

# THE CONSTITUTIONAL COURT OF UKRAINE

## National Report “Problems of Legislative Omission in Constitutional Jurisprudence”

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

#### 1.1. The concept of the legal gap.

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

The issue of the legal gap has emerged long ago and in every historical epoch it required its own solution. In the Soviet period as the positions of the positivist legal understanding were strengthening a metamorphosis took place in the solution of the issue of the legal gap, which was actually reduced to the search of ways of overcoming legal gaps within the limits of current legislation. The Ukrainian Soviet doctrine adhered to the position that “it goes about gaps only in case if the law lacks a norm which regulates certain legal relations, and they also determine that legal gaps are possible only in that field, where the limits of the actual legal regulation and the frames of current legal acts do not coincide». The stress was made on the fact that a subject applying law should be guided by the fact that a legal gap is the absence in current legal acts of necessary norms for the solution of a specific case (or incompleteness of current norms) within the limits of legal regulation, set by the legislator, which necessity is determined by the current legislation” (*V.Zabihailo*).

The contemporary Ukrainian doctrine includes various approaches to the definition of the concept of “legal gap”. Two basic approaches to the determination of the essence of the legal gap are worth mentioning. In particular, the first approach is characterized by the fact, that researchers determine a legal gap as «absence of norms of law (or their parts), which regulate the specific public relations in case, if it is subject to the sphere of legal regulation» (*O.Zaichuk, N.Onischenko*). For denotation of the term “gap” such determinations are used as “unfilled place”, “gap in a printed text”, “omission”, “disadvantage”. An opinion is also expressed that one may dwell upon legal gaps mainly figuratively, as about one of the shortcomings in law, the lack in it of what should be its necessary component.

The other approach to the understanding of the essence of legal gaps is related to a wider interpretation of the sphere of relations which are subject to the legal regulation. In particular, a legal gap is a complete or partial absence of necessary legal norms in the current legislation (*T.Tarakhonych, O.Tarnopolska*).

The research of such legal phenomenon as a legal gap allows to outline the traits or criteria of the existence of this phenomenon. It is stressed that legal gaps are one of the negative legal phenomena, that their existence is the objective inevitability and they are inherent to any legislation system; gaps are interrelated and they exist in a complex: principles of law, policy of the legislator, professional and ordinary legal awareness, judicial practice.

The scholars determine the fact that norms created by a legislator extend not on the specific legal relationships, but on the determined type of legal relationships as one of the reasons of appearance of legal gaps (*V.Zabihailo*).

In addition, it is stressed, that a legal gap appears in case when legal regulation of public relations which are in the field of legal regulation, requires necessary specification, that may not be ensured by general norms of law (moreover, by legal principles); one may speak about a legal gap only in relation to the public relations that are in the field of the legal regulation, which limits are determined by the principles of law (*R.Kondratiev*).

Technical errors of a legislator, made during drafting laws and the use of legislative techniques are also named among of the reasons of appearance of legal gaps (*O.Skakun*).

So various are the outlooks of the researchers as to the essence of legal gaps, so various are the criteria of the classification used for the division of all the variety of gaps to certain types.

One specifies “primary gaps” and “secondary gaps”, and states that the reason of primary gaps is the inability of the legislator to represent in legal acts all the variety of vital situations which require legal regulation, and the reason of secondary gaps is the inability of the legislator to foresee the appearance of new vital situations as a result of permanent development of public relations and, accordingly, to regulate them in legislative acts (*M.A.Voronina*). The scholars determine such reasons as objective and subjective reasons of the existence of gaps (*O.Zaichuk, N.Onischenko*).

“Actual” gaps exist, when a specific issue is to be settled by legal means, but such settlement is not foreseen by law (*V.Kopeychykov*).

Appearance and methods of elimination and overcoming of gaps are separately researched in public and private law. The means of elimination of gaps is the law-making activity of state bodies. The operative means of overcoming gaps are the analogy of a statute, analogy of law, subsidiary application of legal norms.

As regards gaps in criminal law, the institute of analogy of a statute may not be applied. An opinion is expressed, that a gap in criminal law may take place in case, when an issue which it regulates may not be divided into contradictory classes as to its nature, i.e. when the legislative unsettlement is not equal to legislative regulation and it is determined that, despite the imperative norm of part 4 of the article 3 of the Criminal Code of Ukraine, it is to be understood only as such, that forbids to recognize by analogy the criminal acts which are not envisaged by law as such, and to determine punishment “by analogy”, since it

should not damage rights and legitimate interests of a person that committed a crime (*Yu.Ponomarenko*).

In civil, administrative, economic and other legal relationships which emerge from commercial navigation and are not regulated by the Maritime Code of Ukraine the rules of civil, administrative, economic and other legislation of Ukraine are accordingly applied (article 4 of the Maritime Code of Ukraine).

In case of absence of legislation, that regulates disputable relations with participation of foreign subject of entrepreneurial activity, an economic court may apply international commercial customs and the refusal to consider a case from the reasons of incompleteness, vagueness, contradiction or absence of legislation which regulates the disputable relations is forbidden (parts six and seven of the article 4 of the Economic Code of Procedure of Ukraine).

In case of non-compliance of a legal act to the Constitution of Ukraine, a law of Ukraine, international agreement, a consent to the binding nature of which is given by the Verkhovna Rada of Ukraine, or other legal act a court applies a legal act which has a higher legal force.

In case a court has doubts during consideration of a case as to the conformity of a law or other legal act with the Constitution of Ukraine, the solution of the issue of constitutionality of which falls under the jurisdiction of the Constitutional Court of Ukraine, a court applies to the Supreme Court of Ukraine for the solution of the issue on the submission of a petition to the Constitutional Court of Ukraine on the constitutionality of a law or other legal act.

In case of absence of a law, that regulates the respective legal relationships, a court applies a law, that regulates similar legal relationships (analogy of a statute), and in case of absence of such law a court goes out of constitutional principles and general principles of law (analogy of law) (parts five and six of the article 9 of the Code of Administrative Proceedings of Ukraine).

