**Summary to the Decision of the Second Senate of the Constitutional Court of Ukraine No. 11-r(II)/2024 dated December 18, 2024, in the case upon the constitutional complaint of Bohdan Panchenko on the compliance of Article 51.1.9, paragraph 51.1 of Section XIII “Transitional Provisions” of the Law “On the Prosecution Office” No. 1697-VII dated October 14, 2014 with the Constitution of Ukraine (constitutionality) (on the constitutional guarantees of the independence of the prosecutor)**

Bohdan Panchenko appealed to the Constitutional Court of Ukraine to verify the compliance of Article 51.1.9, paragraph 51.1 of Section XIII “Transitional Provisions” of the Law “On the Prosecution Office” No. 1697-VII dated October 14, 2014, as amended (hereinafter, “Law No. 1697”) with Articles 22.3, 32.1, 43.1, 43.6, 58.1 of the Constitution of Ukraine (constitutionality) .

According to Article 51.1.9 of Law No. 1697, a prosecutor is dismissed from office in the event of “liquidation or reorganization of the prosecution office in which the prosecutor holds a position, or in the event of a reduction in the number of prosecutors in the prosecution office”.

In accordance with paragraph 51.1 of Section XIII “Transitional Provisions” of Law No. 1697:

„1) as prosecutors of local prosecution offices shall be appointed:

a) persons who have no experience of work in the prosecution offices – provided they successfully pass the testing and undergo further internship for up to one year. Such persons shall be subject to the requirements of Articles 27.1, 27.5 of this Law, except for the requirement to have work experience in the field of law;

b) persons who have experience in prosecutorial activity but are not employed in the prosecution offices as of the date of entry into force of this Law – provided they successfully pass the testing;

c) prosecutors working in city, district, interdistrict, or district in cities prosecution offices as of the date of entry into force of this Law – provided they successfully pass the testing.

Testing and internship are conducted in accordance with the procedure approved by the Prosecutor General of Ukraine.”

Having examined the content of the constitutional complaint and the case file, the Constitutional Court of Ukraine found that the Supreme Court in its ruling dated April 13, 2023, which is the final court decision in the case of the subject of the right to a constitutional complaint, applied Article 51.1.9 and subparagraph “c” of paragraph 51.1 of Section XIII “Transitional Provisions” of Law No. 1697.

Thus, the subject of constitutional review in this constitutional proceeding is Article 51.1.9, subparagraph “c” of paragraph 51.1 of Section XIII “Transitional Provisions” of Law No. 1697.

Given the provisions of the Fundamental Law and the legal positions of the Constitutional Court of Ukraine, the guarantees of prosecutor's independence, in particular from unjustified dismissal, must be clearly and understandably defined by law.

The persons who make decisions on dismissal of prosecutors in accordance with the procedure established in Article 51.2 of Law No. 1697 are the Prosecutor General - in respect of prosecutors of the Prosecutor General's Office (paragraph 1); the head of the regional prosecution office - in respect of prosecutors of the relevant regional prosecution office and prosecutors of district prosecution offices located within the administrative-territorial unit that falls under the territorial jurisdiction of the relevant regional prosecution office (paragraph 2).

The exercise by the Prosecutor General of the power to liquidate or reorganize a prosecution office or reduce the number of prosecutors' positions in a prosecution office has not only the legal consequence of liquidating or reorganizing a prosecution office or reducing the number of prosecutors' positions in a prosecution office, but also a hidden legal consequence – dismissal of a prosecutor from the position he or she holds in the relevant prosecution office.

The dismissal of a prosecutor under Article 51.1.9 of Law No. 1697 makes it possible to influence or put pressure on the independence of a prosecutor, as a prosecutor may be dismissed not only as a result of his or her decisions, actions or inactions, but also because of a decision to liquidate or reorganize the prosecution office or to reduce the number of prosecutors in the prosecution office.

Article 51.1.9 of Law No. 1697 grants the Prosecutor General discretionary powers without clearly defining their scope that contradicts Articles 8.1, 92.1.14, 1311.2 of the Constitution of Ukraine.

The Constitutional Court of Ukraine proceeds primarily from the fact that in order to comply with the requirements of the Constitution of Ukraine, the state must implement in its activities the constitutional principle of its responsibility to the individual and the principle of good governance that is essentially related to it.

