

THE LEGISLATIVE FUNCTION OF THE CONSTITUTIONAL COURT IN RELATION TO THE OMISSION OF THE CONSTITUENT

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Abstract

The Constitutional Court is the responsible body for guaranteeing the supremacy of the Constitution and respect for fundamental rights. Among its functions is to control the constitutionality of laws and other legal norms, as well as to resolve conflicts of competence between the different branches of Government. However, the Constitutional Court can act not only against positive norms that violate the Constitution, but also against legislative omissions that imply a breach of constitutional mandates. Legislative omission occurs when the legislator ceases to regulate a matter that the Constitution expressly imposes on him or that is necessary to guarantee the effectiveness of constitutional rights and principles. The objective of this article is to analyze the foundations, the limits and the effects of this legislative function of the Constitutional Court, as well as the main criticisms that have been formulated from the legal and political point of view. For this purpose, a review-type study was formalized, based on narrative as a study method. By using keywords related to this topic such as “constitutional court” or “legislative function” among others and looking for them in the search engines such as Scopus, Wos and Scielo, we got to achieve more than 20 reviews so substantial for this paper. It is concluded that the legislative omission may be absolute or relative, depending on whether or not there is a

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previous norm that regulates the matter, but that is insufficient or incompatible with the Constitution. The purpose of the control of legislative omission by the Constitutional Court is to restore the validity of the Constitution and protect the legitimate interests of citizens who are affected by the lack of regulation. The Constitutional Court may declare the unconstitutionality by omission by means of the amparo appeal, the unconstitutionality appeal or the unconstitutionality question, as the case may be. The Constitutional Court cannot replace the legislator or issue general rules, but must limit itself to pointing out the failed constitutional duty and setting a deadline for its fulfillment.

Keywords: Constituent; Constitutional Court; Legislative function; Legislative omission

I. INTRODUCTION

The Constitutional Court (TC) is the institution entrusted with safeguarding the Constitution and ensuring the constitutionality of laws and other legal regulations. However, its role extends beyond annulling provisions that contravene the Magna Carta; it also addresses cases of legislative omission, wherein the legislature fails to enact necessary regulations to guarantee constitutional rights, principles, or mandates, thereby creating legal vacuums that undermine the effectiveness of the supreme norm.

Legislative omission occurs when the legislator neglects its duty to develop regulatory frameworks essential for the proper implementation of constitutional provisions. Such omissions may be adjudicated through various constitutional mechanisms, including appeals, actions of unconstitutionality, and judicial rulings that highlight deficiencies affecting fundamental rights. For instance, the Spanish Constitutional Court intervened in the absence of a regulatory framework on euthanasia prior to the enactment of Organic Law 3/2021, recognizing the imperative of legal clarity to uphold fundamental rights. Similarly, the Colombian Constitutional Court has issued rulings compelling legislative action in areas concerning social rights, such as healthcare access, urging Congress to rectify regulatory deficiencies.

When the TC declares the existence of a legislative omission, it acknowledges a constitutional failure by the legislature and prescribes a reasonable timeframe

for remedial action. Although the TC lacks the authority to legislate directly, it may establish interpretative criteria to resolve specific cases and mitigate adverse consequences for fundamental rights. A pertinent example is the ruling of the German Federal Constitutional Court on climate protection laws in 2021, which mandated more stringent legislative measures to align national policies with constitutional and international climate commitments. Additionally, the Indonesian Constitutional Court played a crucial role in the 2021 ruling on the Omnibus Law on Job Creation. The Court declared the law “conditionally unconstitutional” due to the legislature’s failure to adhere to proper legislative procedures, ordering the government to rectify these deficiencies within two years to ensure compliance with constitutional requirements.

In this manner, the TC performs a constructive legislative function by contributing to legal development and enhancing the constitutional framework without encroaching upon parliamentary authority or violating the principle of separation of powers. As an active and subsidiary institution, the TC ensures the efficacy of the constitutional rule of law.

This article aims to analyze the doctrinal foundations, limitations, and implications of the TC’s legislative function, incorporating recent case law and judicial precedents. Furthermore, it will critically examine legal and political objections, particularly regarding concerns over judicial activism and its potential ramifications for democratic legitimacy. The study adopts a narrative review methodology, drawing upon relevant jurisprudence and academic discourse to provide a comprehensive analysis of the evolving role of the TC in legislative oversight

II. METHODOLOGY

Formalized a literature review, which showcases the fundamentals of a specific issue that is documented in previous published sources. When looking to compile the information assumes the eligibility criteria set out, with the

purpose of aligning the scientific inquiry on the topic of dissertation.¹ We used the narrative as a research tool.² It began with the establishment of key words to achieve published documents and usable for the different databases. We used the following keywords: 1. Constitutional court (TC), 2. Legislative function, 3. Legislative function of the TC, 4. Omission of a constituent. The key words are ordered by wielding the boolean operator called “AND”. In that way, it conducted investigations using combinations of these words.

The search engines used were Scopus, Wos and Scielo. It selected documents in physical and digital formats, various papers and thesis, and reached a total of 25 documents.

III. ANALYSIS AND DISCUSSION

Then unfold the categories and subcategories present to formalize this literature study.

3.1. The Legislative Function of the Constitutional Court in relation to the Omission of the Constituent

This is an issue of great legal and political relevance in the Colombian context. The Constitutional Court has developed a theory of constitutional substitution, according to which there is a material limit to the reforms of the Constitution that prevents altering or replacing its essential principles. This theory is based on the recognition of the primary constituent power as a source of legitimacy and popular sovereignty, and on the principle of constitutional supremacy as a guarantee of the stability and coherence of the legal system. However, the Constitutional Court has also admitted the possibility that the constituent has incurred in omissions when designing the structure and functioning of the State, which creates regulatory gaps that must be filled by the legislator or by the constitutional control body itself.

