**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*On Interpretation of Article 409 of the Criminal Procedure Code*

*of the Republic of Azerbaijan*

**19 July, 2002 Baku city**

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

joined in the proceeding by: the Court Clerk V.Zeynalov;

the legal representatives of the subjects interested in special constitutional proceedings: A. Rustamov, Judge of the Supreme Court of the Republic of Azerbaijan and E. Askerov, employee of the Administration of Milli Majlis of the Republic of Azerbaijan;

expert: Dr. R.Iskanderov, professor of Criminal Procedure Board of Baku State University;

in accordance with Article 130.4 of the Constitution of the Republic of Azerbaijan has examined via special constitutional proceedings in open court session the constitutional case connected with the petition of the Supreme Court of the Republic of Azerbaijan of May 20, 2002, N 8-5/2002 concernig interpretation of Article 409 of the Criminal Procedure Code of the Republic of Azerbaijan,

Having heard the report of Judge B.Garibov, the statement of the legal representatives of the subject interested in special constitutional proceedings: A.Rustamov and E.Askerov and the opinion of expert R. Iskanderov, the Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS:**

Article 408 of the Criminal Procedure Code of the Republic of Azerbaijan regulates the procedure of lodging the cassation complaints and cassation protest against the judgments delivered by courts of appeal instance and resolutions delivered by first instance courts attended by juries.

Article 409 of this Code defines the circle of persons who are enabled to lodge such complaints and protests. According to this article the right to lodge a cassation complaint shall be enjoyed by accused person who had been convicted or acquitted, his/her defence counsel or his/her legal representative; victim (private prosecutor), his/her legal representative or his/her representative; civil plaintiff, civil respondent, their legal representatives or representatives. And the cassation protest can be lodged by public prosecutor who took part in legal proceedings in court of appeal as well as Prosecutor General and his/her deputy. Taking into account that non-use by the persons, who are enabled to lodge an appeal complaint or protest against the judgment or resolution of the first instance court, of this right due to the fact they are satisfied with the court decision or due to any other reason, as well as that neither legislation nor practice specify whether those persons are enabled to lodge cassation complaint or cassation protest regarding the same case to be examined by other higher instance courts the Supreme Court of the Republic of Azerbaijan asks to give interpretation of Article 409 of the Criminal Procedure Code.

The official texts of Articles 7, 32, 35 and 409 of the Criminal Procedure Code of the Republic of Azerbaijan certified by Administration of Milli Majlis of the Republic of Azerbaijan are enclosed to materials of case.

In connection with the petition, the Constitutional Court notes as follows:

The Criminal Procedure Code of the Republic of Azerbaijan determines whether acts, which appear to be offences are criminal or not and whether a suspect is guilty or not, and specifies legal procedures regulating criminal prosecution and defence of suspects or accused persons as provided for criminal legislation.

According to the Constitution of the Republic of Azerbaijan and criminal procedure legislation the criminal legal proceedings shall be carried out on the basis of adversary system between prosecution and defence. In accordance with Article 7.0.21, “the prosecution” comprises the preliminary inquisitor, investigator, prosecutor, victim, private prosecutor and civil plaintiff. And in accordance with Article 7.0.28, “the defence” comprises the suspect or the accused person, his/her defence counsel and the civil respondent.

The prosecution shall seek to prove the commission of criminal act, the presence of corpus delicti in accordance with legislation, the involvement of the accused person into the commission of this offence and the possible bringing to criminal responsibility of the person who committed an offence (Article 32 of Criminal Procedure Code).

The legislator intended to determine the implementation of legal proceedings in accordance with the principle of adversary system, to ensure the procedural independence of parties, to clarify their procedural position and purposes, as well as to equalize the procedural functions.

The adversary between prosecution and defence covers all stages of criminal legal proceedings and contributes to the delivery of lawful, well-grounded and fair judgment by court.

And also other provisions envisaged in Criminal Procedure Code (equality before law and court, guarantees of human rights and freedoms enshrined in the Constitution, presumption of innocence etc.) ensures the full implementation of procedural rights and duties by parties and other persons involved into criminal legal proceedings.

One of the fundamental principles enshrined in Article 35 of the given Code is the right to re-apply to a court that is based on Articles 60 and 65 of the Constitution of the Republic of Azerbaijan.

According to that Article, a party to criminal legal proceedings shall have the right to complain to a higher court, via the procedure specified in that Code, against the procedural decisions and acts of the court dealing with the criminal case or other prosecution materials.

From the analysis of Criminal Procedure Code it gets evident that when guaranteeing the right to complain to higher court (court of appeal, cassation court) the legislator conditioned the observance of consecution of examination of cases by court instances. Thus, the appeal complaint (protest) against judgments or resolutions of first instance court shall be lodged with the court of appeal instance. And the cassation complaint (protest) against the judgments of the first instance court attended by juries shall be lodged with cassation instance court. This means that except for judgments delivered by first instance court attended by juries the complaint (protest) against the judgments and resolutions of first instance court shall be lodged with court of appeal instance.

It should be noted that the use of this right by persons who are enabled to lodge a complaint is based on their free will. However, the legal proceedings initiated at appeal or cassation instance court are held at the attendance of another party who had not lodged the (complaint) protest. From this point of view, the non-use for any reason of this right by a person who is enabled to lodge an appeal complaint (protest) against the judgment or resolutions of first instance court and the realization of this right by other person cannot restrict the right to lodge a complaint with higher instance court against the judgment or resolution of the court of appeal instance via the procedure and in cases specified in Criminal Procedure Code.

The criminal procedure legislation provides for not the procedural duty to lodge a complaint (protest) against the court judgment or resolution but for the free discretion of the parties to criminal legal proceedings and gives them to decide themselves which court’s judgment or resolution should be subject to this complaint (protest) via the specified procedure. For instance, according to Article 32.2.5 of the mentioned Code any party to criminal legal proceedings shall independently express his/her opinion and determine the means and methods with the view to defend it.

Thus, the Constitutional Court notes that the non-use for any reason of this right by a person indicated in Article 409 of the Criminal Procedure Code who is enabled to lodge an appeal complaint (protest) against the judgment or resolutions of first instance court and the realization of this right by other person does not restrict the right to lodge a complaint with higher instance court against the judgment or resolution of the court of appeal instance via the procedure and in cases specified in this Code.

Taking into account the above mentioned and being guided by Article 130.4, 130.6 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. None use of the right to lodge an appeal complaint (protest) by the persons listed within Article 409 of the Criminal Procedure Code shall not restrict the right to lodge complaints (protests) against the judgments or resolutions of court of appeal instance to the court of cassation instance in cases and via procedure provided for by the Code.
2. The decision comes into force from the date of its publication.
3. The decision is subject to publication in the "Azerbaijan" newspaper and “Bulletin of the Constitutional Court of the Republic of Azerbaijan”.
4. The decision is final and cannot be cancelled, changed or interpreted by any body or official.