**ON BEHALF OF REPUBLIC OF AZERBAIJAN**

**DECISION**

##### OF THE CONSTITUTIONAL COURT

##### OF THE REPUBLIC OF AZERBAIJAN

*On interpretation of provisions of Articles 397.1 and 397.2 of the Criminal Procedure Code of the Republic of Azerbaijan*

# 12 May, 2009 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: I.Jafarov, Head of Department of maintain of state prosecution of General Prosecutor’s Office of the Republic of Azerbaijan, E.Askerov, senior adviser of department of the administrative and military legislation of Milli Majlis of the Republic of Azerbaijan,

the experts: F.Abbasov, Head of Chair of Criminal Procedure of the Baku State University, A.Yusubov, Associate professor, Chair of Criminal Law and Criminal Process, “Azerbaijan” University;

the specialists: M.Agazade, Judge of the Supreme Court of the Republic of Azerbaijan and G.Mamedov, Judge of the Court of Appeal of Baku city;

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 General Prosecutor’s Office of the Republic of Azerbaijan of 30 January 2009, N08/4809 concerning interpretation of provisions of Articles 397.1 and 397.2 of the Criminal Procedure Code of the Republic of Azerbaijan;

The Constitutional Court also addressed to famous European specialist of criminal procedure professor of Tilburg University of Netherlands Mr. Van Kalmstut and professor of Frey University of Berlin Dr. [Hartmuth Horstkotte](http://www.jura.fu-berlin.de/fachbereich/einrichtungen/strafrecht/lehrende/horstkotteh/index.html) and received their written opinion on case in point.

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 and familiarized with opinions of foreign specialists, the Plenum of Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS:**

Office of Public Prosecutor of the Republic of Azerbaijan, having addressed to the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as Constitutional Court) with inquiry, has specified that, according to Article 397.1 of the Criminal Procedural Code of the Republic of Azerbaijan (hereinafter referred to as CPC), the court of appeal shall verify that the court of first instance accurately established the facts of the case and applied the provisions of criminal law and of this Code. According to Article 397.2 of the CPC, facts established by the court of first instance shall be verified by the court of appeal only within the limits of the petition of appeal. The first instance court’s compliance with the provisions of the criminal law and of this Code shall be verified by the court of appeal regardless of the evidence for the petition of appeal.

In inquiry it is also underlined that in judicial practice there are cases of wrong application to contested of norms of the criminal law, according to the rules provided in norms (for example, at imposition of punishment on recidivism according to Article 65 of the Criminal Code, set of crimes or sentences according to Articles 66 and 67 of the Criminal Code, definition of a kind of facilities on punishment serving according to Article 56 of the Criminal Code) of the Criminal Code of the Republic of Azerbaijan. But during reconsideration of a case on the appeal complaint of condemned on a sentence of court of the first instance or the protest of public prosecutor concerning not taking into consideration of his conclusions and offers, the offences admitted by court of the first instance, but not specified in the appeal protest, are established by court of appeal instance. In spite of it, the given offences are not eliminated from the point of view of Articles 397.1 and 397.2 of the CPC on the ground that they lead to the consequences unacceptable for the condemned. As a result the illegal sentence or the decision which has been adopted with infringement of requirements of the current legislation is left without change. Though, according to Articles 397.1 and 307.2 of the CPC, the court of appeal instance should accept one of the decisions provided in Articles 391.3 and 398 of the CPC.

Further there are the reference to a number of norms of the Constitution, the legislation and international legal acts in inquiry, and it is specially underlined that unlike Article 420.3 of the CPC supposing the adoption of the decision worsening a position the condemned at sending of criminal case, the materials of the simplified pre-judicial proceedings or via the procedure of private prosecution to for new proceedings in court of appeal instance, only in case of cancellation of a sentence or the decision of court on the basis of the cassation protest of the public prosecutor, in Article 397 of the CPC the similar restriction is not provided.

According to submitted inquiry, non-elimination of the mistakes committed by court of the first instance and ascertained by court of appeal instance, according to Articles 397.1 and 397.2 of the CPC, on the one hand, does not correspond to Articles 12 and 68 of the Constitution, Article 397 of the CPC, Article 2 of the Criminal Code, and on the other hand will not conform with provisions of Article 60.1 and Article 71.1 of the Constitution.

