**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

##### OF THE PLENUM OF CONSTITUTIONAL COURT

##### OF THE REPUBLIC OF AZERBAIJAN

*On interpretation of Article 221.3 of the Criminal Code of the Republic of Azerbaijan*

# 20 May 2011 Baku city

The Plenum of the Constitutional Court of the Republic of Azerbaijan composed of Farhad Abdullayev (Chairman), Sona Salmanova (Reporter-Judge), Fikret Babayev, Sudaba Hasanova, Rovshan Ismaylov, Jeyhun Garajayev, Rafael Gvaladze, Isa Najafov and Kamran Shafiyev;

attended by the Court Clerk Ismail Ismaylov,

the legal representatives of the subjects interested in special constitutional proceedings: Teyub Muhtarov, Judge of Goranboy District Court, Eldar Askerov, senior advisor of the Department for Administrative and Military Legislation of Milli Mejlis of the Republic of Azerbaijan;

specialists: Hafiz Nasibov, Judge of the Supreme Court of the Republic of Azerbaijan, Muzaffar Agazade, Head of Staff of the Court of Appeal of Sumqayit city;

experts: Ph. Rauf Shamsizade, Associate Professor of Criminal Law and Criminology Board of Baku State University;

in accordance with Article 130.6 of the Constitution of the Republic of Azerbaijan examined in open judicial session via special constitutional proceedings the case on inquiry of January 24, 2011 of the Goranboy District Court on interpretation of Article 221.3 of the Criminal Code of the Republic of Azerbaijan.

having heard the report of Judge Sona Salmanova, the reports of the legal representatives of the subjects interested in special constitutional proceedings, specialists and experts, examined the materials of the case the Plenum of Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS:**

Goranboy District Court having applied to the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as the Constitutional Court) asks to give interpretation of the provision “with application” reflected in disposition of Article 221.3 of Criminal Code of the Republic of Azerbaijan (hereinafter referred to as CC) from the point of view of Articles 25, 57, 60 and 71 of the Constitution of the Republic of Azerbaijan (hereinafter referred to as Constitution) and Article 6 of the European Convention “On protection of human rights and fundamental freedoms”.

In the inquiry it is specified that according to materials of Geranboy district court of pending criminal case concerning charge of S. Ismailov as per the Article 221.3 of the CC, S. Ismailov on 5 August 2010 in the village Safikyurd of the Geranboy district, on the street where he lives, approached the car of the fellow villager A.Rasulov (who was in his car and was going to drive together with his family) and loudly abused him by obscene expressions at presence of his family members, then pushed hands through a side window of the car in salon and started stifling A.Rasulov. When A.Rasulov opened a car door and left the car, his brother J. Rasulov and mother K.Muradova who has arrived there, separated them and then S.Ismailov approached to R.Rasulova (wife of A.Rasulov) and abused her, snatched A.Rasulov, beating him and making damage (not causing damage to health), the degree of which was not established. S.Ismailov, also really resisting to K.Muradova (wishing to prevent violation of a public order and to separate them), hit her (not causing damage to health). Further S.Ismailov having gone home, took the single-barrelled gun belonging to him, threatened to kill all of them, having made thus the deliberate hooliganism, being accompanied with threats of application of violence to citizens.

From the perspective of Geranboy district court, interpretation of the provision “with application” reflected in a disposition of the Article 221.3 of the CC in different meanings (application, attempt to apply, weapon demonstration, threat with weapon demonstration, etc.) creates uncertainty in connection with law application in investigative and court practices.

From this point of view, there are an appeal to clarify such questions as, in what sense the provision “with application” provided in the Article 221.3 of the CC is understood, whether it includes use of the weapon or the objects used as the weapon, whether the act made with demonstration of the weapon (weapon existence in hands of an accused person, its direction on victims, etc.) or attempt to apply the objects used as the weapon, creates the corpus delicti of the present article.

In connection with the inquiry Plenum of the Constitutional Court first of all, considers necessary to disclose an essence of the right of freedom of the person fixed in the Constitution, the constitutional bases and the principles of its restriction and also ensuring this right.

