**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

##### OF THE PLENUM OF CONSTITUTIONAL COURT

##### OF THE REPUBLIC OF AZERBAIJAN

*On interpretation of Article 182.2.4 of the Criminal Code*

*of the Republic of Azerbaijan*

# 21 October, 2011 Baku city

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

attended by the Court Clerk I.Ismayilov,

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

the experts: professor Firuddin Samandarov, Head of the Law Department of Baku State University, Doctor of Legal Sciences;

specialist: Shahin Yusifov, Chairman of Criminal Board 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 Article 182.2.4 of the Criminal Code of the Republic of Azerbaijan;

having heard the report of Judge K.Shafiyev, 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’s Office of the Republic of Azerbaijan (hereinafter referred to as Prosecutor’s Office) asks Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as Constitutional Court) to give interpretation of provision of Article 182.2.4 of the Criminal Code of the Republic of Azerbaijan (hereinafter referred to as CC) “committed with causing damage to a victim in significant size”.

In inquiry of Prosecutor's Office it is noted that Article 182.1 of the Criminal Code establishes criminal liability for extortion, that is the requirement to transfer another's property or right on property or commitment of other actions which is admitted as in property nature under threat of application of violence, spreading of data, dishonoring a victim or his close relatives, as well as by threat of destruction of property belonging to them.

Article 182.2.4 of the CC provides criminal liability in connection with commission of the same acts with causing damage to a victim in significant size and Article 182.3.2 of the Code in connection with commission of the same acts with a purpose of occupying large size of property.

In inquiry it is noted that sometimes emergence of body of a crime provided by Article 182.2.4 of the CC, extortion with causing damage to a victim in significant size is caused only at real existence of noted damage. And then the provision “committed with a purpose of occupying large size of property” of Article 182.3.2 of the СС is compared to the provision “committed with causing a extensive damage” of Article 182.2.4 of the СС.

According to inquirer the origin of body of a crime of “extortion with causing an extensive damage to the victim” the СС provided by Article 182.2.4 at real existence of damage, contradicts to sense of Article 182 of the present Code.

In inquiry the Prosecutor's Office asks to interpret, whether the provision “committed with causing damage to a victim in significant size” provided in Article 182.2.4 of the СС cover cases of commission by guilty of actions for occupying large size of property when the significant damage actually was not caused.

According to Article 90 of the Constitutional Law of the Republic of Azerbaijan “On normative legal acts” at ambiguity and differences in contents of the normative legal act and also contradictions in practice of application, official interpretation gives to the relevant norms the law-making body which has adopted this act or the Constitutional Court of the Republic of Azerbaijan according to part IV of Article 130 of the Constitution of the Republic of Azerbaijan. At interpretation of the normative legal act the content of its norms, their place in the legislation are explained and specified and also functional and other connections with other norms regulating various aspects of an identical type of the public relations are defined.

Due to the inquiry Plenum of the Constitutional Court considers necessary first of all, to reveal an essence of the principle of legality of criminal law, its constitutional bases and also importance of execution of this principle.

The principles of criminal law relying on the general principles of legality are the main directions of criminal law-making and the activity, connected with application of this right, fixed in the rules of law establishing the nature of criminal law and its institutes.

Plenum of the Constitutional Court in the Decision of 17 March 2011 “On interpretation of Article 53.4 of the Сriminal Сode of the Republic of Azerbaijan and Article 112.1 of the Code on Execution of Punishments of the Republic of Azerbaijan” noted that the principles reflected in the СС, follow from a number of the Constitutional principles reflecting the nature and an essence of the democratic state and the rights providing guarantee and freedoms of the person and the citizen (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).

According to the principle of the legality, being one of the basic principles of criminal law criminal action (actions or inaction), and also punishments for this actions and other measures of criminal - legal nature are defined by only the Сriminal Code (Article 5.1 of the СС).

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.

At the same time the basis of origin of criminal liability of the person who has committed socially dangerous act, recognition of act as a crime and application to the person of the punishment established only by the criminal law, is one of fixed assets of ensuring the principle of legality.

Characteristic feature of the principles of the criminal law is their stability. Along with it, development of society deepens the content of these principles and therefore they are reflected in criminal law is more expanded.

