**ON BEHALF OF THE REPUBLIC OF AZERBAIJAN**

**DECISION**

# OF THE PLENUM OF THE CONSTITUTIONAL COURT

**OF THE REPUBLIC OF AZERBAIJAN**

## On verification of conformity of Article 1193 of the Civil Code of the Republic of Azerbaijan to parts I and II of Article 13 and parts I, II of Article 29 of the Constitution of the Republic of Azerbaijan

**20 October, 2011 Baku city**

The Plenum of the Constitutional Court of the Republic of Azerbaijan composed of Farhad Abdullayev (Chairman), Sona Salmanova, Fikret Babayev, Sudaba Hasanova, Rovshan Ismaylov, Jeyhun Garajayev (Reporter-Judge), Rafael Gvaladze, Isa Najafov and Kamran Shafiyev;

attended by the Court Clerk V.Zeynalov,

representative of the addressed body – Mahir Mammadov, the senior advisor of the Scientific and Analytical Department of the Staff of Ombudsman,

representative of respondent body – Vasif Amiraslanov, adviser of Department of the Economical Legislation of Milli Majlis of the Republic of Azerbaijan,

expert – Server Suleymanli, senior teacher of Civil Law Board of Baku State University,

## has examined in open session via special constitutional proceedings in accordance with Article 130.VII of the Constitution of the Republic of Azerbaijan the constitutional case on the basis of inquiry of the Ombudsman of the Republic of Azerbaijan of 2 May 2011 on verification of conformity of Article 1193 of the Civil Code of the Republic of Azerbaijan to parts I, II of Article 13 and parts I, II of Article 29 of the Constitution of the Republic of Azerbaijan

Having heard the report of Judge Jeyhun Garajayev and statements of the representatives of the parties, opinion of expert and examined the case, the Plenum of the Constitutional Court of the Republic of Azerbaijan

**DETERMINED AS FOLLOWS:**

The Ombudsman of the Republic of Azerbaijan, having submitted to the Constitutional Court of the Republic of Azerbaijan (hereinafter referred to as Constitutional Court) an inquiry, asked for verification of conformity of Article 1193 of the Civil Code of the Republic of Azerbaijan to parts I, II of Article 13 and parts I, II of Article 29 of the Constitution of the Republic of Azerbaijan (hereinafter referred to as the Constitution).

In inquiry it is also specified that Article 1193 of the Civil Code is not in conformity with requirements of Articles 152.1, 1166 and 1176 of the present Code.

In Article 1193 of the Civil Code it is noted that irrespective of testament’s content testator (testatrix)’s children, parents and spouse have obligatory share of inheritance. According to the law this share makes up to the half of the share due to them (obligatory share) during intestate succession. In this article the circle of people having the right to receiving an obligatory share irrespective of contents of the testament is defined.

According to applicant the right “obligatory share in inheritance” contradicts to Articles 13, 29 of the Constitution and unreasonably limits the property right established by Article 152.1 of the Civil Code.

At the same time, the applicant considers that sometimes the obligatory share can be received contrary to testament of the testator. If the testator in the testament in general deprives of the successor possessing the right to an obligatory share in inheritance, the rights to inheritance then its testamentary order does not deprive this person of the right to an obligatory share in inheritance. The successor can be deprived of the right to an obligatory share not by the testament but according to Article 1203.2 of the Civil Code by court on the basis of the address of the testator at his life. According to applicant the resolution of the matter of law to receiving an obligatory share in inheritance in that order contradicts to Articles 1166 (concept of the testament) and 1176 (deprivation of succession by testament) of the Civil Code. So, if the person included in the list of successors on the testament, in any case has to receive, at least a half of that obligatory share which is due to it at inheritance under the law, the provision of the Civil Code that the testator has the right to disinherit in the testament one, several or all successors under the law and is not obliged to prove it, loses the value.

Plenum of the Constitutional Court in connection with a question lifted in inquiry, considers necessary to note the following.

The property right fixing individual accessory of material benefits, – one of the basic rights fixed in the Constitution and in the international acts which the Republic of Azerbaijan is a party too. According to Article 13 of the Constitution in the Republic of Azerbaijan the property is inviolable and protected by the state. According to Article 29 of the Constitution everyone has the right to property. Any type of property does not prevail over others. The property right, including the right of a private property is protected by the law. No one may be deprived of his property without a court decision.

