**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

##### OF THE CONSTITUTIONAL COURT

##### OF THE REPUBLIC OF AZERBAIJAN

*On interpretation of Articles 46.2, 46.3 of the Criminal Code*

*of the Republic of Azerbaijan and Article 346.1.14 of the Criminal Procedure Code*

*of the Republic of Azerbaijan*

# 14 November, 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 (Reporter-Judge), Isa Najafov and Kamran Shafiyev;

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, Eldar Askerov, senior adviser of Department for Administrative and Military Legislation of Milli Majlis of the Republic of Azerbaijan,

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

specialists: Shahin Yusifov, Chairman of Criminal Board of the Supreme Court of the Republic of Azerbaijan, Vagif Mursagulov, Judge of the Court of Appeal of Baku city,

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;

having heard the report of Judge R.Gvaladze, the reports of legal representatives of the interested subjects, conclusions 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 Articles 46.2, 46.3 of the Criminal Code of the Republic of Azerbaijan (hereinafter referred to as CC) and Article 346.1.14of the Criminal Procedure Code of the Republic of Azerbaijan (hereinafter referred to as CPC).

In inquiry it is specified that though at application of Articles 46.2, 46.3 of the CC by courts, as a rule the legislation requirements are observed, in practice in this regard arise certain difficulties.

So, having sometimes taken as a basis that in the sanction of the relevant articles of Special part of CC punishment in the form of deprivation of the right to hold certain positions or to be engaged in a certain activity is provided as a basic type of punishment, it is considered impossible imposing of this type of punishment as an additional punishment. Besides, when in the sanction cases of application or non application punishment in the form of deprivation of the right to hold certain positions or to be engaged in a certain activity as additional punishment are provided, courts sometimes do not prove in a decision motives of non application. And in some cases imposing of punishment in the form of deprivation of the right to hold certain positions or to be engaged in a certain activity as additional punishment to punishment in the form of a penalty, from the point of view of Article 46.3 of the CC is considered impossible.

For the correct solution of the question which has been brought up in inquiry, Plenum of the Constitutional Court considers necessary to disclosure of essence and the purpose of punishment.

In a number of decisions of Plenum of the Constitutional Court in connection with an essence and the purposes of punishment it was noted that the structure and contents of the criminal legislation serves for providing of purposes of CC. According to the criminal legislation, each person who has made socially dangerous act of criminal character has to be punished. On the one hand punishment is a reaction of the state to the committed crime and with another – a criminal and legal result of the committed crime for person who made criminal act (the decision of 17 March 2011 “On interpretation of Article 53.4 of the Criminal Code of the Republic of Azerbaijan and Article 112.1 of the Code on Execution of Punishments of the Republic of Azerbaijan”).

In Article 41.2 of the CC opening the purposes of punishment it is specified that punishment is applied for restoration of social justice, correction condemned and preventions of commission of new crimes by condemned and other persons.

As evident from contents of specified article, before punishment three interconnected purposes are set:

- restoration of social justice;

- correction of the condemned;

- prevention of commission of new crimes.

As opposed to previous, the existing criminal law, bringing in concept of punishment a number of new elements especially marked that punishment is not applied as a penalty but applied with the purpose of restoration of social justice.

Restoration of social justice as the punishment purpose, starts being carried out when a crime is already committed, in this regard the social balance is broken and the punishment corresponding to the committed crime is applied for restoration of this balance.

Restoration of social justice by application of punishment provides the following:

- the state, applying types of criminal punishment, provides compensation of the done harm by the person who has committed a crime;

- the society believes in ability of the state to punish the person who has committed a crime.

In the criminal legislation the concept of social justice concerning punishment, is disclosed in Articles 8 and 58 of the CC providing the principle of justice and the general bases of imposing of punishment. According to essence of Article 8 of the CC the punishment applied concerning the person, who has committed a crime, shall be fair.

