**Summary to the Decision of the Grand Chamber of the Constitutional Court of December 23, 2022 No. 3-r/2022 in the case upon the constitutional complaint of Vasyl Mosiurchak on compliance of subparagraph 1 of paragraph 2 of Section XI “Final and Transitional Provisions“ of the Law of Ukraine “On Public Service“ dated December 10, 2015 No. 889–VIIІ (on the guarantees of social protection of public servants) (hereinafter refereed to as “Law No. 889”) with the Constitution of Ukraine.**

V.Mosiurchak applied to the Constitutional Court with a request to declare subparagraph 1 of paragraph 2 of Section XI “Final and Transitional Provisions” of the Law “On Public Service” dated December 10, 2015 No. 889-VIII (hereinafter referred to as “the Law No. 889”) as inconsistent with Articles 22, 46.1, 58.1, and 64 of the Constitution (unconstitutional).

The subject of the right to constitutional complaint also claims that subparagraph 1 of paragraph 2 of Section XI “Final and Transitional Provisions” of Law No. 889 significantly narrowed the content of his right to pension provision.

The Constitutional Court proceeds from the fact that the regulation of pension provision of public servants, depending on the time of accrual of pension, was or will be carried out in accordance with normative acts, primarily laws, according to which the form, types, grounds and conditions of pension provision of public servants underwent changes.

From the date of entry into force of the Law No. 889, the pension provision of the subject of the right to constitutional complaint and other public servants has been regulated by the Law “On Compulsory State Pension Insurance” dated July 9, 2003 No. 1058-IV (hereinafter referred to as “the Law No. 1058”) as a general law (*lex generalis*), which regulates relations between all subjects of the compulsory state pension insurance system.

The right to be granted a pension on the basis of Article 37 of the Law “On Public Service” dated December 16, 1993 No. 3723-ХІ as amended (hereinafter referred to as “the Law No. 3723”) as a special law (*leх specialis*) is reserved for the persons defined in paragraphs 10 and 12 of Section XI “Final and Transitional Provisions” of the Law No. 889. However, these persons are not granted the right to indexation and recalculation of the amount of their pensions.

The Constitutional Court takes into account that Article 46 and other provisions of the Constitution do not envisage indications of rights or guarantees regarding the application of “special conditions” or “special procedure” for the pension provision of the subject of the right to constitutional complaint and other public servants.

Taking into account the content and scope of the constitutional powers of the Verkhovna Rada regarding the legislative regulation of pension provision, the Constitutional Court proceeds from the fact that, according to the provisions of the Basic Law, the legislator has a certain margin of appreciation regarding the definition of the content and individual components of the legal mechanism of pension regulation, as well as regarding the adoption of laws by which the latter changes such a mechanism.

That is, the Verkhovna Rada can define and further change the fundamentals of social protection, forms and types of pension provision in laws (Article 92.1.6 of the Constitution).

The Constitutional Court believes that the Verkhovna Rada, by adopting the Law No. 889, implemented its constitutional powers as the only body of legislative power in Ukraine to determine in laws the fundamentals of social protection, forms and types of pension provision for public servants.

Since May 1, 2016, the pension provision of public servants has been regulated by the Law No. 1058 as a general law (*lex generalis*), with the exception of persons specified in paragraphs 10 and 12 of Section XI “Final and Transitional Provisions” of the Law No. 889, to whose pension provision Article 37 of the Law No. 3723 as a norm of a special law (*lex specialis*) may be applied.

Expanding the range of persons who would be granted the right to receive a pension based on Article 37 of the Law No. 3723 would contradict not only the will of the legislator, who had already defined the range of such persons in the Law No. 889, but also the practice of applying Article 37 of the Law No. 3723 as of a special law (*lex specialis*), which should not be interpreted and applied broadly.

The Constitutional Court takes into account that the long-term, namely from January 1, 1994 to May 1, 2016, normalisation of the pension provision of public servants by the provisions of the Law No. 3723 can be considered as a legitimate (legal) basis for the formation of the subject's right to constitutional complaint and other state employees have certain legitimate expectations regarding their pension provision in accordance with the provisions of the Law No. 3723.

