**ON BEHALF OF REPUBLIC OF AZERBAIJAN**

**DECISION**

##### OF THE CONSTITUTIONAL COURT

##### OF THE REPUBLIC OF AZERBAIJAN

*On interpretation of Article 56.1.3 of the Criminal Code*

*of the Republic of Azerbaijan*

# 12 July, 2011 Baku city

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

attended by the Court Clerk Ismayil Ismaylov,

the legal representatives: Ilgar Jafarov, Head of Department on Maintenance of State Prosecution of Prosecutor’s General and Fuad Mammadov, senior advisor of department of military and administrative legislation of Administration of the Milli Majlis of the Republic of Azerbaijan;

specialists: Farhad Karimov, Judge of the Supreme Court of Republic of Azerbaijan; Gail Mammadov, Judge of the Baku Court of Appeal; Musa Humbatov, Head of Ohanization and supervision department of [penitentiary](http://slovari.yandex.ru/penitentiary/en-ru/LingvoUniversal/#lingvo/) service of Ministry of Justice of Republic of Azerbaijan;

experts: Kamala Nazarova, Ph.d. in law, Associate Professor of the Criminal Procedure Board of the Law Faculty of Baku State University,

 in accordance with Article 130.4 of the Constitution of the Republic of Azerbaijan examined in open judicial session via special constitutional proceedings the case on inquiry of Prosecutor’s Office of Republic of Azerbaijan concerning interpretation of Article 56.1.3 of the Criminal Code of the Republic of Azerbaijan,

having heard the report of Judge Sona Salmanova, the reports of the legal representatives of the subjects interested in special constitutional proceedings and experts, the Plenum of Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS:**

The Prosecutor's Office of Republic of Azerbaijan (hereinafter referred to as the Office) having addressed to the Constitutional Court of Republic of Azerbaijan (hereinafter referred to as the Constitutional Court), asked to give interpretation to Article 56.1.3 of the Criminal Code of Republic of Azerbaijan (hereinafter referred to as CC) and Article 114 Punishment Execution Code of Republic of Azerbaijan (hereinafter referred to as the PEK).

The Prosecutor's Office considers that the question whether provision stating “to the persons, for the first time condemned to imprisonment for commitment of serious crimes, and also at relapse of crimes if condemned served time in imprisonment earlier, and to women at especially dangerous relapse of crimes - in establishments on serving punishments of a strict mode” in Article 56.1.3 of the CC and Article of PEC causes uncertainty in law-enforcement practice.

In inquiry it is stated that during determination by courts of the forms of punishment institutions within criminal proceedings the existence of different approaches on the possible application of the Articles of the CC and PEC regarding condemned women would adversely affect on the development of unified court practice. Sometimes, being based on what is provided for in Article of 56.1.3 of CC the position of 'the persons, for the first time condemned to imprisonment for commitment of serious crimes, and also at relapse of crimes if condemned served time in imprisonment earlier at especially dangerous relapse of crimes - in establishments on serving punishments of a strict mode' refers especially to the convicted men, the courts, regarding convicted women, appoint the form strict punishments institution in case of especially dangerous recidivism.

In connection with petition the Plenum of Constitutional Court considers necessary to draw attention to a number of provisions of the CC dealing with the legal nature of penalties providing for penal execution institutions and the PEC regulating the enforcement of punishment.

 The criminal sanction being a reaction by a State to a person who has committed a crime is the main legal outcome involving criminal responsibility.

 According to Article 41.1 of CC Punishment is the measure of criminal - legal nature appointed on a decision of court. Punishment shall apply to the person recognized as guilty in commitment of a crime and consists of the deprivations established by the present Code or restrictions of rights and freedom of this person. Criminal punishment being the legal outcome of committed crime shall be applied with respect to guilty persons only in cases and within the limits prescribed by criminal and bears the individual character.

In this regard, in the decision of the Plenum of Constitutional Court dated on March 17, 2011 “On interpretation of Article 53.4 of the Criminal Code of Republic of Azerbaijan and Article 112.1 of the Punishment Execution Code of the Republic of Azerbaijan” it is pointed out that under criminal law, every person who committed socially dangerous acts of a criminal nature, must be punished. On the one hand the punishment is the State's response to the crime committed and, on the other hand, for the person who has committed a criminal offence it is the result of his offence. Punishment is the special measure of government’s coercion and it can be assigned by criminal law only for an act or omission prescribed as a crime.

In the criminal law of the Republic of Azerbaijan, along with the notion of punishment there are provided for its system and types, as well as the common grounds for the imposition of penalties.

