turn has expressed its will via regulating concurrent circumstances, general norms of law,

general and branch principles of law. It follows from it that for revealing the legislative omission it must reveal the fact of the presence of concurrent circumstances' regulation. Thus, there is no sense in investigating the related character without investigating the legislative omission.

4. INVESTIGATION AND ASSESSMENT OF THE CONSTITUTIONALITY OF LEGISLATIVE OMISSION

4.1. Peculiarities of the investigation of legislative omission.

The peculiarities of the investigation of the legislative omission while implementing *a priori* control and *a posteriori* control. Do the problems of legislative omission arise also in the constitutional justice cases concerning the competence of public power institutions, the cases concerning the violated constitutional rights and freedoms, etc.? The peculiarities of the investigation and assessment of legislative omission in the constitutional justice cases concerning the laws which guarantee the implementation of the rights and freedoms (civil, political, social, economical and cultural) of the person.

Paragraph 1 of Article 63 and Paragraph 7 of Article 68 of the RA Law "On the Constitutional Court" constitute the same approach to investigation and assessment of legislative omissions regardless of the features of constitutional control and proceedings.

Especially, according to Article 19 of the RA Law "On the Constitutional Court, "the Constitutional Court clarifies all the circumstances of the case in ex-officio without limiting itself with the motions, suggestions, evidences and other materials of the case brought by the Participant of the Constitutional Court trial".

According to Paragraph 1 of Article 63 of the RA Law "On the Constitutional Court" "with regard to the issue of constitutionality of the act the Constitutional Court evaluates the act and the existing law-application practice".

According to Paragraph 7 of Article 68 of the RA Law “On the Constitutional Court” “the Constitutional Court shall determine whether the legal acts referred to in the application are in conformity with the Constitution or not, proceeding from the following factors:

1) The type and the form of the legal act;

2) The time when the act was adopted, as well as whether it got into force in compliance with established procedures;

3) The necessity of protection and free exercise of human rights and freedoms enshrined in the Constitution, the grounds and frames of their permissible restriction;

4) The principle of separation of powers, as enshrined in the Constitution;

5) The permissible limits of powers of state and local self-government bodies and their officials,

6) The necessity of ensuring direct application of the Constitution”.

The peculiarities of the investigation of the legislative omission in the laws and other legal acts which regulate the organization and activity of public power. The peculiarities of investigation and assessment of legislative omission in substantive and procedural law. The particularity of investigation of legislative omission in private and public law. The particularity of investigation of legislative omission in the verification of the constitutionality of international agreements. When answering these questions, indicate the constitutional justice cases with more typical examples.

Article 19, paragraph 1 of Article 63 and paragraph 7 of Article 68 of the RA Law “On the Constitutional Court” constitute the same approach to investigation and assessment of legislative omissions, regardless of the features of constitutional control and proceedings.

But, the Constitutional Court controlling the constitutionality of the procedural norms, pays attention to the issue whether the substantive law is given the opportunity to be implemented by appropriate procedural norms. Especially, in

CCD-665 Decision, the Constitutional Court has mentioned: “Comparative analysis of the contents of appropriate provisions of Articles 14 and 15 of the RA Civil Code and Paragraph 1 of Article 160 of the RA Civil Procedure Code indicates that the legislator has tried to create judicial procedures in order to guarantee implementing the provisions of Articles 14 and 15 of the RA Civil Code, but, as a result, has created such a situation, when the provision of procedural law has become an obstacle in the way of implementing a norm of substantive law”.

4.2. Establishment of the existence of legislative omission.

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

The RA Constitutional Court, while assessing the constitutionally of the gap of legal regulation, uses general criteria of assessing the constitutionality of legal acts or their provisions guided by the above-mentioned provisions of paragraph 1 of Article 63 and paragraph 7 of Article 68 of the RA Law “On the Constitutional Court”.

