Recognition as an Unworthy Heir and the Deprivation of the Right to a Compulsory Portion according to the Civil Code of Georgia
(and Some Comments on the Method of Interpretation of Law)

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For the time being the issues related to the procedures for recognition as an unworthy heir and the deprivation of the right to a compulsory portion, as well as other similar measures play an important role in various types of court proceedings in Georgia. Below we shall discuss some basic aspects of the abovementioned issues.

1. Difference should be made between the institutions of recognition as an unworthy heir (Articles 1310-1318 of the Civil Code of Georgia (GCC)) and the deprivation of the right to a compulsory portion (Articles 1381-1382 GCC). Though Article 1381 I GCC refers to Article 1310 GCC, different rules and mechanism apply to these two legal issues.

2. The common aspect for these two compositions is that the wording of the basic rule, namely the first sentence of Article 1310 GCC, is incomplete and imprecise, as it sets forth the preconditions for recognition as an unworthy heir, which under Article 1381 I GCC also apply to the cases of deprivation of the right to a compulsory portion. For instance, the law does not separately regulate cases, when a testamentary or heir by law causes opening of the succession estate through the encroachment or attempted encroachment on testator's life. The latter case is often followed by considerable procedural difficulties.

Georgian court practice expressly demonstrates that there is a complete uniformity of the view that an individual, who has intentionally killed a testator, is not entitled to benefit from testamentary or intestate succession, resulting from the above act. By analogy (Article 5 GCC) we should in this case recourse to Article 98 II GCC, which states, that "If a party for whom the occurrence of the condition is favourable intentionally promotes is occurrence *mala fide*, then the conditions shall not be deemed to have occurred". This rule is the manifestation of the principle of good faith, which applies to whole civil law and is provided for in Article 361 II GCC. This rule prohibits, for instance, obtaining legal benefit from own illegal action. Here the matter comes down to the principle of Roman Law *exceptio doli specialis* which is the basis for "*unclean hands*" rescission in English-American law.[1]

Pursuant to the methodology of interpretation the same result could also be achieved through so called "moreover conclusion", i.e. *argumentum ad fortiori*: if a legal consequence applies to a relatively light "a" composition, regulated by law, it should moreover

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[1] Comp. *Palandt/Heinrichs*, BGB, 2003, 63. Auflage, § 242 BGB, RdNr. 42-45.

apply to the graver "b" composition, not regulated by law, to which the specific purpose of law applies at a larger scale.[2]

As refers the above case: if by virtue of Article 1310 GCC unfair duress on a free will of a testator and violation of his last wish embodied in the will leads to the recognition of an actor as an unworthy heir, the above should moreover apply to cases when a heir kills a testator, as here we face a much graver composition (*corpus delicti*).

The same qualification should be given to acts of similar gravity with the above *corpus delicti,* committed against the testator or his family members.

3. Despite a certain consent in Georgian courts, there still is a vexed question whether who and in what form should raise the issue of recognition as an unworthy heir. Namely, point at issue is whether a testator is authorised to bring the above action during *inter vivos*.

Naturally in the case of completed crime (homicide) this problem will not arise. Pursuant to the Article 1310 (2) and Article 1312 GCC an action could be brought only by a person who will enjoy certain, beneficial,[3] material consequences by disinheritance of an unworthy heir.

From the point of view of the judicial proceedings, the case becomes more complicated, when a testator survives after attempted murder or if the case concerned some other grave *corpus delicti,* which did not jeopardize the life of a testator or his family members, but some other value and according to the above quoted principles (namely, Par. 2 of this essay), could be qualified as a grave act.

Georgian judges partially support the opinion that in similar cases testator (pursuant to Article 1310 (2) GCC) should enjoy the right of bringing a declaratory action (according to Article 180 of the Civil Procedural Code of Georgia). They partially refer to Article 1381 GCC, Parts 2 and 3 of which explicitly provide for the right of a testator to bring an action on the deprivation of the right to a compulsory portion. These rules should be applied by analogy as it is inadmissible the testator to be entitled to deprive an unworthy heir of the right to a compulsory portion through judicial order (Articles 1381, 1371 GCC), but not of the succession.[4] There also is an opinion, that the deprivation of the right to a compulsory portion through judicial order is mechanically followed by the lost of existing succession right as well (Article 1381 GCC).[5]

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[2] The so called *argumentum a minore ad maius*. Comp.: *Rüthers*, Rechtstheorie, 1999, RdNr. 898. See also: *Palandt/Heinrichs*, BGB, 2003, Einleitung, RdNr. 43.

