**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

##### OF THE PLENUM OF CONSTITUTIONAL COURT

##### OF THE REPUBLIC OF AZERBAIJAN

*On interpretation of Article 66.5 of the Criminal Code of the Republic of Azerbaijan*

# 22 February, 2012 Baku city

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

attended by the Court Clerk Ismail Ismaylov,

the legal representatives of the subjects interested in special constitutional proceedings: Jeyhun Gadimov, Judge of the Hazar District Court andEldar Askerov, senior advisor of the Department for Administrative and Military Legislation of Milli Mejlis of the Republic of Azerbaijan;

experts: professor Firuddin Samandarov, Head of the Law Department of Baku State University, Doctor of Legal Sciences;

specialists: Shahin Yusifov, Chairman of Criminal Board of the Supreme Court of the Republic of Azerbaijan,Aflatun Gasimov, Judge of the Court of Appeal of Baku citty, Hasan Mansurov, Prosecutor of Department on Public Prosecution of the Prosecutor’s General Office;

in accordance with the 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 the Hazar District Court concerning interpretation of Article 66.5 of the Criminal Code of the Republic of Azerbaijan.

having heard the report of Judge Kamran Shafiyev, 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:**

The Hazar District Court having applied to the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as the Constitutional Court) asks for interpretation of the Article 66.5 of the Criminal Code of the Republic of Azerbaijan (hereinafter referred to as Criminal Code) from the point of view of clarifying of essence of concepts “imposition of a sentence”, “before judgment” and “condemned” provided in it.

In the inquiry it is specified that according to a sentence of Hazar District Court of January 26, 2011 the accused A. Mukhtarov was found guilty under Article 132 of the Criminal Code, however before the entering of this sentence into force, committed the crimes provided in Articles 178.2.2 and 132 of the Criminal Code.

According to Hazar District Court imposition in similar situations of court practice of punishments not under Article 66.5 of the Criminal Code but on the basis of the rules established in Article 67.1 can bring in court practice to unreasonable deterioration of his situation, violation of the rights and legitimate interests. Also according to sense of Article 83.1 of the Criminal Code, for recognition of the person as condemned the conviction of court pronounced in his relation has to enter into force.

Due to the inquiry, Plenum of the Constitutional Court considers necessary to note the following.

According to part VIII of Article 71 of the Constitution of the Azerbaijan Republic (hereinafter referred to as the Constitution) no one will be responsible for acts which were not considered criminal at the moment of their implementation.

Along with imperativeness of a providing in the law of this act, at the time of commission the requirement, concerning compliance to the law of punishment for commission of this crime and orders of its imposing. The similar right found the reflection also in Article 15 of the International Covenant on Civil and Political Rights and in Article 7 of the European Convention “On Protection of Human Rights and Fundamental Freedoms”(hereinafter referred to as Convention).

In connection with mentioned provision the European Court of Human Rights indicates that in any system of law, including criminal law, however clearly drafted a legal provision may be, there is an inevitable element of judicial interpretation. There will always be a need for elucidation of doubtful points and for adaptation to changing circumstances. Indeed, in the Convention States, the progressive development of the criminal law through judicial law-making is a well-entrenched and necessary part of legal tradition. Article 7 of the Convention cannot be read as outlawing the gradual clarification of the rules of criminal liability through judicial interpretation from case to case, provided that the resultant development is consistent with the essence of the offence and could reasonably be foreseen (case of Moiseyev v. Russia, October 9, 2008, 62936/00, § 234).

From the created legal position of the European Court it is obvious that the clearness of the law is caused not only by its text but also by the interpretation created in jurisprudence.

Exclusive importance of the right of everyone not to be illegally punished, following both from the Constitution and from the Convention demands the special accuracy and clearness from interpretation of the criminal and legal rules relating to this field.

From this point of view it should be noted that according to Article 17.1 of the Criminal Code set of crime forms include two or more crimes, provided by various articles of the present Code, and if a person was not condemned or released from the criminal liability on the lawful grounds for committed crimes, and also if time for attraction to criminal liability on one of these crimes have not expired. According to Article 66.1 of the given Code at set of crimes for each committed crime should be imposed separate punishment and by absorption of less strict punishment to more strict or by full or partial addition of the imposed punishments should be appointed final punishment.

At the same time considering the special danger of the condemned who did not completely serve sentence at repeated from the point of view of Article 18.1Criminal Code, and also insufficiency of the sentence imposed on the previous case for suppression of commission of a new crime by it the legislator determined purpose of punishment to the specified person by set of sentences. In this regard, Article 67.1 of the Criminal Code provides that at purpose of punishment on set of sentences the unexpired part of punishment on the previous sentence of court partially or completely joins the punishment imposed on the last sentence of court.

From the specified norms of the criminal legislation it is clear that punishment at set of crimes is applied to the crimes committed to the first criminal record, and punishment on set of sentences to cases of commission of a new crime by the person condemned on the basis of the sentence which entered into force. As evident, the legislator connected difference in imposition of punishment on set of commission of crimes over time. In this sense, from the inquiry it is clear that the circumstance creating difficulty in practice consists of imposing of punishment for the crime committed during the period from the moment of the announcement of a conviction on the first criminal case until its entering into force on set of sentences or set of crimes.

According to the legal position reflected in the Decision of Plenum of the Constitutional Court of July 8, 2008 “On interpretation of Article 83.2 of the Criminal Code of the Republic of Azerbaijan” and of May 25, 2009 “On interpretation of Article 83 of the Criminal Code of the Republic of Azerbaijan in connection with inquiry of the Court on Grave Crimes” “… previous conviction of the person condemned on a certain kind of punishment for commitment of a crime begins from the date of the introduction of a decision of court into validity…”.

On the other hand, according to the legal position reflected in the Decision of Plenum of the Constitutional Court of September 6, 2010 “On interpretation of Articles 18 and 83.1 of the Criminal Code of the Republic of Azerbaijan” “the provision “condemned person” of Article 18.1 of Criminal Code has to be interpreted according to Article 83.1 of this Code. Other approach can lead to violation of the principle of a presumption of innocence enshrined in Article 63 of the Constitution of the Republic of Azerbaijan, an unreasonable assessment of act as repeated commission, imposing to the person of more heavy punishment, aggravation of its situation in the absence of legal basis”.

According to the above mentioned Plenum of the Constitutional Court comes to conclusion that because of the fact that the concept “condemned” of criminal law covers the person returned guilty on the basis of the sentence which entered into force the Article 66.5 of the Criminal Code provide the sentence which entered into force on the first case.

Being guided by Article 130.6 of the Constitution of the Republic of Azerbaijan and 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. Because of the fact that the concept “condemned” of criminal law covers the person returned guilty on the basis of the sentence which entered into force the Article 66.5 of the Criminal Code provide the sentence which entered into force on the first case.

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

3. 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”.

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