CITIZENS LABOUR RIGHTS PROTECTION LEAGUE

REAL PROPERTY IN THE REPUBLIC OF AZERBAIJAN

Monitoring Report

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General editing: Sahib Mammadov

Monitoring Staff:

Alimammad Nuriyev
Isameddin Khamoyev

Address: **Citizens Labour Rights Protection League**
Rasul Rza St. 87\9
Baku AZ1014
Tel: (994 12) 495 85 54; (994 50) 314 49 15
E-mail: clrpl@bakinter.net;
Website: www.clrpl.org

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EXECUTIVE SUMMARY

Under Article 1 of Protocol No.1 to the European Convention of Human Rights, *"Every natural or legal person is entitled to the peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law."*

The Constitution of the Republic of Azerbaijan ("Constitution") declares property inviolable and protected by the state (Article 13). Property may be public, private or municipal (Constitution, Art. 13). One type of property does not have priority over another type of property (Constitution, Art. 29.2). All ownership rights, including private ownership, are protected equally by the law (Constitution, Art. 29).

The Constitution guarantees everyone the right to own property – both movable and immovable (Constitution, Art. 29.1 and 29.3). Ownership rights confer the right to possess, use and dispose of property (Constitution, Art. 29.3). Property can be owned individually or jointly with others (Constitution, Art. 29.3). *"No one shall be deprived of his (her) property without a court decision"* (Constitution, Art. 29.4). Expropriation of property for state or public need is permitted only after fair reimbursement of its cost paid in advance (Constitution, Art. 29.4).

Despite the guarantees provided by the Constitution of the Republic of Azerbaijan there are serious problems with the right to property in the country. This report examines the status of immovable property in the country, the legal regime governing immovable property, the purchase and alienation of immovable property, as well other rights related to immovable property. Throughout the report, proposals are made to help eliminate gaps or contradictions in the legislation on property. In addition, recommendations directed to alleviate deficiencies in practice – particularly judicial practice – are provided. Overall the report provides concrete suggestions for improving the real property market that are aimed at protecting ownership rights and stimulating investment for continued economic growth.

The overarching issue that is highlighted in the report is the lack of guarantees provided in the law and in practice to a property owner. The report points out that there are too many laws that often contradict each other and multiple institutions with too much discretionary power applying the laws. The judicial system is also affected by the lack of a unified and cohesive legal regime. In general, the laws governing real property need to be consolidated, clarified, and reconciled with each other. One example provided in the report is the fact that the Civil Code does not provide a clear definition of immovable property, but a list of immovable property objects is specified in the Law on State Registrar for Immovable Property.

The abundance of laws does not mean that the legislation is comprehensive. As indicated in the report, the most active real estate sector is the purchase and sale of flats. The largest portion of construction deals is for private multi-storied buildings. The report shows that the rights of market participants in this sector are not protected. Particularly, shareholders in construction contracts, bona fide purchasers, and individuals owning only immovable objects but not the land upon which it is located are at risk. All of these participants need to be protected and laws need to be adopted to that end.

The report notes that the protections that are available in the law do not have a deterring effect. The fines are perceived as too small. In addition, problems with carrying out writs of execution do not encourage compliance with the law. Increased penalties and strengthening the ability to execute judgments are recommended to improve observance of the law.

Other key concerns involve the need for the state to privatise land, transfer allotted land to the municipalities, and provide fair compensation for land that has been expropriated. Regulations need to be adopted that govern real estate professionals. The right to divide property into shares that are so small they disaffect the right to property needs to be prohibited. Moreover, the rights of foreigners and stateless persons to property require review.

Regardless of the legal guarantees, the report makes clear that to fully realise the right to property the registration system must be accessible and operational. All market participants must be able to register their rights to property without interference or undue obstacles. The current situation shows that individuals are unable to register their rights. One example is the inability of citizens who have entered into a contract to rent or use state property to register the right of rent or use with the state register. The law provides that the right to rent or use state property can be registered only by the relevant state authority with the power to enter into the contract.

There have been commendable advances in the real property sector of the country. Azerbaijan has seen an incredible amount of growth and a construction boom. The future promises continued growth. To fully capitalise on the opportunities for economic growth and diversity, the legal regulations governing real property must be strong. The laws must protect all market participants and investors equally as pronounced by the Constitution of Azerbaijan. The recommendations in this report are made with this goal in mind.

PREFACE

Until recently, neither the public authorities, nor the non-governmental organisations have carried out any kind of monitoring of the rights related to immovable property. For this reason some international organisations, however, have recently initiated projects in collaboration with the public authorities. It is impossible to state whether the violations in this field come either from the legislation or its implementation.

The project, "Real Property in the Republic of Azerbaijan" conducted by the Citizens Labour Rights Protection League and financed by the Organization for Security and Co-operation in Europe ("OSCE") Office in Baku aims at outlining the current situation related to ensuring the rights to immovable property and providing recommendations for the elimination of gaps or contradictions in the legislation as well as deficiencies in practice. The recommendations will be submitted to the public authorities and international organisations for their consideration.

The report can be used as a guide for foreign businessmen, legal entities or individuals intending to purchase immovable property in the country or wishing to invest in the country's economy. The report will enable any foreign legal entity or individual to understand the current situation on property and the level of risk involved.

The monitoring methods used for the report include analysing the law, observing the system and interviewing individuals. Specifically, researchers conducted the following activities:

- Analysis of the legislation on immovable property;
- Analysis of selected court decisions on immovable property;
- Non-structured interviews with persons whose real estate rights have been allegedly violated;
- Observation of judicial proceedings;
- Analysis of immovable property related media information;

In addition to these activities, expert groups consisting of relevant public officials, independent experts, representatives from law firms specialising in immovable property issues, counsels and representatives from specialised NGOs, were organised. The recommendations of the experts were taken into account and used in drafting the report.

I. ANALYSIS OF THE LEGISLATION OF THE REPUBLIC OF AZERBAIJAN ON IMMOVABLE PROPERTY AND RECOMMENDATIONS FOR ITS IMPROVEMENT

The Civil Code of the Republic of Azerbaijan ("Civil Code") came into force on September 1, 2000. The Civil Code provides the definition and legal regulation of immovable property as an independent object of civil rights. Since the adoption of the Civil Code, several other normative legal acts have been adopted that regulate immovable property. The normative legal acts have not, however, eliminated the contradictions in legislation or judicial practices related to real estate and have not led to legal stability in this field. To the contrary, both the Civil Code and the other normative legal acts regulating immovable property contain many contradictions, gaps and injudicious legal constructions. The situation is a result of poor legal drafting as well as an attempt to remove the regulation of real estate from the civil law sphere.

One of the main economic goals of the country is civil development of the real estate market. This goal faces many obstacles including too many laws that are repetitive in nature, blanket rules for different types of immovable property, and multiple institutions governing immovable property issues with too much discretionary power. These obstacles also affect the constitutional right of property and the ability to ensure, protect and advocate that right. Accordingly, an analysis of the legislation on immovable property as well as proposals for improvement of the legislation is addressed first in the report.

A. Analysis of the Legislation on Immovable Property

The concept of an immovable object according to the existing legislation

The Civil Code defines "an immovable thing" broadly. An immovable thing means objects that are impossible to move without disproportionate damage to their economic purpose. According to Article 135.4 of the Civil Code, land spots, depths of earth, separate water objects, forests, aged plants, buildings, installations and other objects attached deeply to the land are immovable things. These objects are considered immovable things due to their natural features. A list of other immovable objects is provided along with the criteria used to define a certain thing in specific cases as movable or immovable property. For example, an object is immovable if it is so strongly attached to the land that when this connection is broken, it's impossible to use it for its previous purpose due to damage. Article 135 of the Civil Code also provides that other properties can be designated as immovable things by the legislation.

Evaluation of the existing legislation

The definition of an immovable thing provided by Article 135.4 of the Civil Code should be considered universal. Accordingly, defining an immovable thing requires two main criteria: that it be attached to the land and moving it is impossible without damage to its purpose. In addition, Article 180 of the Civil Code imposes additional conditions for establishing buildings and installations as immovable objects. Pursuant to Article 180 there must be both a physical and legal connection between the immovable object and the land.

Modern science and technology enables moving an object from one place to another with the exception of land spots and objects located on the ground (bridges, residential and non-residential buildings etc.). After an object is moved it can be classified as immovable only when its physical and legal connection with the land has been restored and kept.
It is the CLRPL's opinion that the definition of an immovable thing provided by Article 135 of the Civil Code should not be modified. The definition should not include obligatory state

registration in order for an object to be considered immovable property. State registration is not a feature belonging to the object but rather is a result of the object's natural feature.

The state registration issue as an element of the legal regime for immovable things has been solved by obligatory registration of rights *in rem* to immovable things provided for by the existing legislation as well as by loading of this kind of rights. This approach complies with international practice. In addition, it proved successful in resolving problems concerning the recognition of the established rights of property prior to August 10, 2004 when the Law on State Registrar for Immovable Property of the Republic of Azerbaijan came into force. According to Article 4 of the Law, these rights are deemed to be legally reliable.

It is impossible to regulate the movement of immovable objects without classifying the objects and establishing their place within the general system of civil law objects.

● An immovable object is a specific individual thing. Its individual character can be explained by the physical and legal connection existing between the immovable object and land spot. Buildings, installations, residential and non-residential areas bear individual character in connection with certain land spots. Of course, the land spot itself is always individual.

● Each immovable object is a single independent object of the civil law. Accordingly, if a compound object contains one object for utilisation and different objects are designated as features provided for by Article 135 of the Civil Law, the object as a whole can be recognised as an immovable object.

● If an immovable object can be divided into several independent objects based on its natural construction and physical features, then the original immovable object does not survive. Rather, two or more independent objects of the law exist. Each new object should be registered and the right to the original whole object should be cancelled. This situation should be distinguished from the situation where certain characteristics of the immovable object change such as size or inner structure. In this case, the right to the object is preserved, but the change in character should be included in the description of the legal object as registered by the state registrar.

● If immovable property is indivisible as defined by Article 135.6 of the Civil Code, the object preserves its status as a single independent object of the civil law. In cases where the general right of property to the immovable thing is established, alienation of share in the general right of property can be applied.

Evaluation of the types of immovable property objects listed in Article 135.4 of the Civil Code

Some of the objects listed in Article 135.4 of the Civil Code do not meet the criteria of immovable property. Objects not meeting the criteria should be deleted from the article or, alternatively, the list should be supplemented by some other objects.

Proposals to improve the existing legislation:

● Forests, aged plants and separate water objects should be deleted from the list of immovable property objects given in article 135.4 of the Civil Code. In all three cases, it is not the forests, aged plants or water objects themselves that are immovable objects, but rather the areas, land spots of their location that are immovable objects. According to the Forest Code of the Republic of Azerbaijan, "forest resources" consist of all forests including forest lands not covered by forest plants except forests located on the lands of defence and security designation and inhabited localities. It is clear that "forest resources" in the legislation means not the forest covering itself, but the land. The same is applicable for aged plants and water objects. Excluding forests, aged plants or water objects from the list of immovable objects does not exclude forest lands or lands covered by aged plants and water objects from the category of immovable objects. Thus, it is proposed to delete of the words forests, aged plants or water objects from article 135.4

of the Civil Code and make the same amendments to the Water, Land and Forest Codes of the Republic of Azerbaijan.

● Article 135 of the Civil Code should be supplemented with provisions for new immovable property objects consistent with the list of immovable property objects specified in the Law on State Registrar for Immovable Property. Accordingly, buildings, installations, residential and non-residential areas, individual houses and dachas, forests and aged plants, water objects, establishments and communications such as a property complex listed as immovable property in the State Registrar Law should be included in the Civil Code. The necessity to include them in the list of immovable properties is not solely because of the special significance of these objects for civil law circulation, but also due to need for future specification of their legal regime.

● Recognition of a property-complex establishment as an immovable property is significant. The Law on State Registrar for Immovable Property already recognises a property-complex establishment as a distinct immovable property object. In addition, the legislation on privatisation of state properties contains rules for privatisation of a property-complex establishment. An "establishment", however, is not been defined by the legislation and is complicated by the fact that it has two meanings in the civil law. The first meaning of an establishment is an economic subject with legal entity status that makes products, renders services, operates, etc. The economic subject is a subject of the civil law. The second meaning of an establishment covers an object of civil legal relations. Under the second meaning, an establishment is also an object of the civil law.

In relation to the movement of property, an establishment plays an important role as an object of the law. Numerous countries recognise establishments as an object of the civil law. For example, according to section 8, book 5 of the Civil Code of Italy, "establishments are referred to as property complex". Article 132 of the Civil Code of the Russian Federation defines the legal status and regime for establishments as an object of the law. An establishment is a separate property mainly designed to carry out economic and entrepreneurial activities. Being a single property complex it belongs to the "inconsumable compound thing category"[1]. In the major of cases an establishment is recognised as an object of legal relations on purchase and sale, rent, mortgage, barter, gifting, inheritance. Taking all these and other features into account, it is the CLRPL's opinion that there is a need to include in the Civil Code rules that regulate the civil legal relations in connection with a property-complex establishment. Defining an establishment in the Civil Code will foster correct application of the Law on State Registrar for Immovable Property rules and help circumvent possible future problems in judicial practice.

B. Establishment of the Right to Commonly Shared Real Property: Preventing Cases

Evaluation of existing legislation

There are no restrictions on the right to transfer property to two or more persons allowing the owners of immovable properties to abuse their right of transfer. By their own admission, property owners divide a single right into tiny shares as small as 1/100, 1/32 etc., creating many owners.

This kind of unscrupulous action happens in regard to immovable property objects such as residential buildings and land spots. Regarding residential buildings, Article 40 of the Housing Code of the Republic of Azerbaijan provides that family members of the owner are allowed to reside permanently in an indivisible residential building rather than strangers. Multiple ownership of a residential building violates the provisions of the housing legislation. In addition,

[1] The Civil Law of the Republic of Azerbaijan, volume 1, book 1. S. Allahverdiyev. "Digest" Publishing House, Baku -2003.

the rules providing for purposeful use of the residence by those residing in the place are also violated. A "tiny" share in the property does not comply with per person living space norm. The same is applicable to the commonly shared land spot that is not used as designated.

Proposal to improve the existing legislation

It is proposed that Article 233 of the Civil Code be amended to restrict the right of a property owner to divide the property into shares that by their diminutive size alienate the right of property. Property shares must comply with the provisions of the applicable law and the principle of viability of the shares.

C. Regulation of Land Spots Circulation and Other Objects of Immovable Property Located On It.

Evaluation of existing legislation

The legislation regulating land spots, buildings or installations located on the land and other objects of immovable property and the movement of these objects contains some internal contradictions. On one hand, the legislation considers these objects as independent and not dependent on each other in their movement, establishing various legal regimes. On the other hand, the legislation considers these objects as connected physically and legally with each other.

