**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE PLENUM OF CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*On verification of conformity of some provisions of Articles 17.2.3 and 182 of the Family Code of the Republic of Azerbaijan with Article 60.1 of the Constitution of the Republic of Azerbaijan*

**9 July 2013                                                                             Baku city**

The Plenum of the Constitutional Court of the Republic of Azerbaijan composed of Farhad Abdullayev (Chairman), Sona Salmanova (Reporter-Judge), Sudaba Hasanova, Rovshan Ismaylov, Jeyhun Garajayev, Mahir Muradov and Isa Najafov;

attended by the Court Clerk Elmaddin Huseynov,

the representative of the applicant – Mahir Mammadov, Head of the Science-Analytical Department of the Commissioner for the Human Rights (Ombudsman) of the Republic of Azerbaijan,

the representatives of the respondent – Fuad Mamedov, Senior Advisor of the Department for Administrative and Military Legislation of Milli Majlis of the Republic of Azerbaijan;

specialist – Bagir Asadov, Judge of the Supreme Court of the Republic of Azerbaijan, Doctor of Philosophy in Law;

in accordance with the Article 130.7 of the Constitution of the Republic of Azerbaijan examined in open judicial session via special constitutional proceedings the case on request of the Commissioner for the Human Rights (Ombudsman) of the Republic of Azerbaijan on conformity of some provisions of Articles 17.2.3 and 182 of the Family Code of the Republic of Azerbaijan with Article 36.4 of Civil Procedure Code of the of the Republic of Azerbaijan, Articles 25, 60, 71, parts I and III of Article 149 of the Constitution of the of the Republic of Azerbaijan.

having heard the report of Judge Sona Salmanova, the reports of the legal representatives of the subjects interested in special constitutional proceedings, and specialist, pronounced the opinion of expert professor M. Demircheva, Doctor of Law, Head of Civil Law Department of the Baku State University, examined and discussed the materials of the case the Plenum of Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS:**

Commissioner for the Human Rights (Ombudsman) of the Republic of Azerbaijan having applied to the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as the Constitutional Court) asked to verify the conformity of some provisions of the Articles 17.2.3 and 182 of the Family Code of the Republic of Azerbaijan (hereinafter referred to as the FC) with the Article 36.4 of the Civil Procedure Code of the of the Republic of Azerbaijan, Articles 25, 60, 71, parts I and III of Article 149 of the Constitution of the of the Republic of Azerbaijan (hereinafter referred to as the Constitution).

In the request, it is specified that according to Article 17.2 the dissolution of marriage, irrespective of presence of common minor children is made in relevant organ of the executive authority according to the application of one of spouses in the following cases:

17.2.1. in case of recognition judicially of one of spouses as missing;

17.2.2. in case of recognition judicially one of spouses as incapable;

17.2.3. in case of condemnation of one of spouses for crime execution to imprisonment for the term of over three years.

According to Article 182.1 of the FC regulating the registration of dissolution of marriage according to the statement of one of spouses, spouses, submitted the declaration of dissolution of marriage on the bases stipulated in Article 17.2 of presents of the Code, shall enclose to the application the judgment on recognition of the spouse as missing or incapable as a result of a mental disease or mental deficiency, or the extract from a sentence concerning condemnation of the spouse for commitment of crime to imprisonment for the term of over three years.

According to the Article 182.2 of the FC, in case of submission of application for dissolution of marriage on the grounds, stipulated in the Article 17.2 of the given Code, the relevant body of executive authority registers such dissolution of marriage at day of filing of application with participation of applicant and within 3 (three) days the information concerning that shall be send to the spouse who serve a sentence or to guardian of incapable spouse, or to trustee of property of missing spouse.

According to opinion of applicant the provision “in case of condemnation of one of spouses for commitment of crime to imprisonment for the term of over 3 (three) years” violates the rights of person affirmed in the Articles 25, 60, 71 and parts I and II of Article 149 of the Constitution and also does not correspond to the principles of equality, to the equal treatment to equal interests, to criteria of the right and justice demanded from the normative legal act.

The Plenum of the Constitutional Court, first of all, considers necessary to reveal the concept of marriage, the constitutional content, the principles and guarantees of the right to marriage.

According to Article 17.1 of the Constitution, the family as the main social unit is under special protection of the State.

Everybody has the right to marriage upon reaching the age specified by law. Marriage is contracted on the basis of voluntary consent. No one shall be forced to marry. Family and marriage are protected by state. Rights of husband and wife are equal (Article 34 of the Constitution).

