**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE PLENUM OF CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*Concerning article 1179.2 of the Civil Code of the Republic of Azerbaijan and articles 15 and 18.1 of the Law of the Republic of Azerbaijan “On Notary”*

**29 June, 2007 Baku city**

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

with participation of the Secretary I.Ismayilov,

legal representatives of the interested parties: T.Heydarov, representative of the Surakhani district court of Baku city and S.Mammadov, deputy head of the department of administrative and military legislation of Milli Majlis;

in connection with the request of Surakhani district court of Baku city, according to article 130.6 of the Constitution has examined in open judicial session via procedure of special constitutional proceedings the constitutional case on interpretation of article 1179.2 of the Civil Code of the Republic of Azerbaijan and articles 15 and 18.1 of the Law of the Republic of Azerbaijan “On Notary”.

Having heard the report of Judge R.Gvaladze, reports of legal representatives of interested parties T.Heydarov and S.Mammadov, and having considered materials of the case, Plenum of Constitutional Court

**DETERMINED AS FOLLOWS:**

Citizen M.Askerova, basing on article 1179.2 of the Civil Code of the Republic of Azerbaijan, applied to Yeni-Surakhani district municipality for certifying of her testament. In response Yeni-Surakhani district municipality informed that certifying of testament is a competence of state notary's office and not of municipality. Because of the refuse of Yeni-Surakhani district municipality to certify the testament, M.Askerova via procedure indicated in civil procedure legislation lodged a complaint to Surakhani district court for resolution and action of officials of local self-government bodies. On the base of civil-procedure legislation M.Askerova applied to Surakhani district court on decisions and actions of officials of local municipality bodies because of refusal of Yeni-Surakhani district municipality to certify her testament. During the court examination, M.Askerova has appraised the mentioned as the contradiction to human rights and freedoms and asked for application to the Constitutional Court for the interpretation of articles 15 and 18.1 of the Law of the Republic of Azerbaijan “On Notary”.

Surakhani district court submitted the request to the Constitutional Court and asked for interpretation of article 15 and 18.1 of the Law “On Notary”.

The reference has been proved by that though article 1179.2 of Civil Code provides for certifying of testament by institutions of local government in places of absence of notary, nevertheless, article 1181 of the given Code indicating persons equal to notary, article 15 of the Law "On Notary" indicating the subjects which execute notarial functions in official bodies, article 18 indicating notarial functions executed by officials of corresponding authorities and article 18.1 indicating persons equal to notary, do not provide for realization by institutions of local government of the given notarial function.

Within the request it is also indicated that specified articles of the Law "On Notary" empower relevant executive authorities with the mentioned functions. In practice of application of law such situations lead to disputes and misunderstandings.

In connection with the request, Plenum of Constitutional Court notes the following.

According to article 142.1 of the Constitution of the Republic of Azerbaijan (hereinafter, Constitution) local self-government shall be carried out by municipalities. Organization of their work, their powers and guarantees of independence precisely specified within the Constitution.

Alongside with the powers listed in the Constitution to the municipalities may be given additional authorities of legislative and executive power (144.2 of the Constitution).

According to mentioned position of the Constitution in article 1 of the Law of the Republic of Azerbaijan "On status of municipalities" it is specified that local self-government in Azerbaijan Republic is such system of the organization of activity of citizens which allows them to carry out the right of the independent and free decision of questions of local value within the limits of the law and to carry out according to a article 144.2 of the Constitution of the Republic of Azerbaijan part of the state work in the name of interests of local population.

Transfer of some concrete powers to institutions of local government by legislative and executive authorities is not also excluded in the international documents.

For example, in article 4.1 of the European Charter of local self-government of October 15th 1985 it is indicated that the basic powers and responsibilities of local authorities are prescribed by the constitution or by statute. However the given position does not exclude transfer to institutions of local government according to the law of separate concrete powers. According to item 2 of given article, local authorities within the limits of the law have full discretion to exercise their initiative with regard to any matter which is not excluded from their competence nor assigned to any other authority. According to article 4.3 of the Charter the public responsibilities shall generally be exercised, in preference, by those authorities, which are closest to the citizen. Allocation of responsibility to another authority weigh up the extent and nature of the task and requirements of efficiency and economy.

