**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN
DECISION**

**OF THE PLENUM OF THE CONSTITUTIONAL COURT
OF THE REPUBLIC OF AZERBAIJAN**

**On interpretation of Articles 92.10.1, 92.10.3 and 244.2
of theCriminal Procedure Codeof the Republic of
Azerbaijan in their interrelation**

**28 March, 2019 Baku city**

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

attended by the Court Clerk FaraidAliyev,

representatives of interested parties - Aynur Osmanova, Deputy head of department of legal support of the Prosecutor Office of the Republic of Azerbaijan; Eldar Askerov, Head of sector Administration of the Milli Majlis of the Republic of Azerbaijan;

expert - Midhad Gavarov, Professor of board of criminal procedure of the Baku State University, Doctor of Legal Sciences;

specialists - Hafiz Nasibov, udge of the Supreme Court of the Republic of Azerbaijan; Emil Mammadov, Head of Methodical Control Department of the Main Investigation and Inquest Department of the Ministry of Internal Affairs of the Republic of Azerbaijan Mammadov and Farid Hasanov, mem­ber of the Bar Association of the Republic of Azerbaijan;

in accordance with part IV of Article 130 of the Constitution of the Republic of Azerbaijan examined in open judicial session via special constitutional proceedings the case concerning inquiry Prosecutor’s Office of the Republic of Azerbaijanon interpretation of Articles 92.10.1, 92.10.3 and 244.2 of the Criminal Procedure Code of the Republic of Azerbaijan in their interrelation.

having heard the report of Judge Sudaba Hasanova, 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 Prosecutor’s Office of the Republic of Azerbaijan (here­inafter referred to as the Prosecutor’s Office)having applied to the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as the Constitutional Court) asks for interpretation of Articles 92.10.1 and 92.10.3 of Criminal Procedure Code of the Republic of Azerbaijan(hereinafter referred to as the Criminal Procedure Code) which provide for a prohibition of arbitrary refusal of advocate to defense and to participate in procedural actions with participation of defendant as well as the interpreta­tion of Article 244.2, which provide that the search and seizure of the suspect or accused person is not a duty but the right of the advocate.

The inquiry was justified by the fact that while Articles 92.10. 1 and 92.10.3 of Criminal Procedure Code prohibit the arbitrary refusal of advocate to defense and to participate in procedural actions with participation of a suspect or accused person and put it on his/her as a duty, in Article 244.2 of the same Code, the participation of the advocate in the search and seizure proceedings is regarded as his/her right. Therefore, there is a discrepancy between Articles 92.10. 1 and 92. 10.3 of Criminal Procedure Code and Article 244.2 of the same Code. Thus, in some cases, advocate refuses to participate in inves­tigative actions, citing that this is his right, not his duty to be present at such actions, as well as the fact that the conduct of investigative actions in violation of the law is contrary to the legitimate interests of the defendant.

The refusal of counsel to participate in investigative actions is considered by the Prosecutor’s Office as a violation of the requirements of Articles 90.7.2, 90.7.9, 92.3.9, 92.10.1 and 92.10.3 of Criminal Procedure Code. The inquirer considers that, in order to eliminate the conflicts in law enforcement practice, it would be useful to clarify the rules of criminal pro­cedure legislation prohibiting the advocate from refusing to participate in the proceedings against the interests of the defendant, as well as the rules governing the presence of the advocate in the conduct of investigations as search and seizure.

The Plenum of the Constitutional Court first considers it necessary to note that although some of the circumstances of the case referred to in the request relate to the presence of advocate in the investigation as a personal search and seizure provided for in Article 246 of Criminal Procedure Code, the subject matter of the constitutional case is nevertheless the interpretation of Articles 92.10.1, 92.10.3 and 244.2 of the Code in their interrelation.

According to the parts I and II of Article 26 of the Constitution of the Republic of Azerbaijan (hereinafter referred to as the Constitution), everyone has the right to pro­tect his/her rights and freedoms using ways and means not prohibited by law. The state shall guarantee the protection of rights and freedoms of everyone.