Mentioned norms of Constitution have found reflection also in international legal acts, in field of protection of human rights and freedoms the party of which is the Republic of Azerbaijan too. Thus, according to the Article 23.4 of the International Covenant “On Civil and Political Rights” the states which are parties to this Covenant shall take appropriate steps to ensure equality of rights and responsibilities of spouses as to marriage, during marriage and at its dissolution. In case of dissolution, provision shall be made for necessary protection of any children.

According to Article 5 of the Protocol No. 7 to the Convention “On Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as the Convention) spouses enjoy equality of rights and responsibilities of a private law character between them, and in their relations with their children, as to marriage, during marriage and in the event of its dissolution.

Legal regulation of the family and marriage relations reflected in the Constitution and international legal acts are based on the principles established in the family legislation.

According to Article 1.3 of the FC, the family legislation proceeds from need of strengthening of a family, creation of the family relations on feelings of mutual love and respect, inadmissibility of intervention of someone in affairs of a family, mutual assistance and responsibility to a family of all her members of ensuring free implementation of their rights and a possibility of judicial protection of these rights.

The family legislation of the Republic of Azerbaijan has established a number of conditions for marriage and the family relations, considering the most important duties the creation of a family on a basis the universal principles, the family relations, on the basis of the voluntary marriage union of the woman and the man, mutual love, friendship and respect free from material reasons, education of children in a family in the spirit of devotion to the homeland and so forth.

Article 2.2 of the FC establishes that the legal regulation of family relations is administered in accordance with the principles of the free-will marriage of a man and woman, equality of the spouses, settlement of the interfamily issues on mutual consent, priority of children’s upbringing in the family, care about their welfare and development, ensuring the priority protection of minors and disabled family members’ rights and interests.

According to the Article 2.3 of the FC, the marriage is a free-will alliance of man and woman, registered in appropriate body of executive power with the purpose of establishing a family.

According to legal position reflected in the decision of the Plenum of the Constitutional Court of November 2, 2010 according to principle of free will and liberty of indifference of marriage union of man and woman each man and each woman voluntary, without influence of extraneous persons, possess a right to choose at their own discretion husband and wife. The basic condition of marriage is mutual free-will consent of man and woman.

Plenum of the Constitutional Court, analyzing the above-stated regulations of the Constitution, international legal acts and family legislation, considers that free will of marriage, freedom of expression of a will of the marrying persons, need of strengthening of a family, ensuring free implementation of the rights of the husband and wife and a possibility of upholding of these rights for court, equality of spouses, the solution of internal matters of a family under the mutual agreement, protection of the rights and interests of minor children and other principles, cover all stages of marriage (marriage, the family relations and dissolution of marriage).

Dissolution of marriage in the theory of law of domestic relations is understood as termination of the relations that are formed from marriage of spouses, concluded in the order established by the law in connection with emergence of certain legal facts. In that case, dissolution of marriage is the legal fact terminating their rights and obligations in the future, with the exception of the liabilities of spouses, stipulated by the legislation.

The family legislation provides implementation of dissolution of marriage based on a mutual assent of spouses in executive body, and in the absence of such consent and result of measures of conciliation of spouses judicially.

Determining an order of dissolution of marriage, the FC acts from the point of view of the principles of free will of marriage, equality of spouses, and also freedom of dissolution of marriage, the ensuring of free implementation of the rights of spouses.

The legislator characterized dissolution of marriage on following bases depending on the legal facts which are the termination base of marriage relations:

- in case of the death of one of spouses;

- in case of the announcement of one of spouses as dead judicially;

- based on the application of one of spouses or both of them;

- based on the application of the guardian of one of spouses who was judicially recognized as incapacitated.

The family legislation establishes two orders of dissolution of marriage – judicially and in the relevant body of the executive authority (administratively). According to Article 16 of the FC, the dissolution of marriage is exercised by relevant organ of the executive authority, and in the cases provided by Articles 19 - 21 of the given Code by court.

Articles 19-21 of the FC specify the judicial dissolution of marriage. In these articles legislator determines two main conditions of dissolution of marriage judicially: (i) presence of common minor children and (ii) lack of consent of one of the parties to dissolution of marriage.

Dissolution of marriage in relevant organ of the executive authority is the simplified form of dissolution of marriage, and dissolution of marriage is in this way allowed in the absence of disputes between spouses.

The family legislation provides two circumstances of dissolution of marriage in relevant organ of the executive authority:

1) in case of mutual consent of spouses of not having common children (Article 17.1 of the FC);

2) according to the application of spouses at the presence of one of three bases specified in Article 17.2 of the FC irrespective of presence of common minor children.