According to Article 58.1 of the CC providing the general beginnings of purpose of punishment, the person who is recognized as guilty in commitment of a crime, shall be appointed fair punishment in the limits provided by appropriate articles of the Especial part of the present Code, and in view of positions of the General part of the present Code.

Fair punishment, first of all, is important means for achievement of the purpose of the punishment provided in Article 41 of the CC.

According to Article 58.3 of the CC the justice of the imposed punishment is understood as compliance of this punishment to character and degree of public danger of a crime and the personality guilty, including to the circumstances commuting and aggravating punishment, and also influence of the appointed punishment on correction condemned and on his family living conditions.

According to essence of Article 43 of the CC to the persons guilty of commission of crime, the basic and additional punishment can be applied and these punishments in aggregate provide the purposes of punishment.

In a number of decisions of Plenum of the Constitutional Court it was noted that between each crime and the punishment applied for its commission, there has to be a purposeful and reasonable interrelation (decisions of Plenum of the Constitutional Court of 23 July 2004 and of 17 March 2011 connected with Article 48 of the CC, Article 53.4 of the CC and Article 112.1 of the Code on Execution of Punishments).

Requirements of the law and the specified legal position of Plenum of the Constitutional Court belong as to purpose of the basic and additional punishments.

Additional punishments are a type of punishments which are applied not independently but only to with the basic punishment. However, as well as the basic punishment, additional punishments also are applied for the purpose of strengthening of impact on disciplinary measures, preventions of commission of new crimes in the future, restoration of social justice and compensation of the done harm.

Social value of additional punishments is expressed that they strengthen a guarantee of more successful individualization of criminal liability.

Among punishments the “deprivation of the right to hold certain positions or to be engaged in a certain activity” takes a special place. This punishment, as well as punishment in the form of a penalty, being universal can be applied as the basic and additional kind of punishment (Article 43 of the CC).

Term of application of this type of punishment in a concrete case specifies, what punishment it is the basic or additional. So, according to Article 46.1 of the CC a type of punishment “deprivation of the right to hold certain positions or to be engaged in a certain activity” is imposed term from one to five years as a basic type of punishment and term from one to three years as an additional kind of punishment.

Punishment in the form of deprivation of the right to hold certain positions or be engaged in a certain activity can be applied as the basic or additional punishment for those crimes which are generally committed in connection with use of powers of office or with implementation of a certain activity.

The purpose of this punishment is the prevention of commission of crimes with use of powers of office or official position and also connected with implementation of a certain activity.

As a rule, this type of punishment as the basic and additional punishment is applied directly in the cases specified in the sanction of the relevant article of Special part of CC. At the same time, this punishment as additional punishment can be applied also in the cases which have not been provided by Special part of CC.

According to Article 46.2 of the CC, deprivation of the right to hold certain posts or to engage the certain activities, can be appointed as an additional kind of punishment and in circumstances, when it is not provided by appropriate article of the Especial part of the present Code, in view of nature and degrees of public danger of a crime and person guilty. The court recognizes impossible preservation of rights by him to hold the certain posts or to engage in the certain activities.

From the above it is possible to come to a conclusion that punishment as deprivation of the right to hold certain positions or be engaged in a certain activity can be applied as an additional kind of punishment both in cases provided and not provided in Special part of the criminal law. However, in the latter case at application of this punishment as additional punishment it is necessary to refer to Article 46 of the CC.

Plenum of the Constitutional Court considers that in a case when in the sanction of Article of Special part of CC punishment in the form of deprivation of the right to hold certain positions or to be engaged in a certain activity is provided as one of basic types of punishment the issue of an assumption of its application as additional punishment has to be resolved according to Article 8 of the CC.

So, according to Article 8.2 of the CC providing the principle of justice, nobody can bear criminal liability twice for the same crime. This principle covers also inadmissibility of imposing of an identical type of punishment as the basic and additional. Therefore imposing of one type of punishment as the basic and additional has to be perceived as not logical and not corresponding to the principle of justice and the purposes of punishment.

