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Recognition of a Person as an Unworthy Heir and Inheritance-Legal Sanctions upon the Mandatory Heir of the Share

The civil code of Georgia imperatively defines the circle of mandatory heirs (beneficiaries), who still have the possibility to receive a certain share of inheritance against the will of the bequeather and irrespective of the contents of the will. The inheritance right constitutes the fundamental and traditional aspect of the right of private property. [1]The right of private property is the possibility to acquire property and not the property itself. [2]However, the danger exists that using this possibility will fail and the condition of the mandatory heir will essentially change contingent upon concrete legal circumstances.

A human is born naturally free and this freedom is restricted with rights and obligations by a human himself, deriving from the principles of mutual respect and mutual responsibility.[3]The negligence of exactly these moral norms, which are based on mutual respect and mutual responsibility, preconditions the withholding of the rights of inheritance.

The heirs whose rights of inheritance have been withheld can be divided into two groups. The first group includes those who cannot be heirs either by will or by law, i.e. unworthy heirs, and the second group includes those who cannot be heirs by law but can be heirs by a will. Such a division can be explained, on the one hand, by the necessity of prioritizing the will of a bequeather, and, on the other hand, by the necessity of considering any possible unlawful infringement of the interests of a bequeather by the heirs during his/her lifetime.[4]The presented work discusses the concept of mandatory share, the legal sanctions of withholding of inheritance and the preconditions of its implementation.

Key words: *Property, inheritance, bequeather, heir, the inheritance amount, mandatory share, unworthy heir, withholding the inheritance, inheritance-legal sanctions, family-legal sanctions*

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1. Introduction to Withholding the Inheritance Right

A number of norms of withholding the inheritance right can be traced in old Georgian law, for instance, article 58 of *Samartbeka* describes the case when a father expels his son from the house and this way deprives him of inheritance. Obviously, this action would not have taken place without a reason and the father's decision would have been the response to the unlawful behavior of the son, although even this deprived inheritance right can be restored, depending on how the son behaves after

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1 The Decision of the European Court of Human Rights on June 13, 1979, on the case Marckx v. Belgium, doc. № 6833/74.

2 *Zoidze B.,* Property Law, Tbilisi, 2003, 86 (in Georgian).

3 *Tchanturia L.,* Property of Immovables, Tbilisi, 2001, 112 (in Georgian).

4 *Gongalo U. B.,* Legal Facts in the Inheritance Law of Russia and France, Comparative-Legal Study, Moscow, 2010, 28 (in Russian).

being expelled: whether he repents his "sins" or commits even more "crimes". That is why, the legislator claims the following: "if a son obeys a father, forgiving him and not keeping grudge, the father can change the mind and no one will stand in the way of bequeathing the land to the son", however, if the son does not improve his behavior and continues unworthy action, he will be deprived of the inheritance right for good – "for if a son leaves the house and keeps grudge against his father, and continues to behave unlawfully, he should never hope to inherit his father's land". [5]By underscoring the family relationships, the mandatory share law should be considered within family context. Considering a family without solidarity ties is sensless. Solidarity does not mean the balance between giving and receiving, but it means tolerating certain imbalance sometimes, and it should prove its right of exitence exactly under these conditions. "Solidarity", in the first instance, means a morally justified relationship between family members. The inheritance law provides the offspring with the possibility of receiving the minimum inheritance in the form of mandatory share. So far, not a single field has united biological and genetical ties between generations so tightly in view of transferring inheritance.[6]

The inheritance right, as the basic constitutional right, is equated to the property right.[7] Property is the expression and precondition of personal freedom.[8]Not only does the withholding of inheritance mean the deprivation of private property, but it also implies the debasement and the exposure of a person in a rebukable activity. The linking of property right to personal freedom, in the first instance, is expressed in property relationships, where the goal of the property is to guarantee the citizens with the wide opportunities in the spheres of entrepreneurship, trade, free administering of the property, inheritance and many others.[9]The behavior of an heir regarding the desire and the means of obtaining the inheritance, the attitude and solidarity towards the bequeather before revealing the heirloom, define the criteria for withholding the inheritance.

The limitation or withholding of inheritance is not contingent upon the bequeather's will, but the legislature imposes upon him/her strict regulations and entrusts the final decision to the court who should take into account and make judgment of both moral norms and legal issues of the case before coming to conclusion. "The basis for withholding inheritance should correspond modern views of morality, the withholding of mandatory share should correspond the challenges of transforming immoral lifestyle".[10] For setting the preconditions of withholding the inheritance, the court must evaluate the honest performance of social responsibilities by an heir (such as taking care of a bequeather). The premeditated crime committed by an heir or any other immoral behavior against the will of a bequether must be carefully considered. The right of acquisition of inheritance cannot be based upon the dishonest behavior of an heir. Neither inheritance nor property rights can be gained by a person

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5 *Zoidze B.,* Old Georgian Inheritance Law, Tbilisi, 2000, 256 (in Georgian).

6 *Weigel S.*, European Perspectives on Heritage Culture, Taylor&Francis LTD, The Cardozo School of Law, 2008, 281.

7 *Leibholz G.*, Jahrbuchs des öffentlichen Rechts der Gegenwart, neue Folge, 1982, 148.

8 *Meier-Hayoz A.*, Vom Wesen des Eigentums, cited in: FG f. Carl Oftiger, Zürich 1969, 171.

9 *Tchanturia L.*, Property of Immovables, Tbilisi, 2001, 109 (in Georgian).

10 *Klingelhöffer H.,* Pflichtteilsrecht, 2. völlig neue bearbeitete Aufl., München 2003, 37.

through violation of law and moral norms. At the same time, the benefit brought to the creditor or the loss inflicted upon the debtor, that would not have happened in the case of honest behavior, should be carefully evaluated in each specific case.[11]In the process of considering all these criteria, the priority of interpreting the legal norm as connected with modernity should be borne in mind at all times, for the interpretation of a norm cannot always retain the views of the time of its inception. The sensible function that a law might carry at the moment of its application should be considered. A norm is in continuous connection with social relationships and with public-political views, which it should influence in its turn. Its contents can and must be amended in accordance with the existent circumstances. This rule is particularly significant when social relationships and legal views have so fundamentally changed between the times of passing the law and its application as it was the case in the 20th century.[12]

The civil law of Georgia has generally imposed inheritance-legal sanctions upon: 1. unworthy heirs; 2.the heirs who viciously avoided the responsibility of supporting and caring for the bequeather; 3. The spouses who terminated the family relations no less than three years before the exposure of the inheritance and 4. The heir who has been deprived of inheritance by the order of bequeather's will.

2. The Preconditions for the Recognition of a Person as an Unworthy Heir

The right of a mandatory share presents a special type of inheritance right, which cannot be regarded as a legal inheritance, since it originates only by the will of inheritance. At the same time, the right of a mandatory share is not solely the inheritance right by will, in as much as the legal dedefinition of an obligatory share of the heirs of the first instance indicates their priorities relative to others, despite the contents of the will. Thus, being a special type of inheritance right, obligatory share right complies with all those norms that are generally defined in relation to inheritance right.[13]Article 1381 of the civil code of Georgia (CCG as mentioned later on) defines the preconditions of withholding the mandatory share and states the general principles of withholding the inheritance right. Articles 1310 and 1311 of CCG stipulate the general reasons for withholding inheritance rights. A distinction should be made between recognizing a person as an unworthy heir and withholding a mandatory share. Although different legal regulations apply to these instances, they still have one commonality, namely, the fact that the normative frameworks of the basic norm, article 1310 of CCG, are ambiguous, for they define those preconditions for recognizing an unworthy heir, which, according to the article 1381-I of CCG, are also applied to the cases of withholding a mandatory share. Therefore, the law does not

11 *Palandt O.,* BGB, 73 Aufl., 2014, §242, Rn.42-45.

12 BVerfGE, Beschluss des Ersten Senats vom 14. Februar 1973, Band 34, 288, <http://www.servat.unibe.ch/dfr/bv034269.html>, [12.08.2019].