In this connection, the submitted inquiry for the purpose of elimination of the problems which have arisen in legal application, asks the Constitutional Court to interpret positions of Articles 397.1 and 397.2 of the CPC.

Plenum of the Constitutional Court considers necessary to mention some moments of implementation of justice on criminal legal proceedings concerning the question put in inquiry.

The Republic of Azerbaijan, having selected a way of the state structure which are based on democratic values and rule of law, declared in the Constitution ensuring of the rights and freedom of the person and the citizen as the highest objective, has defined mechanisms of protection and ensuring of the given rights and freedoms based on international legal standards.

The political, economic, social and other changes which have occurred in our country after restoration of the state independence have caused adoption of the new Criminal Procedural legislation. The criminal procedure existing in Azerbaijan makes possible to carry the mixed form (kind) of criminal procedure within continental judicial-legal system. In this process there are elements of investigation process at a stage of pre-judicial proceeding and at legal proceedings stages - the democratic principles of proceeding peculiar to process of competitiveness (publicity, obligatory ensuring of the rights and freedom of participants of process, competitiveness of the parties etc.).

If during proceedings the criminal prosecution is carried out on the basis of presence of the charge which have been brought against accused, only court has the right via the procedure and in the cases established by the law (Article 7.0.10 of the CPC), to consider the charge brought against any person and to pronounce on the substance of this charge a sentence or other final decision.

The procedural law establishing proceeding limits restrains it to limits of the charge which have been only within the limits of the charge laid against the accused or brought before the court. As a result of its examination, the court has the right to classify the act committed by the accused as a less serious offence and to remove specific points from the charge brought (Article 318.1 of the CPC). But on sense of the legislation (provisions of Article 318.2 of the CPC) in view of absence of function of charge, the court cannot aggravate a legal status of accused during proceedings (cannot independently qualify deed of accused to the norm providing more a heavy punishment on charge laid against the accused or brought before the court).

According to criminal legal proceedings the court is the body which is carrying out justice based on principles and conditions provided by the Constitution and the procedural law (Articles 8-36 of the CPC).  In the course of the proceedings, judges may not express interests other than those of the law. One of tasks of justice consists in administration of justice on purpose to conduct judicial proceedings in order to punish persons found guilty of committing offences and to acquit those who are not guilty. The rules concerning the administration of justice may not be unilaterally altered for different cases and persons or in particular circumstances or at given times (Articles 8.0.5, 28.2 and 28.6 of the CPC).

Justice can be recognized as corresponding to the essence only if it provides the rational legal protection of right of each person to judicial protection or the fair proceedings fixed in the Constitution (Article 60.1) and also in international legal acts (in particular, in Article 6 of the Convention “Convention for the Protection of Human Rights and Fundamental Freedoms”, Article 14 of the International Pact “On civil and political rights”, Article 8 of the Universal Declaration of Human Rights).

The increase of prestige of court is inseparably linked with fastening and implementation of democratic principles of the justice serving to performance of tasks, facing court on protection of the rights and freedom of the person. Main principles of justice are defined in Article 127 of the Constitution and further more widely reflected in other acts, including the CPC.

Among these principles the important and special place is occupied by a principle of legality. Being fixed both in the Constitution and in the material and procedural legislation, it provides not only exact both invariable observance of laws and their execution. Legality also is the basic display of democracy, an important principle of a lawful state, and in legal proceedings by one of the main elements making a basis of justice.

The basic essence of a principle of legality consists that it not only establishes the subordination of judges of the Constitution and to laws, but also serves for elimination of the mistakes revealed by court and ensures the judicial protection of everyone, the rights and freedom of citizens, on the assumption of realization of other principles of fair proceedings and as a whole establishes the legal proceedings purpose.

Realization of justice exclusively by the court gives the chance to court to operate and play a supervising role during proceedings. Despite it the court for real administration of justice should aspire to an establishment of the rule of law; provide the right to fair trial and to construct the work on legality principles and also equalities and competitiveness’s of the parties making of the decision on the basis of proofs and the facts.

Implementing the justice the court should comprehensively, completely and objectively find out the circumstances important for case and for this purpose investigate all circumstances both exposing and justifying the accused, and also aggravating and softening his responsibility.

