WHAT WAS DECIDED BY LITHUANIAN CONSTITUTIONAL COURT IN FAVOUR OF PENSIONERS

Vaidotas A. Vaičaitis

Doctor of social science, lecturer at the Vilnius University
Faculty of Law
Saulėtekio al. 9, 1 rūmai, LT-2054 Vilnius
Tel.: (370 5) 236 61 77, 236 61 78

This article was written as a reaction to judgment of November 25, 2002 of Lithuanian Constitutional Court. The article raises a set of different legal problems for Lithuanian legal community: whether Lithuanian judge is a legislator? What is an influence of political, social, economic and moral philosophy of each judge for final decision of court? Whether (constitutional judge) can go ultra petita? Whether obiter dicta arguments have to be considered as binding precedents?

Genesis of the problem

In the end of 2002 Lithuanian Constitutional court made a beautiful Christmas gift for working pensioners in Lithuania – decided that provisions of article 23 of Social Insurance Pensions Act in the way when it limits possibility to get all sum of pension by pensioners, who work and have income from it, and for whom all sum of pension was already granted and paid – contradicts to Lithuanian Constitution1.

Today nobody questions necessity of existence of Constitutional courts in continental Europe, even if there is no one opinion about their place in traditional theory of division of powers. Constitutional courts themselves contributed a lot in assuring their authority and popularity in society. For instance, French Conseil Constitutionnel and...
tionnell in the seventies of XXth century extended its competence till protection of human rights and control of constitutionality of laws adopted even before the birth of Vth Republic. Spanish Tribunal constitutionnel, founded after fall of Franco regime, also contributed a lot to democratisation of society. It is the same with new democracies in Central-East European countries. In Lithuania, for instance, according to Constitution of 1992 Constitutional court was founded in 1993. This court already 10 years controls constitutionality of legal system and by its judgments adopts democratic standards of legal mentalité in the sphere of human rights (e.g. 1998 12 09 judgment concerning unconstitutionality of capital punishment), balance of political powers (e.g. 1998 01 10 judgment concerning form of government), protection of autonomy of higher education (e.g. 2002 01 14 judgment), assuring hierarchy of legal system etc. Confidence in the eyes of society Lithuanian Constitutional court deserved, first of all, by its objective legal arguments (e.g. when dispute is between position and opposition and the like).

There is a tradition in democratic societies during last two centuries, that political decisions are made by political parties through legislature and executive, but not through judicial power (notwithstanding to fact that in USA most of judges are elected). In democratic societies prevails an opinion, that Constitution is "policy blind" document, i.e. it does not say what kind of political program (social-democratic, liberal or other) Government needs to follow. Constitution guarantees only certain moral minimum, without which none of society could exist. If courts openly and directly would try to regulate socio-economic relationships, we could face ourselves to certain democratic deficit and lack of legitimacy.

Here firstly is needed to say that the case to Constitutional court came from administrative court with the latter's application (request) for ruling of Constitutional court, whether some provisions of 3 statutes, dealing with compulsory social security for spouses of Lithuanian diplomats, for the time when they are living abroad together with her/his spouse, does not contradict to article 52 of the Constitution (guaranteeing the right to elderly pension and to other social aid). So, application of administrative court to Constitutional court was rather clear and concrete. But how we'll see in later chapters, Constitutional court answered not only to this, but also to other questions and in this way it enlarged boundaries of the application. To sum up, in this article I would like to analyse some problems of the said judgment: certain "jumps" in legal argumentation, obiter dicta and ultra petita of judgment, "conditional" unconstitutionality of the statute, examination of different versions of statute, relationships between principles of law and legitimate expectations, principle of solidarity and right to pension.

"Conditional" unconstitutionality of the statute

What is interesting in this judgment is that provisions of article 23 of Social Insurance Pen-

\[\text{125}\]
sions Act, limiting elderly pensions for working and having incomes from it pensioners are declared as unconstitutional with certain conditions, but not as unconstitutional per se. In the judgment it is said, that these provisions are not in conformity with Constitution with some reservation – i.e. only in extent to certain circle of persons-pensioners, for whom is reduced some sum of elderly pension, which was already granted and paid before appropriate amendments.

It has to be said that method of “conditional” unconstitutionality of provisions of certain legal instrument is very popular in constitutional jurisprudence and is used by different Constitutional courts cross the Europe, for it gives to High courts some flexibility in their legal terminology towards legislature. In this case it means that Lithuanian Constitutional court is not saying that Constitution does not let for legislature to limit elderly pension for working pensioners. It just saying, that if this pension was already legally granted and paid, it cannot be reduced (with certain extreme exceptions). By this terminology High Court “protected” itself from interference into direct execution of socio-economic policy, which was always acknowledged by this Court as domain of Parliament.

