**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

##### OF CONSTITUTIONAL COURT

##### OF THE REPUBLIC OF AZERBAIJAN

*On interpretation of provisions of Articles 228.1, 229.1, 230, 231 and 232.1 of the Criminal Code of the Republic of Azerbaijan*

# 21 June, 2010 Baku city

The Plenum of Constitutional Court of the Republic of Azerbaijan composed of F.Abdullayev (Chairman), S.Salmanova, F.Babayev, S. Hasanova, R. Gvaladze, I.Najafov and A.Sultanov (Reporter Judge);

attended by the Court Clerk I.Ismayilov,

the legal representatives of the subjects interested in special constitutional proceedings: I.Jafarov, Head of Department for the Maintenance of State Prosecution of the Prosecutor’s Office of the Republic of Azerbaijan, E.Askerov, senior advisor of the Department for Administrative and Military Legislation of Milli Majlis of the Republic of Azerbaijan,

the experts: J.Ahmedov, Head of Ballistics and Trace Examination Department of the Centre of Court Expertise of the Ministry of Justice of the Republic of Azerbaijan; B.Askerov, associate professor of Chair of Criminalities and Court Expertise of the Law Faculty of Baku State University,

visiting specialist: M.Agazade, Judge of the Supreme Court of the Republic of Azerbaijan,

based on Article 130.4 of the Constitution of the Republic of Azerbaijan has examined in open court session via special constitutional proceeding the constitutional case on inquiry of Prosecutor’s Office of the Republic of Azerbaijan on interpretation of provisions of Articles 228.1, 229.1, 230, 231 and 232.1 of the Criminal Code of the Republic of Azerbaijan;

having heard the report of Judge A.Sultanov, the reports of legal representatives of the interested subjects, conclusion of experts and opinion of visiting specialist, the Plenum of Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS:**

In its inquiry the Prosecutor General of the Republic of Azerbaijan asks Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as Constitutional Court) to give interpretation of Articles 229.1, 230, 231 and 232.1 of the Criminal Code of the Republic of Azerbaijan (hereinafter referred to as CC) from the point of view of extend on them of provision of the same Code “the smooth-bore hunting weapon and ammunition to it” specified in Article 228.1.

In inquiry it is indicated that in Article 228.1 of the CC the criminal liability for illegal purchase, transfer, selling, storage, transportation or carrying of fire-arms, accessories to it, supplies (except for the smooth-bore hunting weapon and ammunition to it), explosives or explosive devices is provided.

This Code establishes criminal liability for illegal manufacturing of fire-arms, supplies to it, ammunition, explosives, and also repair of firearms (Article 229.1), the negligent storage of the fire-arms which have created conditions for its use by another person, entailed to heavy consequences (Article 230), inadequate execution of a duties by a person to which protection of fire-arms was assigned, ammunition, explosives or other explosives, plunder or destruction of which has entailed is other heavy consequences (Article 231), plunder or extortion of fire-arms, accessories to it, supplies or explosives (Article 232.1).

In inquiry it is noted that as evident from specified articles of the Code, only in a disposition of Article 228.1 criminal liability for transfer, selling, storage, transportation or carrying of smooth-bore hunting weapon and ammunition to it is excluded. However in dispositions of Articles 229.1, 230, 231 and 232.1 of this Code such exception is unforeseen.

Petitioner considers that existence in the text of the criminal law of such distinction, being a reason of discrepancy in investigative and court practice, interferes with formation of uniform jurisprudence on criminal cases of such kind. So, in court practice in some cases the exception of criminal liability for transfer, selling, storage, transportation or carrying of smooth-bore hunting weapon and ammunition to it belongs along with a crime provided by Article 228.1 of the CC, also to the crimes provided in Articles 229.1, 230, 231 and 232.1 of this Code.

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

According to Article 80 of the Constitution, violation of the Constitution and laws entail responsibility as prescribed by law. According to Article 94.1.17 of the Constitution the Milli Majlis of the Republic of Azerbaijan define crimes and other violations of law, and establish liability for the commission thereof.