The Constitution proclaims as highest objective of the state the ensuring of rights and freedoms of man and citizen and a proper standard of living to the citizens of the Republic of Azerbaijan, entrust to the legislature, executive and judiciary the duty to observe and to protect the rights and freedoms of man and citizen (Article 12.1 and parts I and VI of Article 71 of the Constitution). Provides possession of everyone from the moment of the birth of inviolable and indefeasible rights and freedoms, granting to them the right to protect the rights and freedoms, using ways and means not prohibited by law and means and inadmissibility of restriction of these rights and freedoms (Article 24.1, Article 26.1 and Article 71.2 of the Constitution).

According to parts I and II of Article 28 of the Constitution, everyone has the right to liberty. Right to liberty may be restricted only in accordance with the procedure established by law through detention, arrest or imprisonment.

As evident, in the Constitution the restriction of the right of freedom on the lawful bases is defined. Restriction of the right of freedom can be carried out for the purpose of ensuring public and national security, and also protection of the rights and freedoms of other persons, only on the bases established in the Constitution and laws. However, in such cases it is necessary to consider such important conditions, as expediency, definiteness, proportionality, degree and terms of application of restriction of the right of freedom.

Plenum of the Constitutional Court considers necessary to note that at adopting by legislature of the normative legal acts providing restriction of the right of freedom, it is important to pay special attention to observance of the principles of equality, proportionality, legal definiteness, balance which are the most important principles of the constitutional state. Observance of the above-listed principles follows from the standard principles and norms of international law, and also the Constitutional Law of the Republic of Azerbaijan as of 21 December 2010 “On Normative Legal Acts”.

 General legal criteria of precision, clarity, certainty of rules of law follow from the principle of equality with respect to the law and law court (the Article 25.1 of the Constitution). So, similar equality is possible only as a result of uniform understanding and interpretation of norms by all law enforcement officials. On the contrary, uncertainty of the content of rules of law can lead to immense (unlimited) number of opinions and arbitrariness during of law enforcement. Thereby the principles of equality and rule of law will be broken.

At the same time, Plenum of the Constitutional Court emphasizes that each crime and criminal liability for commission of it has to be precisely defined by the law. Everyone, proceeding from the content of the corresponding norm, has to have the possibility to expect criminal and legal consequences of the actions (inaction). The requirement of clearness, clarity, definiteness and certainty of rules of law, their compliances in the system of regulation of law follows from the above-noted constitutional principles. Otherwise, there can be contradictions in practice of the law-enforcement activity, protection of the rights weakening the ensuring by state of rights, freedoms and legitimate interests of citizens.

According to the Constitution, the disputes concerning the violation of rights and freedoms of man and citizen are resolved by courts.  Legal protection of rights and liberties of every citizen is ensured (Article 60.1 and Article 71.7 of the Constitution).

 The right to judicial protection, entering into number of basic rights and freedoms of the person and the citizen, at the same time acts as ensuring of all other rights and freedoms and it cannot be limited under no circumstances. This right, without being limited only by right to appeals to the court, also provides the justice that is capable effectively protect the violated rights and freedoms and also the right of freedom in a frameworks provided by the legislation.

The right to fair trial found the reflection and in the European Convention “On the protection of human rights and fundamental freedoms”. According to Article 6 of the Convention in the determination of his/her civil rights and obligations or of any criminal charge against him/her, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law.

It is necessary to especially emphasize that by applying of the Article 6 of the Convention courts are obliged to investigate the correctness of qualification of offenses by appropriate authorities, nature of violation and gravity of punishment that can be imposed to the guilty.

Plenum of the Constitutional Court considers that at application of norm of criminal law, promoting restriction of the right of freedom of the person for any public and dangerous act, the special attention to structure of this crime, to its features and issues of qualification of this crime has to be paid. The wrong definition and the wrong qualification of structure of a crime can lead to violation of the right of freedom of the person.

In the Decision of the Plenum of Constitutional Court “On interpretation of Article 244.1 of the Criminal Code of the Republic of Azerbaijan” of 17 March 2011 it is noted that qualification of a crime, along with establishment of compliance between aspects of perfect concrete criminal act and signs of structure provided in a disposition of criminal legal norm, criminal legal assessment of act reflected in the relevant procedural document and being the reason of criminal and legal consequences. Qualification of a crime has important social and legal value. Qualification from the point of view of fulfillment of duties established in the Criminal Code is the important logical process which is carried out by officials by possessing powers on application of the criminal law and on its termination the legal assessment is given to a concrete social event, human behavior which is dangerous to society. It first of all demands comprehensive study of the actual facts of the case, a choice of the legal norm and an explanation of its contents.

