**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

# OF THE PLENUM OF THE CONSTITUTIONAL COURT

**OF THE REPUBLIC OF AZERBAIJAN**

## On conformity of Article 79 of the Criminal Code of the Republic of Azerbaijan with Articles 25.1, 25.2, 25.3, 26.2, 28.1, 147, and 149.1, 149.3

## of the Constitution of the Republic of Azerbaijan

**02 March 2010 Baku city**

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

attended by the Court Clerk I.Ismayilov,

representatives of the parties - M.Mammadov, the senior advisor of Scientific-Analytical Department of the Staff of Ombudsman and E.Askerov, the senior advisor of Department for Administrative and Military Legislation of the Administration of Milli Majlis of the Republic of Azerbaijan,

expert - A.Kerimli, lecturer of Department of Criminal Law of Faculty of Law of Baku State University,

has examined in open session via special constitutional proceedings in accordance with Article 130.VI of the Constitution of the Republic of Azerbaijan the constitutional case on conformity of Article 79 of the Criminal Code of the Republic of Azerbaijan to Articles 25.1, 25.2, 25.3, 26.2, 28.1, 147, and 149.1, 149.3 of the Constitution of Republic of Azerbaijan on the basis of inquiry of Ombudsman of the Republic of Azerbaijan N 1/6310-09 of August 11, 2009.

Having heard a report of Judge Mammadov and statements of representatives of the parties M.Mammadov, E.Askerov and opinion of expert A.Kerimli, studied materials and examined the case, the Plenum of the Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS:**

Ombudsman of the Republic of Azerbaijan, having submitted to the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as Constitutional Court) the inquiry asking for verification of conformity of Article 79 of the Criminal Code of the Republic of Azerbaijan (hereinafter referred to as CC) toArticles 25.1, 25.2, 25.3, 26.2, 28.1, 147, and 149.1, 149.3 of the Constitution of the Republic of Azerbaijan.

In inquiry it is specified that Article 79 of CC regulates relations in connection with a delay of serving of punishment by pregnant women and the women having juvenile children. According to Article 79.1 of the given Code, to condemned pregnant women and women having the child at the age till eight years, except for the women sentenced to imprisonment for the term of more than five years for fulfillment grave or specific grave crimes against the person, a court can defer serving of punishment before achievement by the child 8 ages.

In inquiry it is also mentioned that by Article 79.1 of CC it is not known which age category (juvenile, adult) children from eight to fourteen years old concern to. Although, in Articles 38.6, 1103.1, 1120 of Civil Code of the Republic of Azerbaijan children till fourteen are specified as juvenile. In Article 82.1 of the Criminal Code of Russian Federation similar to Article 79.1 the possibility of a delay of serving of punishment by the women having children aged till fourteen years is also indicated.

The Ombudsman considers that the criminal legislation, having limited concept the juvenile child in frameworks till eight years, has not considered the rights and legitimate interests of juvenile children till fourteen years and their lawful representatives (in a concrete case - mothers). As a result instead of a delay of serving of punishment concerning the women having juvenile children till fourteen years, committed the crimes that does not represent a significant public danger, or a crime of small weight, they are sentenced to punishment in the form of imprisonment.

According to inquiry, concept restriction the juvenile child in frameworks of eight, instead of fourteen years in Article 79.1 of CC, creating the contradiction with a number of the norms fixed in the Constitution, leads to rough infringement of constitutional rights of persons of the given category (juvenile from eight till fourteen years and their mothers) on the specified bases. Leaving of Article in the present kind does not correspond to requirements of Article 79.1 of CC of the Republic of Azerbaijan Articles 25.1, 25.2, 25.3, 26.2, 28.1, 147, and 149.1, 149.3 of the Constitution of Republic of Azerbaijan.

Plenum of the Constitutional Court considers necessary to note the following in connection with inquiry.

The approach of the Ombudsman following from humanistic values concerning Article 79.1 of CC, being worthy approval from the point of view of improvement of the criminal legislation, does not exclude its consideration by the legislator in the future.

Nevertheless, matters of law and expediency in legislation regulation are necessary for distinguishing from each other. The decision of questions of expediency is not included into powers of the Constitutional Court and depends exclusively on the approach of the subjects participating in lawmaking, and finally, the legislator. And the estimation of legal questions the Constitutional Court demands carrying out of the analysis of the norms mentioned in legal dispute, within the limits of the powers, separately and in interrelation.

