**Summary to the Decision of the Second Senate of the Constitutional Court dated September 13, 2023 No. 8-r (ІI)/2023 in the case upon the constitutional complaints of Mykola Starychenko, Serhii Harlyka, Oleksandr Petrychuk, Mariana Ostapenko and Serhii Menchynskyi regarding the constitutionality of the paragraph 3.3 of Section II “Final and Transitional Provisions” of the Law of Ukraine No. 113-IX “On Amendments to Certain Legislative Acts of Ukraine on Priority Measures for the Reform of the Prosecution Service” dated September 19, 2019 (regarding the remuneration of the prosecutor as a guarantee of his/her independence)**

The subjects of the constitutional complaint – M. Starychenko, S. Harlyka, O. Petrychuk, M. Ostapenko and S. Menchynskyi – appealed to the Constitutional Court with a request to declare the paragraph 3.3 of Section II “Final and Transitional Provisions” of the Law of Ukraine No. 113-IX “On Amendments to Certain Legislative Acts of Ukraine on Priority Measures for the Reform of the Prosecution Service” dated September 19, 2019 (hereinafter referred to as Law No. 113-IX) as unconstitutional. According to the impugned provision of Law No. 113-IX, “prosecutors and heads of regional, local and military prosecution offices, prosecutors and heads of structural units of the Prosecutor General’s Office shall retain the relevant legal status they had before the entry into force of this Law when exercising the functions of the prosecution until the day of their dismissal from the office or reassignment to the Prosecutor General's Office, regional prosecution office, district prosecution office. During this period, the remuneration of the staff of the General Prosecutor’s Office, regional prosecution offices, local prosecution offices, and military prosecution offices shall be paid in accordance with the resolution of the Cabinet of Ministers that establishes the remuneration of the staff of the prosecution authorities.

The prosecution acquired a new legal status in the system of the judiciary with the adoption of the Law of Ukraine No. 1401-VIII “On Amendments to the Constitution of Ukraine (regarding justice)” dated June 2, 2016.

The constitutional powers of the prosecution service, combined with its institutional place in the system of the judiciary, bring the functioning of the prosecution service closer to European standards, primarily in terms of strengthening the role of this institution as an important element of the criminal justice system. This requires that prosecutors be guaranteed independence by law to ensure the functioning of an effective judiciary capable of protecting human rights and freedoms.

To regulate by the law, instead of bylaws, the issues of material, social and pension security of prosecutors is a guarantee of their independence that prevents interference of executive authorities in the activities of the prosecution service, which would otherwise lead to non-compliance with the principle of separation of powers.

The Constitutional Court considers that empowering the Cabinet of Ministers to regulate the remuneration of prosecutors is not consistent with the constitutional requirement that public authorities exercise their powers within the limits established by the Constitution and in accordance with the laws of Ukraine.

The functioning of the prosecution as a unified system to perform the functions defined by the Constitution is based, in particular, on the independence of the prosecutor, which is an integral element of his/her status. At the same time, the guarantees of prosecutor’s independence, specified by Law No. 1697-VII “On the Prosecution Office” dated October 14, 2014, as amended (hereinafter referred to as Law No. 1697-VII), in connection with the status and powers of the prosecution office, as defined by Article 1311 of the Constitution, constitute a unified system of prosecutor's independence guarantees.

Prosecutors’ remuneration (as well as the judges’ remuneration) is a guarantee of their independence. An adequate level of material and social security of prosecutors is one of the fundamental prerequisites for independent prosecution, as well as the impartial, unbiased, and effective performance of their duties, which should be guaranteed in such a way as to prevent influence on prosecutors in their decision-making. However, this can only be ensured by defining in the relevant law the proper conditions for the functioning of the prosecution service, first of all, the system of its financing, including regulation of the prosecutor's remuneration, which will guarantee his neutrality and impartiality in the exercise of his powers enshrined in the Constitution. Therefore, it is reasonable to conclude that the remuneration of prosecutors is a guarantee of their independence, which is an inalienable element of their legal status and, hence, a component of the organisation and operation of the prosecution service within the meaning of Article 1311 of the Constitution, and should be determined exclusively by the law.

Law No. 113-IX introduced a reform of the prosecution system.