## **1.2. The concept of legislative omission.**

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

The Ukrainian scientific literature does not differentiate legal gaps, which are forbidden by constitutional norms or other legislative acts. To the scientific doctrine is inherent the research of terms “legal gap” and “legislative gap”, which mean absence of legal norm for regulating these or those public relations. There is a tendency to apply the term “legislative gap” more often.

**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". The concept of the constitutional court as a "positive legislator". Problems of the influence of the jurisprudence of the constitutional court on law-making? Does the scientific legal doctrine consider the activity of the constitutional court when the constitutional court investigates

and assesses legal gaps as well as the influence of the decisions of the constitutional court regarding filling in the said legal gaps? Was the naming of the activity of the constitutional court as the one of "activism", "moderation" and "minimalism" reasoned on the basis of such decisions?

The Constitutional Court of Ukraine, in executing functions of the sole body of constitutional jurisdiction fixed in the Constitution and inherent only to it, has a special place in the mechanism of the state power. For today in the scientific doctrine of Ukraine there is a generally accepted characteristic of the description of the Constitutional Court of Ukraine as a judicial body (body of judicial power). "Substantial in the determination of the Constitutional Court as a judicial body is that the basic principles and forms of its activity coincide or may be compared to the respective traits of the existence of courts of general jurisdiction" (*V.Shapoval*).

The recognition of the Constitutional Court of Ukraine as the sole body of constitutional jurisdiction in Ukraine (article 147 of the Constitution of Ukraine) stipulated the volume of its jurisdiction. As marks *P.Tkachuk*, "the Constitutional Court of Ukraine protects rights and freedoms by way of: assessment of constitutionality of laws and other legal acts of the Verkhovna Rada of Ukraine, the President of Ukraine, the Cabinet of Ministers of Ukraine, current international agreements and those international agreements which are submitted to the Verkhovna Rada of Ukraine for granting consent to their binding nature, the official interpretation of the Constitution and laws of Ukraine; examination of draft-laws on introducing amendments to the Constitution as to impermissibility of existence of provisions that would abolish or limit human and citizens' rights and freedoms. The interpretation of the norms of law is the basis of activity of the Constitutional Court. Any decision or opinion of the Court are preceded by the process of clarification of the essence of all legal norms which they are based on. Functionally the Constitutional Court is the body which has to be an arbiter in the disputes of state authorities as to their competence. It partially exercises this function by verification of the conformity with the Constitution of laws and other legal acts which set forth the authority of the mentioned bodies, and partially - by the interpretation of the Constitution and laws of Ukraine".

Characterizing the concept of constitutional court as a "negative" or "positive" legislator is related to the establishment of the nature of acts of the Constitutional Court of Ukraine at the realization of functions of judicial body: establishment of conformity of legal acts with the Constitution of Ukraine and the official interpretation of the Constitution and laws of Ukraine. There is a general approach as to determination of the Constitutional Court of Ukraine as a "negative" legislator. In particular, *V.Tykhy* specifies, that "recognizing this or that legal act unconstitutional and thus annulling it, the Constitutional Court of Ukraine performs the function of a "negative law-maker", whereas the law-maker is engaged in "positive law-making".

In his turn, *V.Shapoval* considers that there are certain reservations as to the nature of the decisions and opinions in cases as to constitutionality of laws and other determined legal acts and current international agreements accordingly. The

consequence of their adoption is the realization (exercise) of the so-called “negative” law-making. “But it would be too categorical to assert that such decisions and opinions of the Constitutional Court of Ukraine are legal acts”.

The issue of the objection of normative properties of the decisions of the Constitutional Court of Ukraine is to a certain extent related with the concept of «negative/positive» legislator.

For instance, *M.Koziubra* notes that “the Constitutional Court does not belong to the law-making bodies, although it is often enough called a “negative legislator”.

In his turn, *V.Shapoval* specifies, that “under no circumstances the jurisdiction of the Constitutional Court that is established constitutionally and legislatively does not foresee realization of law-making not related to the regulation of a number of issues of organization of its internal work. The decisions and opinions of the Constitutional Court may not have the character of legal acts which are able to actively regulate public relations. The realization by the Constitutional Court of law-making activity would place this body above all state mechanism and even above the Fundamental Law itself”.

*V.Skomorokha and I.Pshenychny* specify, that “the Court, not having a right to fill in gaps in the legislation by its decisions, may not develop law on the basis of judicial precedent, the more so, continuing the “matter of legislator”. Recognition of judicial precedent as the source of constitutional law means, that judicial bodies carry out not only jurisdictional function (settlement of conflicts on the basis of law) but also that of law-making. Making by the Constitutional Court of Ukraine of a norm of law is impossible pursuant to the requirements of the article 6 of the Constitution of Ukraine as to the division of powers.

In its turn, the Ukrainian doctrine has not researched the activity of the Constitutional Court of Ukraine as “activism”, “moderation”, “minimalism”.

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

### **2.1. The constitution in the national legal system.**

Present the model of the hierarchical pyramid of your national legal acts (for example, in the Republic of Lithuania no national legal acts may be in conflict with the Constitution, while laws and other legal acts adopted by the Seimas or acts of the Government or the President of the Republic may not be in conflict with constitutional laws, etc). The place and importance of the constitution in the national legal system. What concept of the constitution as the highest law is developed by the constitutional court? The concept of the constitution as explicit and implicit legal regulation. Is the constitution considered as law without gaps in the constitutional jurisprudence?

The Constitution of Ukraine is a unique legal act, having the highest legal force, through which the Ukrainian people and the Ukrainian state express their sovereign will, assert basic principles of state and society order, the basis of legal status of an individual and citizen, determine the system and functions of state

bodies and bodies of local self-government, the mechanism of realization of state and power authorities and the territorial structure of the state (*V.Pohorilko, V.Fedorenko*).

