**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE PLENUM OF THE CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*Review of conformity of Article 48 of the Criminal Code of the Republic of Azerbaijan to the Constitution of the Republic of Azerbaijan*

**23 July, 2004 Baku city**

The Plenum of the Constitutional Court of the Republic of Azerbaijan in attendance of:

Judges F.Abdullayev (President Judge), B.Qaribov (Reporting Judge), F.Babayev, R.Qvaladze E.Mammadov, I.Najafov, S.Salmanova and A.Sultanov and Court Secretary I.Ismayilov,

in presence of the representatives of the parties in the constitutional procedure Judge M.Aghazade of the Supreme Court of the Republic of Azerbaijan and S.Kerimov of the Administration of the National Assembly (Milli Majlis) of the Republic of Azerbaijan,

based on the inquiry of the Supreme Court of the Republic of Azerbaijan of 16 February 2004 (ref.# 8-1/2004)

has examined in the open session under the special constitutional procedure in accordance with Article 130 Section III of the Constitution of the Republic of Azerbaijan the constitutional case of conformity of Article 48 of the Criminal Code of the Republic of Azerbaijan to Articles 41 and 42 of the same Code and Article 63 of the Constitution of the Republic of Azerbaijan.

Having heard a report of Judge Qaribov and statements from representatives of the parties Judge Aghazade and S.Kerimov, studied materials and deliberated the case, the Plenum of the Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS:**

As stated in the inquiry of the Supreme Court of the Republic of Azerbaijan, according to a rule stipulated in Article 48 of the Criminal Code of the Republic of Azerbaijan, a supplementary sanction in the form of degradation in special or military rank, or deprivation of honorary titles or state awards is done, effectively, by an extrajudicial authority. A function of a court is limited to giving representation needed to effect this sanction to a relevant government authority. This situation contravenes constitutional and criminal law provisions establishing that a criminal penalty can be imposed only by a verdict of a court.

The Supreme Court of the Republic of Azerbaijan is also of the opinion that when a guilty party is degraded in special or military rank, or deprived of honorary titles or state awards by an extrajudicial entity, this can not be equalled with a criminal penalty sanctioned by a court. At the same time, criminal procedure law does not provide for a court to give representations to any government authority with the purpose of obtaining a supplementary sanction at the same time with a court verdict or afterwards.

Based on the foregoing, the Supreme Court of the Republic of Azerbaijan requested the Constitutional Court to examine conformity of Article 48 of the Criminal Code to Articles 41 and 42 of the same Code and Article 63 of the Constitution of the Republic of Azerbaijan.

The official texts of Articles 41, 42 and 48 of the Criminal Code as authenticated by the Administration of the National Assembly of the Republic of Azerbaijan were appended to the inquiry.

The Plenum of the Constitutional Court has noted the following in relation to the inquiry.

In compliance with Article 80 of the Constitution of the Republic of Azerbaijan, violation of the Constitution and the laws, including abuse of rights or non-performance of obligations stipulated by the Constitution and the laws is subject to responsibility established by law. In this context, criminal responsibility, deprivations and limitations imposed as a sanction for harmful conduct in violation of criminal law means to represent a graver penalty imposed for such actions.

Effectiveness of criminal law sanctions is closely related to proportionality of penalties to personality of a convict, degree of social threat and character of a crime committed as well as to individualisation of responsibility and penalty. A penalty as a legal effect of a crime manifests stern public disapproval of criminality.

Article 41.1 of the Criminal Code states that a penalty is a criminal legal measure imposed by a verdict of a court. A criminal penalty is imposed on a convicted person and entails deprivations or limitations of rights and freedoms as stipulated in the said Code.

It should be noted that fairness, proportionality and availability of individualisation of a penalty in respect of a criminal offence is related to a scope of penalty types defined by law (Article 42 of the Criminal Code). Criminal penalties are classified as primary, primary-supplementary and supplementary depending on their application, performance, sanction conditions as well as specificities of effect and legal nature.

According to Article 48 of the Criminal Code, when a court convicts a person for grave or very grave offences, it may decide, based on a nature of an offence, personality of an accused person and other circumstances of a case, that he must be degraded in special or military rank, or deprived of honorary titles or state awards and make representation for this purpose to an entity that has promoted him to a respective special or military rank, or bestowed on him a respective honorary title or state award.

