**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE PLENUM OF THE CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*On the interpretation of Article 53.4 of Criminal Code of the Republic of Azerbaijan and Article 112.1 of Code of Execution of Punishments of the Republicof Azerbaijan*

**17 March, 2011                                                                         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 Ismayilov, JeyhunGarajayev, Rafael Gvaladze, Isa Najafov and Kamran Shafiyev,

attended by the Court Clerk I.Ismayilov,

legal representatives of interested subjects - chief adviser of the Department of Administrative and Military Legislation of the MilliMajlis of the Republic of Azerbaijan EldarAskerov and judge of Narimanov District Court of Baku city Senan Hajiyev,

expert - Associate Professor of Criminal Law and Criminology of the Baku State University, Doctor of Philosophy in Legal Education Jabir Guliyev,

in accordance with Article 130.6 of the Constitution of the Republic of Azerbaijan has examined in open judicial session by way of special constitutional proceedings the petition in connection with the treatment of Narimanov District Court of Baku city on December 16, 2010 concerning the interpretation of Article 53.4 of the Criminal Code and Article 112.1 of the Code of Execution of Punishments of the Republic of Azerbaijan.

Having heard the report of Judge F.Babayev, reports of interested subjects and specialists, hearing the opinion of an expert, examining and discussing the materials of the case, Plenum of the Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS:**

Narimanov District Court of Baku city addressed to the Constitutional Court of the Republic of Azerbaijan (hereinafter - the Constitutional Court) in connection with the interpretation of Article 53.3 of the Criminal Code (hereinafter - the Code) concerning the Article 58.1 of the Code and Article 112.1 of the Code of Execution of Punishments of the Republic of Azerbaijan concerning article 56.1.1 of the Criminal Code.

The appeal states that R.Agayev found guilty under Article 131.2 of the Code according to the verdict of Kurdamir District Court on August 25, 2010, was sentenced to a penalty of restriction of liberty for a term of one year. After the entry into force the verdict R.Agayev was taken on the account in special institution № 11 of the Penitentiary Service of the Ministry of Justice.

Decision of the administration of the special institution on November 28, 2010 in respect of the convicted R.Agaev for his unauthorized abandonment of territory of the office on November 27, 2010 the penalty was applied in the form of a reprimand. Because of repeated unauthorized abandonment of territory of the office by R.Agaev on December 6, 2010 administration of the institution determined in his attitude the penalty - putting in disciplinary facilities for a period of five days.

On December 7, 2010 the administration of the special institution № 11 appealed to court with the idea of ​​replacing the unserved part of the punishment of restriction of liberty for 10 months 28 days of convicted R.Agaev to the penalty of deprivation of liberty.

In appeal Narimanov District Court pointed to the existence of uncertainty in the law with regard to the limits of punishment assigned to the case of replacement of the unserved part of the punishment of restriction of freedom for a sentence of imprisonment, as well as to determination of the penitentiary type.

The appeal was based on the fact that, in accordance with the requirement of Article 53.4 of the Criminal Code in the case of substitution of the unserved part of the punishment of convicted R.Agaev punished by imprisonment sentence of restraint shall be included in the term of imprisonment at the rate of one day of imprisonment for one day of restricted freedom and the decision of the court, he must be sentenced to a prison term of more than 10 months. However, the sanction of Article 131.2 of the Criminal Code on the basis of which R.Agayevis guilty, last sentence of imprisonment is set to six months.

Narimanov District Court hearing the view held that the Constitutional Court should clarify the question about replacing the unserved part of the punishment of restriction of liberty for more than 10 months by assigned to R.Agaev sentence to a penalty of imprisonment in accordance with Articles 53.4 and 58.1 of the Criminal Code and determination of the penal institution in accordance with Article 56.1.1 of the Criminal Code or article 112.1 Code of Execution of Punishments replacing punishment in the form of imprisonment.

For the correct solution to the raised question, the Plenum of the Constitutional Court considers it necessary to clarify the concept and purpose of the punishment, the meaning and the legal nature of the punishment to replace a heavier form of punishment.