According to the Article 61 of Constitution, everyone has the right to receive qualified legal assistance. In specific cases envisaged by legislation legal assistance shall be provided free of charge, at the expense of the State. Every citizen has the right to receive assistance of a lawyer as from the moment of detention, arrest or accusation of a crime by competent state bodies.

According to part 3 of Article 6 of the Convention for the Protection of Human Rights and Fundamental Freedoms (here­inafter referred to as Convention), everyone charged with a criminal offence has the right to defend himself in person or through legal assistance of his own choosing or, if he does not have sufficient means to pay for legal assistance, to be given it free when the interests of justice so require.

European Court of Human Rights in the Decision on the case Articov. Italy indicated that “Article 6 par. 3 (c) speaks of "assistance" and not of "nomination". Again, mere nomina­tion does not ensure effective assistance since the lawyer appointed for legal aid purposes may die, fall seriously ill, be prevented for a protracted period from acting or shirk his duties. If they are notified of the situation, the authorities must either replace him or cause him to fulfil his obligations”.

According to the legal position formed by the Plenum of Constitutional Court in relation with right to have a legal assistance, public value of the right of obtaining by everyone the qualified legal assistance consists that the granted right inherently is a necessary guarantee of realization of the rights and freedom of the person and the citizen. Preventive function which is one of functions of this right, promotes not only to realization by the person of the rights and freedom according to the law, but also guarantees prevention of actions of public authorities and their officials directed on illegal restriction of the rights and freedom of the person and the citizen.

The right of each person for using the help of the advocate which is a kind of the right to reception of the qualified legal assistance it is interconnected with other rights fixed in the Constitution (the right to protect in the ways not forbidden by the law and means the rights and freedom, the right to free­dom, the right of judicial protection) and guarantees their real­ization. As continuation of it, a main objective of the right of use of the help of the advocate as one of justice basic ele­ments, the guarantee of real (valid) equality of the parties in criminal trial with maintenance of the suspected or accused person with the advocate is (Decision of May 20, 2011 on interpretation of some provisions of the Article 92.12 of the Criminal Procedure Code of the Republic of Azerbaijan).

The right to protection, together with the guarantee of a per­son's legitimate interests, is a guarantee of the interests of jus­tice and social value. The legal relations that have arisen in connection with ensuring the right of everyone to legal assis­tance reflect the public interest and therefore confirm the ful­filment by the State of its constitutional obligations in this field. This requires the State to take positive measures, if nec­essary, to protect the rights of the person.

In this context, the need to ensure the right of the accused to receive quality legal assistance serves for full, objective and comprehensive examination of the circumstances of the case and, as a result, is aimed at the effective implementation of justice. Thus, the right to receive quality legal assistance should be regarded not only as ensuring the protection of a person's rights and freedoms, as well as his legitimate inter­ests, but also as an initial condition for the exercise of justice on the basis of the principles of equality of parties and com­petition.

For the purpose of regulation of provision of rights of each person in the territory of the Republic of Azerbaijan to address at the court process, preliminary investigation and inquiry to the lawyer selected by him/her for exercise of his/her rights and legitimate interests from the moment of detention, arrest, accusation in commitment of crime, and of activity of lawyers rendering legal assistance on other issues, the Law of the Republic of Azerbaijan “On Lawyers and Legal Practice” (hereinafter referred to as the Law “On Lawyers and Legal Practice”) was adopted.

On the basis of Article 3 of this Law, the basic tasks of legal practice are the protection of rights, freedoms and legit­imate interests of natural and legal persons protected by law and rendering high quality legal assistance to them.