13 *Chikvashvili Sh*., Inheritance Law, Tbilisi 2000, 130 (in Georgian).

regulate separately the cases when a lawful heir or an heir by will, acquires the inheritance by means of infringing upon the life of a bequeather or by attemting to do so.[14]

According to the article 1310 of CCG, a person cannot be considered a lawful heir or an heir by will, if he/she purposefully hindered the bequeather in carrying out his last will, and in such a way, facilitated his/her inclusion or the inclusion of his/her close relatives in the will, incentivised the increase of the share of inheritance, or committed a premeditated crime or any other immoral act against the final will of a bequeather. If the court vindicates these circumstances, the person will be recognized as an unworthy heir. The concept of morality is especially interesting in understanding the given norm. While interpreting it, historically changing views should be taken into consideration, the views that were accepted in social relations and went through continuous changes. Thus, a modern and different interpretation of the norm is also possible[15]. The first part of the norm of recognizing a person as an unworthy heir indicates the various actions of an heir that engendered certain inheritance concessions or priorities towards an heir or his/her close relatives. This concerns both types of inheritance. The second part of the norm concerns commiting a premeditated crime or any other immoral action against the will of a bequeather. It could be the case that a person does not act in his favor but hinders the bequeather in carrying out his/her last will. The norm implies that the inheritance right is withheld in relation to the bequether towards whom the heir has committed a crime or has acted indecently.[16]

The following preconditions are necessary for recognizing a person as an unworthy heir: **An action must be premeditated.** Careless or negligent behavior of an heir that has caused the death of a bequether does not hinder the acquisition of inheritance.[17]Those individuals who committed an action that presented a public danger cannot be regarded as unworthy heirs, if the action was committed by them while being *non compos mentis* (mentally insane) and were not able to realize their actions or could not control the events. Likewise, the actions of the persons under the age of 14 and of the individuals receiving support or sustenance (considering limitations) cannot be regarded as the preconditions for withholding the inheritance. This can be explained by the fact that although such persons have committed morally reprehensible actions, they are still not regarded as offenders. [18]

The actions must be unlawful. The inactivity of an individual can also be regarded as a precondition for being declared as an unworthy heir. [19]The accomplishment of an unlawful action does not influence the decision of declaring a person as an unworthy heir. The following statement clarifies the matter: "they supported, incentivized or attempted to facilitate" the act of declaring a person as an unworthy heir. The reasons behind the action make no difference. The unlawful actions must facilitate,

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14 *Bioling H.,* Recognizing a Person as an Unworthy Heir and Withholding the Right of a Mandatory Share according to the Civil Code of Georgia, Georgian Law Review, № 4, 2003, 516 (in Georgian).

15 BVerfGE, Urteil vom 15. Januar 1958, Band 7, 215, <http://www.servat.unibe.ch/dfr/bv007198.html №208>, [12.03.2019].

16 *Shengelia R., Shengelia E.,* Inheritance Law, Tbilisi, 2011, 24 (in Georgian).

17 *Chikvashvili Sh*., Inheritance Law, Tbilisi 2000, 26 (in Georgian).

18 *Sergeev A. P., Tolstoy U. K.,* Civil Law, Moscow, 2006, 641 (in Russian).

19 Ibid, 640.

i.e. cause the invitation of an unworthy heir or other individuals to receive the inheritance, as well as, trigger the increase of his/her or others' share. [20]

The actions must be directed against the final wish of a bequeather as expressed in his/her will. Here, again, the accomplishment of the action and attainment of the goals are not necessary, it is the direction of the action that matters. A distinction should be made between the actions directed against the final wish of a bequeather as expressed in his/her will and the actions that violate the principle of freedom in the process of drafting the will. The former can be realized only after drafting the will. This can be achieved through such actions as forcing a person to change the will or declining the inheritance share in favor of an unworthy heir. The following ativities violate the freedom of drafting a will: the action that hindered the drafting of a will, [21]the distortion of the will of a bequeather or wrongful formulation of his/her will, the creation of forceful or deceitful conditions for drafting the will.[22]The precondition for being recognized as an unworthy heir can be established when the heir puts the bequeather under such circumstances that the latter will not be able to draft or re-draft the will till the moment of death, or when the heir hides such facts from the bequether that would make the latter decide the issue of inheritance in a different way,[23]or when there exist unlawful actions that are directed against the will of the bequeather. The unlawful actions can also involve hiding the authentic will, forcing the bequether to draft the will or will obligation/responsibility in favor of a specific person, forcing the lawful heir to decline the right to receive inheritance or forcing the person responsible for the will to decline the will obligation.

The aim of the action that implies that the heir facilitates or attempts to facilitate the inclusion of himself or his close relatives in the will or the increase of his inheritance share**.** The motive of the committed action is vividly revealed, deriving from the goals of the norm. The heir commits unlawful actions in order to bring upon the inheritance the fate that is in the interests of the people committing these actions and act in his favor under any circumstances. The murder of a bequeather committed on the grounds of jealousy or out of unworthy intentions is equated to the premeditated murder, hence, necessitates the opening of the inheritance accordingly, and invites the unworthy heir to receive the inheritance.[24]At the same time, a person must be considered as an unworthy heir, irrespective of committing unlawful actions in his own interest or in the interests of another heir. The heir, in whose interests the unworthy heir committed the unlawful action, does not lose the right of receiving the inheritance. There is a hypothesis that: not only the heir, acting unlawfully against the be-

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20 *Sergeev A. P., Tolstoy U. K., Eliseev I. V.,* Article by Article Commentaries to the Civil Code of the Russian Federation, Part 3, Moscow, 2002, 23 (in Russian).

21 The ruling of December 12, 2001 of the Chamber of Civil, Industrial and Bankruptcy Cases of the Supreme Court of Georgia on the case: № 3K/623-01

22 *Sergeev A. P., Tolstoy U. K., Eliseev I. V.,* Article by Article Commentaries to the Civil Code of the Russian Federation, Part 3, Moscow, 2002, 23 (in Russian).

23 The ruling of March 27, 2002 of the Chamber of Civil, Industrial and Bankruptcy Cases of the Supreme Court of Georgia on the case: № 3K/1212-01

24 *Sergeev A. P., Tolstoy U. K., Eliseev I. V.,* Article by Article Commentaries to the Civil Code of the Russian Federation, Part 3, Moscow, 2002, 23 (in Russian).

queather in the interests of a third person, should be deprived of the inheritance right, but also this third person should be deprived of inheritance, in order not to protect those inheritance rights the inception of which is based on any given unlawful activity, despite the fact that the person having claims on these rights was not related to the unlawful action in any way.[25]However, the action of an unworthy heir, which legally benefitted another heir – i.e. brought him the right of acquiring the inheritance, should not be the responsibility of the latter, for he should not be liable for the unlawful actions of another person. The ungrounded expansion of the circumstances under which the inheritance right is withheld can bring about unjust consequences for the honest heir.

The court trial practice considers the direction of the actions of an heir against the final will of a bequeather as a precondition for recognizing him as an unworthy heir. An unworthy heir should realize that the direction of his action will yield certain results. The conflict or verbal abuse between a bequeather and an heir do not create preconditions for withholding the inheritance. [26]In the case,[27]in which there was a dispute over the withholding the right of inheritance, the court explained that the heir who had not had any contacts with the bequeather for years before the latter's death, could not have hindered him in carrying out his final will. Thus, the bequeather freely fulfilled his last wish and drafted the will, by which he bequeathed his inheritance to the defendant heir. Although the fact of the "abusive verbal-mention" of the bequeather and his family by the heir was proved, and the court considered this to be an unacceptable and unworthy behavior, this action could not be considered as the basis for acting against the final will of the bequeather.[28]Furthermore, if the bequeather had not drafted any will at all, the heir could in no way have committed any action against the last will of the bequeather.[29]The conflict between a bequeather and an heir does not precondition the withdrawal of the right of inheritance[30]and pertains to the legal sphere.[31]Theft of the bequeather's inheritance committed by an heir, even though not aimed at the increase of the inheritance share, and not considered as a precondition for recognizing him as an unworthy heir, is still an immoral action towards a bequeather, that has brought the inheritance to the heir during the lifetime of a bequeather.

Articles 726 and 729 of the civil code of France discuss mandatory and optional bases of withholding the inheritance. Article 726 of the civil code of France discusses the withdrawal of the inheritance from the heirs who have been convicted of felony aimed at murdering or at attemting the murder

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25 *Shilokhvost O. U.,* Inheritance by Law in Russian Civil Law, Norm, Moscow, 2006, 333 (in Russian).