Article 37 of the Law No. 3723, in the wording in effect at the time of the adoption of the Law No. 889, defined the minimum required period of tenure of a person in a public service position as a condition for acquiring the right to the accrual of a public servant's pension.

According to the contested provision of subparagraph 1 of paragraph 2 of Section XI “Final and Transitional Provisions” of the Law No. 889, the right to be granted a pension on the basis of Article 37 of the Law No. 3723 as a special law (*lex specialis*) was acquired by persons who had 10 years of public service experience and were on relevant positions as of May 1, 2016 (paragraph 10); persons who had 20 years of public service experience regardless of their place of work on the date of entry into force of the Law No. 889 (paragraph 12).

The Constitutional Court takes into account that the differentiation of the rights of participants in social relations according to a certain time (temporal) indicator [for example, according to the length of time in public service positions (length of service)] is a traditional and widespread means of normative regulation, the application of which in the legislation itself does not testify to the discriminatory nature of such provisions.

Legitimate expectations of the subject of the right to constitutional complaint and other public servants regarding the conditions for granting them pensions could be formed only taking into account the fact that the acquisition of the right to be granted a pension on the basis of Article 37 of the Law No. 3723 and before the entry into force of the Law No. 889 was conditioned by the availability of 10 or 20 years of public service experience.

At the same time, the subject of the right to constitutional complaint and other persons to whom the effect of paragraphs 10 and 12 of Section XI “Final and Transitional Provisions” of the Law No. 889 is extended are granted the right to the accrual of a pension on the basis of the Law No. 1058 as a general law (*lex generalis*), which regulates pension provision.

Choosing one of the specified grounds for pension accrual gives an opportunity to choose the pension the amount of which will be larger.

In view of the above, the Constitutional Court concluded that the legitimate expectations of the subject of the right to constitutional complaint and other persons who were granted the right to the accrual of a pension on the basis of Article 37 of Law No. 3723 or on the basis of Law No. 1058 were not destroyed.

The positive duties of the state in the field of social protection consist, in particular, in the proper normalisation of relations in this field.

The mechanism of legislative regulation of pension provision will comply with the constitutional provisions if it ensures the effective functioning of the system of protection of human life, health and dignity and creates a legal basis for the realisation by a person in need of social protection of his/her fundamental rights and freedoms.

The right to social protection, guaranteed by Article 46 of the Basic Law, is based on the fact that the amounts of pensions, other types of social payments and assistance, which is the main source of livelihood, shall be determined taking into account human needs, human dignity and other constitutional values, as well as on the fact that in the presence of economic and other prerequisites, the amounts of pensions, other types of social benefits and assistance should be timely indexed and/or recalculated.

The substantial analysis of the provisions of Articles 3, 8, 24, 46 and 92 of the Basic Law provides grounds for the conclusion that the legal mechanism of indexation and recalculation of pensions, other types of social benefits and assistance is one of the constitutional guarantees of the effectiveness of the right to social protection. Therefore, in order to implement the Constitution of Ukraine, the Verkhovna Rada of Ukraine shall ensure the development, specification and detailing of a number of constitutional norms and principles, defining in laws the grounds, procedure, conditions for indexation and recalculation of pensions, other types of social benefits and assistance for all groups of pensioners and recipients of such benefits and assistance.

Subparagraph 1 of paragraph 2 of Section XI “Final and Transitional Provisions” of the Law No. 889 in the substantial correlation with paragraphs 10 and 12 of the same section of the Law No. 889 is the only legal basis for the legal mechanism of granting the right to accrual of pensions on the basis of Article 37 of the Law No. 3723. Due to the fact that there is no reference to Article 371 of the Law No. 3723 in subparagraph 1 of paragraph 2 of Section XI “Final and Transitional Provisions” of the Law No. 889, thus, it is impossible to recalculate the amounts of pensions, that is, to update them, for the subject of the right to constitutional complaint and other persons who are granted the right on the accrual of a pension on the basis of Article 37 of the Law No. 3723.

