**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

##### OF THE PLENUM OF THE CONSTITUTIONAL COURT

##### OF THE REPUBLIC OF AZERBAIJAN

*On interpretation of Article 244.1 of the Criminal Code of the Republic of Azerbaijan*

# 17 March, 2011 Baku city

The Plenum of the Constitutional Court of the Republic of Azerbaijan composed of Farhad Abdullayev (Chairman), Sona Salmanova, Fikret Babayev, Sudaba Hasanova, Rafael Gvaladze, Isa Najafov and Kamran Shafiyev (Reporter-Judge);

attended by the Court Clerk I. Ismayilov,

the legal representative of the subject interested in special constitutional proceedings: Eldar Askerov, senior adviser of the Department for Administrative and Military Legislation of Milli Majlis of the Republic of Azerbaijan and Ilham Hasanov, Judge of the Court of Appeal of Sumqayit city;

the specialists – Shahin Yusifov, Chairman of Criminal Board of the Supreme Court of the Republic of Azerbaijan, Gazanfar Bayramli, deputy head of Department of the Prosecutor’s General Office on Public Prosecution,

based on Article 130.6 of the Constitution of the Republic of Azerbaijan has examined in open court session on special constitutional proceeding the constitutional case on request of Court of Appeal of Sumqayit city of 4 October 2010 concerning interpretation of Article 244.1 of the Criminal Code of the Republic of Azerbaijan;

having heard the report of Judge K.Shafiyev, the reports of the legal representatives of the subjects interested in special constitutional proceedings, opinions of specialist, the Plenum of Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS:**

Court of Appeal of Sumqayit city addressed to the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as Constitutional Court) in connection with interpretation of Article 244.1 of the Criminal Code of the Republic of Azerbaijan (hereinafter referred to as Criminal Code).

In the request it is specified that on 26 January 2010 on the basis of Article 244.1 of the Criminal Code the accused person was condemned by a sentence of city court of Sumqayit on punishment in the form of corrective works for a period of 1 year and 6 months.

The Court of Appeal of Sumqayit city which has considered case on the basis of the appeal complaint by a decision of 14 May 2010 cancelled a decision of court of the first instance because of an absence of proof of fault of the accused person and acquitted him. The Criminal Board of the Supreme Court of the Republic of Azerbaijan considered case on the basis of a cassation protest at definition of the maintaining of a house of prostitution counted what even single granting a place for prostitution, creates structure of a crime of the Criminal Code provided by Article 244.1 and by the decision of 18 August 2010 cancelled a decision of court of appeal instance and remand the case for a new appeal consideration.

At new consideration of criminal case in court of appeal instance, in connection with uncertainty at application of Article 244.1 of the Criminal Code the request was sent to the Constitutional Court. The Court of Appeal of Sumqayit city in the request asked to give official interpretation of Article 244.1 of the Criminal Code, having proved it that a question of act commission as “the organization, maintenance of prostitution house for employment to prostitution or granting of premises for this purpose” established in a disposition of this article once or repeatedly (constantly) creates in practice a divergence of opinions (uncertainty) and also lack of a uniform position concerning the term “houses of prostitution”.

In connection with the request the Plenum of the Constitutional Court first of all considers necessary to open concept of structure of a crime and qualification of a crime.

According to Article 14 of the Criminal Code a crime is admitted as a socially dangerous action (action or inaction), forbidden by the present Code, under threat of punishment on guilty. Actions (action or inactivity), though it is formally containing attributes of any action (action or inaction), provided by the criminal law, but by virtue of insignificance not representing public danger, and shall not cause harm to a person, to a society or the state is not be admitted as a crime.

Definition of socially dangerous act both in legislative and in doctrinal aspect reveals legal and social signs inherent in each crime. Existence of signs forming crime structure (object, the objective aspect, the subject, the subjective aspect), serves to difference of concrete act from other criminal acts including other offenses. So, the structure of a crime is set of the established by criminal law objective and subjective signs characterizing socially dangerous act as a concrete crime.

Signs of structure of a crime are formulated in the Special Part of the Criminal Code establishing a criminal-legal ban. However instructions concerning signs of body of a crime are given also in the General Part and which is the general for many bodies of crimes. In Article 2.1 of the Criminal Code types of object of a crime, in Articles 24-26 signs of the subjective aspect, in Articles 19-21 subjects of crimes are defined.

