**Summary to the Decision of the Second Senate of the Constitutional Court No. 1-r(ІІ)/2023 dated March 1, 2023 in the case upon the constitutional complaint of Serhii Vasylenko regarding the conformity of clause 6 of Section II “Final and Transitional Provisions” of the Law “On Amending Some Legislative Acts of Ukraine on Priority Measures for the Reform of the Prosecution Bodies” with the Constitution (constitutionality) (regarding guarantees of the prosecutor's independence)**

Subject of the right to constitutional complaint – S. Vasylenko – appealed to the Constitutional Court to examine the conformity of clause 6 of Section II “Final and Transitional Provisions” of the Law of Ukraine “On Amending Some Legislative Acts of Ukraine on Priority Measures for the Reform of the Prosecution Bodies” dated September 19, 2019 No. 113-IX (hereinafter referred to as the “Law No. 113”) with the Constitution (constitutionality), whereby “from the date of entry into force of this Law, all prosecutors of the Prosecutor’s General Office of Ukraine, regional prosecution offices, local prosecution offices, military prosecution offices shall be deemed to have been personally warned in due manner of possible future dismissal from office on the basis of Article 51.1.9 of the Law of Ukraine "On the Prosecution Office"”.

The constitutional order in Ukraine is based on a number of constitutional principles, in particular the principles of democracy, the rule of law, and the separation of state power.

Pursuant to Article 131¹ of the Constitution, the public prosecution office operates in Ukraine, the functions of which are established in the same article.

The Constitutional Court states that since September 30, 2016, the prosecution office is institutionally an element of the general system of justice, which requires the state to ensure the independence of the prosecutor’s status.

The state's provision of adequate guarantees against the illegal dismissal of a prosecutor, whose activities are related to the functioning of the justice system, is not only an element of the prosecutor's status, but also one of the prerequisites for the implementation of the constitutional right to judicial protection. Therefore, the dismissal of any prosecutor is possible only in the manner and on the grounds determined by the law, the norms of which must meet the requirements of the rule of law, must be aimed at achieving a legitimate goal, and the means used for dismissal must be reasonable (proportional).

According to the contested provision of Law No. 113, “from the day this Law enters into force, all prosecutors < ... > shall be deemed to have been personally warned in due manner of possible future dismissal from their office < ... >”.

Thus, the contested provision of the Law No. 113 is one of the components of the special procedure for the dismissal of the subject of the right to a constitutional complaint and other prosecutors from their offices.

Given the modern institutional place of the prosecution bodies in the general system of justice and the function of the prosecutor in the mechanism of protection of constitutional human and citizen’s rights and freedoms, the Constitutional Court considers that the actions and decisions of the legislative body must comply with constitutional principles, in particular the principle of separation of state power. Therefore, the Verkhovna Rada may interfere in the organisation and activities of bodies and officials of the general justice system only on the basis, within the limits of the powers and in the manner determined by the Constitution, taking into account the need to observe the prosecutor's independence, which is one of the guarantees of his/her impartial and effective exercise of his/her powers.

Since the Constitution of Ukraine does not contain a provision empowering the Parliament to adopt law enforcement acts in the procedure of dismissal of S. Vasylenko, another specific prosecutor or all prosecutors from their offices, in particular by means of personal warning of the prosecutor by a law of possible future dismissal, there are grounds to believe that the challenged provision of the Law No. 113 was adopted by the Verkhovna Rada of Ukraine beyond its constitutional powers.

The disputed provision of the Law No. 113 should not only be accessible to participants in social relations, but also correspond to the principle of the rule of law, in particular such a component of this principle as legal certainty, which consists, among other things, in the clarity and comprehensibility of legal norms, predictability of their content and possible consequences of the application or other form of implementation of these legal norms.

Paragraph 1 of clause 7 of Section II “Final and Transitional Provisions” of the Law No. 113 establishes the procedure for employment of prosecutors for offices in the General Prosecutor's Office, regional prosecution offices, district prosecution offices and indicates the availability of offices that can be replaced by persons who are warned “of a possible future dismissal from the office”.