Among punishments reflected in Article 42 of CC only two types of punishment isolate the convicted person from society: isolation of imprisonment for a fixed term and a life imprisonment. According to Article 55.1of CC “Imprisonment on a certain term consists in isolation of condemned from a society by his premise in establishments of a settlement type, in establishments on serving punishments of the general, strict or special mode or in prison.” The degree of isolation of condemned persons from society is divided according to the level of the danger of crime committed by him, availability of previous condemnations and other, depends on the type of punishment execution institution and behavior of condemned person.

However, it is necessary to take into account the isolation of the inmates from society should not go into social isolation, there should be fulfilled the conditions for the serving of sentences in the punishment execution institutions (to purchase the basic products and necessities, phone calls, visits of relatives and other persons, engagement in physical culture and sports, etc.) laid down in the legislation on the enforcement of sentences. The appointment of the form of punishment execution institution for the persons condemned to deprivation of liberty is directly regulated by criminal legislation. The providing by criminal legislation for the different types of punishment execution institutions serve for purpose of correction for convicts.

Article 56 provides for the type of punishment execution institution for the persons sentenced to deprivation of liberty. The classification of punishment execution institutions create favorable conditions for individual educational work directed at understanding of the fallacy of the views formed by prisoners at the norms set by the society, and the human behavior. The perception by the convicted person of fairness of the sentence applied and the imposed coercive measures is one of the main conditions for the achievement of the purposes of punishment.

From this point of view for the serving of imprisonment Article 56.1 of CC provides for following types of punishment execution institutions: to persons, condemned for crimes, committed on imprudence, to imprisonment for the term of up to five years - in establishments - settlements on serving punishments; to persons, for the first time condemned to imprisonment for commitment of deliberate crimes, not representing the big public threat or less serious and minor serious crimes, and also to the persons condemned for crimes, accomplished on imprudence, to imprisonment for the term from above five years - in establishments on serving punishments of the general mode; to the persons, for the first time condemned to imprisonment for commitment of serious crimes, and also at relapse of crimes if condemned served time in imprisonment earlier, and to women at especially dangerous relapse of crimes - in establishments on serving punishments of a strict mode; to persons condemned to life imprisonment - in prisons.

According to Article 56.2 of CC, to the persons condemned to imprisonment for the term from above five years for commitment of serious crimes, and also at especially dangerous relapse of crimes, can be appointed serving a part of punishment term in prison.

 With respect to persons deprived of liberty the definition of a type of institution as to serving of punishments shall be made by a decision of court according to above-mentioned Articles of CC and shall be indicated in the final part of verdict of guilty (Article 56.3 and Article 353.4.4 of Criminal procedure Code of Republic of Azerbaijan.)

The definition in Article 56.1 of various types of punishment execution institutions depends on the severity of the crimes committed by convicts, as well as the personality and proceeds from the need to keep them separately from each other and also from the protection of persons guilty of a less serious offence and sentenced to deprivation of liberty for the first time from the negative impact of convicts who committed serious or particularly serious crimes and creates an opportunity for a different approach to convicted persons of different categories.

 At the same time the persons sentenced to deprivation of liberty are differentiated by sex, age, severity of the crimes committed by convicts, the behaviour of the convicted person within the period of serving of sentence and his state of health. Differentiation of the convicted persons is essential for the individualization of execution of punishment in the form of deprivation of liberty in the form of a group, the protection of persons sentenced to deprivation of liberty for the first time in the short term from the harmful impact of more dangerous criminals. The basis of differentiation of punishment execution institutions comprises such principles of criminal law and law enforcement, as justice, humanism purposeful application of coercive measures and means of correction of prisoners, encouragement and reinforcement of the law in correctional treatment.

Persons sentenced to imprisonment are different from each other and on social, psychological, moral qualities. Convicted women, given their physiological and physical characteristics in order to ensure personal safety and conducting of educational work fall into a separate category. This approach is based on the principle of humanity, which is one of the basic principles of the CC.

 As it was already noted, given the gravity of a socially dangerous act committed by convicted women and availability of sentence the legislator for the punishment through imprisonment defined different types of punishment execution institutions.

According to the Articles 56.1.2 and 56.1.3 of CC, to persons, for the first time condemned to imprisonment for commitment of deliberate crimes, not representing the big public threat or less serious and minor serious crimes, and also to the persons condemned for crimes, accomplished on imprudence, to imprisonment for the term from above five years - in establishments on serving punishments of the general mode; to the persons, for the first time condemned to imprisonment for commitment of serious crimes, and also at relapse of crimes if condemned served time in imprisonment earlier, and to women at especially dangerous relapse of crimes - in establishments on serving punishments of a strict mode.

