**ON BEHALF OF REPUBLIC OF AZERBAIJAN**

**DECISION**

##### OF THE CONSTITUTIONAL COURT

##### OF THE REPUBLIC OF AZERBAIJAN

*On interpretation of provisions of Article 21 of the Law “On Basics of Call-up to Military Service in the Republic of Azerbaijan” and Article 180.3 of the Code of the Republic of Azerbaijan “On Execution of Punishments”*

# 22 September, 2008 Baku city

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

attended by the Court Clerk I. Ismayilov,

the legal representatives of the subjects interested in special constitutional proceedings: V. Gadirov, Judge of the Military Court of Ganja city; S.Mammadov, Deputy Head of the Department of Administrative and Military Legislation of Milli Majlis of the Republic of Azerbaijan

the expert: D.Guliyev, Acting Associate Professor of the Chair of Criminal Law, of the Law Department of the Baku State University;

specialists: Sh.Yusifov, Head of Criminal Board of the Supreme Court of the Republic of Azerbaijan; R.Kishiyev, Head of Legal Department of the Ministry of Defense of the Republic of Azerbaijan and E.Nasibov, Head of Department of Administrative and Military normative acts of Headquarters of Legislation of the Ministry of Justice of Republic of Azerbaijan;

based on Article 130.4 of the Constitution of the Republic of Azerbaijan has examined in open court session the constitutional case on inquiry of Military Court of Ganja city of 13 February 2008, N 30 concerning interpretation of items “b” and “v” of Article 21 of the Law “On Basics of Call-up to Military Service in the Republic of Azerbaijan” and Article 180.3 of the Code of the Republic of Azerbaijan “On Execution of Punishments”;

having heard the report of Judge E.Mamedov, the reports of the lawful representatives of the subjects interested in special constitutional proceedings and opinions of expert and specialist, the Plenum of Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS:**

Military Court of Ganja city, having addressed to the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as Constitutional Court), has shown that in pending court proceedings there is a criminal case concerning charge of soldiers of military unit R.Guliyev and N.Guliyev by Article 332.1 of the Criminal Code of the Republic of Azerbaijan (hereinafter referred to as Criminal Code).

N.Guliyev, 23 September 1989 year of birth, has been called up to active service on 5 October 2007 by the Agdjabedi regional military commissariat, and R.Guliyev, 4 October 1989 year of birth - on 5 October 2007 by the Beylagan regional military commissariat. R.Guliyev before come of age had committed theft for which on 25 July 2007 he was recognised guilty by Military Court of Sabirabad city on Article 177.2.1 of the Criminal Code and was deprived of freedom for a period of 3 years, and the imprisonment for 3 years was imposed on him in accordance with Article 70 of the Criminal Code. Before termination of a trial period he has been called-up to military service and during military service, that is on November 2007, having applied a violence against the companion - soldier N.Guliyev, thus harming their subordination relations, he committed a military offense.

By a legal investigation of Military Court of Ganja city assessing whether R.Guliyev is a subject of a military offense when examining a question of possibility of a call-up of condemned to active service has faced the diversity of various provisions in points “b” and “v” of Article 21 of the Law “On Basics of Call-up to Military Service in the Republic of Azerbaijan” and Article 180.3 of the Code of the Republic of Azerbaijan “On Execution of Punishments” (hereinafter referred to as CEP).

For elimination of the ambiguities which have arisen in connection with a call-up or non-call-up of condemned person to military service within judicial practice the Military Court of Ganja city in connection with guarantees of the rights and freedoms of the person and the citizen provided by provisions of Article 71 of the Constitution of the Republic of Azerbaijan asked the Constitutional Court to interpret of items “b” and “v” of Article 21 of the Law “On Basics of Call-up to Military Service in the Republic of Azerbaijan” and Article 180.3 of the CEP.

In this connection the Plenum of the Constitutional Court considers that for the correct solution of the inquiry of Military Court of Ganja city, first of all, it is necessary to note that the essence of military service as well as the legal source regulating a call-up to this service and also the comprehensive analysis of provisions of the acts causing the ambiguities represent a great importance.

According to Article 76.1 of the Constitution of the Republic of Azerbaijan (hereinafter referred to as Constitution) defense of motherland is duty of any citizen. Citizens of Republic serve in the army according to legislation.

As a whole, the defense of motherland as well as the passing of military service, the timely passing for this purpose of military training, execution of other tasks connected with defense, admit by right, as components of a military duty. According to the current legislation, each male citizen of the Republic of Azerbaijan who reached 18-year-old age and is suitable for it on a state of health should pass military service.