Under the criminal procedural laws, every detained or arrested person must be informed immediately, in a language he or she understands, of the reasons for detention or arrest, as well as the essence of the suspicion or charge, the right to refuse to testify and the right to legal assistance from advo­cate. During the criminal prosecution the preliminary investi- gator,prosecutor and court shall take measures to guarantee the right of victim, suspect and accused to receive a legal assis- tance.The prosecuting authority should secure the rights of the suspect or accused to have the assistance of the advocate for the protection from the moment of detention or arrest,as the suspect before the first interrogation or as the accused as soon as charges have been laid,to be able to protect himself in per­son or with the aid of advocate chosen by him/her,or if unable to pay for advocate,to receive free legal assistance (Articles 14.4,19.1 and 19.4 of Criminal Procedure Code).

It appears that ensuring the rights of a suspect or accused person to receive qualified legal assistance and protection in cases and in the manner provided for by law is one of the main duties of the body conducting criminal proceedings.

The cases in which the advocate is required to participate in criminal proceedings, his rights, duties, actions which the advocate is prohibited to carry out, etc. are regulated by Article 92 of Criminal Procedure Code.

Cases where the participation of advocate in criminal pro­ceedings must be ensured are provided for in Article 92.3 of the Code. Based on this article the participation of advocate shall be ensured in the following circumstances: where the suspect or accused so requires; if the suspect or the accused is dumb, blind, deaf, has other serious speech, hearing, or visu­al disabilities, or because of serious chronic illness, mental incapacity or other defects cannot exercise the right to defend himself independently; if the suspect or the accused is in detention or the accused is held on remand as a restrictive measure (excluding the circumstances provided for in Article 153.2 of this Code); if the interests of the accused persons diverge and one of them has advocate, etc.

Thus, the legislator, having established special circum­stances in Article 92.3 of Criminal Procedure Code, took into account the importance of the participation of advocate in criminal proceedings and prohibited the conduct of criminal proceedings without his/her participation. Under these circum­stances, the court or the body conducting the criminal prose­cution may carry out investigative or other proceedings after ensuring the compulsory participation of the advocate. At the same time, the legislator provided for the possibility of renouncing the advocate of a suspect or accused person. However, according to Article 92.12 of Criminal Procedure Code, in some cases referred to in Article 92.3 of the Code, the refusal of a suspect or accused person to defend himself or herself is not accepted.Failure to ensure the compulsory participation of advocate in criminal proceedings may be con­sidered as a violation of criminal procedure law and lead to the recognition of the relevant procedural act and its results as illegal.

Article 92.9 of Criminal Procedure Code provides for a number of procedural rights in order to ensure the proper ful­filment of the defense function in the prosecution. The advo­cate exercises the following rights: on the proposal of the body carrying out the process, participates in investigative or other procedural actions carried out by that body, as well as in any such actions carried out with the participation of the advocate; reminds the suspect or accused of his rights, draws the attention of the person carrying out the investigative or other procedural action to the violation of the law; objects to the actions of the body conducting the criminal proceedings and requests that they be recorded in the report of investiga­tive or other procedural actions; familiarize himself with the records of investigative or other procedural actions carried out with his or her participation or with the participation of the defendant, as well as with the minutes of the trial; comments on the accuracy and completeness of records in the records of investigative or other proceedings in which he/she participat­ed; by participating in investigative or other proceedings and judicial proceedings, requires that the necessary circumstances be recorded in the relevant protocol, etc.

However, Article 92.11 of Criminal Procedure Code defines the duties of advocate in order to ensure compliance with the principles and rules governing the professional activities of advocate, as well as the rules governing criminal proceedings. According to this article, the advocate must perform the fol­lowing duties: by participating in criminal proceedings, be guided by the requirements of the law; to defend the legitimate interests of the suspect or accused by all legal means; to pro­vide the defendant with the necessary legal advice and to act in accordance with the position taken by the defense party in order to complete the case in favor of the defendant, to the extent possible in his/her situation, to observe the legal ethic; on the call of the body conducting the criminal proceedings, appear to provide legal assistance to the suspect or accused, etc.

According to Article 16 of the Law “On Lawyers and Legal Practice”, in the course of exercise of professional activity, the lawyer shall be obliged to: comply with the requirements of the law, use all methods provided for in the legislation for protection of interests of the defended person or the person rights of whom are represented; keep the lawyer confidential­ity, comply with the oath of lawyer and lawyer ethics; comply exclusively with requirements of the law.

