**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE PLENUM OF CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*On Interpretation of Article 237 of the Criminal Code of the Republic of Azerbaijan*

**25 February 2013 Baku city**

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

attended by the Court Clerk Nigar Askerova,

representatives of interested parties – Ilgar Jafarov, Head of Department for Maintenance of Public Prosecution of the Prosecutor's Office of the Republic of Azerbaijan; Eldar Askerov, Chief Adviser of the Department of Administrative and Military Legislation of Milli Majlis of the Republic of Azerbaijan,

expert – Rafiq Guliyev, Associate Professor of Criminal Law and Criminology of Baku State University, Doctor of Philosophy in Law,

specialists –Shahin Yusifov, Chairman of Criminal Board of the Supreme Court of the Republic of Azerbaijan; Huseynaga Mamedov, Deputy Head of the Department of Generalization of Judicial Practice and Judicial Statistics of Secretariat of the Supreme Court of the Republic of Azerbaijan; Rovshan Aliyev, Chief Consultant of Production and Processing of Crop Production and State Regulation of Food Resources of the Office of the Ministry of Agriculture of the Republic of Azerbaijan; Parvana Garakhani, Head of the Laboratory of Herbarium of the Institute of Botany of National Academy of Sciences of Azerbaijan; Nasiba Goyushova, Doctor of Philosophy in Botany, Employee of Institute of Manuscripts of National Academy of Sciences of Azerbaijan, Doctor of Philology;

in accordance with the Article 130.4 of the Constitution of the Republic of Azerbaijan examined in open judicial session via special constitutional proceedings the case on request of the Prosecutor's Office of Azerbaijan.

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

**DETERMINED AS FOLLOWS:**

Prosecutor's Office of the Republic of Azerbaijan (hereinafter referred to as the Prosecutor's Office) appealed to the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as the Constitutional Court) asking for interpretation of the following issues:

1. is the collection of the wild-growing plants containing narcotic substances covered by the concept “cultivation” provided by the Article 237 of the Criminal Code of the Republic of Azerbaijan (hereinafter referred to as the Criminal Code) and the Article 1.0.6 of the Law of the Republic of Azerbaijan dated June 28, 2005 “On Circulation of Narcotics, Psychotropic Substances and their Precursors” (hereinafter referred to as the Law “On the Control of Illicit Trafficking in Narcotic Drugs, Psychotropic Substances and Precursors”);
2. in what quantity collection of plants’ parts containing narcotic substances leads to criminal liability under the Article 237.1 of Criminal Code;
3. based on what criterion collection of parts of plants containing narcotic substances is recognized under the Article 237.2.3 of Criminal Code as the large scale.

In the request it was stated that the Article 237.1 of the Criminal Code for “Illegal crop, cultivation of the plants containing narcotic substances, and also gathering of such plants (their parts), as well as manufacturing grades of a hemp, a poppy or other plants containing narcotic substances” established the criminal liability. Also, in this article, the collection of plants (their parts), containing narcotic substances, along with acts of planting and growing of plants, defined as a separate offense.

The request was based on the fact that Article 234 of the Criminal Code establishes criminal liability for illegal acquisition of narcotics, and in the Article 1.0.9 of the Law “On the Control of Illicit Trafficking in Narcotic Drugs, Psychotropic Substances and Precursors” illegal acquisition of narcotics is defined as action aimed at the purchase of drugs, in violation of legislation of the Republic of Azerbaijan of rules of acceptance of them as a gift, or a means of mutual settlements, exchange for other goods and objects, appropriation or mastering by them by any other means, separately inclusion of the crime provided for in the Article 237.1 of the Criminal Code collection of wild plants in unprotected areas, containing narcotic substances, or parts thereof. The classification of this crime in this article led to the emergence of different approaches in law enforcement.

In the request it was also noted that due to the fact that the law in contrast to Article 234.1 of the Criminal Code does not specify the amount of plants’ parts containing narcotic substances creating criminal liability under Article 237.1 of the Criminal Code, as well as does not specify the quantity of such plants (or parts thereof) which shall be understood as a “large scale” (term used in Article 237.2.3 of the Criminal Code), thus leading to uncertainty in practice.

In connection with the request, the Plenum of the Constitutional Court considers necessary to point out the following.