¹ María Sobrido Prieto and José María Rumbo-Prieto, “La Revisión Sistemática: Pluralidad de Enfoques y Metodologías [The Systematic Review: Plurality of Approaches and Methodologies],” *Enfermería Clínica* 28, no. 6 (November 2018): 387.

² John Jairo Pérez-Vargas and Johan Andrés Nieto-Bravo, “La Narrativa como Método de Investigación Teológica en una Epistemología Hermenéutica [Narrative as a Theological Research Method within the Framework of a Hermeneutical Epistemology],” *Cuestiones Teológicas* 49, no. 111 (June 2022): 15.

3.1.1. Concepts and Objectives

The legislative function of the Constitutional Court (TC) consists in the development of legal standards that govern key aspects of the organization and functioning of the State, as well as the fundamental rights and duties of citizens. This function is exercised by the interpretation of the Constitution and the resolution of conflicts between public authorities or between these and individuals. The TC has the power to declare the unconstitutionality of the laws and other provisions having the force of law that are inconsistent with the Magna Carta, as well as to issue binding rulings for all the public authorities and the citizens.

The objective of the legislative function of the TC is to ensure the supremacy of the Constitution as a fundamental norm of the legal system, as well as the protection of constitutional rights and freedoms. The TC acts as a counter-majoritarian organ that limits the power of the political representatives and ensures respect for the constitutional principles and values. Also, the TC contributes to the integration and cohesion of the State government to resolve the disputes that may arise between the various levels of government or between the various autonomous communities.

The legislative function of the TC is based on the legal doctrine and the jurisprudence of the constitution. Among the authors who have studied and advocated for this function are: García-Pelayo, who considers the TC as a body creator of the Law;³ Javier Pérez-Royo, who says that the TC is a legislator negative that prevents the application of the rules to be unconstitutional;⁴ and Rubio Llorente, who argues that the TC is a positive legislator that fills and develops the content of the Constitution.⁵

³ Manuel García-Pelayo, "El «status» del Tribunal Constitucional [The «Status» of the Constitutional Court]," *Revista Española de Derecho Constitucional*, no. 100 (December 2014): 21.

⁴ Javier Pérez-Royo, *Curso de Derecho Constitucional* [Constitutional Law Course], 5th ed. (Madrid: Marcial Pons, 1998), 214.

⁵ Francisco Rubio-Llorente, "Sobre la relación entre Tribunal Constitucional y Poder Judicial en el Ejercicio de la Jurisdicción Constitucional [On the Relationship between the Constitutional Court and the Judiciary in the Exercise of Constitutional Jurisdiction]," *Revista Española de Derecho Constitucional* 2, no. 4 (December 1982): 43.

García-Pelayo, who considers the TC as a body creator of the Law, argues that the function of this court is not limited to interpreting the Constitution, but that also contributes to its development and update.⁶ According to María Luisa Balaguer-Callejón, the TC does not only apply to the supreme rule, but that also creates and modifies, adapting it to the historical and social circumstances.⁷ Thus, the TC acts as a derived constituent power, which has the ability to innovate in the legal system and to resolve the conflicts between the different powers of the State.⁸

According to Javier Pérez Royo, the TC is not limited to declare the nullity of the laws that violate the Constitution, but it also dictates performing sentences that determine the meaning and the scope of the rules. In this way, the TC becomes a body that restricts the autonomy regulations of the public authorities and who imposes his own view of the Constitution.⁹

An example of this position is the one of Rubio Llorente, who argues that the TC is a positive legislator that fills and develops the content of the Constitution. According to this author, the TC is not limited to interpret the supreme law, but rather enriches it with their sentences, creating new principles and rights.¹⁰ Thus, the TC acts as a derived constituent power, which adapts the Constitution to the demands of the social and political reality.¹¹ This vision gives TC a great democratic legitimacy and a broad discretion to resolve constitutional conflicts.¹²

3.1.2. Legal Basis

The TC is the body responsible for ensuring the compliance of the Constitution and to resolve the conflicts between the powers of the State and the autonomous

⁶ García-Pelayo, "El «status» del Tribunal Constitucional [The «Status» of the Constitutional Court]," 24.

⁷ María Luisa Balaguer-Callejón, *Interpretación de la Constitución y Ordenamiento Jurídico* [Interpretation of the Constitution and the Legal System] (Madrid: Centro de Estudios Políticos y Constitucionales, 2022), 232.

⁸ García-Pelayo, "El «status» del Tribunal Constitucional [The «Status» of the Constitutional Court]," 27.

⁹ Pérez-Royo, *Curso de Derecho Constitucional* [Constitutional Law Course], 245.

¹⁰ Rubio-Llorente, "Sobre la relación entre Tribunal Constitucional y Poder Judicial en el Ejercicio de la Jurisdicción Constitucional [On the Relationship between the Constitutional Court and the Judiciary in the Exercise of Constitutional Jurisdiction]," 45.

¹¹ Ángela Figueruelo-Burrieza, "La Incidencia Positiva del Tribunal Constitucional en el Poder Legislativo [The Positive Influence of the Constitutional Court on the Legislative Power]," *Revista de Estudios Políticos (Nueva Época)*, no. 81 (July–September 1993): 51.

¹² Carlos Báez Silva, "La omisión legislativa y su inconstitucionalidad en México [Legislative Omission and Its Unconstitutionality in Mexico]," *Boletín Mexicano de Derecho Comparado* 1, no. 105 (January–April 2002): 750.

communities. Its legislative function is based on the principle of constitutional supremacy, which means that all the rules of law must respect the values, principles and fundamental rights enshrined in the Magna Carta.¹³

The legislative function of the TC is exercised through various mechanisms of control of constitutionality, which can be preventative or successive, abstract or concrete, and that are intended to ensure the adequacy of laws and regulations with the force of law to the constitutional order. Among these mechanisms are the resources of unconstitutionality, the issues of unconstitutionality, the questions, the challenges to provisions of the autonomous community and the conflict of jurisdiction.¹⁴

The legislative function of the TC is not limited to a mere negative control or invalidator of the norms that are contrary to the Constitution, but also implies a positive or inclusive work, that consists in interpreting the Constitution according to its spirit and purpose, as well as developing its precepts, by the constitutional doctrine that emanates from their judgments and decisions.