According to Article 17.2 of the FC the dissolution of marriage is made in relevant organ of the executive authority based on the application of one of spouses irrespective of presence of common minor children, in case of recognition judicially of one of spouses as missing, in case of recognition judicially of one of spouses as incapable, in case of condemnation of one of spouses for commitment of crime to imprisonment for the term of over three years.

Apparently, in the presence of one of the bases specified in the above-stated regulation of the family legislation, marriage is dissolved based on the application of one of spouses in the simplified order. In such cases, lack of a consent of the counter party and (or) presence of minor children promotes dissolution of marriage in relevant organ of the executive authority.

According to Article 19.1 of the FC regulating judicial dissolution of marriage with the exception of cases stipulated in Article 17.2 of the FC, marriage is dissolved judicially in the presence at spouses of common minor children or in the absence of a consent of one of spouses to dissolution of marriage.

Apparently from specified, unlike Article 17.1 of the FC causing dissolution of marriage in relevant organ of the executive authority of absence of minor children and availability of a consent of both parties, Article 17.2.3 of the FC promotes dissolution of marriage in relevant organ of the executive authority without this provision.

Considering specified, the Plenum of the Constitutional Court considers that dissolution of marriage in relevant organ of the executive authority based on the application of other party in case of condemnation of one of participants of the family relations for commitment of crime to imprisonment for the term of over three years can lead to violation of the above-stated principles of the Constitution and FC.

Main objective of the principles of the family legislation as freedom of expression of a will of the persons marrying the necessity of strengthening of a family, the solution of intra family issues on the basis of a mutual assent, protection of the rights and interests of minor children are directed to protection and preserving a family and its moral values, respect for opinion of each participant of the family relations, protection of the rights of the minor children.

However, in case of condemnation of one of spouses for commitment of crime to imprisonment for the term of over three years the dissolution of marriage in relevant organ of the executive authority based on the application of one of the parties irrespective of presence of minor children and a consent of one of spouses, deprives other party of a possibility of protection of marriage in court and the last possibility of preserving a family, and also can lead to violation of interests of minor children.

Thus from the point of view of the above-stated principles of the Constitution and family legislation in case of condemnation of one of spouses for commitment of crime to imprisonment for the term of over three years there would be reasonable an implementation of dissolution of marriage judicially irrespective of presence at them of common minor children and availability of a consent of one of spouses.

In Article 12 of the Constitution, the ensuring of human rights, civil liberties, and an adequate standard of living for the citizens of Azerbaijan is fixed as the supreme objective of the State.

The Constitution relying on the values inherent in the constitutional and democratic state, affirming the human and citizen rights and freedoms, also determined the guarantees directed to their guarding and protection.

From this point of view, in the Constitution are affirmed the rights of everyone is authorized to defend his or her human rights and freedoms by accepted means (Article 26) and guarantees of legal protection of rights and freedoms (Article 60).

Article 60 of the Constitution guarantees both the legal protection of the rights and freedoms of the citizens fixed by the Constitution as well as the rights and freedoms provided in laws and other regulatory legal acts of the Republic of Azerbaijan. At the same time, the judicial guarantee along with the right of appeal to the court for the purpose of recovery of the violated rights and freedoms of everyone, also determines an obligation of courts to consider and make fair solutions according to these complaints.

According to legal position formed by the Plenum of the Constitutional Court in connection with the right of legal protection, enforcement of the right to judicial protection (right to fair trial) though various legal procedures at the courts of justice is a key prerequisite of the rule of law. Although this right is not absolute, limitations to it shall be stated in law and shall not inhibit its substance (decision of the Plenum of the Constitutional Court of December 13, 2005 according to complaint of Kh.I.Qasimov).

According to Article 6.1 of the Convention in the determination of one’s civil rights and obligations or of any criminal charge against person, everyone is entitled to fair and public hearing within reasonable time by an independent and impartial tribunal established by law.

The European Court of Human Rights in the decision of September 21, 1993 on case of Zumtobel vs. Austria noted that each state-participant of the Convention shall guarantee to everyone in case of the solution of the civil issues within the jurisdiction the right to consideration by means of procedure having the signs inherent to judicial supervision.

The right to marriage and family law being natural, integral constitutional right fall under protection of the rights and freedoms affirmed in the Constitution of all guarantees, including a legal guarantee.

The legal guarantee of a marriage and family is one of the grounds of family legislation. Thus family legislation provides for free implementation of rights of husband and wife and possibility of protection of these rights in court.