At the same time, paragraphs 1 and 2 of clause 19 of Section II “Final and Transitional Provisions” of the Law No. 113 determined that prosecutors shall be dismissed from the office of prosecutor on the basis of Article 51.1.9 of the Law of Ukraine “On the Prosecution Office” dated October 14, 2014 No. 1697- VII on the condition of “failure to submit < ... > within the prescribed period of time an application to the Prosecutor General about the transfer to the Office of the Prosecutor General, the regional prosecution office, the district prosecution office and the intention to undergo certification in this regard“.

Thus, the contested provision of the Law No. 113 in the substantive conjunction with specific provisions of clauses 7 and 19 of Section II “Final and Transitional provisions” of the Law No. 113 can be interpreted and applied as a notice of possible future dismissal of the subject of the right to constitutional complaint and any other prosecutor from the office, and as a proposal for the possible further employment of any prosecutor for a office in the General Prosecutor's Office, regional or district prosecution office on the basis of the relevant application for transfer and the intention to undergo certification in this regard.

As a result, the use of the words “possible future dismissal” in the contested provision of the Law No. 113 led to a contradiction in its content, since the subject of the right to constitutional complaint and any other prosecutor from the moment of entry into force (September 25, 2019) of the contested provision of the Law No. 113 could consider that this order is either a notification of the next inevitable dismissal from the office of prosecutor, or, given the use of the words “possible” and “future” in it, that the dismissal in the future could not be applied and could be expected under certain conditions for the future tenure as a prosecutor.

Therefore, the subject of the right to constitutional complaint and any other prosecutor, to whom the contested provision of the Law No. 113 was extended, did not have the opportunity to clearly understand the content, foresee the legal consequences of its application, and plan their further actions.

The Constitutional Court takes into account the use of impersonal (depersonalised) provisions in laws and other normative acts, the addressees of which are all participants in social relations, i.e. “everyone and each" or clearly defined persons, in particular all prosecutors of the General Prosecutor's Office of Ukraine, regional prosecution offices, local prosecution offices, military prosecution offices. Such depersonalisation of provisions is inherent in normative acts of law.

However, the contested provision of the Law No. 113 contains both separate features of an act of law enforcement, that is, an individual act of law addressed to the prosecutor, who is warned “about possible future dismissal from office”, and features of an impersonal regulatory provision that does not contain any personal data.

A person who has suffered material and moral damage in view of the application of the disputed provision of the Law No. 113 has the right to compensation if the contested provision of the Law No. 113 is declared as unconstitutional.

Thus, the Constitutional Court of Ukraine held to declare clause 6 of Section II “Final and Transitional Provisions” of the Law “On Amending Some Legislative Acts of Ukraine on Priority Measures for the Reform of the Prosecution Bodies” dated September 19, 2019 No. 113-ХХ as inconsistent with the Constitution (unconstitutional). It shall lose its effect from the date of delivering of this Decision by the Constitutional Court.

*References:*

Decisions of the Constitutional Court of Ukraine:

- No. 12-rp/2009 dated May 27, 2009,

- No. 25-rp/2009 dated October 7, 2009,

- No. 6-r/2020 dated March 26, 2020,

- No. 5-r(ІІ)/2020 dated June 18, 2020,

- No. 1-r(ІІ)/2021 dated April 7, 2021,

- No. 4-r(ІІ)/2021 dated July 21, 2021.

Judgments of the European Court of Human Rights:

- The Sunday Times v. the United Kingdom (No. 1) of 26 April 1979 (application no. 6538/74),

- Rekvenyi v. Hungary [BP] of 20 May 1999 (application no. 25390/94),

- Rotaru v. Romania [BP] of 4 May 2000 (application no. 28341/95),

- Maestri v. Italy [BP] of 17 February 2004 (application no. 39748/98),

- Vyerentsov v. Ukraine of 11 April 2013 (application no. 20372/11)

Recommendation Rec(2000)19 of the Committee of Ministers to Member States on the Role of Public Prosecution in the Criminal Justice System, 6 October 2000, Rec(2000)19.

Bordeaux Declaration “Judges and Prosecutors in a Democratic Society” adopted on December 8, 2009 jointly by the Consultative Council of European Judges [Opinion No. 12(2009)] and the Consultative Council of European Prosecutors [Opinion No. 4(2009)].