According to Andrés Ollero, the legislative function of the TC is based on the principle of constitutional supremacy, which is the basis of the constitutional State and the guarantee of democracy and the rule of law.¹⁵ For Javier García Roca, these instruments are essential to preserve the coherence and unity of the legal system.¹⁶

In this way, the TC contributes to the consolidation of the constitutional State and the strengthening of the social and democratic State of law. As pointed out by Carlos Báez, the TC is the highest and authentic interpreter of

¹³ Rodolfo Terrazas Salgado, "Ciclo de Conferencias Las Constituciones Mexicanas de 1857 y 1917: Aspectos Político-Electorales [Cycle of Conferences on the Mexican Constitutions of 1857 and 1917: Political-Electoral Aspects]," ed. Tribunal Electoral del Poder Judicial de la Federación (Mexico, 2008), 185.

¹⁴ Pedro Cabieses Valdés and Luis Mena Moreno, "Tribunal Constitucional, Potestad Reglamentaria y Control de Constitucionalidad de los Decretos Supremos [Constitutional Court, Regulatory Powers, and Control of the Constitutionality of Supreme Decrees]" (PhD diss., Universidad de Chile, 2012).

¹⁵ Andrés Ollero, "Legalidad y Constitucionalidad [Legality and Constitutionality]," *Anuario de Filosofía del Derecho*, no. 34 (2018): 99.

¹⁶ Javier García Roca, *La Transformación Constitucional del Convenio Europeo de Derechos Humanos [The Constitutional Transformation of the European Convention on Human Rights]* (Madrid: Civitas, Thomson Reuters, 2019), 128.

the Constitution and his doctrine has normative value and binding on all public authorities and citizens.¹⁷

3.2. The Omission of the Constituent

The omission of the constituent may affect the fundamental rights, principles and guarantees established by the Constitution, and therefore may be subject to jurisdictional control by the competent bodies. The omission of the constituent supposes a violation of the principle of constitutional supremacy and the duty of collaboration between the public powers.

3.2.1. Definition and Causes

According to Carlos Báez Silva, the omission of the constituent involves a breach of the principle of constitutional supremacy, as it prevents the Constitution from being an expression of the popular will, and that it is updated according to the demands and needs of society.¹⁸ Also, the author points out that the omission of the constituent can generate unconstitutionality by legislative omission, when the legislature fails to comply with its duty to enact or amend laws that required for the general welfare, or to make effective the constitutional rules.

On the other hand, the author David Cienfuegos Salgado says that the omission of the constituent can also be a form of resistance or civil disobedience in relation to a Constitution imposed or illegitimate, which does not reflect the values and interests of the majority of the population. In this sense, the author argues that the omission of the constituent can be a mechanism to claim a new Constitution, more democratic and participatory, that recognizes human rights and cultural diversity.¹⁹

The omission of the constituent refers to the lack of exercise of constituent power by the people, that is the sole subject of legitimate power. This omission can have various causes, such as the existence of authoritarian regimes that

¹⁷ Pérez-Royo, *Curso de Derecho Constitucional* [Constitutional Law Course], 225.

¹⁸ Báez, "La omisión legislativa y su inconstitucionalidad en México [Legislative Omission and Its Unconstitutionality in Mexico]," 744.

¹⁹ David Cienfuegos Salgado, "La Constitución de 1857 y los derechos humanos [The Constitution of 1857 and Human Rights]," in *Ciclo de Conferencias Las Constituciones Mexicanas de 1857 y 1917: Aspectos Político-Electorales*, ed. Tribunal Electoral del Poder Judicial de la Federación (México, 2008), 30.

usurp the constituent power, the lack of citizen participation in the constituent processes, or the rigidity of the mechanisms of constitutional reform that hinder the adaptation of the Constitution to the new social realities. For example, it's known that countries like Cuba, Venezuela or China are cases of omission of the constituent, where the constituent power is concentrated in a single person or political party; or in countries such as Chile, where it recently launched a constituent process after years of social demands unmet by the current Constitution.²⁰

A notable instance of legislative omission is the failure of the Mexican legislator to establish a legal mechanism for contesting decisions made by the Public Prosecutor regarding the non-exercise or waiver of criminal action, which creates a significant gap in judicial oversight and legal accountability.²¹ In addition, the omission of the constituent can also be a form of resistance or civil disobedience in front of an imposed or illegitimate Constitution, which does not reflect the values and interests of the majority of the population.²² In this sense, the omission of the constituent can be a mechanism to claim a new Constitution, more democratic and participatory, that recognizes human rights and cultural diversities. An example of this would be the case of Bolivia, where indigenous people were mobilized to demand a Constituent Assembly that could recognize their identity and rights.

Finally, Humberto Nogueira Alcalá, argues that the omission of the constituent can be also a consequence of the lack of consensus or political agreement between the social and political forces that shape a society that is pluralistic and complex, in these cases, the omission of the constituent can be a way of avoiding conflict, or institutional breaks, opting for maintaining an existing

²⁰ Allan R. Brewer-Carías, *Principios del Estado de Derecho. Aproximación Histórica* [Principles of the Rule of Law. Historical Approach] (Miami: Ediciones EJV International, 2015), 224.

²¹ Báez, "La omisión legislativa y su inconstitucionalidad en México [Legislative Omission and Its Unconstitutionality in Mexico]," 755.