26 The ruling of September 15, 2005 of the Chamber of Civil, Industrial and Bankruptcy Cases of the Supreme Court of Georgia on the case: №AS-201-521-05

27 Ibid.

28 The ruling of June 20, 2011 of the Chamber of Civil, Industrial and Bankruptcy Cases of the Supreme Court of Georgia on the case: № AS-786-840-2011

29 The ruling of June 25, 2012 of the Chamber of Civil, Industrial and Bankruptcy Cases of the Supreme Court of Georgia on the case: № AS-786-739-2012

30 The ruling of December 20, 2010 of the Chamber of Civil, Industrial and Bankruptcy Cases of the Supreme Court of Georgia on the case: № AS-922-869-2010

31 The ruling of the Supreme Court of Georgia of September 20, 2013 on the case: AS-347-330-2013

of a bequether[32]. Likewise, the court may rule to withhold the inheritance from the heir, if the latter is convicted of committing a lesser-degree crime aimed at murdering, or at attempting to murder, or at infringing upon the life or health of a bequeather.[33]

Paragraph 2333 of the Civil Code of Germany provides an exhaustive enumeration of the bases for withholding an obligatory inheritance share and other cases cannot be used as analogies[34]. According to the paragraph 2333 of the Civil Code of Germany: A bequeather can withhold an obligatory inheritance share from the offspring: 1. If the latter infringes upon the life of the bequeather, upon the life of his spouse or upon the life of his child. 2. If an offspring is exposed in the cruel physical treatment of a bequeather or of his spouse (Misshandlung), although, in the case of cruel treatment of the spouse, this only applies only if an offspring is the decendant of a spouse. 3. If an offspring viciously avoids the responsibility of caring for a bequeather. 4. If the offspring commits a premeditated criminal offence towards the bequeather, in which case the former is sentenced to minimum one year of imprisonment, and in which case a bequeather cannot be required to bequeath the inheritance share to the offender.[35]

For a long time, the German doctrine and litigation practice had only ruled the withdrawal of the obligatory share of inheritance from the "unworthy" heir only in those instances when an heir acted offensively. [36] This approach was changed by the 2005 decision of the Federal Constitutional Court.[37]According to the clarification of the constitutional court, the existence of the obligatory share serves the purposes of special protection of a family. The withdrawal of an obligatory share is not contingent upon the culpability of an heir.As discussed in the given case, the person entitled to obligatory share, had been committing a grave felony towards the bequeather for several years (had attacked and had physically abused him) and thus, had hampered the preservation of the unity of the family. Having withheld the obligatory share from the heir, the court indicated that there was no clear basis for the withdrawal of the obligatory share, deriving solely from the offensive activity of the latter.[38]

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32 Code Civil, Version consolidée au 12 juillet 2014, <http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070721>, [16.04.2019].

33 Code civil, Version consolidéeau 12 juillet 2014, <http://www.legifrance.gouv.fr/affichCode.do?cidTexte=LEGITEXT000006070721>, [16.04.2019].

34 *Palandt O.,* Bürgerliches Gesetzbuch, 73 Aufl., 2014, §2333, Rn.2. comp., BGH NJW 74, 1084.

35 Paragraph 2333 of GCC.

36 Comp. OLG Düsseldorf, NJW 1968, 944, 945; OLG Hamburg, NJW 1988, 977, 978; *Palandt O.,* Edenhofer W., BGB, 64. Aufl., München. 2005, § 2333 Rn. 2.

37 BVerfG, Beschluss vom 19.04.2005 - 1 BvR 1644/00, openJur 2010, 3199. The plot of the case is as follows: The heir and the bequeather lived together with the offspring who suffered from schizophrenic psychosis. Shortly before the death, the psychotic offspring attacked the mother several times and inflicted a physical harm upon her. After one of the serious attacks, the mother drafted a new will of 20.01.1994, in which she withdrew the right of inheritance from her violent offspring. Within one month after the drafting of the will, the psychotic offspring murdered the mother. After the murder, the court sent the offspring to a psychiatric clinic on the basis of an expert's diagnosis, which stated that the murderer, although aware of the unlawfulness of the action, was mentally ill while commiting the murder and was in the condition of spiritual anxiety, that did not enable him/her to act consciously.

38 BVerfG, Beschluss des Ersten Senats vom 19. April 2005 - 1 BvR 1644/00 - Rn. 36 .

The Civil Code of Germany considered the intentional physical abuse of the bequeather or of his spouse a reasonable ground for withholding the obligatory share from the heir.[39]The mentioned norm in the litigation practice clarified that only hardened crime laid grounds for the withdrawal of the obligatory share, i.e. the offence had to be so grave that the relationship between the bequeather and the heir was destroyed and caused the humiliation of the bequeather. The court thereafter overlooked the general concepts that had not been legally considered or accounted for – such as the deterioration of relationship between the bequeather and the heir, disrespectful treatment of the bequeather, and it was explained that only such an action of the heir as inflicting psychological harm on the bequeather, that in its turn led to the physical harm of the latter, could be the basis for withholding the obligatory share. Desperation, anger, distress and grief solely cannot serve as the bases for withdrawal. The court provided further clarification: "Cruel psychological treatment can become the basis for withholding the mandatory share only if it has led (or will lead) to the considerable physical harm of the bequeather".[40]

The Supreme Court of Georgia offers two distinct explanations in the decisions of two different periods regarding the withdrawal of the mandatory share from the heir as a result of committing premeditated murder by the latter. For instance, an heir committed a premeditated offence – a murder of a bequeather – for which he was sentenced to 20 years of imprisonment. The committed crime was followed by the death of the bequeather, the fact that necessitated the invitation of the person as an heir. Such a circumstance presents the basis for the recognition of a person as an unworthy heir.[41] And vice versa, the verdict stated that the heir had committed the murder of the bequeather not for the gain of profit but for the revenge, i.e. while committing offence the goal was not the aqcuisition of the inheritance or the increase of its share, but the revenge. The bequeather had not drafted any will, and obviously, the heir could not have acted in any way against the will of the former. Deriving from this fact, the heir had not commited the crime for the purpose of acquiring inheritance. Accordingly, the court did not find any legal grounds for recognizing him as an unworthy heir.[42]

According to the litigation practice and verbatim clarification of the norm for recognizing a person as an unworthy heir, a person who has murdered a bequeather has the right to make use of the consequent will or inheritance, if the murder committed by him is not connected to the inheritance. When resolving such disputes, a court must justify the decision by analogy (article 5 of CCG), by article 98 – II of CCG, according to which, "if a party has brought about the condition dishonestly, which is profitable for him, the circumstance cannot be considered as valid". This norm, in itself, is the expression of the general principle of good faith, it is formulated in the article 361_II of the CCG and is

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39 Civil Code of Germany, the second part of paragraph 2333, 01.01.2010.

40 BGH*,* Urteil v*om* 25./26.10.1976 – IV ZR 109/74*,* NJW 1977, 339.

41 The ruling of September 15, 2003 of the Chamber of Civil, Industrial and Bankruptcy Cases of the Supreme Court of Georgia on the case: № 3K-1127-02

42 The ruling of May 31, 2010 of the Chamber of Civil, Industrial and Bankruptcy Cases of the Supreme Court of Georgia on the case: № AS-266-251-2010

applicable to the entire civil law[43]. It establishes social-ethical values in civil legal relations [44] and enables us to evaluate any relationship through this prism. At the same time, when using analogies, a judge can either use or not use any norm through analogy, by taking into account specific conditions, and can adjust any relevant decision (of using the norm through analogy) to expediency and justice.[45]Even in the case of impossibility of applying the law through analogy, the article 5 of CCG directly indicates the necessity to act in accordance with general principles of law, justice, good faith and morality. Even in the process of applying the law through analogy, when taking a decision on recognizing a person as an unworthy heir for the premeditated murder of a bequeather, the court sets the rules of behavior in accordance with the principle of good faith, even more so, when this principle in itself essentially entails both, the principles deriving form the legal or constitutional values and from the obligation to act in accordance with justice and "moral requirements".[46]