First of all it is necessary to note that the Constitution, along with other questions, establishing position, including, fundamental laws, freedom and a duty of the person, represents itself as the main source and an acceptance basis in the state of laws and other regulatory legal acts. In the Constitution also there are the norms marking its force and relevancy. Article 147, 149.1 and 149.3 of the Constitution on which the reference in inquiry was made are among such norms.

Thus, according to Article 147, the Constitution of the Republic of Azerbaijan possesses highest and direct legal power and is the basis of legislative system. According to parts I and III Articles 149 of the Constitution, normative legal acts must be based on law and justice (equal benefit, equal attitude). Laws should not contradict to the Constitution.

Article 147 and parts I and III Articles 149 of the Constitution are the important and not denied norms, but, to come to any conclusion concerning execution of requirements of the given norms special attention should be given to observance of other as a group applied constitutional norms, and for this purpose to their maintenance and an essence. From this point of view for research of conformity of Article 79.1 of CC of the Constitution the great value has an establishment of the maintenance and an essence of parts I, II and III of Articles 25, a Article 26.2 and Article 28.1 of the Constitution to which the Ombudsman refers.

According to parts I, II and III Articles 25 of the Constitution, all people are equal with respect to the law and court. Men and women have equal rights and liberties. The State guarantees equality of rights and liberties of everyone, irrespective of race, nationality, religion, language, gender, origin, property status, occupation, beliefs, affiliation with political parties, trade unions or other public associations. It is prohibited to limit human and civil rights and liberties due to race, nationality, religion, language, gender, origin, belief, political or social affiliation.

Evidently, the right of equality proclaimed in the Constitution, expresses equality of the rights and freedom of everyone. The granted right does not operate separately from other rights and freedom provided in the legislation, and protects any person from discrimination at using the given rights and freedom.

It is necessary to notice that the right of equality has arisen historically in a counterbalance to feudal privileges, and has gradually made a basis of very important principle regulating the relations between a society and the state. Equality of the rights, at the same time, admits as one of corner principles of constitutionalism and the integral elements of democracy.

Not casually that the right of equality takes the important distinctive place and in the international legal acts in this or another form of expression (Article 7 of the Universal Declaration of Human Rights, Article 14 of the International Covenant on Civil and Political Rights, Article 14 of the European Convention on Human Rights, and point 2 of Article 1 of the Protocol N1 of the same Convention etc.).

The equality right expresses, as a matter of fact, equality of the rights and freedom of everyone with respect to the law and court, does not provide mechanical association of people. According to positions of Article 25.3 of the Constitution, it is possible to speak about infringement of the granted right only in the event that equality of the rights and freedom of any person is limited from the point of view of objective legal criteria.

In inquiry of the Ombudsman though it is indicated about infringement of the right of equality of the women having the child at the age till fourteen years, except for the women sentenced to imprisonment for the term of more than five years for fulfilment grave or especially grave crimes against the person, in Article 79 of CC, the legal categories of it are not specified, though this point in question is solving for an establishment of infringement of equality of the right.

Nevertheless, Plenum of the Constitutional Court considers that the possible differentiation between the persons concerning certain social groups in positions of CC, including those in Article 79.1, should not be estimated as infringement of the right of equality. The privileges given by the criminal legislation to women, in particular pregnant and having the child at the age till 8 years, to men is more 65 years, to invalids of I and II groups and to other persons (positive discrimination), does not break constitutional laws of other persons, and simply expresses the special relation of the state to vulnerable social groups.

Also it is necessary to consider that after acceptance of CC, the legislator several times made changes to it. The law № III-QD - № 424, adopted on October 1, 2007, to Article 79 of CC makes changes, and in expression «the women having children, except the women condemned to imprisonment for term over five years for fulfillment of grave and especially grave crimes against the person» words «the women condemned» are replaced by words of "the persons condemned», and after words «the women having children» are added words «the men, one bringing up the child who has not reached eight years». Subsequently these changes, the action of Article has extended on all persons irrespective of a sex - both on women, and on men, and possible here an inequality to a sexual sign has been eliminated.

Besides, it is necessary to specify that Article 79.1 of CC providing possibility of a delay of serving of punishment by some condemned persons, having children at the age till 8 years, has dispositional character and defines not a court duty on this question but namely the right. And in that case, the reason concerning infringement of the condemned women referring to parts I, II and III of Article 25 of the Constitution not seems proved with the legal point of view.