In this Decision it is also noted, whether that at trial of each criminal act the correct establishment of its structure and the correct qualification are directed on establishment is a crime act reflecting signs of a crime, on establishment of existence of fault at the person accused of commission of crime, and also on purpose of fair punishment to the person accused for this crime. Otherwise it can become the reason of prosecution of the innocent person or evasion from responsibility of the person guilty of commission of crime, the wrong application of punishment. And it in turn can lead to violation of the principles of legality, equality before the law, responsibility for fault justice and humanity on which the Criminal Code is based.

Based on stated, Plenum of the Constitutional Court considers that for the correct settlement of questions raised in the appeal of Geranboy district court and elimination of uncertainty, the structure, qualifying signs of hooliganism (Article 221 of the CC) have to be researched.

According to the Article 221.1 of the CC, hooliganism, that is the deliberate actions roughly breaking a social order, expressing obvious disrespect for a society, accompanying with application of violence on citizens or threat of its application, as well as destruction or damage of another's property.

In the criminal legislation hooliganism is referred to category of crimes against public safety, the public order acts as its main object and as additional object the public relations connected with protection of health, honor and advantage and also property of people. Crimes against public safety are the public and dangerous acts violating rules established in the legislation on ensuring of protection of a public order, safety and health, honor and dignity of the personality labour, and rest, normal activity of the enterprises and the organizations.

In spite of the fact that hooliganism is objectively expressed in the various actions listed in a disposition of Article 221 of the CC, all of them have to possess three main signs. First, these actions have to break a public order roughly; secondly, such violation has to express obvious disrespect for society; and thirdly, it has to be accompanied by violence application to citizens, or threat to apply such violence, and also destruction or damage of others’ property.

It should be noted that crude violation of the public order, being expressed by open disrespect for society, in itself is an administrative offense and leads to the administrative responsibility provided by Article 296 of the Code of Administrative Offences of the Republic of Azerbaijan. However, for formation of structure of the crime provided in Article 221 of the CC, requires existence of above-noted signs.

Plenum of the Constitutional Court considers necessary an explanation of signs of criminal act of hooliganism.

In criminal law, under a public order it is meant a complex of the relations established in society between people and ensuring the public safety, integrity of human beings and integrity of property, normal activity of the state and public institutions.

The actions which are grossly breaking a public order is the actions causing a significant damage to public or personal interests or which were expressed in deliberate violation of the rules of community and the behavior established in society between people.

The crud violation of a public order which is expressing in obvious disrespect for society are the such actions of guilty person which create danger to normal life and activity of citizens, institutions, the enterprises and other organizations, lead to emergence of sense of fear and uneasiness.

Application of force has to be understood as beating, application of violence to health and other violent acts that physically influence a victim. The threat of application of violence during hooliganism is the expression, words or actions, intentions of application of a physical abuse. Responsibility for threat arises in case if there are real bases for realization of this threat.

Destruction of others’ property is a full loss by property of economic and historical value and the damage is a full or partial screw up of property, but drawing to it damage in degree which can be fixed.

The motive of hooliganism consists in assert himself by guilty as the exceptional nature in consciousness of a circle of uncertain persons and the thorough difference from others. The subjective aspect of this crime is a specific intent. Guilty person, demonstrating by his actions the obvious disrespect of society, realizes that roughly breaks a public order, beforehand expects that as a result of these actions the damage can be caused to health of the victim, or others’ property can be destroyed or damaged, and wishes it. Indispensable condition of the subjective aspect of hooliganism is the motive of this crime. Intended attempt to oppose itself to a public order, to show force, tendency to scandal, to revenge the individuals, trying to prevent hooligan actions, are a base of motive.

Commission of hooliganism by a group of persons or repeatedly, with a maintaining resistance to the public officer or other person, performing duties on protection of a public order or trying to stop a violation of a public order, is qualified by Article 221.2 of the CC.

Article 221.3 of the CC as another qualifying sign of hooliganism provides commission it with a use of weapons or the objects used as the weapon.