In search of social justice, the Appeals Court of Tbilisi granted the claim to recognize a person as an unworthy heir and referred to the usage of analogy of the regulatory norm of contractual relations of gifting. As the Court clarified, the systemic analysis of the norms of gift-giving and recognizing a person as an unworthy heir gives grounds to state that the legislation sets high standards of behavior both for gift-recipient and for heir, the inviolable adherence to which enables them to enjoy the legal right established by inheritance law and by gift-giving norms. [47] The Supreme Court had sufficient grounds not to share the reasons expressed in the mentioned conclusions of the Appeals Court and stated further that the established factual circumstances did not provide the legal basis to be regarded as essential preconditions for recognizing a person as an unworthy heir. The actions taken by the heir were as follows: the person secretly obtained and unlawfully appropriated the gold items belonging to the spouse of the bequeather, through which he inflicted a significant loss to the plaintiff. The same verdict proved that the claimant did not disclose the offence committed by him (murder of the bequeather). However, the established factual circumstances, although deserving reprehension, do not justify the implementation of the preconditions for recognizing the person as an unworthy heir. The court clarifies further that even applying the article 529-I is not justifiable, since the latter norm aims at regulating a different matter and pertains to the part of the regulatory statement of gift-giving relations, which belong to special type of relations. And the norms regulating special relations cannot be used as analogies.[48]

The participants of legal relations are required to carry out their rights and obligations in good faith[49]. Although it is true that the majority of norms do not indicate this directly, they still refer to it, since the civil order is based exactly on this principle. Good faith behavior entails considerate and re-

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43 *Bioling H.,* Recognizing a Person as an Unworthy Heir and Withholding the Right of a Mandatory Share according to the Civil Code of Georgia, "Georgian Law Review", № 4, 2003, 516 (in Georgian).

44 *Palandt O.,* Bürgerliches Gesetzbuch, 65. Aufl., München 2006, §242, Rn. 3.

45 *Kereselidze D.,* The Most General Systemic Concepts of Private Law, Tbilisi, 2009, 95 (in Georgian).

46 Ibid.

47 The decision of the Appeals Court of Tbilisi on May 24, 2017 on the case: №2B/5313-15

48 The decision of the Supreme Court of Georgia of February 15, 2018 on the case: №AS-1101-1021-2017

49 Civil Code of Georgia, Article 8.

spectful attitude of the participants of civil relations towards each other's rights. The basic function of the principle of good faith is the attainment of fair results and the avoidance of injustice, the fact that is directly connected to the stability and reliability of civil relations. [50] The overall analysis of inheritance-legal sanction norms obiges the subjects of private law to act within the framework of good faith. If we turn to the aspiration of a legislator to guarantee the realization of the principles of justice and good faith in inheritance-legal relations by introducing sanctions, then the acquisition of a legal good, i.e. the inheritance, through one's own unlawful action must be construed as impermissible. "The acquisition of direct legal good through one's own unlawful action pertains to the principle of Roman law *Expceptio doli specialis,* which in Anglo-American law is referred to as the contest of *unclean hands*"[51].It is important that an individual must not have any possibilities to influence the attainment of the desired condition through dishonest means, the fact that is considered by the article 98 of CCG as impermissible. [52]

An heir, whose unlawful action caused the death of a be queather , must not be granted the right to acquire the inheritance for the mere reason that the motive of his action was not directly aimed at receiving the inheritance, although he was quite well aware of the fact that his action would lead to the desired result, i.e. to the death of the bequeather and to his acquisition of the inheritance. "Deriving from the methodology of explanation, this result can also be achieved through the so-called "the more so" principle, i.e. *Argumentum a fortiori – (arg a majore ad minus od a minore ad maius –* from the greater to the lesser and from the lesser to the greater), during the application of which the principle of "the more so" operates: if a concrete legal result occurs as a consequence of unlawful action against the will of a bequeather or as a consequence of the violation of the moral norms of caring for him, so that the heir becomes deprived of the right to acquire the inheritance, then this result will occur "even more so" in the case of committing a more serious offence, since the legal aims and procedures will be more clearly applicable in the second case. For instance, this could be the application of the obligation of compensation of damages during expropriation in the cases of unlawful deprivation of the right of private property.[53]

The Georgian litigation practice and the contents of the existent norm reject the possibility of withholding the right of inheritance in the case of infringing upon the life and health of a bequeather. That is why, the rightful regulation of this issue fully depends on the development and formulation of the court law. For the purposes of establishing the rightful litigation practice, the issue regarding the recognition of a person as an unworthy heir as a consequence of unlawful action, should receive special evaluation. Accordingly, if we do not use the law analogy and the explicit explanation of the norm in the above discussed sense, during the verbatim interpretation of the article 1310 of the CCG, that refers to the sanctions of withholding inheritance, we will face a curious legislative error, deriving

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50 The decision of the Supreme Court of Georgia of April 12, 2011 on the case: № AS-1224-1076-2010

51 *Bioling H.,*Recognizing a Person as an Unworthy Heir and Withholding the Right of a Mandatory Share according to the Civil Code of Georgia, Georgian Law Review, № 4, 2003, 516-517 (in Georgian).

52 *Kereselidze D.,* The Most General Systemic Concepts of Private Law, Tbilisi, 2009, 397 (in Georgian).

53 *Palandt O.,* BGB, 73 Aufl., München. 2014, Rn. 51.

from the fact of unequal treatment.

"The application of a legal norm through analogy means the generalization of this norm that is achieved by evaluation: the contents of the norm reveal that the difference between the legally regulated and unregulated cases is so insignificant that their different resolutions could not be justified. In other words, the general common features of the legal norm should be sufficient to justify the application of legal result. This fact proves that the application of the legal norm through analogy is one of the reflections of the application of the principle of equality. In law, equal treatment and equal evaluation always mean abstracting the existent inequality under a concrete legal view".[54]

Therefore, the legal result, as defined by law, must be applied to the relationships of greater significance, and the heir, whose premeditated inlawful actions led to the death of a bequeather or to the death of any of his family members, must be recognized as an unworthy heir, irrespective of the motives of the committed offence. "The law must protect not only life but also the right to life"[55]. Life is an untouchable right of a human and is protected by law. [56]It presents not only the taken-for-granted good but also defines other human virtues. There is no freedom, or spiritual, mental and cultural development or human happiness without life. The right to life protects the natural existence of a human and by this creates the precondition for enjoying other human goods.[57]

The unlawful action of an heir for gaining the legal good, i.e. inheritance share, should be considered as impermissible. Deriving from the principles of equality and expediency, the application of the analogy of legal norm, or its teleological definition, may be allowed for recognizing a person as an unworthy heir. A special mention will be made of the legislator's aspiration and zeal to establish the principles of justice and good faith by imposing sanctions. This action, in its turn, can become an important instrument for further development of law.[58]"While elaborating the cases of this category, the judge should set the correction of flaws existent in the law as his goal. On the basis of interpreting the analogy of legal norm, in fact he creates a new norm, which is one of the significant foundations for the development of law. That is why, the modern theories of law interpretation are in reality the theories of the development of law, which are created on the basis of litigation practice".[59] Therefore, the "flaw in the law should not frighten us, as it often happens with the Georgian judges, but on the contrary, should incentivize us to create a new norm. Only, this norm should conform the constitutional foundations and the strife of the given law"[60]. In addition to achieving justice, the goal of a law is to guarantee legal security and the optimal and expedient satisfaction of the interests. The mentioned goal should be taken into account in the process of interpreting and generalizing a law. The function

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54 *Radbruch G.*, Rechtsphilosophie, 3. Auflage, Heidelberg. 1932, §§ 49.
55 *Fawcett J. F.C.*, The Application of the European Convention on Human Rights, Oxford, 1987, 37.
56 The Constitution of Georgia, Article 15.
57 *Gotsiridze E.,* Commentary to the Constitution of Georgia, Tbilisi, 2013, 72 (in Georgian).
58 *Kereselidze D.,* The Most General Systemic Concepts of Private Law, Tbilisi, 2009, 94 (in Georgian).
59 *Staudinger J. von*., Kommentar zum Bürgerlichen Gesetzbuch, Buch 1, 15 Aufl., Berlin, 2015, Rn. 124.
60 *Tchanturia L.,* Introduction to the General Part of the Civil Law of Georgia, Tbilisi, 1997, 121 (in Georgian).