The Constitution requires the existence of certain hierarchy of legal acts. Being a legal act itself, the Constitution is a self-sufficient result of the realization of “sovereign” constituent power, it executes certain system-making functions as to the system of national law on the whole. (*V.Shapoval*).

In order to outline the model of hierarchical pyramid of acts of the national law, one should note the following. The Constitution of Ukraine has the highest legal force. Acts and other legal acts are adopted on its basis and must conform with it. The norms of the Constitution of Ukraine are the norms of direct effect (article 8).

In the Decision as of December 23, 1997 no.7-zp/1997 in case on the Chamber of Account the Constitutional Court of Ukraine defined that “*the Constitution of Ukraine has the highest legal force (part two of the article 8 of the Constitution of Ukraine). The supremacy of the constitutional norms extends to all spheres of the state activity, including the law-making process. The Verkhovna Rada of Ukraine, when adopting laws, does not have a right to assume inconformity as to any provisions set forth directly in the Constitution of Ukraine*” (paragraph four item 1 of the motivation part).

In accordance with the provision of the article 91 of the Constitution of Ukraine the Verkhovna Rada of Ukraine adopts laws, decrees and other legal acts by the majority of its constitutional composition, except for the cases envisaged by this Constitution.

The President of Ukraine on the basis and in view of the ensuring of the Constitution and laws of Ukraine issues decrees and orders which are obligatory for execution on the territory of Ukraine (part three of the article 106 of the Constitution of Ukraine).

The Government of Ukraine within the limits of its competence issues resolutions and orders which are obligatory for execution (part one of the article 117 of the Constitution of Ukraine). The Cabinet of Ministers of Ukraine in its activity is guided by this Constitution and laws of Ukraine, as well as the decrees of the President of Ukraine and the decisions of the Verkhovna Rada of Ukraine, adopted in accordance with the Constitution and laws of Ukraine (part three of the article 113 of the Constitution of Ukraine).

The hierarchical pyramid of legal acts is traced in item 1 part 1 of the article 150 of the Constitution of Ukraine, which sets forth that to the competence of the Constitutional Court of Ukraine there are related issues as to the conformity with the Constitution of Ukraine (constitutionality) of laws, decrees of the Verkhovna Rada of Ukraine; decrees and orders of the President of Ukraine; resolutions and orders of the Cabinet of Ministers of Ukraine; decisions and decrees of the Verkhovna Rada of the Autonomous Republic of Crimea.

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

What legal acts (constitutional, organic laws, laws adopted by referendum, ordinary laws, regulations of the parliament, international agreements, laws of the subjects of the federation, substatory acts, as well as laws adopted before coming into force of the constitution and other legal acts) are directly named as the object of the constitutional control? Does the constitution of your country establish *expressis verbis* that the constitutional court investigates and assesses the constitutionality of gaps (legislative omission) in the legal regulation? Does the constitution provide for any special procedures for the investigation of legislative omission?

In accordance with the provisions of the article 150 of the Constitution of Ukraine and article 13 of the Law of Ukraine «On the Constitutional Court of Ukraine» the Constitutional Court of Ukraine adopts decisions and gives opinions in cases as to the constitutionality of laws and other legal acts of the Verkhovna Rada of Ukraine, acts of the President of Ukraine, acts of the Cabinet of Ministers of Ukraine, legal acts of the Verkhovna Rada of the Autonomous Republic of Crimea; conformity with the Constitution of Ukraine of current international agreements of Ukraine or those international agreements which are submitted to the Verkhovna Rada of Ukraine for granting consent to their binding nature; adherence to the constitutional procedure of investigation and consideration of the case on the removal of the President of Ukraine from office through the impeachment procedure within the limits established in the articles 111 and 151 of the Constitution of Ukraine; the official interpretation of the Constitution and laws of Ukraine.

Draft-laws on introducing amendments to the Constitution are also the object of direct constitutional control. The indicated provision is fixed in the provision of the article 159 of the Constitution of Ukraine, where it is noted, that a draft-law on introducing amendments to the Constitution of Ukraine is examined by the Verkhovna Rada of Ukraine provided there is an opinion of the Constitutional Court of Ukraine as to the conformity of the draft-law with the requirements of the articles 157 and 158 of the Constitution of Ukraine. This control is exercised with the purpose of prevention of abolition or limitation of human and citizen's rights and freedoms or prevention of changes which are directed on liquidation of independence or violation of the territorial integrity.

The current Constitution of Ukraine does not contain provisions as to the competence of the Constitutional Court of Ukraine to examine and assess the constitutionality of legislative gaps, as well as missing constitutional norms as to the special procedures of examination of legislative gaps.

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

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

The authority of the Constitutional Court of Ukraine is regulated by the article 150 of the Constitution of Ukraine, the provisions of articles 13, 14, 15 of the Law of Ukraine «On the Constitutional Court of Ukraine», which determine that the Constitutional Court of Ukraine decides the issues on the constitutionality of laws and decrees of the Verkhovna Rada of Ukraine, decrees and orders of the President of Ukraine, resolutions and orders of the Cabinet of Ministers of Ukraine, decisions and decrees of the Verkhovna Rada of the Autonomous Republic of Crimea, as well as provides the official interpretation of the Constitution of Ukraine and laws of Ukraine upon the respective the petitions and appeals.

The examination and identification of legislative gaps, as well as evaluation of constitutionality of gaps in a legal regulation does not fall under the jurisdiction of the Constitutional Court of Ukraine. The analysis of constitutional norms testifies that in its provisions there are no special procedures of examination of legislative gaps. Although, undoubtedly, as a judicial body, the Constitutional Court of Ukraine specifies in its acts the following possibilities of the realization by the Constitutional Court of the examination of a legislative gap: declaration of the necessity of legislative settlement of certain legal relationships; refusal to give interpretation of legislative gaps, that would be interference with the jurisdiction of the legislative branch of power.