The civil legislation regulating the rights *in rem* and movement of immovable property has the following features:

- There are significant differences in the range of rights *in rem* to buildings and land spots.
- The differences in the rights *in rem* to buildings (property, servitude and other rights) and land spots (property, servitude and other rights) hampers the elaboration of a common regime for movement of the mentioned objects.
- The legislation provides the owners of buildings located on the land spots belonging to the state municipalities the right to permanent use of these land spots except where other rules have been prescribed by the law or agreement. The legislation, however, restricts the range of the mentioned persons possessing the land spots by use of right in rem, especially of those who can obtain it. According to Article 48 of the Land Code of the Republic of Azerbaijan, nationals and legal entities of the Republic of Azerbaijan can obtain the property as well as the use and tenant rights to state municipal land spots. Special proprietary right of individuals and legal entities to land spots can be obtained through privatisation, purchase and sale, inheritance, gifting, barter of the state and municipal lands and other transactions connected with the land as well as on the base of giving them to the statutory fund of the legal entities. At present individuals and legal entities face many problems in obtaining the proprietary, use and tenant rights to state municipal land spots. First, problems arise in the legal rules and application of the law. The legislation provides numerous concessions regarding utilisation, rent and possession in giving municipal lands to individuals and legal entities. The application of these concessions is abused. Second, although the legislation provides for giving the lands on utilisation, rent and private possession through public sales and tenders, it has not happened in practice (there are more than 2500 municipalities in the country). In addition, the pricing of municipal lands for sale are not conducted by independent appraisers, but by the assumptions of officials of the municipalities, which hampers the expedient use of the lands and the creation of an effective local land markets.

Proposal to improve the existing legislation:

● Without exception, the concessions provided for by the legislation should be annulled. Amendments to the law should be adopted that provide rules for the sale of state municipal land spots only through open public sales and tenders that inform the population about the public sale a minimum of 30 days prior to the sale through appropriate media channels. In addition, the law should require the publication of the results of the public sales and tenders.
● Adoption of rules that provide for the involvement of representatives of local communities, non-governmental organisations and the media in the Public Sale and Tender Commissions for giving the municipal lands on utilisation, rent, private possession or putting them on sale in the legislation.
● Amendments should be made in the legislation that provide for the sale of municipal lands only by market prices and in accordance with the opinion of a commission consisting of independent appraisers.
● According to paragraph 3 of Article 48 of the Land Code of the Republic of Azerbaijan, foreigners and stateless persons are not entitled to land spots in the Republic of Azerbaijan. In a purchase and sale transaction on land spots, foreigners and stateless persons can not be buyers, but they can be sellers. Pursuant to paragraph 4 of Article 49 of the Land Code, the right of property to land spots obtained by foreign individuals and legal entities through inheritance, gifting and mortgage transactions should be alienated within a year in accordance with the legislation of the Republic of Azerbaijan. If the foreign individuals and legal entities have not alienated the right of property to the land spot in accordance with the legislation, the local executive authority or municipality will purchase the land spot as prescribed by the Land Code.
The prohibition on property ownership by foreigners and stateless persons provided by the Land Code, however, does not deprive those persons of indirectly purchasing a land spot. They can register the right of property to the land spot under the name of a legal entity created by them in the Republic of Azerbaijan[2]. Thus, a local legal entity founded by a foreigner can be a buyer in a purchase and sale transaction on land spots. Allowing private possession of land spots in restricted size (for example up to 200 hectares) to foreigners and stateless persons would be an alternative way to attract investments in the real estate market. It would also be a more practical use of lands designed for agriculture providing opportunities for knowledge sharing and high tech application. In addition, it would accelerate the proceedings for recovering unusable lands in civil circulation.
● Seemingly groundless differences exist in the legal regulation of transferring buildings and land spots. Special rules are provided in the civil legislation for transactions such as purchase and sale, rent of buildings, installations and other immovable property objects located on land spots. In contrast, there are no comparable rules for transactions relating to land spots causing the general provisions of law regulating purchase and sale to be applied with in regard to land spots.
● There are contradictions in the regulation of the transfer of land spots and buildings located on them as follows:
- Buildings and land spots are involved in some transactions as a single object, but in other transactions they are involved as two independent objects. For example, the owner of a building located on a land spot that he does not own is allowed to sell the building independent of the land spot. If, however, the same person owns the land spot and the building, the building can not be sold independently of the land spot on which it is located.
- Numerous exceptions have been established in regard to circulation of buildings located on the land spots taken out of the circulation or with restricted circulation;
- Gaps in the legislation exist regarding the fate of land spots especially in transactions where a building is located on a land spot. For example, the legislation does not contain any rules regulating the fate of land spots when the management of buildings and installations located on the land spot are transferred. In addition, the legislation does not provide rules regulating the

[2] Purchase and sale: Commentary for the Civil Code. E.Garabalov, A Hasanov. Published by the financial support of OSCE Baku Office. Baku-2007.

free use of land spots where the buildings and installations are located. The legislation also does not address rules for renting immovable objects.
- The law fails to establish the character and nature of the right obtained by an owner of a building located on another's land spot to the use of the land spot. Specifically, the Land Code of the Republic of Azerbaijan does not sufficiently define "the right of utilisation" in regard to a land spot. The Civil Code and the Labour Code of the Republic of Azerbaijan grant the building owner the right to the part of the land spot where the building is located. In this way, the Civil and Labour Code try to establish a connection between the building and the land spot. Although not part of the land spot, the building is wholly involved as a subject of the civil circulation and object of the right *in rem* and commitment.

D. Evaluation of existing legislation on immovable property

There are obvious irregularities in the civil legislation that regulates the circulation of land spots and objects of immovable property located on them. The Land Code of the Republic of Azerbaijan declares "a single fate for land spots and objects closely connected to them" as one of the main principles of land legislation. Pursuant to that principle, objects closely attached to the land spots are connected with the fate of the land spots except for cases prescribed by Article 3 of the Land Code of the Republic of Azerbaijan. Looking at the present-day economic and legal realities it is impossible to implement this principle due to the following reasons:
- As compared to land spots, buildings are in the possession of more persons then the land spot. In addition, numerous buildings and installations belong to individuals who have no right in rem and no registered commitment as prescribed by law with regard to the land spots where these objects are located.
- Residential and non-residential buildings possessed by those who have no right to the land spots pursuant to the existing legislation constitute a major part of the civil circulation. The rights on these objects located on land spots belonging to the owners of immovable property cannot be separated from the land, because the land has been taken out of circulation or their circulation has been restricted;
- In regard to immovable objects located on the land spot belonging to the owners of the immovable property, the civil legislation allows some transactions that cause alienation of these objects and requires granting neither the right of property to the land spot nor analogous rights in regard to the immovable object;
- In major cases the price of the object built on the land spot is higher than the price of the land spot itself. This is true especially in the case of establishing the price of the land spot designed for construction. In that case, the price of the object built on the land spot is taken into consideration. Accordingly, there are insufficient economic grounds for considering the buildings and installations along with land spots of their location wholly as "improvement" to land.

Proposals to improve the existing legislation

Currently, defining "single immovable property objects" as a single object of the civil law in the legislation and prevalent objects of the civil circulation have no economic and legal basis in the civil law. This does not mean that the land spot and building located on it should be separated from each other legally and should be independent of one another. On the contrary, for the normal use of immovable objects and in order to regulate circulation, it is important to grant to the person who possesses an immovable object on another person's land a certain right in regard to that land spot. The right should allow him (her) or his (her) trustees to fully use the immovable property belonging to him (her) or to freely transfer the immovable property and to grant to the person who obtained the immovable property a certain right in regard to the land spot allowing

him (her) to use the immovable property. Otherwise, a building created legally but located on another's land spot would have the same fate as a building created illegally.

When the land spot and objects of immovable property located on it are in possession of a single person, the following regulation should be established: although the land spot and objects located on it are not considered a single object of the civil law, they should be involved together in the transfer of the object or the land spot. In this case, the idea of "a single object" is considered well-grounded. But, it is necessary to dismiss attempts to determine what is the main object and what belongs to it (what is attached) and establish a sequence depending on the answer. It is of no concern if the building or the land spot is to be transferred first. The rule providing for non-alienation of them separately should be applied to both cases - objects should be transferred only together. The main focus is that the legal connection between the land spot and the building located on it should not be interrupted and they should be transferred from one person to another at one time and together.

Accordingly, the principle of "a single fate" for the land spot and other immovable property objects located on it should be implemented in the civil legislation through the legal regulation providing the owner of the building with the right to use the land spot where the building is located on within the *in rem* and commitment institution. If the building and land spot belong to the same person, they should not be separated (except in cases prescribed directly by the law).

State expropriation of land spots and the buildings located on the land can occur only when the land spot can not be used for its intended purpose after the suspension of the right of property to the building located on it pursuant to Article 207 of the Civil Law. Although the building is located on the land spot taken out of public circulation it can be transferred and a new owner of the building can obtain the right of use of other land spot without enjoying any property rights.

Following the principle of "a single fate" for the land spot and immovable property objects located on it, it is important to ensure concurrent registration of the transfer of the rights to the building and land spot or the transfer of the right to the building and appearance of another's land spot where the building is located. Realisation of the principle of "a single fate" for the land spot and the immovable property objects located on it requires acceleration of measures on land cadastre (making of cadastre plans for land spots etc.). The Land Code of the Republic of Azerbaijan provides that land spots known to the state cadastre records can be objects of purchase and sale transactions. A cadastre plan of the land spot should be drawn up and submitted before making a contract for sale or rent.

Possession of the land spot as a pre-condition for obtaining the right of property to a building built on that land spot and the legal outcomes of the building owner losing the right to the land spot where the building is located

The following conditions are recognised as general conditions for establishing the right of property to a newly constructed immovable object that is complete or incomplete:

- Possessing the right of property and the right *in rem* (commitment) to the land spot as well as the right (permission) to build a building. Existence of this right is established by the land regime, conditions of granting the land spot and administrative acts (permission for construction). The right is determined by the provisions of legislation.

- Accordingly, property relations between a contractor and a customer in regard to a building, that is under construction, are determined pursuant to the capital construction contract such that the right of property to the building as an object of immovable property (complete or incomplete)

belongs to the person who has the right of property to the land spot. As a general rule, following the terms of contract, it belongs to the customer. The obligation of allotment of land spot for construction is imposed on the customer.

When the building owner's right to the land spot is suspended:

a) If the building owner possesses the land spot on which the building is located by lease (sublease) or by the right of free use, suspension should be guided by the Civil Code according to the termination of a contract on any civil legal basis. Until the regulation of relations between the owners of the land spot and the owners of the building, the latter have the right to use the land spot where the building is located only to the extent required for the use of the building (article 243 of the Civil Code).

b) If the building owner possesses the land spot on which the building is located based on the right of property and the land is taken, the fate of the building depends on the basis of the taking.

- If the land spot is expropriated by the State and it appears impossible to use the land spot for the appropriate purposes without taking the immovable object from the land spot where it is located, the immovable property located on the land spot is purchased in the manner prescribed by the law (articles 246, 247, 248, 249 of the Civil Code and article 70 of the Land Code). In this instance, it is important to fix in the legislation the right of the owner whose land spot is taken for the State (public) needs to claim the purchase of his (her) immovable property located on the land spot.
- If the building belongs to the person whose land spot is taken then his (her) right to use the land spot is created. In this case, regardless of whether the land spot is kept independently or is attached to another land spot, the building owner has the right to use the land spot.
- If it is established that there is no need to take all of the land spot belonging to the private owner then the land spot can be divided. In this case, the building owner may keep the new reduced land spot along with the immovable property located on it (in this connection it is necessary to amend article 246 of the Civil Code by providing for the purchase of "a part of the land spot").
- If the land spot is taken for not using it according to its designation or its use infringes the law, the land spot must be sold. The sale of the land spot is provided for by the Civil Code. Following Article 247 of the Civil Code and the principle of simultaneous transfer of the building and the land spot belonging to the same owner, it can be concluded that the land spot should be offered for sale along with the building belonging to the owner of the land spot (unless the building was built without permission). At the same time, the Civil Code needs to be amended to address the situation when the land spot along with the building fail to sell.
- Also, the legislation needs to establish the content of the claim to be put before the court by the agency making a decision on taking the land spot where a building is located. Article 246 of the Civil Code should be amended such that the removal of a building does not depend on the ability to use the taken land spot without the building.
- Requisition or taking the land spot and building belonging to the owner should be carried out in regard to both objects following the principle of simultaneous alienation of these objects.

(c) If the building owner possesses the land spot on which the building is located based on the right of permanent (term less) use or the right of lifelong possession of inheritance then:

- If the land spot is expropriated by the State, the immovable property located on it is purchased in the manner prescribed by the Civil Code (articles 207, 246, 247 of the Civil Code of the Republic of Azerbaijan). At the same time, an agreement on the division of the land spot or purchase of a part of the land spot is also possible, which would eliminate the need to purchase the immovable property;

● If the land spot is taken for failing to use it according to is designation, the approach mentioned above regarding the results of taking the land spot for not using it according to its designation or its use infringes the law should be used - i.e. the land spot must be sold.

In both cases, if the conditions mentioned in Article 247 of the Civil Code are met, the person whose right *in rem* to the land spot has been suspended may preserve his (her) right of property to the building. In this case the right of property to the building is not separated from the right of property to the land spot.

Circulation of the land spot and buildings (installations) located on it belonging to a single owner

Following the principle of "a single fate" for the building and land spot belonging to a single owner, transactions causing alienation should be distinguished from transactions that do not result in alienation. When transactions causing alienation of the building and land spot are conducted (purchase and sale, barter, gifting, reliable management, mortgage etc.) as well as when rights to them are obtained as a result of taking, requisition, sequestration, in the manner of legal succession, immovable objects are assumed to be involved together as a subject of the transaction.

If a transaction causing alienation of one or more buildings on the land spot is conducted, the land spot connected with the building(s) should be separated. When the land is indivisible or when an agreement on the shared right of property to the land as a result of the transaction is reached, the sale of the share in the right of property is realised. The parties may come to the agreement on sizes of shares. In the absence of an agreement, the legislation should establish the shares in the right of property to the land spot. In this case, shares can be established proportional to the buildings' area or the land spot where the buildings are located. Pursuant to the legal restrictions, if alienation of one of the immovable objects (land spot or building) is not permitted, the owner can not be deprived of the right to dispose of the other object. If the building is alienated, the owner should give the use of the land spot to the purchaser of the building based on the right *in rem* or commitment prescribed by the law. But, when the land spot is alienated, the owner should preserve the right to use the land spot to the extent required to use the building based on the right *in rem* or commitment.

If the building and land spot belong to the public or municipal authorities, the building can be granted to any establishment or department based on economic or operative management right on the condition that the land spot is granted to that establishment or department based on the right of permanent (term less) use or the right of lease. But following the general principle of disposal of a building belonging to the establishment based on the right of economic management realised by the consent of the owner, alienation of the land spot from the state (municipal) possession is not obligatory. If the state (or municipality) agrees with the alienation of the immovable property, but does not make a decision on alienation of the land spot the purchaser of the building obtains the right of use (lease) in regard to the land spot pursuant to the law.

II. LEGAL REGIME FOR VARIOUS TYPES OF IMMOVABLE PROPERTY

A. The Land Spot as an Object of Immovable Property

Land is one of the most important national assets. Current and future generations should use this great wealth efficiently, rationally and reasonably referring to the law. For this reason alone adjustments to the regulation of land relations should be legislative priorities.

Land spots constitute one of the important objects of immovable property. In order to realise the importance of land spots as objects of immovable property, the general state of land resources in the country should be studied.

Data received from the appropriate public authorities' show that Azerbaijan's land resource consists of 8641596 hectares. 4913639 hectares (59.6 %) are in State possession; 2032744 hectares (23.5 %) have been granted to municipalities; 1695123 hectares are allotted for private ownership. 1.5 hectares of the land spots allotted for the private ownership has been privatised. Excluding regions under occupation, 869268 out of 873618 families that are entitled to land spot shares, received land spots.

