**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE PLENUM OF CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*On interpretation of the Article 188 of the Criminal Code of the Republic of Azerbaijan*

**30 March 2015 Baku city**

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

attended by the Court Clerk Faraid Aliyev,

representatives of interested parties – Mubariz Mamedov, Judge of Astara District Court; Fuad Mamedov, Head of Sector of the Department for Administrative and Military Legislation of Milli Majlis of the Republic of Azerbaijan;

expert – prof. Firuddin Samandarov, Head of the Department of Criminal Law and Criminology of Baku State University, Doctor of Legal Sciences;

specialists – Shahin Yusifov, Chair of the Criminal Board of Supreme Court of the Republic of Azerbaijan; Farid Nagiyev, Senior prosecutor - methodologist of Department of protection of crown case in courts on grave crimes of Directorate on protection of crown case of the Prosecutor General's Office of the Republic of Azerbaijan;

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 Astara District Court on interpretation of Article 188 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 and specialists, conclusions of expert, examined the materials of the case the Plenum of Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS:**

The Astara 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 188 of the Criminal Code of the Republic of Azerbaijan (hereinafter referred to as the Criminal Code)from the point of view of the Article 70 of the Code on Administrative Offenses of the Republic of Azerbaijan (hereinafter referred to as the Code on Administrative Offenses).

In the inquiry it is indicated that in court proceeding there is a criminal case on Z.Djabbarov's accusation under the Article 188 of the Criminal Code in connection with illegal capture of the land plot of 0,6 hectares relating to forest fund, an unauthorized construction on it of the individual apartment house and violation by that of the title to land.

The inquirer considers that thereupon the legislation provides two types of responsibility for the same act, with the purpose of elimination of uncertainty in court practice in a question of bringing to the criminal or administrative responsibility of the person who guilty in occupation of the land relating to forest fund it is necessary to give interpretation to the Article 188 of the Criminal Code from the point of view of the Article 70 of the Code on Administrative Offenses.

In connection with the inquiry, the Plenum of the Constitutional Court considers necessary to note the following.

According to the Article 13.1 of the Constitution of the Republic of Azerbaijan (hereinafter referred to as the Constitution) the property in the Republic of Azerbaijan is inviolable and protected by the State.

The ownership right is considered as one of the foundations of democratic society, the constitutional state, reflecting the commonly accepted supreme human values.

Regulation of the land relations, and also order of emergence of the ownership right to the land and its separate elements are established by the Constitution and land, civil and other legislations of the Republic of Azerbaijan. The Land Code of the Republic of Azerbaijan (hereinafter referred to as the Land Code) is directed to settlement in the Republic of Azerbaijan of the land relations evolving from application of different types of a land ownership, implementation of the obligations of owners, users and tenant farmer of the land connected with the land and protection of their land rights, creation of conditions for rational use of lands and their protection, recovery and increase in fertility of the land, re-cultivation of the lands which came to unfitness as a result of pollution and destruction, preserving and improvement of the environment (Article 2 of the Land Code).

According to the land legislation of the Republic of Azerbaijan, the land plot is understood as a part of the surface of the Earth registered with the state land cadastre and documents of state registration of right to land with its borders, size, geographic location, legal status, regime, function and other indicators.

According to Article 5 of the Land Code, there are state, municipal and private ownership types for a land plot in the Republic of Azerbaijan. Types of ownership are equal and safeguarded by the state. The subjects of the ownership right are: for land plot owned by the state - the Azerbaijan state, for land plots owned by municipalities — municipalities, for land plot owned privately — citizens and legal entities of the Republic of Azerbaijan. The ownership right to a land plot consists of the rights of the owner to sole or joint ownership, use and disposal of a land plot.

At the same time, in the Article 9 of Land Code accurately established the uniform land fund and its structure. All the lands located within the borders of the Republic of Azerbaijan shall form a single land fund. Depending on their function and legal status, lands of the Republic of Azerbaijan are subdivided in the following categories: lands of agricultural purpose; lands of residential settlements (cities, settlements and rural residential settlements); lands of industry, defense, transport, communication and other purposes; lands of specifically protected territories; lands of the forest fund; lands of the water fund; lands of the reserve fund.