According to Article 60.1 and Article 71.1 of the Constitution, the court should protect rights and freedom of everyone who are taking part in criminal trial. On the legal position generated by the Constitutional Court in the previous decisions, during objective and all-round realization of justice there should be considered the rights and legitimate interests both accused, and the victim, as the parties, undergo moral, physical and to a material damage in connection with a crime.

According to Article 65 of the Constitution, every person convicted by the law court has the right to appeal, as specified by the law, to the higher law court asking for reconsideration of the verdict and also for pardon and mitigation of the sentence.

According to sense of Articles 35.1 - 35.3 of the CPC, the right of everyone to complain to a higher court and to request a retrial, alleging that the judgment was unlawful or groundless, to request a reduction of the penalty to which he was sentenced, may not be restricted.

The right to appeal to a higher court, first of all, is provided at the expense of appeal legal proceedings. Inclusion of this kind of legal proceedings in criminal trial should be recognized as additional guarantee of fair trial by inviting in our country of judges of higher courts to trial using their more perfect knowledge and experience.

Reconsideration of a decision of the court of the first instance which has not entered into force via appeal procedure should be considered as a cure of miscarriages of justice. Such kind of proceedings establish and eliminate the offences which have affected or able to affect on comprehensive and complete investigation of circumstances of case during pre-judicial or preliminary judicial investigation, of an appropriate criminal-legal qualification of committed criminal act, and ensuring of the rights of participants of criminal trial. And this gives the possibility to higher court to cancel in due time the illegal or unreasonable sentence which has been adopted by court of the first instance, and to pronounce a new sentence. Thereby the miscarriages of justice admitted in a consequence of infringements, made purposely or on an oversight are corrected, and heavy consequences of these errors are in due time prevented.

It should be especially noted that unlike cassation proceedings an appeal proceedings provide for repeated investigation of the final decision (including, a sentence) not entered into force, from the point of view of its conformity to actual circumstances of case and (or) to requirements of the criminal and criminal procedural legislation by full or partial check of legality and validity of the given decision. Court of appeal instance, representing itself as full court is competent to recognize case in essence, to uphold the final decision of court of the first instance, to change it, or having cancelled to adopt instead of it the new decision.

Reconsideration of a decision via the procedure of appeal proceedings is possible in the presence of the appeal complaint or the protest (hereinafter referred to as petition of appeal). Legal subjects of filing of the petition of appeal and capacity of their granted right are regulated by Articles 383.1 and 383.2 of the CPC. Each subject has the right to dispose of the rights independently. It depends only on the subject of proceedings via which procedure the complaint against a sentence (partially, completely, together with other participants of criminal trial or independently) will be filed and what bases (arguments) will be specified for this purpose.

The petition of appeal should reflect the concrete request addressed to higher court concerning cancellation or change of a sentence of court of the first instance (Article 387.1.5 of the CPC). The given request gives to the petition of appeal a certain direction in advantage or to the detriment of the condemned or defended person (hereinafter referred to as condemned) a sentence of court of the first instance. Absence of a similar direction gives the grounds for recognition of the petition of appeal deprived of the necessary legal content. In this case, the court of appeal instance should keep the complaint or appeal without taking any action, to demand elimination of the given lack during certain term and if these requirements are not met during the set period, the court of appeal should decide to leave it unexamined (Article 391.4 of the CPC).

The disagreements which have arisen in application of law in connection with application of Articles 397.1 and 397.2 of the CPC actually are not connected neither with provisions of Articles 397.1 CPC nor with the first sentence of Article 397.2 of the CPC. These norms are given by the legislator consistently, precisely and clearly, and their understanding does not cause any difficulties or doubts.

The ambiguity causes only the second sentence of Article 397.2 of the CPC. Though, usage in this sentence of words “regardless of the evidence for the complaint or appeal” in a context of verifying by court of appeal instance of observance of norms of the criminal or criminal procedural legislation by court of the first instance does not contradict to spirit of norms of the acting Constitution and the legislation.

So, in spite of the fact that only participants of criminal trial authorised by the law should demand change of a sentence of court of the first instance or its cancellation and passing of the new decision instead of it, the procedural law assigns a duty to court of appeal instance to verify observance of norms of the criminal or criminal procedural legislation by court of the first instance irrespective of arguments of the appeal complaint or the appeal protest (Article 397.2 of the CPC).

The given duty is connected with the nature not only appeal procedure, but also justice as a whole. Discovery of the truth is an indispensable condition of justice, and the society will always demand from court of the justice reflecting true. Not casually that one of last important changes brought in our Constitution, demands from legal proceedings of ensuring of a discovery of the truth (Article 125.7).