According to Article 80 of the Constitution of the Republic of Azerbaijan (hereinafter referred to as the Constitution) violation of provisions of the Constitution and laws of the Republic of Azerbaijan are persecuted. According to the Article 71.8 of the Constitution, no one bears responsibility for action that was not a violation of law when committed. If a new law, adopted after violation took place, introduces no accountability for such actions or mitigates them, the new law should be applied.

Plenum of the Constitutional Court in its decision of April 10, 2012 “On interpretation of Article 264 of the Criminal Code of the Republic of Azerbaijan” noted that the principle of legal certainty principle in the field of the criminal legislation follows from the Article 71.8 of the Constitution and Article 7 of the Convention. Provision in Article 71.8 of the Constitution expressing the principle of legality in the Basic Law along with the requirement of lawful justification of a crime and punishment has to be based on the law (the principles of *nullumcrimen* and *nullapoena sine lege*), also demands a ban on broad interpretation of the criminal law (lexstricta) of clarity of definiteness of the criminal legislation (lexcerta).

This Constitutional provision has fixed a possibility of bringing of the person to responsibility only for commitment of the act specified as an offense by the legislation existing during its commitment. This right is also reflected in Article 15 of the International Covenant “On civil and political rights”.

The European Court of Human Rights in its decision of October 9, 2008 on the case of Moiseyev vs. Russia noted that it is not confined to prohibiting the retroactive application of criminal law to the disadvantage of an accused. It also embodies, more generally, the principle that only the law can define a crime and prescribe a penalty (*nullumcrimen, nullapoena sine lege*) and the principle that criminal law must not be extensively construed to the detriment of an accused, for instance by analogy. From these principles it follows that an offence must be clearly defined in law.

Thus, in order not to create a condition for involvement of the innocent to criminal liability and in order that guilty have not been able to avoid from criminal liability provision of criminal law establishing responsibility, should not be uncertain and ambiguous.

Along with the above, it should be noted that criminal action (actions or inaction), and also punishments for this actions and other measures of criminal - legal nature should be determined only by the Criminal Code and application of the criminal law by analogy is not allowed (Article 5.1 and 5.2 of the Criminal Code).

According to the legal position formed by the Plenum of the Constitutional Court the essence of the principle of legality is that activity of the law-enforcement body connected with application of the criminal law, is guided only by the law and is carried out on the basis of the law and also that recognition of act by a crime and recognition of the person guilty of commission of this act and application of punishment concerning him is allowed only on the basis of the criminal law (decision of Plenum of the Constitutional Court of October 21, 2011 “On interpretation of Article 182.2.4 of the Criminal Code of the Republic of Azerbaijan”).

It should be noted that in the field of the international fight against drug trafficking the Republic of Azerbaijan has joined to the Single Convention “On Narcotic Drugs” of 1961 (hereinafter referred to as the Single Convention “On Narcotic Drugs”) with the amendments made to it according to the Protocol of the United Nations as of 1972 and Convention “Against Illicit Trafficking in Drugs and Psychotropic Substances” as of 1988 having adopted the Law “On the Control of Illicit Trafficking in Narcotic Drugs, Psychotropic Substances and Precursors” governing the public relations, establishing the rights and obligations of state bodies, natural persons and legal entities in the respective area and revealing concepts used in the legislation.

By ratifying the mentioned international acts the Republic of Azerbaijan has undertaken liabilities within the borders and at own discretion to take special measure of control which considers important concerning any drug specified in the List I on drugs of the Single Convention “On Narcotic Drugs” (subparagraphs “a” and “b” of point 5 of Article 2, the point “a” of Article 4 of the Single Convention “On Narcotic Drugs”).

It is also based on the complete prohibition of circulation of such drugs and substances in the Republic of Azerbaijan, representing the greatest danger to the health and welfare of the people and is directed to protection of the rights and legitimate interests of other persons provided to public safety of health of the population.

According to the paragraph “I” of Article 1 of the Single Convention “On Narcotic Drugs” the “cultivation” means the cultivation of the opium poppy, coca bush or cannabis plant”.

In the Article 1.0.6 of the Law “On the Control of Illicit Trafficking in Narcotic Drugs, Psychotropic Substances and Precursors” the concept of illegal cultivation of plants containing narcotic substances given as the planting, raising or growing of plants with narcotic properties in violation of the regulations established by law in the Republic of Azerbaijan.