According to Article 2.1 of the Criminal Code of a task of this Code consist of providing of the peace and safety of mankind, protection of rights and freedom of the person and the citizen, of property, of economic activities, of social order and public safety, of environment, of constitutional building of the Republic of Azerbaijan from criminal encroachments, and also the prevention of crimes. According to Article 19 of the Criminal Code to Criminal Liability shall be subjected person, who has mental capacity, committed a crime and reached appropriate age, settled by the present Code. The person, who has committed a crime (action or inaction) only on deliberate or on imprudence grounds, shall be admitted as guilty (Article 24.1 of the Criminal Code).

Qualification of a crime, along with establishment of compliance between aspects of perfect concrete criminal act and signs of structure provided in a disposition of criminal legal norm, criminal legal assessment of act reflected in the relevant procedural document and being the reason of criminal and legal consequences. Qualification of a crime has important social and legal value. Qualification from the point of view of fulfillment of duties established in the Criminal Code is the important logical process which is carried out by officials by possessing powers on application of the criminal law and on its termination the legal assessment is given to a concrete social event, human behavior which is dangerous to society. It first of all demands comprehensive study of the actual facts of the case, a choice of the legal norm and an explanation of its contents.

According to Article 3 of the Criminal Code the ground of the criminal liability shall be committing of action (action or inaction), structure of which provided only by the present Code.

Plenum of the Constitutional Court considers necessary to note, whether that at trial of each criminal act the correct establishment of its structure and the correct qualification are directed on establishment is a crime act reflecting signs of a crime, on establishment of existence of fault at the person accused of commission of crime, and also on purpose of fair punishment to the person accused for this crime. Otherwise it can become the reason of prosecution of the innocent person or evasion from responsibility of the person guilty of commission of crime, the wrong application of punishment. And it in turn can lead to violation of the principles of legality, equality before the law, responsibility for fault justice and humanity on which the Criminal Code is based.

According to the specified principles of the Criminal Code criminal action (actions or inaction), and also punishments for this actions and other measures of criminal - legal nature shall be determined only by the present Code. The person shall be subjected to the criminal liability and punishment only for socially dangerous action (action or inaction) and its consequences, concerning of which his fault is provided. Punishment and other measures of criminal - legal nature instituted to the person, who has committed a crime, shall be fair, and shall correspond to nature and a degree of public danger of a crime, circumstances of committing it and nature of a guilty person (Articles 5.1, 7.1, 8.1 of the Criminal Code).

In Article 1.2 of the Criminal Code it is specified that the present Code is based on the Constitution of the Republic of Azerbaijan both the conventional principles and norms of international law.

Basis of the principles of the Criminal Code make Parts I and II of Article 28, Part I of Article 60, Article 63, Article 67, Article 24, Parts I and II of Article 71, Parts VII and IX of Article 127 of the Constitution of the Republic of Azerbaijan (hereinafter referred to as Constitution).

The principles reflected in the criminal legislation being continuation of the principles fixed contain existence of inviolable, firm and inalienable rights and freedoms of everyone in the Constitution; restriction of the right on freedom of everyone only in the order provided by the law; guarantee of judicial protection of the rights and freedoms of everyone; proof of fault of everyone accused of the order provided by the law; explanation to each detainee arrested or accused of commission of crime to the person of its rights with an explanation of the reasons of detention, arrest and criminal prosecution.

Due to specified Plenum of the Constitutional Court considers that at qualification of criminal act provided in Article 244.1 of the Criminal Code, it is necessary to pay special attention to the listed above principles of the Constitution.

In Article 244.1 of the Criminal Code criminal liability for the maintenance of houses of prostitution is established. According to this article the organization, maintenance of prostitution house for employment to prostitution or granting of premises for this purpose is punished by public works for the term from two hundred up to two hundred forty hours, or corrective works for the term up to two years, or imprisonment for the term up to three years.

In the Criminal Code this criminal act is referred to category of crimes against public moral, thus the public moral is object and house of prostitution – a subject of criminal act. It is necessary to consider those crimes against public moral it is socially dangerous acts encroaching on public moral and doing essential harm. Such acts harm not only to one person but group of people, and also moral bases of society.

According to Article 244.1 of the Criminal Code as the organization and the maintaining of a house of prostitution and granting premises for this purpose is the basis of criminal liability.

In specified article three criteria of creation of conditions for occupations by prostitution are established. The first of them is the organization of the house of prostitution, the second – the maintaining of a house of prostitution, and the third granting premises for this purpose.