At the same time, in the Land Code the actions attracting responsibility for violation of the land legislation are precisely established. Thus, according to Article 110 of this Code, the persons guilty of making of following actions bear responsibility in the order established by the legislation:

- arbitrary occupation of land plots;

- conduct of illegal construction on land plots;

- change of the category of land without observing the legislation;

In addition, in Articles 111 and 112 of the Land Code the return of arbitrary occupied lands and compensation of damage in the Republic of Azerbaijan are regulated. Arbitrary occupied (captured) land plots shall be returned without compensation of the expenses incurred during illegal use. Bringing lands to the original condition (including the demolition of buildings, facilities and constructions located on them) shall be carried out by the legal entities and individuals that had captured the lands or at their expense. Legal entities and individuals shall compensate the damage caused as a result of breach of the land legislation.

The Forest Code of the Republic of Azerbaijan (hereinafter referred to as the Forest Code) establishes legal bases of regulation of forest relations, use, protection, preservation and reproduction of forests, increase of their ecological and resource potential on the territory of the Republic of Azerbaijan. Regulation of forest relations is carried out in view of forest conception as unity of forest vegetation, land, fauna and other components of the natural environment of important ecological, economic and social value.

Relations in the area of use, preservation, protection and reproduction of forests, the lands of forest fund (forest relations) are regulated by the corresponding norms of the forest and land legislation of the Republic of Azerbaijan (Article 4 of Forest Code).

According to Article 6 of Forest Code all forests, and also lands of the forest fund not covered with forest vegetation (the forest and non-forest lands), form the forest fund of the Republic of Azerbaijan.

The forest fund in the Azerbaijan Republic belongs to the state and is its property. Forests and the lands of forest fund are not subject to privatization (Article 11 of Forest Code).

At the same time, the persons guilty of infringement of the forest legislation bear disciplinary, administrative, civil and criminal responsibility according to the legislation of the Republic of Azerbaijan. The persons answerable to administrative and criminal liability for capture of forest fund plots without permission are obliged to release the specified plots at a stated dates (Article 79 of Forest Code).

Thus, apparently from the mentioned regulations of the land and forest legislation, category of all lands constituting single land fund of the Republic of Azerbaijan irrespective of pattern of ownership and a legal regime are protected by the state.

According to the legislation of the Republic of Azerbaijan, such protection is established in types of disciplinary, administrative, civil and criminal liability.

According to Article 188 of the Criminal Code the infringement of property right on land which is provided by the law, that is, arbitrary occupation, replacement or crop of land plot, is punished by the penalty at a rate from hundred up to five hundred manats, or public works for the term up to two hundred hours, or corrective works for the term up to one year.

First of all, it should be noted that public danger of the crime established by this regulation of the Criminal Code is that commitment of such acts violates rules of legal use, ownerships and disposal of land, that playing a very important role in an economic system and increase of ecological potential, leads to change of purpose of lands.

In this article of the Criminal Code the legislator refers the violation of the land property right to all categories of lands constituting single land fund of the Republic of Azerbaijan irrespective of pattern of ownership and a legal regime. At the same time, the violation of the property right to land provided in a disposition of the mentioned regulation should be understood as violation of each element of the property right – a right of possession, use and disposal of land. Thus, an object of the crime specified in this article of the Criminal Code is the public relations arising in connection with implementation of the property right to the land.

The acts, provided by the mentioned regulation of the Criminal Code, which entail the criminal liability for violation of the property right to the land affirmed by the law, are expressed in arbitrary occupation, replacement or crops of land plot. These acts, in turn, are considered as the objective party of noted crime.

In the criminal law, the arbitrary occupation of the land plot is understood as occupation of land plot without permission of the owner or other legal owner of the land, and also arranged in a stipulated by the legislation order of the administrative decree concerning granting in use of the state or municipal land. At the same time, the person who committed the act actually starts ownership or use of illegally occupied land plot (builds the fencing determining borders of the land plot, begins to carry out works on a construction, improvement and so forth activities of economic household purpose).