1.2 million hectares of the country's land has become saline, and subjected to various erosions. More than 50 000 hectares have been polluted. In addition, more than 1.4 million hectares of sown area have been damaged. More than 630 000 hectares of area under crop have become saline. Of those hectares, the salinity level of 140 000 hectares is medium, 66 000 hectares are high, and 267 000 hectares should be repaired urgently. 90% of the sown area is water; the water resources of the country are estimated at 31.2 billion cubic metres. About 12 billion cubic metres of them are used for watering. 1.45 million hectares of lands under crop are watered. Drainage systems have been installed only on 610.000 hectares. The total length of watering channels is 73.3 thousand kilometres; length of drainage lines is 33 thousand kilometres. The general scarcity of water equals to 3.7 billion cubic metres at normal time, but in drought years it equals 4.75 billion cubic metres. The Republic of Azerbaijan is a country with limited land resources. Per person share of sown area is 0.22 hectares and per person share of productive agricultural lands is 0.58 hectares in the country.

With regard to granting possession of lands that are used by citizens (individual residential houses, court areas, individual collective and co-operative dachas etc.), 907906 families in 3090 villages out of 4551 existing villages and settlements in the country received certificates confirming their rights of property.

Pursuant to the Law on Municipal Areas and Lands, certificates on the right of property to the land spots which are in their possession of municipal units are being made (2058 our of 2748 existing municipal units already have certificates). Despite the fact that the land of 63 city municipalities (including Baku city) have been initially recognised within the area, **the State Acts** confirming the right of property have not been issued to the municipalities due to the lack of mutual recognition by the local executive authorities. This is the case even though upon the establishment of the municipalities in 1999 the executive authorities were to give the municipalities the property belonging to them. Thus, it is clear that the majority of the country's lands (56 %) are still in the possession of the State.

The failure to issue the State Act confirming the municipal units' right of property to land spots causes numerous problems especially in Baku city. The main infrastructure of the country is concentrated in the capital city and the tax share of Baku and the Absheron peninsula paid to the State budget constitutes more than 90 %. Non issuance of the State Act for the land spots of municipalities in Baku city prevents rational use of municipal lands. The same land spots have been granted to different persons; executive authorities have used the land illegally; and lands have been illegally granted to different legal entities and individuals on possession and lease. All these actions hamper the acceleration of civil circulation of lands belonging to municipalities, delay the growth of a civil land market in the country, restrict the financial resources of the municipal budget, and cause illegal occupation of land spots, which in turn restricts the whole use of land spots belonging to the municipalities. The Constitutional provision on the

inviolability of property and its protection by the State is violated. In addition, it results in an unequal approach with regard to different types of property.

According to statistics, numerous individuals and legal entities have not yet received all of the papers required from the State confirming their ownership and rights *in rem* over the land spots granted to them as a result of land reforms. Undoubtedly, the lack of proper documentation reduces the belief in following the principle of inviolability of the rights of property by hampering the exercise of these rights by the land owners.

The registrar for immovable property began to operate as an independent body in 2007. Within 7 months of that year, the registrar recorded 8665 re-registrations on land spots as well as 3803 preliminary registrations. It becomes clear, then, that the registration of the right of property and other rights *in rem* of numerous land owners by the state registrar for immovable property will continue (the legislative body embodied provision for recognition of the previously established rights in article 4 of the Law on State Registrar for Immovable Property).

Land reforms were launched when the legal framework for regulating land relations was insufficient in the first years of independence and before the adoption of the Civil Code, Land Code, Law on Management of Municipal Lands, and the Law on Approval of Regulations for Making and Agreement of Documents on Allotment of Municipal Lands. During that time, numerous legal entities and individuals who had become virtual owners of land spots pursuant to decisions made by different public authorities did not obtain official documents on their right of property. This is presently causing very serious problems in regard to those objects of immovable property. The situation requires an urgent legal solution.

One of the current problems concerns the state of legislation on land spots. According to our research, the approximate number of acts regulating relations on land spot exceeds 120. These acts include laws, presidential decrees and orders, numerous decisions by the Cabinet of Ministers as well as normative acts and acts of normative character by the central and local executive authorities and municipalities. If we add decisions by the courts on different land spot related cases then we see the complicated situation of the field. Of course the dynamic development of public relations requires improvement in the legal regulation process. The multiplicity of legislative acts, however, has not always positively influenced the stability and quality of legal relations in the field. The legislative acts contain repetitive rules; embody different internal contradictions, collisions, and scope of blanket rules; grant different and numerous discrete powers and establish various institutions with repeated functions.

Accordingly, the following proposals are made to resolve the above mentioned problems:

- To keep the lands that are serving the necessary state needs as state land resources, and still increase the volume of land spots as objects of immovable property in civil circulation, decisions need to be adopted that accelerate the process for privatisation of a part of the lands included in the state resources and grant possession to the municipalities, legal entities and individuals;
- The appropriate executive authorities should issue the necessary documents establishing the legal regime for lands given to municipalities within a short time – 6 months - and establish the legal rules providing expedited registration of these acts by the state registrar;
- Establish legal rules that enhance the responsibility of officials of the appropriate executive authorities in order to prevent their illegal intervention in the allotment of lands that are in the possession of the municipalities;
- Accelerate the role of municipalities in the establishment of a local land market;
- Issue appropriate documents to persons who obtained land spots based on bona fide possession and acts of public authorities in order to establish their rights of property and other rights in rem

to the land spots. Or, insert appropriate amendments in the legislation with other land spots establishing their provision to these land spots;
● Analyse the legislation on land spots as objects of immovable property and eliminate the contradictions and repetitions in the law.

B. Legal Regime for Residential and Non-Residential Areas

House and related existing legislation

Housing relations in the Republic of Azerbaijan are regulated by the following legal acts:

1. The Housing Code of the Republic of Azerbaijan, adopted on July 8, 1982;
2. Law on Privatisation of Housing Resources in the Republic of Azerbaijan of the Republic of Azerbaijan adopted on January 26, 1993;
3. Decision on rights to additional housing area, made by the Council of Ministers of the Soviet Socialist Republic of Azerbaijan on March 12, 1996;
4. Decision on sample rules for recording of citizens who are in need of improvement of housing conditions and distribution of housing area on the territory of the Republic of Azerbaijan, made by the Council of Ministers of the Soviet Socialist Republic of Azerbaijan on October 14, 1983;
5. Decision on approval of rules for barter of housing areas in the Soviet Socialist Republic of Azerbaijan, made by the Council of Ministers of the Soviet Socialist Republic of Azerbaijan on December 11, 1983;
6. The Housing Code of the Republic of Azerbaijan (of the Soviet Socialist Republic of Azerbaijan) was approved by the Law of the Republic of Azerbaijan dated by 08/07/1982.
7. Decision on approval of Sample Regulations for building society in the Soviet Socialist Republic of Azerbaijan, made by the Council of Ministers of the Soviet Socialist Republic of Azerbaijan on 14/10/1983;
8. Decision on rules for recording of citizens who are in need of improvement of housing conditions and distribution of housing area in Baku city, made by the Council of People's Deputies of Baku city at its 4th session (20th call) on 08/04/1988.

Residential houses as well as residential areas in other buildings located within the territory of the Republic of Azerbaijan constitute the housing resources. The housing resources include:

1. residential houses and residential areas in other buildings belonging to the state (state housing resources);
2. residential houses and residential areas in other buildings belonging to trade unions and non-governmental organisations;
3. residential houses belonging to the building society (building society resources);
4. housing resources of the local self-governing authorities.

It should be noted that some of the legal acts listed above, including a majority of the provisions of the Housing Code of the Republic of Azerbaijan (of the Soviet Socialist Republic of Azerbaijan), do not have any legal force. The housing legislation based on the former USSR legislation was approved at a time when State ownership dominated and then some additions and amendments were inserted. At present, the legislation is outdated. Keeping these laws and rules in force hampers the implementation of the Civil Code and other applicable rules. It also creates serious obstacles in the legalisation of property rights related to immovable property consisting of a residential area. We believe that a local Housing Code of the Republic of Azerbaijan should be adopted that fully contains citizens' housing rights.

The Civil Code of the Republic of Azerbaijan regulates, in part, the norms on housing legislation. Although the Civil Code considers both residential and non-residential areas as independent objects of immovable property and civil law, these specific features have not been sufficiently reflected in establishing the characteristics for their legal regime. Consequently, serious problems exist in obtaining the rights of property to a residential area. In the past privatisation of houses was not a serious problem. Presently, however, the registration of the right of property to residential areas has become very problematic.

Thousands of owners can not legalise their rights of property to apartments purchased by them at market prices. Pursuant to Article 178 of the Housing Code of the Republic of Azerbaijan, the right to immovable property is transferred to the purchaser upon registration of the transaction and issuance by the state registrar for immovable property. In fact, apartments in the majority of newly built buildings are not purchased by a sales contract but rather by joining the building societies. Apartments in buildings built this way are registered to the members of the building society not on the basis of a sales contract, but by issuance of authorisation to an apartment. Owners of apartments having this paper can not later legalise their rights to these apartments (otherwise it does not comply with article 178 of the Civil Code). This practice violates property rights of thousands of people.

An amendment to Article 178.8 of the Civil Code would help eliminate this problem. Article 178.8 provides: *"A member of housing, dacha, garage or other building society as well as others entitled to share collection obtain the right of property to the apartment, dacha, garage or separate installation granted to them by the building society upon clearing off the share payments wholly."* The executive authorities, however, continue to give the members of the building society authorisation to the apartments by implementing the former Housing Code.
In the opinion of the senior lawyer of the Baku Legal Centre, the other problem causing violation of the rights to immovable property concerns the pre-sale of apartments in a building to be built in future. Pre-sale of apartments occur prior to the authorisation to the building, approval of project papers, and execution of other legalisation issues putting the money paid by the purchasers at great risk.

In countries where the construction boom is intensifying special laws are adopted to reduce the risks. For example, a law on shared involvement in construction was adopted in Kazakhstan. In this law those who intend to purchase an apartment and who pay money with that end in view are called shareholders. In Kazakhstan construction is a type of activity that is subject to licensing, Pursuant to the law on shared involvement in construction, those legal entities and individuals that intend to deal with shared construction should receive a separate license. According to the law, a person dealing with the construction of a building may start selling apartments only upon completion of "zero stage" - that is completion of the foundation and apparatus floor. The law guarantees the shareholders that the person dealing with the construction provides at a minimum 12 % of the total estimate for the construction. Finally, agreements on shared involvement in construction should be registered by the registrar for immovable property. Thus, the purchaser of an apartment realises registration of his right to the shared involvement in construction at that stage.

The legal gaps existing on this matter in Azerbaijan put the purchasers of an apartment in an unprotected and unequal position. The elimination of these gaps would play an important role in strengthening the stability of the civil circulation. It is recommended that a similar law be adopted in Azerbaijan *mutatis mutandis*. Adoption of this kind of law would contribute to the elimination of problems.

Some problems frequently noticed in judicial practice arise with regard to apartments previously privatised. This demonstrates the next contradiction regarding immovable property in the Civil Code - specifically, the different rules for invalidating transactions on the one hand and guarantees for bona fide purchasers on the other hand. For example, any owner who has purchased an apartment illegally can later encounter a claim by another person to the apartment. In this case, the illegal purchaser may lose both the money paid and the apartment or he may retain the apartment because he is considered a bona fide purchaser. Although a special decision was made by the Plenum of the Supreme Court, this problem has not been completely resolved.

The establishment of condominiums may benefit the efficient management of housing resources. This matter is passed over lightly by the Civil Code. Condominiums are legal entities uniting the joint owners of the residential building (owners of apartments) and carry out the management of the communal needs of the building. It is recommended that the experience of other countries use of condominiums be studied and appropriate rules reforming the housing and communal services be adopted and implemented.[3]

Proposals to improve the existent legislation

Residential and non-residential areas can be considered independent objects of a simple, indivisible property and civil circulation. In this regard, the right of property is registered by the State Registrar for Immovable Property or it should be registered by it. One of the main difficulties in establishing a residential or non-residential area as an independent immovable object is establishing its location lines. The main legal principle regarding the establishment of location lines of an immovable property is the **principle of independent civil defence capability**. The legal description of each object consists of instructions based either on subjective civil law or that exist or can exist in regard to the object. Accordingly, objects that have been registered or should be registered (or can be registered) by the State Registrar for Immovable Property may be involved as immovable properties in the civil legal sense.

Defining the terms “residential area”, “residential building”, “residential house”, “apartment”, “room”, “non-residential” and “shared place” is beyond the scope of civil legislation. These terms concern the subject of housing law. Unfortunately, the housing legislation currently in force does not contain definitions for these terms. Taking into account that the objects covered by these terms are involved in the civil circulation as objects of immovable property it is recommended to amend the civil legislation or housing legislation to provide definitions of these terms. Sample definitions of the terms are provided below. The definitions attempt to provide characteristic features of things existing under those terms, their position in stabilised practice as well as to use approaches available in legislation and legal science.

- **A residential area** includes buildings, houses, apartments and rooms designed for residence of people that meet the established sanitary engineering requirements.
- **A residential house** is a building consisting of residential rooms, non-residential areas and supplementary areas.
- **An apartment** is a separate residential area located in the building and consisting of residential rooms and supplementary areas.
- **A non-residential area** is built for non-residential purpose and includes areas within the residential areas designed for trade, household and non-industrial needs as well as cellars, roofs, etc.
- **Shared places** include places serving the residential building and commonly used and possessed by all residents such as entrance, stairs, lift, etc.

[3] This part was drawn on the basis of views and proposals put by Mr. Mehman Sultanov, a senior lawyer of Baku Legal Center, in round-table organised within the project.

- **A room** is a part of the immovable property complex, taken as nature, designed for use on residential, non-residential and other purposes, possessed by individuals or legal entities as well as by state and municipalities.
- **A building** is a construction built manually on the land spot or in the ground and considered eligible for use on this or other designation.

Depending on how a building is constructed and the way it is utilised, a building can be divided into one or more rooms. In other words, attention should be paid to construction or location when setting interrelated parts of the building eligible for use. Unlike a building, a room is deprived of any real expression. Thus, a room is an exceptional property in the legal sense. The features of a room make it eligible for use as residential or non-residential. The requirements for residential buildings are determined by the legislation. Each residential room should be eligible for independent use.

Recognition of rooms as independent immovable property in the building means denying the existence of the building as an object of immovable property. In this case, the building is considered an object not from the legal point but from the technical point. There is a need for a legal regime that excludes registration of two or more rights of property to a single thing (to the building or rooms in it), but at the same time provides obligation of state registration of the rights of property in regard to any immovable property involved in the civil circulation. It is possible to recognise the right of property to the building (without making any records by the State Registrar for Immovable Property) as presumptively belonging to the person with the right of property to all of the rooms in the building. This presumption is significant when the owner of the building grants the use of different rooms in the building that does not cause alienation or possibility for alienation of the rooms - for example, leasing the rooms.

Following the principle of defence capability, the sale of any part of an immovable object should be considered impossible because independent legal existence of the immovable property, which is necessary for alienation, is established by state registration. Registration of the right of property to a building or land spot excludes registration of the right to any part of that land spot or building (any room in it) by a third person or the owner. The right *in rem* to the immovable property exists due to the state record. Because of this, it is impossible to address the involvement of the immovable property, rights to which are not or can not be registered, as an object of circulation in the legal sense. An owner of the building, who intends to use a separate room, should first separate this room and register his (her) right of property to it. The building loses its essence as a whole object of immovable property; the right of property to the building is suspended from the legal point of view. Instead of the single right of property to the building, several rights of property to the rooms appear. Their number and structure are established by the owners taking into account the technical rules on eligibility and possibility for independent use of these rooms.