Plenum of the Constitutional Court considers that for the correct application of Article 244.1 of the Criminal Code it is necessary to consider the below-noted signs of the organization, the maintenance of house of prostitution or granting premises for this purpose:

- Under organization of a house of prostitution it is necessary to understand fulfillment of actions concerning search (acquisition, employment) houses, the building and other room, its putting in a suitable condition and adaptations for using (a repairing, providing with furniture, household appliances, etc.) for the purpose of using for occupation of prostitution, a choice of persons engaged in prostitution and also clients. House of prostitution can be organized in inhabited (the house, the apartment, giving) or uninhabited (garage, cellars, attics of constructions) and also stationary (house) or mobile (a cabin of the ship, a car compartment, etc.) objects.

The legislator established criminal liability for the organization of house of prostitution irrespective if it started acting or not. So, here criminal act is expressed in available intention and comes to the end with carrying out a preparatory work for achievement of a purpose.

The maintenance of house of prostitution provides payment of expenses connected with activity of a place adapted for occupation by prostitution after its organization, granting this place for a payment or is gratuitous also assuming of other measures for implementation of its activity (place cleaning, ensuring protection, bedding, etc.).

Granting premises for these purposes has to be understood as granting premises by the person who initially knows that these premises will be used for the organization and the maintaining of a house of prostitution by the person who organizes or keep a house of prostitution.

As evident, the purpose of these criminal (illegal) acts consists of the organization of occupation by prostitution, involvement in occupation by prostitution, creation of conditions for these purposes and exploitation of persons engaged in prostitution. It should be noted that criminal liability for such acts as the organization of house of prostitution, their maintain or granting premises for these purposes, can arise only after it will be proved that the organization of such actions is directed for occupation by prostitution.

All above comes to a conclusion that under concept house of prostitution the premises adapted for occupations by prostitution used for this purpose on a paid or free basis are provided inhabited or not.

Considering specified in total, Plenum of the Constitutional Court specifies that the crime structure according to Article 244.1 of the Criminal Code arises respectively in the presence of such signs as the organization, the maintenance of house of prostitution or granting premises for these purposes noted in this Decision of Plenum.

At the same time, in each of three criminal acts separately (the organization, the maintenance of house of prostitution or granting premises for these purposes) are available is considered all signs of structure of a crime and a crime complete. At the same time even one action (the organization, the maintenance of house of prostitution or granting premises for these purposes) directed on commission of this act creates structure of Article 244.1 of the Criminal Code.

Repeated commission any of these criminal acts is a reason of emergence of responsibility provided in Article 244.2 of the Criminal Code that is frequency the established by Article 16.1 of this Code.

Prevention of crimes from this category and also establishment of responsibility for them found the reflection as well in the international documents. The Republic of Azerbaijan by the Law of 31 May 1996 No. 102-IQ joined in the Convention for the Suppression of the Traffic in Persons and of the Exploitation of the Prostitution of Others adopted by the resolution of General Assembly of the UN of 2 December 1949. According to Articles 1 and 2 of the Convention the parties of the Convention agree to punish any person who, to gratify the passions of another: 1) Procures, entices or leads away, for purposes of prostitution, another person, even with the consent of that person; 2) Exploits the prostitution of another person, even with the consent of that person; 3) Keeps or manages, or knowingly finances or takes part in the financing of a brothel; 4) Knowingly lets or rents a building or other place or any part thereof for the purpose of the prostitution of others. According to Article 3 of the present Code To the extent permitted by domestic law, attempts to commit any of the offences referred to in articles 1 and 2, and acts preparatory to the commission thereof, are also punishable.

On the basis of the above Plenum of the Constitutional Court comes to a conclusion that expression “house of prostitution” specified in Article 244.1 of the Criminal Code means an inhabited or non-residential premise adapted for occupations by the prostitution, used for this purpose on a paid or free basis.

According to Article 244.1 of the Criminal Code the crime structure on the organization, the maintenance of house of prostitution or granting premises for these purposes arises in the presence of signs specified in this Decision and commission, at least time of one of these acts, creates crime structure according to this article.

Being guided by Article 130.6 of the Constitution of the Republic of Azerbaijan and Articles 60, 63, 65-67 and 69 of the Law of the Republic of Azerbaijan “On Constitutional Court”, Plenum of the Constitutional Court of the Republic of Azerbaijan

**DECIDED:**

1. The notion “house of prostitution” specified in Article 244.1 of the Criminal Code means an inhabited or non-residential premise adapted for occupations by the prostitution, used for this purpose on a paid or free basis.

2. According to Article 244.1 of the Criminal Code the crime structure on the organization, maintenance of house of prostitution or granting premises for these purposes arise in the presence of signs specified in this Decision and commission at least time of one of these acts, creates crime structure according to this Article.

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 can not be cancelled, changed or officially interpreted by any body or official.