

“Testate Succession” in the Italian and Georgian Legal Systems. Terminological Differences

Irina Gvelesiani

Associate Professor of the Faculty of Humanities at
Ivane Javakishvili Tbilisi State University, Tbilisi, Georgia
irina.gvelesiani@tsu.ge

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Abstract

Throughout the centuries human societies of the world have progressively established closer contacts. However, the pace of these processes has significantly increased during the last decades. The growing tendency of globalization has stipulated the resemblance of juridical norms of different countries. The given paper is dedicated to the problems associated with the transference of a deceased person's property. It describes a legal mechanism of practical realization of the right of inheritance and nominates it as one of the major rights of an individual. The rules of inheritance are usually applied after the death of a person. They comprise the norms of “testate” and “intestate” successions. However, “testate succession” - the inheritance established through the last will or testament – acquires pressing urgency in today's world. It enables individuals to make valid distributions of their property during the epoch of “all-embracing” market economy. The given paper presents a precise study of the Italian (capitalistic) and Georgian (“almost” capitalistic) “testate successions”. It singles out major terminological units and underlines the most prominent differences of capitalistic and “almost” capitalistic mechanisms of the modes of inheritance.

1. Introduction

During many centuries human societies of the world have progressively established closer contacts. However, the pace of these processes has significantly increased throughout the last decades. “Constantly progressive” process of globalization has stipulated an international integration arising from the interchange of the experiences depicted in different areas of life. The latest advances in communication and transportation technologies have given capital, goods and population unprecedented mobility. The world has been gradually becoming a boundless space connected with the exchange of ideas, world views and advances. Besides offering significant innovations, the process of globalization has even changed the contours of law and has created new global legal institutions and norms.

The given paper makes an attempt to answer the demands of the modern epoch via studying the Italian and Georgian legal norms dedicated to the testate succession. The greatest emphasis is put on the major concepts and their nomination, which somehow reveal the impact of the contemporary globalizing processes.

2. “Testate succession” in the contemporary Italian law

Succession can be regarded as “the procedure through which all legal aspects pertaining to the deceased are transferred to the heirs” (Italian inheritance). It means, that “the successors occupy the part of the deceased person in property relations. This type of permanent link between generations is a sine qua non (essential precondition) for public stability and perpetuity of cultural, property and spiritual traditions” (The Commentary of the Civil Code of Georgia, 2000) all over the world.

It's a well known fact, that during the centuries, transference of the estate has involved assets and liabilities of a deceased person. In modern times, any society considers the following issues having primary importance for the distribution of wealth and for the social and political structure of the society:

“1. the issue of the extent to which owners of property shall have the power by their own decision to determine the course of inheritance and, 2. the issue of whether or not estates shall be allowed or even required to pass undivided to one single heir” (Rheinstein M.).

Contemporary hereditary law is oriented on the disposition of a deceased person's property via a valid will (testate succession) or according to the rules of intestacy (intestate or legitimate succession). The given paper studies the Italian

and Georgian legal norms dedicated to the testate succession.

The Italian inheritance law dates back to the Roman law tradition. The Roman citizens could create a will via considering several very formal requirements of the validity of this legal document. The major requirement was the appointment of the heir/heirs. "An heir, in the Roman sense of the term, was a universal successor; that is, he took over the rights and duties of the deceased (insofar as they were transmissible at all) as a whole. On acceptance, the heir became owner if the deceased was owner, creditor if he was creditor, and debtor if he was debtor, even though the assets were insufficient to pay the debts" (Glendon M. A.). Till Justinian's famous reform, certain categories of heirs could avoid payment of debts via refusing the acceptance of the inheritance. Hence, Justinian changed this law. One of the most important peculiarities of the Roman legal system was the freedom of testation. However, it was limited to a certain extent. A part of a testator's property had to be left to his children (in some cases - to brothers, sisters and ascendants).

The contemporary Italian hereditary law vividly shares the principles of the Roman law tradition. If a person dies without leaving a valid will (*Intestata*), intestate succession (*Successione legittima*) takes place. If a person creates a will (*Testamento*) during his/her lifetime, the family members have to deal with a testate succession.

"*Testamento*" usually represents a legal document drafted and signed by a deceased person (*testatore*) during his/her lifetime. It states a testator's wish regarding the distribution of his/her estate between his/her beneficiaries (*Eredi/Legatari*). The contemporary Italian law makes distinction between three major types of wills:

1. *Testamento Olografo* (handwritten/holographic will) – this is a private deed, which is created, dated and signed by the testator himself/herself. A holographic will "can be drawn up at any time using any kind of sheet, without any cost. It can be kept by the testator, but it is more convenient for the testator to deliver the will to a public notary for publication, in order to avoid destruction before or after death" (Inheritance law, 2011);
2. *Testamento Pubblico* (formal/public will) – this is a formal deed drafted by the Italian notary under the instructions of a testator, read out by the notary and signed by the testator in the presence of witnesses;
3. *Testamento Segreto* (secret will) – "this is a will drafted/written by the testator and placed in a sealed envelope which is then delivered to an Italian notary. The notarial fees are reduced, the contents of the will shall remain secret until after the death of the testator when, the sealed envelope will be opened" (Dr. Claudio Del Giudice).