The structure and content of the criminal law is a guarantee of solving the questions of Criminal Code. Objects protected by criminal law are constructed by sequence determined on the basis of the hierarchy of values. The modern science of criminal law highlights the protection of peace and security of mankind, people, individual, his rights and freedoms, that is, the natural rights arising from the birth of man.

To carry out the tasks set out in Article 2 of the Criminal Code, there were established the acts in the Code which are appeared as crime and defined penalties and other measures of the criminal law applicable to persons who are guilty in committing crimes.

Under the criminal law, each person who committed socially dangerous acts of a criminal nature should be punished. On the one hand the punishment is the reaction of the state to the committed crime, and on the other hand to a person who committed a criminal act is the criminal legal result of the committed crime. Punishment is a special measure of state coercion, and it can be appointed only by the criminal law for an act or omission referred to as a crime.

The article 41.1 of the Criminal Code gives the concept of punishment. According to this concept punishment is a measure of the criminal law, appointed by a court. The penalty applies to a person convicted in committing a crime and is to create a determined by Criminal Code deprivation or restriction of the rights and freedoms of the person.

The criminal legislation of the Republic of Azerbaijan along with the concept of punishment also defines the system and the types and general principles of sentencing.

In imposing a sentence must be taken into account the principles of the rule of law, equality before the law, the responsibility for the guilt, justice and humanity of the Criminal Code.

According to these principles criminality of act (action or inaction), as well as the punishment for this act, and other measures of criminal law are determined solely by this Code. A person shall be tried and punished only for the socially dangerous acts (actions or inaction) and their implications with respect to which his fault is determined. Punishment and other measures under the criminal law applicable to a person who has committed a crime, should be fair, that is, should be appropriate to the nature and degree of social danger of the crime, the circumstances of its commission, and the personality of guilty (Articles 5.1, 7.1 and 8.1 of the Criminal Code).

The principles contained in the Criminal Code, based on a number of constitutional principles that reflect the nature and essence of the democratic state and provide the guarantee of the rights and freedoms of individuals and citizens in criminal law (Articles 25, 28, 32, 33, 60, 61, 63, 64, 65, 66, 67, 68, 71, 125 and 127 of the Constitution of the Republic of Azerbaijan).

Considering the provisions of the General Part of the Criminal Code, the court shall appoint a fair punishment on a person convicted of a crime within the limits specified in the relevant articles of the Special Part. At the same time, when sentencing, court must consider the nature of the offense and the degree of public danger, the personality of the accused, including the circumstances mitigating and aggravating the punishment, as well as the effect of the imposed punishment to correction the accused and to the life of his family. Appointment of fair punishment first of all is an important tool in achieving the purpose of punishment, that is, the restoration of social justice, of correction and prevention of new crimes by convicted and others.

Along with the circumstances of determination of punishment for multiple offenses and cumulative sentences in the criminal law there is an opportunity in provision for the replacement of punishment imposed by court on an even more grievous punishment in the form of persistent evasion of execution of punishment.

Articles 44.4, 47.3, 49.3 and 53.4 of the Criminal Code provides for replacement determined to nominee punishment to more severe punishment in the form of malicious evasion face of the penalty.

In the case of fraudulent evasion of serving of sentence by person convicted to imprisonment, it is replaced with a punishment of imprisonment for a term of imprisonment. When replacing the punishment of restriction of freedom with punishment restriction of liberty the term of serving the restraint shall be included in the term of imprisonment at the rate of one day of imprisonment for one day of restriction of liberty (Article 53.4 of the Criminal Code).

As can be seen, to ensure the execution of punishments the legislator defined the procedure in the Criminal Code for replacing some of the penalties to more severe punishments. The main condition for this commutation is willful refusal of the convicted person to execute or serve a sentence, and such a substitution of the punishment enhances the effect of corrective punishment.

