**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE PLENUM OF THE CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*On interpretation of some provisions of Articles 59.1.9 and 60 of the Criminal Code of the Republic of Azerbaijan*

**02 April 2012 Baku city**

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

attended by the Court Clerk Ismail Ismaylov,

the legal representative of the subject 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, Shamil Rzaguliyev, Judge of the Court of Appeal of Ganja city and Eldar Askerov, senior adviser of Department for Administrative and Military Legislation of Milli Majlis of the Republic of Azerbaijan;

specialists: PhD. Maleyka Bayramova, Associate Professor of Criminal Law and Criminology Board of Baku State University;

the expert: Gasim Rahimov

based on parts IV and VI of Article 130 of the Constitution of the Republic of Azerbaijan has examined in open court session via procedure of special constitutional proceedings the constitutional case on interpretation of some provisions of Articles 59.1.9 and 60 of the Criminal Code of the Republic of Azerbaijan based on request of Prosecutor’s Office of the Republic of Azerbaijan and inquiry of Court of Appeal of Ganja city;

having heard the report of Judge Isa Najafov, the reports of the legal representatives of the subjects interested in special constitutional proceedings, conclusions of expert and specialists, the Plenum of Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS:**

The Prosecutor’s Office of the Republic of Azerbaijan (hereinafter referred to as the Prosecutor’s Office) having applied with request to the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as the Constitutional Court) asks to give interpretation of provision “giving oneself up” of Article 59.1.9 of the Criminal Code of the Republic of Azerbaijan (hereinafter referred to as the Criminal Code), provision of Article 60 of given Code “by articles 59.1.9 and 59.1.10 of the present Code” and the possibility of application of Article 60 of Criminal Code to crimes for which commission provided the imprisonment for life as the most severe kind of punishment.

In the request it is specified that in Article 59.1.9 of Criminal Code the “giving oneself up” is provided as one of the circumstances mitigating a penalty. In spite of using in the criminal law of the provision “giving oneself up”, its sense is not explained neither in Criminal Code, nor in the Criminal Procedure Code of the Republic of Azerbaijan (hereinafter referred to as the Criminal Procedure Code). Links to the provision “giving oneself up” meet often in criminal legal proceedings, but on various circumstances, there is a need for an explanation of its essence. Thus, sometimes an appearance of the person who committed a crime at persons who know him or committed it in public at numerous people and the body of preliminary investigation knows the person who committed a crime, and also arriving of the wanted person to law-enforcement authorities, is estimated by courts as a giving oneself up, and it is considered at imposing of punishment as the mitigating circumstance.

In inquiry it is noted that courts in certain cases for application of Article 60 of Criminal Code are satisfied by the existence of one of the mitigating circumstances provided in Articles 59.1.9 and 59.1.10 of this Code. According to applicant as in Article 59.1.9 of Criminal Code the conjunction “or” is not used, for application of this article as the mitigating circumstance, active facilitation of the person, who give himself up, to detection of a crime, exposure of other accomplices of a crime and search of the property got as a result of a crime is also accepted as a necessary condition. Similar circumstances prejudiced the possibility of application of Article 60 in such order.

In request there is also the petition to give interpretation of issue of application of Article 60 of this Code concerning persons who committed extremely serious crime for which in the sanction of article of Special part of Criminal Code the punishment in the form of life imprisonment is prescribed. Because punishment in the form of life imprisonment is a termless type of punishment, the applicant considers that application to these persons of Article 60 of Criminal Code does not find the unambiguous solution in the legislation.

At the same time, the Court of Appeal of Ganja city in the inquiry applies to the Constitutional Court asking for interpretation of the provision “giving oneself up”, specified in Article 59.1.9 of the Criminal Code, and “Articles 59.1.9, 59.1.10 of the present Code”, specified in Article 60 of this Code from the point of view of Articles 25, 57, 60 and 71 of the Constitution of the Republic Azerbaijan (hereinafter referred to as the Constitution), Articles 6 and 7 of the Convention “On Protection of Human Rights and Fundamental Freedoms”.

As evident from the inquiry and appended documents, the citizen S. Gasymov, because of the dispute which arose between them, out of revenge killed S. Khalilov. By a sentence of Court of Grave Crimes of Ganja city of April 12, 2011 S. Gasymov is found guilty under Article 120.1 of Criminal Code and sentenced to punishment in the form of imprisonment for a period of 11 years.