However, in case of condemnation of one of the spouses for commitment of crime with imprisonment for the term of over three years dissolution of marriage in relevant body of executive authority based on the application of one of the parties, deprives other party of an opportunity to assert the right to a family and marriage in court.

On the other hand, one of spouses is not being informed on dissolution of marriage in relevant body of the executive authority and get information concerning that only after dissolution of marriage.

Thus, according to Article 182.1 of the FC the spouses, submitted the application on dissolution of marriage on the bases stipulated in Article 17.2 of the FC, shall enclose to the application the statement from a sentence concerning condemnation of one of spouses for commitment of crime to imprisonment for the term of over three years.

Along with it, in Article 182.2 of the FC it is specified that in case of submission of the application on dissolution of marriage on the bases provided in Article 17.2 of this Code, the executive body registers on dissolution of marriage in day of filing of application in the presence of the and within 3 days the information concerning that is send to the spouse who serving a sentence.

This provision has found the reflection in Article 5.11.2 of the Resolution of the Cabinet of Ministers of the Republic of Azerbaijan No. 145 of October 31, 2003 “On Approval of the Order of the State Civil Registration”.

Apparently, spouses whose marriage is dissolved lose a right of defense of a marriage and family, having informed the court concerning own opinion, and also appeals in court the decision of relevant body of the executive authority on dissolution of marriage.

Plenum of the Constitutional Court, once again emphasizing the importance of the constitutional principle that marriage and a family are under special protection of the state as the main society unit, notes that the family and marriage are the integral natural human right, and restriction of these rights of the person is allowed only in a judicial proceeding.

Basis of a judicial guarantee of the right to a marriage and family is the principle of “ensuring of free implementation of the rights of the husband and the wife and a possibility of protection of these rights in court” and the right of legal protection of the rights and freedoms of everyone fixed in Article 60.1 of the Constitution.

Considering specified, the Plenum of the Constitutional Court considers that dissolution of marriage by the relevant body of the executive authority based on the application of one of the parties irrespective of presence of common minor children, in case of condemnation of one of spouses for commitment of crime to imprisonment for the term of over three years contradicts to Article 60.1 of the Constitution as deprives the subjects of legal relationship of legal protection of the rights enshrined in Articles 17 and 34 of the Constitution.

Along with it the analysis of legislation of a number of countries indicates the availability of other approaches in this issue, unlike the family legislation of the Republic of Azerbaijan. Thus, according to the changes made to the Family Code of the Republic of Ukraine, the regulation providing dissolution of marriage by the corresponding executive body based on the application of one of spouses in case of condemnation of other spouse for commitment of crime to imprisonment for the term of over three years was excluded from the Code. The Civil Code of the Federal Republic of Germany provides dissolution of marriage only judicially.

Considering specified the Plenum of the Constitutional Court comes to the following conclusion:

- Article 17.2.3 of the FC should be considered as invalid in view of its discrepancy with the Article 60.1 of the Constitution of the Republic of Azerbaijan that guarantees the legal protection of rights and freedoms of everyone.

- the provision of the Article 182.1 of the FC establishing an order of registration of dissolution of marriage “or the extract from a sentence concerning condemnation of the spouse for commitment of crime to imprisonment for the term of over three years”, a provision of the Article 182.2 of this Code “to one of spouses serving a sentence in the form of deprivation of liberty or” and a provision of Article 5.11.2 of the Resolution of Cabinet of Ministers of the Republic of Azerbaijan No. 145 of October 31, 2003 “one of spouses serving a sentence in the form of deprivation of liberty” should be considered as invalid.

Being guided by the Article 130.7 of the Constitution of the Republic of Azerbaijan and Articles 52, 62, 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. Article 17.2.3 of Family Code of the Republic of Azerbaijan should be considered as null and void in view of its discrepancy with the Article 60.1 of the Constitution of the Republic of Azerbaijan that guarantees legal protection of rights and freedoms of everyone

2. To consider as null and void a provision of the Article 182.1 of the Family Code of the Republic of Azerbaijan “or the extract from a sentence concerning condemnation of the spouse for commitment of crime to imprisonment for the term of over three years”, a provision of the Article 182.2 of the same Code “to one of spouses serving a sentence in the form of deprivation of liberty or” and provision of the Article 5.11.2 “to one of spouses serving a sentence in the form of deprivation of liberty or” of the Resolutions of Cabinet of Ministers of the Republic of Azerbaijan No. 145 as of October 31, 2003 “On Approval of the Order of the State Civil Registration” establishing an order of registration of dissolution of marriage.

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 institution or official.