Obiter dicta and ultra petita in judgment of the Court

From the text of the judgment we know that applicant (administrative court) asked Constitutional court, whether analogous provisions of three mentioned statutes, guaranteeing that spouses of diplomats should be insured by social insurance, are in conformity with article 52 of Constitution. Constitutional Court in its judgment does not give us facts of the case, examined by administrative court. Therefore, it is very difficult to grasp the real problem, which was faced in the case and what was the real dispute between the parties (spouse of diplomat from one side and SODRA/Social insurance fund – from other). From given facts we can guess, that dispute could arise because (according to newly adopted Laws mentioned above) spouses of Lithuanian diplomats, living abroad, had not a right to recount their pension or because – in order to get all sum of granted pension they can not live abroad together with their spouses. It has to be said that lack of factual situation of the case is not only practise of Lithuanian Constitutional court, but rather – of courts of continental Europe as such. But modern legal science, facing convergence of common law and civil law legal traditions, criticizes this “civilian” position. I hope that Lithuanian Constitutional court should be aware of it in its future judgments and progressively will change this attitude.

High court ruled here that provisions of statutes mentioned in application do not contradict to Constitution. But the Court also ruled ultra petita – i.e. extended object of research and decided that analysis of constitutionality of application is “inseparable” from examination of other rule – provision of article 23 of Social Insurance Pensions Act, reducing elderly pension for working pensioners (and having incomes from it).

In common law countries legal arguments, extending boundaries of dispute (lat. ultra petita) of the case (application) are treated as obiter dicta and are not binding as a precedent. In con-
tinental legal doctrine there is no clear concept on issue, how “secondary” arguments should be treated. In Lithuania the only scientific article on the issue shares the same opinion with our common law colleagues. But novelty of this judgment is that here the Court extends boundaries of application not only in its reasoning, but also in final ruling. So, the Court while dealing with application goes ultra petita and aside the question of social security of spouses of Lithuanian diplomats,—decides to examine also the question of reduction of elderly pensions of all working pensioners. How can be treated this decision of High court? I thing, it is rather controversial. Lithuanian legal doctrine already criticized our Constitutional court in saying that court’s reasoning extending boundaries of application should be treated as obiter dicta and should not have the same legal value with arguments answering the question of application (ratio decidendi).

But if obligatory aspect of obiter dicta, formulated in court’s reasoning can be questioned without big opposition, it is not the same with obiter dicta, declared in final ruling. Ruling of judgment (so called “resolutionary” part) by Lithuanian legal doctrine is treated as obligatory without any hesitation. Nevertheless, legal science can raise question, whether Constitutional court has a discretion to extend ultra petita even to its final part of judgment—ruling? My answer to this isn’t negative per se. We know that, for instance, French Conseil Constitutionnel sometimes uses it. But on the other hand, it should be stressed, that Lithuanian Constitutional court has no discretion to raise question of constitutionality of legal rule by itself (how it is the case with some foreign Constitutional courts) and depends on formulated application. Therefore, in the case of ultra petita High court should give clear reasons in justifying this step and should not rely on simple wording, that question of constitutionality of application cannot be solved without examination of constitutionality of other provisions. Furthermore, analysis of this judgment shows that latter statement of the Court is not true: the Court here could analyse constitutionality of application without any reference to article 23 of Social Security Pension Act,—for provisions of application concerning social insurance of spouses of diplomats were ruled as being in conformity with Constitution, but provisions of other rules concerning reductions of pensions, which have been already granted and paid, were ruled as unconstitutional.

In sum up, when case to Constitutional court comes from courts (and in this way it has certain features of concrete judicial review), High court should try to avoid ultra petita, especially in final ruling. But if nevertheless it finds it necessary, the Court should give good reasons, why it decided to do so.

Review of different versions of the Law

This judgment is interesting also because constitutionality of provisions of article 23 of Social Insurance Pensions Act (which was not mentio-
ned in application) was examined according to its three versions: 21/12/1994, 21/12/2000 and 08/05/2001. It happens quite often that High court uses method of legislative history in its reasoning, but here it was the first time, when the Court treats three different versions of the Act not only in the part of reasoning, but also in final ruling. Why did High court make this decision in examining different versions of the provisions of the Act?