Military service, being a special kind of governmental service, is subdivided into active service and service out of uniform. Active service is carried out in armed forces and other armed formations. Enlisting to military service is carried out on a call-up per four times a year. And the service out of uniform consists of passing of military assembly and fulfillment of rules of a call-up on mobilization in wartime.

Regulation of the legal relations connected with a call-up to military service, is carried out by the Law “On Basics of Call-up to Military Service in the Republic of Azerbaijan”.

According to Article 1.2 of the given Law the tasks of legislation on the bases of call-up to military service in the Republic of Azerbaijan are aimed at determination of the bases of a military duty, a procedure of preparation of youth to military service, conditions and procedure of a call-up and admission to military service, a procedure of the military account of persons liable for call-up and recruits, the bases of call-up on mobilization and dismissals on demobilization as well as a professional training for Armed forces of the Republic of Azerbaijan and maintenance of constant fighting and mobilization readiness of Armed forces.

It is necessary to bear in mind that the military service is obligatory within the limits and forms established by the present Law (Article 2.2). Provisions of this Law establish the procedure of a call-up of citizens to military service and also a deferment of military service, a circle of the citizens who are exempted from a call-up to service of the given kind and not called up to service (Articles 16-21).

In this connection it is necessary to specify that according to provisions of parts I and III of Article 16 of the Law “On Basics of Call-up to Military Service in the Republic of Azerbaijan” the deferment of military service is granted: on marital status, a state of health, for continuation of education, in connection with deputy activity. The recruits who have lost the bases for a deferment and also the persons who do not have the rights to a deferment or the bases provided by the present Law for grounds for exemption from call-up, not called up for the various reasons on military service in scheduled dates, should be called up at carrying out of the next call-up before achievement by them of 35-year-old age.

It is necessary to consider that the circle of persons, exempted in a peace time from a call-up to military service and also not called up to military service is established accordingly by parts I and II of Article 21 of the given Law.

According to point “ğ” of part I of given article, among the persons exempted from a call-up, there are specified the citizens condemned to punishment in the form of imprisonment for commitment of serious or gravest crime. For persons of the given category a legal ground of exemption from a call-up in a peace time make a commitment of serious or gravest crime and condemnation on punishment for it in the form of imprisonment. Taking into account the provisions of Article 16.3 and point “ğ” of Article 21.1 of the Law “On Basics of Call-up to Military Service in the Republic of Azerbaijan” the specified citizens in the presence of the given grounds (except for justification cases) should not be called up to military service in a peace time.

However the rules specified in Article 21.2 of the Law “On Basics of Call-up to Military Service in the Republic of Azerbaijan” for non call-up to military service are interim as circumstances making them have transitive character.

So, according to the contents of points “b” and “v” of part II of given article, to military service there are not called up the citizens who still have previous conviction or the whose previous conviction for the crime committed earlier is not redeemed, and also the citizens with respect to whom the investigation or an inquest on criminal case is still conducted, or regarding whom the or criminal case is pending in a court.

Taking into account Article 16.3 and points “b” and “v” of Article 21.2 of the Law “On Basics of Call-up to Military Service in the Republic of Azerbaijan” the given citizens should be called to military service after loss of status accordingly condemned, suspected or accused person.

The above-stated provisions of the Law “On Basics of Call-up to Military Service in the Republic of Azerbaijan” cannot be considered casual and are from the legal point of view quite logical, as continuation of provisions of criminal and criminal-procedural legislation in force.

At the same time, the contents of points “b” and “v” of Article 21.2 of the Law “On Basics of Call-up to Military Service in the Republic of Azerbaijan” became the reason of various approaches in law enforcement.

Thus, since the provisions of point “v” of given article concerning a call-up to military service of citizens in regard to whom investigation or a consequence on criminal case is conducted, or criminal case in regard to whom is pending in a court, follow from some restrictions applied to suspected and accused persons in connection with presence of certain problems in criminal trial, they do not create any problem with the contents of Article 180.3 of the CEP. Provision of point “b” of part II of given article concerning non call-up of citizens from whom the previous conviction is not cleared or the previous conviction for the crime committed earlier is not redeemed, to military service, even though is constructed according to the criminal legislation, nevertheless, the contents of Article 180.3 of the CEP differ from it.

According to Article 180.3 of the CEP, in case of a call-up of condemned person to military service for realisation of supervision for condemned person in a place of passing of military service the copy of sentence together with other demanded documents is sent to a military commissariat. The commander (chief) of military unit within ten days should notify the court which pronounced a sentence on registration of the given person or his dismissal from military service.

