**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

#### *On Interpretation of Articles 21 and 23 of the Civil Code of the Republic Azerbaijan*

### 31 May, 2002 Baku city

The Constitutional Court of the Republic of Azerbaijan composed of Kh.Hajiyev (Chairman), Judges: F.Babayev (Reporter Judge), B.Garibov, R.Gvaladze, S.Salmanova, A.Sultanov, I.Najafov, E.Mamedov,

joined in the proceeding by: the Court Clerk I.Ismayilov;

the legal representatives of the subjects interested in special constitutional proceedings: B. Asadov, Judge of the Supreme Court of the Republic of Azerbaijan and I.Rafibeyli, Deputy Head of the Department on Economic Legislation of the Milli Majlis of the Republic of Azerbaijan;

the expert: professor A. Talibov, Lecturer of the Civil Law Board of the Law Faculty of Baku State University;

in accordance with Article 130.4 of the Constitution of the Republic of Azerbaijan has examined in open court session via special constitutional proceedings the petition submitted by the Supreme Court of the Republic of Azerbaijan of 3 April, 2002, N 08/2002 concerning interpretation of Article 21.2 of the Civil Code of the Republic of Azerbaijan.

Having heard the report of Judge F. Babayev, the statements of B.Asadov and I. Rafibeyli, the legal representatives of the subjects interested in special constitutional proceedings, the opinion of expert A.Talibov, the Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS:**

Taking into account the difficulties within judicial practice as to application of “moral damage”, the Supreme Court of the Republic of Azerbaijan asks for interpretation of concept “damage” envisaged in the Civil Code of the Republic of Azerbaijan.

In connection with the petition, the official texts of Articles 21 and 23 of the Civil Code of the Republic of Azerbaijan, Articles 7.0.36, 57 and 60 of the Criminal Procedure Code of the Republic of Azerbaijan, Article 290 of the Labour Code of the Republic of Azerbaijan as well as Article 12 of the Law “On Protection of Consumers’ Rights” certified by Administration of Milli Majlis of the Republic of Azerbaijan are enclosed to materials of the case.

The Constitutional Court of the Republic of Azerbaijan notes as follows:

Within the social meaning any delinquency influences negatively upon the public relations and thus causes damage (loss) to them.

Causing the damage infringes the subjective right of a person or organization. At the same time, in civil law the reason the damage has the social meaning is that the infringement of subjective rights is accompanied by infringement of objective rights protected by law.

Depending on its content and form the damage is of property and non-property character.

Article 21.1 of the Civil Code specifies that the person whose right has been infringed shall be enabled to claim for full compensation of damage caused to him/her if legislation or agreement does not provide for compensation of losses at lower rate. Article 21.2 of the Code determines that “losses” shall imply the expenses incurred or to be incurred by a person whose right had been infringed in order to restore the infringed right, loss or damage of his/her property (real damage) as well as the profits (missed benefit), which would be gained by the person under the ordinary conditions of civil circulation if his/her right would not have been infringed. Thus, the damage provided for in this Article consists of real damage and missed benefit.

From the above mentioned it is obvious that Article 21 can be regarded as the general regulations concerning compensation of material damage caused by infringement of individual rights.

The provisions related to the damage are provided for in other rules of general part of the Civil Code as well.

Article 23.4 of Code states: “Where information harming the honor, dignity or business reputation of a natural person is disseminated, such person has the right to recover damages caused by such dissemination and obtain a declaration that the information is untrue”. The same provisions are applied with respect to protection of business reputation of legal entities (Article 23.6). However, it is not directly indicated here whether this damage is material or moral one.

Where the dignity, honor and business reputation of a person is degraded he/she feels shock, anguish and thus gets exposed to moral insult. As a result, the moral and material damage is caused to a person.

It should be noted that the legislator admits the presence of moral damage alongside with material one and provides for responsibility of the person who caused this damage.

For instance, Articles 7.0.36, 57 and 60 of the Criminal Procedure Code, Article 290 of the Labour Code and Article 12 of the Law “On Protection of Consumers’ Rights” of the Republic of Azerbaijan as well as other laws contain the provisions providing for compensation of moral damage. Article 12 of the Law “On Protection of Consumers’ Rights” envisages that where the rights of a consumer are infringed by producer (executor, seller) then the moral damage caused to this consumer shall be compensated by a tortfeasor.

The importance of compensation of moral damage is enshrined in a number of international instruments.

Article 1 of the UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power of 29 November 1985 states: “"Victims" means the persons who, individually or collectively, have suffered harm, including physical or mental injury, emotional suffering, economic loss or substantial impairment of their fundamental rights, through acts or omissions that are in violation of criminal laws operative within Member States, including those laws proscribing criminal abuse of power.”

