**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

**OF THE PLENUM OF THE CONSTITUTIONAL COURT**

**OF THE REPUBLIC OF AZERBAIJAN**

*On interpretation of Article 307.2.4 of the Civil Procedure Code of the Republic of Azerbaijan*

02 November, 2010 Baku city

The Plenum of the Constitutional Court of the Republic of Azerbaijan composed of Judges F.Abdullayev (Chairman), S.Salmanova, F.Babayev, S. Hasanova, J.Garajayev, R.Qvaladze, K.Shafiyev, I.Najafov (Reporter Judge) and R.Ismaylov;

attended by the Court Clerk I.Ismayilov,

legal representatives of interested parties: Fuad Talyshinsky, judge of Yasamal district court of Baku city, Eldar Askerov, the senior advisor of the Department for Administrative and Military Legislation of the Administration of Milli Majlis of the Republic of Azerbaijan,

expert Mahabbat Demircheva, Doctor of Law, lecturer of the Department of the Civil Process, Labor and Ecological 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 inquiry of Yasamal district court of Baku city of June 7, 2010 on interpretation of Article 307.2.4 of the Civil Procedure Code of the Republic of Azerbaijan .

Having heard the report of Judge J. Garajayev, reports of legal representatives of interested parties and expert, and having considered materials of the case, Plenum of Constitutional Court

**DETERMINED AS FOLLOWS:**

Yasamal district court of Baku city, applying to the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as Constitutional Court) in connection with application of the civil procedure norm of law on case, being on proceeding, asked to give interpretation to Article 307.2.4 of the Civil Procedure Code of the Republic of Azerbaijan (hereinafter referred to as CPC).

It was specified in application that according to Article 307.2.4 of CPC the court are examine the cases in connection with the ascertainment of fact of actual marital relationships in cases established by law, in case of impossibility of registration of marriage in relevant body of executive authority due to death of one of spouses the court considers cases in connection with an establishment of the fact of a condition in actual marriage relations, in cases if provided for by law, if marriage registration in corresponding enforcement authority cannot be made owing to death of one of spouses. However, the position provided be Article 307.2.4 CPC « in cases if provided for by law», creates uncertainty in practice.

Plenum of the Constitutional Court considers that for examination of a question concerned first of all it is necessary to draw attention to concept, the purpose of marriage, and also on the principles regulating marriage relations in the Constitution and the legislation.

According to Article 17.1 of the Constitution of the Republic of Azerbaijan (hereinafter referred to as Constitution) a family as a basic element of society is under special protection of the state. The purpose of a family policy of the state consists of improvement of quality and maintenance of a necessary condition for realization of the basic functions of family life.

It is not casually that the marriage right as the inalienable and natural right of an individual has found a place among fundamental rights and freedom of the human and the citizen. So, according to parts I and II of the Articles 34 of the Constitution everyone has the right to marry on reaching the age specified by legislation. Marriages should be concluded voluntarily. Nobody should be forced into marriage.

A number of the main principles regulating the marriage law found reflection in the specified norm of the Constitution. The main of them is a principle of free will and liberty of indifference of the marriage union of a man and woman.

This right is reflected in Article 29 of the Universal Declaration of Human Rights, in Article 21 of the International Covenant on Civil and Political Rights and in Article 12 of the European Convention on Human Rights. According to the specified international norms of the men and women of full age, without any limitation due to race, nationality or religion, have the right to marry and to found a family. Marriage should be entered into only with the free and full consent of the intending spouses.

Marriage and family relations are regulated by the Family Code of the Republic of Azerbaijan (hereinafter referred to as Family Code), adopted on December 28, 1999.

According to Article 2.2 of the Family Code 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.

Marriage is a free-will alliance of a man and woman, registered in the appropriate body of the executive power with the purpose of establishing a family (Article 2.3 of the Family Code).

According to a principle of free will and liberty of indifference of the marriage union of the man and the woman each man and each woman voluntary, without influence of extraneous persons, possess the right to choose to itself the husband and the wife. The basic condition of a marriage is the mutual free-will consent of the man and the woman.

According to other important principle reflected in Article 1.4 of the Family Code in the Azerbaijan Republic the legal regulation of family and marriage relations from the legal viewpoint it is administered by the state, and recognized only the marriage registered in the appropriate body of the executive power.

This principle expresses that as the legal fact the state recognize the legal and social consequences arising only from officially registered marriage.

From the aforesaid it is possible to come to such conclusion that according to sense of the existing legislation marriage of the woman and the man, entered into family relations voluntary and on the basis of a free will, recognize only after attaching to it of official character as it established by state.

Along with it, marriage which is not contracted by state structures (actual marriage) does not create legal consequences.

The legislation does not prohibit a marriage of individuals according to the religious traditions; such marriage just does not create any legal consequences.

Thus, according to Article 1.5 of the Family Code religious wedding (religious marriage) has no legal effect. The given position does not concern the religious marriages contracted before creation of corresponding executive bodies, and documents concerning their acknowledgement, documents on a birth, a marriage, the marriage and death termination.

At the same time, for actual marriage relations as in were, together with in the current legislation only one exception is provided.

According to Article 251.4 of CPC, adopted by Law of the Republic of Azerbaijan on September 11, 1964 noted that, the court can consider cases concerning finding of the fact of actual marriage relation in cases established by the law if registration of marriage in registry office cannot be made owing to death of one of spouses.

According to Article 6 of the Code “On Marriage and Family”, adopted by the Law of the Republic of Azerbaijan on December 26, 1969 the legal regulation of marriage and family relations, is carried out only by the state. The marriage concluded by registry office recognized. Religious marriage customs and also other religious customs have no legal effect.

According to the Decree of Presidium of the Supreme Council of the USSR on July 8, 1944 «On children born out of marriage» only marriage of persons which were in actual marriage relations before adopting of this Decree can be recognized.

By this decree, for an official recognition (legalization) of marriage of the husband-wife which was in actual marriage relations, registration by registry office was required. Because of recognition of actual marriage relations available till 1944, in the legislation the recognition by courts of the fact of actual marriage relations only in the cases begun before July 8, 1944 and proceeding to death of the husband or the wife has been admitted.

Before Milli Majlis of Azerbaijan adopts a relevant decision concerning Article 307.2.4 of CPC, courts shall take into account that since legal consequences following from the factual marital relations are not recognized by legislation, they can not determine the fact of factual marital relations which commenced after 8 July 1944.

Taking into account the above mentioned Plenum of Constitutional Court comes to conclusion that Article 307.2.4 of CPC must be brought to conformity with Constitution and family legislation.

Plenum of Constitutional Court decides that Milli Majlis must be advised to bring Article 307.2.4 of CPC to conformity with requirements of parts I and II of Article 34 of Constitution and family legislation.

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

**DECIDED:**

1. To advise to Milli Majlis to bring Article 307.2.4 of CPC to conformity with requirements of parts I and II of Article 34 of Constitution and family legislation.

2. Before Milli Majlis of Azerbaijan adopts a relevant decision concerning Article 307.2.4 of CPC, courts shall take into account that since legal consequences following from the factual marital relations are not recognized by legislation, they can not determine the fact of factual marital relations which commenced after 8 July 1944.

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.