If we are taking into account examination of first version of the Act (1994), we can rely on the Court’s reasoning while it is saying: “when Law on Diplomatic service was adopted (in 1999) Social Insurance Pensions Act was valid by its 1994 version” [7.2]. But High court (without any reasons) decided to treat not only this, but also later versions of the Act. It can be explained by this, that Constitutional court did not want to leave aside actual version (2001) of the provision without a word on actual problem of society. For the Court cannot raise a question of constitutionality by itself, it sometimes uses *obiter dicta* as a method to reach some sensible questions of society. But we need to say again that every “jump” in argumentation has to be justified by clear reasons, which are needed not only by legal science but also by the Court itself in order to follow this reasoning in future judgments.

Another problem here is that Constitutional court did not prove unconstitutionality of 1994 version of mentioned provision. In the ruling the Court is saying that mentioned 1994 version of the Act contradicts to the Constitution in the way, when “sum of pension is reduced for those persons, for whom it was already legally granted and paid all sum of pension”. But the Court in its reasoning did not explained, what was the legal basis in granting elderly pension before Jan 1st, 1995, when this Act came into power, and whether it was possible for pensioners, having other incomes, to receive all sum of pension.

**Constitutional court and legal principles**

I need to say, that reference to various legal principles, as a method of reasoning is rather popular and was used already from the very beginning of existence of Lithuanian Constitutional court (1993). If in the beginning legal principles were treated just as *source d’inspiration*, later, as in this judgment, they have become one of the main legal instruments in declaring unconstitutionality of legal rule.

As we see in the ruling, High court was relying on principle of *rule of law*, which is formulated not in the main part of the Constitution, but in its *preamble*. The court in its earlier jurisprudence has been already said, that legal principles set down in the preamble have the same

---

13 Original version (21/12/1994) of this article, which came into force on Jan. 1st, 1995 reads as follows: “Pensioners who are 65 years old and elder should be paid full SI elderly pension, irrespective of their income. Pensioners who are under 65 years old and having insured income, which exceeds 1.5 minimum monthly salary shall be paid only the basic part of SI elderly pension”. Version of the Act after Dec. 21, 2000 amendments reduced elderly pension till basic part to all working pensioners, irrespective to their age and income. May 8, 2001 version (after big debate in the society) stated that full pension should be paid for those pensioners, whose income do not exceed 1 MMS; for other working and having insured income pensioners elderly pension was still reduced till basic part.

14 2000 and 2001 reform of social security was very sensible issue in society. Especially in the year of 2000 society groups and mass media discussed it very actively.

15 “Lithuanian nation ... in seeking open, just civil society and rule of law... adopts this Constitution".
legal value as the rules, formulated in certain articles of the Constitution itself, and that this Court has authority in explaining content of these principles.

It is interesting that principle of rule of law in declaring unconstitutionality of certain legal rule was started to be used by this Court only very recently—from 1999. Sometimes content of this principle was explained relying on certain articles of the Constitution (with concepts of independence of judge, protection of human rights, privacy of person, right to criticize the government etc.), sometimes it was explained relying on so called “general principles of law” (lex retro non agit, proportionality, due process of law, hierarchy of legal system etc.).

But in this judgment principle of rule of law was “revealed” by principles of legal certainty (teisinio saugumo principas) and legitimate expectations (teisėtų lūkesčių principas). These principles (as well as principle of proportionality) by Lithuanian Constitutional court have been accepted as legal transplants from jurisprudence of both European courts.

**Principles of legal certainty and (protection of) legitimate expectations**

Principle of legal certainty in jurisprudence of European courts is treated as rather broad and covering principles of legitimate expectations, proportionality, prohibition of retroactivity and others. Court of Strasbourg till 2003 even 76 times made a reference to principle of legal certainty. The first time it was used in 1975 in the case *Golder v. United Kingdom* (21/02/1975). One of recent examples of reference to this principle we can find in the case *Ploski v. Poland* (12/11/2002), where Court is saying that the Court according to principle of legal certainty has not to turn away from its previous jurisprudence without clear reasons.

Principle of legitimate expectations is quite new one in jurisprudence of Strasbourg court, but, instead, it is very popular in reasoning of Luxembourg court. This principle is linked to German concept of “Vertrauensschutz”, which was developed from article 2 of GG and other constitutional rules and which corresponds to French term of “protection de la confiance légitime”.