Usually, the moral damage takes place when the non-material rights of citizens have been infringed. Being the non-material damage the moral damage is the delinquency that does not have any economic significance. Such damage by means of infringing of the citizen’s rights relating to non-material volumes (dignity, honor, business reputation, family privacy, right to move and choose the domicile, copyright, other private non-material rights and material goods), which are attributable to him/her from birth and on the basis of legislation, shocks a physical person and imposes anguish.

The moral damage directly influences on the victim’s conscience and after the actions of a person causing the damage provokes the negative psychological reaction of a victim. Moral damage is the independent consequence of infringement of citizens’ rights. It is compensated both where the material damage is caused or not.

When compensating moral damage it is necessary to take into account the character and degree of moral and physical sufferings as well as the guilt of respondent, his/her financial position and other important aspects. In each concrete case the peculiarities of compensation of this damage should be determined on the basis of court’s discretion.

Article 46 of the Constitution of the Republic of Azerbaijan envisages the right of everyone to defend his/her dignity and honor and ensures the state protection of dignity of each individual.

As it is obvious, the Constitution envisages the protection and guarantee of social, political, economic rights and freedoms of individual among the fundamental human and citizen’s rights and freedoms as one of attributes of the democratic State governed by the rule of law and regards as the aspects contributing to comprehensive development of a person, society and state.

At the same time it should be noted that one of the basic principles of development of society is the guarantee of the freedom of thought and expression. This right is enshrined in Article 47 of the Constitution of the Republic of Azerbaijan. Article 10 of the European Convention on Human Rights and Fundamental Freedoms *inter alia* states: “Everyone has the right to freedom of expression”. Article 17 of the Convention states: “Nothing in this Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention”.

The provisions of Article 10 of European Convention constituted the basis for the Judgment of 8 July 1986 delivered by European Court of Human Rights with respect to the case of *Lingens v. Austria*. In this judgment the right to freedom of expression is recognized to be one of the important foundations of society and is the necessary precondition for its development.

Article 80 of the Constitution of the Republic of Azerbaijan states: “Violation of provisions of the present Constitution and laws of the Republic of Azerbaijan including the abuse of rights and freedoms as well as failure to fulfill responsibilities specified in the present Constitution and laws of the Republic of Azerbaijan shall be persecuted by legislation”.

Thus, the implementation of this right cannot be accompanied by restriction or complete rejection of other rights. From this point of view when defending the dignity and honor one should respect the constitutional provisions concerning the right to freedom of thought and expression and observe the proportionality between these two rights. When implementing rights they compete with each other. Therefore, when applying the legal provisions concerning compensation of moral damage the protection of this right should not imply the restriction of other right.

It should be underlined that the civil legislation provides for compensation of damages caused as result of infringements concerning dignity, honor, business reputation, family privacy and personal immunity, however, it does not provide for compensation of damages caused as result of infringement of non-property rights and right to use non-material values.

According to Article 96.1.1 and 96.1.6 of the Constitution of the Republic of Azerbaijan the Milli Majlis of the Republic of Azerbaijan establishes the general rules concerning the implementation of human and citizen’s rights and freedoms enshrined in the Constitution of the Republic of Azerbaijan, the state guarantees these rights and freedoms, legal proceedings and execution of court decisions.

Taking into account the above mentioned and being guided by Article 130.4 of the Constitution of the Republic of Azerbaijan, Articles 66, 75, 76, 78, 80, 81, 83 and 85 of the Law of the Republic of Azerbaijan “On Constitutional Court”, the Constitutional Court of the Republic of Azerbaijan

**DECIDED:**

1. The provisions of Article 21 of the Civil Code of the Republic of Azerbaijan provides for compensation of real damage and the missed benefit as well. The damage envisaged in Article 23 of this Code shall imply the moral (physical and moral sufferings) and material damage degrading dignity, honor or business reputation.
2. To recommend to the Milli Majlis of the Republic of Azerbaijan to determine in the Civil Code of the Republic of Azerbaijan the protection of other non-property rights and non-material values.
3. The compensation of moral damage as well as the application of other restrictions specified in the legislation should be proportional to other rights and freedoms ensured by the Constitution of the Republic of Azerbaijan and depend in each concrete case on the court’s discretion.
4. The decision comes into force from the date of its publication.
5. The decision is subject to publication in the "Azerbaijan" newspaper and “Bulletin of the Constitutional Court of the Republic of Azerbaijan”.
6. The decision is final and cannot be cancelled, changed or interpreted by any body or official.