In the case-law of the Constitutional Court of Ukraine there have been formulated consequences of the establishment by the Constitutional Court of Ukraine of the existence of a legislative gap. In particular, in the Decision as of March 25, 1998 no. 3-rp in case on the interpretation of the Law of Ukraine «On elections of People's Deputies of Ukraine» the Constitutional Court of Ukraine marked that *«filling in gaps in laws, separate provisions of which were recognized by the Constitutional Court of Ukraine as unconstitutional does not belong to its competence. Pursuant to the article 6 of the Constitution of Ukraine the state power in Ukraine is exercised on the principles of its division in legislative, executive and judicial. Coming out of it and in accordance with part two of the article 19 of the Constitution of Ukraine the solution of the mentioned issues is the prerogative of the body of legislature – the Verkhovna Rada of Ukraine»*.

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

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



The Law of Ukraine «On the Constitutional Court of Ukraine», which regulates the activity of the Constitutional Court of Ukraine, does not foresee the competence as to examination and evaluation of a gap in a legal regulation in laws and other legal acts.

The sole subject which has a right to eliminate legislative gaps is the Verkhovna Rada of Ukraine. The subjects of initiating of issues on elimination of legislative gaps may be subjects of legislative initiative: the President of Ukraine, People's Deputies of Ukraine, the Cabinet of Ministers of Ukraine (part one of the article 93 of the Constitution of Ukraine).

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

#### **3.1. Application to the constitutional court.**

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

The subjects of right to constitutional petition as to the decision by the Constitutional Court of Ukraine of issues on the constitutionality of laws and other legal acts of the Verkhovna Rada of Ukraine, acts of the President of Ukraine, acts of the Cabinet of Ministers of Ukraine, legal acts of the Verkhovna Rada of the Autonomous Republic of Crimea is the President of Ukraine, no less than forty-five People's Deputies of Ukraine, the Supreme Court of Ukraine, the Authorized Human Rights Representative of the Verkhovna Rada of Ukraine, the Verkhovna Rada of the Autonomous Republic of Crimea, in accordance with their jurisdiction.

The subjects of right to constitutional petition as to giving opinions by the Constitutional Court are: 1) as to the conformity with the Constitution of Ukraine of current international agreements of Ukraine or those international agreements which are submitted to the Verkhovna Rada of Ukraine for granting consent as to their binding nature, - the President of Ukraine, the Cabinet of Ministers of Ukraine; 2) as to adherence to the constitutional procedure of investigation and consideration of case on the removal of the President of Ukraine from office through impeachment procedure – the Verkhovna Rada of Ukraine; 3) as to the official interpretation of the Constitution and laws of Ukraine - the President of Ukraine, no less than forty-five People's Deputies of Ukraine, the Authorized Human Rights Representative of the Verkhovna Rada of Ukraine, the Supreme Court of Ukraine, the Cabinet of Ministers of Ukraine, other state bodies, the Verkhovna Rada of the Autonomous Republic of Crimea, bodies of local self-government; 3) as to the conformity of a draft-law of Ukraine on introducing amendments to the Constitution of Ukraine with the requirements of the articles 157 and 158 of the Constitution of Ukraine - the Verkhovna Rada of Ukraine.

The subjects of right to constitutional appeal on giving opinions by the Constitutional Court as to the official interpretation of the Constitution and laws of

Ukraine are the citizens of Ukraine, aliens, stateless persons and legal entities in Ukraine.

The Constitutional Court may refuse to initiate proceedings in case on such grounds: absence of the right to constitutional petition or constitutional appeal set forth by the legislation; inconformity of a constitutional petition or constitutional appeal with the requirements, envisaged by the legislation; issues raised in constitutional petition or constitutional appeal do not fall under the jurisdiction of the Constitutional Court.

The subjects of right to constitutional petition, constitutional appeal may not raise the issue of a legislative gap, since the solution of this issue is not the jurisdiction of the Constitutional Court of Ukraine.

### **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? What part of the petitions received at the constitutional court is comprised of the petitions, wherein the incompliance of the act with the constitution is related to the legislative omission? What subjects, who have the right to apply to the constitutional court, relatively more often specify in their petitions the legislative omission as the reason of the act's being in conflict with the constitution? Are there any specific requirements provided for as regards the form, contents and structure of the applications concerning the unconstitutionality of the legislative omission? If yes, describe them. Are they established in the law which regulates the activity of the constitutional court or are they formulated in the constitutional jurisprudence?

Taking into consideration absence of authority of the Constitutional Court of Ukraine to decide on legislative gaps, in accordance with the provisions of the Law of Ukraine «On the Constitutional Court of Ukraine» in their applications to the Constitutional Court of Ukraine the applicants should provide legal grounds of statements of unconstitutionality of a legal act. In addition, the grounds for constitutional petition as to the official interpretation of the Constitution of Ukraine and laws of Ukraine is a practical necessity in identification or explanation, official interpretation of the provisions of the Constitution of Ukraine and laws of Ukraine (article 93). The grounds for the constitutional appeal as to the official interpretation of the Constitution of Ukraine and laws of Ukraine is the ambiguous application of the provisions of the Constitution of Ukraine or laws of Ukraine by the courts of Ukraine, other state bodies, if a subject of right to constitutional appeal considers, that this may lead or resulted in violation of his/her constitutional rights and freedoms.

The requirements to the form, content and structure of constitutional petition / constitutional appeal are set forth in the articles 39, 42 of the Law of Ukraine “On the Constitutional Court of Ukraine” accordingly. These requirements are general.

### **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.

The Constitutional Court of Ukraine examines cases exceptionally upon the initiative of subjects of right to constitutional petition / constitutional appeal. Furthermore, the Constitutional Court of Ukraine does not examine the issue of legislative gaps. In case of identification of such gap the Constitutional Court of Ukraine, referring to the fact that the case falls beyond the jurisdiction, only establishes the availability of certain legislative gap and forwards its position to the respective body of law-making.

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

The Constitutional Court of Ukraine decides on the constitutionality of legal acts or the official interpretation of the Constitution or law of Ukraine without separate examination of availability of gaps of legal regulation in laws and other legal acts.