Criminal Board of Court of Appeal of Ganja city, considering the appeal complaint to a sentence, came to a conclusion about necessity of interpretation of the provision “giving oneself up” provided in Article 59.1.9 of Criminal Code, and provisions by “Articles 59.1.9 and 59.1.10 of the present Code” provided in Article 60 of this Code. The court notes that the unequal understanding and various application of the specified norms leads to divergences in jurisprudence.

Plenum of the Constitutional Court considers that the correct decision put in inquiry and the request of questions as the general bases of infliction of punishment requires research of the circumstances mitigating and aggravating a penalty from the point of view of the criminal and criminal procedure law.

Tasks of the Criminal Code of the Republic of Azerbaijan are: providing of the peace and safety of mankind, protection of rights and freedom of the person and the citizen, of property, of economic activities, of social order and public safety, of environment, of constitutional building of the Republic of Azerbaijan from criminal encroachments, and also the prevention of crimes (Article 2 of the Criminal Code).

According to Article 8 of the Criminal Code covering the principle of equity, punishment and other measures of criminal - legal nature instituted to the person, who has committed a crime, should be fair, and correspond to nature and a degree of public danger of a crime, circumstances of committing it and nature of a guilty person.

In Article 58 of the Criminal Code providing the general bases of infliction of punishment it is noted that to the person, which is recognized as guilty in commitment of a crime, should 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.

Establishment of the circumstances mitigating and aggravating a penalty in the criminal legislation serves for infliction by court of fair punishment, and an individualization of the imposed sentence in each case. Thus, at infliction of punishment the nature and degree of public danger of a crime, personality of guilty person, including the circumstances mitigating and aggravating punishment, and also influence of the appointed punishment on correction of condemned and on conditions of his family’s life, should be taken into consideration (Article 58.3 of the Criminal Code). In this regard, the correct establishments of the circumstances mitigating a penalty has a special importance.

The legislator in Articles 59.1.1 - 59.1.10 of the Criminal Code defined the incomplete list of the circumstances mitigating a penalty. In Criminal Code, except these circumstances, the possibility of the accounting of other circumstances mitigating a penalty is also noted.

Thus, from contents of Article 59 of the Criminal Code follows that the circumstance mitigating a penalty are various circumstances relating to the identity of the guilty, committed crime and respectively the dangers of the person who committed a crime, and criminal action, and the circumstances that are out of corpus delicti.

In Article 59.1.9 of the Criminal Code the “giving oneself up” it is established as one of the circumstances mitigating a penalty.

It should be noted that giving oneself up includes a voluntary appearance of guilty person to investigative agencies without any coercion or to other government body, inform these bodies concerning the exact data on committed or preparing crime, or participation in this crime. Also the active support is expressed in uncovering of crime, provision of truthful testimony about all circumstances known to him in connection with the committed crime, rendering to investigating authorities assistance in exposure of participants of a crime, and also identification of the subjects got in the criminal way, or tools and means, traces of crime.

It is necessary to consider that even if the voluntary giving oneself up is not connected directly with sincere repentance of each case, the giving oneself up of the person in agency of investigation and inquest, statement of reliable information on the committed or imminent crime or participation in it in a certain degree is an indicator of its sincerity. It is not excluded also that the giving oneself up of the person is connected with the sincere repentance, recognition of fault or condemnation of the own behavior.

It is necessary to highlight that giving oneself up has to take place not as a result of a certain influence and pressure of investigative agency or other government body, and to consist in a voluntary attendance and submission of reliable information on the committed or preparing crime, or participation in it. In this sense, it is necessary to consider that cases of recognition by the person of the fault as a result of a certain influence or pressure, and recognition of participation in commission of crime during detention as the suspect cannot be estimated as giving oneself up. Also it is impossible to lose sight that according to Article 66 of the Criminal Code, at imposition of penalty on set of crimes the giving oneself up as the mitigating circumstance has to be connected only with crimes which guilty itself confessed.

Plenum of the Constitutional Court considers necessary to refer to the legal positions created by it in connection with criterion of voluntariness.

Thus, Plenum of the Constitutional Court in its decision of May 20, 2011 “On Interpretation of some provisions of Article 92.12 of the Criminal Procedure Code of the Republic of Azerbaijan” connected the voluntariness with own initiative of the person and came to a conclusion about illegality of any influence (mental or physical) on it.