Arbitrary replacement of the land plot is a replacement by the person of the land plot that is in his property (ownership, use) for the land plot belonging to other owner without consent of that owner. Occupation of other land plot instead of the land plot provided to the person in the order corresponding to the legislation also shall be considered as arbitrary replacement of the land plot.

Under arbitrary crops, it is necessary to understand the activities consisting in crops, cultivation of plants and care of them on any land plot without the permission of owner or other legal possessor. Crops of the land are a set of such actions as reduction of this site in a condition, suitable for cultivation (cleaning of bushes, stones and so forth), a plowing, crops of seeds and so forth.

Thus, the Plenum of the Constitutional Court notes that the criminal legislation protects each element of the property right to the land, irrespective of pattern of ownership, and the land of all categories constituting single land fund of the Republic of Azerbaijan shall be considered within the scope of the mentioned article of the Criminal Code.

Besides, the responsibility for violation of land and forest legislation is also provided by legislation of the Republic of Azerbaijan on administrative offenses.

According to Article 70 of the Code on Administrative Offenses, unauthorized occupation of lands of forest fund or conducting construction and other works on these land plots without proper permission to use of them – attracts imposing of a fine on individuals in the amount of seven hundred to one thousand manats, on officials - from three thousand five hundred to five thousand manats, on legal entities – from six thousand five hundred to eight thousand manats.

Unlike the Article 188 of the Criminal Code, subject to administrative offense, stipulated in Article 70 of the Code on Administrative Offenses, are the public relations arising in the field of protection and effective use not of all categories of the lands constituting single land fund of the Republic of Azerbaijan, but only lands of forest fund.

The objective party of this offense are the acts attracting the administrative responsibility under the specified article of the Code on Administrative Offenses – arbitrary occupation of lands of forest fund, conducting construction and other works on these land plots without proper permission to use of them.

From the analyzed norms of the criminal legislation and legislation on administrative offenses it is evident that the object protected by both codes are the public relations arising in connection with the lands making uniform land fund of the Republic of Azerbaijan. In the criminal legislation to this object are carried the land of all categories, and to the legislation on administrative offenses – only the land of forest fund. Thus, both norms (Article 188 of the Criminal Code and Article 70 of the Code on Administrative Offenses), in fact, protect the land of forest fund from illegal encroachments.

At the same time some objective parties of illegal acts coincide in Article 188 of the Criminal Code and Article 70 of the Code on Administrative Offenses. As it was already noted, the violation of the property right with respect to land affirmed by the law provided by this article of the Criminal Code that is the objective party of a crime is expressed in arbitrary occupation, replacement and crops of the land plot. In the mentioned article of the Code on Administrative Offenses as the objective party of this offense is also considered the arbitrary occupation of lands of forest fund, conducting construction and other works on these land plots without proper permission to use them.

It should be noted that coincidence of the objective parties of the illegal acts directed to the object protected by the criminal legislation and the legislation on administrative offenses results in uncertainty of classifications of these acts and creates difficulties in law-enforcement practice.

The Plenum of the Constitutional Court considers that the regulations of the criminal legislation and the legislation on administrative offenses providing responsibility shall be unambiguous, clear, consecutive and simple, the legislator shall give determinations of structures of the norms of law, exact and differing from each other providing responsibility for the same illegal act. Otherwise, it can complicate protection of the rights and freedoms of everyone, predictability of actions of the law enforcement official and to call into question the preliminary awareness of the person on consequences of the illegal act. Such circumstance can lead to unreasonable involvement of the person to criminal liability or, on the contrary, to impunity of the perpetrator for committed act. At the same time, it can create conditions for double involvement of the person to responsibility for the same illegal act.

At the same time, the Plenum of 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 taking into account that approach of responsibility generates legal, and also criminal consequence in law, in the law according to the principle of legal certainty shall be accurately and clearly specified, making of what action (inaction) including what failure to fulfill of an obligation, leads to it. At the same time, the principle of legal definiteness in the field of the criminal legislation follows from Article 71.8 of the Constitution and Article 7 of the Convention. Provision of 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) and clarity of definitions of the criminal legislation (lexcerta).

