**ON BEHALF OF AZERBAIJAN REPUBLIC**

**DECISION**

**OF THE CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

On Article 109.5 of the Law of the Republic of Azerbaijan “On Courts and Judges” and item 7 of “Transitional Provisions” of the same Law

# 29 April, 2003 Baku city

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

attended by the Court Clerk I.Ismayilov,

the legal representative of the party filed a request, M. Agazadeh, Judge of the Supreme Court of the Republic of Azerbaijan,

the legal representative of the respondent party, S.Kerimov, official of the Administration of the Milli Mejlis (Parliament) of the Republic of Azerbaijan

 in accordance with Article 130.3 of the Constitution of the Republic of Azerbaijan has examined in open judicial session via special constitutional proceedings the case on inquiry of Supreme Court of the Republic of Azerbaijan of 31 March 2003, N 8-3/03 concerning interpretation of Article 109.5 of the Law of the Republic of Azerbaijan “On Courts and Judges” and conformity of item 7 of “Transitional provisions” of the same Law to Article 25 of the Constitution of the Republic of Azerbaijan,

having heard and discussed the report of Judge R. Gvaladze, the statements of legal representatives of parties M.Agazadeh and S. Kerimov, the Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS:**

According to Article 109.5 of the Law of the Republic of Azerbaijan “On Courts and Judges” former judges at the retirement age after expiry of their term of office are entitled to pension at the rate of 80 percent of official salary of the last workplace.

According to item 7 of “Transitional provisions” of the same Law the regulations on financial and social protection of judges relate only to the judges appointed in accordance with the requirements of the given Law. Taking into account an unreasonable non-application of the specified procedure of payment of pensions with respect to the judges who worked before these appointments the Supreme Court of the Republic of Azerbaijan in its inquiry asks to check conformity of item 7 of “Transitional provisions” of the Law “On Courts and Judges” to Article 25 of the Constitution of the Republic of Azerbaijan and also to give interpretation of Article 109.5 of the same Law.

The official texts of Article 109 of the Law of the Republic of Azerbaijan “On Courts and Judges”, “Transitional provisions” of the same Law, Article 38 of the Law of the Republic of Azerbaijan “On Office of Public Prosecutor”, Article 20.14 of the Law of the Republic of Azerbaijan “On service in bodies of Office of Public Prosecutor” certified by the Administration of Milli Mejlis of the Republic of Azerbaijan are enclosed to materials of the case.

In connection with inquiry the Constitutional Court notes the following.

Being enshrined in the Constitution of the Republic of Azerbaijan the independence of judges is directed to ensuring of a principle of separation of powers and independence of judicial term of office.

The high status of the judge is not their personal privilege but a mean of protection in public interests and first of all in the interests of justice. Thereupon, a society and the state, presenting to the judge and his professional work high requirements, should provide to him the guarantees of appropriate realisation of activity on administration of justice.

The special place among such guarantees there keeps the material and social protection of judges.

According to Article 6.1of the European Charter “On the Statutes for Judges” Judges exercising judicial functions in a professional capacity are entitled to remuneration, the level of which is fixed so as to shield them from pressures aimed at influencing their decisions and more generally their behaviour within their jurisdiction, thereby impairing their independence and impartiality.

According to provisions of the Constitution everyone has the right for social protection on reaching specific age according to legislation, in case of illness, disability, loss of bread-winner in the family, due to unemployment and in other cases envisaged by legislation (Article 38).

According to provisions of Constitution and international law acts the social and material guarantees are provided in section 19 of the Law “On Courts and Judges”.

In the decisions adopted in connection with interpretation of some norms, specified in this section, the Constitutional Court noted that legislatively fixed guarantees of judges are directed on maintenance of real independence and impartiality of judges.

So, in the decision of 23January 2001 “On Article 106.2 of the Law “On Courts and Judges”” the Constitutional Court has specified that the material and social security of judges is a component part of their independence.

The Constitutional Court in its decision of 27 June 2001 on interpretation of Article 109 of the same Law has specified that the steadiness of a court to any kind of influence depends not only on judges’ ethics, qualification, reputation and responsibility but also on real social guarantees.

Thus, in the Constitution of the Republic of Azerbaijan, in the norms of international legal acts, in a number of decisions of the Constitutional Court the necessity of definition of the material and social guarantees providing real independence and impartiality of judges was especially underlined.

Since the pension system is a component part of social security, the right for everyone to social security fixed in the Constitution includes also right to pension.

Article 109.5 of the Law “On Courts and Judges” defines the amount and conditions of fixing of pensions to the judges who reached a pension age.