For this reason when in the sanction of article of Special part of CC punishment in the form of deprivation of the right to hold certain positions or to be engaged in a certain activity is provided as the basic punishment and it is applied in such quality, its application as additional punishment should not be allowed. In case of not application of this punishment as the basic and application of other alternative punishment, in CC is not present any ban or an exception concerning application as additional punishment of punishment in the form of deprivation of the right to hold certain positions or to be engaged in a certain activity.

On the contrary, proceeding from requirements of Articles 46.2 and 46.3 of the CC punishment in the form of deprivation of the right to hold certain positions or be engaged in a certain activity of punishment as the additional can be applied to punishments in the form of public works, corrective works, the contents in disciplinary military unit and imprisonments, even in the cases which have not been provided by the relevant article of Special part of CC. In specified articles any exceptions concerning these rules are not provided.

According to requirements of the criminal law, the punishment to person found guilty of commission of crime is appointed in the limits provided by the relevant articles of Special part of CC taking into account provisions of the General part of this Code. Therefore, at imposing of punishment in the form of deprivation of the right to hold certain positions or to be engaged in a certain activity as additional punishment the requirements of Article 46 of the CC surely have to be considered.

Considering the noted Plenum of the Constitutional Court comes to a conclusion that punishment in the form of deprivation of the right to hold certain positions or be engaged in a certain activity can be applied as additional in cases when it is provided in the sanction of the relevant article of Special part of CC as the basic punishment but is not applied in such quality. In this case it is necessary to refer to Article 46 of the CC providing conditions and rules of application of this punishment.

Due to the question concerning possibility of application of punishment in the form of deprivation of the right to hold certain positions or to be engaged in a certain activity as additional to punishment in the form of a penalty, from the point of view of the Article 46.3 of the CC the Plenum of the Constitutional Court considers necessary disclosure of concept of system of punishment and its signs.

The system of punishment is understood as the exhaustive list of types of the punishment being with each other in interrelation established in the law, possessing the certain function, located in a certain sequence, according to degree of their weight.

The following belongs to signs of system of punishment:

- the exhaustive list of types of the punishment, providing inadmissibility of application of other type of punishment in the Republic of Azerbaijan;

- depending on severity classification of punishments from less heavy punishment to graver;

- obligation, for courts of application of the punishments provided by the criminal law.

The system of punishments has the structure and elements. Different types of punishment act as elements of this system.

According to structure of Article 42 of the CC the types of punishment, depending on gravity, are classified from less heavy punishment to graver.

According to Article of 43 the punishments divides on three kinds:

- basic punishments (Article 43.1 of the CC);

- punishments which can be appointed both as the basic and additional punishment (mixed) (Article 43.2 of the CC);

- only additional punishments (Article 43.3 of the CC).

The basic punishments are types of punishments which cannot be attached to other types of punishments. They represent more strict punishments. As the basic punishment one of the main punishments provided in the criminal law can be applied only.

To the mixed punishments belong punishments which can be applied both as the basic and additional punishment. Punishments concern to them in the form of a penalty and deprivation of the right to hold certain positions or to be engaged in a certain activity.

According to Article 43.3 of the CC deprivation of a special or military rank, honorary title or state award, deprivation of the right to operate a vehicle, confiscation of property and exclusion out of borders of the Republic of Azerbaijan belong to additional punishments.

As it was noted, additional punishment cannot be imposed independently. It joins to the basic punishment and acts as means of its individualization. So, this punishment on the essence differs from the main punishment. Additional punishment cannot be graver than the basic punishment. For this reason the legislator did not provide in Article 46.3 of the CC the application to punishment in the form of a penalty being most easy type of punishment an additional one, graver punishment in the form of deprivation of the right to hold certain positions or to be engaged in a certain activity. According to sense of Article 58.1 of the CC when imposing the punishment the provisions of Article 46.3 of the CC surely have to be considered.