In order to guarantee the right to receive qualified legal assistance under Article 61 of Constitution, Article 92.10 of Criminal Procedure Code prohibits the exercise of certain acts by the advocate. Thus, according to Articles 92.10.1 and 92.10.3, the advocate is prohibited from carrying out any act contrary to the legitimate interests of the defendant, including confirming the defendant 's link with the crime committed and his/her guilt, accepting the civil action brought against him/her, refusing to participate in proceedings involving the defendant and impeding his exercise of his rights; to waive defense or to terminate his or her powers as advocate.

Prohibition by the mentioned articles of Criminal Procedure Code, the defender of certain actions, the proper exercise by an advocate of the obligations to provide qualified legal assis­tance provided for in Article 92.11 of the Code and Article 16 of the Law “On Lawyers and Legal Practice” as well as the protection of the legitimate interests of the defendant. This is reflected mainly in the prohibition of the advocate from par­ticipating in proceedings involving the suspect or accused, as well as in the refusal of the defense by himself or herself.

An analysis of Article 92.10.1 of Criminal Procedure Code makes it clear that, the involvement of advocate in the pro­ceedings involving the defendant is a requirement of the law, and the refusal to participate in the conduct of such actions was forbidden to protect the legitimate interests of the defen­dant. Such refusal along with being regarded as the contra­dicting to legal interests of the defendant and the requirements of the criminal procedure law, it also can be regarded by the legislation as improper fulfillment of the duties of the advo­cate.

In this connection, it should be noted that in order to pro­tect the legal interests of the suspect or the accused, the advo­cate fulfills his/her procedural responsibilities by participating in procedural actions involving the defendant. Ensuring of implementation of the procedural rights and duties of the advocate in criminal proceedings, in the end, is a significant contribution to the administration of justice.

The Plenum of Constitutional Court considers necessary to note that the provision of Article 92.10.3 of Criminal Procedure Code “arbitrary refusal of defense” includes, along with the total refusal of advocate, the rejection of certain stages of the defense process and the refusal, without good reason, to participate in any proceedings.

Thus, the legislator does not make the participation of the advocate in proceedings involving the suspect or accused dependent on the assertion of the advocate and the defendant.

The participation of advocate in the proceedings without the participation of a defendant should be carried out by agreeing with him/her in order to effectively protect the defense, taking into account the interests of the defendant.

The Plenum of the Constitutional Court in connection with the inquiry on interpretation of the right of the advocate to participate in the search and seizure investigation provided for in Article 244.2 of Criminal Procedure Code, noted the fol­lowing. The detailed procedure for the exercise by advocate of the procedural rights listed in Article 92.9 of Criminal Procedure Code is laid down in the special rules of the Code. According to Article 244.2 of Criminal Procedure Code, which is one of these articles, the advocate is entitled to be present during the search and seizure in the relation of suspect or accused person. If the advocate, who has previously been warned by the investigator of the conduct of the investigation, wishes to be present during the search and seizure, the inves­tigator must ensure such right.

It should be noted that the right of advocate to be present during the search and seizure established in Article 244.2 of the Code includes the possibility provided for by law to ensure the exercise of the criminal procedure functions of the defen­dant in order to protect his/her legitimate interests. In this con­text, the legislator imposed on the investigator the obligation to prior warn the advocate about the conduct of this inves­tigative action, and if the advocate wishes to be present dur­ing the search and seizure - to ensure such right.