Subparagraph “c” of paragraph 51.1 of Section XIII “Transitional Provisions” of Law No. 1697 does not establish an additional ground for dismissal of a prosecutor, but is one of the provisions regulating the selection of persons for the positions of prosecutors in the newly established prosecution offices.

The application of testing for the position of a prosecutor in the newly established prosecution office on the basis of subparagraph “c” of paragraph 51.1 of Section XIII “Transitional Provisions” of Law No. 1697 is covered by the legal construction “selection of prosecutors”, which is constitutionalised in Article 131.10 of the Fundamental Law of Ukraine, according to which “in pursuance with the law, bodies and institutions are established in the justice system to ensure the selection of ˂…˃ prosecutors”.

The application of “successful passing of the testing” as one of the means of selection for the position of a prosecutor in the newly established prosecution office does not violate the independence of the prosecutor, since the success of such testing in the process of selection of prosecutors depends primarily on the professional knowledge, skills and other personal qualities of the candidate for the position of a prosecutor, and not on the decisions and actions of the Prosecutor General and/or other official.

The successful passing of the testing as a condition for holding the position of a prosecutor in the newly established prosecution office ensures the implementation of the principle of good governance in the organisation and activities of the prosecution office, and participants in public relations have reasonable expectations that only those persons who have the personal qualities appropriate for this position, primarily professional knowledge and skills, and are of high integrity, will be appointed as prosecutors.

The Constitutional Court of Ukraine declared subparagraph “c” of paragraph 51.1 of Section XIII “Transitional Provisions” of the Law “On the Prosecution Office” No. 1697–VII dated October 14, 2014, as amended, as compliant with the Constitution of Ukraine (is constitutional).

The Constitutional Court of Ukraine declared Article 51.1.9 of the Law “On the Prosecution Office” No. 1697–VII dated October 14, 2014, as amended, as inconsistent with the Constitution of Ukraine (unconstitutional); the article declared unconstitutional shall cease to be effective six months after the date of delivery of this Decision by the Constitutional Court of Ukraine.

The Constitutional Court of Ukraine closed the constitutional proceedings in the case concerning the compliance of subparagraphs “a”, “b” and passage 5 of paragraph 51.1 of Section XIII “Transitional Provisions” of the Law of Ukraine “On the Prosecution Office” No. 1697–VII dated October 14, 2014, as amended, on the basis of Article 62.4 of the Law of Ukraine “On the Constitutional Court of Ukraine” – inadmissibility of the constitutional complaint – with the Constitution of Ukraine (constitutionality).

**Supplementary information:**

* Report on European Standards as regards the Independence of the Judicial System: Part II – the Prosecution Service – Adopted by the Venice Commission – at its 85th plenary session (Venice, 17–18 December 2010) [CDL-AD(2010)040];
* Opinion on the Draft Law of Ukraine amending the Constitutional Provisions on the Procuracy adopted by the Commission at its 68th plenary session (Venice, 13–14 October 2006) [CDL-AD(2006)029];
* Report on the relationship between political and criminal ministerial responsibility adopted by the Venice Commission at its 94th Plenary Session (Venice, 8–9 March 2013) [CDL-AD(2013)001];
* Recommendation Rec(2000)19 of the Committee of Ministers to Member States on the Role of Public Prosecution in the Criminal Justice System adopted by the Committee of Ministers of the Council of Europe on 6 October 2000;
* Bordeaux Declaration on Judges and Prosecutors in a Democratic Society, jointly adopted by the Consultative Council of European Judges [Opinion No. 12 (2009)] and the Consultative Council of European Prosecutors [Opinion No. 4 (2009)] on 8 December 2009;
* Opinion of the Consultative Council of European Prosecutors “Independence, accountability and ethics of prosecutors” dated November 23, 2018 [Opinion No. 13(2018)];
* Rule of Law Checklist, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016) [CDL-AD(2016)007].

**Cross-References:**

Constitutional Court of Ukraine:

* no. 6-r/2020, 26.03.2020;
* no. 5-r(II)/2020, 18.06.2020;
* no. 9-r(II)/2022, 16.11.2022;
* no. 1-r(II)/2023, 01.03.2023;
* no. 8-r(II)/2023, 13.09.2023;
* no. 9-r(I)/2024, 02.10.2024.

European Court of Human Rights:

* *Stoianoglo v. the Republic of Moldova*, no. 19371/22, 24.10.2023.