Negation of possibility of a discovery of the truth, depriving justice of the moral purpose and the content, can justify any injustice. A discovery of the truth and by that the fair solution of case: condemnation guilty and only in proportion to fault degree, its punishment according to requirements of the criminal law, and finally the unconditional justification of innocent - both a duty, and a moral imperative of the judge.

Each judge for execution of the given duty, first of all, should provide obligatory observance of procedural requirements as the given circumstance is an important condition of a discovery of the truth on criminal case and passing of the correct judicial decision. And procedural guarantees create appropriate conditions for achievement of true.

Also, if considerable circumstances of the event making a subject of investigation on criminal case are not established, and (or) provisions of the criminal law in relation to the given circumstances have not been correctly applied, this decision cannot be considered as the true act of justice. The given act should be corrected irrespective of the illegal actions of the judge which have led to injustice, miscarriages of justice or other circumstances which have affected its legality and validity.

For this reason Plenum of the Constitutional Court considers that positions of Article 397.2 of the CPC are very important concerning verification by court of appeal instance of correctness of application of norms of the criminal and criminal procedural legislation even in cases of absence in the petition of appeal of corresponding arguments.

The resolution of dispute which has arisen concerning application of the second sentence of Article 397.2 of the CPC is basically connected with the answer to a question on what decision can be adopted after check by court of appeal instance of correct application of norms of the criminal and criminal procedural legislation in case of absence in the petition of appeal of corresponding arguments.

In this connection there are two positions among law applicants:

- according to the first, when court of appeal instance establishes the corresponding legal grounds it should change the final decision of court of the first instance, cancel it or pass the new decision even if the given circumstance will lead to aggravating of positions of condemned;

- according to the second, even if the court of appeal instance reveals any legal ground it can change the final decision of court of the first instance or, having cancelled it, pass the new decision only provided that as a result position of the condemned will improve.

If in the first case there is reference to necessity to follow of a legality principle in the second it is underlined the inadmissibility of aggravation of a legal status of condemned.

Plenum of the Constitutional Court considers that when passing a sentence the court should base its act on the given factors for ensuring of its conformity to legality and validity requirements. Restriction of possibility of revision of the judicial decisions which do not meet the given requirements, can lead to balance infringement in protection of such values, as justice and legal definiteness, and to infringement of the rights and freedom of the person guaranteed by the Constitution.

The second sentence of Article 397.2 of the CPC can become a subject of disputes only in case when the petition of appeal is submitted to higher court not by condemned but by the public prosecutor (a private prosecutor) to the detriment of condemned. So, in case of giving of the petition of appeal by an accuser independently or simultaneously with the complaint of condemned usually there is a probability of imposing to the given person more a heavy punishment unlike the first. The exception from this is possible only in the event that the petition of appeal of an accuser is connected with softening of a sentence of court of the first instance as which he has counted excessively severe.

To come to such conclusion, there is a necessity to stop on the subsequent questions.

It is necessary to consider that as the legal content of the petition of appeal is made by the request reflected in the given petition, the court of appeal instance should not come to the conclusions heavier, rather than the request specified in the petition of appeal. And consequently, if the defender of the condemned has submitted the petition of appeal in favour of the given person or the petition of appeal of an accuser did not contain the corresponding request, a legal status of the person condemned by court of the first instance cannot be aggravated (worsened).

If the petition of appeal has been submitted by the given person, deterioration of a legal status of this person as a result of appeal procedure according to acting standards of legislation is generally inadmissible. So, Article 91.7 of the CPCs unequivocally establishes that accuser’s exercise of or refusal to exercise his rights should not cause him to suffer prejudice or detriment. And in this connection it is necessary to consider that among the rights of the accused there is a right to bring the appeal complaint to a sentence (Article 91.5.31of the CPC), and as regards the previous conviction of the person condemned by a sentence of court of the first instance this is not the case unless the sentence comes into force (Article 83.1 of the Criminal Code) and until that time he remains in a legal status of accused.

The right to lodge a complaint via appeal procedure against the final decision (sentence) of court of the first instance which did not enter into force and a principle of inadmissibility of change to the worst successfully solves a problem of mutual relations of interests of the person and justice. An advantage of the given principle in criminal trial acts as a real guarantee of ensuring of the right of accused to fair trial.