[3] This word should be added to the Law. The same is proved by *Akhvlediani*, Commentary to the Civil Code of Georgia, Book V, Article 1312, 370.

[4] Methodologically this is also a case of the so-called "moreover conclusion", mentioned in supra note 2, but it is misapplied in such cases. We shall discuss this issue in Subparagraph "a" of this article.

[5] *Prima facie*, it is very difficult to imagine a similar composition, i.e. the coincidence of the right to compulsory portion and succession, as according to Article 1371 GCC the precondition for demanding a compulsory portion is the exclusion of a testamentary heir by will. However, it is not a necessity: e.g. a person entitled to a compulsory portion received a lesser portion then was due to him according to the compulsory portion provided by the law. An example: a testator has two children. He bequeaths 1/10 of the legacy to his one child and 9/10 to the other. By virtue of Article 1371 GCC a compulsory portion for the first child

a) We have to oppose both opinions:
By virtue of law rules a testator is not entitled to raise the question on demanding the recognition of a person as an unworthy heir *inter vivos* at the court.[6] The opposite opinion of the above is contradictory to literal meaning, system, the essence and purpose of the law. There is even no necessity to bring such an action.

aa) Even literal meaning of the law itself is against such an action of a testator. Article 1312 GCC determines the circle of persons, entitled to bring a respective action. This circle is limited only to those persons "to whom the disinheritance of an unworthy heir results a certain material consequence". The testator is not among them as *inter vivos* he would not have been affected by disinheritance of an unworthy heir. The testator is not limited in his freedom of disposition and thus is not dependent on or bound by a similar court decision. The above is proved by the possibility of rehabilitation of an unworthy heir as provided by Article 1313 GCC, which would remain in force even in the case of recognition unworthiness of heir by court.

The above also conforms to the fact that Article 1317 GCC envisages a five-year period for bringing a claim after opening an estate, what itself considers the death of a testator as a necessary precondition for bringing an action.

bb) Consequently, the legislator intentionally developed the rule, which is so different from Article 1381 GCC, Parts 2 and 3 of which provide for the right of a testator to bring an action. Deliberate decision of a legislator excludes the application of a rule by analogy with regard to a case unregulated by the law, as there is none of the preconditions for the use of the principle of analogy, namely the unintended deficiency is missing. The fact that a specific "a" circumstance and unregulated by the law "b" case were not deliberately regulated in a similar way, exclude the application of the principle of analogy. On the contrary, the legislator allows only the possibility of making an opposite argument – *argumentum e contrario* or *argumentum e silentio*. Silence of a legislator here expressly demonstrates his opinion: no matter that is not regulated by law should be solved like an explicitly regulated one.[7]

In the above-discussed case is there a deliberate decision of a legislator or not, or an unintended deficiency and consequently is there a possibility to apply principle of analogy or is there any room for opposite argumentation, shall only be cleared after the study of the essence and purpose of the rule. This is the case of teleological interpretation.[8] The application of the latter being based on the purpose of the rule leads us to the

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makes 1/4, while under Article 1379 GCC he is entitled to demand the portion, provided by will to be filled up by 1/4, pursuant to the amount of a compulsory portion.

[6] See also *Akhvlediani*, Commentary to the Civil Code of Georgia, Book V, Article 1312, 435, where it is said that this possibility exists with regard to a compulsory portion, unlike succession.

[7] Comp. *Rüthers*, Rechtstheorie, 1999, RdNr. 899.

[8] Comp. *Rüthers*, Rechtstheorie, 1999, RdNr. 900-901.

following consequence: when with regard to the right to a compulsory portion a testator may deprive a person of the right to demand a statutory compulsory portion only through a court decision, he needs no judicial interference with regard to right of succession. He is entitled to deprive heir by law the right on succession through his will, while a testamentary heir – on the grounds of a respective change in the will.