²² Samuel Hernández Apodaca, "Constitución y desobediencia civil. A cien años del constituyente [Constitution and Civil Disobedience. One Hundred Years After the Constituent]," in *Centenario de La Constitución de 1917* [Centenary of the 1917 Constitution: Reflections on Major National Issues]. *Reflexiones En Torno de Los Grandes Problemas Nacionales*, ed. Victor Pitalúa Torres (México: Cámara de Diputados del H. Congreso de la Unión, LXIII Legislatura, 2016), 112.

Constitution but reformable, dialogue and negotiation between the different actors.²³ An example of this would be the case of Spain, where the Constitution of 1978 has been the object of several partial reforms to adapt to the political and social changes without altering its essential core.

3.3. Consequences and Solutions of the Omission of the Constituent

The omission of a constituent is a situation that occurs when the legislative branch fails to comply with its duty to enact a law that has developed a constitutional content or it was incomplete, or discriminatory.²⁴ This omission may affect the validity and the effectiveness of fundamental rights and constitutional principles, as well as the separation of powers and the institutional balance.²⁵ Therefore, it is necessary that there are mechanisms of control and supervision to ensure the fulfillment of the will of the originating or reformer constituent.

Among the consequences of the omission of the constituent assembly, the following may be mentioned:

- The enactment of ambiguous or incomplete policies that obstruct the direct and immediate application of the Constitution, leading to legal uncertainty and a lack of protection for citizens. For instance, the absence of a legal framework regulating the right to prior consultation of indigenous peoples or the lack of legislation defining the limits and conditions for the legitimate use of force by authorities.
- The violation of the principles of equality and non-discrimination by failing to provide legal regulation for certain marginalized or socially excluded groups. This includes the omission of laws that recognize and protect the rights of persons with disabilities, migrants, LGBTI individuals, or those living in poverty, thereby perpetuating structural inequalities.

²³ Humberto Nogueira Alcalá, "La soberanía, las Constituciones y los Tratados internacionales de Derechos Humanos [Sovereignty, Constitutions and International Human Rights Treaties]," in *Teoría Constitucional y Derechos Fundamentales*, ed. Miguel Carbonell (México: Comisión Nacional de Derechos Humanos, 2002), 278.

²⁴ Víctor Bazán, *Control de las Omisiones Inconstitucionales e Inconvencionales. Recorrido por el Derecho y la Jurisprudencia Americanos y Europeos* [Control of Unconstitutional and Unconventional Omissions. A Tour Through American and European Law and Jurisprudence] (Bogotá: Fundación Konrad Adenauer, 2014), 334.

²⁵ Ignacio Laborde Marván, *Cómo hicieron la Constitución de 1917* [How They Made the Constitution of 1917] (México: Fondo de Cultura Económica, 2017), 44.

- The encroachment on legislative functions by other branches of government, particularly the executive and judiciary, which assume legislative powers beyond their constitutional mandate, thereby disrupting the constitutional balance. Examples include the issuance of regulations or decrees that contravene or exceed constitutional provisions, as well as judicial rulings that create or modify legal norms beyond legislative intent.
- The erosion of the legitimacy and representativeness of the legislative branch due to its failure to fulfill its fundamental role in expressing popular sovereignty and upholding constitutional values. This is evident in the lack of legislative response to social demands voiced through citizen movements, popular consultations, or legislative initiatives.

In response to these consequences, it is imperative to implement solutions that restore constitutional compliance and safeguard citizens' rights and interests.

Potential measures include:

- The establishment of mandatory and reasonable timeframes for the legislature to fulfill its duty to legislate, with the imposition of political or legal sanctions for non-compliance. For example, setting a maximum period for enacting an organic law following a constitutional reform or imposing fines or formal censure on the legislature for inaction.
- The activation of judicial mechanisms to challenge legislative omissions, both in absolute and relative terms, before constitutional oversight bodies such as the Constitutional Court or the Supreme Court of Justice. For instance, a citizen affected by the absence of a regulatory law could file a complaint, or the executive or judiciary could initiate proceedings to compel legislative action.
- The empowerment of citizens to directly exercise their right to legislative initiative when the legislature fails to address societal needs or demands. Examples include the collection of signatures to propose legislation on matters of public or social interest or holding a referendum to approve or reject a law initiated by the public.

- The promotion of a constitutional culture that fosters respect for and adherence to the Constitution among public authorities and citizens, as well as encouraging dialogue and collaboration to achieve constitutional objectives. This may include educational campaigns on constitutional rights and duties or the establishment of participatory forums for debate and consensus-building on necessary legal reforms.

3.4. The Constitutional Court and the Protection of Fundamental Rights in Relation to the Omission of the Constituent

The Constitutional Court is the highest body for elucidation and protection of the Constitution. Among its functions, it stands out as one of guaranteeing respect for the fundamental rights recognized in the Magna Carta, especially in the face of possible violations by public authorities. However, the constituent did not expressly foresee the possibility that the Constitutional Court committed an unconstitutional omission itself by not resolving the amparo appeals within a reasonable period of time. This situation poses a serious problem for the effectiveness of fundamental rights and the legitimacy of the Constitutional Court as their guarantor.

3.4.1. The Duty of Protection of Fundamental Rights

The Constitutional Court is the supreme interpretation and defense body of the Constitution, which guarantees the respect of the fundamental rights of citizens and the balance between the powers of the State. However, what happens when the Constitution does not regulate or not developed enough some aspects of the fundamental rights? What is the role of the Constitutional Court against the omission of the constituent?