As evident, the property right is inviolably and there are special conditions of its restriction.

The property right is considered one of bases of democratic society, constitutional state reflecting supreme human values. According to Article 1 of Protocol 1 of the Convention for the Protection of Human Rights and Fundamental Freedoms (hereinafter referred to as Convention) every natural or legal person is entitled to the peaceful enjoyment of his possessions.

According to Article 152.1 of the Civil Code the ownership rights means acknowledged right, protected by the state, of a subject to possess, use and dispose of property (chattel) belonging to such subject at their discretion.

However, the property right as well as many constitutional laws of the personality in certain cases can be limited. So, according to Article 71.2 of the Constitution the everyone’s rights and freedoms are restricted on the grounds provided for in the present Constitution and laws, as well as by the rights and freedoms of others. Such restriction on the property right is specified in Article 13.3 of the Constitution, and also in Article 152.5 of the Civil Code.

The ban on using of property provided by Article 13.3 of the Constitution to infringe upon rights and freedoms of man and citizen, interests of society and state, and the dignity of the human person can be regarded as one of the main restrictions imposed on property. According to the civil legislation the owner in the limits established by the legislation, or in other form, including, contractual restrictions can masterfully use, enjoy and dispose of property (chattel), cannot allow transition is right possession of the specified property to other persons, has the right to make at discretion any actions in the relation the property belonging to him on conditions that these actions did not violate the rights of other persons, or there was no abuse of the right.

Thus, the property right belonging to the person can be partially limited for the purpose of not assumptions of violation of constitutional rights of others.

In turn, Article 29.5 of the Constitution guarantees a right of succession. In broad understanding this article of the Constitution, on an equal basis with the right of the testament at the same time creates also guarantees on the right of receiving inheritance. So, the guarantee of a right of succession means inheritance leaving, that is, on the one hand, to have opportunity to bequeath and with another – being the successor, to accept inheritance and to own of it.

According to the civil legislation of the Republic of Azerbaijan the concept of inheritance is understood as transition of property of deceased person to other persons (successors) by law or testaments, or on both bases. The hereditary relations between the testator and successors arise on the bases provided in the law or on the testament, based on testaments of the testator (Article 1113 of the Civil Code).

The institute of a right of succession regulates the civil-legal relations existing between group of norms of the family and labor laws. The inheritance institute in a certain degree reflects in itself specific features of both groups of norms (family and labor). So, this feature of institute of a right of succession proves, as in a binding character of considerable part of the rules relating to it, and in restriction with special conditions of freedom of the contract.

Legal systems of the states in which there is a right of succession, provide creation of this legal institute on the basis of two various principles: principle of individuality and principle of family wellbeing.

The principle of individuality puts above all interests of the owner and provides a complete dependence of inheritance from testament of the testator. This principle provides possession an individual in the period of life, and also after death, powers of definition of a fate of the property (the property benefits). Thus, the main conditions of the property right are provided. According to sense of this principle if for an individual conditions for the full order are not created by the property, it can become just the user of property and in the period of life won't show effort for increasing and qualitative renewal of property.

The principle of family wellbeing in the law of succession provides a prevalence of interests of the family members making a social unit of civil society, over interests of other persons. According to this principle to the persons tied with the testator by close related bonds (the child, the husband, the wife, parents) regardless of testament of the testator is allocated an obligatory share from inheritance.

Naturally, that during lifetime the owner possesses the right of the dispose over property belonging to it. At the same time, the owner in a certain degree bears responsibility before children and also other close family members. The families relations are protected from the rash decision of one family member in which interests of other its members are not considered. Everyone can acquire during lifetime property, use and dispose of it at discretion. However, the property right of the person over this property stops after his death, and he does not participate in a type of the subject in legal relations. In that case, according to logic of the principle of family wellbeing, the right of the order property (a certain part of property), belonging to the owner during lifetime, after his death has to belong to close members of his family. At inheritance under the law this principle proves in rules of sequence, hereditary transmission and serves for receiving inheritance to a circle of closer persons. Thus, the right of an obligatory share in the inheritance, limiting freedom of the testament, serves protection of family interests.

