**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*On interpretation of article 75 of the Criminal Code of the Republic of Azerbaijan concerning continued and serial crimes, reflected within the criminal-procedure legislation of the Republic of Azerbaijan*

**27 December, 2006 Baku city**

Plenum of Constitutional Court of the Republic of Azerbaijan composed of F. Abdullayev, (Chairman), F.Babayev, B.Garibov, R.Gvaladze, E.Mammadov, I.Najafov, S.Salmanova, and A.Sultanov (Reporter Judge)

with participation of Secretary I.Ismayilov,

legal representatives of interested parties: deputy Prosecutor General – Military Prosecutor H.Veliyev; chief advisor of the department of administrative and military legislation of Milli Majlis I.Jafarov; judge of the Supreme Court and expert, chief of criminal law board of Baku State University professor F.Samandarov;

in accordance with article 130.4 of the Constitution via procedure of special constitutional proceedings has examined in open judicial session the constitutional case on interpretation of article 75 of Criminal Code concerning continued and serial crimes, reflected within article 74.2 of Criminal Procedure Code of the Republic of Azerbaijan.

Having heard the report of Judge A.Sultanov, reports of legal representatives of interested parties and expert, and having considered materials of the case, Plenum of Constitutional Court

**DETERMINED AS FOLLOWS:**

Within the request of the Prosecutor’s Office it was reflected that article 74.2 of the Criminal Procedure Code (hereinafter CPC) determines continued and serial crimes based on territorial jurisdiction and the legislation does not provide clearly which crimes can be related to such crimes and does not determine the concrete norms on application of exemption from criminal responsibility in connection with statute of limitation, that causes some difficulties in practice.

Taking into account the above mentioned, the subject submitted the request asks for the interpretation of article 75 of Criminal Code (hereinafter CC) in connection with continued and serial crimes provided for by article 74.2 of the CPC.

Within the request it is also indicated that in practice application of decision of Plenum of Supreme Court of former USSR of 4 March 1929 “On conditions of application of amnesty and terms in regard to continued and serial crimes” causes some vagueness.

In connection with the request, Plenum of Constitutional Court notes the following.

The main task of the CC is provision of peace and security of a mankind, protection of human rights and freedoms, protection of property, economic activity, public order and public security, environment and constitutional order of the Republic of Azerbaijan from criminal infringement as well as prevention of crimes.

For implementation of these tasks, CC provides for the ground and principles of criminal responsibility, determines which activity dangerous for a person, community or state can be considered as a crime and determines kinds, limitations and capacity of punishment and other measures of criminal and legal character for perpetration of these crimes (article 2 of CC).

One of such measures was provided for by article 75 of the CC. This article provides for the terms of exemption from criminal responsibility for the categories of crimes, their calculation and other issues.

Article 75 provides for the following terms of exemption from criminal responsibility in connection with statute of limitation:

Two years after perpetration of crime, which does not represent a great public danger;

Seven years after perpetration of less grave crime;

Twelve years after perpetration of grave crime;

 Fifteen years after perpetration of specially grave crime;

According to article 75.2 of the CC, statute of limitations shall be calculated from the moment of perpetration of a crime until the entry of a court sentence into the legal force. In case if a person perpetrates a new crime, then statute of limitations of each crime shall be calculated independently.

Ground for institution of criminal proceedings shall be availability of sufficient facts, indicating the features of crime. Investigator or Prosecutor, who acts within his powers, must immediately institute a criminal case if there is a ground to assume perpetration of act, which has features of crime and absence of circumstances excluding criminal prosecution (article 46.3 of the CPC). However, if statute of limitations has elapsed (excluding cases of discontinuance of statute of limitations) the criminal prosecution or criminal case cannot be instituted, and started criminal prosecution or proceedings on criminal case shall be discontinued (article 39 of the CPC).

Having issued the order on refusing the starting of criminal prosecution if the time-limit for prosecution has expired or discontinuing the criminal case the requests of Article 41.2 shall be taken into account.

However, according to this article if there are no grounds for acquittal the preliminary investigator, investigator or prosecutor may not decide to discontinue the criminal prosecution without the consent of the accused (or suspect). In this case the criminal prosecution shall be continued in the manner provided for in this Code and shall end with a judgment or another court decision.

Pursuant to the article 43.3 of CPC, during the trial, the court may decide to discontinue the criminal prosecution with the consent of the defense if time-limit for prosecution has expired.

Moreover, if there are no grounds for acquittal or for a decision to discontinue the criminal
prosecution in accordance with Articles 42 or 43 of this Code, the court shall not
sentence the accused if the time-limit for prosecution has expired (CPC Article 42.2.1).

To enforce the exemption of criminal responsibility on the ground of expiration of time-limit for prosecution it also gets great importance to determine the circumstances shown in the Article 39 and 75.3 of Criminal Code. So according to these articles if the person committed criminal offence avoid trial or investigation the lapse of time shall be stopped.

According to the Article 53.1.3 if the person to be charged is not available to the investigating authority or the court the criminal prosecution may be suspended by the issue of investigator in conformity with Article 277 of CPC and according to the Article 278 of this Code it begins to take measures to search for the accused. If the circumstances, justifying a suspension of the proceedings no longer exists it shall be resumed by decision of the investigator pursuant to the Article 279 of CPC. From this moment, that is from the moment of detention of the mentioned person or his appearance and confession of his guilt according to article 75.3 of CC the statute of limitations shall be resumed.

In spite of the clear indication by legislator of his position concerning application of statute of limitations in regard to bringing to criminal responsibility, the calculation of statute of limitations on continued and serial crimes has not been provided for by article 75 of the CC.