of the law to solve the problems fairly is not carried out solely by interpretation, but also by checking the necessity to extend or generalize the law.[61]Besides, the interpretation of a law should adhere to the principle of "preserving the coherence of a law", namely, it is necessary to redress the fair balance while interpreting separate norms and coming across logical discrepancies and inconsistencies between the different goals of various norms.[62]

3. Withholding the Mandatory Share and Decreasing its Amount by the Order of Will

A bequeather can withhold the inheritance from his offspring during his lifetime by the two types of will order: by the first type, he may not make any mention of the heir in the will, and by the second type, he can withhold the inheritance through the order of will. A person, from whom the inheritance has been withheld through the direct order of the will, cannot be a legal heir to the part of the inheritance, which has not been included in the will, also in the case when the heirs-by-will declined the wish to acquire the inheritance.[63]In both cases, the mandatory heir retains the right to acquire the obligatory share. The explanation of the article 1354 of the CCG is especially interesting in this respect, which discusses whether the first order heir will be considered as an obligatory heir at all, and if yes, what portion of inheritance he can make claims to. The interconnected interpretation of the articles 1354 and 1371 of the CCG gives grounds for drawing such a conclusion. The offspring, parents, and spouse of a bequeather are entitled to an obligatory share, irrespective of the contents of the will, and irrespective of the fact that the bequeather has withheld the right of mandatory share from the first-order heir by the direct order of the will. Therefore, irrespective of the contents of the will, such an heir will still acquire a mandatory share both from the inheritance mentioned in the will and from the property left out of the will. Although, under such a will order, he/she may not be regarded as a lawful heir, but may merely remain as an heir of a mandatory share.

The second part of the article 1381 of the CCG makes an explicit and direct indication of the fact that the heir from whom the inheritance has been withheld by will, still remains as an heir of mandatory share. According to this article, a bequeather can withhold the mandatory share from the heir during his lifetime by appealing to the court. Therefore, a bequeather can withhold the mandatory share from the heir only through the court and not by will order, in the case of proving the existence of the preconditions as set by the article 1381.[64]

A bequeather who decides to forgive an heir, should explicitly state this in the will. This is the case, when a bequeather knows that the heir deserves to be deprived of the inheritance due to his action, but in spite of this, he still considers the latter as his heir.[65]The will may also be drafted in favor of another heir, but it must make an explicit formulation of the bequeather's desire to forgive the un-

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61 The decision of the Supreme Court of Georgia of July 14, 2017 on the case: №AS-178-167-2017.
62 *Zippelius R.,* Teaching of Legal Methods, the 10th Rev. Ed., GIZ, Tbilisi, 2009, 53 (in Georgian).
63 Article 1354 of CCG.
64 The decision of the Supreme Court of Georgia of March 9, 2016 on the case: № AS-1048-988-2015.
65 *Akhvlediani Z.,* Inheritance Law, Tbilisi, 2007, 10 (in Georgian).

worthy heir. Under such circumstances, an unworthy inheritance-deprived heir will be invited to receive his mandatory share. Although the law requires that the bequeather should formulate in the will his desire to forgive the heir, any other written document, which makes an explicit statement about the firm desire of a bequeather to forgive an heir, can be used as a valid proof.

A bequeather may draft a will, and despite the court decision on withholding the mandatory share from the heir, bequeath to the mandatory heir the portion of inheritance that is less than the obligatory share. The right to acquire a mandatory share rises only in the instance when the heir becomes deprived of the entire or portion of the inheritance by the order of will. At the same time, the legislation takes into consideration the commensurability of the mandatory share and the inheritance share as allotted by the will, more specifically: if a person, entitled to the mandatory share of the inheritance, has been bequeathed the property that is half the portion that he/she could have received in the case of being a legal heir, then he/she can claim the portion, by which the share received by the will is less than half the protion that he/she would have received in the case of being a legal heir.[66]Accordingly, a mandatory heir acquires a mandatory share and, at the same time, is the heir by will as well. Deriving from the disposition of the article 1379 of the CCG, the claimant, the mandatory heir, disputed that the inherited share was less than half the share that he/she would have received in the case of being considered as a legal heir.[67]If a bequeather withholds the inheritance from a mandatory heir by court decision, and despite such a decision, still mentions the latter in the will, the deprivation of the entitlement to the mandatory share still does not cause the loss of the inheritance by will, and the withdrawal of the mandatory share still leaves the right to aqcuire the inheritance by will unalterable. In such a case, a bequeather can amend the will and not make any mention of an heir in a new will. Therefore, if an heir is not mentioned in the will any longer, and has been deprived of the mandatory share by the court decision, he/she cannot receive the inheritance.

A distinction should be made between the two different cases in respect to the articles 1379 and 1381 of the CCG: a. If a bequeather in his lifetime and by his will has bequeathed a portion of inheritance to the heir, who has been deprived of the mandatory share, and the bequeathed share is less than mandatory share (and the will does not make a mention of forgiveness), then although the heir has the right to claim the full mandatory share (to fill up the share), he still cannot claim the full share, since there exists a court decision regarding withholding the mandatory share from him. This is the case when a bequeather refuses to withhold a relatively small share of inheritance from the heir, from whom the mandatory share has been already withheld. According to the article 1313 of the CCG, this decision is mandatory for the individuals named in the article 1312 of the CCG.[68]Accordingly, the claim initiated by them to recognize a person as an unworthy heir, will be unsuccessful. Therefore, the heir, who has been bequeathed a share less than the mandatory one and has been deprived of the right

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66 Article 1379 of CCG.

67 The decision of the Supreme Court of Georgia of December 4, 2013 on the case: № AS-531-505-2013

68 *Bioling H.,* Recognizing a Person as an Unworthy Heir and Withholding the Right of a Mandatory Share according to the Civil Code of Georgia, "Georgian Law Review", № 4, 2003, 524 (in Georgian).

to receive the mandatory share by a bequeather, cannot receive the right to fill up the share to the amount of the mandatory one, as defined by the artile 1379 of the CCG, and will only receive the small amount that the bequeather left for him by the will, and that is smaller in amount than the portion of the mandatory share. And another heir, who has been bequeathed a lesser portion than the mandatory share, but has not been deprived of the mandatory share by the court decision during a bequeather's lifetime, may receive the right to fill up the share, as defined by the article 1379, i. e. may receive the entire mandatory share. In this case, an heir-by-the-will can appeal to the court and claim the withdrawal of the mandatoy share from the mandatory heir. If the court decides to withhold the mandatory share from the obligatory heir, he will still not be granted the right to fill up the share to the amount of the mandatory share, and will have to accept only a small portion, as allotted by a bequeather.

4. Withholding Inheritance for Viciously Avoiding Family-Legal Responsibility

The unfulfillment of family-legal responsibilities is the precondition for withholding inheritance. This is revealed in vicious avoidance of the duty of caring for a bequeather. Such an heir retains the possibility of receiving inheritance, if a bequeather names him as an heir by will. He will acquire the inherited share as a result of "generous forgiveness" of a bequeather. In the case of absence of such a document, the heir will be deprived of the right of inheritance by law, since he did not carry out the responsibilities not only in respect to the bequeather, but in respect to the law and society as well. [69]

The withholding of the inheritance from an heir for viciously avoiding the moral and legal responsibility of caring for a bequeather is the utmost expression of the protection of the interests of heir and bequeather from dishonest and unlawful influences in the sphere of legal relations of inheritance. When we talk about moral norms, we do not mean the firmly fixed, unalterable and readily-given principles, but the views of "the people in good faith", that are prevalent in the social relations of a given society. These views are historically changeable. At the same time, their change can happen through legal concepts.[70] In family law, the relations between family members are mainly defined by moral principles. They bear the responsibilities of caring for each other. The law, committing family members to take care of each other, also implies the obligation to offer each other material assistance, should the necessity arise.[71]The inheritance-legal relations are in close connection with family reltions. The inheritance right and the right to receive goods and benefits, together with the law regulating the spousal property relations, make up the family-property law.[72]Inheritance-legal sanction of withholding the inheritance is applied in the case of unfulfillment of family legal responsibilities. The subjects

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69 *Makovski A. L., Sukhanov E. A.,* Commentaries to the Third Part of the Civil Code of the Russian Federation, Moscow, 2005, 78 (in Russian).

70 BVerfGE, Urteil des Ersten Senats vom 15. Januar 1958, Band7, 215, <http://www.servat.unibe.ch/dfr/bv007198.html#208>, [12.08.2019].