Recognizing the rooms of a building as immovable property requires regulating the legal status of the common property of the building. Common property includes: main and filler structures, floors, roof, foundation, engineering equipment as well as areas connecting several rooms with each other and outer enclosures including commonly shared areas (stairs, corridors, halls). The commonly shared areas have a common feature of non-eligibility for independent use as residential and non-residential areas.

Establishing a regime for the owners of separate rooms in regard to common property in the building has some peculiarities. A share in the right to the common property is closely connected with a room in the building and it can be obtained and alienated along with the room. As provided for by Articles 226-227 of the Civil Code, this kind of share does not have an

independent circulation and the co-owners are deprived of the right to claim separation of it by its nature as common property. Also, as provided for by Article 227 of the Civil Code, co-owners are not entitled to claim that other co-owners must purchase their shares.

● The shared property right to common property of the building has no relation to the right of use of the room because the right to common property does not cause a regime for purchase by other owners;
● Risks and responsibility related to the security of the building, its damage or destruction by accident lie with the owners of the separate rooms. Destruction of a room, for example destruction of an upper level by natural accident, its re-mounting or destruction of the residential area in other cases suspends the right of property of its previous owner except in cases of repairing the room for a certain time and following technical rules.
● In addition, the commonly shared right to the common property in the building loses its force in regard to these persons.

The maintenance costs for the commonly shared property are divided among the owners according to their shares. Shares are determined by the interrelation of areas and rooms belonging to them through the right of property. When the costs are shared, it is not relevant whether the owners actually use the common property. Repairing the roof may not directly concern those who reside on lower floors of a many-storied building, but the costs should be covered by all owners in accordance with their shares in the common right to the commonly shared property. Those who avoid contributing to common maintenance costs are punished by legal sanctions provided for delay of payments on common costs.

It should be noted that all commonly shared property, including rooms designed for common use, can not be considered independent objects because they are deprived wholly of the circulation capability. Thus, it is impossible to establish servitudes in regard to such commonly shared property. In this case some elements belong to some owners of rooms in the building by the common property right.

It is important to take into account the following conditions for precise determination of the regime for common property in a building:

1) Real property composed of an independent room belongs to a person on the basis of the right to property;

2) Common property of the building, including constructive elements of the building that is a subject of review, belongs to proprietors of all rooms in the building as common shared property.

The right to property should be excluded from the legal regime of water pipe systems, lifts or entrances that belong to all persons in the building.

The features of common property, conditioned by limited circulation, are determined by the registration of the right on a share in common property. The particular subjective composition of the proprietors is not significant for purposes of civil circulation. However, it is impossible to apply it to the description of the composition of the property under common property rights. This means that for common property objects only the first section – the technical description of the object - should be completed in the state register and it should be stated that all proprietors of the rooms in the building of the described property use the objects on a common basis. The latter statement, as a legal regime element, can also be considered in similar cases concerning land.

Considering the numerous practical disputes connected with the rights and duties of proprietors of residential areas (also previous proprietors of the residential area) and their family members as well as the social importance of this issue, it is important to address this issue separately. Issuing

the right to freely own and use residential areas by family members of proprietors (also previous proprietors of the residential area) should be based on ensuring the social protection of citizens. It is impossible to ensure protection by means of a contract that is based on the principle of freedom of contract. The only solution is to use the right conditionally called **'flat usufruct'** as the only method of effective civil law.

Usufruct is the legal right to use and enjoy the advantages of another person's property. The essence of a flat usufruct is closely connected with two rights: 1) ownership of residential area; 2) use (**right to use**) of residential area by usufructuary jointly with his/her children who attain majority. Flat usufruct does not confer to the usufructuary any right to dispose of the residential area including the making of a will and transferring the property by inheritance. The duration of usufruct does not extend beyond the life of the usufructuary.

Usufruct belongs to various family members of the proprietor of a residential area in the following order:

- **First**, it is the right of the husband and wife. Flat usufruct - being a right on someone's property - can be determined only in favour of the husband and wife. The husband and wife do not have to be the proprietor or common proprietor of a room. In the residential area, the fact of taking joint obligations, of joint living as husband and wife, and the conditions of the lease agreement confers the possibility for usufruct. Flat usufruct by a husband or wife can be directed only to a room..
- **Second**, the right extends to children. According to the Family Code of the Republic of Azerbaijan, determining the right of a juvenile to live with his/her parents (one of the parents) is related to the alimentary obligations of the parents. Except in cases where living with the parents conflicts with the interests of the child (Article 49.2 of the Family Code) or when the parents live separately (Article 60 of the Family Code), the child has the right to live with his/her parents. If the parents live separately, the determination of the child's residence is in accordance with the agreement between the parents. According to Article 105 of the Family Code, support can be paid by way of giving the property. Thus, giving residential area for child's living should be considered as a method of one's execution of alimentary obligations in relation to the child.
- **Third**, the right of other family members over a residential area is considered. In all other cases provided for by the Family Code, giving of a residential area by the proprietor to other members of the family should also be considered as execution of alimentary obligations.

When the execution of alimentary obligations consists of giving property (for ownership, use, etc.) then it falls within the framework of civil relations. If the proprietor of a residential area has alimentary obligations to family members, then the property given to them is used in the framework of flat usufruct. Giving residential property by way of alimentary obligation, can be determined by a court on the basis of an agreement signed by the parties and, in the absence of an agreement in the order provided for by the law.

Flat usufruct should be registered with the state register of real property. Flat usufruct should not prevent usufructuary family members, in accordance with the general rules, from living in the residential area and using it together with the proprietor. If the usufructuary is not a family member of the proprietor, then a decision on the common use of the room would depend on the size of the room.

The proprietor can define the obligations for the usufructuary for maintenance of the residential area used, depending on whether the residential area is used partially or fully. It is also important to impose a duty on the usufructuary regarding the costs of communal services including current and general repair of the residential area and other similar issues. If the proprietor looses the

right to freely use the residential area, the question can be raised as to whether the usufructuary pays a certain sum for use of the residential area.

Grounds for terminating flat usufruct include:

- Expiration of alimentary obligations of the proprietor;
- Termination of usufruct by court on the basis of proprietor's suit connected with elimination of grounds for placing usufruct on real property;
- Violation of usufruct conditions by usufructuary;
- Agreement between usufructuary and proprietor;
- Refusal of usufructuary from usufruct.

The proposals made regarding flat usufruct can, in general, enlarge the possible application of the right and at the same time better protect the rights of family members of the proprietor (previous proprietor) and decrease social tensions in this field.

C. Allocation of Land for Residential Areas and Construction of Residential Buildings

Residential areas have a special place in the real property market of Azerbaijan. It is not a coincidence that during 7 months of 2007, out of 14090 rights registered for the first time by the State Register Service on Immovable Property, residential areas (together with flats – 6848 and private houses - 2479) constituted 9327 or 67%. During 7 months of 2007, out of 29610 rights that passed repeated registration, residential areas (together with flats – 5141 and private houses - 4356) constituted 19497 or 66%. Out of 8100 rights connected with mortgage that passed registration, residential areas (together with flats – 5055 and private houses - 1814) constituted 6869 or about 84%.

The construction boom in the country will lead to further increase in the quantity of residential areas in the real property market. Despite the increase in residential blocks under construction there are still numerous problems in the allocation of land for construction. This problem is connected with the lack of a clear division of power between municipalities and relevant executive authorities in relation to the allocation of land. In some cases, both the municipality and the executive authority have the power to allocate land. Requests for land allocation are not answered in a timely manner as envisaged by the law. Moreover, in many cases the requests are left unanswered. For instance, the Law on Approving Guidelines 'On Laws on preparation and coordination of documents on allocation of land by municipalities' states that when the municipality deems it appropriate to allocate land to a natural and legal persons in the given area, within 5 days it sends the request to the relevant executive authority for preparation of the excerpt from the request and plan (scheme) of land. The relevant executive authority, within 10 days, approves the plan (scheme) of land to be allocated and sends it to the municipality along with the document about the standard price of the land. The main problem starts from this moment. In many cases the relevant executive authority either does not reply at all to the request or sends a negative reply without any explanatory reason. The rigid agreement procedure does not allow the municipality the possibility to use its own property in full. These cases are particularly typical for Baku and other big cities. To prevent these cases, there is a need to determine disciplinary and administrative responsibility for officials who fail to comply with the requirements of the procedural norms envisaged by legislation.

Another serious problem is connected to obtaining permission by natural and legal persons for construction on land given to them for use, rent and ownership. According to some sources, in order to build a residential or non-residential building one needs to obtain permission from up to 42 entities. In the best case scenarios, it takes more than 130 days to obtain permission for

construction. This happens when the legal and natural persons have personal relations with high officials or obtained permission for construction by making various illegal payments.

Undoubtedly, this practice decreases the flow of investments in the real property market and leads to a monopoly in the construction field. It also causes a rapid increase in land prices and residential areas as objects of real property.

We propose making certain changes in the legislation that would provide for a reasonable time clearly defined for any state body connected with allocating land and obtaining permission for construction. It is also necessary to apply a 'single window' principle[2] as soon as possible for minimizing contacts of state officials and the persons who seek services from the state.

D. Proposals on Share Holding in Construction

It is impossible to regulate the relationship between subjects signing and executing contracts connected with attracting funds of citizens and legal persons for the construction of apartments using the known types of contractual obligations. We believe there is a need for a special type of the contract 'on share holding in construction'. Therefore, it is proposed to add the following chapter to section 7 of the Civil Code of the Republic of Azerbaijan:

Share holding contract in construction

1. According to a share holding contract in construction, a construction company (contractor) conducts construction of a residential building on the determined address and within the deadlines specified in the contract; undertakes an obligation to give ownership of the residential area to the share holders when the building is admitted operational and the share holders undertake the duty to pay the sum in accordance with the conditions of the contract.
2. A construction company (contractor) has the right to sign a contract with natural and legal persons about share holding in construction. A share holding in construction contract can be signed anytime from the moment permission on building a building enters into force until signing of a State Act on admitting an object for use.

Form of a share holding contract in construction and its initial registration

1. A share holding contract in construction is prepared in a form of a unified document signed by the parties and is certified by public notary.
2. Failure to certify a share holding contract in construction by a public notary voids the contract.
3. A share holding contract in construction should be subjected to initial state registration. Initial registration of a share holding contract in construction is a basis for subsequent registration of property rights of share holders over the residential area.
4. Initial registration of a share holding contract in construction is carried out by the State Register Service on Immovable Property.
5. Making changes and amendments to a share holding contract in construction in accordance with the Code should be subjected to state registration of the contracts on rights on the said contract or assignment.

Mandatory conditions of a share holding contract in construction

The content of a share holding contract in construction covers the following:

1. All information needed to identify the real property to be given to share holders once the investment agreement comes to an end;

[2] A way of centralising administrative procedures.

2. Total amount of the cost paid to a construction company (contractor) by the share holders on the basis of a contract, the payment chart, terms of payment during construction, and the possibility of making amendments;
3. The date when the construction is to be completed; information about admission of a building by the state commission and permission on use of the residential areas issued to the share holders;
4. The terms of making payment for maintenance of a residential building from the moment of admittance of the building for exploitation until the period before the registration of property rights of share holders;
5. Realisation of all measures connected with giving the residential building for exploitation by a construction company (contractor);
6. Responsibility of a construction company (contractor) about the quality of the residential area (rooms) given to ownership of the share holders on the basis of a contract.

State registration of share holders' property rights on residential rooms

1. A construction company (contractor) shall provide assistance to share holders of the contract on state registration of property rights to the residential areas (rooms).
2. Unless otherwise provided for by the contract, the share holders shall pay all the costs connected with the registration of their property rights over the residential area (rooms).
3. If the share holders refuse the assistance of a construction company (contractor) on state registration of property rights on residential area (rooms), the construction company (contractor) shall provide the share holders with all of the necessary information and documents for state registration of the property rights.

Sharing the risks between the parties

1. If the work activity pursuant to the share holding contract in construction is suspended for the reasons not depending on the parties and the construction object is temporarily frozen, the share holders and a construction company (contractor) bear joint responsibility derived from the risk and losses, sum paid into the construction in respective percentage, if otherwise not provided for in the contract.
2. If the construction is temporarily frozen because of a reason attributable to the construction company (contractor) or if the deadlines for giving the building to the state commission and exploitation are missed, unless otherwise stipulated in the contract, the construction company (contractor) shall be responsible for the failure to execute the contract or failure to execute the contract properly.
3. Unless otherwise envisaged in the contract, a construction company (contractor) shall be responsible for loss of goods or damage to the construction object prior to the building's operation.
4. Unless otherwise envisaged in the contract, a construction company (contractor) shall be responsible for the increase of expenditures of the object during construction.

The words **'share holders on the basis of a share holding contract in construction'** shall be added to the definition of a producer in the Law of the Republic of Azerbaijan 'On rights of producers'.

We believe these proposals can establish order in the construction sector, increase construction quality, as well as better protect the rights of flat producers including the rights of owners of real property. The proposals can help clear determine the legal regime for newly established objects of real property, their timely state registration, timely payment of state duties for those objects, as well as prevent property tax evasion.

Another issue that is important to decide upon during the construction of residential and non-residential areas is connected to the insurance for those constructions. It is necessary to make changes in the legislation to provide for compulsory insurance of buildings during construction.

Despite the considerable role land in circulation plays in regard to real property objects, a land market based on civil relations has not yet been formed. About 20% of the land fund is in private property and there are approximately 3 million persons owning land in the country. If we look at the dynamics of registering rights on land with the state register of immovable property, we can see that the process is inadequate for the number of land owners in the country. All these issues necessitate changing the conditions for the formation of a land market. To make land reform more effective, it is necessary to establish a single database for all of the information about land and land owners and to ensure that this database is transparent and accessible. It is even more important to develop the institute of independent evaluators to ensure that land is evaluated on the basis of market prices. This institute is also important for the evaluation of the other objects of real property, not just the evaluation of land.

Another obstacle currently preventing the use of land as real property is the occupation of land by citizens, legal persons, refugees, and IDPs. There are some legal acts that give legal guidance to this situation. For example, paragraph 2 of the Decree 'On the State Programme on improving living conditions and increasing employment of refugees and IDPs' states that '**the administration of relevant state bodies of the Republic of Azerbaijan shall be instructed to prevent eviction of IDPs from public buildings, apartments, lands and other objects *irrespective of their property status* who temporarily settled there from 1992 to 1998 until they are moved to their native lands as well as to new settlements and houses designed for temporary residence'** (emphasis added).

This paragraph of the Decree clearly contradicts Articles 13 and 29 of the Constitution of the Republic of Azerbaijan, Article 1 of Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms [European Convention on Human Rights], the Azerbaijani Civil Code and other legislative acts. The local courts, however, refer to this paragraph of the Decree and refuse to evict IDPs from the land, apartments and non-residential areas that they occupy. This practice suspends the legal force of Article 13 of the Constitution concerning inviolable of property and protection by the state as well as the norms guaranteed by Article 29.

We believe that if the Decree is amended by replacing the words 'irrespective of their property status' with 'property of the state', this would ensure compliance with the constitutional norm as well as Protocol №1 to the European Convention on Human Rights.