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

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

Taking into account that the competence of the Constitutional Court of Ukraine does not include examination and evaluation of legal gaps, in case of application to the Constitutional Court of Ukraine on these grounds, the latter refuses to initiate the constitutional proceedings in a case.

The refusal of the Constitutional Court of Ukraine may have the following grounds:

*"... elimination of gaps in the norms of laws ... is the prerogative of the legislative body, and not the Constitutional Court of Ukraine"* (Ruling of the Constitutional Court of Ukraine as of July 9, 1998 no. 35-u on the refusal to initiate constitutional proceedings in case upon constitutional petition of the High Court of Arbitration of Ukraine as to the official interpretation of the articles 19 and 20 of the Law of Ukraine "On fundamental bases of social protection of invalids in Ukraine");

*“... improving specific state-official relations, removal of contradictions and filling in gaps in the current legislation does not fall under the jurisdiction of the Constitutional Court”* (Ruling of the Constitutional Court of Ukraine as of July 10, 1998 no. 41-u on the refusal to initiate constitutional proceedings in case upon constitutional petition of the Central Election Commission on the official interpretation of part one of the article 9 of Law of Ukraine “On civil service”);

*“... the removal of collisions and filling in gaps in legislative acts, pursuant to the article 85 of the Constitution of Ukraine, is the exceptional jurisdiction of the Verkhovna Rada of Ukraine as the sole body of legislative power in Ukraine”* (Ruling of the Constitutional Court of Ukraine as of January 15, 2004 no. 1-u on the refusal to initiate constitutional proceedings in case upon constitutional petition of 50 People’s Deputies of Ukraine on the conformity with the Constitution of Ukraine (constitutionality) of provisions of the article 2 of the Law of Ukraine “On the order of granting in kind (on locality) of land plots to the owners of the land plots (shares) and on the official interpretation of part three of the article 82 of the Land Code of Ukraine).

It is necessary to point out separately the doctrine of “issue of political expedience”, formulated in the constitutional jurisprudence of Ukraine. In particular, in the Decision as of February 26, 1998 no. 1-rp/1998 in case on the elections of People’s Deputies of Ukraine the Constitutional Court for the first time applied and formulated the issue of “political expedience”. The Constitutional Court came to a conclusion, that *“... deprivation of lists of candidates from political parties, electoral blocks of parties which got less than 4% of votes of the right to participate in the division of deputies’ mandates, is the issue of political expedience, and is to be settled by the Verkhovna Rada of Ukraine”* (paragraph three item 5 of the motivation part).

The doctrine of political issue (political expedience) also showed up in the Decision of the Constitutional Court of Ukraine as of December 3, 1998 no. 17-rp/1998 in case on the formation of factions in the Verkhovna Rada of Ukraine. In this Decision the Constitutional Court noted that *“... establishment of order of organization and activity of factions in parliament, determination of their quantitative composition, tasks, functions, aims, etc. is foremost the issue of political expedience, which are to be settled by the Verkhovna Rada of Ukraine”* (paragraph nine item 3 of the motivation part).

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

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

The identification and examination of legislative gaps does not fall under the jurisdiction of the Constitutional Court of Ukraine. But in exercising the control of constitutionality of acts and giving the official interpretation of the Constitution

and laws of Ukraine, the Constitutional Court of Ukraine undoubtedly runs into the problem of identification of legislative gaps.

The main task of the Constitutional Court of Ukraine is to guarantee the supremacy of the Constitution of Ukraine as the Fundamental Law of the state on all territory of Ukraine. With regard to this, the Constitutional Court of Ukraine realizes its mission upon the initiative of subjects of right to constitutional petition / constitutional appeal.

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

In the process of its activity the Constitutional Court of Ukraine exercises the prior (preventive) and subsequent (repressive) control. The prior control of the Constitutional Court of Ukraine extends on two categories of cases: 1) upon the appeals of the President of Ukraine or the Cabinet of Ministers of Ukraine the Constitutional Court gives opinions on the conformity with the Constitution of Ukraine of international agreements which are submitted to the Verkhovna Rada of Ukraine for granting consent as to their binding nature (article 151 of the Constitution of Ukraine); upon the appeal of the Verkhovna Rada of Ukraine the Constitutional Court of Ukraine gives an opinion as to the conformity of the draft-law on introducing amendments to the Constitution of Ukraine with the requirements of the articles 157 and 158 of the Constitution of Ukraine (article 159 of the Constitution of Ukraine).

The Constitutional Court of Ukraine exercises the subsequent (repressive) control in cases: on the conformity with the Constitution of Ukraine (constitutionality) of laws and other legal acts of the Verkhovna Rada of Ukraine, acts of the President of Ukraine, acts of the Cabinet of Ministers of Ukraine, legal acts of the Verkhovna Rada of the Autonomous Republic of Crimea (part one of the article 150 of the Constitution of Ukraine); on the conformity with the Constitution of Ukraine of current international agreements (part one of the article 151 of the Constitution of Ukraine); on adherence to the constitutional procedure of investigation and consideration of case about the removal of the President of

Ukraine from office through impeachment procedure (part two of the article 151 of the Constitution of Ukraine); on violation by the Verkhovna Rada of the Autonomous Republic of Crimea of the Constitution of Ukraine or laws of Ukraine in case of early termination of its authorities upon the decision of the Verkhovna Rada of Ukraine (item 28 of part one of the article 85 of the Constitution of Ukraine).

Most often exactly while exercising the posterior control of constitutionality there may indeed arise the problems of legislative gaps. The system analysis of legal acts during the consideration of a case gives grounds to the Constitutional Court of Ukraine to specify the availability of separate legislative gaps. If the provisions of a legal act are recognized unconstitutional, they lose their effect as of the day of the adoption of a decision by the Constitutional Court of Ukraine.