Along with the specified, it should be noted that in view of the fact that voluntariness in itself is connected with conscious approach of the person to the actions, thus actions of compulsory character in any form contradicting his will are inadmissible. It assigns to the body that is carrying out criminal trial, a problem of comprehensive investigation not of compulsoriness of display of voluntariness. Anyway, the issue of “voluntariness” has to be strictly investigated and by consideration of a question of existence of a voluntary giving oneself up, courts are obliged to check voluntariness of the statement or message in any form of a guilty person to body of investigation or inquest.

In point 4 of the Decision of Plenum of the Supreme Court of the Republic of Azerbaijan (hereinafter referred to as the Supreme Court) “On practice of imposing of criminal penalties by courts” of June 25, 2003 it is specified that “… by consideration of a question of existence of a voluntary giving oneself up, provided in Article 59.1.9 of the Criminal Code, courts have to check voluntariness of the statement or information of guilty person in any form to body of investigation or inquest”.

Due to stated, Plenum of the Constitutional Court considers that the provision “giving oneself up” of Article 59.1.9 of the Criminal Code has to be understood as independent, voluntary (without exposure to any mental or physical impact) an appearance of the person to the bodies which are carrying out investigative and operative-investigation activity or in other government body, and the written or oral statement on participation in the committed or imminent crime.

Plenum of the Constitutional Court finds it possible to regard the following circumstances as a voluntary giving oneself up:

• giving oneself up in a case when a crime and the person who committed the crime are not known to law enforcement agencies;

• giving oneself up in a case when the bodies which are carrying out criminal trial know about a crime, but person who committed the crime is not identified;

• giving oneself up in a case when law enforcement agencies know about the committed crime and about the person who committed the crime, but operative-investigation activity for his detention don not lead to any result;

• giving oneself up in a case when law enforcement agencies know about the committed crime and about person who committed the crime, but the person gives himself up without knowing about his denunciation;

• giving oneself up in law enforcement agencies or other government bodies right after obviously committed crime (at that information about him from the persons which became witnesses of a crime before giving oneself up, and also the information of medical institution to law enforcement agencies about the victim placed in this institution as a result of sustaining an injury, or circumstances of a crime from his words should not interfere to noted conclusion);

• information of the person brought to trial about commission of other crimes which are unknown to investigating authorities.

Plenum of the Constitutional Court considers necessary the analysis of a number of the provisions of the Criminal Procedure Code regulating in a criminal procedure order, implementation of registration of actions of the person on a voluntary giving oneself up.

In the Criminal Procedure Code as the reason for initiation of legal proceedings, the information on a crime which received from various subjects (natural, legal entities and officials) and mass media are specified. Thus, according to Article 204.1 Criminal Procedure Code information provided by an individual concerning an offence committed or planned, which is deemed to constitute grounds for instituting criminal proceedings, may be in written or verbal form. According to Article 204.7 of this Code, the provisions of paragraphs 204.1, 204.4 and 204.5 of this Code should also apply in cases where a perpetrator comes forward voluntarily to make a confession.

The statement for voluntary recognition of fault can be written or oral. At an oral statement the separate protocol in the order specified in Article 204.2 of the Criminal Procedure Code has to be made. The protocol and the written statement have to be signed by the applicant and the official accepted the statement.

At the same time, if it is detected that as a result of non-compliance with this rule, registration of the person who voluntary giving oneself up isnot carried out the fact of existence of a voluntary giving oneself up has to be investigated and established by the bodies which are carrying out criminal trial on the basis of the proofs which are available in the criminal case or other materials connected with criminal prosecution.

Other issue raised in inquiry and connected with the fact of a voluntary appearance of person who committed a crime to investigation authorities giving oneself up, with written or oral confession in the committed crime, is not considered by court as circumstance mitigating a penalty in view of non-admission by him of committed crime at the subsequent stages of criminal legal proceedings.

In this regard, Plenum of the Constitutional Court notes that non-admission by the person who committed crime at the subsequent stages of criminal legal proceedings should not lead to not taking into consideration of a voluntary giving oneself up as the circumstance mitigating a penalty at imposing of punishment. The voluntary giving oneself up of the person who committed a crime is the action which is carried out without pressure and is conscious. Therefore, non-admission by the person of the testimonies at the subsequent stages of procedure cannot be the basis for non-admission of a voluntary giving oneself up as the circumstance mitigating a penalty.