The essence of a principle of inadmissibility of change to the worst consists that the complaint submitted by condemned on sentence of court of the first instance to higher court, cannot cause for him the undesirable consequences. The court of appeal instance by a legal investigation via appeal procedure even after sentence cancellation has not the right to increase punishment or to replace charge heavier or substantially with different charge on actual circumstances, and also to worsen position of condemned at the permission of other criminally-legal questions. Otherwise the fear to aggravate the position will force condemned to refuse using the right even in the presence of the bases to contest the sentence.

However the principle of inadmissibility of change of position to the worst does not limit court to a discovery of the truth irrespective of whether it is favorable for accused or not. The given interdiction providing freedom of filing of the complaint to a sentence, promotes correction of judgments not corresponding to justice, including the decisions which are not reflecting an objective truth, and by that to discovery of the objective truth.

Possibility of reconsideration of the considered case in appeals proceeding and any connected with it desirable and undesirable consequences are considered as standard for judicial-legal systems of the European countries applying similar kind of proceedings. In these countries the courts of appeal instance, as a rule, verify the correctness of application of norms of the criminal and criminal procedural legislation even if the person submitting the petition of appeal does not have these arguments nt and in case of revealing of the bases causing cancellation or change of a judgment of the first instance, pass the corresponding decision (even if it will lead to aggravation of position of condemned by a judgment of the first instance).

In the majority of the European countries the criminal procedural legislation against the application of rule “reformatio in pejus” (“change to the worst” - imposing of more severe punishment in the case considered by higher court, on the complaint of the party of defense) in appeal proceeding. So, if with the petition of appeal accused or his defender, or in exceptional cases when the petition of appeal of the public prosecutor is directed on softening of a judgment of the first instance, provisions of the legislation of some countries of continental Europe (paragraphs 290.2, 295.2 and 345.4 of the CPC of Austria; Article 515.2 of the CPC of France; paragraphs 331 and 358 of the CPC of Germany; Article 515 of paragraph 3 of the CPC of Italy; chapter 51 of section 25 of the Code of Judicial Proceeding of Sweden etc.) do not allow application of rule “reformatio in pejus”.

But some countries of Europe have not enlarged the application of rule “reformatio in pejus”. In these countries even if the court of the first instance recognises the person innocent, the court of appeal instance at revealing of the bases can recognise the person as guilty. A vivid example of it is England applying the Anglo-Saxon law. In spite of the fact that the rule “reformatio in pejus” has been reflected in the CPC of France since 1806, the Court of Cassation supports opinion that after cancellation of a sentence of the Court of Appeal taking into account wrong application of the right, the minor court where case is directed, has the right to pronounce heavier sentence, than the first sentence challenged by accused (cf. Jacques Boré, La cassation en matiere penale, 1985, p. 365). And in Holland, in some cases, if the Court of Appeal warns in advance accused that its complaint can lead to heavier consequences for him, subsequently judges can unanimously make the corresponding decision (Art. 424.2 Wetboek van strafvordering).

Nevertheless, in the European countries at lodging of the petition of appeal by the public prosecutor in a counterbalance to interests of accused the approach to it is absolutely different and the results of appeal proceeding have no limits.

In general, from the beginning of XIX century in continental Europe there is a general rule, well known, - the complaint or other legal means directed on change of a judgment of the first instance, should not lead to a rule “reformatio in pejus” on condition that the complaint has been submitted by the accused. The given rule extends and on those cases when the defender and the public prosecutor submit the petition of appeal for mitigation of punishment.

The European Commission of Human Rights which assignee is the European Court of Human Rights (hereinafter referred to as European Court), on 9 March 1988 has considered case where, by appeal consideration by Court of Appeal of England, the result was the replacement of the penalty with punishment in the form of imprisonment. The Commission has noticed that taking into account Article 6 of the European Convention the fact of the warning of accused by the Court of Appeal before passing of the decision that it does not consider the penalty as the punishment proportional to severity level of an offence, has special value. Not so persevering accused should have understood the given warning as a sign the withdrawal of the appeal complaint on purpose leaving the imposed punishment in the form of the penalty in force is more comprehensible. Nevertheless, the Commission has not made any remarks concerning application in the given case of the rule “reformatio in pejus” (FroweinPeukert, Europäische Menschenrechtskonvention, 1996, Art. 6 ECHR, note 68).