According to Article 26.2 of the Constitution on which in inquiry the reference for legal contest of Article 79 of CC becomes, the state guarantees protection of rights and liberties of all people.

As appears from this norm, in the Republic of Azerbaijan the state guarantee of the right of protection is given by each person of the rights and freedom. Existence of such right and a guarantee testifies that in our country are not content with declaration of the rights and freedom of the person and from outside the states there is a support to their realisation actually, and also acts as an indicator of the approach of the Republic of Azerbaijan to execution of the obligation taken on according to the Viennese Final document of OSCE, as member of the given international organisation.

For realisation of the right of protection of the rights and freedom in our country a number of laws (for example, «On order of consideration of references of citizens», Civil, Criminal, Civil-Procedure and Criminal-Procedure Codes etc.) is accepted, and except a legislature, executive authorities, local government (municipalities), the special institutions which are engaged directly in this point in question (including Office of Public Prosecutor, courts, the Ombudsman etc.) are created.

Expression of the relation to dispute concerning infringement of the right of protection of the rights and freedom of any person is possible only in case of creation of obstacles to realisation of the granted right (for example, not consideration of the reference directed on restoration of the broken rights or freedom by state or municipal bodies, or consideration, but not acceptances of legal measures and other cases).

As in inquiry it is not specified, what criteria prove infringement in Article 79.1 of CC of the state guarantee of the rights and freedom of everyone, provided regarding Article 26.2 of the Constitution, concerning the women having the child at the age till eight years, except for the women sentenced to imprisonment for the term of more than five years for fulfillment grave or especially grave crimes against the person, it is impossible to come to any confirming conclusion concerning infringement of the given constitutional norm.

In inquiry for legal contest of Article 79 of CC the reference to infringement of the right of freedom of the women having the child, except for the women sentenced to imprisonment for the term of more than five years for fulfillment grave or especially grave crimes against the person, and by that infringement of Article 28.1 of the Constitution providing the given right.

In this connection it is necessary to notice that the right for freedom of everyone is recognized all over the world, as one of fundamental rights of the person (Article 3 of the Universal Declaration of Human Rights, Article 9 of the International Covenant on Civil and Political Rights, Article 5 of the European Convention on Human Rights etc.)

In the Constitution freedom right is fixed according to norms of international law and its restrictions as the granted right is not absolute are established. It is necessary to consider that according to Article 28.2 of the Constitution, right for freedom might be restricted only as specified by law, by way of detention, arrest or imprisonment.

Similar restriction is applied by the authorised officials by the special rules established at legislative level at detention, accordingly election of a measure of restraint in the form of imprisonment or the official penalty concerning suspected either accused of commitment of crime or an administrative offence, and also fix of punishment concerning the persons recognised guilty of commitment of crime.

In our country of a rule of imprisonment, detention or custody, and also a circle of persons authorized on restriction of the right of freedom according to the given rules, are established by operating legislative acts (Criminal-Procedure Code, Code of Administrative Offences, Laws «On Public Prosecutor Office », «On Police» etc.).

Therefore, if detention, custody or imprisonment of any person occurs out of the circumstances provided in the Constitution, and a counterbalance to the rules established by effective standards of the law, it should be estimated as infringement of the right of freedom of the given person. But, unprovide in Article 79.1 of CC of a delay of serving of punishment by the condemned women having the child at the age till fourteen years, in itself it should be accepted not as infringement of the right of freedom of everyone, fixed in Article 28.1 of the Constitution, but as the temporary restriction following from responsibility of the person which has committed a crime, and applied concerning the criminal under the law.

Similar restriction should provide observance of a principle of the proportionality acting as the basic condition of measures, accepted by the state for regulation of the conflicts which have arisen with commitment of crime. In the criminal legislation the given proportionality is defined on the basis of principles of legality, justice, equality before the law, guilt, responsibility for fault, inevitability of punishment and humanism, necessity and expediency of the selected kind of punishment, and also sufficiency of restriction of the right on time.