It is also necessary to consider that as the voluntary giving oneself up is not investigative action (Article 134 of the Criminal Procedure Code) and is not the proofs specified in Article 124.2 of the Criminal Procedure Code, it can be considered only as the information on a crime (Article 204 Criminal Procedure Code). In this case, guilt of the person has to be established not according to this information but according to the collected and investigated proofs on case. On the other hand, only primary confession of the person in commission of crime does not testify to his guilt, and this confession has to be confirmed with proofs.

Thus, because the voluntary giving oneself up of the person who committed a crime is provided in the criminal procedure legislation not as the proof but as the circumstance mitigating a penalty, rejection by accused the fault during judicial proceedings does not interfere to recognition of this fact as the circumstance mitigating a penalty.

As for the question, whether existence of one of the mitigating circumstances provided in Articles 59.1.9 and 59.1.10 of the Criminal Code is enough or the circumstances specified in both articles have to be available in total, for application of Article 60 of the Criminal Code which interpretation asks in inquiry and the request, it should be noted the following. The Plenum of the Constitutional Court in a number of the decisions emphasized importance of observance by the legislator of the principles of proportionality, the legal definiteness, balance which is the main principles of the constitutional state at adoption of normative legal acts on regulation of the public relations. The called principles are enshrined in Article 8 of the Constitutional Law of the Republic of Azerbaijan “On normative legal acts” of December 21, 2010 as the base of norm-making activity.

According to the legal position created by Plenum of the Constitutional Court concerning an essence and value of the principle of legal definiteness, the principle of legal definiteness acts as one of features of the rule of law. Compliance of each law or each its provision to the principle of legal definiteness is the extremely important. For its providing, norms of law should not be uncertain and ambiguous. It, in turn, has to create to everyone opportunity to protect the rights and freedoms, and to foresee the actions of the law-enforcement body.

Proceeding from this general legal principle, Plenum of the Constitutional Court considers that the relevant provision of the criminal law mitigating position of the person accused of commission of crime, and having importance at imposing of punishment should not be uncertain and ambiguous.

Each circumstance mitigating the punishment prescribed in Articles 59.1.9 and 59.1.10 of the Criminal Code characterizes various forms of fault, different types of crimes. Thus, the circumstances provided in Article 59.1.9 of the Criminal Code characterize the crimes committed in a deliberate form of fault, with complicity, and the circumstances provided in Article 59.1.10 of the Criminal Code, as a rule, crimes, committed negligently. It follows from here that the legislator does not cause existence of the circumstances provided in Articles 59.1.9 and 59.1.10 of the Criminal Code, surely in total for application of Article 60 of the Criminal Code, and gives the chance independently to apply the circumstances provided in these articles depending on a form of fault and character of a crime.

It is necessary to consider that in connection with the matter the Supreme Court in point 5 of the Decision “On practice of imposing of criminal penalties by courts” of June 25, 2003 noted that “on sense of the Law, the rules established in Article 60 of the Criminal Code can be applied in the presence of not less than one of the circumstances mitigating a penalty, specified in Articles 59.1.9 and 59.1.10 and also in the absence of the circumstances aggravating punishment”.

Due to other question raised in inquiry, Plenum of the Constitutional Court notes that establishment by the legislator in Article 60 of the Criminal Code of an order of imposing of punishment in the presence of the circumstances mitigating a penalty follows from the principle of the humanity which is one of the main bases of the criminal law. The requirement of the criminal legislation for the matter consists that the punishment and other measures of criminal and legal character applied concerning the person who committed a crime cannot aim at corporal tortures or humiliation of human dignity. The principle of humanity concerning the person who committed a crime assumes achievement of the purpose of punishment by election and application to guilty rather mild type of punishment.

By applying of Article 60 of the Criminal Code at imposing of punishment, the judge has to differentiate accurately the principles of justice and humanity making a basis of imposing of punishment, the humanity shown them should not lead to imposing of unfair punishment.

The punishment and other measures of criminal - legal nature instituted to the person, who has committed a crime, should be fair and correspond to nature and a degree of public danger of a crime, circumstances of committing it and nature of a guilty person (Article 8.1 of the Criminal Code).

As it is noted above, the court has to appoint to the person found guilty of commission of crime, fair punishment in the limits provided by the relevant articles of Special Part of the Criminal Code taking into consideration provisions of its General Part. Imposing of fair punishment is important means in achievement, first of all, of the punishment purpose, that is, the restoration of social justice, correction condemned, prevention of commission of new crimes, as condemned, and other persons.