On the basis of the above mentioned, Plenum of the Constitutional Court considers necessary to note that when adopting by legislature of the criminal legal norm it is necessary to pay special attention to observance of such principles of legality as the principle of supremacy, unity, expediency of the law and reality of legality. Execution of the listed principles follows from the principles of equality fixed in the Constitution, harmony, legal certainty, balance.

General legal criteria of accuracy, clarity, unambiguity of criminal legal norms follow from the principle of equality of all before the law and court and serve ensuring the principle of legality of the СС. So, ensuring the principles of legality and equality of all before the law and court is possible only as a result of uniform understanding and interpretation criminal legal norms by the all law-enforcement bodies. Otherwise, from the point of view of the principle of legality, uncertainty of the contents of legal norms in the course of right application, leads to the boundless examinations and an arbitrariness, and can break the principles of equality, rule of law.

From this point of view Plenum of the Constitutional Court in the Decision of 20 May 2011 “On interpretation of Article 221.3 of the Criminal Code of the Republic of Azerbaijan” noted that each crime and also criminal liability for its commission has to be accurately defined in the law. Everyone, proceeding from the content of the corresponding norm, has to have opportunity to expect criminal and legal consequences of the actions (inaction). The requirement of clearness, clarity, definiteness and certainty of rules of law, their compliances in system of right regulation follows from the above-noted constitutional principles. Otherwise, there can be contradictions in practice of the law-enforcement activity, protection of the rights weakening the state ensuring and freedoms, legitimate interests of citizens.

Based on above-noted, Plenum of the Constitutional Court considers that for the correct resolution of the questions which have been brought up in inquiry, elimination of uncertainty and ensuring the principle of legality qualification, the structure qualifying signs of extortion as criminal act (Article 182 of the СС) have to be investigated.

In the Decision of Plenum of the Constitutional Court of 17 March 2011 “On interpretation of Article 244.1 of the Criminal Code of the Republic of Azerbaijan” it was noted that at trial of each criminal act the correct establishment of its structure and the correct qualification are directed on establishment is a crime act reflecting signs of a crime, on establishment of existence of fault at the person accused of commission of crime, and also on purpose of fair punishment to the person accused for this crime. Otherwise it can become the reason of prosecution of the innocent person or evasion from responsibility of the person guilty of commission of crime, the wrong application of punishment. And it in turn can lead to violation of the principles of legality, equality before the law, responsibility for fault justice and humanity on which the Criminal Code is based.

In Article 182.1 of the СС the criminal liability for extortion is established. According to the present Article the extortion, that is the requirement to transfer another's property or right on property or commitment of other actions which is admitted as in property nature under threat of application of violence, spreading of data, dishonoring a victim or his close relatives, as well as by threat of destruction of property belonging to them is punished by restriction of freedom for the term from three up to five years.

First of all, it should be noted that in the criminal legislation the norms establishing responsibility for crimes depending on features and degree of danger of crimes divide into two groups: formal and material structure. In formal structure the objective element of a crime consists only of socially dangerous action (inaction). In crimes with such structure the action (inaction) forbidden by the law is considered ended from the moment of its commission.

In material structure, along with action (inaction) to objective element of a crime it is added also a socially dangerous result which has arisen in view of such action (inaction). The solution of a question on the responsibility arising in connection with commission of crime with material structure requires origin of socially dangerous result.

The extortion established in Article 182.1 of the ССs is a crime having formal structure. From the moment of promotion of requirements by means of threat, the crime is considered ended. So, regardless of transfer of property, the right to property or commission of actions of property character, this crime is considered ended from the moment of raise of threat.

Public danger of extortion is that this act encroaches not only on property of the person but also on other property relations (the obligation, inheritance, the apartment) acting as independent forms of property interests. At extortion infringement of the personality consists in illegal property requirements and illegal intervention in life of the person by means of threat.

For this reason extortion is considered a multi-object crime and the main object of this criminal action, the property right is additional – health, honor and dignity of the person.

The requirement of transfer of someone else's property or the right to property or commission of other actions of property character and, as a way of such requirement, threat of application of violence, or spreading of the data dishonoring the victim or his close relatives and equally threat of destruction of property belonging to them from the guilty – objective properties of extortion.