It is necessary to notice especially that positions of CC (including, Article 79) are connected with the policy of a crime-punishment characterized as system of certain political-legal relations spent by the state, norms of the right, ideas, sights. The basic maintenance of the given policy consists of working out of the purposes and problems, selection of means and the ways necessary for elimination of public safety and criminality, or maintenance of its maintenance at the level comprehensible from the social point of view. The policy a crime-punishment has complex character and along with others, first of all, provides an establishment criminally-legal, criminal-procedure, norms of punishment-execution for conducting struggle against criminality.

Policy of a crime-punishment and position of CC are closely connected among themselves. The given Code, being based on the Constitution, the standard norms and international law principles, defines not only concept of a crime, but also its kinds, subjects, structures of crimes, and also concept, the purpose, kinds and conditions of application of punishment, including the questions connected with a delay of departure of punishment.

According to Article 94.1.17 of the Constitution, interpretation of crime and other violations of law; establishment of responsibility for these acts is carried to the general rules established by Milli Majlis of the Republic of Azerbaijan.

Similar rules do not exclude their establishment in various forms (peculiar most) depending on features of the corresponding legal relations regulated on separate spheres of the legislation, and in certain cases do necessary their differentiation (for example, in sphere of the civil and criminal legislation). At the same time, considering the sovereignty the states passed in the Republic of Azerbaijan laws should not contradict to provisions of Constitution (Article 149.3 of the Constitution).

In inquiry coordination of possibility of a delay of serving of punishment for the women having the child, except for the women sentenced to imprisonment for the term of more than five years for fulfillment grave or especially grave crimes against the person, in Article 79 of CC, with a limit of fourteen years of children as it is defined in our civil legislation or the criminal legislation of Russia, can lead to intervention in powers of Milli Majlis of the Republic of Azerbaijan.

Besides, at the approach to a question challenged in inquiry, from the point of view of legislative experience of other countries, it is necessary to consider that in each country within the limits of certain international legal standards depending on positions of the constitution, features of legislative system and internal expediency positions peculiar to in regulation of legal relations are chosen. And consequently, the legislative system (its structure and the maintenance) in the world countries is not always identical.

It is necessary to notice that in the majority of the developed countries the delay of serving of punishment for the condemned persons is provided in rare instances (for example, for children who committed the crimes that does not represent a significant public danger and have not attained majority). But the delay of serving of punishment for the condemned persons (both women, and men), having child irrespective of age, as a rule, is not provided. Nevertheless, though in the state-participants of CIS the criminal legislation are provided cases of a delay of serving of punishment by the condemned persons (women, and in certain cases as well men), having the child, the criteria connected with an age limit of children, are various. For example, possibility of a delay of serving of punishment is connected by the condemned persons with achievement of children in Kazakhstan and Russia - 14 years, in Azerbaijan, Kirghizia, Moldova, Tajikistan and Turkmenistan - 8 years, Ukraine - 7 years, Georgia - 5 years, in Belarus - 3 years.

Inquiry also puts forward such opinion that by positions of Article 79.1 of CC it is not known, to what age category (juvenile, adult) children from eight till fourteen years concern.

In this connection it is necessary to consider that the establishment of an age category of children in this or other Article of CC cannot be carried to a subject of the criminal legislation. In general, it is necessary to underline that the indication in CC of age categories are connected with subjects of a crime, that is, it is necessary for an establishment of the persons who are subject to bringing to criminal liability. Not casually that in Article 20 of CC possibility of bringing to criminal liability of the person who has reached up the time of commitment of crime of sixteen-year age, in all cases, and the person who have reached of fourteen-year age in certain cases is provided.

According to the above-stated, Plenum of the Constitutional Court comes to conclusion that Article 79.1 of CC corresponds to parts I, II and III Articles 25, a part of II Article 26, a part of I Article 28, to Article 147 and parts I and III Articles 149 of the Constitution of the Republic of Azerbaijan.

Being guided by parts VII, IX and Х Articles 130 of the Constitution of the Republic of Azerbaijan, Articles 52, 62, 63, 65-67 and 69 Law of the Republic of Azerbaijan «On the Constitutional Court», Plenum of the Constitutional Court of the Republic of Azerbaijan

**DECIDED:**

1. To recognize Article 79.1 of the Criminal Code as corresponding to parts I, II and III of Article 25, part II of Article 26, part I of Article 28, Article 147 and parts I and III of Article 149 of the Constitution of the Republic of Azerbaijan.
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 can not be cancelled, changed or officially interpreted by any body or official.