However, since the given norm of the Law did not cover the changes connected with fixing of pensions to employers of bodies who work in judicial system there emerged a discrepancy between provisions of the given Law and norms of the laws adopted later.

For instance, the social and material maintenance of employers of bodies of the Office of Public Prosecutor attributed by section of VII of the Constitution of the Republic of Azerbaijan to judicial system, shall be, according to Article 38 of the Law of the Republic of Azerbaijan “On Office of Public Prosecutor”, implemented on the basis of legislation provided for judges.

According to Article 20.14 of the Law of the Republic of Azerbaijan “On service in the bodies of Office of Public Prosecutor”, the retired employers of public prosecutor office shall get the pension at a rate of 80 percent of a monthly average salary which they got for any 5 years in a place of the latest work and this sum is subject to subsequent changes to salary increase.

The comparison of Article 20.14 of the specified Law and Article 109 of the Law “On Courts and Judges” shows that the legislator provided for employers of public prosecutor office higher provision of pensions, than for judges. In the Law “On service in bodies of Office of Public Prosecutor” it is specified that independently from restrictions, the employers of public prosecutor office who retired before adoption of the present Law shall receive the pension at a rate of 80 percent from the monthly salary on last place of work.

According to item 7 of “Transitional provisions” of the Law “On Courts and Judges”, the provisions on material and social protection of the judges, specified in Article 109 of the present Law concern only the judges appointed according to requirements of this Law. Provisions of Article 109.5 of the Law do not extend on the judges who worked and reached the pension age before appointments of judges according to the Law “On Courts and Judges”. According to item 2 of “Transitional provisions” of the Law “On Courts and Judges” the pension is to be paid to the given persons via the procedure specified in the Law “On Judicial System in the Republic of Azerbaijan”.

Thus, according to item 7 of “Transitional provisions” of the Law “On Courts and Judges”, the persons who worked as judges and reached of pension age before appointment of judges according to the Law “On Courts and Judges” seem to be socially less protected.

Such position contradicts the principle of equality fixed in the Constitution (Article 25), to provisions of the Constitution that normative legal acts must be based on law and justice (equal benefit, equal attitude) (Article 149). According to Article 20.14 of the Law “On service in bodies of Office of Public Prosecutor” the amount of pensions of employers of public prosecutor office is subject to subsequent changes in salary increase. Article 109.5 of the Law “On Courts and Judges” does not provide any subsequent increase for pensions of judges.

Thus, the pension provision of employers of public prosecutor office attributed according the Constitution to judicial system, is higher than pension provision of judges.

Taking into account the above stated the Constitutional Court comes to a conclusion that in connection with non-conformity of item 7 of “Transitional provisions” of the Law “On Courts and Judges” with Article 25.1 and Article 149.1 of the Constitution it is necessary to recognize it as null and void; provisions of Article 109.5 of the Law “On Courts and Judges” should be extended to the judges who worked and reached of pension age before appointments of judges on the basis of this Law; taking into account material and social security of employers of public prosecutor office defined by the Law “On service in bodies of Office of Public Prosecutor” to define the procedure of material and social security of judges.

According to Article 94.1.16 of the Constitution of Azerbaijan Republic the general rules concerning the labor relationships and social maintenance are established by the Milli Mejlis of Azerbaijan Republic.

It is necessary to note that the Constitutional Court in its decision of 27 June 2001 recommend to Milli Mejlis of the Republic of Azerbaijan to determine the procedure of payment of pensions to judges who reached the pension age and retired before the termination of office and judges due to inability to perform his/her duties because of disease, disablement and other reasonable excuses.

However no changes have been made to the legislation on the basis of this recommendation.

The Constitutional Court considers that for ensuring of independence of judicial authority fixed in the Constitution the legislator should establish the procedure of material and social security including pension provision of the judges corresponding to their high status.

 Being guided by parts III and IV of Article 130 of the Constitution of the Republic of Azerbaijan, Articles 55, 57, 64, 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. In connection with non-conformity of item 7 of “Transitional provisions” of the Law “On Courts and Judges” with Article 25.1 and Article 149.1 of the Constitution to recognize it as null and void.

2. To recommend to Milli Mejlis of the Republic of Azerbaijan to establish the procedure of payment of pensions to judges including judges who worked and reached the pension age before new appointments on the basis of Law of the Republic of Azerbaijan “On Courts and Judges”.

3. The decision comes into force from the date of its publication.

4. The decision is a subject to publication in the "Azerbaijan" newspaper and “Bulletin of the Constitutional Court of Azerbaijan Republic”.

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

.