Thus, the opinion reflecting possibility of adopting by court of appeal instance of the decision only improving position of person condemned by a judgment of the first instance is not a standard in the European countries. On the contrary, here the possibility of reduction of the appeal to deterioration of position of condemned is more comprehensible rule. And in some countries the requirement of decision-making by judges unanimously gives an additional guarantee for protection of the condemned.

Coming back to positions of the current legislation of the Republic of Azerbaijan, it is possible to specify that unlike the norms regulating appeal proceeding, Article 420.2 of the CPC directly provides that during the reconsideration of the case by the court of first instance the penalty may be increased or the legal provisions governing a more serious offence may be applied only if the initial judgment was set aside pursuant to the public prosecutor’s appeal to the Supreme Court. The given position completely corresponds to legal tradition of continental Europe excluding in similar cases application of a rule “reformation in pejus”. Presence of Article 420.2 of the CPC in practice creates possibility of use of analogy of the law for a resolution of disputes between law applicators concerning application during appeal proceeding of Articles 397.1 and 397.2 of the CPC.

Article 392.2 CPC also plays a part in a resolution of dispute, arisen among law applicators, in connection with application of the second sentence of Article 397.2 of the CPC. So, according to the given article, condemned or justified, their lawful representatives are subject to an obligatory call on session of court of appeal instance if in the appeal complaint or the appeal protest is brought a question on deterioration of position of condemned either justified, or the court of appeal instance considers necessary carrying out of judicial investigation. In such cases the public prosecutor and the defenders which participation in criminal trial is obligatory are called.

As it is evident, in spite of the fact that Article 392.2 of the CPC confirms the possibility of deterioration of position of condemned in appeal proceeding, it does not mention a question whether it is possible in cases of giving of the petition of appeal by condemned either the defender or a prosecutor in favour of the given person. Presence of given article does not cancel the requirement of Article 91.7 of the CPC and cannot be interpreted to the detriment and lead to consequences undesirable for him (for example, to deterioration of his position), realization by accused of rights, including the right to lodge of complaint to court of appeal instance of the person condemned by sentence of court of the first instance, not entered into force, but still representing as the accused.

On sense of Article 6.1 of the European Convention and Article 2.1 of the Protocol N7 of the European Convention, it is undesirable to admit the occurrence of fear of condemned that abstains him from lodging of the appeal complaint against a sentence. Otherwise, possibility of “reformatio in pejus” can transform the complaint of the given person to the procedure which can finally toughen punishment, and the appeal proceeding in comparison with preliminary proceeding – to the procedure leading to more serious consequences.

Therefore Article 392.2 of the CPC can be interpreted so that possibility of “deterioration of position of condemned as a result of the appeal”, containing in the given norm, extends only on those cases when besides the petition of appeal of condemned and his lawful representative or the defender the petition of appeal is lodged also by a prosecutor (state or private). In such cases deterioration (worsening) of positions of condemned, as a result of appeal proceeding, does not make the contradiction with justice rules.

Plenum of the Constitutional Court for the resolution of a question concerning correct application of the second sentence of Article 397.2 of the CPC also considers necessary to consider the below-mentioned.

Any proceedings should come to the end by passing of the fair judgment. In this sense, in the generalized form the parties of criminal trial and the society expect from court not only lawful, but also a well-founded decision. Anyway the adjudication should be adopted not only according to law requirements on form and content, on the basis of the facts established according to requirements of the criminal procedural law, and at correct application of the criminal law, but at the same time should be well-grounded and proved. One of the last changes brought in the Constitution for perfection of legal proceedings (Article 129.3) also makes the given demand.

After a legal investigation the court should construct the conclusions according to true and on proofs investigated in judicial session, to state these proofs an estimation excluding passing of other decision, deeply analyse structure and qualifying signs of a crime, to impose a punishment at a recognition of the person guilty taking into account character and public danger of a crime, the person and the circumstances softening and aggravating responsibility, and in case of a recognition of the person innocent, to justify him.

The reasoning plays an important role in acceptance of a sentence by a society, in its perception as the fair decision. It, being an integral part of validity of a sentence, should give an explanation why just the given decision is adopted by court, and other possible decisions are rejected.