Law No. 113-IX has preserved the legal status of prosecutors who continued to exercise their powers until the day of their dismissal from the office or reassignment to the Prosecutor General’s Office, regional prosecution office, or district prosecution office, and thus also preserves the guarantees of their independence as an inalienable element of the prosecutor’s status.

Following the entry into force of Law No. 113-IX, the remuneration of prosecutors who have passed the certification and have been reassigned to the Prosecutor General’s Office, regional prosecution offices, and district prosecution offices is regulated by Law No. 1697-VII, while the remuneration of prosecutors who continued to exercise their powers until the day of their dismissal from the office or reassignment to the Prosecutor General’s Office, regional prosecution offices, and district prosecution offices is regulated by a bylaw.

Consequently, the impugned provisions of Law No. 113-IX establish a different regulatory framework for the prosecutors’ remuneration from that stipulated in Article 81 of Law No. 1697-VII. This demonstrates a difference in the legislator’s approach to the issue of remuneration of female prosecutors, and thus unequal treatment of prosecutors despite the fact they have the same legal status in terms of guarantees of their independence as an inalienable component of this status.

By introducing the reform of the prosecution system by Law No. 113-IX, the legislator empowered the Cabinet of Ministers to determine the amount of remuneration of prosecutors by an act. By doing so, the legislator introduced unequal regulation of the prosecutors' remuneration, de facto splitting them into two categories. The first category includes those who were reassigned to the Prosecutor General’s Office, regional prosecution offices, and district prosecution offices and are paid remuneration in accordance with Law No. 1697-VII. The second category includes those who continued to perform their duties until the dismissal from their office or their reassignment to the Prosecutor General’s Office, regional prosecution office, or district prosecution office, and whose remuneration is stipulated by a bylaw, i.e. a resolution of the Cabinet of Ministers. Objectively, such a difference in the treatment of prosecutors who have the same legal status cannot be considered to be justified, and therefore it is discriminatory.

The functions and legal status of the prosecution, as defined by Article 1311 of the Constitution, as well as the status of the prosecutor and the scope of guarantees of his/her independence, established by Law No. 1697-VII, constitute a unified system of independence guarantees for the prosecution as an institution in general and for an individual prosecutor in particular. The Verkhovna Rada of Ukraine has created grounds for prosecutors to be confident that their status (and its inalienable elements), like the status of judges, is guaranteed by the state and protected by normative acts of a higher level than by-laws.

Prosecutors had legitimate expectations of stability in the regulation of their remuneration as a guarantee of their independence, which is an inalienable element of the legal status of a prosecutor.

The same effect of legal acts of the same level, which regulate the same issue – prosecutor’s remuneration – in different ways, does not meet the requirement of legal certainty as a component of the rule of law enshrined in Article 8.1 of the Constitution.

Since the State interfered with the right to property guaranteed by the Constitution by means of a regulation that is contrary to Article 8.1 of the Constitution, the second sentence of paragraph 3.3 of Section II “Final and Transitional Provisions” of Law No. 113-IX is not in line with Articles 41.1 and 41.4 of the Constitution.

The content analysis of the Cabinet of Ministers Resolution “On the Regulation of the Structure and Conditions of Remuneration of the Staff of the Prosecution Office” No. 505 dated May 31, 2012, as amended (hereinafter referred to as Resolution No. 505), which, similarly to Article 81 of Law No. 1697-VII, regulates the prosecutors’ remuneration, shows that the level of prosecutors’ remuneration paid in accordance with Resolution No. 505 was higher than the minimum subsistence level and higher than the minimum wage established by the Verkhovna Rada during the period of validity of Resolution No. 505.

The right to a wage not lower than the one determined by law, as guaranteed by Article 43.4 of the Constitution, has not been violated, and therefore there are no grounds to believe that the content and scope of such a right has been narrowed as a result of the adoption of the challenged provisions of Law No. 113-IX.

The second sentence of paragraph 3.3 of Section II |Final and Transitional Provisions” of the Law of Ukraine “On Amendments to Certain Legislative Acts of Ukraine on Priority Measures for the Reform of the Prosecution Service” No. 113-IX dated September 19, 2019, is declared to be inconsistent with the Constitution (unconstitutional) and shall cease to be effective from the date of adoption by the Constitutional Court of this Decision.

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