Plenum of the Constitutional Court notes that the legislature in exercise of its specific powers in the field of safety and protection of human and civil rights, as well as in criminal law - human rights in the content of the criminal law, including punishment for a socially dangerous acts and other criminal legal circumstances of committed by an individual impact within the Constitution. From this point of view, the legislator has the power to determine the possibility of appointment to a person convicted in a crime punishment not involving deprivation of liberty, including the sentencing of restraint of liberty, and replace it with another penalty in case of non-compliance with the requirements provided by law, with respect to serving the sentenced punishment.

It should be note particularly that the legislature, by securing the order provided for in Article 53.4 of the Criminal Code does not go beyond its powers. This provision in relation to the principles of law, equality before the law, responsibility for the guilt, justice and humanism of the Criminal Code is tolerated neitherduring appointment of a new penalty for the offense for which the person was previously convicted, nor during appointment of an independent punishment for the act, which is not a crime (that is, failure from the penalty of restriction of liberty). This provision provides an equivalent for the replacement of the designated by court judgment, but not executed by convicted person. And this, in turn, creates the conditions for the execution of the sentence and it provides the imminence (inevitability) and the validity of responsibility for the criminal act, for which the person was convicted.

Thus, with persistent evasion from execution of the sentence its replacement with more severe punishment may not be regarded as the appointment of a new sentence. In this case, the imposed punishment is replaced by more severe punishment.

Plenum of the Constitutional Court emphasizes that the admission of the appropriate submission of the replacement of the sentenced punishment for more severe punishment in cases provided in Articles 44.4, 47.3, 49.3 and 53.4 of the Criminal Code, the court should first determine the validity of view, the causes of malicious evasion and others. At the same time, during the replacement of the punishment for more severe punishment on the basis of representation, the court should again consider the personality of the convicted person, as well as effects of replaced punishment to correction of the person and the living conditions of his family.

Thus, as a result of conceptual analysis of the institute of commutation of punishment it becomes clear that considering the nature of the violation, as well as the personality of the convicted person, the replacement of more serious kind of punishment is not an obligation, but a right of court.

In addition, the replacement of the penalties, provided for in Articles 47.3 and 49.3 of the Criminal Code, for more severe form of punishment applies only to the unserved part of the punishment and based on the principles of fairness and legal certainty this approach of the legislator is with the principle of justice.

Plenum of the Constitutional Court on the basis of the principles of justice and legal certainty believes that the provision of Article 53.4 of the Criminal Code "restriction of freedom is replaced by imprisonment for a period of restriction of liberty" includes replacement of this penalty for punishment of imprisonment only within the unserved part of the punishment.

Due to the uncertainty that has arisen in determining the penitentiary type, the Plenum of the Constitutional Court notes the following.

The legislation on the execution of sentences that determines the order of execution, serving and conditions of the defined by court sentences, consists of Code of the Execution of Punishments, other normative legislative acts of the Republic of Azerbaijan and international treaties, the part of which is the Republic of Azerbaijan (Article 1 CEP).

The aim of CEP is to fix convicted persons, prevention of committing of new crimes both by convicted and other persons. The objective of this Code is to regulate the procedure and conditions for execution and serving sentences, identify means of correction of convicted persons, the protection of their rights, freedoms and legitimate interests (Articles 2.1 and 2.2 of CEP).

The legislation on the enforcement of sentences according to its mission defines the general rules and principles of execution of punishments, provided for in the Criminal Code, other measures of criminal law, the application of corrective action in relation to convicted persons, terms and conditions of the execution and service of punishments, the legal status of prisoners, the order of activity of criminal executive institutions and penal authorities, the participation of the relevant executive authorities, other agencies, offices or organizations, public associations and citizens in the correction of convicted persons, rules for releasing of convicted persons from serving a sentence and assisting individuals, freed from serving a punishment.

In accordance with Article 6 of the CEP there were identified the grounds of execution of punishments. Thus, the grounds of execution of punishments and the use of other measures to convicted persons under the criminal law are the sentences of the court, which has the legal force, as well as settlements of the court, which change those sentences, acts of amnesty or pardon.