Using in given article of expression “at a call-up of condemned to military service” has created such an impression that the condemned persons, as well as other citizens, can be called up to military service. The similar approach to the contents of Article 180.3 of the CEP do not correspond to point “b” of Article 21.2 of the Law “On Basics of Call-up to Military Service in the Republic of Azerbaijan” and the given circumstance create an ambiguity in application of law.

Plenum Constitutional Cуда considers that the comprehensive legal analysis of the above-stated acts, the attentive and complex approach to acting norms of legislation allow to distinguish the norms promoting occurrence of ambiguities, and precisely to define the purpose to which each of them directed.

First of all, it is necessary to underline that both acts in themselves carry various functions. The Law “On Basics of Call-up to Military Service in the Republic of Azerbaijan” regulates the relations directly connected with a call-up to military service. And the CEP establishes a procedure and conditions of execution and serving of punishments. The purpose of the given Code consists in correction of condemned person, prevention of commitment of new crimes both by condemned and other persons, and its task consists in regulation of rules and conditions of execution and serving of punishments, an establishment of cures of condemned, protection of the rights and freedom, legitimate interests of condemned (Articles 2.1 and 2.2 of the CEP).

As it gets evident from its title, Article 180.3 of the CEP provides for realisation of supervision in connection with execution of a sentence of court only for probationers. And according to point “b” of Article 21.2 of the Law “On Basics of Call-up to Military Service in the Republic of Azerbaijan”, to military service there are not called up the citizens from whom the previous conviction is not cleared or the previous conviction for the crime committed earlier is not redeemed, that is if a person is recognised condemned, including probation then the call-up to military service of such person is limited. The given circumstance is connected with presence of punishment for a crime and previous convictions.

At the same time it is necessary to consider that though in the Law “On Basics of Call-up to Military Service in the Republic of Azerbaijan” it is directly specified that the condemned persons are not called up to military service, nevertheless, Article 180.3 of the CEP does not regulate a call up of condemned persons, more precisely, probationers, to military service, and is simply directed at execution of requirements of Article 70.6 of the Criminal Code. Though there are used the words “in case of a call-up of condemned person to military service” in Article 180.3 of the CEP the given article, nevertheless, acts as the norm providing for execution of punishments.

The structure of current legislation creates an impression that Article 180.3 of the CEP, on the one hand, does not deny the Law “On Basics of Call-up to Military Service in the Republic of Azerbaijan”, and on another - continues the provisions of Criminal Code.

Plenum of the Constitutional Court considers that from the point of view of the resolution of question it is necessary to analyze in details some questions connected with the legal nature of criminal punishment and previous conviction, which underlie in the provision concerning the non-call up to military service of citizens from whom the previous conviction is not cleared or the previous conviction for the crime committed earlier is not redeemed in accordance with point “b” of Article 21.2 of the Law “On Basics of Call-up to Military Service in the Republic of Azerbaijan”.

According to the concept of punishment given in the Criminal Code the punishment is the measure of criminal - legal nature appointed by a decision of court. Punishment is applied to the person recognized as guilty in commitment of a crime and consists of the deprivations established by the present Code or restrictions of rights and freedoms of this person (Article 41.1 of the Criminal Code).

Kinds of punishments in the Criminal Code are established from less serious to more serious: penalty; deprivation of the right to operate a vehicle; deprivation of the right to hold the certain posts or to engage in the certain activity; public works; deprivation of special, military or a honorary title and state award; corrective works; restriction on military service; confiscation of property; forced exile from the Republic of Azerbaijan; restriction of freedom; maintenance in disciplinary military unit; imprisonment on the certain term; life imprisonment (Article 42 of the Criminal Code).

Each punishment is directed at restoration of social justice, correction of condemned and prevention of commitment of new crimes. Any punishment possesses according to its nature the contents and a corresponding quantity indicator that is the means adjustable to criminal law and recognised sufficient for influence on condemned person. However, any deprivation of the certain rights and freedom or other restrictions is the content of punishment. This content obviously distinguishes the condemned person from other citizens.

The content of punishment as the lever on condemned person is concretized in the legislation of execution of punishments. The CEP, according to the tasks put before it, establishes general provisions and principles of execution of the punishments provided by the Criminal Code, other measures of criminal-legal character, application to condemned of means of execution, the rules and a conditions of execution and serving of punishments, a legal status of condemned person, a list of bodies executing of punishment, participation of corresponding enforcement authorities, other bodies, offices or organisations, public associations and citizens involved in correction of condemned person, rules of exemption of condemned from serving of punishment and rendering assistance to the persons released from serving of punishment (Article 2.3 of the CEP).