It is necessary to take into account that along with the property being in property of the victim and his close relatives, a subject of extortion can be the right to property and commission of other actions of property character. Actions of property character are understood, how the action bringing to guilty certain material benefit (destruction of the document of a debt certifying existence, wills refusal of a share being in the general property, etc.).

At the same time, in certain cases when extortion the requirement of transfer of someone else's property cannot be accompanied by threat. In this case guilty, based on objectively existing danger to the victim or his relatives makes the demand and specifies that for defined remuneration this threat can be eliminated.

In Article 182.1 of the СС some types of extortion are provided: 1) under the threat of application of violence; 2) under the threat of destruction of someone else's property; 3) under the threat of spreading of the data dishonoring the victim or his close relatives, or data which can cause a extensive damage to the rights and legitimate interests of the victim or his close relatives.

It should be noted that any threat has to be real and be perceived by victim as feasible threat. At extortion threat acts as means for acquisition of property and other property benefit. Threat can be expressed in the form of use of force over victim's identity or his close relatives, spreading of the data dishonoring them or destructions of their property. Threat can be expressed orally or in writing, openly or secretly, personally or by means of the intermediary. Under the threat is understood the application of violence threat of causing easy, less heavy or heavy harm to health.

Spreading of dishonoring data is a transfer to the third parties of information which spreading is not desirable for the victim or his close relatives. Dishonoring data regardless of that corresponding to reality or not is the any information recognized by the victim as humiliating his honor and dignity. The assessment of dishonoring data completely depends on how they are perceived by the victim. The victim tries to keep these data in secret and threat of their spreading is used by guilty for the purpose of acquisition from victim of certain property.

Extortion assumes existence at guilty the direct intention and mercenary ends. Guilty understands that makes the illegal demand and wants to acquire property by this way. In that case from the subjective element this crime is committed with direct intention. At the same time, for body of a crime of criminal action the presence at guilty an intention of implementation of threat is not important.

Plenum of the Constitutional Court, having investigated structure, the subject, object, objective and subjective characteristics of the crime committed by force of extortion notes that the crime committed by extortion is considered ended from the moment of the requirement of transfer of someone else's property or the right to property or commission of other actions of property character.

Along with it, in the criminal legislation some qualifying signs of the crime committed by extortion are provided. One of such qualifying signs is also commission of this act with causing damage to a victim in significant size (Article 182.2.4 of the СС).

As it was noted, according to a disposition of Article 182.1 of the СС, commission of this criminal action is directed not on property capture but on the requirement of transfer of property by means of threat. At the same time capture of property has no value for origin of body of a crime committed by force of extortion. That is, in such crimes the result does not act as an obligatory sign because the crime committed by extortion is a crime with formal structure.

It should be noted that Article 182.2.4 of the СС is directly connected with a disposition specified in Article 182.1 of the present Code. So, the basis of each aggravating circumstances of extortion (Articles 182.2.1-182.2.5 of the СС) is committed by the body of extortion specified in a disposition of this article. For origin of body of a crime committed by extortion, an indispensable condition is existence of the bases noted in Article 182.1 of the СС.

In that case, condition of origin of body of a crime committed by force of extortion with causing damage to a victim in significant size provided by Article 182.2.4 of the СС with real existence of damage does not correspond to a disposition of Article 182.1 of the present Code.

On the basis of the above, Plenum of the Constitutional Court comes to the following conclusions:

According to Article 182 of the СС the criminal action committed by force of extortion has to be recognized ended from the moment of the requirement of transfer of someone else's property or the right to property or commission of other actions of property character.

Milli Majlis of the Republic of Azerbaijan must be recommended to adjust in accordance with a qualification sign of the criminal action committed by force of extortion “committed with causing damage to a victim in significant size” provided in Article 182.2.4 of the СС with a disposition of Article 182.1 of the present Code.

Being guided by Article 130.4 of the Constitution of the Republic of Azerbaijan and Articles 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 182 of the СС the criminal action committed by force of extortion has to be recognized as ended from the moment of the requirement of transfer of someone else's property or the right to property or commission of other actions of property character.

2. To recommended to Milli Majlis of the Republic of Azerbaijan to adjust in accordance with a qualification sign of the criminal action committed by force of extortion “committed with causing damage to a victim in significant size” provided in Article 182.2.4 of the СС with a disposition of Article 182.1 of the present Code.

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.