By the Law “On approval of lists on amount of drugs and psychotropic substances, and also on their large size which are sufficient for bringing of person to criminal liability” of June 28, 2005 (hereinafter referred to as the Law “On approval of lists on amount of drugs and psychotropic substances, and also on their large size which are sufficient for bringing of person to criminal liability”) to the List III of illegally cultivated plants containing narcotic substances areas signed the substances classified as narcotic such as opium poppy, other types of rank poppy, hemp plants which grow, but the cultivation of which is prohibited in the Republic of Azerbaijan; long-term bushes of poppy and wild-growing hemp, illegal cultivation of which is organized for the purpose of cultivation; cocaine bush and plant kat which due to climatic conditions do not grow at the territory of the Republic of Azerbaijan and the cultivation of which is forbidden.

For the correct resolution of the issues which are brought up in request of elimination of uncertainty and ensuring the principle of legality the Plenum of the Constitutional Court considers necessary to investigate an essence and content of the concepts reflected in Article 237.1 of the Criminal Code, structure and the classifying signs of criminal acts.

In Article 237.1 of the Criminal Code is established the criminal responsibility for the illegal planting, cultivation of plants containing narcotic substances and the collection of such plants (or parts thereof), as well as the cultivation of varieties of hemp, poppy, or other plants containing narcotic substances.

As can be seen, this article considers the following acts, which independently create criminal responsibility:

1. illegal planting of plants containing narcotic substances;
2. illegal cultivation of plants containing narcotic substances;
3. collection of illegally planted-grown plants (or parts thereof) containing narcotic substances;
4. cultivation of kinds of hemp, poppy, or other plants containing narcotic substances.

First of all, it should be noted that in the criminal law, depending on the characteristics and degree of danger of crimes the norms establishing responsibility for the crimes are divided into two groups: compositions having a formal and material structures.

In the structures possessing a formal structure objective feature of crime consists only of socially dangerous action (inaction). In crimes with such composition the action (inaction) prohibited by law is considered as over from the moment of commitment.

In the structures possessing a material structure along with action (inaction) of socially dangerous consequence arising from such action (inaction) also includes the objective feature of crime composition. For determination of responsibility for crimes with material structure the availability of socially dangerous consequence is required.

Apparently, the objective feature of the criminal actions provided in Article 237.1 of the Criminal Code is reflected in the illegal crop, cultivation, collection and cultivation of the plants containing narcotic substances. Due to the fact that the crime was committed as a result of these actions, it has a formal structure and is considered as completed from the moment of planting, cultivation, collection of plants, containing narcotic substances, as well as from the moment of cultivation of plants containing a special type of drugs, that is the end of the crime is not determined by the socially dangerous consequences.

In connection with the question whether the collection of wild-growing plants belongs to cultivation the Plenum of the Constitutional Court notes that according to scientific sense “cultivation” is an illegal crop, cultivation of the plants containing narcotic substances, and also enhancement of technology of selection of seeds of these plants, including also an budding of different types of plants, and sometimes this agriculture reflecting in itself crop and cultivation of such plants, obtaining new species, increase of their productivity, endurance to adverse climatic conditions. Sowing involves planting seeds in the ground, in any form, seedling plants containing narcotic substances. Cultivation includes crop of these plants and care of it (irrigation, cleaning of weeds, fertilizer and other) by persons who are seeded them (or not seeded them), for bringing to maturing level.

The concept “cultivation” of Article 237.1 of the Criminal Code, according to its legal meaning in contrast to the sowing, growing and gathering of plants containing narcotic substance, envisages actions aimed at creating of special conditions for the sowing and cultivation of plants containing specific drugs, as well as on the improvement of methods of their cultivation, obtaining new varieties, increasing their productivity and hardiness to adverse climatic conditions. Inclusion in structure of the concept “cultivation” of such sign as gathering of wild-growing plants won not be coordinated with scientific and legal meanings of this concept.

According to the foregoing the Plenum of the Constitutional Court considers that according to Article 237.1 of the Criminal Code cultivation of hemp, poppy and other plants containing narcotic substances does not cover the collection of wild plants (or its parts) and containing narcotic substances.