According to the above, Plenum of the Constitutional Court comes to a conclusion that proceeding from requirements of Articles 42 and 46.3 of the CC, punishment in the form of deprivation of the right to hold certain positions or be engaged in a certain activity cannot be imposed as additional punishment to punishment in the form of a penalty.

Concerning a question of reasoning in a decision of motives of not application of punishment in the form of deprivation of the right to hold certain positions or to be engaged in a certain activity in cases when in the sanction of the relevant articles of the criminal law its application or not application as additional punishment is provided, Plenum of the Constitutional Court notes that according to Article 346.1.14 of the CPC by results of judicial proceedings, in the consultative room court the question of need of purpose of additional and which punishments concerning accused, found guilty in commission of crime has to be discussed.

At the same time, in a decision of court the reasons for any decision on imposing an additional type of penalty has to be specified (Article 353.2.8 of the Criminal Procedure Code).

Thus, the instruction in a decision of reasons on not imposing of an additional kind of punishment in the criminal procedure legislation is not provided.

According to requirements of the criminal procedure legislation in cases when in the sanction of the relevant articles of the Criminal Code application or not application of punishment in the form of deprivation of the right to hold certain positions is provided or to be engaged in a certain activity as additional punishment, courts have to discuss a question of need of its application and specify reasons of the imposing of this punishment in a decision.

Plenum of the Constitutional Court in connection with a question raised in inquiry comes to the following conclusion:

in cases when punishment in the form of deprivation of the right to hold certain positions or to be engaged in a certain activity is provided in the sanction of the relevant article of Special part of CC as the basic punishment, however was not imposed in this quality, it can be applied as additional punishment;

according to requirements of Articles 42 and 46.3 of the CC punishment in the form of deprivation of the right to hold certain positions or be engaged in a certain activity cannot be imposed as additional punishment to punishment in the form of a penalty;

according to requirements of Articles 346.1.14 and 353.2.8 of the CPC in cases when in the sanction of the relevant articles of the criminal law application or not application of punishment in the form of deprivation of the right to hold certain positions or to be engaged in a certain activity as additional punishment is provided, courts have to discuss a question of need of its imposing and specify reasons of the imposing of this punishment in a decision.

Plenum of the Constitutional Court during judicial proceedings established existence of uncertainty in sanctions of a number of articles of the criminal legislation.

So, sanction of Article 162.2 of the CC for violation of the rules of labor protection provides punishment in the form of imprisonment for a period up to five years with deprivation of the right to hold certain positions or to be engaged in a certain activity for a period of three till five years or without that. According to Articles 43.2 and 46.1 of the CC both punishments specified in the sanction of Article 162.2 of the CC are belong to the basic punishments. According to Article 8.2 of the CC the requirements of imposing of two basic punishments for the same act is inadmissible. The same lack exists also in the sanction of Article 284.2 of the CC. Elimination of these lacks is possible only in a legislative order.

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

**DECIDED:**

1. In cases when punishment in the form of deprivation of the right to hold certain positions or to be engaged in a certain activity is provided in the sanction of the relevant Article of Special part of Criminal Code as the basic punishment, however, was not imposed in this quality and it can be applied as additional punishment.

2. According to requirements of Articles 42 and 46.3 of the Criminal Code punishment in the form of deprivation of the right to hold certain positions or be engaged in a certain activity cannot be imposed as additional punishment to punishment in the form of a penalty.

3. According to requirements of Articles 346.1.14 and 353.2.8 of the Criminal Procedure Code in cases when in the sanction of the relevant Articles of the criminal law application or none application of punishment in the form of deprivation of the right to hold certain positions or be engaged in a certain activity as additional punishment is provided courts must discuss a question of necessity of its imposing and specify reasons of the imposing of this punishment in their decision.

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

5. 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”.

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