The procedure of consideration of cases as to the constitutionality of legal acts, which cause a dispute as to the authorities of constitutional bodies of state power of Ukraine, bodies of power of the Autonomous Republic of Crimea and bodies of local self-government, as to the conformity of current legal acts with constitutional principles and norms in relation to human and citizens' rights and freedoms, and also as to the constitutionality of legal acts which regulate the order of the realization of constitutional human and citizens' rights and freedoms in a contradictory way is general. The particularities concern only the subjects, object of proceedings and the content of the resolution part.

#### 4.2. Establishment of the existence of legislative omission.

Specify the criteria formulated in the jurisprudence of the constitutional court of your country, on the grounds whereof gaps in the legal regulation may and must be recognized as unconstitutional. Does the constitutional court investigate only the disputed provisions of a law or other legal act? Does the constitutional court decide not to limit itself with only autonomous investigation of the content of the disputed provisions (or disputed act) but to analyse it in the context of the whole legal regulation established in the act (or even that established in the system of acts or the whole field of law)? Can the constitutional court investigate and assess legislative omission of the legal regulation that used to be valid in the past? Does the constitutional court state the existence of gaps in the legal regulation which used to be valid in the past, when it analyzes the development of the disputed provisions (disputed act)? Does the constitutional court, when identifying the legislative omission, investigate and assess only the content and form of the legal regulation or also the practise of the implementation of the legal regulation?

With regard to the fact that the competence of the Constitutional Court of Ukraine does not include the research and evaluation of legal gaps, the Court had not elaborated the criteria of establishment of availability of legislative gaps.

The Constitutional Court of Ukraine examines only the provisions of the acts appealed to it (laws and other legal acts of the Verkhovna Rada of Ukraine, acts of the President of Ukraine, acts of the Cabinet of Ministers of Ukraine, legal acts of Verkhovna Rada of the Autonomous Republic of Crimea, current international agreements and international agreements which are submitted to the Verkhovna Rada of Ukraine for granting consent to their binding nature, draft-laws on introducing amendments to the Constitution of Ukraine with the requirements of

the articles 157 and 158 of the Constitution of Ukraine). Herewith the Constitutional Court of Ukraine examines only acts which are in effect. In accordance with the provision of part three of the article 61 of the Law of Ukraine “On the Constitutional Court of Ukraine” *“in case if in the process of consideration of a case upon constitutional petition or constitutional appeal there is established non-compliance with the Constitution of Ukraine of other legal acts (their separate provisions), except for those, in relation to which the proceedings in a case were initiated, and which influence the adoption of decision or giving opinion in a case, the Constitutional Court of Ukraine recognizes such legal acts (their separate provisions) unconstitutional”*. That is, the Constitutional Court of Ukraine exercises the system analysis of legal acts in their interrelation, examining all the issues which are related to the constitutionality of the appealed acts (their provisions).

#### **4.3. The methodology of revelation of legislative omission.**

Describe the methodology of revelation of legislative omission in the constitutional jurisprudence: what methods and their combinations does the constitutional court apply while revealing legislative omission? How much importance falls upon grammatical, logical, historical, systemic, teleological or other methods of interpretation in stating the existence of legislative omission? Does the constitutional court, while investigating and assessing legislative omission, directly or indirectly refer to the case-law of the European Court of Human Rights, the European Court of Justice, other institutions of international justice and constitutional and supreme courts of other countries?

In deciding on the case as to the constitutionality of a legal act or official interpretation of the Constitution and laws of Ukraine, the Constitutional Court of Ukraine may establish the availability of a legislative gap. Herewith, as a rule, while performing the analysis the Constitutional Court of Ukraine applies a number of methods (system, purpose-oriented (teleological), grammatical, functional interpretation, comparatively-legal). Mostly it appears at the analysis of legal acts which were adopted prior to coming into effect of the Constitution of Ukraine in 1996 and which were amended after 1996. Often enough the Constitutional Court of Ukraine applies the method of system analysis of a legal act in combination with the practice of application of this act by state bodies. The application by the Constitutional Court of Ukraine of logical interpretation enables, through means of formal logic (identity, non contradiction, exception of the third, sufficient basis) and logic operations (analysis and synthesis, construction of syllogism etc.) to establish all the volume of the content of a norm, to eliminate certain inaccuracies. Separately it is necessary to specify the realization by the Constitutional Court of Ukraine of teleological (purpose-oriented) interpretation. Such type of interpretation is effective enough at consideration of competence disputes.

At consideration of cases the Constitutional Court of Ukraine refers to the case-law of the European Court of Human Rights; in applying a comparatively-legal method, it analyses the jurisprudence of constitutional or supreme courts of other states.

#### 4.4. Additional measures.

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

In case of establishment of a legislative gap, if it is related to the protection of rights of an individual, the Constitutional Court of Ukraine does not have competence to exercise any actions as to their ensuring. The Constitutional Court of Ukraine only specifies the availability of a legislative gap and in case of non-compliance of a legal act (its separate provisions) with the Constitution of Ukraine and may determine a body which should bring the appealed act in conformity with the Constitution of Ukraine.

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

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

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

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

A legislative gap is fixed in the motivation part of an act of the Constitutional Court with the identification of the fact, that filling in legislative gaps belongs to the jurisdiction of the Verkhovna Rada of Ukraine, and not the Constitutional Court of Ukraine. Herewith the Court draws no conclusions and sets no duties. For example:

*“ ... removal of gaps in the norms of laws ... is the prerogative of the legislative body, and not the Constitutional Court of Ukraine”* (Ruling of the Constitutional Court of Ukraine as of July 9, 1998 no. 35-u on refusal to initiate constitutional proceedings in case upon constitutional petition of the High Court of Arbitration of Ukraine as to the official interpretation of the articles 19 and 20 of the Law of Ukraine “On bases of social protection of invalids in Ukraine”);

*“«... filling in gaps in the laws of Ukraine does not fall under jurisdiction of the Constitutional Court of Ukraine”* (Ruling of the Constitutional Court of Ukraine as of April 20, 1999 no. 8-u on refusal to initiate constitutional proceedings in case upon constitutional petition of 47 People’s Deputies of Ukraine as to the conformity with the Constitution of Ukraine (constitutionality) of



provisions of part two of the article 3 of the Law of Ukraine “On charge for obligatory social insurance”);

*“... the removal of collisions and filling in gaps in legislative acts, pursuant to the article 85 of the Constitution of Ukraine, is the exceptional jurisdiction of the Verkhovna Rada of Ukraine as the sole body of legislature in Ukraine”* (Ruling of the Constitutional Court of Ukraine as of January 15, 2004 no. 1-u on refusal to initiate constitutional proceedings in case upon constitutional petition of 50 People’s Deputies of Ukraine as to the conformity with the Constitution of Ukraine (constitutionality) of provisions of the article 2 of the Law of Ukraine “On procedure of allocation in kind (on locality) of land plots to the owners of the land stakes (shares)” and on the official interpretation of part three of the article 82 of the Land Code of Ukraine).