The Constitutional Court, in its investigation of such cases, rests on the principle of the rule of law as a key principle, the content of which is revealed in provisions of the above-mentioned Articles.

Does the constitutional court investigate only the disputed provisions of a law or other legal act?

Does the constitutional court decide not to limit itself with only autonomous investigation of the content of the disputed provisions (or disputed act) but to analyze it in the context of the whole legal regulation established in the act (or even that established in the system of acts or the whole field of law)?

According to paragraph 9 of Article 68 of the RA Law “On the Constitutional Court,” “While determining the constitutionality of any general act mentioned in Paragraph 1 of Article 100 of the Constitution the Constitutional Court together with the challenged provision of the act finds out the constitutionality of any other provision of the act from the perspective of systematic interrelation of those. If the findings of the Court prove that other provisions of the act are interrelated with the challenged provisions and are not in conformity with the Constitution, the Constitutional Court can determine those provisions also invalid and unconstitutional”.

Besides, the investigation into legal positions of the RA Constitutional Court indicates that the Constitutional Court, when assessing the constitutionality of legal act or its provision, investigates other legal acts as well. Particularly,

a) In CCD-650 Decision, the Constitutional Court, while assessing the constitutionality of disputed provisions of paragraphs 1 and 2 of Article 280 of the RA Civil Code, Articles 100 and 101 of the RA Land Code, investigated Article 2 of the RA Law “On the Order of Discussing the Proposals, Applications and Complaints of Citizens”, Article 31 and Clause 1 of Article 50 of the RA Law “On Administrative Procedure and the Basis of Bureaucracy”.
b) In CCD-665 Decision, the Constitutional Court touched upon paragraph 1 of Article 15 of the RA Civil Code, paragraph 4 of Article 6, Article 22 of the RA Law “On Legal Acts”,
c) In CCD-701 Decision, besides the disputed norms, the provisions of Paragraph 1 of Clause 15 of Article 68 of the RA Law “On the Constitutional Court” were investigated.
d) In CCD-710 Decision on July 24, 2007, the applicant disputed the constitutionality of paragraph 2 of Article 311 of the RA Criminal Procedure Code. While the concept of the court returning a criminal case to additional pre-trial investigation isn’t regulated by the above-mentioned provision only, but also by the whole Article and Clause 5 of Article 292, Article 297,

Clause 2 of Article 363, Clause 5 of Article 394, Clause 6 of Article 398, Clause 2 of Article 419, Clause 3 of Article 421. As the result of the investigation, the RA Constitutional Court recognized not only the disputed provision, but also the above-mentioned provisions to be conflicting with Article 19 of the RA Constitution and, therefore, invalid.

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

No, in case the legal act loses its power, it cannot be disputed in the Constitutional Court. According to Article 60 of the RA Law on the Constitutional Court the Constitutional Court shall dismiss a case: "…2) if the legal act, the constitutionality of which is questioned, is abrogated or is invalidated before the review of the case or during the process of being reviewed".

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

According to paragraph 1 of Article 63 of the RA Law "On the Constitutional Court," regarding the issue of constitutionality of the act, the Constitutional Court evaluates the act and the existing law-application practice.

There are many cases in the practice of the Constitutional Court, where the Constitutional Court, determining the constitutionality of the concrete act or its provision, investigates and assesses the law-implementing practice. Especially, in CCD-665 Decision, the law-implementing practice became an object of serious investigation. (See the reasoning of the Court above, in point 1.2)

It is worth mentioning that, in the conclusion of the decision, the Constitutional Court recognized paragraphs 1 and 2 of Article 160 of the RA Civil Procedure Code as conflicting with Articles 18 and 19 of the RA Constitution and invalid on the basis of the contents given to it by the law-implementing practice.

4.3. The methodology of revelation of legislative omission.

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

Besides the above-mentioned methods, the Constitutional Court often uses the method of comparative analysis, as well.

