**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

# OF THE PLENUM OF THE CONSTITUTIONAL COURT

**OF THE REPUBLIC OF AZERBAIJAN**

## On verification of conformity of Article 107.4 of the Criminal Procedure Code of the Republic of Azerbaijan to Article 60.1 of the Constitution

##  of the Republic of Azerbaijan

**31 May 2012 Baku city**

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

attended by the Court Clerk Ismail Ismaylov,

representative of the addressed body – Mahir Mammadov, Head of the Scientific and Analytical Department of the Staff of Ombudsman,

representative of respondent body – Fuad Mammadov, senior adviser of Department for Administrative and Military Legislation of Milli Majlis of the Republic of Azerbaijan;

expert – Rauf Rustamov, associate professor of Department of Civil Procedure of the Baku State University;

## in accordance with Article 130.7 of the Constitution of the Republic of Azerbaijan examined in open judicial session via special constitutional proceedings the case on request of Commissioner for Human Rights (Ombudsman) of January 27, 2012 verification of conformity of Article 107.4 of the Criminal Procedure Code of the Republic of Azerbaijan to parts I of Article 12, to Article 26, parts I and II of Article 47, to the Article 60.1, parts I, II and IX of Article 79, to the Article 125.7, parts II and VIII of Article 127 and Article 149.1 of the Constitution of the Republic of Azerbaijan.

## having heard the report of Judge Fikret Babayev, the reports of the legal representatives of the subjects interested in special constitutional proceedings and expert, examined the materials of the case the Plenum of Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS:**

The Ombudsman of the Republic of Azerbaijan, having submitted to the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as the Constitutional Court) an inquiry, asked for verification of conformity of Article 107.4 of the Criminal Procedure Code of the Republic of Azerbaijan (hereinafter referred to as CPC) to the Constitution of the Republic of Azerbaijan (hereinafter referred to as the Constitution).

According to Article 107.4 if rejection to the judge (the court) or a juror is raised for the purpose of delaying the court proceedings, or if the reasons for the rejection are fabricated (do not correspond to the facts), the person who raised the rejection is liable to fine equivalent of two hundred and twenty AZN, imposed by decision of the court.

According to Ombudsman, the provision “fine of two hundred and twenty AZN” of the Article 107.4 of Criminal Procedure Code does not correspond to provisions of some articles of the Constitution and unreasonably limits the right for rejection of the persons participating in criminal legal proceedings established by the criminal procedure legislation.

According to Ombudsman's conclusion, on the basis of the criminal procedure legislation the right for rejection of court is entitled to participants of trial including accused. According to Article 107.3.3 of the CPC full rejection can be declared to the judge or the juror only prior to judicial examination. According to this article, after the beginning of judicial examination, the rejection can only be declared to the judge or the juror if any participant of criminal trial declaring rejection proves that the circumstances excluding participation of the corresponding person in process became known to him just before the statement of rejection. In that case, to declare rejection with the purpose to tighten judicial proceedings it is almost impossible.

Due to the issue that is brought up in request, the Plenum of the Constitutional Court considers necessary to note the following.

According to Article 60 of the Constitution, legal protection of rights and liberties of every citizen is ensured. By this article of the Constitution, it is guaranteed that the rights and freedoms of citizens provided by the Constitution, laws and other normative legal acts of the Republic of Azerbaijan is under protection of courts.

The judicial guarantee, on the one hand establishes the right of everyone for an appeal to the court for restoration of the violated rights and freedoms, and on the other hand an obligation of courts to consider addresses, petitions, objections and to accept on them the fair, impartial and reasonable decision.

The right for fair trial found the reflection in the Convention “For the Protection of Human Rights and Fundamental Freedoms” (hereinafter referred to as the Convention). According to the Article 6 of the Convention in the determination of his civil rights and obligations or of any criminal charge against him, 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 emphasize that the Convention provides two groups of a guarantee of fair judicial proceedings:

- organic guarantees – these guarantees are directed on possibility (availability) of judicial proceedings. For this purpose a number of duties is assigned to public authorities: impartiality, open conducting proceedings;

- functional guarantees – are aimed at providing the principle of equality. Equality has to be observed at all stages of process.

One of necessary conditions of the effective resolution of the tasks set for criminal legal proceedings are objectivity and impartiality of the persons having power to make decisions execution that it is obligatory in criminal trial. One of important means of ensuring of objectivity and impartiality in criminal trial of the persons participating in criminal legal proceedings is existence in criminal trial of institute of rejection. Reasonable rejection of the judge (composition of the court) in criminal trial or rejection of the judge promotes adoption of objective and impartial judicial acts and increase trust of participants of criminal trial and other persons to justice and judicial acts.