**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 of Ukraine, having established a legislative gap in motivation part of an act, in the resolution part of an act:

- terminates constitutional proceedings in a case, establishing that filling in gaps in legal acts does not fall under the jurisdiction of the Constitutional Court of Ukraine;

- refuses to initiate constitutional proceeding in case on the basis of item 3 of the article 45 of the Law of Ukraine “On the Constitutional Court of Ukraine” - absence of jurisdiction of the Constitutional Court of Ukraine as to the issues raised in constitutional petition (appeal);

- refuses to initiate constitutional proceedings in case on the basis of item 2 of the article 45 of the Law of Ukraine “On the Constitutional Court of Ukraine” - non-compliance of constitutional petition (appeal) with the requirements set forth by the Constitution of Ukraine and the Law of Ukraine “On the Constitutional Court of Ukraine”.

**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.

See the reply to the question 3.6.

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

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

In accordance with the provisions of part two of the article 152 of the Constitution of Ukraine laws, other legal acts or their separate provisions which are recognized unconstitutional, lose their effect as of the day of the adoption by the Constitutional Court of Ukraine of the decision as to their unconstitutionality. The decisions and opinions of the Constitutional Court of Ukraine are signed not later than seven days after the adoption of a decision, giving of an opinion. The decisions and opinions of the Constitutional Court of Ukraine are officially promulgated on the next working day after they have been signed (parts one and two of the articles 67 of the Law of Ukraine "On the Constitutional Court of Ukraine").

Postponing of the official promulgation or establishment of a later date of coming into effect of the decision of the Constitutional Court of Ukraine is not envisaged by the constitutional norms.

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

**5.1.** Duties arising to the legislator.

Does the statement of the existence of legislative omission in a decision of the constitutional court mean a duty of the legislator to properly fill in such gap of legal regulation? Does the regulation of the parliament provide how the questions are considered concerning the implementation of the constitutional court decisions? Does the parliament promptly react to the decisions of the constitutional court, wherein the legislative omission is stated? Are there cases

when the parliament disregarded the decisions of the constitutional court concerning the legislative omission? How is it ensured that the parliament would implement the duty which has appeared due to the decision of the constitutional court? What are the powers and role of the constitutional court in this sphere?

Taking into account the fact that the decisions and opinions of the Constitutional Court of Ukraine are obligatory for execution, the removal of legislative gaps which emerged in connection with their recognition (or separate provisions thereof) unconstitutional, is attributed to the competence of the Verkhovna Rada of Ukraine as the sole body of legislature in Ukraine (article 75 of the Constitution of Ukraine). In some decisions the Constitutional Court of Ukraine specified the necessity of regulation of the relations which “suffered” when a legal act was recognized unconstitutional. In particular, in the Decision as of December 29, 1999 no. 11-rp/1999 in case on death penalty the Constitutional Court of Ukraine defined that “*the Verkhovna Rada of Ukraine is to bring the Criminal Code of Ukraine in conformity with this Decision of the Constitutional Court of Ukraine*” (item 3 of the resolution part). Similarly, it was indicated in the Decision of the Constitutional Court of Ukraine as of July 9, 2002 no. 15-rp/2002 in case on the pre-trial settlement of disputes and in the Decision of the Constitutional Court of Ukraine as of November 2, 2004 no. 15-rp/2004 in case on more lenient punishment.

In accordance with the provisions of the article 70 of the Law of Ukraine «On the Constitutional Court of Ukraine» “*in case of necessity the Constitutional Court of Ukraine may determine in its decision, opinion the order and terms of their execution, and also to lay on the respective state bodies duties as to ensuring the execution of a decision, adherence to an opinion. The Constitutional Court of Ukraine has the right to demand from the bodies mentioned in this article, written confirmation of execution of a decision, adherence to an opinion of the Constitutional Court of Ukraine. Non-execution of decisions and non-adherence to opinions of the Constitutional Court of Ukraine entail responsibility according to the law*”. In addition, in the Decision as of December 14, 2000 no. 15-rp/2000 in case on the order of execution of the decisions of the Constitutional Court of Ukraine it is indicated that “*... regardless of whether in the decision, opinion of the Constitutional Court of Ukraine, there is an indication, in particular, of the order of its execution, respective state bodies, are to operate only on basis, within the limits of competence and in a manner, envisaged by the Constitution and laws of Ukraine.*”

*However, additional determination in the decisions, opinions of the Constitutional Court of Ukraine of the order of their execution does not abolish and does not substitute general binding nature of their execution. Regardless of the fact whether there are or no in the decisions, opinions of the Constitutional Court of Ukraine prescriptions as to the procedure of their execution, respective laws, other legal acts or their separate provisions recognized by these decisions unconstitutional, are not subject to application as such, that have lost their effect as of the day of the adoption by the Constitutional Court of Ukraine of a decision*

*as to their unconstitutionality*” (paragraphs five and six of the item 4 of the motivation part).

In the Decision as of June 20, 2007 no. 5-rp/2007 in case on the creditors of enterprises of communal ownership the Constitutional Court of Ukraine specified, that *“the positive duty of the legislator is the filling in a gap in the article 40 of the Law for proper application of disputed provisions by the courts”* (sentence four of the item 5 of the motivation part).