However, Article 43 of the Criminal Code, when defining primary and supplementary penalties, includes this sanction among exclusively supplementary penalties (Article 43.3).

Assigning degradation in special and military rank and deprivation of honorary titles or state awards a supplementary status purports to strengthen moral effect of sanction on a convict and intensify feelings of repentance. Along with damaging social standing of a convict, this sanction also serves to deprive him of financial preferences, benefits and exemptions conferred on persons enjoying a respective status. Another purpose of this sanction is to help eliminate competition between measures of social disapproval afforded to various conducts. The same sanction is provided by criminal legislation in a number of countries (Russia, Ukraine, Belarus, Kazakhstan, etc.).

It should be noted that law-makers determined application procedure of this sanction differently from others.

As seen from the substance of Article 48 of the Criminal Code, if a court comes to a conclusion that this sanction shall be applied, it gives a representation to this effect to a respective authority. Only this sanction is determined by a court verdict.

While recognising autonomy of competencies and functions of each arm of the government, the Constitution of the Republic of Azerbaijan does not rule out their cooperation in resolution of issues faced by the society and the state (Article 7 of the Constitution).

According to Article 109 Paragraphs 23 and 24, conferring state awards and granting high special and military ranks belongs to the prerogatives of the President of the Republic of Azerbaijan.

This constitutional rule is further developed in relevant legislation dealing with special and military ranks, honorary titles and state awards. According to Clause 2 of the Statute of the Title of National Hero of Azerbaijan enacted by the Law of the Republic of Azerbaijan of 15 July 1992, Clause 5 of the Statute of Honorary Titles of the Republic of Azerbaijan approved by the Decree of the President of the Republic of Azerbaijan of 14 May 1999 (honorary titles were instituted in line with Article 109 Paragraph 32 of the Constitution), and Article 3 of the Law of the Republic of Azerbaijan on Institution of Honorary Title “Freedom Warrior of the Republic of Azerbaijan,” these titles are granted by the President of the Republic of Azerbaijan.

In accordance with the Law of the Republic of Azerbaijan on Institution of Orders and Medals of the Republic of Azerbaijan, granting of state awards is also within competencies of the President of the Republic of Azerbaijan as defined in Article 109 of the Constitution.

Analysis of provisions regulating promotion and degradation in special and military ranks contained in relevant laws (Articles 9 and 10 of the Law of the Republic of Azerbaijan on Military Service, Articles 6 and 11 of the Statute on Ranks of Justice Personnel enacted by the Law of the Republic of Azerbaijan of 6 December 1993, Articles 9.1 and 11 of the Law of the Republic of Azerbaijan on Diplomatic Service, Articles 19 and 29 of the Statute on Service in State Taxation Agencies enacted by the Law of the Republic of Azerbaijan of 12 June 2001) shows that high special and military ranks are also granted by the President of the Republic of Azerbaijan.

It should be noted that granting of state awards and honorary titles reflects recognition of services of the receiving party to society and state and, in cases provided by law, may result in bestowing special preferences, benefits and exemptions that serve to encourage such conduct in society. According to law, in certain cases promotion in special or military ranks may also reflect this recognition.

State awards, honorary titles, high military and special ranks are granted by acts (Decrees and Orders) of the President of the Republic of Azerbaijan (Article 113 of the Constitution). Analysis of constitutional and legislative provisions shows that adoption, amendment and annulment of presidential Decrees and Orders lies within the competencies of the President of the Republic of Azerbaijan. Conformity of these presidential acts to the Constitution and laws of the Republic of Azerbaijan is reviewed by the Constitutional Court of the Republic of Azerbaijan (Article 130 of the Constitution).

As seen from the foregoing discussion, courts of common jurisdiction are not competent to directly resolve matters pertaining to presidential acts. Hence, a procedure for imposition of a criminal penalty provided by Article 48 of the Criminal Code in the form of degradation in special or military rank, or deprivation of honorary titles or state awards is dictated by the above-stated constitutional norms and can not be seen as violation of other constitutional provisions about imposition of penalties only by courts (Articles 63 and 125 of the Constitution).

Otherwise, this would undermine the constitutional principle of separation of powers and lead to unlawful interference by one arm of the government or one state authority in competencies of, respectively, another arm or another authority within the same arm.