As it gets evident from the content of above stated Articles “the convicted person” notion has general meaning without differentiation between men and women. It should be noted that the term 'the convicted person' was used in Articles 18, 47, 49, 70.6, 71, 79, 80 and other of CC and this term relates both to men and women.

In the decision of the plenum of Constitutional Court of September 6, 2010 'On interpretation of Articles 18 and 83.1 of the Criminal Code of the Republic of Azerbaijan» when using the term “convicted person” there is no distinction between male and female. In this decision it was stated the term “the convicted person” implies the person with respect to whom there is a valid verdict of guilty, non-served or preserved sentence.

The Plenum of Constitutional Court also considers that there should be analyzed the conditions which constitute the basis in Articles 56.1.3 and 56.1.4 of CC for appointment of punishment execution institutions of strict and extremely strict modes.

In case of especially dangerous relapse of crimes, as well as when replacing the life imprisonment for imprisonment for a fixed term, according to 56.1.4 there should be applied the punishment execution institutions of special mode, and in Article 56.1.3 of CC the women in case of especially dangerous recidivism are assigned to punishment execution institutions of strict mode.

In this case, the existing differences in the mentioned Articles of CC shows that for serving of the sentence of imprisonment imposed by the Court in case of especially dangerous recidivism, the convicted women and men respectively should be assigned to punishment execution institutions of strict and special regimes. It should also be noted that according to Article 57.2 of CC the appointment of life imprisonment to women is excluded.

Along with this, the legislator, as to the provided for in Article 56.1.3 of CC provision “at relapse of crimes if condemned served time in imprisonment earlier”, relating to men and women, determined their serving in punishment execution institutions of strict mode.

 Article 18 of CC provides for the relapse and its kinds. This Article distinguishes between ordinary, dangerous and especially dangerous relapse.

However, in that Article the legislator in case of especially dangerous recidivism in contrast to the convicted men, has fixed the serving of a term by convicted women also in punishment execution institutions of strict regime.

In addition to these, it should be noted that in the general provisions and principles of execution of punishments provided in CC the rules of execution of punishments in different types of punishment execution institutions shall be governed by the law on the execution of punishments.

The purpose of PEC is the correction of convicts, prevention of commission of new crimes both by sentenced persons and others. The task of present PEC consists in regulation of the procedure and conditions of execution of punishment, determination of the means of correction of convicts, protection of right, freedoms and interests of convicts (Articles 21 and 2.2 of PEC).

According to Article 112 of PEC in the punishment execution institutions of general regime there serve the sentence the persons sentenced to deprivation of liberty for the first time for the fixed term because of deliberate commission of actions which do not represent big public danger, as well as less dangerous and dangerous actions, and also the persons sentenced to deprivation of liberty for the period exceeding five years for the commission of crime due to imprudence including the persons whose punishment was substituted for the punishment for fixed term. As it is evident, both this norm and Article 56 of PEC under notion “persons” imply both men and women.

Article 114 has a title as “punishment execution institutions of strict regime” and defines the circle of persons serving the punishment namely in the punishment execution institutions of such regime. According to this Article in the punishment execution institutions of strict regime there serve the term the persons sentenced to deprivation of liberty for the fixed period for first time due to commission of particularly serious offences, as well as those having the relapse of crimes i.e. previously having served a sentence of imprisonment for a fixed term and women sentenced to deprivation of liberty for a fixed period in case of especially dangerous recidivism.

The Plenum of Constitutional Court considers that since according to criminal law the provisions of Article 114 of PEC regulate the procedure of execution of punishments for serving of sentences in punishment execution institutions of strict regime appointed by the decision of court, the legal provision in connection with Article 56.1.3 of CC determined in the decision of the Plenum relates also to the application of Article 114 of PEC.

Based on the above-stated the Plenum of Constitutional Court comes to conclusion that the provision of Article 56.1.3 of CC stating “to the persons, for the first time condemned to imprisonment for commitment of serious crimes, and also at relapse of crimes if condemned served time in imprisonment earlier” relates both to convicted women and men.

 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. The provision of Article 56.1.3 of the Criminal Code of Republic of Azerbaijan stating “to the persons, for the first time condemned to imprisonment for commitment of serious crimes, and also at relapse of crimes if condemned served time in imprisonment earlier” shall relate both to convicted women and men.

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

3. 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”.

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