71 *Shengelia R., Shengelia E.,* Family Law, Tbilisi, 2009, 244 (in Georgian).

72 *Malaurie Ph., Aynés L.*, Droit Civil, Les successions. Les libéralités. 3e éd. Defrénois, Paris, 2008, 6.

of family-legal responsibilities are parents, offspring, spouses, grandparents, and sister-brother. As a rule, the obligations of care, help and sustenance should be carried out on a voluntary basis, otherwise the court takes decision of imposing support in the best interests of those who need help. "The best interests" imply the concepts, which are influenced by cultural, economic conditions and religious norms,[73]"need help" means the lack of necessities for normal life under modern social-economic conditions.[74]Not fulfilling the legal and civil-moral responsibilities of supporting a bequeather create the preconditions for withholding the inheritance. Therefore, support and viciously avoiding the the responsibility of support should be clearly defined.

The majority of familial disputes in the Georgian legal system stem from the unfulfillment of alimony obligations by parents towards offspring. Both parents have equal and common responsibilities for upbringing and developing the offspring,[75]the best interests of a child should present the primary topic of discussion and deriving from its nature and gravity, may even supercede the interests of a parent.[76]Even in the case when the balance of interests needs to be redressed, the best interests of a child get prioritized and the corresponding decision is taken. [77]

Not every kind of avoidance can be regarded as the violation of familial obligations and can serve as the basis for withholding the inheritance, but only the vicious avoidance of these obligations. Financial condition (low income, unemployment, lack of stable income) or health problems do not diminish the requirements of underage or disabled persons, accordingly, even in such a case, a minimum amount of alimony/sustenance should be preserved. The imposition of alimony or sustenance below the minimum threshold is only permissible under the exceptional conditions, when the financial or physical inability of a parent to make any payments is beyond reasonable doubt and therefore, the imposition of any financial obligations is excluded.[78]In the case of establishing such circumstances, no assumptions should be made that the person in question viciously avoided familial responsibilities.

The familial-legal sanction of withholding the right of parenthood breeds another inheritance-legal sanction as well, namely, withholding the right of custody over offspring. Deprivation of parental rights is possible in respect to one or several offspring. If the offspring has died, over whom the parental right was not deprived, the parent retains the legal right of inheritance, but has no rights over another offspring[79].

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73 *Blair M. D., Weiner M. H., Stark B., Maldonado S.,* Family Law in the World Community: Cases, Materials and Problems in Comparative and International Family Law, Carolina Academic Pres Law Casebook Series, 2nd ed., Durham, North Carolina, 2009, 394.

74 *Sergeev A. P., Tolstoy U. K.*, Civil Law, Moscow, 2006, 564 (in Russian).

75 *Kurdadze I., Korkelia K.,* International Law of Human Rights, according to the Human Rights Convention, Tbilisi, 2004, 183 (in Georgian).

76 The decision of the European Court of Human Rights of February 2, 2016 on the case: 'N.Ts. et al vs. Georgia', statement № 71776/12.

77 The decision of the European Court of Human Rights of July 31, 2000 on the case: – Elsholz v. Germany, statement: № 25735/94, Par. 52.

78 The decision of the Supreme Court of Georgia of October 20, 2015 on the case: №AS-538-511-2015.

79 *Shengelia R., Shengelia E.,* Inheritance Law, Tbilisi, 2011, 24 (in Georgian).

German litigation practice presents an interesting case in regards to withholding the mandatory share for avoiding the legal responsibility of care. Regarding the withholding of the mandatory share for viciously avoiding the legal duty of care for a bequeather, the supreme court of Frankfurt stated that it is impossible to withhold the mandatory share based on the non-fulfillment of physical care for a disabled or ailing person, since the support is carried out only through monetary payments. Besides, merely declining the obligation of care is not sufficient for vicious avoidnce of the responsibility. The non-fulfillment of the obligation should also be based on the reprehensible and immoral attitude of an heir.[80]

The first-order heir of the bequeather, the spouse, is also an obligatory heir. Besides avoiding the familial-legal responsibility of care, a spouse may not be rearded as a legal or mandatory heir, if the spouses terminated their familial relationships three years before the disclosure of the inheritance and lived separarately during this period. Naturally, the employment location of spouses in different cities, long-term business trip, etc. do not constitute the preconditions for the withholding of inheritance. For this purpose, the existence of specific preconditions is necessary, namely, the termination of spousal relationships is of decisive importance. The aim of the legal order is to guarantee that nobody is deprived of rights without due proof, and vice versa, nobody appropriates the goods unlawfully[81]. Already during feudal period, the foundation of inheritance law was laid by inseparable habitation under one roof, the fact that also constituted the frames of legal inheritance.[82]Legal inheritance is based upon familial and relational ties[83], and withholding the inheritance right from a spouse by law is connected with the break-up of exactly these ties. The goal of a legislator in this case is to regulate the legal relations in such a way that the inheritance of a deceased person is transferred to other persons by law and the circle of legal heirs is rightfully established. These procedures are carried out in view of avoidance of illegal transfer of those rights and privileges to the wrongful heir (who was registered as a spouse), that a bequeather enjoyed at the moment of death (the amount of inheritance), and in view of avoidance of unjustifiable violation of the rights of legal heirs.[84]In order to legally withhold the inheritance, and hence, the mandatory share, from the spouse, an expression of will of termination of wedlock by both, or at least one spouse, must be established. This latter fact must be demonstrated through a concrete action, which must,in its turn and by considering certain circumstances, give grounds to drawing unequivocal conclusion that the spousal relation was terminated within three years before the death of one spouse.[85]The term "during divorce", which is mentioned in the preamble of the article 1341 of the CCG, causes certain confusion, although the fact of separate habitation of spouses

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80 Münchener Kommentar zum BGB, Band 9, 6. Aufl. München, 2013, § 2333, Rn. 32.
81 The decision of the Supreme Court of Georgia of July 22, 2015 on the case: №AS-187-174
82 *Zoidze B.,* Old Georgian Inheritance Law, Tbilisi, 2000, 12 (in Georgian).
83 *Shengelia R., Shengelia E.,* Inheritance Law, Tbilisi, 2007, 123 (in Georgian).
84 The decision of the Supreme Court of Georgia of July 22, 2015 on the case: №AS-187-174-2015.
85 The decision of the Supreme Court of Georgia of December 8, 2010 on the case: №AS-611-573-2010.

for more than three years must be established, and the fact that no legal divorce has taken place does not exclude the decision to legally withhold the inheritance from a spouse.[86]

5. Legal Proceedings of Withholding Mandatory Share

The material-legal norm of the recognition of a person as an unworthy heir imperatively defines the circle of persons who can commence legal proceedings. However, two distinct regultions should be singled out: under the first regulation, already during his lifetime, a bequeather, can initiate a legal proceeding for withholding the mandatory share form an heir, and under the second regulation, the heirs who have property-legal interests can instigate the litigation. In accordance with law, during his lifetime, a bequeather cannot raise the issue of legally recognizing a person as an unworthy heir, and the opposite view contradicts the verbatim meaning of the law, also the system, the essence and the aim of the law. Moreover, there is no need to initiate such a legal proceeding.[87]Some judges do not agree with this opinion, since the norm does not make a mention of the condition for recognizing a person as an unworthy heir that this may only happen after the disclosure of the inheritance.[88]However, a verbatim and purposeful interpretation of the inheritance-withdrawal norm excludes such a claim made by a bequeather. The article 1312 of the CCG defines the circle of persons who are legally entitled to making such a claim. The mentioned circle is limited to those persons, whose deprivation of the inheritance right will bring about certain property consequences to an unworthy heir. A bequeather does not belong to this circle, during whose lifetime the recognition of a person as an unworthy heir will not bear any property implications. A bequeather is not restricted in his dispositional freedom and does not depend on or is not limited by the court decision. The recognition of a person as an unworthy heir and the deprivation of the right to acquire a mandatory share are based on different regulations, and deriving from the legal system, must be strictly distinguished.[89]

The withdrawal of mandatory share before the disclosure of inheritance is possible only through a bequeather's appeal to court already during his lifetime. The expansion of the circle of the subjects entitled to making such claims is not permissible, since "the laws, setting special regulations, may not be used through analogies"[90]. Such a prohibition does not mean the limitation of access to legal proceedings, since other subjects can make such claims after the disclosure of the inheritance. An access to legal proceedings can be restricted out of expediency conciderations. The restrictions should not

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86 The decision of the Supreme Court of Georgia of May 13, 2010 on the case: №AS-109-103-10.