At the same time, there were established the recovery factor terms and conditions of execution, organization of execution of punishment of persons convicted with such types of punishments, as fine, community service, correctional labor and restraint, the order of calculation of the penalty period, the rights and obligations of sentenced persons, incentive and prospecting measures used against them, as well as the responsibility of persons, serving sentences and others.

It should be noted that the basis of substitution of the punishment by more severe punishment is defined in Articles 44.4, 47.3, 49.3 and 53.4 of the Criminal Code, and the general order of the circumstances of malicious evasion of serving of punishment is provided for in Articles 26, 38.2, 51.4, 53.2 and 53.3 of CEP.

Non-arrival or non-return of the convicted person in a special institution without valid reasons and leaving the territory of the special institution without the permission is willful refusal to the penalty of restriction of liberty (Article 63 of CEP).

Plenum of the Constitutional Court reiterates that the application by authority penalties against convicted person should be taken into account conditions of commission of the offense, the personality of the convicted and his behavior before the commission of the offense, as well as compliance with the severity and recovery features of committed misconduct of the convicted. Investigating misconducts, which caused the submission made to the court to replace the defined punishment for punishment of imprisonment for a fixed term, the courts must especially pay attention to the conditions above.

As can be seen, the prevention of cases of malicious evasion of execution of punishment that has no relation to the isolation of the convicted from society, is one of the tasks of CEP. To achieve the aims of these punishments legislator has determined implementation of the above measures either in the Criminal Code, or in CEP. At the same time, one of these measures listed in Article 112.1 of CEP. According to this article there are serving in the penitentiary institutions of a common mode persons convicted for the first time to imprisonment for a fixed term for an intentionally not posed danger to society, less serious and serious crimes, and persons, sentenced to imprisonment for more than five years for committing crimes by negligence, as well as persons, whose punishment is replaced for punishment of imprisonment for defined period.

However, according to Article 56.1 of the Criminal Code, dedicated to the establishment of the type of penitentiary institution there is set a service of sentence in colony type of penitentiary institutions for persons, sentenced to the penalty of deprivation of liberty, those convicted, who sentenced to imprisonment for a term not exceeding five years crimes for committing crime through negligence.

Despite this, the legislator appraising avoidance of persons, sentenced to the penalty of a fine, community service, hard labor and restrictions of freedom even for a crime committed for the first time due to negligence, from the execution of penalty as a maliciously committed action, when replacing these types of penalties for penalty of deprivation of liberty for a certain period found their place in common mode of penitentiary institution.

In this case, when replacing by the courts punishments of those sentenced to a fine, community service, hard labor and restriction of liberty, the punishment of imprisonment for a fixed term, the type of the confinement should be set in accordance with Article 112.1 of CEP.

However, the Plenum of the Constitutional Court in its rulings have repeatedly emphasized the importance of the principles of proportionality, legal certainty, balance, which is one of the highest principles of law when adopting the normative legal actsby legislator to regulate any public relations. Observance of these principles has been approved by the Constitutional Law of the Republic of Azerbaijan "On normative legal acts" of 21 December 2010. According to the legal opinion, formed by the Constitutional Court concerning the nature and value of legal certainty, the principle of legal certainty stands as one of the main features of the rule of law. It is extremely important to observe the principle of legal certainty by each law or any of its provision. To ensure this, legal acts must be unambiguous and clear. This, in turn, should give everyone confidence in the protection of his rights and freedoms and predictability in the actions of the applied law.

At the same time, taking into consideration the provisions of the Constitution, the legal position of the European Court of Justice and the international practice of the Plenum of the Constitutional Court noted that an exact, unambiguous indication in the law of act that creates a criminal offense. Based on this, not to create the conditions to attract innocent persons to justice and avoidance of persons found guilty of criminal responsibility, the provisions of criminal law establishing liability should not be vague and ambiguous. (Resolution of the Plenum of the Constitutional Court on the interpretation of provisions of Article 21 of the Law of the Republic of Azerbaijan "On the basis of call of military service in the Republic of Azerbaijan" and Article 180.3 of the Code of Execution of Punishments of the Republic of Azerbaijan on September 22, 2008 and on the interpretation of certain provisions of Articles 228.1, 229.1, 230, 231 and 232.1 of the Criminal Code of the Republic of Azerbaijan of June 21, 2010).