Therefore, the pensions of public servants accrued on the basis of Article 37 of the Law No. 3723, in contrast to the pensions accrued on the basis of other normative acts, are not subject to recalculation.

The Constitutional Court also takes into account the fact that due to the application of subparagraph 1 of paragraph 2 of Section XI “Final and Transitional Provisions” of the Law No. 889, there is a difference in the amount of pensions of public servants accrued on the basis of Article 37 of the Law No. 3723, depending on the time of pension accrual.

The current state of the legislative regulation on the recalculation of the pensions of the subject of the right to constitutional complaint and other persons who are granted the right to the accrual of a pension on the basis of Article 37 of the Law No. 3723 is not an ordinary legislative gap (lacuna), but a legislative omission, the existence of which is a violation of the Constitution of Ukraine. In order to develop, specify and detail the provisions of Articles 3, 8, 24 and 46 of the Basic Law, the recalculation of pension amounts shall be regulated in a law adopted by the Verkhovna Rada.

Failure by the state to provide a legislative basis for functioning of an effective legal mechanism for calculating the amounts of pensions, other types of social benefits and assistance, which is the main source of livelihood, in particular in view of the legislative omission in the normalisation of social relations, proves the illusory nature of the constitutional guarantees of the right to social protection and violations of a number of constitutional norms and principles.

The legislative omission identified in subparagraph 1 of paragraph 2 of Section XI “Final and Transitional Provisions” of the Law No. 889 indicates the failure of the state to fulfil its positive obligations to regulate a certain segment of pension relations in the law, is discriminatory against the subject of the right to constitutional complaint and other persons, who are granted the right to a pension on the basis of Article 37 of the Law No. 3723, does not ensure compliance with legal equality as one of the components of the principle of the rule of law and violates the constitutional guarantees of the right to social protection.

To maintain the balance of private interests of the subject of the right to constitutional complaint and other persons who are granted the right to the accrual of a pension on the basis of Article 37 of the Law No. 3723, and the public interest in maintaining the balance of the State Budget during the period of martial law in Ukraine, based on the analysis of Articles 3, 8, 24, 46, 64 and 95 of the Basic Law in their substantial correlations, the Constitutional Court considers it expedient to postpone the expiration of the effect of subparagraph 1 of paragraph 2 of Section XI “Final and Transitional Provisions” of the Law No. 889.

Thus, the Constitutional Court of Ukraine held to declare subparagraph 1 of paragraph 2 of Section XI “Final and Transitional Provisions” of the Law “On Public Service” dated December 10, 2015 No. 889-VIII as such that does not comply with the Constitution (is unconstitutional) since it had made it impossible to recalculate the amounts of pensions accrued on the basis of Article 37 of the Law “On Public Service” dated December 16, 1993 No. 3723-ХІ, as amended. It shall lose its effect three months after the termination or cancellation of martial law in Ukraine, introduced by the Decree of the President “On the Introduction of Martial Law in Ukraine” dated February 24, 2022 No. 64/2022 as amended.

The Verkhovna Rada is to regulate the recalculation of pensions of the subject of the right to constitutional complaint and other persons who are granted the right to accrual of a pension on the basis of Article 37 of the Law “On Public Service” dated December 16, 1993 No. 3723-ХІ, as amended, taking into account the provisions of the Constitution and of this Decision.

**References:**

Decisions of the Constitutional Courts:

No. 3-r/2018 dated April 24, 2018;

No. 9-r/2018 dated November 7, 2018;

No. 1-r(ІІ)/2019 dated April 25, 2019;

No.  5-r(I)/2019 dated July 12, 2019;

No. 5-r(ІІ)/2020 dated June 18, 2020;

No. 9-r(ІІ)/2022 dated November 16, 2022;

Report on the Rule of Law adopted by the Venice Commission at its 86th Plenary Session (Venice, 25-26 March 2011);

CDL-AD(2016)007-e Rule of Law Checklist, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016);

Judgment of the European Court of Human Rights in the case of Pichkur v. Ukraine, 7 November 2013 (application no. 10441/06).