Article 94 of the Constitution established the powers of Milli Majlis of the Republic of Azerbaijan in the field of the legislation. According Article 94.1.17 of the Constitution, determination of crimes and law violations; imposing responsibility for their commitment is referred to special powers of legislative authority.

It should be noted that the legislator, regulating criminal and administrative measures of law-enforcement character of lands of forest fund, has to consider the requirement of harmony between the consequences generated by measures of legal protection, and the damage caused as a result of an offense. It does not exclude the feasibility based on the Constitution in case of establishment of crime components, and also relies on accounting of actual state of the public relations in the specific conditions dictating need of more effective protection of any rights and legitimate interests of citizens, ensuring harmony of criminal liability with the values protected by the criminal law in case of respect for the constitutional principles of equality and justice.

Considering the above, the Plenum of the Constitutional Court considers necessary to recommend to Milli Majlis of the Republic of Azerbaijan to give accurate and differing from each other definitions of structures of Article 188 of the Criminal Code and Article 70 of the Code on Administrative Offenses.

At the same time, at attracting to administrative or criminal liability for the illegal act directed against the lands of forest fund constituting single land fund of the Republic of Azerbaijan it is necessary to consider the public danger of act and the consequences generated by it from the point of view of the extent of the caused damage, depending on damage caused to the owner, the environment and so forth. Otherwise, it will lead to violation of the constitutional principles of equality and justice, weakening of the property right, criminal and administrative legal protection of the environment, to discrimination against the persons who were affected by criminal act.

The Plenum of the Constitutional Court emphasizes that the criminal law, being by its legal nature the extreme means of reaction of the state to illegal act, influent on the public relations only in that case when their regulation by means of other legal norms including establishing the administrative responsibility is represented insufficient. Thus, according to Article 14.2 of the Criminal Code, act (action or inaction) though it is formally containing attributes of any action (action or inaction), provided by the criminal law, but by virtue of insignificance not representing public danger, and is not cause harm to a person, to a society or the state, is not be admitted as a crime.

From this point of view, the Plenum of the Constitutional Court considers that until improvement of the relevant norms of criminal legislation and the legislation on administrative offenses the law-enforcement bodies, bringing the person who guilty in commitment of the illegal act directed against lands of forest fund to administrative or criminal liability, shall consider degree of public danger of act, gravity of the damage caused to the owner, the environment and so forth and to qualify his actions under Article 188 of the Criminal Code or Article 70 of the Code on Administrative Offenses.

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

- according to the legal position formed in the present decision to recommend to the Milli Majlis of the Republic of Azerbaijan to improve Article 188 of the Criminal Code and Article 70 of the Code on Administrative Offenses from the point of view of the principles of legal certainty and harmony;

- until improvement of the relevant norms of criminal legislation and the legislation on administrative offenses the law-enforcement bodies, bringing the person who guilty in commitment of the illegal act directed against lands of forest fund to administrative or criminal liability, shall consider degree of public danger of act, gravity of the damage caused to the owner, the environment and so forth and to qualify his actions under Article 188 of the Criminal Code or Article 70 of the Code on Administrative Offenses.

Being guided by the 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. According to the legal position formed herein to recommend to the Milli Majlis of the Republic of Azerbaijan to improve the Article 188 of the Criminal Code of the Republic of Azerbaijan and the Article 70 of the Code of the Republic of Azerbaijan on Administrative Offenses from the point of view of the principles of legal certainty and harmony.

2. Until improvement of the relevant norms of criminal legislation and the legislation on administrative offenses the law-enforcement bodies, bringing the person who guilty in commitment of the illegal act directed against lands of forest fund to administrative or criminal liability, shall consider degree of public danger of act, gravity of the damage caused to the owner, the environment and so forth and to qualify his actions under the Article 188 of the Criminal Code of the Republic of Azerbaijan or the Article 70 of the Code of the Republic of Azerbaijan on Administrative Offenses.

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 institution or official.