The punishment in the form of imprisonment for life which is an exclusive type of punishment in Criminal Code is provided for especially serious crimes committed against the world and mankind in connection with war crimes against the personality, public safety and a public order, the government (Articles 100.2, 103, 105, 108, 116, 120.2, 274, etc. of the Criminal Code). This type of punishment is imposing to persons which probability of correction is small, taking into account character and especially high degree of public danger of act, and the identity of the person who committed a crime.

But also in this case the legislator, having taken the dignity of the personality as a basis, fixed possibility of revision of the punishment of condemned, serving sentence in the form of imprisonment for life after the valid served period by condemned which is not less than twenty five years' of punishment period in the form of imprisonment for life (Article 57.3 of the Criminal Code).

According to Article 60 of the Criminal Code at presence of the circumstances mitigating punishment, as it is provided by Articles 59.1.9 and 59.1.10 of the present Code, and absence of aggravating circumstances, term or measure of punishment cannot exceed three quarters of a limit of more strict kind of the punishment, provided by appropriate article of the Especial part of present code.

Plenum of the Constitutional Court notes that application with regard the person sentenced to punishment in the form of imprisonment for life of Article 60 of the Criminal Code is impossible because of indefiniteness of this type of punishment from the date when it is imposed, and respectively, impossibility of calculation of three quarters of term of punishment.

At the same time, Article 60 of the Criminal Code cannot be applied at imposing of mild type of the punishment (imprisonment for a certain term, etc.) provided along with punishment in the form of imprisonment for life in the sanction of articles of Special part. In view of the fact that in the sanction of these articles the most severe kind of punishment is imprisonment for life, the calculation of three quarters of punishment of such kind is impossible.

Along with specified, Plenum of the Constitutional Court considers that the provision of the criminal legislation on imposing of punishment in the presence of the circumstances mitigating a penalty is subject to improvement, and the uncertainty, in connection with application of Article 60 of the Criminal Code concerning articles prescribing punishment in the form of imprisonment for life, has to be eliminated by legislature.

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

- the provision “giving oneself up” of Article 59.1.9 of the Criminal Code has to be understood as independent, voluntary (without exposure to any mental or physical impact) an appearance of the person in the bodies which are carrying out investigative and operative search activity or in other government body, with the written or oral information on participation in the committed or preparing crime.

- the voluntary appearance of the person who committed a crime in the bodies which are carrying out investigative and operative search activity or in other government body with written or oral confession in the committed crime, has to be considered by courts as circumstance mitigating penalty irrespective of non-admission of guilt at the subsequent stages of criminal legal proceedings.

- the provision “in Articles 59.1.9 and 59.1.10 of the present Code” noted in Article 60 of the Criminal Code provides independent application of the circumstances provided in these articles as in total, and depending on a form of fault, character of a crime.

- to Milli Mejlis of the Republic of Azerbaijan it has to be recommended that at improvement of the criminal legislation to consider the legal position of Plenum of the Constitutional Court in connection with application of Article 60 of the Criminal Code to crimes for which commission punishment in the form of imprisonment for life.

Being guided by parts IV and VI of Article 130 of the Constitution of the Republic of Azerbaijan and 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. The provision “giving oneself up” of Article 59.1.9 of the Criminal Code has to be understood as independent, voluntary (without exposure to any mental or physical impact) an appearance of the person in the bodies which are carrying out investigative and operative search activity or in other government body, with the written or oral information on participation in the committed or preparing crime.

2.The voluntary appearance of the person who committed a crime in the bodies which are carrying out investigative and operative search activity or in other government body with written or oral confession in the committed crime, has to be considered by courts as circumstance mitigating penalty irrespective of non-admission of guilt at the subsequent stages of criminal legal proceedings.

3. The provision“in Articles 59.1.9 and 59.1.10 of the present Code” noted in Article 60 of the Criminal Code provides independent application of the circumstances provided in these articles as in total, and depending on a form of fault, character of a crime.

4. To MilliMejlis of the Republic of Azerbaijan it has to be recommended that at improvement of the criminal legislation to consider the legal position of Plenum of the Constitutional Court in connection with application of Article 60 of the Criminal Code to crimes for which commission punishment in the form of imprisonment for life.

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

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

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