Does the constitutional court, while investigating and assessing legislative omission, directly or indirectly refer to the case-law of the European Court of Human Rights, the European Court of Justice, other institutions of international justice and constitutional and supreme courts of other countries?

An inherent part of the Constitutional Court's practice is research on the practice of bodies of constitutional justice of different countries and international organizations, in particular, the European Court of Human Rights.

4.4. Additional measures.

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

It has already been mentioned that, in case of certifying the presence of legislative omission, the Constitutional Court's decision sometimes involves direct

approaches concerning the appropriate bodies in order to overcome those omissions.

Besides, according to paragraph 12 of Article 68 of the RA Law “On the Constitutional Law,” “The Constitutional Court may decide to validate the influence of the decisions mentioned in Subparagraph 2 of Paragraph 8 of this Article on the relations that started before those decisions got into force, if the absence of such decision of the Court can cause irretrievable consequences for the state or the public. The administrative and judicial acts that were adopted and implemented on the basis of the general acts that were annulled and found unconstitutional (together with those acts that were providing the implementation of the former) by the decision defined in Paragraph 1 of this Article within three years before the Constitutional Court decision got into force shall be revisited by the administrative and judicial bodies that adopted those in the procedure stipulated by Law.”

According to paragraph 13 of the same Article, “In case of ruling a decision on finding unconstitutional or invalid the challenged provisions of Law related to the criminal code or the administrative liability, those provisions are annulled from the moment of the announcement of the Court's decision. The administrative and judicial acts that were adopted and implemented for the implementation of those provisions within the period before the Constitutional Court decision got into force shall be revisited in the procedure stipulated by Law”.

It should be mentioned that paragraph 1 of Article 34 of the RA Law “On the Constitutional Court” states: “By the initiative of the applicant or the Constitutional Court, after the case is admitted, the Constitutional Court shall suspend the application of the legal act, the constitutionality of which is challenged, if the absence of such decision on suspension can cause irretrievable or harmful consequences to the applicant or the society”.

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

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

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

Does the constitutional court state the existence of legislative omission or other gap in the legal regulation is to be filled in when courts of general jurisdiction apply the general principles of law?

Does the constitutional court apply other models of assessment and filling in legislative omission?

As it was mentioned above, the direct or indirect approaches in the legal positions of the Constitutional Court directed at the law-making and law-implementing bodies in order to overcome the legislative omissions under the context of the interpretations given by the Constitutional Court are the characteristic features of the cases in which the constitutionality of legislative acts or their provisions is determined. For instance, SDV-652, SDV-674, SDV-678, SDV-700 and SDV-705 Decisions.

Besides, the Constitutional Court, finding a legislative omission in a disputed legal act, *ex officio* must assess its constitutionality. The Constitutional Court *ex officio* must assess the constitutionality of the legal gap found in any other provision of the act from the perspective of systematic interrelation to the disputed one.

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

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

a) recognizes the law (other legal act) as being in conflict with the constitution;
b) recognizes the provisions of the law (other legal act) as being in conflict with the constitution;
c) leaves the act (provisions thereof) to be in effect and at the same time recognizes the failure to act by the legislator (other subject of law-making) as unconstitutional by specifying the time period in which, under the constitution, the obligatory legal regulation must be established;
d) states the duty of the legislator (other subject of law-making) to fill in the legal gap (by specifying or without specifying the filling in of the legal gap);
e) states the existence of a gap in the legal regulation and points out that it may be filled in by general or specialized courts;
f) obligates courts of general jurisdiction and specialized courts to suspend the consideration of the cases and not to apply the existing legal regulation until the legislator (other subject of law-making) fills in the gap;
g) states the existence of the gap in the legal regulation without drawing direct conclusions or establishing any assignments;
h) applies other models of assessment of legislative omission.

The Constitutional Court, in the conclusion of its decision, according to paragraph 8 of Article 68 of the RA Law “On the Constitutional Court”, may make one of the following decisions:

1) Finding the challenged act in conformity with the Constitution,
2) Finding the challenged act fully or partially invalid and in non-conformity with the Constitution.