Establishment by the point “b” of Article 21.2 of the Law “On Basics of Call-up to Military Service in the Republic of Azerbaijan” of non-a call up to military service of citizens from whom the previous conviction is not cleared or the previous conviction for the crime committed earlier is not redeemed is closely connected with concept and the previous conviction nature.

Convictions as the institution of criminal law reflect the criminal punishment and its negative legal consequences for the condemned person. The person condemned for commitment of a crime is considered as convicted from the date of entry of a decision of court into validity up to the moment of removal or release from a previous conviction (Article 83.1 of the Criminal Code).

Clearance of previous conviction is defined in the Criminal Code, as a rule, not only as a kind of punishment and the expiration of certain term after end of serving of punishment but also as a character and degree of public danger of the committed crime (Article 83.3 of the Criminal Code). These moments also play an important role for an establishment of legal frameworks of corresponding restrictions and deprivations for the condemned person. Criminal Code provides also certain exceptions of the general procedure of clearance of a previous conviction and also concrete conditions of clearance of a criminal record (Articles 83.4 and 83.5). Clearance of a criminal record cancels all legal consequences connected with a previous conviction (Article 83.6 of the Criminal Code).

It is also necessary to note that probation, being a special measure of criminal-legal influence, by its nature represents the form of realisation of a criminal liability and institution of clearance of real serving of punishment. According to Article 70.1of the Criminal Code, the probation is applied concerning five basic punishments (corrective works, restriction on military service, maintenance in disciplinary military unit, and restriction of freedom or imprisonment on the certain term). In case of probation the condemned person through his behaviour within the trial period established for him should prove that he was reformed.

At probation the court imposes one of noted punishments, and at the second stage, considering the character of a crime, degree of its public danger, the personality of condemned, the circumstances aggravating and commuting the punishment, recognises the given punishment as suspended and establishes for condemned person a trial period (from six months till five years). Thus, at probation the punishment imposed on the general rules, creates a conviction, however the punishment actually is not executed. Person on probation is considered condemned from the moment of the coming of a verdict of guilty into force.

Probation does not mean impunity and cannot be recognised as release from punishment. Though it is not a special kind of punishment it, nevertheless, includes its some elements. For example, it is applied only to the person recognised by a sentence of court as guilty of commitment of crime and is followed by presence of some restrictions for the given person.

So, court imposing probation, can assign on condemned person the following duties: to not change a constant place of residence, study, work without notice to appropriate body which is carrying out control of condemned behavior; to not attend certain place; to pass course of treatment from alcoholism, narcotics, glue sniffing or venereal disease; to render material support to family. The court can assign on condemned person the execution of other duties promoting his correction (Article 70.5 of the Criminal Code).

For this reason the Criminal Code provides for necessity of imposing of control over persons on probation. Such control is carried out, as a rule, by corresponding state structures (judicial authorities), and for the condemned soldiers – by command of military units and institutions (Article 70.6 of the Criminal Code). Last circumstance does not contradict to provision of Article 180.3 of the CEP, on the contrary, it completely corresponds to it.

It is necessary to especially note that Criminal Code does not provide a leaving of probationers from control of corresponding state structures (judicial authorities), including his sending to military service before end of the trial period imposed by court. The given circumstance can be regarded as clearing without trial from the probation which is a special criminal-legal measure of influence and, as result, from a criminal liability.

As a whole, it is necessary to remember that depending on behavior of condemned person the probation can have several legal consequences. If after the expiration of suspension period, which is not less than half of his probation period, the condemned person by his behavior proved a correction, a court can decide on cancellation of probation and on clearing of previous convictions (Article 71.1 of the Criminal Code). If probationer has evaded from execution of duties assigned on him by court or committed disorderly conduct for which on him the official penalty has been imposed, the via the procedure established by the law can prolong a probation period but not more than for one year (Article 71.2 of the Criminal Code). In case of regular or malicious default by probationer during a suspension period assigned on him by court of duties, a court via the procedure established by the law can decide about a cancellation of probation period and execution of the punishment imposed by a decision of court (Article 71.3 of the Criminal Code).

It is necessary to especially underline that probationers are considered as the persons who do not have previous convictions only after expiration of a probation period (Article 83.3.1 of the Criminal Code).

Plenum of the Constitutional Court of the Republic of Azerbaijan previously stated its position concerning a previous conviction and the questions connected with it. So, in the decision of 8 July 2008 “On interpretation of Article 83.2 of the Criminal Code of the Republic of Azerbaijan” the Court marked: “As it gets evident from Article 83.1 of the Criminal Code, the previous conviction of the person condemned on a certain kind of punishment for commitment of a crime, begins from the date of the introduction of a decision of court into validity and proceeds both in a current of all term of punishment, and after the termination of term of punishment within the limits of the terms established by the law.”