E. Legal Regime of the Object that is Under Construction

Evaluation of existing legislation

According to Article 17 of the Law 'On state register of real property' objects that are under construction are treated as real property. However, there is a need for clarification in the legal regime of objects that are under construction. Below are proposal for modernising the current legislation:

- It is important to include objects that are under construction in the list of real property reflected in Article 135.4 of the Civil Code of the Republic of Azerbaijan. This amendment would reflect the significance of objects that are under construction.
- The legal status of objects under construction should be determined based on the following approaches:

- Chapter XII of the Land Code provides that the property rights of objects that are under construction belong to the proprietor and the owner of the land by right of rent or real right.
- In deciding the issue of ownership for objects that are under construction it is irrelevant if the construction was made pursuant to the material means of the owner or derived from a construction agreement.
- If the land owner is the owner of the object built, termination of a construction contract is of no effect.

- The necessity of registering property rights over objects that are under construction with the State Register can arise if the proprietor of the land suspends construction. For registering with the State Register the property rights over the objects that are under construction, the support can be a document about the property right or a document on allocation of the land on the basis of one of the mentioned rights. Construction should be permitted after the property right is registered in a State Register. This allows excluding registration of property rights to objects built arbitrarily.

III. REAL PROPERTY RIGHTS OF FOREIGNERS AND STATELESS PERSONS

The real property rights of foreigners and stateless persons in the Republic of Azerbaijan are regulated by following legislative acts:

- Constitution of the Republic of Azerbaijan;
- European Convention for the Protection of Human Rights and Fundamental Freedoms and Protocol 1 to the Convention;
- Land Code of the Republic of Azerbaijan (25 June, 1999, # 695-IQ);
- Civil Code of the Republic of Azerbaijan (28 December 1999, # 779-IQ);
- Law on protection of foreign investments (15 January 1992, # 57-IQ);
- Law on entrepreneur activity (15 December 1992);
- Law on privatisation of real property (16 May 2000, #878-IQ);
- Law on State Register of Real Property (29 June 2004, # 713-IQ);
- Law on legal status of foreigners and stateless persons (13 March 1996);
- Law on privatisation of state flat fund of the Republic of Azerbaijan;
- Law on concluding, executing and terminating international treaties of the Republic of Azerbaijan (13 June 1995).

In addition to the above mentioned laws, a number of normative legal acts were adopted by the Government of Azerbaijan concerning the regulation of property rights of foreigners and stateless persons. According to Article 69 of the Constitution of the Republic of Azerbaijan, foreigners and stateless persons in the Republic of Azerbaijan may enjoy all rights and must fulfil all obligations like citizens of the country unless otherwise specified by the legislation or international treaties. The rights and freedoms of foreigners and stateless persons, who permanently or temporarily live in the Republic of Azerbaijan, can be restricted only in accordance with applicable international legal norms and laws of the Republic of Azerbaijan.

The Civil Code provides that international treaties to which the Republic of Azerbaijan is a party shall be directly applied to civil law relations regulated by the Civil Code except for cases when the adoption of domestic normative legal acts is required for implementation of an international treaty. If the norms in international treaties provide different norms than the national legislation of the State, then international treaties shall apply.

According to Article 29 of the Constitution, everyone has the right to property and this right is protected by law. Everyone can enjoy the right to property over real and movable property. The

right to property includes a person's right to own, use and dispose of the property alone or together with others. No one can be deprived of their property except by a court decision. Total confiscation of property is prohibited. Alienation of the property for state or public needs is permitted only after fair reimbursement of its value.

Foreigners and stateless persons have the right to be a proprietor of any real property objects in the Republic of Azerbaijan except land. According to Article 48 of the Land Code, foreigners and stateless persons, foreign legal persons, international associations and organisations, as well as foreign states can obtain land in the Republic of Azerbaijan only on the basis of the right to lease. The right to property that is given to foreign legal and natural persons as a result of inheritance, donation and mortgage shall be subjected to amortisation within a year. If foreign legal and natural persons fail to subject the land to amortisation within a year, a relevant executive authority (Cabinet of Ministers) or municipality can buy the land at market price.

Land is given for lease in accordance with its function and legal status. For example, when foreigners and stateless persons take agricultural land for lease, they are limited to using the land for production of agricultural products and refining. Lessees of land when exercising their rights shall not cause damage to the natural environment or the rights and interests of other persons.

The right to rent land means temporary use of land on a contractual paid basis. Contracts for renting land can be short-term (up to 15 years) and long term (from 15 to 99 years). Summer and winter areas used for feeding animals as well as the municipality reserve fund are leased from 5 to 10 years. When the lease period comes to an end, the duration of the contract can be prolonged. For land in state ownership the lessor is a relevant executive body (Cabinet of Ministers) and for lands in municipal ownership – municipality. For lands in private ownership, the lessor is the proprietor of that land. The conditions of the lease, including its duration and rental, are determined by agreement of the parties. The minimum amount of rent for lands owned by the state and municipality is determined by the Cabinet of Ministers. With the permission of the lessor, the lessee can sublease the land. Until the lease expires, the successors of the lessee have the right to lease the land in case of lessee's death.

When leasing lands of state and municipal ownership, the following obligations and restrictions can apply:

- Prohibition on subleasing;
- Deadlines for starting and completing construction work or appropriation of land on the basis of certain agreed projects;
- Respect of requirements about protection of environment, protection of fauna on the land, retention of fertile strata of land, rare plants, nature, geological, historical and cultural monuments and archaeological objects, etc.

Obligations and restrictions on leased land are determined by the contract or court decision. Obligations and restrictions on land shall be included in its legal description and subject to state registration. In general, state registration is not required for real property with a lease contract less than 11 months. In all other cases, the lease contract on all objects of real property is subject to state registration on immovable property. When the right to lease land transfers to another person, the obligations and restrictions are retained by the land.

Servitude can also attach to land. Servitude can attach on the basis of agreement between the land owner and lessee or on the basis of a court decision. Servitude can be temporary or permanent. Servitude is subject to state registration.

Agricultural lands from the municipal reserve fund can be leased to foreigners and stateless persons only for agricultural production. The legislator has established a single queue rule for leasing land designed for agricultural production to foreigners and stateless persons. Pursuant to the queue rule, foreigners, stateless persons and foreign legal persons are last in the queue and can lease the land only if it is not leased by others. **We think this norm of the legislation should be changed and the rights should be made equal**. The decision to lease municipal land is made after receiving an opinion from the executive authority in accordance with the features of the land, function of land, current technical norms as well as structure of the land and town building documents. The lessee has the right to make construction, build temporary objects, dismantle the construction and instalments and rebuild them according to the obligations and restrictions set forth for the land.

The proprietor of the privatised institution (object) who is a foreigner or a stateless person or a foreign legal entity can lease the land without the right to sell it.

According to Article 70 of the Land Code, the lands under lease can be recovered for state or public needs. The land can be recovered by the relevant executive authority (Cabinet of Ministers) with the consent of the lessee. Redress regarding the decision on recovering the land can be made to a court. When the land is recovered for state and public needs, on the basis of an agreement, the lessee can be provided with a similar size and quality land in another place. When the land is recovered for construction, the following conditions should be met:

1. Determine the amortisation zone for the land to be reclaimed and indicate the zone in the state land cadastre and other relevant registration documents;
2. Announce a competitive tender (auction) for real property on the land to be reclaimed or the land that is recovered by the relevant executive authority and municipality under construction;

The following list provides the grounds for terminating the rights of foreigners and stateless persons to land:

- Lease agreement expires;
- Failure to use the land in accordance with its purpose;
- Failure to follow the conditions of the lease agreement;
- Failure to pay rent for 2 consecutive years without good reason;
- Failure to use the land given for agricultural production for 2 consecutive years without good reason;
- Failure to use the land given for non-agricultural needs for a year without good reason;
- Use of land deteriorates the quality of land and erosion, pollution with chemical and radioactive materials, water logging, repeated salinisation, violation of rules of melioration and irrigation in land or pollution of environment;
- When, in accordance with the law, it is necessary to reclaim the land for state and public needs;
- When the lessee of land dies and there are no successors.

If the parties cannot agree upon terminating a lease agreement for failure to follow the conditions of the agreement, termination can be made only by the court. In cases of failure to use the land in accordance with its purpose, failure to pay rental for 2 consecutive years without good reasons, pollution of land and worsening of its quality, the lease can be terminated after notification to the lessee to correct the violations within a certain deadline. When the court, relevant executive authority or municipality terminates a lease and, they can further instruct monetary compensation either for the lessee's expenses on improving the quality of land or damage to land caused by the ineffective use of land. Decisions on the termination of a lease agreement can be appealed in court.

Terminating a lease does not deprive the lessee the possibility to collect the harvest and does not release him/her from the responsibility to pay taxes and maintain the fertility of the land.

Foreigners and stateless persons can engage in entrepreneur and investor activity or other activity not prohibited by the law by acquiring other real property objects. When other real property objects are acquired in this manner, foreigners and stateless persons enjoy the rights envisaged for the citizens of Azerbaijan[3]. According to the Law 'On privatisation of state property', foreigners and stateless persons and foreign legal entities can take part in the privatisation of state property as buyers. Foreign investors take part in privatisation relations by obtaining a state privatisation option. An option allows its owner to participate in privatisation (options are used during the circulation period of privatisation cheques).

The Law 'On protection of foreign investments' enables foreigners and stateless persons to act as investors in the Republic of Azerbaijan. Foreign investments are fully protected by the law without conditions. The legislation in force when an investment was made shall apply to the investment for a period of 10 years. Therefore, if the future legislation of the Republic of Azerbaijan damages the conditions for investment, the investment is still protected up to 10 years. This provision, however, does not apply to changes in the legislation regarding defence, national interests and public order, taxation, loan and finances, environment, protection of health and morals of the population. The law also provides compensation for damage to foreign investors, guidelines on profit use and other favourable economic conditions.

The legislation of the Republic of Azerbaijan provides full guarantees for the protection of property rights including the right to real property of foreigners, stateless persons and foreign legal entities. This protection is a constitutional guarantee. Article 13 of the Constitution states that property is inviolable and protected by the state. Protection of property includes a system of measures for restoring violated property rights and eliminating negative consequences. Protecting real property rights implies:

- Recognising the property right over real property;
- Eliminating illegal ownership;
- Preventing attacks and obstacles to real property ownership.

Recognition of the right to real property prevents violations of the right and disputes over the property. According to Article 307 of the Civil Code, ownership of real property is confirmed in court by a special proceedings order that establishes the fact of use and disposal of the property. The proprietor's right to demand property from another person gives him/her the possibility to recover property taken without consent and to restore his/her rights to the land. A suit submitted by the proprietor demanding property from illegal ownership of another person is called vindication. It is an implied request to the court to stop the acts that hinder the proprietor's realisation of property rights to the real property.[4]

The legislator provides for the amortisation by the relevant state body (Cabinet of Ministers) of foreigners', stateless persons' and foreign legal entities' property taken for state and public needs by law on the condition of advanced payment of the market value of the property and for the purposes of (1) making roads and other communication lines; (2) determination of border line; or (3) construction of objects important for national defence. Except for these mentioned purposes, in no circumstances can the property of a person be expropriated contrary to his/her will. If the person does not agree with the expropriation of the property for the mentioned purposes, then s/he can address the court within 1 year from receiving notification of the decision to expropriate

[3] See S. Allahverdiyev, Civil Law of the Republic of Azerbaijan. Vol. I., 2nd ed., Digesta, Baku, 2003.
[4] I. Askerov, B. Asadov. Commentary of the Civil Code of the Republic of Azerbaijan. 1st edition.

the land. Only after a court decision can the relevant executive power (Cabinet of Ministers) execute the expropriation. The State is allowed to expropriate the real property of the person with the condition of giving fair compensation.

As stated, the Republic of Azerbaijan has ratified the European Convention for the Protection of Human Rights and Fundamental Freedoms and its Protocol No. 1. In accordance with the provisions of the European Convention and Protocol 1, complaints deriving from disputes about any form of restriction on the right to property can be sent to the European Court of Human Rights after exhaustion of domestic remedies. The legislation of Azerbaijan also allows foreign investors to include arbitration provisions in its contracts on real property. Under the arbitration provision, disputes concerning the investments in real property are brought before international arbitrage courts located outside the territory of Azerbaijan. Currently there is information in press about international arbitration courts located outside the territory of Azerbaijan admitting cases concerning contracts signed between the Government of Azerbaijan and some foreign legal entities.

IV. MORTGAGE OF REAL PROPERTY

According to Article 269 of the Civil Code, the right to pledge and mortgage confers a property right to a pledgee with respect to the property of a pledger, and at the same time a method of securing performance of a financial or other commitment of a debtor before a pledgee.

The right to pledge and mortgage constitutes a limitation on a property right. A pledge is a limitation on the proprietary interests of the movable estate (except for the movables subject to mortgage).

A mortgage is a limitation on the proprietary interests of the real estate as well as on the movable estate and is subject to registration in an official register. The property pledge and mortgage extends to all ownership rights with respect to the property. With respect to the commitment, secured by a pledge or a mortgage, the creditor (lender or mortgagee) shall have the right, in the event of the debtor's non-performance of such commitment, to receive security from the value of the property pledged or mortgaged, on the basis of priority against other creditors of the person (borrower or mortgagor), who own such property.

There is a right to indemnity in the event of destruction or damage of the pledged or mortgaged property, or in the event of termination of the right, pledged before a creditor (mortgagee) of such a right, or in the event of a violation of such a right.

According to Article 270.1 of the Civil Code, the pledge and mortgage occur on the basis of an agreement. Any change of ownership of the pledged or mortgaged property shall not change the right to pledge or mortgage.

Mortgage contract

According to Article 307 of the Civil Code, a mortgage contract should contain the name and place of residence of the parties, subject of mortgage, substance of the obligation ensured by the mortgage, amount and deadlines for execution.

Mortgage contracts should indicate the mortgagee's ownership right to the subject of mortgage and the state body that registered his/her right. The contract should also indicate the obligation ensured by the mortgage, its amount, and grounds for its establishment and deadlines for execution. Mortgage contracts should be certified by a public notary.

State registration of mortgage

According to Article 309 of the Civil Code, mortgage contracts on real property should be registered in the State register of real property and the mortgage of movable property should be registered in the official register of movable property. Registration is carried out in a certain order by presenting the movables by the proprietor of the movables subjected to mortgage and the documents of the creditor certified by a public notary.

According to the legislation, if the mortgagor defaults, the creditor becomes a proprietor. According to Article 317 of the Civil Code, if the debtor delays payment then the mortgagee can demand the sale of the real property.

Consequences of delay of executing obligations by debtor

According to Article 319 of the Civil Code, if a debtor delays his/her obligation on a mortgage of a good, the mortgagee has the right to sell the good subjected to mortgage in an open auction. If the amount ensured by the mortgage is not satisfied, the mortgagee and debtor can agree on a form of sale other than an open auction to satisfy the mortgage.

Objections of proprietor about mortgage

Even if the proprietor of real property is not also a personal debtor of the amount ensured by the mortgage, s/he can make a counter claim to the mortgagee. These are mutual claims about replacement of monetary obligation and submission of complaint against the claim. This is also relevant when the proprietor is a personal debtor of the amount ensured by the mortgage. In addition to the Civil Code, the legislator has adopted the Law 'On mortgage' (2005).

V. PROBLEMS ARISING FROM PUBLIC NOTARY ACTIVITY RELATED TO THE RIGHTS OF REAL PROPERTY

Certification of rights and facts of legal significance for preparation of official and original documents in the Republic of Azerbaijan and execution of other actions belonging to the public notary can be conducted only in the order and by certain persons provided for by the Law 'On Notary' of the Republic of Azerbaijan.