It's worth mentioning, that the creation of these three types of wills is available not only to the Italians, but to the foreigners as well. Moreover, a foreigner, who is not resident of Italy can draw up an holographic will according to the formal requirements provided by the Italian Civil Code. Such type of a will must be delivered to a trustworthy person, preferably, in a sealed envelope. After the death of a testator, a trusted person will deliver this document to the Italian notary for making all the required fulfillments: publication, registration, transcription in the Real Estate Public Register and payment of an inheritance tax. It's also worth mentioning, that "pursuant to Law No.90/387, Italy entered into the Washington Convention of October 26, 1973, providing a uniform law on the form of an international will. As a consequence, if the international will (of an Italian or a foreigner) is handwritten, even by the third parties, it is considered formally valid, irrespective of the place where it was drawn up, the nature of the goods, the object of the inheritance, the domicile or residence of the testator, or the language used to write the will" (Inheritance law, 2011).

All the above mentioned indicates to the freedom of the disposition of property by the will. However, the Italian law protects the members of the deceased person's immediate family via entitling them to the minimum statutory share (*Successione necessaria*). Therefore, the law reserves a portion of the estate (a reserved quota) to the so-called forced heirs. Accordingly:

- "The spouse is reserved half of the estate, unless the deceased leaves children. Article 540 of the Italian Civil Code reserves the right of the spouse to occupy the family home, and to use its furniture, even if there are other heirs;
- If a parent leaves only one child, legitimate or natural, he/she is reserved half of the estate. If more than one child is left, the children receive two thirds of the estate, divided into equal parts;
- If a deceased leaves only legitimate ancestors, they have the right to receive one third of the estate;
- If a deceased leaves a spouse with only one child (legitimate or natural), both of them have the right to receive one third of the estate ..." (Inheritance law, 2011).

The rights of forced heirs are strongly defended by the law. It's a well known fact, that any person during his/her lifetime may donate the ownership. He/she can also make a testamentary disposition of the wealth. However, if in consequence of testator's actions, the reserved portion is not respected i.e. if the testamentary dispositions or donations exceed the portion which the testator may legally dispose of, "*Azione di riduzione*" takes place. "*Azione di riduzione*" is a specific legal action, which permits the forced heirs to restore their right of a minimum statutory share via asking for the abatement. This legal action must be filed within ten years from the opening of the estate. "Any person who has received

donations or legacies in terms of money or property from the deceased during his/her lifetime is obliged to give back such things to the forced heirs (the so-called "*collazione*") (Inheritance law, 2011).

3. "Testate succession" in the contemporary Georgian law

Under conditions of globalizing processes and the growing tendency of the rapid development of the market economy, a testate type of succession becomes more and more popular in today's Georgia. It enables a testator to distribute his/her assets and liabilities according to his/her last will and testament. During the Soviet era, the acting legislation required a notarial attestation of a will. However, the contemporary Georgian law of succession enables each person to make a preferential will. Therefore, the distribution of property depends on the testator, who makes a valid will in order to leave his/her estate or its part to one or several persons from the circle of intestate successors or outside it. The Georgian testate succession comprises the following major elements:

- *moanderZe (moanderze)*– a person who creates a will;
- *anderZismieri memkvidre (anderdzismieri memkvidre)* – a person or an entity, which receives property from the estate of a deceased through a valid will;
- *anderZi (anderdzi)*– a document created by the testator.

A person making a will must be a capable adult, who wisely justifies his/her actions and clearly expresses desires during the process of the creation of the document. The Georgian wills are created according to the proper format. They must be in writing. A written will may be in a notarial form (the so-called *sanotaro anderZi (sanotaro anderdzi)*) or without it.

"A notarial form requires a will to be prepared and signed by the testator and attested by a notary, but if a notary is not available, the above mentioned function is executed by a local self-government body" (The Civil Code of Georgia, 2012). Generally, wills are prepared by testators, but in certain cases, it is permitted, that a will in words of the testator be written down by a notary in the presence of two witnesses. The usage of generally accepted technical means while writing down the given document is also permitted. "A will written by a notary in words of the testator will be read by the testator and signed by him (her) in the presence of a notary and a witness" (The Civil Code of Georgia, 2012). "Notarized wills" (official wills) differ from unofficial or holographic wills (the so-called *xelnaweri anderZi (khelnatseri anderdzi)*).