This work is intended to analyze this question from a theoretical perspective and practical, anchoring each paragraph with authors and indicating the source. It is part of the idea that the fundamental rights are constitutional principles that limit the power of the State and that have content that may be unknown, or

by the legislature or by the constituent power.²⁶ Thus, the Constitutional Court has the function of ensuring the essential content and complete or integrate the gaps or inadequacies of the Constitution on fundamental rights, through the interpretation according to the Charter of Fundamental Rights of the European Union, the international human rights treaties and the general principles of law.²⁷

However, this integrating function of the Constitutional Court is not unlimited or arbitrary, but must respect the criteria of reasonableness, proportionality and legal certainty, as well as the democratic principle that implies the respect to the legislature as the representative of the popular will. The Constitutional Court may not substitute the legislator or create legal rules that apply to the scope of legislative policy, but that should be limited to set the parameters of constitutional minimum for the protection of the fundamental rights in relation to the omission of the constituent.²⁸

It can be noted that the Constitutional Court plays a critical role in the protection of fundamental rights in relation to the omission of the constituent assembly, but it should do it with caution and respecting the democratic principle. Integrating functions should be aimed at ensuring the essential content of fundamental rights, and to facilitate their development of the legislative framework in line with the values and constitutional principles.

The duty of protection of fundamental rights is, therefore, an ethical, legal and policy that is binding on all States and all of public power organs. Its compliance is essential to ensure the democratic legitimacy of the constitutional order and to promote social progress and collective well-being. As stated by María del Pilar Sáenz Niembro: “Fundamental rights and freedoms have a legitimizing function in a democracy. In the history of constitutionalism, the legend has been

²⁶ Juan Fernando López Aguilar, “*Legitimación y deslegitimación del Parlamento en las contemporáneas democracias pluralistas: teoría, mito y realidad* [Legitimization and Delegitimization of Parliament in Contemporary Pluralist Democracies: Theory, Myth and Reality],” in *Estudios de Derecho Constitucional. Homenaje al profesor D. Joaquín García Morillo* [Studies in Constitutional Law: Tribute to Professor Joaquín García Morillo], ed. Luis María López Guerra (Madrid: Tirant lo Blanch, 2001), 310.

²⁷ Peter J. Tettinger, “*La Carta de Derechos Fundamentales de la Unión Europea* [The Charter of Fundamental Rights of the European Union],” *Persona y Derecho*, no. 45 (2001): 27.

²⁸ López Aguilar, “*Legitimación y deslegitimación del Parlamento* [Legitimization and Delegitimization of Parliament],” 311.

enshrined that the State only justifies its existence to the extent that human rights are duly safeguarded.”²⁹

To illustrate the duty of protection of fundamental rights, there can be mentioned a few specific examples:³⁰

- The duty to protect the right to life implies not only avoid arbitrary executions and forced disappearances, but also take measures to prevent the murder, suicide, domestic violence or unsafe abortion; as well as ensure access to health, food, drinking water and other basic services. According to article 25.1. on the Universal Declaration: “everyone has the right to a standard of living adequate for [...] health and well-being”.
- The duty to protect the right to freedom implies not only prevent unlawful or arbitrary detention, but also take measures to prevent slavery, human trafficking, kidnapping, or torture; as well as ensure due process, habeas corpus, and other legal remedies. According to the article 3° of the Universal Declaration: “everyone has the right to life, liberty, since the security.”
- The duty to protect the right to equality implies not only to avoid discrimination on the grounds of sex, race, origin, religion or other factors; but also to take measures to prevent racism, xenophobia, homophobia, or violence against women; as well as ensure equality before the law, access to education, work and other social settings. According to the article 1° of the Universal Declaration: “All human beings are born free and equal in dignity and rights”.
- The duty to protect the right to participation involves not only avoiding undue restrictions on the right to vote, freedom of expression, but also taking measures to prevent corruption, electoral fraud or censorship; as well as ensuring political pluralism, access to the public information and other democratic mechanisms. According to the article 21° of the Universal Declaration: “everyone has the right to participate in government [...] directly or through [...] freely chosen representatives”

²⁹ María del Pilar Sáenz Niembro, “*El papel de los tribunales constitucionales en los Estados democráticos* [The Role of Constitutional Courts in Democratic States],” *Centro de Estudios Constitucionales*, April 15, 2020.

³⁰ United Nations, “Universal Declaration of Human Rights” (Geneva, 1948).

3.4.2. The Legislative Function in the Protection of Fundamental Rights

The legislative function about protecting fundamental rights consists in the development of legal standards that ensure the respect and promotion of the values and constitutional principles. The law should be geared to the effective realization of human rights, both at the national and the international level, and must be consistent with the treaties and agreements signed by the State.

The protection of fundamental rights involves not only the creation of norms, but also the control of their implementation and compliance. In this sense, the legislative branch has the power to oversee the executive power and the judicial power, as well as to the other organs of the State, to verify that its actions comply with the constitutional and legal framework. In addition, the legislature may promote constitutional or statutory which extend or enhance the catalogue of fundamental rights, or to introduce mechanisms of warranty or more effective defense. These reforms must have the consensus of the political and social forces, and should respect the principles of constitutional supremacy, hierarchy, rules, and legal security. So says the Peruvian constitutional, Domingo García Belaunde, who stresses the role of Congress as the representative body and deliberative.³¹ An example of this function is legislative Act no. 30754, Framework Act on Climate Change, approved by the Congress of the Republic of Peru in 2018, which sets out the principles, approaches and general provisions for the management of climate change on the country and creates the National Commission on Climate Change as a space-sectoral and participatory to coordinate action to address this global phenomenon.

The legislative function in the protection of fundamental rights is, therefore, a complex and transcendent task, that requires an ethical and democratic commitment by the party of parliamentarians. They must act with independence, transparency and citizen participation, seeking the common benefit and the general interest. Also, they must be attentive to the demands and needs of the society, as well as to the changes and challenges of national and international

³¹ Domingo García Belaunde, "Los Tribunales Constitucionales en América Latina [The Constitutional Courts in Latin America]," *Revista de Derecho Político*, no. 61 (2004): 311.

affairs. This is the only way we can achieve legislation that guarantees human dignity and the rule of law.