A person who professionally engages in notary activity is called a notary. According to Article 8 of the Law on Notary of the Republic of Azerbaijan, a notary can draft deeds, applications and other documents, give copies of documents and excerpts from them and can request a document and information from natural and legal persons for taking those actions.

When carrying out his/her duties, a notary should explain the rights and duties of natural and legal persons about notary actions, assist in the realisation of these rights and protection of their lawful interests, notify them about consequences of notary actions for preventing possible damage that the lack of legal knowledge can cause to them, and guarantee confidentiality with regard to the information known to him/her in connection with the professional functions.

A public notary does the following actions related to real property:

- Certifies deeds and powers of attorney;
- takes measures on protection of inherited property;
- issues certificates on succession;
- issues certificates on the right to shared common property of husband and wife;

- issues certificates on obtaining flats from open auction; and
- certifies copies of documents and the authenticity of excerpts of documents.

Notary activity related to real property is also conducted in the consulates of the Republic of Azerbaijan. Except for contracts on amortisation of real property located in the territory of the Republic of Azerbaijan and placing that property under pledge, the consulates of the Republic of Azerbaijan certify deeds and powers of attorney; take measures on the protection of inherited property; issue certificates on succession; issue certificates on the right to a share of husband and wife's common property; and certify the authenticity of signatures on documents.

Notary actions are conducted when all documents are submitted and upon payment of a state fee. According to Article 46 of the Law on Notary, deeds on the amortisation of property and deeds on pledge that require registration can be certified upon submission of documents establishing the right of property over the subject property.

Deeds by a spouse that dispose of real property certified by a notary should include the consent of the other spouse certified by a notary.

When certifying deeds on amortisation or pledge of house, flat, dacha, countryside house, garage, land and other real property, it is determined if there is a restriction for amortisation of the property or an arrest.

According to Article 46 of the Law on Notary, certifying of deeds on amortisation or pledge of house, flat, dacha, countryside house, garage, land and other real property shall be carried out by a notary of the administrative territory where the property is located. In practice, this provision creates problems and restricts the realisation of the property right. With the exception of notaries operating in Baku city who are notaries of Baku city and deal with deeds on real property by administrative districts of Baku city. The problem is aggravated in practice due to many reasons including excessive workload, lack of a single registration system and lack of a single computer database. In fact, this is connected to lack of coordination (both computer network and link necessary for single register of deeds) between notaries, notaries and central executive authority controlling notary activities, and between the State Register Service on Immovable Property dealing with registration of real property rights.

We consider the following to be important in course of conducting notary activities related to real property:

- In accordance with Article 9 of the Law on Notary, a notary, while carrying out his/her duties, should:
    - duly explain to natural and legal persons their rights and duties with regard to notary actions;
    - assist in the realisation of these rights and protection of lawful interests; and
    - notify them about consequences of notary actions for preventing possible damage that the lack of legal knowledge can cause to them. For example, some court cases concerning real property deal with withdrawal of permission by persons who previously gave such permission; those persons think withdrawal is possible even if it leads to termination of the right to real property in the future. Naturally, these cases are a result of a lack of knowledge. This kind of information and rights are not explained in notary bodies.
- With an aim to ensure coordination and information exchange between notary bodies, a single computer information database should be established. It should be ensured that any notary receives the necessary information about the right to be registered.

VI. STATE REGISTRATION OF RIGHTS ON REAL PROPERTY

According to Article 139.1 of the Civil Code, the right to property and other rights in relation to real property, limitation, establishment, transfer and termination of these rights shall be subjected to state registration.

According to Article 193.3 of the Code and Article 2.2 of the Law 'On state register of real property', state registration of property rights of immovable objects is carried out by the State Register on Immovable Property of the Republic of Azerbaijan in the register prepared and managed in the order provided for by the legislation. Unless an inaccuracy in the content of the register is proved, there is a presumption that the content is accurate and complete.

A. Making Changes in the State Register on Real Property

According to Article 141.1 of the Civil Code of the Republic of Azerbaijan, if the content of the state register of real property is not in line with the actual legal status of the right to land or the limitations to that right, a person whose right was not registered or wrongly registered under the law, or the person whose right was violated by the inclusion of a note about a non-existing obligation, can, for purposes of amending the state register of immovable property, demand permission from the person whose rights are affected by the change.

One has the right to object to the credibility of the state register of immovable property. An objection concerning the state register of immovable property is made by a court decision or on the basis of permission from a person whose rights were affected by the change in the register.

B. Certifying Contracts on Disposal of Real Property Objects with the State Registrar by a Public Notary

According to Article 144.1 of the Civil Code, contracts on the disposal of real property with state registrar are to be certified by a public notary. When certifying, the notary shall verify that the party disposing of the property has the right to disposal and shall check that the agreement corresponds to the laws. The notary is responsible if he/she certifies a false agreement.

The right to disposal, according to the Civil Code, is confirmed by the registered right as evidenced in the state registrar of real property or by permission from a competent person with the right of disposal. Conformity of the agreement with the laws is affirmed by its certification from a notary.

After certification by a notary, the notary gives two copies of the agreement to the applicant or at the applicant's request sends the State Register Service on Immovable Property the application registered by the notary along with the agreement, documents reflecting other grounds provided for by the law for the state registration of the rights, plan and size of the land spot, technical passport of the building, plant, construction and other immovable property (their components) located on the land, a plan-scheme and a receipt for payment of the state fee. If the document has a reference to a court decision that entered into force or an equivalent document including registration by the notary, then certifying with the notary is not required.

C. Establishment of the Right to Immovable Property

According to Article 146 of the Civil Code, the right to own and use property is established from the moment the agreement is certified by the public notary with the exception of when the right

is established by court decision or other lawful decision that can not be appealed. It is prohibited to certify by notary a contract on real property that is not registered with the state register of real estate and the contract signed on this property shall be void. The right to dispose of property is established from the date of registration with the state register.

After the contract on the real property is legalised by the notary, the notary provides two copies of the contract to the applicant or upon his/her request within 2 days sends the person's application for registration of the right with the state register of real property legalised by the notary to the State Register Service on Immovable Property. The application is accompanied with one copy of the contract, documents reflecting other grounds provided for by the law for the state registration of the rights, plan and size of the land spot, technical passport of the building, plant, construction and other immovable property (their components) located on the land, a plan-scheme and a receipt on payment of the state fee. A copy of the application is given to the person who submitted a request to legalise the copy of the contract by the notary.

D. Real Property Market and Proposals for Modernising the Registration System for Real Property Rights

Current situation

The issues surrounding property rights and the activities aimed at solving were the basis for economic change in the country that started in the 1990s. The system of registration of real property rights is one of the most important institutions for ensuring property rights.

Currently the legal foundation for a real property market and a registration system for real property rights are mostly established. The most active sector in this market is the sale-purchase of flats. The largest portion of the deals made regarding the purchase-sale of lands is for the construction of private and multi-storied buildings.

Everyone who has real property must be interested in registering it. The protection of citizen's property rights along with other rights and freedoms is a main goal for the Republic of Azerbaijan, which is developing rapidly and has a fast rate of social-economic development in the world. The State Register Service on Immovable Property of the Republic of Azerbaijan was established to help realise this goal and to apply the experience of leading countries in the respective field.

When the Civil Code was adopted in 2000, it contained provisions on the organisation and realisation of the state register of real property. Previously this competence belonged to the Ministry of Justice. For some technical reasons, however, the provisions were not implemented. The President of the Republic of Azerbaijan by his Decree # 188 of 7 February 2005 established the State Register Service on Immovable Property.

Prior to organisation of the State Register Service on Immovable Property, there were several institutions dealing with the registration of various types of property. It should be acknowledged that this led to various problems. Like other developed countries, there was a need to organise the state registration of real property rights in a centralised system.

The goals in creating the State Register Service were to ensure better protection of property rights in the country, establish a civil market infrastructure in Azerbaijan, and increase investment initiatives. All of these factors are very important for economic development in any country.

A state's guarantee of the credibility of real property is realised by the registration of property rights by a single body in the period of rapid economic growth and issuance of a single document approving the property right (i.e. extract from the state register), which is recognised by all bodies, banks and institutions of finance and justice. A citizen, legal or natural persons who obtain this document will not have any problems establishing a business or engaging in entrepreneur activity in any field.

The State Register Service on Immovable Property first of all successfully completed the structuring issues. The Service was established on the basis of approximately 50 departments dealing with registration of property rights. Currently there are 20 territorial departments. There are about 800 persons working for the Service. The departments as well as regional branches were provided with the necessary equipment and qualified staff. The Activity Plan of the Service was approved on 29 June 2006 by Decree #1540 of the President of the Republic of Azerbaijan.

The National Registration System of Real Property has been developed and is already being applied by some territorial departments. All of the operations conducted between this system and the Service, including information about owners and their property, are connected online to a central server. This makes it possible to register property rights in the state register electronically. This increases the efficiency of the work. The state registration of property and other real rights over the property is carried out in three forms: on paper, in electronic format and on the basis of digital database maps.

The work on establishment of digital database maps covering the whole territory of Azerbaijan is ongoing. These maps will reflect information about all property objects and owners of the right.

The rate of a secondary property market in all property types in Azerbaijan continues to grow. From 1 March 2006 to the present day a total of 117 452 extracts were issued from the state register. Out of them 26 764 that were issued for land, 64 587 were for flats, 19 154 for private houses, and 6 947 for other types of property. From 1 March 2006 to the present day 31 033 extracts out of all the extracts issued from the state register are connected with initial registration of the rights, 77050 with repeated registration of the rights and 9369 with mortgage. From 1 March 2006 to the present day, 62 149 extracts out of all the extracts issued from the state register in the country were issued for Baku city (12 877 for initial registration, 42 222 for repeated registration and 7 050 for mortgage). A comparative analysis of the initial registration and repeated registration of property demonstrates that in the city of Baku the secondary market volume is 3 times more than the registration of initial rights.

The growth rate is also visible from the results of the first seven months of 2007. During seven months of 2007, a total of 51 809 real property rights were registered with the state register. Out of those rights, 14 090 were for initial registration, 29 610 for repeated registration and 8 109 for mortgage. Among the rights registered 12 882 are connected with land, 17 044 with flats, 8 546 with private houses, and 3 234 with other types of property.

Out of 34 620 rights registered with the state register during four months of 2007, 16 072 were for Baku city only. In 2007, out of the rights registered for Baku city 3 924 were for initial registration, 9 666 for repeated registration, and 2482 for mortgage.

Significant progress is also visible in the field of mortgage registration and a comparative analysis of the figures demonstrates an increase in the role of the regions. As it was mentioned earlier, from 1 March 2006 to the present day a total of 9369 mortgage were registered of which 7050 were for Baku city. For the first four months of 2007, a total of 4552 mortgages were registered in the country and only 2482 of them were for Baku city. The remaining 2070

registration of mortgages was conducted in various regions of Azerbaijan. The statistics show that the difference between mortgage registration in the capital and in regions has diminished.[5]

Despite these achievements, the system of registration for real property falls short of the market requirements. This can be explained by the fact that during previous times there was no clear conceptual basis for the development of this system. Previously the interests of the department and the technical aspects of organisation pushed the main goal, i.e. the guarantee of the rights registered, into the background. Currently the attention should be directed at the guarantee of registered rights and not just the development of legislation and organisational technical components of the system. All other obligations should be subject to this goal. Delay can allow the needs of the real property market to increase the negative consequences for the economy.

Currently, the registration of real property is a system that facilitates an increase in the number of natural and legal persons maintaining contacts in the system. As the real property market grows, the significance of this system increases for individuals and for the country's economy in general. Despite its complex structure and diverse functions, natural and legal persons using the services of the system consider it as a single unit. Moreover, they do not know the system also covers the technical registration of buildings, plants, construction, cadastre registration of land as well as the registration of the rights on real property. Clients are not interested in the problems that might occur or how these issues will be resolved. They are interested in one simple question: How long will the registration of the rights to real property take and how much will it cost?

Modernise the state registration system for real property rights

Modernisation of the state registration system requires resolving two main problems:

1. Lack of sufficient guarantees of property rights over the registered property and other property rights;
2. Lack of single state registration system of real property objects.

The first problem can be solved in the following way:

- Modernisation of registration procedures: in its turn this should be ensured by determining the information's credibility, accuracy and correctness, accessibility of the gathered information for participants of a real property market as well as the responsibility forms for damage caused to participants of a real property market by bodies of the Register service.

- Compensation structure for damage sustained by bona fide purchaser: measures for establishing a legislative basis and financial means for paying damages to those who acted as bona fide purchasers based on the information from the State Register Service on Immovable Property and suffered losses because of the information.

We believe that if a person who is a bona fide purchaser based on the information from the State Register can not get compensation from the perpetrators as provided by the law within a year, there should be financial guarantees for compensation based on the principle of **title ownership** (ownership with legal ground) over the real property. It would be necessary to establish the legislative basis and financial sources.

Taking into account the increase of real property prices, the legislator should propose that when a purchase-sale of real property is terminated by the courts, the compensation to the bona fide buyer should be made on the basis of the market value of the real property on the day when the

[5] **Source: Interview with Arif Qarashov, the chief of the State Register Service on Immovable Property, published in 'Respublika' newspaper on 17 May 2007.**

court decision entered into force and not on the basis of the sum indicated in the contract[6]. At the same time, from the bona fide buyer's position of interests, all activities conducted on the property since it was established should be mentioned in order in the Form №1 issued by the State Register Service on Immovable Property.[7]

The civil legislation needs to be modernised to provide broader rights for a bona fide buyer of property. It is very important to (1) clarify the definition of bona fide buyer of property, (2) determine the separate requirements for a bona fide purchaser of immovable and movable property, and (3) introduce additional grounds for establishing the property rights of a bona fide buyer.

The second problem that needs to be resolved in order to modernising the state registration system is the lack of a single state registration system for real property objects. The problems associated with a lack of a single state system include:

- No comprehensive legislation base for state registration of real property objects; different executive bodies and local self-governed bodies conduct various parts of the registration process; no organised method for sharing information about real property objects; and in many cases repetition of information and activities;
- the volume of information kept in the relevant cadastres is not compliant with the goals of the state registration system and the information is deficient;
- many functions of the current system are not available to all market participants.

Proposal to improve the state registration system of real property objects

1. Adopt the Law 'On cadastre of real property' with an aim to establish a single state registration of real property;
2. Form various information systems in order to provide real property market participants and investors with the necessary information including area development plans, area zoning, property tax and other information taking into account the needs of the state and local self-governed bodies;
3. Create adequate conditions for development in a competitive environment with an aim to form the land and other real property objects of the private sector and to attract a service market for technical description, landscape, cartography and geographic work. We believe the majority of activity related to the technical inventorying of real property objects and area structure is a service provided by natural and legal persons on the basis of competition and their operation shall be considered entrepreneur activity.
4. The formation and issuing of land requires determining the state land boundaries, privatisation of land upon which a privatised entity is located, and establishing a modern planning system. When determining state property boundaries the process of giving land to the proprietors of the real property objects located on the given land should be completed. For this the Law 'On privatisation of state property in the Republic of Azerbaijan' should be amended and a concrete provision should be determined. There should be a deadline for the privatisation of all land situated under private objects if it is not already privatised and measures should be taken to ensure the resolution of this issue. We propose as a deadline 1 January 2009.