4.7. The “related nature” investigation and decisions adopted.

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

The attribute of legal gaps is that the factual circumstances, about which the normative orders are absent, are in general regulated, the legislator in turn has expressed its will via regulating concurrent circumstances, general norms of law, general and branch principles of law. It follows that, for revealing the legislative omission, it must reveal the fact of the presence of regulation of concurrent circumstances. Thus, there is no sense in investigating the related character without investigating the legislative omission.

Article 88 of the RA Law “On Legal Acts” relates to the implementation of norms of a legal act by analogy. According to that Article, “if the relations occurred are not directly regulated by law or other legal act, then the legal acts regulating similar relations in cases prescribed by law may be applied to such relations (by analogy). The analogy may not be applied, if rights and freedoms of legal and individual persons are restricted by it, or it provides for new obligation or responsibility, or it makes severe the means of compulsion, which could be implemented to individual persons, then the order of implementing those means, the order of paying taxes, fees and other compulsory payments by legal and individual persons, the order of exercising control over the activity of natural and legal persons”.

4.8. Means of the legal technique which are used by the constitutional court when it seeks to avoid the legal act is recognized as being in conflict with the constitution.

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

publishing of the constitutional court decision. Establishment of a later date of the coming into force of the constitutional court decision. Statement by the constitutional court that the investigated act complies with the constitution temporarily, at the same time specifying that in case that the act is not amended till certain time, it will be in conflict with the constitution. Recognition of the act as being in conflict with the constitution due to the legislative omission, without removing such act from the legal system. Interpretation of the act (provisions thereof) which complies with the constitution, in order to avoid the statement that the act (provisions thereof) is in conflict with the constitution due to the legislative omission. "Revival' of previously effective legal regulation. Other models of the decision are chosen (describe them).

According to paragraph 15 of Article 68 of the RA Law "On the Constitutional Court," "if in accordance with Paragraph 3 of Article 102 of the Constitution the Constitutional Court finds that declaring invalid the challenged general act or any provision of it from the time of the announcement of the Court decision are unconstitutional and will inevitably cause such hard consequences for the public and for the state that it would harm the legal security expected from the annulment of the given general act, then the Constitutional Court has the right to declare the act as unconstitutional and at the same time to postpone the period of invalidation of the act. In this case the act is considered constitutional before being invalidated". Moreover, according to paragraph 16 of the same Article, "the postponing of the invalidation of the general legal act shall be proportionate to the period of time, which provides possibility and is necessary for taking measures for preventing the consequences described in Subparagraph 1 of Paragraph 15 of this Article.

Thus, the decision on the postponing should be made taking into account the fact that it be possible to prevent inevitable and hard consequences for the public and for the state and not to damage more seriously the fundamental human and civil rights and freedoms".

Particularly, in the conclusion of CCD-630 Decision, the Constitutional Court mentioned. “Following Part 3 of Article 102 of RA Constitution and taking into account that RA National Assembly and RA Government should adjust a lot of legal acts related to the problem which is subject of consideration in possible brief timeframes to the requirements of the RA Constitution and the Decision of the Constitutional Court and clearly regulate through law the legal regime of alienation of property for society and public needs related to the prior public interests, define the deadline for becoming invalid the legal norms in this Decision admitted as not in conformity with RA Constitution the moment of coming into force of such a legal regime based on a law, but not late than 1st of October, 2006”.

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

5.1. Duties arising to the legislator.

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

Neither the Constitution nor the RA Law “ Rules of Procedure of the National Assembly” provide for the directly-established duty of the legislator to properly fill in such gaps of legal regulation, since, in accordance with Article 75 of the RA Constitution: “[t]he right to legislative initiative in the National Assembly shall belong [only] to the Deputies and the Government”; nevertheless, provisions of the RA Law “On Legal Acts” stipulate, as it was mentioned above, that “[t]he laws shall conform to the Constitution and shall not contradict the Decisions of the Constitutional Court of the Republic of Armenia…”(Article 9). This provision implicitly obliged the legislator and other law-making subjects to properly fill in such gaps of legal regulation in accordance with the legal positions, stated in the Constitution Court decisions.