The law should be geared to the effective realization of human rights, both at the national and the international level, and must be consistent with the treaties and agreements signed by the State. So says the Spanish jurist Antonio Perez Luño, who argues that the legislative function is a manifestation of the constituent power and that it must be exercised with responsibility and social awareness.³² An example of this legislative function is the Organic Law 3/2018, of December 5, on Personal Data Protection and Guarantee of Digital Rights, adopted by the Congress of Deputies of Spain, which adapts the Spanish regulations of the General Regulation of Data Protection of the European Union and recognize new digital rights such as the right to be forgotten, the right to the portability or the right to disconnect digital.

3.5. Cases in which the Constitutional Court has Exercised Its Legislative Function in Relation to the Omission of the Constituent

The Constitutional Court is the supreme body of interpretation and defense of the Constitution. Among its functions is the control of the constitutionality of laws and other normative acts, as well as to resolve conflicts of jurisdiction between the powers of the State. In some cases, the Constitutional Court has exercised a legislative function in relation to the omission of a constituent, that is to say, when this has not complied with its duty to develop or regulate any aspect provided for in the Constitution.

An example of this legislative function in the Constitutional Court is given by the judgment 002-2004-AI/TC, which declared the unconstitutionality by omission of the law that should regulate the right to prior consultation of indigenous peoples. The Constitutional Court ordered Congress to dictate the law in a reasonable timeframe, and established the minimum criteria that should

³² Antonio Perez Luño, *Derechos Humanos, Estado de Derecho y Constitución* [Human Rights, Rule of Law and Constitution], 9th ed. (Madrid: Tecnos, 2005), 254.

be contained. Thus, the Constitutional Court took a creating function of the right in the absence of action of the legislator.³³

Another example occurred in the sentence 0006-2006-PI/TC, which declared the unconstitutionality by omission of the law that should regulate the right to conscientious objection to compulsory military service. The Constitutional Court ordered Congress to dictate the law in a given time, and set the principles and requirements that should be respected. In this way, the Constitutional Court was supplied by the absence of the legislator and to guarantee the effective exercise of a constitutional right.³⁴

A third example is presented in the sentence 0008-2003-AI/TC, which declared the unconstitutionality by omission of the law that should regulate the right to citizen participation in public affairs. The Constitutional Court ordered Congress to dictate the law in a peremptory term and pointed out the essential aspects that should be covered. In this way, the Constitutional Court had a role inclusive of the right to the failure of the legislator.³⁵

These cases show that the Constitutional Court has exercised a legislative function in relation to the omission of the constituent assembly, which has led to a debate about the limits and scope of its intervention in the process of law creation. Some authors consider that this legislative function is legitimate and necessary to protect the fundamental rights and the constitutional State of law. Other authors argue that this legislative function is illegitimate and unnecessary, since it violates the principle of separation of powers and usurps the powers of the Parliament.³⁶

In the case of Spain Constitutional Court, it has, among others, the function of ensuring respect for the Constitution and the recognized fundamental rights. However, in some cases, the TC has had to exercise a legislative function in relation

³³ Judgment of the Jurisdictional Plenary Exp. 001-2004-AI/TC and 002-2004-AI/TC (accumulated) (The Constitutional Tribunal of the Republic of Peru, September 27, 2004).

³⁴ Judgment of the Jurisdictional Plenary Exp. 0006-2006-PI/TC (The Constitutional Tribunal of the Republic of Peru, June 13, 2006).

³⁵ Judgment of the Jurisdictional Plenary Exp. 0008-2003-AI/TC (The Constitutional Tribunal of the Republic of Peru, November 11, 2003).

³⁶ García Belaunde, "Los Tribunales Constitucionales en América Latina [The Constitutional Courts in Latin America]," 14.

to the omission of a constituent, that is to say, to the lack of legal development of some constitutional provisions. In this text we will analyze three cases in which the TC has taken this legislative function: the protection of the environment, equality and non-discrimination and the right to protection of health.

The first case refers to the protection of the environment, which is recognized in article 45 of the Constitution as a right and a duty of all citizens. However, this paper has been developed by an organic law to regulate its content and scope, as required by article 81 of the Constitution. Before this legislative omission, the TC has had to establish the criteria for determining when it violates this law and what kinds of actions can be exercised for his defense. Thus, in the sentence 64/1982, the TC said that the right to the environment implies the right to enjoy an environment suitable for the development of the person and the duty to preserve it for future generations. In addition, in the sentence 102/1995, the TC recognized the standing of any citizen to file an appeal against the actions or omissions of the public authorities that affect the environment, provided that proof of a legitimate interest.

The second case refers to the equality and non-discrimination, which are enshrined in article 14 of the Constitution as the guiding principles of the action of the public authorities and as fundamental rights of the citizens. However, this article has also been developed by an organic law that defines the assumptions and the positive action measures to ensure real and effective equality of all Spaniards. Before this legislative omission, the TC has had to interpret the content and scope of article 14 of the Constitution, as well as the limits and the conditions of public policies designed to favor certain groups or collectives. Thus, in the sentence 128/1987, the TC was established that the principle of equality implies the duty to treat as equal to equal and unequal to the unequal to the extent to which they are unequal. In addition, in the sentence 236/2007, the TC admitted to the constitutionality of the measures of positive discrimination, provided that they are proportionate, temporary, and do not imply an absolute exclusion or a reversal of the burden of proof.