According to the Constitution one of the powers transferred by the state to municipalities is stipulated by article 1179 of the Civil Code.

In the article 1179.1 of the Code it is specified that the testament must be made in written form. Written testament is allowed in notarial form as well as without it. According to article 1179.2 of the Civil Code the notarial form requires that the testament is made and signed by the testator and certified by the notary, and in case of absence of notary - by the institutions of local government.

As evident from the above-mentioned article, even though the legislator attributes certification of testament to the notary, nevertheless, as exception, in places of absence of the notary it allows to institutions of local government to execute such functions.

It is necessary to note, that the legislation provides for realization of notarial activity not only by institutions of local government, but also by other subjects.

Thus, in conformity with the article 15 of the Law "On Notary" a notarial activity through the state in the order established by the given law shall be executed by state notaries working in the state notary's offices, in settlements where there are no notary's offices - by corresponding executive authorities, persons equal according to the Civil Code of the Republic of Azerbaijan to the notaries and competent officials of consulates of the Republic of Azerbaijan.

Besides in article 18 of the Law it is specified that testaments shall be certified by the relevant executive authorities in settlements, where there are no notaries. According to paragraph 5 of item 3 of the Decree of the President of the Republic of Azerbaijan of January 18th 2000 "On application of the Law of the Republic of Azerbaijan On Notary" competences of "relevant executive authorities" provided for by article 15 and article 18.1 of the present Law shall be executed by representatives of executive authorities of regions, cities and city regions.

In conformity with article 18.1 of the above-mentioned Law the persons indicated in article 362 of the Civil Code of the Republic of Azerbaijan shall certify power-of-attorney and the persons indicated in article 1181 – shall certify testaments.

Apparently, the above-stated norms of the Law "On Notary" regulate bases of notarial activity only in state institutions. The given norms, including articles 15 and 18.1 do not provide for the order of certifying of testaments by municipalities that does not exclude powers of institutions of local government to certify testaments in places of absence of the notary, provided for by article 1179.2 of the Civil Code.

At the same time, as it was already indicated, Law "On Notary" provides for the list of subjects which execute notarial functions in state institutions and also in what cases and conditions they can execute notarial functions. Unlike it the legislation does not provide for the mechanism of realization by institutions of local government of competences on certifying of testaments in places of absence of the notary, stipulated by article 1179.2 of the Civil Code.

Besides according to article 18 of the Law “On Notary” in settlements where there are no notary's offices testaments shall be certified by competent persons of the relevant executive authority. According to article 1179.2 of the Civil Code in places of absence of the notary, the certifying of the given documents is assigned to institutions of local government. Such uncertainty leads to certain problems with certifying of testaments in places of absence of the notary.

According to items 1 and 12 of para I of article 94 of the Constitution, general rules concerning using the rights and freedoms of a person and citizen specified in the Constitution, state guarantees of these rights and liberties, transactions, civil and legal agreements, representation and inheritance are established by the Milli Majlis of the Republic of Azerbaijan.

Being guided by Article 130.6 of the Constitution of the Republic of Azerbaijan and Articles 60, 62, 63, 65, 66, 67 and 69 of the Law of the Republic of Azerbaijan “On Constitutional Court”, the Plenum of Constitutional Court:

**DECIDED:**

1. In spite of the fact that articles 15 and 18.1 do not provide for the order of certifying of testaments by municipalities, it does not exclude powers of institutions of local government to certify testaments in places of absence of the notary, provided for by article 1179.2 of the Civil Code of the Republic of Azerbaijan.
2. According to items 1 and 12 of para I of article 94 of the Constitution of the Republic of Azerbaijan, to recommend to Milli Majlis of the Republic of Azerbaijan to set the rules of execution by institutions of local government of powers concerning certification of testament in places of absence of the notary, stipulated by article 1179.2 of the Civil Code of the Republic of Azerbaijan.
3. The decision comes into force from the date of its publication.
4. The decision is subject to publication in “Azerbaijan”, “Respublika”, “Khalq gazeti”, “Bakinski rabochiy” newspapers and “Bulletin of Constitutional Court of the Republic of Azerbaijan”.
5. The decision is final and cannot be cancelled, changed or interpreted by any body or official.