According to Article 71.8 of the Constitution no one shall be liable for an act which did not constitute an offence at the time when it was committed. If, after the commission of an offence, a new law abolishes or diminishes liability for such an offence, the new law shall be applied.

By the latter Constitutional provision the possibility of attraction of the person to responsibility for commission of the act provided as an offense only by the legislation, acting at the time of commission of this act is established. This right found the reflection also in Article 15 of the International Covenant on Civil and Political Rights and in Article 7 of the European Convention on Protection of Human Rights and Fundamental Freedoms.

The European Court of Human Rights noted that the specified norm 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 (*nullum crimen, nulla poena 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 (the decision of 9 October 2008 on case of Moiseyev v. Russia, §233).

Importance of the mentioned principles is observed and in jurisprudence of the European states. For example, in the decision of the Constitutional Court of Belgium of 13 July 2005 it is specified that the nullum crimen, nulla poena sine lege principle derived from the idea that the criminal law should be framed in terms which enabled everyone to know, when he or she adopted a form of conduct, whether it was punishable. It required that it be stated in legislation, in sufficiently detailed and clear terms offering legal certainty, what acts would be punished, firstly so that someone adopting a particular form of conduct could assess in advance what the criminal consequences of that conduct would be and secondly so that the courts were not given too much discretion.

Thus, considering provisions of the Constitution, a legal position of the European Court and the international practice, becomes obvious that the exact and unambiguous indication in the law of the act involving criminal liability is required. From this follows that for the purpose of prevention of criminal prosecution of innocent persons and avoidance of not criminal prosecution of perpetrators, the provision of the criminal law establishing responsibility, should not be uncertain and ambiguous.

Proceeding from it, it should be noted that by the some norms of the criminal legislation of the Republic of Azerbaijan some forbidden acts connected with firearms are established (Articles 228-232 of the CC).

The notion “firearms” provided in these articles is specified in the Protocol “Against the illicit manufacturing of and trafficking in firearms, their parts and components and ammunition”, supplementing the United Nations Convention against

Transnational Organized Crime to which the Republic of Azerbaijan joined by the Law N.750-IIQ of 10 September 2004. According to the point “a” of Article 3 of this Protocol, “firearm” shall mean any portable barreled weapon that expels, is designed to expel or may be readily converted to expel a shot, bullet or projectile by the action of an explosive, excluding antique firearms or their replicas. Antique firearms and their replicas shall be defined in accordance with domestic law. In no case, however, shall antique firearms include firearms manufactured after 1899.

The concept of firearms found the reflection also in the national legislation of the Republic of Azerbaijan. According to Article 2.8 of the Law of the Republic of Azerbaijan “On the service and civilian weapon” (hereinafter referred to as Law “On the service and civilian weapon”), firearms – the weapon, capable to put mechanical damage at a certain distance or to put out of action the target by the shell which is setting in directed motion for the account of energy of ignition of gunpowder or other flammable substances. The specified Law established a circle of the actions connected with a ban of a turn of service and civilian weapon, including of firearms, and acquisition, carrying and use, also its production and sale is caused by obtaining the corresponding permission (Articles 3, 8 and 9 of the Law “On the service and civilian weapon”).

Violation of this Law and the rules established by other relevant acts becomes the reason of origin of responsibility. So, the specified Law regulates the legal relations connected only with a turn of the service and civilian weapon, but responsibility for illegal actions with firearms is regulated by other laws, including criminal liability which is established by the criminal law. As one of types of such responsibility acts Article 228 of the CC.

According to this article, “illegal purchase, transfer, selling, storage, transportation or carrying of fire-arms, accessories to it, supplies, explosives or explosive devices” forms criminal act. However the provision “except for the smooth-bore hunting weapon and ammunition to it” reflected in specified norm referred to category of the civilian weapon by Article 2.3 of the Law “On the service and civilian weapon”, leaves such weapon out of field of this article of the criminal law. In view of the fact that by implication of Article 228.1 of the CC the smooth-bore hunting weapon and ammunition to it are not crime subjects, then accessories of this weapon also do not form criminal liability.