By the similar norm the legislator of some countries (Switzerland, Spain) distinguishing at determination of terms of bringing to criminal responsibility the continued and serial crimes from other crimes, has provided for norms reflecting special rules of calculation of terms in regard to them. However, other states (Georgia, Moldova and others) determining notions of these crimes, regarded to them the norm concerning calculation of terms. Some states, including European states decided this issue by similar way.

From the comparatively analyses of the cited above it gets evident that, the criminal law of the Republic of Azerbaijan does not distinguish continued and serial offences from other criminal offences, does not give their notions and provide any special provisions which regulate calculating the period of these offences.

It clearly seems from Article 75.2. of Criminal Code that, the requirements of this article concern all criminal offences displayed in the Special part of this Code.

In view of Article 75.2 it should be noted that, this article determines only the territorial jurisdiction of criminal matters which are linked with committing continued and serial offences and does not include any provisions concerning the notion of these crimes. In this regard the procedural regulation of the territorial hearing jurisdiction of continued and serial offences does not influence to the enforcement of Article 75 of Criminal Code.

As accepted commonly serial offences does not finish with committing of this crime. It only begins and becomes to be committed continuously during the certain period. However continued offences consist of the same crimes committing continuously with timely interval covered the unit intention.

Continued and serial offences institute is known by doctrine. It is not fortuitous to refer to these crimes in the Article 74.2 of Criminal-Procedure Code. However, failing to provide norms concerning continued and serial offences in the Criminal Code arise uncertainty for calculating the period on these crimes and thus would be caused to failure to calculate the continuity of these offences and to resolve relevant judgment in accordance with normative-legal acts.

Moreover, this might harm some constitution principles, as well as guarantee of rights and freedoms by law courts reflected in Article 60 of Constitution.

Especially, European Court of Human Rights also accepts the mentioned periods as the most important manner of remedy. So, European Court of Human Rights in its decision on the case Coeme and others v. Belgium connected with Article 7. “No punishment without law” of European Convention for Protection of Human Rights and Fundamental Freedoms, noted that, limitation may be defined as the statutory right of an offender not to be prosecuted or tried after the lapse of a certain period of time since the offence was committed. Limitation periods, which are a common feature of the domestic legal systems of the Contracting States, serve several purposes, which include ensuring legal certainty and finality and preventing infringements of the rights of defendants, which might be impaired if courts were required to decide on the basis of evidence which might have become incomplete because of the passage of time (Coeme and Others v. Belgium, §146).

It is necessary to note that, Constitutional Court′s commentaries must conform to the meaning of the norms given by the legislative and such interpretation must serve to elucidate and specify only the words indicated in the norms. The interpretation does not make any amendments or supplements to the norms and should not do so. In this respect whenever there is not manifestly difference between the text and meaning of article 75 of Criminal Code, it is prohibited to give broad interpretation of it.

Calculating the preclusion periods of criminal responsibility in other way is under the extraordinary competence of legislative and according to Article 130 of the Constitution of the Republic of Azerbaijan and Article 3 of Law of the Republic of Azerbaijan on Constitutional Court resolving this problem is not under competence of Constitutional Court.

However, regulating the matter submitted thorough petition can be resolved only by the way to give proper notion concerning the meaning and content of these offences, as well as to determine the beginning and the ending moments of these crimes. This competence was given to Milli Majlis of the Republic of Azerbaijan by Constitution.

Plenum of Constitutional Court notes the following with regard to application of the decision of Plenum of Supreme Court of former USSR.

Plenum of Supreme Court of the Republic of Azerbaijan in its decision on 3 May 1993 maintained that, beginning from 1 January 1992 during the transitive period the decisions of Plenum of Supreme Court of USSR keep their binding force on the territory of the Republic of Azerbaijan.

In accordance with Article 8 of Transitional Clauses of Constitution provisions of laws and other normative-legal acts acting on the territory of the Republic of Azerbaijan before acceptance of the present Constitution remain valid if they do not contradict the present Constitution.

According to this provision the former Criminal Code acting till 1 September 2000 remained valid with regard to the parts not contradicting the Constitution and other laws of the Republic of Azerbaijan.

Also pursuant to the Law of the Republic of Azerbaijan “On confirmation, Entry into Force of the Criminal Code of the Republic of Azerbaijan and the Issues of Legal Regulation as to the Matter” adopting on 30 December 1999, the new Criminal code came into force from date of 1 September 2000 and former Criminal code and other normative legal acts introducing amendments and supplements into it became null and void.

As the explanations given by USSR Plenum of Supreme Court in its decision on “” on 4 March 1929 was linked with former Criminal Code and could not apply separately, due to becoming null and void of this Code the maintained decision has also lost its importance.

On the ground of cited above the Plenum of Constitutional Court observes that, the application of Article 75 of Criminal Code to the continued and serial offences reflected in the Criminal-Procedure Code is possible under the conditions of taking into account the notions of these crimes, the beginning and finishing moments of it. It should recommend to Milli Majlis to carry out the necessary legal regulating measures for elimination the existed gaps.

Being guided by Article 130, para 4 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”, the Plenum of Constitutional Court:

**DECIDED:**

1. The application of Article 75 of Criminal Code of the Republic of Azerbaijan to continued and serial offences reflected in the Criminal-Procedural Code is possible under the conditions of taking into account the notions of these crimes.
2. To recommend to Milli Majlis of the Republic of Azerbaijan to add the notion of continued and serial offences, the provisions determining the beginning and finishing moments of these offences to Criminal Code of the Republic of Azerbaijan.
3. The decision comes into force from the date of its publication.
4. The decision is subject to publication in the “Azerbaijan”, “Respublika”, “Khalq gazeti”, “Bakinski rabochiy” newspapers and “Bulletin of Constitutional Court of the Republic of Azerbaijan”.
5. The decision is final and cannot be cancelled, changed or interpreted by any body or official.