In spite of the fact that legality and validity of a sentence are various concepts, they are closely connected among themselves and became the main criteria of the fair judgment. In view of the given criteria, deterioration of position of the person, condemned (justified) in appeal proceedings, is possible on some circumstances. For example, if the court of appeal instance changes legal qualification of actions of the given person from one norm of criminal law in another which sanction provides more severe punishment, will apply to the given person of norm of the criminal law, aggravating punishment, will reconsider a kind of punishment or term of application of the imposed punishment etc.

The similar conclusion of appeal proceedings is absolutely possible, owing to the nature of the given proceedings (reconsideration of the case by full court with verifying of legality and validity of the final decision of court of the first instance which have not entered into force, including establishments of actual circumstances, correct application of the criminal and criminal procedural legislation) and from the point of view of interests of justice. But for this purpose at first there should be established the presence of the petition of appeal directed to a damage of condemned (otherwise, the court incurs function of charge unusual for it as justice body), and the corresponding bases and the reasons provided in the criminal and criminal procedural legislation, established by the law at reconsideration of the case by court of appeal instance.

On the one hand, strict observance of the given moments, and on the other hand, declination of condemned to abstain from such actions as lodging of the appeal complaint, do not serve not only to interests of the given person, but also justice requirements as a whole.

It is necessary to underline that filing of protest on unreasonable and illegal judgments to highest authority court is a duty of the public prosecutor, and consideration of the petition of appeal via the procedure established by the law is a duty of court of appeal instance. Owing to execution of this duty the court of appeal instance is obliged to verify the observance by court of the first instance of norms of the criminal law and the criminal procedural legislation, irrespective of arguments of the appeal complaint or the appeal protest, and to provide fair proceedings. At the same time the provisions of Article 91.7 and Articles 398 – 405 of the CPC should be in the limelight of court.

In spite of the fact that requirements concerning fair proceedings are applied in proceedings on civil and to criminal cases, concerning the second, within the limits of continental judicial-legal system the present “corpus juris”, reflecting two principal views of ensuring is developed: the organic guarantee making possible fair judicial proceedings taking into account some obligations assigned to state structures (openness of process, independence and impartiality of court); guarantee of the action falling within the concept of dynamics and equality of the parties during all proceeding.

The latter guarantee is the best to expresses the character of justice which should be observed during litigation. This guarantee is directed on proceedings regulation so that, without giving any advantages, to guarantee justice of the given trial at all procedural stages.

In this connection, speaking about fair trial it is necessary to pay attention to a position of the European Court which especially noted that the principle that the rules of criminal procedure must be laid down by law is a general principle of law. It stands side by side with the requirement that the rules of substantive criminal law must likewise be established by law and is enshrined in the maxim “*nullum judicium sine lege*”. It imposes certain specific requirements regarding the conduct of proceedings, with a view to guaranteeing a fair trial, which entails respect for equality of arms. The principle of equality of arms requires that each party must be afforded a reasonable opportunity to present his case under conditions that do not place him at a substantial disadvantage *vis-à-vis* his opponent (Case of Coëme and others v. Belgium, 22/06/2000; Art. 6 of the ECHR).

It is necessary especially to note that the right to judicial protection makes an integral part of true justice. Non-recognition of the granted right leads to negation of the right of everyone to fair trial though proceedings on criminal cases, first of all, should be fair.

But despite significance of the right to judicial protection in criminal legal proceedings it is not absolute and it is impossible to interpret it in excessively expanded form. In this connection the European Court considers that the Article 6 para. 3 (c) guarantees three rights to a person charged with a criminal offence: to defend himself in person, to defend himself through legal assistance of his own choosing and, on certain conditions, to be given legal assistance free (Case of Pakelli v. Germany, 25/4/1983; Art. 6 of the ECHR).

The European Court also noted that Article 6 para.3 (c) does not provide for an unlimited right to use any defence arguments (Case of Brandstetter v. Austria, 28/8/1991; Art. 6 ECHR).