According to Article 19.1 of the Law "On state register of real property", any right to rent or to use real property that exceeds eleven months should be officially registered. The application for registration of the right to rent or to use real property can be submitted by one of the parties of

[6] This proposal was made by Zaur Mammadov, the junior scientific worker of the department on civil law and civil procedure of the Institute of Philosophy and Social-legal studies of the National Academy of Sciences of Azerbaijan.
[7] Ibid note 6.

the contract on rent (use) of the real property. However, registration of the right to rent (use) immovable state property is allowed on the basis of application by the relevant executive authority that has the right to make the contract. In practice this creates problems in the registration of the right to rent (use) immovable property. The persons who entered in a contract to rent (use) immovable property with a state body cannot register there right. Registration is dependent on application by the relevant state body. Because of this, it is proposed to exclude this provision from Article 19.1 or to make the necessary changes that would allow registration of the right to rent (use) immovable state property on the basis of a request by the relevant executive authority **or lessees (user)** who has the right to sign the rent contract on the immovable state property.[8]

VII. TOWN PLANNING, AREA PLANNING, ZONING AND ESTABLISHMENT OF NEW REAL PROPERTY OBJECTS

Current situation

The development of an immovable property market is impossible without ensuring clear procedures on area planning, zoning and purchase of land for construction and other purposes. This requires a complex town planning system. This kind of regulation is ensured by two main legislative norms on basic town planning:

1) determining the purpose of real property by applying zoning regulations (rules) on area planning and issuing permission for the use of real property;
2) establishing new real property objects and making changes to existing real property.

In the current situation, problems occur in connection with the activity or **lawful activity** by relevant bodies of the executive power and municipality in regulating area planning, use of land and construction rules and preparation of town planning documents regarding construction in the area**.** These documents issued by the different governmental bodies create extra guarantees for activity by real property market participants as well as investors. In addition, uncertainty and inaccuracy in the legal procedures for determining the purpose of real property as well as the formation and allocation of land for construction and other purposes should be eliminated. Important changes in this field should start with the application of legal zoning reflected in the Land Code (article 40) and Law 'On basics of town planning'.

The regime for using real property applies to all land and other real property objects located in the same territorial zone. This type of zoning creates a legal guarantee that would allow better and more effective use of real property from an economic perspective. This type of zoning is a legal mechanism that mutually binds the relevant executive power, local self-governed bodies and natural and legal persons to the rules of market relations.

Proposal

It is necessary to unify the codification of town building related norms. In this regard, the following facts should be taken into account. In 2001, the Law 'On basics of town planning' was adopted. This law is largely based on blanket rules. After the adoption of this law, there was a rapid growth in the construction sector with negative consequences. The regulation of town planning norms by numerous other normative legal acts created obstacles for those who applied these acts. In addition, there was large scale misuse in the activity by the officials in charge of applying the acts. Therefore, we propose to prepare and adopt the 'Town Planning Code'.

[8] Proposed by Mehman Soultanov, senior legal adviser at Baku Law Centre.

VIII. ACTIVITY OF SELF-GOVERNED BODIES IN REAL PROPERTY MARKET

In today's real property market, there are a number of professional participants including real estate agents (real property agents), appraisers, architects, engineers, designers and so on. There is a need to legally regulate their activity. These professionals participate in the real property market by making a plan, design, evaluation, purchase-sale, change, lease, rent, or contract for use of property and in the realisation and limitation of other rights. Although these services encompass entrepreneur activity, there are no concrete normative legal acts regulating the legal status of persons providing the service. This gives them complete discretion in relation to the services provided to the clients.

Proposal

Adoption of the Law 'On the activity of real estate agent' (on agents of the real property market) and introduction of changes to some legislative acts could help eliminate gaps in this field and development of civil relations in the real property market. This law would regulate a number of services provided to legal and natural persons by the state bodies as well as the activity of persons who conduct the abovementioned services in the real property market. The laws and amendments should reflect the legal framework, principles, rights and obligation of persons conducting these types of activity and the corresponding responsibility.

IX. INFORMAL INTERVIEWS WITH ALLEGED VICTIMS OF VIOLATION OF REAL PROPERTY RIGHTS

Informal interviews were conducted with 21 alleged victims of violation of real property rights. Of them, 9 were land owners, 7 were owners of non-residential areas, and 5 persons were apartment owners. These persons were chosen randomly. All of the individuals interviewed consider themselves to be victims of arbitrariness and violation of the law.

The most common case of violation of rights on land was studied. Individuals normally obtained land based on a decision by the municipality. The purchasers made official and non-official payments for the land. At some later time a decision by another state body or municipal body terminates the previous decision on the land or gives the land to another person. In the course of the dispute, the person who considered himself as the owner of the land cannot prove his/her rights on the land. As a result, he/she looses land and all of the investment made to it. In this scenario one can conclude that the victims are ordinary citizens harmed by the lack of cooperation between various state and municipal bodies and illegal decisions of the officials of local executive and self-governed bodies. These bodies do not bear any responsibility for their mistake or unlawful decision and the persons who spent money and tried to obtain property become victims. During the interviews some victims acknowledged that they did not prepared their documents in due order when they obtained the land and did so knowing that the decision of the municipality was a wrong one. But, they also stated that there was no alternative method for obtaining the land.

The situation with non-residential areas is similar. Many people stated that they obtained non-residential areas with the permission of the relevant executive body for a certain fee. The people interviewed stated that the majority of non-residential areas built or obtained in the country were obtained in this way (i.e. by imperfect decision of executive bodies). These individuals used the non-residential areas for many years for purposes of trade, catering and so on; paid taxes to the

state and paid salaries to employees. Their ownership rights and right to use the land were violated when the buildings on the land were destroyed because they were considered illegal constructions.

The situation with residential areas is slightly different from the situation with land and non-residential areas. With regard to residential areas, there are many cases of illegal occupation of apartments. The majority of apartment owners whose apartments were occupied by IDPs sought relief in court for ensuring their right to use the property. The courts, however, have never taken a decision evicting the IDPs.

The situation deteriorated after the adoption of the Decree of the President of the Republic of Azerbaijan 'On the State Programme on improving living conditions and increasing employment of refugees and IDPs' of 1 July 2004. Paragraph 2 of this Decree states that '**the administration of relevant state bodies of the Republic of Azerbaijan shall be instructed to prevent eviction of IDPs from public buildings, apartments, lands and other objects *irrespective of their property status* who temporarily settled there from 1992 to 1998 until they are moved to their native lands as well as to new settlements and houses designed for temporary residence'**. Even though this paragraph of the Decree clearly contradicts Article 29 of the Constitution, Article 1 of Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms, the Civil Code and other legislative acts of Azerbaijan, the local courts rely on this provision and refuse to satisfy suits on eviction of IDPs from the apartments having private property status. The owners of apartments that were interviewed stated that the courts do not return their property even when they and their family members do not have any other place to live.

A. Illegal Confiscation and Destruction of Real Property by State Bodies

The monitoring team observed total violation of the property rights of real property owners in the course of the project.

20 villagers of Ranjbar village of Hajigabul region can not access their land allocated to them during the land reform (1998) because their lands are on the path of the Baku-Supsa oil pipeline.[9] British Petroleum Company (BP), the operator for exploitation of the pipeline, refers to Decree #219 of the Cabinet of Ministers of 1996, stating that these lands were given by the Government pro bono (without charge) to Azerbaijan International Operation Company. According to the requirements of the law, however, the proprietors should receive compensation because these lands were subject to servitude. Pursuant to the Civil Code compensation should be paid to proprietors if their land is put under servitude for a state interest. According to the law on the state register of real property, the lands with servitude should be registered in the state register. The State Register Service on Immovable Property responding to a questionnaire sent to them stated that 'the Service has never received a request for registration of servitude and the registration was never conducted'.

Unfortunately, there are thousands of proprietors in the country whose lands are used by the state and yet there is no registration of servitude and the proprietors, for the most part, do not receive compensation. Moreover, the pipeline security service deprived proprietors access to their lands even though they could have partially used the land. As a result, for the past 10 years the proprietors have not received compensation for their right to use the land (servitude) or for the lost profit.

[9] In total there are more than 7200 owners whose lands were on the path of Baku-Supsa and Baku-Novorossiysk pipelines.

Nine proprietors of land from Bozalqanli village in the Tovuz region addressed the CLRPL (with all relevant documents) and stated that their lands were confiscated because of 'Silk-way' road construction. The proprietors noted that they were offered 130USD for every 0.01 hectare of the land whereas the market price was 3000USD for 0.01 hectare. The proprietors of land that was close to the road in Tovuz were forced with the help of police to sign **'purchase-sale of real property'** documents. Pressure was put on those who refused to sign it.

In June 2007, the trade centre near Azizbekov Metro Station was completely destroyed by heavy machines. The proprietors of the objects on the land did not receive any compensation. The representatives of the authorities authorised the demolition saying that the objects were illegal constructions. The majority of those objects, however, received permission for construction from the local executive powers as discussed above.

A number of residential and non-residential areas built near the railway in Biladjari settlement of Baku were destroyed by the State Railways Department. The explanation for their destruction was that these objects were built close to the railway and, according to relevant norms, objects can not be located in that vicinity. Proprietors of those objects, however, received permission for the construction and some even had extracts from the State Register on immovable property. The proprietors have not received any compensation.

Some proprietors of a trade centre located on F. Agayev Street in Baku have received notification from the Metro Department that they have to vacate the construction. The letter said that a second exit of 'Elimler Akademiyasi' metro station will be built in that location. The trade centre was built on the basis of the decree of the mayor's office and in accordance with the plan prepared and approved by the Main Department on Architecture and Town-planning of Baku City. Since its construction, those objects have been repeatedly sold and purchased. The proprietors were told they will not receive any compensation.

The representatives of authorities have destroyed the non-residential areas located near the roads in Qabala, Barda and Ismayilli regions and the proprietors did not receive any compensation.

The abovementioned examples are only a small representation of all of the violations registered during the monitoring project. It is evident that there are serious problems in the country related to the protection of real property. We believe the problems are due to the following reasons:

- The bodies issuing decisions for obtaining real property or its construction seriously violate the law. The decisions about some constructions and allocation of land are illegal. As a result a bona fined buyer has to bear losses.
- Officials take advantage of citizen's low level of legal education and the lack of effective judicial mechanisms. When confiscating or destroying property, officials know in advance that there will be not held responsible for their actions.
- There are a lot of shortcomings in the regulations for the purchase-sale, amortisation and registration of real property. Many norms, as mentioned in the report, are in conflict with each other.

X. EXAMINATION OF REAL PROPERTY RELATED CASES IN THE COURTS AND THE STATUS OF EXECUTION OF COURT RESOLUTIONS

The order of court proceedings on civil cases and economic disputes are determined by the Constitution of the Republic of Azerbaijan, the Law of the Republic of Azerbaijan 'On courts and judges', the Civil Procedure Code of the Republic of Azerbaijan and international treaties to which the Republic of Azerbaijan is a party. According to Article 1.5 of the Civil Procedure

Code, if international treaties joined by the Republic of Azerbaijan contain different rules from the national procedural legislation, the international treaties shall apply.

In Azerbaijan, justice with respect to civil cases and economic disputes is under the sole competence of courts and is carried out by the courts (Article 6 of the Civil-Procedure Code). According to Article 7 of the Civil Procedure Code, judges are independent in the course of execution of justice. Judges shall resolve civil cases and economic disputes without any outside interference. Direct or indirect limitations of court proceedings, illegal pressure, exercise of threats, or interference by any person shall not be permitted and shall result in liability as specified by the law.

The courts on civil cases have the obligation to ascertain rights and interests of every natural and legal person deriving from the Constitution of the Republic of Azerbaijan, laws and other normative legal acts. According to article 4 of the Civil Procedure Code, all natural persons and legal entities have the right, in accordance with the procedure specified by law, to seek redress in the courts for the protection and guarantee of their rights and freedoms as well as interests. The courts can act by resolution, ruling, decision, and order.

When studying the civil cases, the courts never refer to international law. Even when considering cases that review the compliance of normative legal acts to the Constitution and commenting on the laws, the Constitutional Court does not refer to international law. Article 1 of Protocol 1 to the European Convention for the Protection of Human Rights and Fundamental Freedoms contains three (3) norms about property rights. **The first norm** enounces the principle of peaceful enjoyment of property. **The second** norm concerns the deprivation of possessions. **The third** norm recognises that the states are entitled to control the use of property in accordance with the general interest by enforcing such laws as they deem necessary for the purpose. The courts must take into account these principles when dealing with civil cases. And, the experience of the European Court of Human Rights should be studied by the courts and applied.

A. Real Property Related Cases

In cases concerning real property claims, the courts make different resolutions under the same conditions. In some cases the resolutions are annulled by the decisions of the appellate courts or Supreme Court. In the course of monitoring some civil court cases it was determined that the main problem with many of the decisions issued by the first instance court and annulled by higher courts was the failure to hold comprehensive examination of all of the circumstances of the case and the wrong application of material and procedural legal norms.

In some cases the complexity of the language of the legal norm complicated its application. For example, Article 361 of the Civil Procedure Code determines the content of the appellate complaint. According to 361.5, the complaint about the resolutions **to be executed immediately** should be accompanied with the documents approving the execution of the resolution. Article 363 of the Civil Procedure Code establishes when the appellate complaint can be rejected. There are 4 grounds for rejection of the appellate complaint by the first instance court:

- where the appellate complaint has not been signed or has been signed by a person not authorised to sign it or fails to specifying his position;
- where the document confirming payment of the state duty in specified order and amount has not been attached to the complaint;
- where the appellate complaint is submitted after expiration of a specified period;

- where a petition has been filed by the person submitting the appellate complaint for return of the complaint prior to the court sending out its ruling on the acceptance of the complaint to persons participating in the case.

Article 361.5 of the Civil Procedure Code concerning the content of the appellate complaint, provides explicitly that the complaint regarding the court's resolution **to be executed immediately** should be accompanied with the documents approving the execution of the resolution. This leads to serious problems in practice. In particularly complicated cases the execution of the resolution is impossible in the timeframe required to file the complaint. An example is the execution of the resolution on the construction of high-rise residential or non-residential buildings. The complaint against the resolution can be submitted within a month. The court of first instance, in accordance with the practice, rejects the complaint pursuant to Article 361.5 on the grounds that the resolution was not executed. A specific example involves a suit against 'Inturavto'. The complaint of the plaintiffs Ibrahim Elshan and others was submitted against the Absheron District Court's resolution recognizing the right to construct a highrise residential building. The complaint was rejected on 06.07.2007 on the grounds that there was no document establishing the execution of the resolution.

Proposals

- We believe that under these circumstances the courts deprive the person of the right to address the court, which contradicts the right guaranteed by the Constitution of Azerbaijan. The Constitutional Court, therefore, needs to provide comments on the relevant Civil Procedure Code articles.
- We believe it is also important for the courts to refer to applicable international law when dealing with real property cases.
- The Judicial-Legal Council should create a body to study court resolutions in this field.
- It is important to determine a rule about judge's workload in order for the courts to be better prepared for cases and to make correct decisions. The courts sometimes handle several cases per day making it impossible for the judge to study all the cases.

B. Status of Execution of Court Decisions

The legislation of the Republic of Azerbaijan on execution of decisions of courts and other bodies comprises of the Constitution of the Republic of Azerbaijan, Law of the Republic of Azerbaijan 'On execution of court decisions', Civil Procedural Code of the Republic of Azerbaijan and other legislative acts.