The European Court of Human Rights (hereinafter referred to as the European Court) in the decision of October 22, 2007 on the case of Lindon, Otchakovsky, Laurens and July vs. France noted that impartiality, within the meaning of Article 6 §1 of the Convention, normally denotes absence of prejudice or bias. There are two tests for assessing whether a tribunal is impartial: the first consists in seeking to determine a particular judge’s personal conviction or interest in a given case and the second in ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt in this respect.

From this point of view Plenum of the Constitutional Court considers necessary to note that impartiality of the judge serves in criminal trial for full, objective and comprehensive trial of case, adoption of the fair decision, and effective implementation of justice. The institute of rejection of the judge reflected in the criminal procedure legislation is one of the means providing impartiality of the judge.

Chapter XII of the CPC is devoted to rejections in criminal trial. In the criminal procedure legislation the circle of people by which rejection can be declared is accurately established.

Rejection in criminal trial is the complaint which is put forward for discharge from process of any person, having recognized illegal its participation in process. The right for rejection demands from the persons participating in court to be impartial and objective in relation to itself and case papers.

According to Article 109.1 of the CPC the rejection to the judge (composition of the court), has to be motivated. If rejection does not contain concrete motives, it is left by the court considering case without consideration.

Along with it, the legislator for recognition of rejection of the judge as reasonable and for its unconditional satisfaction established a number of the circumstances excluding participation of any person in criminal trial as the judge.

The specified circumstances are shared in the criminal procedure legislation on the basis of the principles of legality and subjectivity.

The principle of legality is expressed in appointment of the person to the judge's position in the order established by the legislation of the Republic of Azerbaijan and also in possession of the judge according to the legislation of the Republic of Azerbaijan, necessary powers for consideration of the corresponding criminal or other case connected with criminal (Articles 109.1.1 and 109.1.2 of the CPC).

The principle of subjectivity is expressed that the judge is the victim, civil party, defendant to the civil claim or their representative or legal representative in the same criminal case or another prosecution matter relating to it, the judge is questioned or may be questioned as a witness in the same criminal case or in another prosecution matter relating to it (Articles 109.1.3-109.1.8 of the CPC).

Along with specified the criminal procedure legislation assigned a duty to explain to the parties their right for rejection, to judges or all composition of the court to the judge. Thus, according to Article 322.1.7 of the CPC when opening judicial review the chairman on court session has to explain to the parties their right for rejection to the judge, judges or all composition of court, to bring to participants of process what circumstances are the reason for rejection to what can lead rejection, what circumstances for rejection can be on the concrete case which is under procedure.

If by the chairman it is not explained in a clear form to participants of criminal trial, the right for rejection then this circumstance having put impartiality of court on doubt influences on legality of process in general.

At the same time according to Article 107.3.3 of the CPC rejection can be declared to the judge or the juror only prior to judicial examination. According to this article, they may be made after the start of the examination only if the rejection party to the criminal proceedings can prove that he knew about the circumstances precluding the person’s participation in the proceedings just before he raised the rejection.

As it was noted, any rejection to the judge (composition of the court) by the participant of criminal trial has to be motivated. The motivation of rejection is understood as confirmation of existence of concrete circumstance (circumstances) provided by CPC and excluding participation in criminal trial of the judge (judges) to whom the rejection is declared (Article 109.1 of the CPC).

The motivation of rejection is important also from the point of view of Article 107.4 of the CPC. According to this article if rejections to the judge (the court) or a juror are raised for the purpose of delaying the court proceedings, or if the reasons for the rejection are fabricated (do not correspond to the facts), the person who raised the rejection is liable to a fine equivalent to two hundred twenty AZN, imposed by decision of the court.

As evident, for ensuring of impartiality of the judge and objective and comprehensive conducting of judicial proceedings with the legislation are adjusted, both the right of the judge for withdrawal, and the right of participants of criminal trial for rejection to the judge. For the purpose of prevention of abuse of this right and a procrastination of judicial proceedings, the criminal procedure legislation provided the above measure in the form of a penalty. At the same time if in rejection there are no concrete bases to the judge granted the right to leave it without consideration.

Considering that the guarantee of legal protection fixed in Article 60 of the Constitution is not obligatory the Plenum of the Constitutional Court considers that the measure specified in Article 107.4 of the CPC in the form of a penalty, in fact does not contradict to provisions of the Constitution.