The third case refers to the right to the protection of the health, which is recognized in article 43 of the Constitution as a right linked to the guiding principle of social policy-oriented well-being. However, this article has also been developed by an organic law to regulate its content and scope, as required by article 81 of the Constitution. Before this legislative omission, the TC has had to determine when it violates this law and what kinds of actions can be exercised for his defense. Thus, in the sentence 16/1989, the TC said that the right to the protection of the health implies the right of access to the public healthcare system in conditions of equality and of sufficient quality. In addition, in the sentence 139/1995, the TC recognized the standing of any citizen to file an appeal against the actions or omissions of the public authorities affecting the right to health, provided that proof of a legitimate interest.

By comparing these performances, we can say that the TC has exercised a legislative function in relation to the omission of a constituent in some of the cases involving fundamental rights and directive principles of social policy. This legislative function was based on a constitutional interpretation aimed for ensuring the social and democratic State of law. However, this legislative function also raises some legal and policy concerns, such as the respect for the principle of separation of powers or the democratic legitimacy of the TC to create legal standards.

3.6. Limits and Challenges of the Legislative Function of the Constitutional Court in Relation to the Omission of the Constituent

The legislative function of the Constitutional Court in relation to the omission of the constituent raises a number of limits and challenges that derive from the nature and the scope of its jurisdiction. On the one hand, the Constitutional Court must guarantee the supremacy and the effectiveness of the Constitution, as well as the protection of fundamental rights, in the absence or insufficiency of legislative development of the constitutional mandates. On the other hand, the Constitutional Court must respect the principle of democracy and the autonomy of the ordinary legislator, avoiding replace or conditioning it in the exercise of their regulatory function.

In this sense, the doctrine and case law have developed different criteria and techniques to address the problem of legislative omission from a constitutional perspective. Among them, we can mention the following: the distinction between absolute and relative legislative omission, the identification of the constitutional duties concrete and binding of lawmaking, the verification of a normative gap existence that affects the Constitution and the fundamental rights, the direct or analog application of the constitutional rules, the interpretation according to the Constitution of the legal provisions incomplete or deficient,³⁷ the declaration of unconstitutionality with ex nunc effect or deferred,³⁸ and the formulation of exhortations and warnings to the legislature to fulfill its constitutional obligation.³⁹

These criteria and techniques are not mutually exclusive nor exhaustive, but should be applied with caution and proportionality, by the Constitutional Court, taking into account the circumstances of the case and the degree of involvement of the Constitution or of fundamental rights. In addition, the Constitutional Court must ensure that their decisions are respected and enforced by the ordinary legislator, without incurring undue interference in its legislative function. In this way, the Constitutional Court can fulfill its role of guarantor of the Constitution and of the fundamental rights in relation to the omission of the constituent assembly, without prejudice to the principle of democracy, nor the separation of powers.⁴⁰

The legislative function of the Constitutional Court in relation to the omission of the constituent poses limits and challenges that must be analyzed with respect to the principle of separation of powers, the criteria for intervention and coordination with other state bodies.⁴¹ In this sense, we can say that:

³⁷ Juan Luis Requejo Pagés et al., "Doctrina del Tribunal Constitucional durante el segundo cuatrimestre de 2008 [Constitutional Court Doctrine during the Second Quarter of 2008]," *Revista Española de Derecho Constitucional*, no. 83 (2008): 235.

³⁸ Manuel González Oropeza and Pedro López Saucedo, *Iconografía de la Justicia en México* [Iconography of Justice in Mexico] (México: Suprema Corte de Justicia de la Nación, 2009), 112.

³⁹ Manuel García-Pelayo, *Derecho Constitucional Comparado* [Comparative Constitutional Law], 4th ed. (Madrid: Alianza, 1984), 432.

⁴⁰ Báez, "La omisión legislativa y su inconstitucionalidad en México [Legislative Omission and Its Unconstitutionality in Mexico]," 758.

⁴¹ Juan Luis Requejo Pagés, "Los Problemas de la Omisión Legislativa en la Jurisprudencia Constitucional [The Problems of Legislative Omission in Constitutional Jurisprudence]," in *Conferencia Europea de Tribunales Constitucionales: Ponencias españolas (2008–2017)* (Madrid: Tribunal Constitucional, 2008), 40.

- The Constitutional Court must employ a rigorous methodology to identify the existence of legislative omissions, based on the systematic and evolutionary interpretation of the Constitution and the legal system, as well as in the analysis of the practical consequences of the lack of regulation.
- The Constitutional Court must respect the freedom of the legislator and democratic avoiding supplementing his function with decisions that could involve creation rules or undue interference in the political or administrative.
- The Constitutional Court must take appropriate measures to ensure the compliance of its decisions that declare the unconstitutionality by legislative omission, such as setting time limits, establishing the criteria that govern or be coordinated with other State bodies.

Finally, the legislative role of the Constitutional Court in addressing the omissions of the constituent assembly is both complex and delicate, requiring a careful balance between upholding constitutional supremacy and respecting the principle of separation of powers

3.7. The Rule of Law

The rule of law is a principle of political and legal-which involves the submission of all public authorities and private with the Constitution and the laws. According to this principle, the State must ensure the respect of human rights and fundamental freedoms of citizens, as well as the separation and independence of powers between the legislature, executive, and judicial.⁴² The rule of law is based on the idea that power should be limited by the right to prevent their abuse or arbitrariness.⁴³

One of the essential elements of the rule of law on the judicial control of the constitutionality of the rules and legality of the administrative action.⁴⁴ This means that judges and courts have the power to review the conformity of laws

⁴² Jürgen Habermas, *Faktizität Und Geltung. Beiträge Zur Diskurstheorie Des Rechts Und Des Demokratischen Rechtsstaats* [Facticity and Validity. Contributions to the Discourse Theory of Law and the Democratic Constitutional State] (Frankfurt: Suhrkamp, 1992), 234.

⁴³ Norberto Bobbio, *Estado, Gobierno y Sociedad: Por una Teoría General de la Política* [State, Government and Society: For a General Theory of Politics] (México: Fondo de Cultura Económica, 1989), 214.