As for the in which quantities the gathering of plants (or its parts), containing narcotic substances can lead to criminal liability under the Article 237.1 of the Criminal Code the Plenum of Constitutional Court notes that the act for occurrence of a crime provided for in this article, that is the gathering of plants containing narcotic substances for personal consumption or sale is not determined. Thus, the presence of these objectives is irrelevant for the qualification of the act under Article 237.1 of the Criminal Code.

At the same time, the Article 123-1 of the Code on Administrative Offenses of the Republic of Azerbaijan (hereinafter referred to as the CAO) established the administrative responsibility for crop, cultivation or gathering of plants containing narcotic substances not for sale but for personal consumption.

As can be seen, for commission of actually equally socially dangerous acts by the legislator the conditions of emergence of criminal and administrative liability are established. In the first case, for criminal responsibility is not required gathering of these plants for personal consumption or sales, in the second case the administrative liability arises for the planting, growing or gathering of these plants for the purpose of marketing and for personal consumption. This leads to the fact that the person committed an act blamed in administrative criminal proceedings imposed to more severe punishment.

It is no coincidence that in the Articles 234.1 and 234.2 of the Criminal Code the legislator distinguishes between the criminal responsibility for the illegal manufacture, production, acquisition, storage, transportation, transfer or selling of narcotics, psychotropic substances or precursors, depending on the purpose of acquisition (for personal consumption or sale) of drugs means.

As continuation of it, the Article 68.1 of the CAO provides an administrative responsibility for consumption of drugs, psychotropic substances, production, acquisition, storage, transportation or sending drugs, psychotropic substances not for sale but for personal consumption, with violation of the rules established by the legislation of the Republic of Azerbaijan.

It should be noted that such different legal regulation in Criminal Code for criminal actions of identical character does not accord with the principles of equality of all with respect to the law, court and justice (Articles 25.1 and 149 of the Constitution, Articles 5 and 8 of the Criminal Code).

Plenum of the Constitutional Court notes that carrying out the powers established in the field of observance and protection of human and citizen’s rights and also in the field of the criminal legislation the legislator has the right to establish within the limits provided by the Constitution the contents of provisions of the criminal law, including punishment for commission of socially dangerous acts and other criminal-legal consequences of person who has committed a crime. Determination of socially dangerous act reveals legal and social features inherent in each crime. The presence of signs (object, objective side, subject, subjective side) constituting the offense is precisely discern the specific acts of other criminal acts, including against other offenses.

Such legal regulation should be based on the principles of equality, proportionality, legal certainty, balance, which are the highest principles of the rule of law. Observance of the listed principles follows from the common principles and norms of international law, and from the Constitutional Law of the Republic of Azerbaijan “On Normative Legal Acts”.

Clarity and clearness of rules of law, general legal criteria for their uniqueness is based on the principle of equality of all with respect to the law and court, and this equality is only possible as a result of a common understanding and interpretation of the rules by all law enforcers. On the contrary, the uncertainty of content of legal rules at enforcement process may lead to the infinite (unlimited) conclusions and arbitrariness.

According to the legal position formed by Plenum of the Constitutional Court concerning an essence and value of the principle of legal definiteness, the principle of legal definiteness acts as one of features of the rule of law. Compliance of each law or each its provision to the principle of legal certainty is the extremely important (decision of Plenum of the Constitutional Court of April 2, 2012 “On interpretation of some provisions of Articles 59.1.9 and 60 of the Criminal Code of the Republic of Azerbaijan”).

In this respect, the Plenum of the Constitutional Court considers necessary to recommend to Milli Majlis of the Republic of Azerbaijan to enhance according to the legal line items specified in this Decision a disposition of Article 237.1 of the Criminal Code providing illegal gathering of the plants containing narcotic substances irrespective of the purpose of personal use or sale.

Considering the special importance for law enforcement agencies of issue raised in the request of Prosecutor's Office, the Plenum of the Constitutional Court considers that before making amendments to the Criminal Code, when deciding on the establishment of the amount of plants containing narcotic substances (including amounts for personal consumption), which leads to criminal liability provided for in Article 237.1 of the Criminal Code, for the basis should be taken the amount (dried or unseasoned) set out in List I of the Law “On approval of lists on amount of drugs and psychotropic substances, and also on their large size which are sufficient for bringing of person to criminal liability”.