However, the order of commutation of persons sentenced to a fine, public works, hard labor and restriction of liberty by more serious punishment are set differently in the Criminal Code.

Thus, despite the fact that Article 44.4 of the Criminal Code in respect of persons who evade paying the fine, and provides replacement of this kind of punishment by punishment of public works, corrective labor or imprisonment for a fixed term, terms and conditions of such a change in the criminal law are not been established. In addition, setting the term of a sentence by replacing a sentence of hard labor, in case of the term rate of one day of imprisonment for one day of hard labor, or one day in prison for three days of hard labor, by replacing restrictions on liberty of imprisonment while serving restraint is included in the term of imprisonment rate of one day in prison for one day of imprisonment. As can be seen, at the replacement of punishment in that order in one case, the punishment of restriction of freedom was equated to a sentence of hard labor, and in the other case to a sentence of imprisonment (Article 49.3 and 53.4 of the Criminal Code).

Given the above, the Plenum of the Constitutional Court has come to the conclusion that the provisions of the criminal law about replacement of the punishment should be improved, and the disproportionality and confusion that exist between the provisions for a change of the sentence imposed in the cases provided for in Articles 44.4, 47.3, 49.3 and 53.4 of the Criminal Code on more serious penalty should be eliminated by the legislative body.

According to mentioned above, the Plenum of the Constitutional Court in relation to the issues raised in the appeal of Narimanov District Court of Baku city, comes to the following conclusions:

- in case of replacement of defined punishment by more serious punishment the courts should take a decision considering the nature of the crime for which the person was convicted, the individual of person found guilty in committing a crime, the causes of failure and willful evasion of execution of defined sentence;

- in case of replacement of defined punishment by more serious punishment decision taken by the courts on the basis of Article 53.4 of the Criminal Code should be solid;

- in case of willful evasion of punishment of person sentenced to the penalty of restriction of liberty in the manner provided in Article 53.4 of the Criminal Code, remanent restraint of restriction of liberty may be replaced by a punishment of imprisonment, and in this case, the time of completion of restraint will be counted in term of imprisonment with rate of one day in prison for one day of restriction of liberty;

- in case of replacement of punishment of restraint by punishment of imprisonment for a fixed term type of the confinement should be determined in accordance with Article 112.1 of the Criminal Code;

- to recommend to Milli Majlis of the Republic of Azerbaijan for improvement the provisions of the Criminal Code with respect to change penalties.

Being guided by Article 130.4 of the Constitution, Articles 60, 63, 65-67 and 69 of the Law of the Republic of Azerbaijan "On the Constitutional Court", the Plenum of the Constitutional Court of the Republic of Azerbaijan

**DECIDED:**

1. In case of willful evasion of punishment of person sentenced to the penalty of restriction of liberty in the manner provided in Article 53.4 of the Criminal Code, remanent restraint of restriction of liberty may be replaced by a punishment of imprisonment, and in this case, the time of completion of restraint will be counted in term of imprisonment with rate of one day in prison for one day of restriction of liberty.

2. In case of replacement of punishment of restraint by punishment of imprisonment for a fixed term type of the confinement should be determined in accordance with Article 112.1 of the Criminal Code.

3. to recommend to Milli Majlis of the Republic of Azerbaijan for improvement the provisions of the Criminal Code with respect to change penalties.

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

5. The decision shall be published in “Azerbaijan”, “Respublika”, “XalqQazeti” and “Bakinskiy Rabochiy” newspapers, and “Bulletin of the Constitutional Court of the Republic of Azerbaijan”.

6. The decision is final, and may not be cancelled, changed or officially interpreted by any body or official.