Considering all stated, the legal position of the Constitutional Court consists that, according to the provisions reflected in Articles 397.1 and 397.2 of the CPC, the court of appeal instance should verify an establishment of actual circumstances by the court of the first instance within the petition of appeal, observance of norms of the criminal and criminal procedural legislation in any case, including even if in arguments of the appeal complaint or the protest the requirements concerning it are not advanced. And procedural-legal consequences of the given verification could be absolutely different, and it depends first of all, on an orientation of the petition of appeal on content, and then directly from the received results of verification. In this case:

- if appeal proceedings conducted on the appeal complaint submitted by the condemned or his defender, or the appeal protest submitted by the public prosecutor as a matter of fact in favour of one of them, the court of appeal instance can having improved the position of the specified person change the final decision of court of the first instance, or cancel it and adopt the new decision;

- if appeal proceedings conducted on the appeal protest submitted by the public prosecutor, or the appeal complaint submitted by a private prosecutor, as a matter of fact, to the detriment of condemned, court of appeal instance, irrespective of arguments of the petition of appeal, can change the final decision of court of the first instance, or cancel it and adopt the new decision, also having aggravated position of condemned (even if this basis is not specified in the petition of appeal).

In both cases at verifying of observance of norms of the criminal and criminal procedural legislation the revealing of circumstances and the reasons provided in Articles 403-405 of the CPC, has crucial importance.

Along with it, in the first case, inadmissibility in the CPC of principle “reformatio in pejus” concerning the condemned, the adoption of decision in the contradiction with the legal content of the appeal protest submitted by the public prosecutor in favour of one of given persons and by that an undertaking by court of accusatory function, and in the second case, the fact of filing by the public prosecutor of the appeal protest (the appeal complaint of a private prosecutor) and at the same time non-restriction in the CPC of aggravation of a legal status of condemned in via the procedure of appeal proceedings, act as major factors. In the latter case, also the direction of the legal content of the petition of appeal to the detriment of the person condemned by a sentence of court of the first instance, irrespective of arguments, is a primary condition.

Plenum of the Constitutional Court also considers that in the presence of omissions in CPC, even in case of absence of any provisions concerning it, during conducting of appeal proceedings on the appeal protest submitted by the public prosecutor, or the appeal complaint submitted by a private prosecutor, as a matter of fact, to the detriment of condemned, irrespective of arguments, the court of appeal instance for prevention unreasonable aggravation of positions of the person condemned by the definitive decision of court of the first instance, for the purpose of adoption of the fair judgment, can demand of unanimous voting of judges applied in appeal proceedings of some countries of Europe.

The given circumstance will act as additional guarantee for adoption of the lawful and well-founded decision by court of appeal instance, and also strengthening of judicial protection of the accused. In the current legislation the given practice is used at application of imprisonment for life (Article 347.4 of the CPC). In this case there emerge also the adoption of the lawful and well-founded judgment and strengthening of judicial protection of the accused as a main criterion.

Plenum of the Constitutional Court considers that the adoption of the lawful and well-founded judgment and the guarantee of judicial protection of accused when applying the second sentence of Article 397.2 of the CPC before filling of the omission which is available in the legislation (before filling by the legislator of a omission in the law concerning the requirement of unanimous adopting of the decision by judges of court of appeal instance) can be carried out on the basis of analogy of the law and compulsion of execution of the decision of the Constitutional Court.

Being guided by parts VI and IX 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. Before making by the legislator of respective modifications to the Criminal-Procedural Code of the Republic of Azerbaijan, at application of Articles 397.1 – 397.2 of the given Codes there should be taken into account the following:

a) the court of appeal instance should verify the observance by court of the first instance of norms of criminal and criminal-procedural law in any case including even if in the arguments of the appeal complaint or the protest accordingly there is no any demand concerning it.

b) when establishing the circumstances and the reasons provided in Articles 403-405 of the CPC, after verifying of observance of norms of the criminal and criminal-procedural legislation:

– if appeal proceedings is conducted on the appeal complaint submitted by the condemned or his defender, or the appeal protest submitted by the public prosecutor as a matter of fact in favour of one of them, the court of appeal instance can having improved the position of the specified person change the final decision of court of the first instance or cancel it and adopt the new decision, having improved the position of the specified person;

– if appeal proceedings conducted on the appeal protest submitted by the public prosecutor, or the appeal complaint submitted by a private prosecutor, as a matter of fact, to the detriment of condemned or acquitted, the court of appeal instance, irrespective of arguments of the petition of appeal, can change the final decision of court of the first instance, or cancel it and adopt the new decision, also having aggravated position of condemned, but if in the arguments of the appeal the basis for this purpose is not specified the decision can be adopted only unanimously by all judges of the appeal court considering case.

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

3. 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”.

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