In connection with the inquiry the Plenum of the Constitutional Court also considers necessary to clear up concept of the weapon and the objects used as the weapon and a question of their application.

The Law of the Republic of Azerbaijan “On service and civilian weapons” of 30 December 1997 (hereinafter referred to as Law “On service and civilian weapons”) regulates the legal relationship arising in connection with a turnover of the service and civilian weapons and its ammunition in the Republic of Azerbaijan, and also its application in exceptional cases.

According to Article 2 of the specified Law, the weapon it is facility and the means provided for destruction of manpower and other objects, including equipment and constructions, or provided for signal giving but which can be used also for destruction of manpower and other objects.

The hooligan acts being qualified by Article 221.3 of the CC can be made with application of fire and cold steel.

To the objects used as the weapon are concern any objects, including for household use (an axe, a pitchfork, a kitchen knife, etc.), and also the brick, a stone, iron, a birch, in a word, all objects, which application poses hazard to life or health.

The notion “the objects used as the weapon” was clarified in the Decision of Plenum of the Constitutional Court according to B. Yusifova's complaint as of 17 February 2006. According to this Decision, the objects used as weapons, as opposed to weapons per se, are not constructively intended for killing or destruction; such use is opposite to their purpose and nature. Objects used as weapons are those that are constructively intended for other purposes, including for productive or domestic use, or those that are in general not intended for any specific purpose and are neither produced nor processed, i.e. natural objects. These objects are not weapons according to the above definition thereof; nevertheless, they may possess lethal capacity and certain characteristics of cold arms and other weapons. The list of such objects is inexhaustible. Lethal capacity possessed by objects used as weapons is the primary and absolute feature distinguishing them from other objects lacking such capacity.

Article 221.3 of the CC does not make distinction between the objects that have been previously prepared for commission of hooligan acts, and the objects that have been casually acquired at commission of these acts.

Proceeding from the contents of Article 16 of the Law “On Duty and Civil Weapon” under the weapon employment is understood the fire opening from the weapon.

Application at commission of hooliganism of the weapon or the objects used as the weapon consists in their usage for direct causing damage to health and by the way of posing real threat for life or health of the victim. If it is proved that by a usage of weapons or the objects used as the weapon there was a real threat for life or human health, this act has to be qualified by Article 221.3 of the CC.

Along with it if the weapon or the objects used as the weapon is applied only to destruction or property damage and as a result of it the damage won't be caused to human health or there will be no real threat for their life or health, act cannot be qualified under Article 221.3 of the CC.

Considering noted the Plenum of the Constitutional Court considers that by consideration by courts of cases on hooliganism, application or attempt of a use of weapons or the objects used as the weapon, and also, all circumstances creating real threat for life or health of the victim has to be comprehensively investigated.

Due to the questions put in the request of Geranboy district court, according to stated, Plenum of the Constitutional Court comes to such conclusion that the provision “with application” of Article 221.3 of the CC includes the causing of damage to health by means of the weapon or the objects used as the weapon, or cases when there is a real danger to life or health at commission of hooligan acts.

At the same time, weapon demonstration, verbal threat of a use of weapons, without real attempt of its application, and also use of unsuitable firearms at commission of hooliganism excludes qualification of act under the Article 221.3 of the CC.

Being guided by the Article 130.6 of the Constitution of the Republic of Azerbaijan and the Articles 60, 62, 63, 65-67 and 69 of the Law of the Republic of Azerbaijan “On Constitutional Court”, Plenum of the Constitutional Court of the Republic of Azerbaijan

**DECIDED:**

1. The provision “with application” of Article 221.3 of the Criminal Code includes the causing of damage to health by means of weapon or objects used as a weapon, or cases when there is a real danger to life or health at commission of hooligan acts.

2. The weapon demonstration, oral (verbal) threat of a use of weapons, without real attempt of its application, and also use of unsuitable firearms at commission of hooliganism excludes qualification of act under Article 221.3 of the Criminal Code.

3. The decision shall come into force from the date of its publication.

4. The decision shall be published in “Azerbaijan”, “Respublika”, “Xalq Qazeti” and “Bakinskiy Rabochiy” newspapers, and “Bulletin of the Constitutional Court of the Republic of Azerbaijan”.

5. The decision is final, and may not be cancelled, changed or officially interpreted by any body or official.