The Plenum of the Constitutional Court also notes that laws of the Republic of Azerbaijan regulating relations in respect of special and military ranks, except for high military and special ranks, assigned this competence to relevant government authorities (Article 19 of the Statute on Service in State Taxation Agencies, Article 9.2 of the Law of the Republic of Azerbaijan on Diplomatic Service, Articles 52, 56, 59 and 64 of the Statute of Carriage of Military Service enacted by the Law of the Republic of Azerbaijan of 3 October 1997, Paragraph 5.2 of the Rules for Granting Specialised Degrees to Public Servants in Government Agencies approved by the Decree of the President of the Republic of Azerbaijan of 3 September 2001).

Article 63 Section V of the Constitution of the Republic of Azerbaijan states that none one can be made guilty in any offence except by a verdict of a court. Article 125 Section I of the Constitution establishes that judicial power is exercised only by courts through fair process.

Scrutiny of Article 48 of the Criminal Code gives grounds to conclude that a provision contained therein, while defining constitutional status and scope of competencies of entities authorised to grant military and special ranks (and differentiating between those granting such ranks, i.e. high military and special ranks and ordinary military and special ranks), establishes the same procedure for deprivation thereof. From this perspective, extension of provisions of this Article to degradation in special or military ranks as a supplementary penalty imposed by other authorities should be considered as being outside the scope of Articles 63 and 125 of the Constitution. Existence of such situation corresponds to a provision about imposition of a criminal penalty by a court verdict as stated in Article 41.1 of the Criminal Code.

Article 507.6 of the Code of Criminal Procedure of the Republic of Azerbaijan defines actions to be taken by a judge in relation to degradation in special or military rank, or deprivation of honorary titles or state awards. If there arises a need in degradation in special or military rank, or deprivation of honorary titles or state awards, a judge forwards a relevant representation and a court verdict to an entity that granted a special or military rank, or a honorary title, or a state award. Evidently, this Article of the Code of Criminal Procedure defines functions of a judge in respect of penalties provided in Article 48 of the Criminal Code.

Article 94 Section I Paragraph 17 of the Constitution states definition of criminal and other legal offences and determination of respective sanctions is performed by the National Assembly (Milli Majlis) of the Republic of Azerbaijan. According to Article 63 Section III of the Constitution, laws should not contravene the Constitution of the Republic of Azerbaijan. Hence, if constitutional principles and ideas are not properly taken into account or negated by laws, this amounts to contravention of the Constitution.

In consideration of the foregoing and in view of Article 109 Paragraphs 23, 24 and 32 and Article 113 of the Constitution of the Republic of Azerbaijan, the Plenum of the Constitutional Court has come to the conclusion that provisions of Article 48 of the Criminal Code shall be deemed conforming to Articles 63 and 125 of the Constitution of the Republic of Azerbaijan only in respect of high military and special ranks, state awards and honorary titles.

In line with a legal opinion of the Constitutional Court expressed herein, determination of the procedure for degradation in rank in reference to other military or special ranks as a supplementary penalty in the Criminal Code of the Republic of Azerbaijan shall be resolved by the National Assembly of the Republic of Azerbaijan in accordance with Article 94 Section I Paragraph 17 of the Constitution of the Republic of Azerbaijan.

Guided by Article 130 Sections III and IX of the Constitution of the Republic of Azerbaijan and Articles 60, 62, 63, 65, 66, 67 and 69 of the Law of the Republic of Azerbaijan on the Constitutional Court, the Plenum of the Constitutional Court

**DECIDED:**

1. In consideration of Article 109 Paragraphs 23, 24 and 32 and Article 113 of the Constitution of the Republic of Azerbaijan, provisions of Article 48 of the Criminal Code shall be deemed conforming to Articles 63 and 125 of the Constitution of the Republic of Azerbaijan only in respect of high military and special ranks, state awards and honorary titles.
2. Determination of the procedure for degradation in rank in reference to other military or special ranks as a supplementary penalty in the Criminal Code of the Republic of Azerbaijan shall be recommended to the National Assembly of the Republic of Azerbaijan.
3. The Decision shall become effective from the day it is published.
4. The Decision shall be published in the newspapers Azerbaycan, Respublika, Xalq Qazeti and Bakinskiy Rabochiy and in the Bulletin of the Constitutional Court of the Republic of Azerbaijan.
5. The Decision is final and can not be annulled, amended or officially interpreted by whichever person or entity.