Despite it, Plenum of the Constitutional Court considers necessary to examine the Article 107.4 of the CPC from the point of view of the principles of the impartiality provided in Article 6.1 of the Convention and legal certainty following from the Constitution.

Thus, according to a legal position of the European Court speaking about criminal trial, first of all, it should be noted that the issue of creation at the accused the feeling of trust has fundamental value in democratic society. In this regard, Article 6 of the Convention demands from court to be impartial. Impartiality, as a rule, forbids preliminary formation of a conclusion or forbids partiality, and it can be checked by various methods (case of Kyprianou v. Cyprus of December 15, 2005).

As evident from the specified Article 107.4 of the CPC, the person who declared rejection to the judge or the juror can be fined two hundred twenty AZN on the basis of a judgment in two cases: 1) rejection is declared for the purpose of a procrastination of judicial proceedings; 2) the bases of rejection are far-fetched.

However, in the criminal procedure legislation it is not fixed on the basis of what criteria distinction between unmotivated rejection and rejection, the basis of which are far-fetched, and also that rejection is declared for the purpose of a procrastination. Respectively there can be doubts in impartiality of conclusions of the court that recognized that the declared rejection fictional or is declared for the purpose of a procrastination of judicial proceedings.

At the same time, as it was noted, the criminal procedure legislation granted to the judge the right to leave rejection without consideration if it does not contain the concrete bases. In that case, in the criminal procedure legislation is not established on the basis of what criteria the judge can appoint a penalty and on the basis of what criteria having recognized rejection as unmotivated to leave it without consideration. This uncertainty existing in the legislation, prejudicing the impartiality of the judge is capable to cause damage to the acting principle of procedural justice.

From this point of view, Plenum of the Constitutional Court considers necessary to note that requirements of definiteness, clarity, unambiguity and sequence of legal norm in system of the general legal regulation have special importance within criminal and criminal procedure legislations. Also it should be noted that the principle of legal certainty of the demanding accuracy and clarity of provisions of the CPC being the integral element of the rule of law, creates a guarantee for ensuring of effective protection of human rights and the principle of procedural justice, both in legislative, and in law-enforcement activity.

In the decision of March 17, 2011 “On interpretation of Article 53.4 of the Criminal Code of the Republic of Azerbaijan and Article 112.1 of the Code “On Execution of Punishments” of the Republic of Azerbaijan, Plenum of the Constitutional Court emphasized that at adoption of regulations by the legislator on regulation of any public relations it is important to pay attention to the principle of legal certainty that is one of the highest principles of the constitutional state.

According to the legal position created by the Constitutional Court concerning an essence and value of the principle of legal certainty, the principle of legal certainty acts as one of the main features of the rule of law. Observance of the principle of legal certainty by each law or any of its provision is extremely important. For providing of it the legal norm have to be unambiguous and clear. It, in turn, has to give everyone confidence in protection of its rights and freedoms, and predictability in actions of the law enforcement official.

In the decision of the European Court of February 16, 2000 on case of Amann v. Switzerland it was noted that the provisions of domestic law should be sufficiently accessible, precise and foreseeable in their application. The similar reflected in point 60 of the decision of the European Court of October 24, 2006 on case of Edwards v. Malta and in the decision of April 1, 2010 on case of Vrbica vs. Croatia.

Considering above-stated, Plenum of the Constitutional Court considers that for ensuring of efficiency of the right for rejection which is a component of the rights of participants of criminal trial for protection, the basis of application of the penalty provided by Article 107.4 of the CPC have to be improved from the point of view of the principles of a guarantee of judicial protection and legal certainty. According to Article 94.1.6 of the Constitution establishment of rules of legal proceedings is referred to powers of Milli Mejlis of the Republic of Azerbaijan.

On the basis of the above, Plenum of the Constitutional Court comes to the following conclusion:

Article 107.4 of the CPC has to be recognized as corresponding to the Article 60.1 of the Constitution;

to recommend to Milli Mejlis of the Republic of Azerbaijan to improve the bases of application of the penalty provided by Article 107.4 of the CPC from the point of view of the principles of a guarantee of judicial protection and legal certainty.

Being guided by Article 130.7 of the Constitution of the Republic of Azerbaijan and Articles 52, 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. To recognize the Article 107.4 of the Civil Procedure Code as corresponding to the Article 60.1 of the Constitution.

2. To recommend to Milli Mejlis of the Republic of Azerbaijan to improve the bases of application of the penalty provided by the Article 107.4 of the CPC from the point of view of the principles of a guarantee of judicial protection and legal certainty.

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.