Thus, the joint and complex legal analysis of provisions of the military, criminal legislation and the legislation of execution of punishments indicates that any citizen after clearing or redeeming of previous conviction can become the subject of a call-up to military service (except for the citizens condemned on punishment in the form of imprisonment for commitment of serious or gravest crime in a peace time). And Article 180.3 of the CEP cannot give a legal ground for a call-up of probationers to military service without clearing or redeeming of previous conviction.

At the same time, since the provisions of point “b” of Article 21.2 of the Law “On Basics of Call-up to Military Service in the Republic of Azerbaijan” and Article 180.3 of the CEP lead to occurrence in application of law of certain ambiguities concerning a call-up of condemned to military service, Plenum of the Constitutional Court considers necessary also to note the following.

Effective and fair mutual relations of any person with the state are possible at a fair perception by the given person of his own rights and duties and also powers of public authorities. Only such position creates the base not only for achievement of exact legal regulation and reasonable stability but also for increase of confidence to the law and the state.

The principle of legal certainty acts as one of the basic aspects of the rule of law. It is very important that any law or any of its provisions should meet with a principle of legal certainty. Norms of law should be unequivocal and clear for ensuring of it. It, in its turn, should give to everyone a confidence of protection of rights and freedoms and possibility to foresee the actions of applicators of law.

Requirements concerning legal certainty follow from the constitutional principles of a prevalence of the right, conformity of regulatory legal acts to the law and justice (to equal relations to equal interests). The uncertainty of the contents of legal norm, which create at application of law the possibility for unlimited opinions, leads to infringement of rule of law which should base on one or another normative legal act, principles of equality before the law and court.

In many decisions of the European Court of Human Rights there are specified that the restrictions of fundamental rights can be considered as based on law only cases if the conscious person, having familiarised with a norm and having addressed to the help of the lawyer or judicial practice, can precisely enough estimate the consequences of his own actions. The court also recognised that in this aspect the basic threat of legal certainty represent the set of the general expressions, vagueness of the basic terms or presence of various interpretation of the same terms in various laws (the decision of 4 June 2002 on case of Landvreugd v. the Netherlands; the decision of 28 October 1999 on case of Brumărescu v. Romania).

Thus, in connection with the inquiry of Military Court of Ganja city Plenum of the Constitutional Court comes to a following conclusion:

1) In connection with regulation of the questions connected with the release from a call-up to military service or not call-up to military service by provisions of Article 21 of the Law “On Basics of Call-up to Military Service in the Republic of Azerbaijan”, in case of presence of one of the bases or the reasons provided by parts I or II of the given article the citizen in a peace time should be accordingly released from a call-up to military service or not be called up to military service;

2) In connection with the fact that the provisions of Article 180.3 of the CEP directed at regulation of a procedure of supervision of probationers, instead of questions of call-up to military service and the provisions of point “b” of Article 21.2 of the Law “On Basics of Call-up to Military Service in the Republic of Azerbaijan” in practice are understood ambiguously, with a view to ensure the legal certainty it is necessary to recommend to Milli Majlis of the Republic of Azerbaijan to conduct a necessary improvement in the current legislation.

Being guided by parts VI, IX and X of Article 130 of the Constitution of the Republic of Azerbaijan, Articles 60, 62, 63, 65-67 and 69 of the Law of the Republic of Azerbaijan “On the Constitutional Court”, Plenum of the Constitutional Court of the Republic of Azerbaijan

**DECIDED:**

1. In connection with regulation of the questions connected with the release from a call-up to military service or not call-up to military service by provisions of Article 21 of the Law “On Basics of Call-up to Military Service in the Republic of Azerbaijan”, in case of presence of one of the bases or the reasons provided by parts I or II of the given article the citizen in a peace time should be accordingly released from a call-up to military service or not be called up to military service;

2. In connection with the fact that the provisions of Article 180.3 of the CEP directed at regulation of a procedure of supervision of probationers, instead of questions of call-up to military service and the provisions of point “b” of Article 21.2 of the Law “On Basics of Call-up to Military Service in the Republic of Azerbaijan” in practice are understood ambiguously, with a view to ensure the legal certainty it is necessary to recommend to Milli Majlis of the Republic of Azerbaijan to conduct a necessary improvement in the current legislation.

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

4. The decision shall be published in “Azerbaijan”, “Respublika”, “Xalq Qazeti” and “Bakinskiy Rabochiy” newspapers, and “Bulletin of the Constitutional Court of the Republic of Azerbaijan”.

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