Lithuanian Constitutional court hasn’t its own doctrine of “general principles of law”, so when it wants to adopt some legal transplants (in this case—principles of legal certainty and legitimate expectations), there is a need to find certain legal justification for it in Lithuanian legal system. I think it was very useful to use constitutional principle of rule of law in order to cover and justify the reference to “European” principles of legal certainty and legitimate expectations. In judgment of 18/12/2001 High Court tried to formulate meaning of principle of (protection of) legitimate expectations. It is said here that in context of the case “constitutional principle of protection of legitimate expectations means, that if wage is stated by legal rule, it has to be paid in fixed period, i. e. that legitimate interests and
expectations of person will not be denied” 22. It was also said that principle of legitimate expectations does not mean that wage of civil servants never can be reduced, but that it can be done only in exceptional cases, if it is needed to protect other constitutional values and if it complies with principle of proportionality.

So in this judgment High court, following its jurisprudence concerning mentioned principles, stated that if elderly pension was granted and paid to a person, it has to be paid in the future and can be reduced only in exceptional cases (economic crises, war, etc.), when it is necessary to protect other constitutional values and when it complies with principle of proportionality. From this reasoning we see that in this case the most important argument in declaring unconstitutionality of the rule is principle of (protection of) legitimate expectations. But the Court in its ruling instead of reference to principle of legitimate expectations – has mentioned a provision contradicts to constitutional principle of rule of law. It was probably done, because principle of legitimate expectations is not directly expressed in the text of Lithuanian Constitution. So, the Court in order to feel “safer” decided to make a reference to broader “constitutional” principle, which “covers” legitimate expectations and which is formulated in the preamble of Lithuanian Constitution.

I have to say that this part of reasoning is quite logic and consistent with exception of one idea. Here the Court is saying that provision of statute contradicts to principle of rule of law (in fact – to principle of legitimate expectations), when it reduces pension, which was (i) granted and (ii) paid to a concrete person. I think that this position of the Court is too rigid, for legitimate expectations already “appear”, when the pension is already granted (assigned), even if it was not started to pay yet for some reasons. Therefore, I think that from view of legitimate expectations the Court not justly discriminates persons, for whom the pension was legally granted, but not started to pay.

The court in this judgment ruled that provision of the Act contradicts to articles 52, 48, 23 of the Constitution and to constitutional principle of rule of law. But here I wanted to stress, that main argument of the Court in declaring the rule of statute unconstitutional is done not by reliance on mentioned articles of Constitution, but – relying on principle of legitimate expectations as one of principles, construing broader constitutional principle of rule of law.

Right to pension and principle of solidarity

As we have already seen, the Court could speak about unconstitutionality of the rule of statute to certain articles of Constitution (52, 48, 23) only then, when it was proved that it contradicts to principle of rule of law. As we see from the application, applicant was asking, whether adequate provisions of three statutes do not contradict to article 52, granting the right to pension. Therefore, it is very important to analyze Court’s reasoning concerning this article.


23 “The state shall guarantee the right for citizens to elderly and disability pension, as well as to social assistance in the event of unemployment, sickness, widowhood, loss of breadwinner, and other cases provided by law”.

24 “Every person may freely choose an occupation or business and shall have the right to safe, healthy working conditions, adequate compensation for work and social security in the event of unemployment”.

25 “Property rights shall be inviolable”.
But reasoning concerning rule's unconstitutionality to article 52 makes biggest problem. We see in the judgment that unconstitutionality of reduction of pension to articles 48(1) and 23 is proved without problems. For instance, concerning unconstitutionality to article 48(1) is said: "restrictions of possibility to choose a job or business, when in this case one's granted pension will be reduced, should be considered as a contradiction to article 48(1)". And further, - when "pension is granted and paid to a person, the right to property, protected by article 23, arises". And then we get very surprised, when we do not find appropriate reasoning concerning unconstitutionality of statute's rule to article 52 of Constitution, which was nevertheless declared in the final ruling! For it was really not difficult to give arguments concerning unconstitutionality to article 52, I have to state here another big "jump" in reasoning of the Court, which was made, probably, as "oversight" or even kind of "laziness" in reasoning.

When we are talking about the Court's reasoning concerning one's right to pension (protected by in art. 52), I would like to have a look to this problem from another perspective. I should agree that conception of so called "commonwealth state" (with idea of state's broad social security policy) prevails in legal and social thinking of our days. It is recognised also in jurisprudence of Lithuanian Constitutional court. Cases of last three years shows, that disputes concerning a right to pension become more and more popular. But here we can ask, how detailed can be influence of Constitutional court in forming social security policy of the country? As a rule, judicial power (e. g. by using doctrine of political questions) tries to avoid to be involved in proves of making decisions, implementation of which can cost very expensive. For instance, Supreme Court of USA (in sixties) while declaring unconstitutionality of school segregation provisions of state statutes, let to aware, that long existed segregate school system has not to be abolished at once and in this way - gave a lot of flexibility for political power in implementing this judgment.