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

The RA Law on "Rules of Procedure of the National Assembly" does not provide for any provision dedicated to the consideration of issues of practical implementation of the Decisions of the Constitutional Court of the Republic of Armenia.

Does the parliament promptly react to the decisions of the constitutional court, wherein the legislative omission is stated?

The established practice witnesses that the Parliament promptly reacts to the decisions of the Constitutional Court. Furthermore, as a result of several recent decisions, relevant amendments to the provisions of normative legal acts declared unconstitutional have been made during extraordinary meetings of the National Assembly. One may be mentioned, for example, the RA Electoral Code, the RA Law "On Alienation of Property for the Needs of the Society and the State" of November 27, 2006, the RA Law "On the Regulatory Body of Public Services".

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

No, the National Assembly never disregarded the decisions of the Constitutional Court concerning the legislative omission.

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

The National Assembly honors a duty that has appeared due to a decision of the Constitutional Court through drafting and adopting amendments to the legislative

act the provisions of which were declared inconsistent with the Republic of Armenia Constitution.

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

Article 61, paragraph 5 of the RA Law “On the Constitutional Court” provides: “The decisions of the Constitutional Court on the substance of the case are mandatory for all the state and local self-government bodies, their officials as well as for the natural and legal persons in the whole territory of the Republic of Armenia”.

The Constitutional Court of the Republic of Armenia assists the Parliament in the sphere of implementation of the duty flowing from the Constitutional Court Decisions, in particular, by officially informing on the adoption of such decision. For example, Article 65 of the mentioned Law stipulates that the decisions and conclusions of the Constitutional Court shall, within three days of their adoption, be sent to:

“1) The trial parties;

2) The President of the Republic, the National Assembly, the Government, the Court of Cassation, the Ombudsman and the Prosecutor General”.

Paragraph 2 of the said Article 2 stipulates that “[t]he decisions and resolutions of the Constitutional Court shall be published in the Official Gazette of the Republic of Armenia in the order prescribed by Law and in the Bulletin of the Constitutional Court”.

It must also be mentioned that Article 66 (“Consequences of Not Applying the Decision”) of the RA Law “On the Constitutional Court” sets forth that “not applying the decision of the Constitutional Court or obeying it inadequately, as well as preventing its observance will cause liability stipulated by the Law”. Lastly, the Constitutional Court can indirectly affect the adoption by the Parliament of relevant measures, using its power established in Article 67 of the Law, according to which “[t]he Constitutional Court publishes information about

the situation on applying its decisions at the end of each year. It is sent to the relevant state and local self-government bodies".

In the sphere of enforcement of the Constitutional Court Decisions by the Parliament, the power of the Constitutional Court, stipulated in Article 102, paragraph 3 of the Constitution is very important, since according to it "The Constitutional Court may adopt a decision stipulating a later term for invalidating a normative act contradicting the Constitution or a part thereof".

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

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

It is due to mention that in accordance with Article 68, paragraph 11 of the RA Law "On the Constitutional Court": "The relevant provisions of the other acts that provided the implementation of the acts determined as invalid are annulled together with the challenged act." This provision implicitly makes an obligation for the other law-making subjects to properly fill in the gaps taking into consideration the legal positions of the Constitutional Court, as enshrined in its decisions.

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

No, they do not provide how the said subjects implement the Constitutional Court decisions.

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

The established practice witnesses that the said subjects promptly react to the decisions of the Constitutional Court.

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

No, there were no cases when these subjects disregarded the decisions of the Constitutional Court concerning the legislative omission.

How is it ensured that the said subjects would properly implement such duty?