Thus it is useless to bring a declaratory action. There is no legal interest with this respect either, provided for by Article 180 of the Civil Procedure Code of Georgia. Such an action should be rejected, as the admissibility conditions are not met. The court is entitled and obliged to indicate in a motivation part that a testator has a easier way to execute his last wish. Under Article 1312 and Article 1310 (2) GCC only those persons may bring an action, who benefit from the recognition of a heir as an unworthy one. As a rule, this refers to co-heirs, whose share will increase in the case of an unworthy heir or to the persons, whose successive order shall be promoted under a court decision. They do not enjoy any other possibility to execute the testator's will or exclude an unworthy heir from inheritance, than to bring a declaratory action before court.

b) Interim consequence: Articles 1381, 1310 and 1312 GCC are based on the same procedural principle: bringing an action with regard to the recognition as an unworthy heir and the deprivation of the right to a compulsory portion is reasonable only in the case of necessity. The above does not apply to disinheritance of heir by law by a testator, as far as this could also be done through respective testamentary disposition. Under Article 1310 GCC he does not enjoy the right of bringing an action. By virtue of Article 1381 GCC he is entitled to bring an action only with regard to the deprivation of the right to a compulsory portion.[9]

4. The above assumption does not however answer all the disputable issues related to the recognition as an unworthy heir and the deprivation of the right to a compulsory portion. Hence, we shall touch upon some of them:

a) A mechanical consequence of the deprivation of the right to a compulsory portion by a testator (Article 1381 II-III GCC) is not the loss of the succession under 1310 GCC. We have already spoken about the coincidence of the rights of succession by will and a compulsory portion.[10] Because of the difference of system of law related to the right to a compulsory

[9] Law rule is not imperative in favour of a testator either: under German law a testator does not enjoy the right to bring an action neither with the purpose of recognition of a person as an unworthy heir nor for the deprivation of the right to a compulsory portion. Respective action could be taken only by persons, determined by §§ 2341 and 2345 of German Civil Code, similar to Article 1312 GCC, i.e. persons who will benefit from respective court decision. As a rule it is excluded to bring a declaratory action *inter vivos* of a testator (*Palandt/Edenhofer,* BGB, 2003, § 2340 BGB, RdNr. 1).

[10] Comp. Supra note 5. As a rule, a person entitled to the compulsory portion does not enjoy right to testamentary succession, as far as he is excluded from inheritance. Thus, it does not generally come to the issue, whether this decision covers succession as well (Article 1381 GCC). In opposition to the above said coincidence of the right to compulsory portion and right to succession by law is impossible. Under Article 1371 GCC a precondition for the origin of the right to a compulsory portion is total or partial deprivation of heir right to testamentary succession.

portion and succession, deprivation of a compulsory portion leaves unchanged the possible succession.[11] The testator may disinherit a person only through the change of will.

b) If the testator misses the mentioned opportunity, only the persons listed in Article 1312 GCC enjoy the right to take actions provided for by Article 1310 (2) GCC and recognise unworthiness of heir through court order. Besides, account should be taken of legal assessment of Article 1313 GCC: this provision excludes the recognition as an unworthy heir if the testator forgives him and expressly mentions about this in his will. This also includes cases when the testator, who is aware of heir's misbehaviour, leaves unchanged his will made in favour of the heir and deprives him of only a compulsory portion. This may happen when, for instance, the estate under the will is rather small, while the compulsory portion – relatively large.[12] There may happen that a testator, taking account of the needs of heir, refuses to disinherit him of a relatively small inheritance due to him, together with the deprivation of a compulsory portion. By virtue of Article 1313 GCC, this decision is mandatory for the persons envisaged by Article 1312 GCC.

c) And finally, on the other hand, Article 1381 GCC may be applied by analogy if a testator becomes the victim of an encroachment on the part of a person entitled to the compulsory portion as it was mentioned in part 2 of this essay. In this case, the persons determined by Article 1312 GCC not only become entitled to recognise person as an unworthy heir under Article 1310 GCC according to the principle of analogy, but to deprive him of the compulsory portion through court order.[13] Respective account should be taken of the time term provided for by Article 1317 GCC.

5. Outcome: Recognition as an unworthy heir and the deprivation of the right to a compulsory portion are based on different rules and should be strictly delimited from each other according to the system of the law. Certain articles could be applied with regard to second type of relations by analogy, but in each case the rule should be studied thoroughly and methodologically from the point of view of necessary preconditions for its application and legal consequences and they should be applied cautiously.

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[11] Comp. Supra 3a.
[12] Comp. Supra note 5, with regard to a similar case.
[13] See also: *Akhvlediani*, Commentary to the Civil Code of Georgia, Book V, Article 1381, 436.