If the amount of the harvested plants containing narcotic substances creates a sign of “large scale”, then it admits the circumstance aggravating a crime, and act of the person is classified as the crime specified in Article 237.2.3 of the Criminal Code.

As it was noted, units of measure (the large scale) of illegal gathering the plants containing narcotic substances which leads to criminal liability are established in the List provided in the Law “On approval of lists on amount of drugs and psychotropic substances, and also on their large size which are sufficient for bringing of person to criminal liability”.

In the List I, under the name “narcotic drugs” of these Lists set as the amount for personal consumption, and the quantity exceeding quantities for private consumption which leads to criminal liability, and also amount of these drugs, considered as the large scale. List III of the illegally cultivated plants, containing narcotic substances, the amount of these plants, which leads to criminal responsibility is set as the large scale.

In connection with this the Plenum of the Constitutional Court notes that, due to the fact that plants (or parts of it) containing drugs are drugs (Article 1.0.1 of the Law “On the Control of Illicit Trafficking in Narcotic Drugs, Psychotropic Substances and Precursors”) when deciding on the large amount stipulated in Article 237.2. 3 of the Criminal Code as the basis to be taken amount (as in the dried and undried form) established in List I, and when deciding on a large scale (number of units) in List III.

Considering the above mentioned, the Constitutional Court comes to the following conclusions:

- the cultivation of varieties of hemp, poppy, or other plants containing narcotic substances provided in Article 237.1 of the Criminal Code, does not cover the gathering of wild growing plants (or parts of it), containing narcotic substances;

-to recommend to Milli Majlis of the Republic of Azerbaijan to enhance according to the legal line items specified in this Decision a disposition of Article 237.1 of the Criminal Code providing illegal gathering of the plants containing narcotic substances irrespective of the purpose of personal use or sale;

-before making amendments to the Criminal Code, when deciding on the establishment of the amount of plants containing narcotic substances (including amounts for personal consumption), which leads to criminal liability, for the basis should be taken the amount (dried or unseasoned) set out in List I of the Law “On approval of lists on amount of drugs and psychotropic substances, and also on their large size which are sufficient for bringing of person to criminal liability”.

- for determination of the large scale of illegally harvested plants (or parts of it) containing narcotic substances for the basis should be taken the List I of the Law “On approval of lists on amount of drugs and psychotropic substances, and also on their large size which are sufficient for bringing of person to criminal liability” and in case of determination of the large scale of quantity of units of these plants for the basis should be taken the List III.

Guided by the Part IV of Article 130 of the Constitution of the Republic of Azerbaijan, Articles 60, 62, 63, 65-67 and 69 of the Law of the Republic of Azerbaijan "On Constitutional Court", the Plenum of the Constitutional Court of the Republic of Azerbaijan

**DECIDED:**

1. The cultivation of varieties of hemp, poppy, or other plants containing narcotic substances specified in the Article 237.1 of the Criminal Code of the Republic of Azerbaijan, shall not be covered by gathering of wild growing plants (or parts of it), containing narcotic substances;

2. To recommend to Milli Majlis of the Republic of Azerbaijan to enhance according to the legal line items specified in this Decision a disposition of the Article 237.1 of Criminal Code of the Republic of Azerbaijan providing illegal gathering of the plants containing narcotic substances irrespective of the purpose of personal use or sale;

3. Before making amendments to the Criminal Code of the Republic of Azerbaijan, when deciding on the establishment of the amount of plants containing narcotic substances (including amounts for personal consumption), which leads to criminal liability, for the basis shall be taken the amount (dried or unseasoned) set out in List I of the Law “On approval of lists on amount of drugs and psychotropic substances, and also on their large size which are sufficient for bringing of person to criminal liability”;

4. For determination of the large scale of illegally harvested plants (or parts of it) containing narcotic substances for the basis shall be taken the List I of the Law “On approval of lists on amount of drugs and psychotropic substances, and also on their large size which are sufficient for bringing of person to criminal liability” and in case of determination of the large scale of quantity of units of these plants for the basis shall be taken the List III.

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

6. 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”.

7. The decision is final and cannot be cancelled, changed or officially interpreted by any body or official.