In that case, purchase, storage, carrying, transfer to other persons or sale of the hunting firearms, accessories and ammunition to it by the person who has not got permission of appropriate authority of executive power of the Republic of Azerbaijan, can become the origin of reason only for administrative responsibility (Article 346.2 of the Code on administrative offenses of the Republic of Azerbaijan).

For this reason only other illegal actions with this weapon have criminal law sense. Just such actions are provided in Articles 229.1, 230, 231 and 232.1 of the CC. So, the legislator, considering the principle of work of firearms and possibility of drawing lethal defeat and considering especially dangerous character in modern time, irrespective of service or civilian category, and also purpose, including whether serves for the hunting purposes, whether is rifle-bore or smooth-bore, established the acts which are cause of criminal liability, also as its illegal manufacturing (Article 229 of the CC), the negligent storage (Article 230 of the CC), the inadequate execution of a duties on protection (Article 231 of the CC), plunder or extortion (Article 232 of the CC).

It is especially necessary to note that Article 220 of the Criminal Code of the Republic of Azerbaijan acting till 1 September 2000, along with carrying, storage, purchase, sale of firearms, ammunition or explosives without the corresponding permission were provided as the act forming a crime also the production and marked out as an exception the smooth-bore sporting gun. Thus, the specified exception belongs also to production of firearms, ammunition or explosives.

However at present the legislator, having established in Article 229.1 of the CC production of firearms, ammunition or explosives as separate element of crime, did not provide in this article any exception connected with the smooth-bore hunting weapon. Also, in spite of the fact that Article 220.1 of the Criminal Code of the Republic of Azerbaijan acting till 1 September 2000, at determination of criminal liability for theft of firearms, ammunition and explosives excluded the smooth-bore hunting weapon, the Article 232.1 of acting CC devoted to “plunder or extortion of fire-arms, accessories to it, supplies or explosives”, did not provide such exception. Proceeding from it, the legislator refused to carry the exceptions connected with the fire hunting weapon to certain crimes.

Thus, it becomes clear that the legislator deliberately did not provide the exceptions connected with smooth-bore firearms in Articles 229-232 of the CC. As confirmation it can cite as an example also Article 206 of the CC establishing criminal act “smuggling”. So, in noted article, also as well as in Article 228.1 of the CC, the smooth-bore hunting weapon and ammunition to it are expelled from crime structure.

According to the above mentioned Plenum of the Constitutional Court comes to conclusion that:

According to sense of Article 228.1 of the CC illegal purchase, transfer, selling, storage, transportation or carrying of smooth-bore hunting weapon and ammunition to it, exclude the criminal liability provided in this Article;

Negligent storage and also inadequate execution of duties on protection of the weapon and ammunition to it, also illegal production of the smooth-bore fire hunting weapon, accessories and ammunition to it, plunder or the extortion of the smooth-bore fire hunting weapon specified in Article 228.1 of the CC form structure of the crimes provided respectively in Articles 230, 231, 229.1 and 232.1 of the CC.

Being guided by Article 130.4 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”, Plenum of the Constitutional Court of the Republic of Azerbaijan

**DECIDED:**

1. According to Article 228.1 of the CC illegal purchase, transfer, selling, storage, transportation or carrying of smooth-bore hunting weapon and ammunition to it, exclude the criminal liability provided in this Article;

2. Negligent storage and also inadequate execution of duties on protection of the weapon and ammunition to it as well as illegal production of the smooth-bore fire hunting weapon, accessories and ammunition to it, plunder or the extortion of the smooth-bore fire hunting weapon specified in Article 228.1 of the CC, form structure of the crimes provided respectively in Articles 230, 231, 229.1 and 232.1 of the CC.

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 can not be cancelled, changed or officially interpreted by any body or official.