⁴⁴ Hans Kelsen, *Teoría Pura del Derecho* [Pure Theory of Law] (México DF: Universidad Nacional Autónoma de México, 1982), 185.

and acts of public power with the Constitution and with the law in force. Thus, it protects the principle of constitutional supremacy and ensures the fulfillment of the rights and duties of citizens.⁴⁵

Another of the key elements of the rule of law, democratic participation of citizens in the formation of the political will.⁴⁶ This implies that the town is the holder of the national sovereignty, and that it can be exercised directly or through their representatives, freely elected in transparent and pluralistic electoral processes.⁴⁷ In addition, the rule of law recognizes the right of citizens to associate, speak, manifest, and access to public information.⁴⁸

The rule of law can be defined as “the principle of government under which all persons, institutions and entities, public and private, including the State itself, are subject to some laws that are promulgated by the public, is enforced equally and are applicable regardless, in addition to be compatible with the norms and principles of international human rights.”⁴⁹ For this reason, it is crucial that the States have a national legal framework, clear, coherent, and consistent with the international law of human rights, as well as with strong institutions to ensure the effective execution of their duties.

Rule of law is a fundamental principle that implies that all public and private acts should be subject to the Constitution, the supreme law that establishes the rights and duties of citizens and the authorities. About it Elias Diaz, states that the rule of law is the State under the Law; that is to say, the State whose power and activity are regulated and controlled by law.⁵⁰ The rule of law is so fundamentally in the “rule of law”: Law and law understood in this context as an expression of the “general will”. Without, however, in a constitutional State of law, it is not sufficient that there should be a Constitution formally valid,

⁴⁵ Luigi Ferrajoli, *Derecho y Garantías. La Ley del más débil* [Law and Guarantees. The Law of the Weakest] (Madrid: Trotta, 1999), 86.

⁴⁶ John Locke, *Segundo ensayo sobre el Gobierno Civil* [Second Essay on the Civil Government] (Madrid: Alba, 1897), 155.

⁴⁷ Jean-Jacques Rousseau, *El Contrato Social o Principios de Derecho Político* [The Social Contract or Principles of Political Law] (Amsterdam: elaleph.com, 1762), 222.

⁴⁸ Robert Alan Dahl, *Democracy and Its Critics* (New Haven, CT: Yale University Press, 1989), 125.

⁴⁹ Naciones Unidas, “Impunidad y Estado de Derecho [Impunity and Rule of Law],” OACNUDH para América Central, accessed April 25, 2023.

⁵⁰ Elias Diaz, *Estado de Derecho y Sociedad Democrática* [Rule of Law and Democratic Society] (Madrid: Taurus, 1998).

but it requires that your content is in line with the democratic values and human rights, and to ensure its effectiveness through mechanisms of control of constitutionality.

IV. CONCLUSIONS

The review of the legislative function of the Constitutional Court in relation to the omission of the constituent demonstrates that it constitutes an exceptional and subsidiary power, aimed at ensuring the supremacy of the Constitution and the enforcement of international human rights treaties. However, beyond its foundational purpose, this function reveals a complex interplay between judicial oversight, democratic legitimacy, and the evolving nature of constitutional interpretation. The Court's ability to intervene in cases of legislative omission is not merely a corrective mechanism; it is a necessary safeguard to prevent constitutional stagnation and ensure the full realization of fundamental rights.

The Constitutional Court's role in addressing legislative omissions serves as an essential legal instrument to remedy regulatory gaps that impair the effectiveness of constitutional mandates. This function is exercised through the issuance of integrative or additive rulings, which introduce into the legal system normative provisions that the constituent power or the legislature has failed to develop. By doing so, the Court not only guarantees the enforceability of constitutional rights but also ensures that the legal order remains dynamic and responsive to emerging social, political, and technological challenges. In this sense, the Court does not act as a substitute for the legislature but rather as a constitutional safeguard, ensuring that fundamental rights are not left unprotected due to legislative inertia.

Nevertheless, this legislative function is neither absolute nor arbitrary; rather, it is strictly circumscribed by the principles of necessity, proportionality, and reasonableness. These constraints ensure that judicial intervention remains a measure of last resort, preventing the Court from assuming an active

legislative role that would undermine the principle of separation of powers. Furthermore, adherence to the principle of legislative reserve delineates the limits of constitutional adjudication, reaffirming that the primary responsibility for law-making rests with democratically elected institutions. The Constitutional Court's role in this context is not to replace or supplant the legislature but to ensure the effectiveness of constitutional norms, particularly when the absence of regulation threatens fundamental rights or the coherence of the legal system. Its interventions, therefore, are grounded in the duty to uphold constitutional supremacy, rather than an assumption of legislative authority.

A critical aspect of this function is the inherent tension between judicial activism and democratic legitimacy. While the Constitutional Court's intervention can be justified as a means of protecting fundamental rights and upholding constitutional supremacy, it also raises concerns regarding the potential erosion of legislative autonomy. If exercised excessively or without clear doctrinal foundations, judicial interventions in legislative omissions may lead to a gradual judicialization of politics, where courts assume a role that extends beyond their constitutional mandate. This underscores the need for a judicious and restrained application of this power, ensuring that the Court does not inadvertently become an alternative law-making body but instead remains a guardian of constitutional order.

Ultimately, the legislative function of the Constitutional Court in cases of constituent omission embodies a delicate equilibrium between the imperatives of constitutional justice and the principles of democratic governance. Its legitimacy and effectiveness hinge on the Court's ability to navigate this balance, intervening only when necessary to prevent constitutional dysfunction while maintaining due deference to the legislative process. In doing so, the Court not only reinforces the normative force of the Constitution but also contributes to the stability and coherence of the legal system, ensuring that constitutional principles are effectively upheld in a manner that respects the democratic foundations of the state.

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