87 *Bioling H.,* Recognizing a Person as an Unworthy Heir and Withholding the Right of a Mandatory Share according to the Civil Code of Georgia, "Georgian Law Review", № 4, 2003, 520 (in Georgian).

88 The decision of the Supreme Court of Georgia of July 4, 2001 on the case: №3K/299-01.

89 *Bioling H.,* Recognizing a Person as an Unworthy Heir and Withholding the Right of a Mandatory Share according to the Civil Code of Georgia, Georgian Law Review, № 4, 2003, 524.

90 *Trubetskoy E. N.,* Encyclopedia of Law, New York, 1982, 34 (in Russian).

impact the essence of the access right[91], also the restriction should serve a specific goal and should be proportionate to this goal.[92]

Accordingly, a legislator only permits the withdrawal of legal inheritance right during the lifetime of a bequeather in accordance with the will of the latter. As regards the withdrawal of mandatory share, only article 1381 considers its possibility. We can conclude that "the legislator purposefully created the norm, distinct from the article 1381 of the CCG, the second and the third parts of which consider granting a bequeather with the right to instigate the legal proceedings. The conscious decision of the legislator excludes the application of the norm through analogy towards the case unregulated by law, since we lack one of the preconditions for using analogy, namely, an overlooked error. The fact that a concrete circumstance "A" and legally regulated case "B" were not regulated purposefully in a similar way, naturally excludes the possibility of applying analogy. Quite on the contrary, the legislator here permits only the possibility of making the so-called counterargument *–argumentatio e contratio* or *argumentum e silentio*. By his silence, the legislator unequivocally declares that a legally unregulated case must not be addressed in a similar way as the legally regulated case.[93]

The analysis of the indicated norm of recognition of a person as an an unworthy heir makes it clear that the recognition of a person as an unworthy heir happens only when an unlawful action of an heir hinders the expression of a real will by a bequeather, and solely those individuals can appeal to the court for whom the withdrawal of inheritance right bears certain property consequences. Therefore, when a claimant is a supposed bequeather, the appeal to recognize the defendants (heirs) as unworthy heirs will bear no property consequences for him, [94]since a bequeather's claim made during his lifetime against the mandatory heirs must derive from the requirements set by the article 1381 of the civil code and must contain the requirements defined by this article.

A bequeather's claim regarding the recognition of a person as an unworthy heir presents a declaratory relief and the precondition for its permissibility of the existence of legal interest. For the establishment of legal interest, the potential improvement of claimant's legal circumstance in the case of granting his declaratory relief requirement must be proved.[95]The declaratory relief of a bequeather regarding the withdrawal of legal inheritance right from the heir does not meet the procedural preconditions for permissibility of making claims, neither the right of making such a claim exists from the material-legal standpoint. To carry out his last will, a bequeather has a much simpler way than a legal proceeding: to withhold the inheritance from all or from one heir by drafting a will, as well as to withhold the inheritance of everything, and of the property remaining outside the will among others, by

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91 The decision of the European Court of Human Rights of October 24, 1979 on the case: Winterwerp v The Netherlands, statement: №6301/73, <http://www.bailii.org/eu/cases/ECHR/>, [13.08.2019].

92 The decision of the European Court of Human Rights of October 30, 1998 on the case: F.a. v. FRA, statement: №38212/97, <http://www.bailii.org/eu/cases/ECHR/>, [13.08.2019].

93 *Bioling H.,* Recognizing a Person as an Unworthy Heir and Withholding the Right of a Mandatory Share according to the Civil Code of Georgia, Georgian Law Review, № 4, 2003, 520 (in Georgian).

94 The decision of the Supreme Court of Georgia of March 13, 2006 on the case: AS-22-473-06.

95 The ruling of the Great Chamber of the Supreme Court of Georgia on March 17, 2016 on the case: №AS-121-117-2016.

direct will order. A legal proceeding is permissible only based on the claims of those persons who will receive certain property benefit in the case of the recognition of an heir as unworthy. "They have no other way than to make a declaratir relief in the court in order to carry out the bequeather's last will or exclude the unworthy heir from inheritance"[96].

With the aim of withholding a mandatory share, a bequeather, who connects the withdrawal of inheritance right from the family member with his inheritance plans, might have a legal interest to make a declaratory relief claim in order to see whether the institution of mandatory share will operate in the case of disclosure of the inheritance. Only an heir-by-will has a legal interest of withholding the mandatory share and instigating a prorpietary claim, since the withdrawn mandatory share will be transferred solely to the heir-by-will. There might exist several such heirs, though a claim made even by one of them may be regarded as permissible. Considering procedural expediency and real property interests of the parties, it is bettrer for an heir to make proprietary claim regarding the recognition of an unworthy heir as an inheritance heir, even more so, in the case when the issues of inheritance amount and inheritance acquisition are disputable. These steps should be taken to avoid future necessity of instigating further legal proceedings.

In the case of instigating legal proceedings regarding the recognition of a person as an unworthy heir, the claimant must produce a proof of the existence of a will. A bequeather is not required to produce an original or a copy of the will, but only a notary statement regarding the existence of a will drafted by a bequeather will suffice to prove the point. And this will be made possible only if a bequeather has drafted a notary-type will. A claimant is also required to produce trustworthy and relevant proofs regarding the existence of preconditions for withholding the inheritance right. [97]The burden of proof of the existence of grounds for withholding the mandatory share must be borne by the person who makes a claim of withholding the right of inheritance.[98]

According to CCG, the following type of a person will be regarded as unworthy: 1. Who committed a premeditated and unlawful murder of a bequeather, or made an attempt of his murder, or drove him to the condition in which a bequeather was incabale of making or annulling a will order before his death, 2. Who purposefully hindered a bequeather in either making or annulling a will order, 3. Who purposefully misled or unlawfully threatened a bequeather to make or annul a will order, 4. Who has been convicted as a criminal for committing a crime in connection with the will order of a bequeather that pertains to §§ 267, 271-274 of criminal law.[99] In this case, only court verdict can be used as a basis for withholding the inheritance, although "the recognition of a person as an unworthy heir is realized through the contest by a receiver of inheritance. The contest is directed towards the legal relation, through which an unworthy person became an heir (§ 2339). The realization of contest

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96 *Bioling H.,* Recognizing a Person as an Unworthy Heir and Withholding the Right of a Mandatory Share according to the Civil Code of Georgia, "Georgian Law Review", № 4, 2003, 522 (in Georgian).

97 The decision of the Supreme Court of Georgia of September 20, 2013 on the case: AS-347-330-2013.

98 BGH, NJW 1974, 1084,1085.

99 Paragraph 2339 of CCG.

is possible after the transfer of property to an unworthy heir[100], the right of contest is realized within one year after the heirs make a claim. It is sufficient to produce a contest statement before making such a claim by the persons who have inheritance legacy or the right to acquire mandatory share. [101] The contest comes into effect only after the enforcement of court decision.[102] According to German law, there are several types of claim that a person entitled to mandatory share can apply. More specifically, a person entitled to the mandatory share can legally require the information about the amount (volume) of the inheritance (claim regarding the disclosure of information – Auskunftsklage des Pflichtteilsberechtigte). In addition to this, a person entitled to the mandatory share can instigate a legal proceeding for establishing the value of the inheritance – (Klage auf Wertermittlung). A person entitled to the mandatory share can demand to have his right to the mandatory share proved by declaratory relief (declaratory relief – Feststellungsklage). After going through the above-mentioned steps, a person entitled to the mandatory share can instigate a proprietary suit and claim the due share (proprietary claim / suit – Leistungsklage). At the same time, a person entitled to the mandatory share can initiate the suit taking the above-mentioned steps simultaneously. According to the civil legislature of France, in the event of facultative indecency, the withdrawal of inheritance is permissible only after the disclosure of the inheritance on the basis of court decision made regarding the heir's claim.[103] The cassation court of France considers the sanction of withholding the inheritance from an unworthy heir as a civil-legal responsibility of a private nature, because such a civil-legal sanction plays into the hands of a concrete heir, and it is logical that he should decide on his own whether to apply this sanction towards an unworthy heir.