According to Article 15.2 of the Civil Procedural Code, a court resolution, ruling, decision or order entered into legal force shall be obligatory for all state authorities, local self-governed bodies, their officials, political parties, trade unions, their officials, as well as for natural and legal persons and shall be executed in a compulsory manner throughout the territory of the Republic of Azerbaijan. Compulsory execution of a court decision is carried out by court officers. According to the legislation, the requirement of court officers for the execution of court decisions is compulsory for all bodies, legal persons, their officials and natural persons throughout the territory of the Republic of Azerbaijan.

Article 32 of the Law of the Republic of Azerbaijan 'On execution of court decisions', provides liability for those who do not comply with the instruction of the court officers on the execution of court decisions and who hinder the execution of their duties. According to Article 313.1 of the Code on Administrative Offences of the Republic of Azerbaijan, there is a fine ranging from 30 to 250 times the conditional financial unit for failure to comply with the instructions of the

court officers or for failure without good reasons to execute the writ of execution[10] within the deadlines established by the court officers.

Court officers receive a writ of execution from the court or other bodies and start the execution. A court officer must make a decision on executing the writ within 3 days from when s/he receives the writ of execution. According to the legislation, if the debtor is a natural person, the writ should be executed in his place of residence or on the location of the property. Because of the bureaucratic obstacles related to obtaining the right to property, in many cases a person's place of residence and place of registration are different. This makes the execution of a court decision difficult if not impossible. For example, the court sends a writ of execution to the address of a debtor. The debtor, however, is only registered there and does not live at that location. Under these circumstances, the writ is returned to the court. A specific example was observed in the Nasimi District Court when it considered the case where the plaintiff was Baku International Sea Trade Port and the respondent was Qordiyeva Lyudmila Valentinovna and others. The court made a resolution on 11 June 2002 and the resolution entered into legal force. The court issued a writ of execution on 6 June 2003 and sent it to the Department on Court Bailiffs and Ushers of Khatai District. The writ was not executed but returned based on a letter from the Housing Office ('*JEK'*) # 2 that Qordiyeva Lyudmila Valentinovna was not living at the said address.

Another problem facing the executing writs is that the legal system determining a debtor's property has not been established. For example, the debtor lives in a certain place for many years, but there is no document confirming his/her right to property. In this case, the execution can not attach to the property and the execution of the writ becomes impossible. For example, the court found in favour of the Trade Union of Vessel Repair Production Unit named after Paris Commune against Taisiya Qordiyeva concerning the return of documents on real property (land). The court issued a resolution that entered into legal force but was not executed. The court fined T. Qordiyeva in the amount of 1100 manat for failing to comply with the court resolution, but this did not lead to the execution of the court decision either.

There are a number of eviction cases concerning property occupied by refugee and IDPs, but the owners of those properties still can not enjoy their property right. Similar court decisions are not executed at all. We believe there are two reasons for this: First, due to the Decree of the President of the Republic of Azerbaijan about refugees and IDPs occupying property that was explained in a previous chapter; second, there is a failure by the bodies in charge of execution to execute the decisions.

There are also some court resolutions that used the wrong method in deciding the resolution or satisfaction or rejection of the claim. This leads to difficulties in executing the resolution or makes it impossible to execute.

For instance, in a resolution on the division of real property only the proportion of division (3/1, 3/2) is indicated. At the time of execution a dispute is created between the parties as to what proportion belongs to them.

Plaintiff N.Aliyeva submitted a suit against Q.Aliyeva claiming the right of residence in the residential area. Nizami District Court by its resolution of 28.04.2006 found in favour of the plaintiff on this issue. The plaintiff's right to use the apartment was recognised and the resolution entered into force. The resolution, however, was not executed. In a letter dated 16.05.2007 the

[10] Writ of executions require debtors to take or not to take certain actions within an established deadline.

chief of the Main Department of the Ministry of Justice stated that the execution would be facilitated by court officers. At the time of this report, the resolution has not been executed.

Proposals

The following proposals are made with regard to the execution of the decisions of courts and other bodies.

- Increase the penalties for failure to comply with the instructions of a court officer on the execution of decisions of courts and other bodies or failure without good reasons to execute the writ of execution that forces debtor to take or refrain from certain actions within the deadlines established by the court officers, established in Article 313.1 of the Code on Administrative Offences of the Republic of Azerbaijan;
- To supervise the activity of court officers when dealing with execution of decisions of the courts or other bodies;
- To modernise the activity of courts and other bodies with an aim to ensure full execution of resolutions of those bodies and for compliance of court officers with the requirements of the law.

C. Responsibility for Violation of the Right to Property (real property) Provided for by the Legislation of the Republic of Azerbaijan

The Code on Administrative Offences and the Criminal Code of the Republic of Azerbaijan provide sanctions for the violation of the right to property (real property).

Chapter 8 of the Code on Administrative Offences governs administrative offences against property. The chapter is composed of seven articles. There is a fine in the amount up to 130 times the conventional financial unit for squatting of forest lands or illegal use of those lands and 15 to 150 times the conventional financial unit for violation of the right to property with regard to water objects.

Chapter XXIII of Section 9 of the Criminal Code governs crimes against property (real property) and imposes the following sanctions: a fine in the amount of 100 to 500 times the conditional financial unit, or 200 hours of community service, or up to 1 year of correctional work for violation of the right to real property (land).

Proposal

The fines envisaged in the Code on Administrative Offences are not sufficient to prevent violations of the right to property. The amount of those fines should be increased.

XI. ANALYSIS OF NEWSPAPER ARTICLES ABOUT REAL PROPERTY

As part of the project 'Real property in the Republic of Azerbaijan' an analysis of the information from mass media was conducted. For three months 3 leading newspapers of the country were analyzed on a daily basis.- '525', 'Zerkalo' and 'Azadliq' newspaper. The analysis revealed that out of 95 articles about real property 8 were positive and 87 were negative in nature. Positive articles reported on the restoration of the proprietors' right to property or the purchase of newly established property objects by various individuals. Among the negative articles, 43 were concerned with the destruction of real property objects owned by natural and legal persons; 19 involved the eviction of a lessees from the premises on the basis of forcible termination of the contract or administrative acts on rent or use; 8 dealt with violations of the

right to land as a result of wrongful application of land reform and distribution; the remainder covered the increase in the value of land and various issues regarding real property.

The first group of materials is characterised by the confiscation of property for state needs. As earlier mentioned, the Civil Code provides only three grounds for amortisation of the property by the state body (on the basis of the decision of the Cabinet of Ministers) for state needs: (1) widening of roads and other communication lines, (2) determination of the border line, or (3) construction of objects of defence nature. Moreover, confiscation requires compensation paid in advance in the amount of the market value of the property (article 157.9). In addition, provisions of the Civil Code (articles 246, 247, 248 and 249) clearly stipulate the rules on obtaining the land for state needs.

The information from the media shows that property is destroyed within several days and owners can not access the property irrespective of whether they own the land and the objects on the land or just the objects. During the purchase of land for state needs and subsequent to the transaction there were no decisions by the relevant executive power (the Cabinet of Ministers). The proprietors where not given compensation for the land or the property on the land in accordance with the market value. They also did not receive compensation for losses deriving from the purchase of the land including the lost income and losses deriving from early termination of the proprietor's obligations to third parties. The proprietors have not received proposals of compensation or allocation of other land. At the same time, the proprietors were not provided with adequate time for addressing the court about the alleged decision on purchase of their lands for state needs. The Civil Code stipulates that if the proprietor is not satisfied with the decision of the relevant body of executive power on purchase of his/her land for state or public needs or when there is no agreement about the cost of the sale or other conditions of sale, s/he can raise the claim in court within 1 month from the time s/he receives a written notification about the decision.

Violation of applicable law

The interference with citizens' (natural persons) right to property violates the provisions of Articles 13, 29, 60 of the Constitution of the Republic of Azerbaijan, Articles 157, 207, 246, 247, 248 and 249 of the Civil Code and Article 1 to Protocol 1 of the European Convention on Human Rights.

First, the principle of inviolability of the property was violated and the persons were deprived of the right to property as a result of the interference with their right to use the property.

Second, even if at first glance the purchase of land for state needs has a legitimate goal, the interference with the right to property was carried out in violation of the principle of legal certainty and the requirement of lawfulness. This principle is provided for in the second paragraph of Article 1 to Protocol 1 of the European Convention on Human Rights that states that deprivation of property can be carried out 'subject to the conditions provided for by law'. The expression 'subject to the conditions provided for by law' implies the domestic legislation of the country. Here the occupation of land was carried out in violation of the conditions provided for in Article 29 of the Constitution and Articles 246, 247 and 248 of the Civil Code of the Republic of Azerbaijan.

The actions of state bodies can reinforce the idea that the right to property in the country is **'illusory and ineffective'**. Similar activity has become common practice by some state bodies. In 2000-2001 similar incidents took place and with judicial support hundreds of proprietors were deprived of their property by relevant executive bodies and many residential areas were

destroyed. The proprietors have not received fair compensation for those properties. Similar incidents are repeated in regions when the heads of city or regional executive power are replaced. This activity undermines the presumption of inviolability of the property. Destruction of real property objects as described above not only creates civil law responsibility but criminal responsibility as well (e.g. Criminal Code Articles 186 'intentional destruction of or damage to the property'; 188 'violation of the right to property over land'; and 309 'abuse of powers').

Of particular concern is the media information on the preliminary termination of a contract for rent (use) of real property. The contract is terminated by interference of law-enforcement bodies contrary to the will of the parties to the contract. Such cases not only restrict the property owner's right to use and dispose of the property, but also interfere with the right to be engaged in entrepreneur activity of the renter (lessee) as regulated by the Civil Code.

Many articles reported on the destruction of residential and non-residential areas located in the railway security zone, lands that are near the metro transit to be constructed, and lands designed for natural reserve. There are about 200 property objects that were destroyed on the lands at railway security zone. According to Decision # 33 of the Cabinet of Ministers[11] the sizes of land for transportation were determined - including for sanitary security zone on railways allocated to Azerbaijan Rail Ways and other organisations, institutions and establishments for railways and turns. Construction of objects in those areas is prohibited. The media articles demonstrate that those real property objects can be considered illegal constructions as defined by Article 180 of the Civil Code and can be destroyed because they were built in the prohibited area. However, one should pay attention to the fact that in the said territory there were residential and non-residential areas built 10-15 years ago. The persons who lived there are tax-payers who regularly paid all levies. This means that all the construction in that area was made with direct or indirect involvement of the local and self-governed bodies. The same is relevant to buildings on the land where the metro will pass and lands designed for natural reserve. Throughout the country, including big cities and centres of regions, there are a lot of residential and non-residential areas like this that were built either on the basis of an administrative act by the local executive or self-governed bodies or the lands were unlawfully occupied and construction was made on them. Along with destroying unlawful constructions, the officials who played a role in creating these objects must also be brought to responsibility.

Some media articles are devoted to unlawful constructions – i.e. when the buildings are built on a certain land without any official document. In relation to those objects it would be necessary to include a provision in Article 180 of the Civil Code concerning the duty of a person who unlawfully constructs to destroy the construction and clean the area himself/herself or at his/her expenses.

Other articles report on fires incidents or the suspension of the right to use property because of failure to follow fire safety regulations. The number of fire incidents in the country illustrates that the failure to follow fire safety regulations both in existing buildings and buildings under construction leads to causalities and destruction of property. The situation supports the adoption of the aforementioned decisions suspending the right to use property for failure to follow fire safety regulations. In some cases the reason behind the failure to observe the fire safety regulations is connected with the demand to make unlawful payments or to purchase fire extinguishing equipment from certain persons. It is necessary to include legislation that would strengthen the responsibility for violations of the fire safety regulations in existing residential and non-residential areas as well as those under construction.

[11] Decision # 33 of the Cabinet of Ministers of the Republic of Azerbaijan 'On norms on allocation of land for railways and sanitary security zone on railway' dated 23 February 2005.

XII. CONCLUSIONS AND RECOMMENDATIONS

Each chapter in this report provided relevant proposals and recommendations on improving the legislation and eliminating problems and deficiencies in practice. Listed below are only generalised proposals and recommendations.

- The failure to follow the rules on the purchase of lands for state needs undermines the basic presumption of inviolability of property a natural and legal person is entitled to, jeopardises property rights, and reinforces the idea that the right to property in the country is illusory and ineffective.
- Taking into account that local executive bodies and other state bodies controlling construction are the main bodies interfering with the right to property, it is necessary to clarify the powers of those bodies in this field and to determine the responsibility for such interference by officials. Article 180 of the Civil Code should be amended to provide that it is the duty of a person who unlawfully constructs to destroy the illegal construction and clean the area himself/herself or at his/her expenses.
- A public body should be established to ensure access to information about objects of privatisation, to increase the transparency of the activity of relevant executive authorities during privatisation, and to exercise control over the privatisation of state property.
- The application of legal norms ensuring the inviolability of cultural monuments should be strengthened, and the planned destruction and construction in the area of historical and cultural sights be permitted only by the opinion of specialists and experts and after public discussions.
- The Plenum of the Supreme Court should adopt a decision that would establish a court practice for other courts determining fair compensation (on the basis of law) for those whose property rights were violated.
- Legislation that would increase the penalties for violating construction safety and fire safety regulations in residential and non-residential areas should be enacted.
- It would be instructive if the Supreme Court issued a decision about the practice of application by other courts of the right to property and other rights with regard to land and other real property objects.
- The conditions needed to ensure fair competition in the real property market should be created (including create a database of market (land and other real property) participants and ensure transparency of information regarding the participatory share of legal and natural persons in contracts about real property objects). This information can help disclose existing monopolies in the real property market.
- Immediate action should be taken to ensure that land is given to those who have the right to receive land but were not provided with land during the land reform, ensuring social justice.
- The Civil Code should be amended with an aim to ensure the rights and lawful interests of proprietors of residential and non-residential areas located near construction sites at the stage of allocating the land for construction. In many cases during allocation the roads to residential and non-residential areas are closed, a fence is made by the construction owners in a way that endangers lives and property of those proprietors, and their right to use the property is restricted.
- Reviews of all legislative acts about land and real property should be conducted. There are many norms about land and many provisions are in conflict with similar provisions in other norms. This leads to abuse of power by executive and local self-governed bodies and creates implementation difficulties for the courts. It is very important to conduct inventorying and unified codification of the norms.
- Judges should be enlightened with the case law of the European Court of Human Rights with regard to the application of Article 1 of Protocol 1 to the European Convention on Human Rights. They should be informed about the practice of leading countries with regard to judicial guarantees of the right to property.

- All of the information about the registration of the right to property conducted prior to the establishment of the State Register Service on Immovable Property (2006) should be included in a single register.
- The legislation should provide a schedule of fees for the registration of the right to real property and any other paid services. Determination of these fees by the Tariff Council creates problems in the realisation of the right to property.
- In the places that register the right to property and perform notary activities there should be a special board that reflects the fees for the services along with their detailed description in plain language allowing everyone to understand it. In addition to educating and informing people who are dealing with real property, the boards will serve to increase transparency and help eliminate corruption.
- Although there are extra fees to speed up the registration process of the right to real property, in practice it does not work. To eliminate this problem, the State Register Service on Immovable Property should carry out the necessary technical and organisation work in order to eliminate this shortcoming in practice.
- Relevant state bodies and civil society should publish booklets, handouts and manuals providing information about the registration of the right to real property as well as other operations, types of the services provided, fees for the paid services, an address where the service is provided, internet pages, etc. These publications should be widely distributed among civil society members.