Search and seizure proceedings covered the procedural acts regardless of participation of the suspect or the accused. In such case, the issue of participation of an advocate in these investigative actions should be resolved taking into account the requirements of Articles 92.9.3, 92.10.1 and 92.10.3 of Criminal Procedure Code, depending on whether the suspect or accused is involved. That is, when the investigation is car­ried out with the participation of the accused, according to the imperative norm of Article 92.10.1 of Criminal Procedure Code, the refusal of advocate to participate in this proceeding contrary to the legitimate interests of the defendant is forbid­den. If such investigation is carried out without the participa­tion of a suspect or accused, then, according to Article 92.10.3 of Criminal Procedure Code, the advocate cannot refuse to take part at such investigate actions if it was required by the suspect or accused. As the involvement of advocate in the criminal proceedings, as a rule, depends on the will of the sus­pect or the accused, with the purpose of the effective defense, he/she must exercise this right in concordance with the person he/she advocates, rather than on the basis of his/her own dis­cretion.

The Plenum of Constitutional Court also notes that in the absence of circumstances of compulsory participation in inves­tigative or other procedural actions and in the absence of such requirement on the part of the suspect or accused, it is unac­ceptable for the body conducting criminal proceedings to require the participation of counsel in such actions.

It should be noted, however, that in view of the need for prompt investigation of the search or seizure, these investiga­tions are not excluded without the participation of advocate. In this case, the investigator must make a reasoned decision to carry out a search or seizure (Decision of the Plenum of Constitutional Court of February 12, 2015 “On interpretation of some provisions of Articles 137 and 445.2 of the Criminal Procedure Code of the Republic of Azerbaijan”).

In view of the above, the Plenum of Constitutional Court concludes as follows:

* there are no contradictions between Articles 92.10.1 and 92.10.3 of Criminal Procedure Code and Article 244.2 of the same Code;
* the right of advocate to participate in conduction of search and seizure referred to in Article 244.2 of Criminal Procedure Code include the possibility provided by law to carry out its criminal proceedings functions in order to protect the legiti­mate interests of the suspect or the accused;
* from the point of view of Article 61 of Constitution and in accordance with the requirements of Article 92.10.1 of Criminal Procedure Code, when the search and seizure inves­tigations provided for in Article 244 of this Code are carried out with the participation of a suspect or accused, the advo­cate may not refuse to participate in those proceedings in order to protect them;
* the provision of Article 92.10.3 of Criminal Procedure Code “arbitrary refusal of defense”, along with the full refusal of advocate, also include the refusing to participate in any pro­cedural actions as well as refusal to participate in any proce­dural action without reason;
* from the point of view of requirements of Article 92.10.3 of Criminal Procedure Code, when the search and seizure investigations provided for in Article 244 of this Code were carried out without the participation of a suspect or accused, the advocate cannot refuse to participate in the proceedings without the consent of the defendant.

Being guided by part IV of Article 130 of the Constitution of the Republic of Azerbaijan and Articles 60, 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. There is no contradiction between Articles 92.10.1 and 92.10.3 of Criminal Procedure Code and Article 244.2 of the same Code.
2. The right of advocate to participate in conduction of search and seizure referred to in Article 244.2 of Criminal Procedure Code include the possibility provided by law to carry out its criminal proceedings functions in order to protect the legitimate interests of the suspect or the accused.
3. From the point of view of Article 61 of Constitution and in accordance with the requirements of Article 92.10.1 of Criminal Procedure Code, when the search and seizure inves­tigations provided for in Article 244 of this Code are carried out with the participation of a suspect or accused, the advo­cate may not refuse to participate in those proceedings in order to protect them.
4. The provision of Article 92.10.3 of Criminal Procedure Code “arbitrary refusal of defense”, along with the full refusal of advocate, also include the refusing to participate in any pro­cedural actions as well as refusal to participate in any proce­dural action without reason.

From the point of view of requirements of Article 92.10.3 of Criminal Procedure Code, when the search and seizure investigations provided for in Article 244 of this Code were carried out without the participation of a suspect or accused, the advocate cannot refuse to participate in the proceedings without the consent of the defendant.

1. The decision shall come into force from the date of its publication.
2. The decision shall be published in “Azerbaijan”, “Respublika”, “XalqQazeti” and “BakinskiyRabochiy” news­papers, and “Bulletin of the Constitutional Court of the Republic of Azerbaijan”.
3. The decision is final, and may not be cancelled, changed or officially interpreted by any institution or official.