In the Regulations of the Verkhovna Rada of Ukraine the consideration of issues as to the implementation of the decisions of the Constitutional Court of Ukraine is not envisaged. Ensuring by the parliament of the duties which are perceived from the decisions of the Constitutional Court of Ukraine concern only the execution of the decisions of the Constitutional Court of Ukraine.

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

Does the statement the existence of legislative omission in a decision of the constitutional court mean the duty of other law-making subjects to properly fill in such gap of legal regulation? Do the acts regulating the activity of these subjects provide how the said subjects implement the constitutional court decisions? Do the said subjects promptly react to the decisions of the constitutional court, wherein the legislative omission is stated? Are there any cases when these subjects disregarded the decisions of the constitutional court concerning the legislative omission? How is it ensured that the said subjects would properly implement such duty? What are the powers and role of the constitutional court in this sphere?

Similar to the implementation by the Verkhovna Rada of Ukraine of the decisions of the Constitutional Court of Ukraine, which recognized separate provisions of legislative acts unconstitutional, other subjects of law-making (the President of Ukraine, the Cabinet of Ministers of Ukraine, the Verkhovna Rada of the Autonomous Republic of Crimea) may be obliged by the Constitutional Court of Ukraine to eliminate gaps (to bring a legal act which was appealed to the Constitutional Court of Ukraine in conformity with the provisions of the Constitution). In particular, as regards the Cabinet of Ministers of Ukraine, in the Decision of the Constitutional Court of Ukraine as of November 25, 1998 no. 15-rp/1998 in case on paid medical services the Constitutional Court of Ukraine determined that *“in accordance with the article 70 of the Law of Ukraine “On the Constitutional Court of Ukraine” to lay on the Cabinet of Ministers of Ukraine the duty in a monthly term to bring the Decree of the Cabinet of Ministers of Ukraine as of September 17, 1996 no. 1138 with the amendments, introduced by the Decree of the Cabinet of Ministers of Ukraine as of May 12, 1997 no. 449, in conformity with the article 49 of the Constitution of Ukraine and this Decision of Constitutional Court of Ukraine”* (item 3 of the resolution part). Similarly it was indicated in the Decision of the Constitutional Court of Ukraine as of July 24, 1999 no. 6-rp/1999 in case on courts’ financing and in the Decision of the Constitutional Court of Ukraine as of June 19, 2001 no. 9-rp/2001 in case on term of office for scientific work.

As regards bringing in conformity legal acts by the Verkhovna Rada of the Autonomous Republic of Crimea, the Constitutional Court of Ukraine outlined the following: in the Decision of the Constitutional Court of Ukraine as of June 2, 1998 no. 7-rp/1998 in case on the 1998 budget of the Autonomous Republic of Crimea: *“to lay on the Verkhovna Rada of the Autonomous Republic of Crimea the duty as to ensuring the execution of this Decision of the Constitutional Court of Ukraine. To the Verkhovna Rada of the Autonomous Republic of Crimea pursuant to the execution of item 3 of the Decision of Constitutional Court of Ukraine as of March 25, 1998 no. 4-rp as to unconstitutionality of the use by the Verkhovna Rada of the Autonomous Republic of Crimea of the term "the law of the Autonomous Republic of Crimea" as a form of a legal act of the Verkhovna Rada of the Autonomous Republic of Crimea to bring in conformity with the Constitution of Ukraine and the Law of Ukraine "On the Verkhovna Rada of the Autonomous Republic of Crimea" the name of the legal act of the Verkhovna Rada of the Autonomous Republic of Crimea "On the 1998 Republican budget of the Autonomous Republic of Crimea" as of January 14, 1998 and the Decree of the Verkhovna Rada of the Autonomous Republic of Crimea "On bringing into effect of the law of the Autonomous Republic of Crimea "On the 1998 Republican budget of the Autonomous Republic of Crimea" as of January 14, 1998»* (item 3 of the resolution part). Similarly it was indicated in the Decision as of February 27, 2001 no. 1-rp/2001 in case on legal acts of the Verkhovna Rada of the Autonomous Republic of Crimea: *“The Verkhovna Rada of the Autonomous Republic of Crimea within two months from the day of the adoption of this Decision is to bring in conformity with the Constitution of Ukraine and laws of Ukraine the provisions of legal acts of the Verkhovna Rada of the Autonomous Republic of Crimea, which are recognized unconstitutional”* (item 6 of the resolution part).

In addition, the Constitutional Court of Ukraine in the Decision as of December 14, 2000 no. 15-rp/2000 in case on the order of execution of the decisions of the Constitutional Court of Ukraine specified, that *“state bodies, organs of the Autonomous Republic of Crimea, bodies of local self-government, enterprises, establishments, organizations, officials and officers, citizens and their associations, foreigners, persons without citizenship should restrain from application or the use of legal acts or their provisions recognized unconstitutional”* (sentence two paragraph two item 4 of the motivation part).

**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?

The Constitutional Court of Ukraine may establish the availability of gaps in a legal regulation. However, such establishment of gaps is not the main activity of the Constitutional Court of Ukraine. The Constitutional Court of Ukraine may not fill in gaps by the official interpretation. Being a law-application body, the

Constitutional Court of Ukraine may come forward as a “negative” legislator, when recognizing unconstitutional acts or their separate provisions. However, filling in gaps, their removal or overcoming may not be exercised by the Constitutional Court of Ukraine.

In exercising the control of constitutionality of acts of the Ukrainian legislation and in giving the official interpretation of the Constitution and laws of Ukraine, the Constitutional Court of Ukraine ensures first and foremost the supremacy of the Constitution of Ukraine as the Fundamental Law, that is why law-making bodies should be guided, except for constitutional provisions, by the general legal principles, by the decisions and legal positions of the Constitutional Court of Ukraine, which indirectly formulate certain criteria of the new regulation of public relations.