Holographic/handwritten wills are made personally by the testator. The creation of a will through a representative is not permitted. The category of handwritten wills consists of a "domestic will" (the so-called *Sinauruli anderZi (shinauruli anderdzi)*) and a "closed will" (the so-called *daxuruli anderZi (dakhuruli anderdzi)*). "Domestic wills" are made in the testator's handwriting and signed by him (her). In cases of a "closed will": "at the request of a testator, witnesses will confirm the will so that they do not know its content. In this case, the witnesses should be present during the signing of the will. During the confirmation of a closed will, the witnesses have to indicate that it was made personally by the testator and that they did not become aware of the content of the will" (The Civil Code of Georgia, 2012).

A will is usually executed by one person. However, the Civil Code of Georgia permits a joint creation of a will by two or more individuals. In such cases, only spouses are allowed to make a reciprocal will on joint legacy, which may be revoked by one of the spouses, but still during the lifetime of both of them. This type of a will is called a "joint will" (the so-called *saerTo anderZi (saerto anderdzi)*).

Like the Italian legal system, the Civil Code of Georgia often faces the problem of the freedom of disposition by will. Testators' wishes are usually restricted by the existence of the so-called "reserved quota" (*savaldebulo wili (savaldebulo tsili)*). However, in contrast to the Italian law, the Georgia's Civil Code entitles all the forced heirs to receive equal shares. Therefore, according to Article 1371: "despite the contents of a will, a deceased person's children, parents and spouse are entitled to a reserved portion, which is equal to the half of the share transmitted to them in case of an intestate succession (The Civil Code of Georgia, 2012).

The rights of forced heirs are strongly defended by Georgia's law. It's a well-known fact, that any person during his/her lifetime may donate the ownership via making a gift. However, Article 1378 of The Civil Code of Georgia permits the forced heirs to increase their minimum statutory shares via asking for the inclusion of a testator's "*inter vivos*" gifts into the estate. This legal action is considered only within ten years from the donation.

4. Conclusions

All the above mentioned enables us to conclude, that the process of globalization has embraced the whole world. It

"unites the world communities" (Makstutis A., Tumulavicius V., 2012), facilitates the emergence of political changes and stipulates the integration of the legal systems of different countries. Certain changes can be seen in the laws of the countries of the former USSR. The given paper has presented a comparative analysis of the Italian law and the Georgian legislation, which was formed on the basis of the legal system of the USSR. The major emphasis has been put on the concept of "testate succession" and terms related to it. The carried out research enables us to single out the following outcomes:

1. The contemporary laws of Georgia and Italy make distinction between testate and intestate successions. The legal systems of both countries single out three major elements of testate succession: a testator (*the Italian - Testatore; the Georgian - moanderZe*), an heir (*the Italian - Erede; the Georgian - anderZismieri memkvidre*) and a will (*the Italian - Testamento; the Georgian - anderZi*).
2. The contemporary laws of Georgia and Italy nominate a "will" as the most commonly used legal instrument by which a testator regulates the rights of others over his/her property after his/her death. The legal systems of both countries differentiate official (notarized) and unofficial types of wills. However, the major difference lies in the fact, that the Civil Code of Georgia recognizes domestic (*Sinauruli anderZi*), closed (*daxuruli anderZi*) and joint (*saerTo anderZi*) wills, while the corresponding legal terms are not found in the Italian law. The Italian legal system makes distinction between *Testamento Olografo* (handwritten/holographic will) and *Testamento Segreto* (secret will). However, it's worth mentioning, that *Testamento Olografo* can be identified with *Sinauruli anderZi*. Both of them represent a private deed, which is created, dated and signed by the testator himself/herself. *Testamento Olografo* and *Sinauruli anderZi* can be kept by the testator or can be delivered to a notary.
3. The contemporary Italian and Georgian legal systems single out a concept of a *forced heir*, which is entitled to a reserved portion. Italian law strongly defends the rights of forced heirs via a specific legal action "*azione di riduzione*". This concept and its corresponding terms are not found in the Georgian Civil Code. However, the Georgian law permits the forced heirs to increase their minimum statutory shares via asking for the inclusion of a testator's "*inter vivos*" gifts into the estate.

Finally, it's worth mentioning, that the comparative analysis of the Georgian and Italian legal systems revealed their major differences and similarities. Obviously, the existed terminological and conceptual gaps will be filled during the flow of time via the influence of ongoing globalizing processes. The Georgian testate succession has already undergone important changes after the completion of the Soviet era. Wills acquired holographic forms and simplified the process of the transference of property. Supposedly, the final establishment of capitalism (in Georgia) will "increase the homogeneity" of the Georgian and Italian legal systems.

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