6. Conclusion

The acquisition of a mandatory share is not contingent upon the will of a bequeather. It is a legal right of an heir and can be withheld by the decision of the court only in the case of a grave mistake made by an heir. Owing to the unsound attitude towards an heir, a bequeather sometimes considers the withholding of the inheritance as an important and essential act.There are frequent cases when a bequeather has disagreements with his/her family members, when heirs do not carry out the legal or moral duty of supporting a bequeather and caring for him/her. Under these circumstances, the will of a bequeather to subject heirs to inheritance-legal sanctions can be understood from personal perspective,[104] although this should be the issue of a scrutiny of not only a bequeather, but of the court as well.

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100 Paragraph 1942 of CCG.

101 *Palandt O.,* Bürgerliches Gesetzbuch, 73. Aufl., München, 2014, § 2340, Rn. 1-2.

102 Paragraph 2342 of CCG.

103 *Gongalo U. B.,* Legal facts in Inheritance Laws of Russia and France, Comparative-Legal Study, Moscow, 2010, 28 (in Russian).

104 *Klingelhöffer H.*, Pflichtteilsrecht, 2. völlig neue bearbeitete Aufl., München, 2003, 37.

The precondition for withholding inheritance is not a general but a vicious and subjective avoidance of carrying out of the family-legal responsibilities. Complete inactivity of an heir, expressed in indifferent and careless attitude towards a bequeather, can be rendered as one such instance. The recognition of a person as an unworthy heir should derive from the views of honest people based on moral values and inter-generational solidarity. During the legal proceedings of withdrawing inheritance, the evidence of avoiding the responsibility of caring for a bequeather by the heir must be established in the first instance, which should be included in the burden of proof of the defendant. [105]The defendant should also prove that the avoidance of the responsibility of caring for a bequeather had objective and excusable reasons, and he/she did not consider this fact as a ground for being deprived of inheritance. If a bequeather did not accept assistance from an heir, despite the wish of the latter, [106]and forbade the heir to contact him/her,[107]no inheritance sanctions can be imposed, because no vicious and purposeful avoidance of responsibilities can be established.

If the violation of a moral-legal obligation of caring for a bequeather, as well as the dishonest influence on his/her wish and the violation of the will, lead us to the recognition of a person as an unworthy heir, it should be, even more so, extended to the aggravated instance of an unregulated case, such as infringement upon a bequeather's life or health. In such a case, the concrete aim of the law should be more widely applied. Human life and health are such rights that express a personality, and thus, have not been created by law but have been created by the nature, and have been bestowed to the law. These rights are the expressions of life, of living being and of human being, and acquire their meaning together with the existence of life. Every individual has the right to enjoy these bestowed goods and the right not to have their natural growth and development terminated or hindered by another individual.[108]The above-mentioned actions of similar gravity, which are directed against a bequeather and his/her family, should be qualified likewise. [109] An heir, who has committed a premeditated murder of a bequeather, must be withheld the right of inheritance, and this issue must be addressed on the basis of the free access to the justice and law, since in the instance of stating the positive norm, while choosing the precedent norm and defining the factual normativity, a person's natural rights and freedoms must not be violated, as the criteria of justice.[110]

An attempt of infringement upon the life or health of a bequeather or any of his/her heirs must be considered as the basis for withholding the right of inheritance. The motive of the respective actions should make no difference. If the murder has been committed on the grounds of personal enmity, without the intention of acquiring the inheritance, the offender must be deprived of the right of

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105 The decision of the Supreme Court of Georgia of June 29, 2017 on the case: №AS-1227-1147-2017.

106 The decision of the Supreme Court of Georgia of May 12, 2011 on the case: №AS-265-249-2011.

107 The decision of the Supreme Court of Georgia of December 12, 2001 on the case: №3K/623-01.

108 Comp. Urt. v. 20.12.1952, Az.: II ZR 141/51, <https://www.jurion.de/urteile/bgh/1952-12-20/ii-zr-141_51/>, [11.04.2019].

109 *Bioling H.,* Recognizing a Person as an Unworthy Heir and Withholding the Right of a Mandatory Share according to the Civil Code of Georgia, "Georgian Law Review", № 4, 2003, 518 (in Georgian).

110 *Savaneli B.,* Legal Methods, Tbilisi, 2008, 95 (in Georgian).

inheritance even more so, because by his/her actions he/she facilitated his/her inclusion in the will.[111]The motive of committing these actions can be not only a person's desire to be included in the will or the increase of his/her inheritance share, but also jealousy, revenge, or unworthy cunning behavior.[112]If we consider the strife of the legislator to guarantee the equal treatment of parties in inheritance-legal relationships and the realization of the principles of justice and good faith by imposing sanctions, the modern norm and its interpretation in connection with the recognition of a person as an unworthy heir, can be formulated in the following way: A person cannot be considered a lawful heir or an heir-by-will, if he/she purposefully hindered a bequeather in carrying out his last will, and in such a way, facilitated his/her inclusion or the inclusion of his/her close relatives in the will, incentivised the increase of the share of inheritance, or committed a premeditated crime or any other immoral act against the final will of a bequeather,irrespective of the motives and aims of such actions. If the court vindicates these circumstances, the person will be recognized as an unworthy heir.

The withholding of the mandatory share of the inheritance should be carried out by court decision, on the basis of the appeal of the heir, for whom the withholding of the inheritance will bear proprietary consequences. It is noteworthy that a bequeather can forgive an heir at any time or change a will or include an unworthy heir in it. In such a case, the litigations regarding the recognition of a person as an unworthy heir become devoid of any sense. According to the civil legislature of Germany, "Producing a declaratory relief during the lifetime of a bequeather is not permissible, because he/she can forgive an heir at any time."[113]

Litigation should not be necessary for withdrawing an obligatory share from an unworthy heir, who has been exposed in committing a crime and has been deprived of any rights by parents. In this instance, an interested heir should have the right to deprive an unworthy heir of the obligatory share by means of appealing to notary and producing enacted court decision or verdict. Obviously, it is at the discretion of an heir whether he/she applies this rule towards an unworthy heir. If he/she does not produce such an appeal to notary, then we should assume that she/she has declined the legal right to acquire the inheritance share. Regarding the instance when an heir purposefully hindered a bequeather in carrying out his last will, and in such a way, facilitated his/her inclusion or the inclusion of his/her close relatives in the will, incentivised the increase of the share of inheritance, or committed a premeditated crime or any other immoral act against the final will of a bequeather,and also in the case when an heir viciously avoided the responsibility of caring for a bequeather, such a person should be recognized as an unworthy heir. These circumstances must be proved solely by the court.

In conclusion, through "interpreting a law and drawing analogies, a court enters the so-called "borderline mine-field" between legislative and judiciary bodies. A judge will be able to act success-

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111 *Marisheva N. I., Iaroshenko K. B.,* Article by Article Commentaries to the Third Part of the Civil Code of the Russian Federation, Contract Infra-m, 2004, 29 (in Russian).

112 *Shilokhvost O. U.,* Inheritance by Law in Russian Civil Law, Moscow, Norm, 2006, 330 (in Russian).

113 *Palandt O.,* Bürgerliches Gesetzbuch, 73. Aufl., München, 2014,§ 2340, Rn. 1-2.

fully and smoothly on this territory only if he/she adheres to the interpretation method of the law in good faith and makes the basis of his/her decision more transparent. [114]

If the law grants certain freedom to the judge in the process of making a decision, and the assessments established by law and other indicies do not contain valid and reliable grounds for agreed-upon views on justice, the decision should be made on the basis of the legal perceptions of a judge. Oftentimes, a judge appears in the situation, in which justice is violated owing to the unequivocal definition of the law and to the limitations of unarguable rules and principles of interpretation. In the instance when a judge is granted the freedom of decision-making during law interpretation and deficiency correction, he/she can participate in the development of legal proceedings. This way, the application of the law can become a momentous episode in the development process, which is always accompanied by the existence of the guaranteed justice and legal morale. [115]

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[114] *Papuashvili Sh.,* The Development of Law by Means of Judiciary Law and Access to Justice, "Georgian Law Review", № 4, Tbilisi, 2003, 462 (in Georgian).

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