The said subjects properly implement such duty through drafting and adopting amendments to the normative legal act the provisions of which were declared inconsistent with the Republic of Armenia Constitution, as well as through annulling acts that provided the implementation of normative legal act found invalid, since, as it was mentioned above, Article 68, paragraph 11 of the RA Law "On the Constitutional Court" stipulates that "[t]he relevant provisions of the other acts that provided the implementation of the acts determined as invalid are annulled together with the challenged act."

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

For the powers and role of the Constitutional Court in this sphere see, in particular, Paragraph 5.1.

6. WHEN DRAWING CONCLUSIONS concerning the experience of the constitutional court of your state regarding consideration of cases by the Constitutional Court related to legislative omission, answer the following questions: is it possible to consider such investigations as an important activity of the constitutional court (explain why), does the

constitutional court have sufficient legal instruments of such investigation and how do the constitutional court decisions influence the process of law-making in such cases?

- Taking into consideration the fact that, during the period from July 1, 2006 to September 15, 2007, 13 of the submitted 25 individual applications challenged the constitutionality of normative acts on the basis of legislative omission, it can be concluded that such investigations form an important activity of the Constitutional Court.

- The Constitutional Court has sufficient legal instruments of such investigation. Particularly, the following Articles of the RA Law on Constitutional Court provide sufficient legal instruments for such investigation:

i. Article 19: according to this Article, the Constitutional Court clarifies all the circumstances of the case *ex officio*, without limiting itself to the motions, suggestions, evidence, and other materials of the case brought by the Participant of the Constitutional Court hearing.

ii. Article 63, part 1: according to this provision, with regard to the issue of constitutionality of the act, the Constitutional Court evaluates the act and the existing law-application practice.

iii. Article 68, part 7: according to this provision, the Constitutional Court shall determine whether the legal acts referred to in the appeal are in conformity with the Constitution or not, based on the following factors:

1) The type and form of the legal act;

2) The time when the act was adopted, as well as whether it entered into force in compliance with the established procedure;

3) The necessity of protection and free exercise of human rights and freedoms enshrined in the Constitution, the grounds and frames of their permissible restriction;

4) The principle of the separation of powers, as enshrined in the

Constitution;

5) The permissible limits of powers of state and local self-government bodies and their officials, and

6) The necessity of ensuring direct application of the Constitution.

iv. Article 68, part 9: according to this provision, while determining the constitutionality of any general act mentioned in Paragraph 1 of Article 100 of the Constitution, the Constitutional Court, together with the challenged provision of the act, determines the constitutionality of any other provision of the act from the perspective of a their systematic interrelation. If the finding of the Court proves that other provisions of the act are interrelated with the challenged ones and are not in conformity with the Constitution, the Constitutional Court may find those provisions as invalid and unconstitutional, as well.

- The practice indicates that decisions of the Constitutional Court have an essential positive influence on the law-making activity. Particularly, as a result of the Constitutional Court Decision CCD-630 dated 18.04.2006, the RA National Assembly adopted the RA Law "On Alienation of Property for the Needs of Society and State" in 2006, and the Government of the RA adopted Decision N 611-N on 17.05.2007.

On the basis of the Constitutional Court Decision CCD-649 dated 04.10.2006, the RA Government adopted Decision N 369-N on 01.03.2007.

On the basis of the Constitutional Court Decision CCD-652 dated 18.10.2006, the Council of the Court Chairmen adopted on 10.07.2007 decision N-1.

On the basis of the Constitutional Court Decision CCD-664 dated 07.11.2006, the Central Electoral Commission adopted Decisions N-2 and N-4 on 01.02.2007.

The practice indicates that decisions of the Constitutional Court have an essential positive influence not only on the law-making activity, but also on the law-implementing practice. Particularly, following the adoption of the Constitutional Court Decision CCD- 690 dated 09.04.07, each time when the Cassation Court decides to return a petition, it must adopt a reasoned decision on returning the petition.