As it was already mentioned, Constitutional court by declaring unconstitutionality of some statutes' provisions did not ruled that legislature according to Constitution can not limit the sum of elderly pensions for working pensioners having incomes from their job. Otherwise, it could not correspond to concept of Constitution as "politically neutral" document and to traditional idea of separation of powers. So, let us have a look, how the Court interprets article 52 of the Constitution and the right to pension protected therein.

The Court states that provisions of article 52 grant to a citizen a right to have (i) pensions (elderly, disability), (ii) other social contributions (in the case of unemployment, sickness, widowhood, loss of breadwinner), (iii) other pensions and social contributions. Of course, this is not the case, when the Court needed to give a complete interpretation of this article, but the Court's reconstruction of the article needs to be commented:

1. Article 52 can not be interpreted as granting other (than elderly and disability) pensions. There is no such a (expressis verbis) provision in the article. If we have to treat the article as granting the right to other

26 Here reference to reasoning of Strasbourg court in case Wessels v. Netherlands (04/06/2002) was made, where right to elderly pension was linked to right to property, protected by Protocol No1 of ECHR.
27 From year of 2000 Constitutional court had 6 appropriate cases, when before this year - only one.
(than elderly and disability) pensions, it can bloc in the future a possibility to abol­lish existing “double” pension system (“ordi­nary” and so called “governmental” pen­sions), if society so would require. 2. Article 52 of the Constitution can be inter­preted also in the way, as granting the right to pension only, when one does not work and does not have income from it. Of course, this is a liberal point of view to social security system, but different point of view would be economically not justified, too heavy financial burden for the state and unjust for working persons, who do not have elderly pension age. The Court has men­tioned here an idea of solidarity as a prin­ciple of existing social security system, but unfortunately did not connect this principle to facts of the case. Principle of solidarity in social security system means, that pensions are paid by taxpayers for socially not active persons (who can not provide themselves with economical means). The fact, that in interpreting article 52, the Court did not comment the content of principle of solidarity, which is inherent in the existing social security system, means that interpretation of this article can not be con­sidered as full and objective. Every inter­pretation of the “right”, enshrined in the Constitution, has to be interpreted and “weight” together with another right or principle, for every constitutional provi­sion is not “one-sided” and covers two (or more) different concurring rights or prin­ciples. Courts have to weight and balance all the principles and rights in order to arrive at legally justified conclusion and to avoid “gaps” in reasoning.

In loci conclusioni

By this article I wanted to touch only some legal aspects of the judgment of Constitutional court, but it can be analyzed also from political, economic and social point of view. It can be men­tioned that Lithuanian mass media did not pro­vide society with full and objective information concerning, what was decided in the judgment. It can partly be explained by Presidential elections campaign, when mass media was “busy” with elections and politicians did not want to have politically not popular “talks”. Society was just informed that Constitutional court declared, that statute's provisions, reducing elderly pensions for working pensioners are unconsti­tutional as such, what was not the case, in fact.

In the article I did not want to be very catego­rical in denying the discretion of Constitutional court to go ultra petita in its ruling. I just wanted to say, that in this case High court had to give clear reasons for this “move” of reasoning, especial­ly when ultra petita is formulated in the final ruling.

Another purposes of this article is that uncon­stitutionality of provisions of Social Insu­rance Pensions Act (art. 23) by Constitutional court was declared only through principle of leg­itimate expectations, i. e. for limited circle of persons – for whom already granted and paid elderly pension was reduced. Therefore, High court did not limit discretion of legislature to

---

28 Now in Lithuania exist so called 1) „ordinary” pen­sions, granted by Social Insurance Pensions Act (for ~ 90 % of persons) and so called 2) “governmental” pensions, granted by special acts for former Presidents of the Republic, judges, other judicial and military of­ficers, academics, victims and resis­tants of anti-soviet move­ments and for so called “deserved” persons in politi­cal, cultural and other spheres.

29 Here i am not talking about private pension funds.
reduce sum of future pension for working pensioners. In other words, a right to elderly pension of one part of society through principle of solidarity is inseparable bound with obligation to pay taxes of other part of society. So, legislature (in boundaries of its discretion) has and must have a discretion to combine these two interests in the process of legislation.

LITERATURE

8. Valstybės žinios. 2001, Nr. 107-3885