In the civil legislation of the Republic of Azerbaijan the institute of the law of succession is created on the basis of unity of both principles.

According to Article 1133.1 of the Civil Code the property of the deceased (testator (testatrix) is devolved to other persons (heirs) according to law or testament or on both grounds.

Intestate succession (devolution of decedent’s property to persons indicated in law) is effective in case of an intestacy or if testament is declared invalid entirely or partly (Article 1133.2 of the Civil Code).

It should be noted that as well as the property right and the right to heir and be the successor from the point of view of social justice have the limits (borders). According to Article 1193 of the Civil Code Irrespective of testament’s content testator (testatrix)’s children, parents and spouse have obligatory share of inheritance. According to the law this share makes up to the half of the share due to them (obligatory share) during intestate succession. It is means that the testator cannot deprive of these persons of the right of receiving an obligatory share in inheritance on the basis of the testament. The legislator, establishing in Article 1193 of the Civil Code a circle of people, possessing the right of an obligatory share in inheritance in such order, that is, specifying prime successors under the law, pursues the aim to preserve, keep and warden the family relations.

Obligatory share in inheritance is the traditional part of the law of succession possessing a social and economic and moral component. The right of an obligatory share plays a role of a social guarantee concerning a certain category of relatives (that is obligatory successors) the deceased person.

As evident, the Civil Code guaranteed the right of the person to dispose of part of the property on the basis of the testament and also the right of family members to receiving an obligatory share in inheritance. Thus, the legislator, proceeding from a principle of social justice in the law of succession, counterbalancing the relations between an individual and the state, the gender relations, the relations young with elderly, a stable family and other relations, creates equal legal opportunities for a certain category of privileged persons (children, women, people with physical deviations) in comparison with others.

In itself principle of social justice is a counter concession of interests of certain people, social groups because mutual concessions and relative equalizing of opportunities of subjects in legal relations make essence of management of society in modern conditions. For this reason, function of social justice of the right in society as a whole corresponds to the nature of the principle of justice.

The right to an obligatory share in the inheritance, limiting the right of the testament, originate from the Roman right. In the Roman right this right was covered by rather wide range of persons: the widow, “being in need” (that is the woman who does not have personal property, also is not able to provide herself after death of the husband); directly consisting under the power only at the mention of their names in the testament (heredes sui); emancipated children; brothers and sisters (if their names were not entered in persona turpis testament, that is were not unworthy) and persons of some other categories. Even in practice of the Roman lawyers the opinion was created that the testator who has not provided the successors, admitted feeble-minded and therefore, recognized as weak-headed and as a result of such injustice, his close relatives could submit the claim against him in connection with rights of succession (querela inofficiosi testament).

In the majority of the states of modern Europe the right of an obligatory share in institute of the law of succession is accepted as the important social guarantee protecting the family relations. In the decision of the European Court of Human Rights of 13 June 1979 on case on Marckx v. Belgium it is specified that obligations under the alimony or the right of an obligatory share in inheritance exists in the legislation of the majority of the states which have signed the Convention and the right of succession of property is a component of family life. In the dissenting opinion on the this case the judge of Pinheiro Farinha noted that “the reserved portion - from which only relatives benefit – thus constitutes a form of family protection arising from the moral and social obligations existing between persons connected by close family ties”.

In several cases of the Constitutional Court of the Russian Federation, connected with individual cases: in definitions concerning refusal in acceptance to consideration of complaints of 17 May 1995 No. 31-O of citizen G.V.Grisha, of 22 March 2011 No. 421-O-O of citizen I.I.Golubeva it was specified that rules of an obligatory share in the inheritance, testaments limiting the right, in the civil legislation are added for the purpose of material security of the persons needing special protection.

Based on the above, Plenum of the Constitutional Court considers that from the point of view of social justice the institute of the obligatory share established by Article 1193 of the Civil Code does not contradict to norms relating to the property right of the person, fixed by the Constitution.

Due to other question lifted in inquiry, Plenum of the Constitutional Court notes the following.

According to Article 1166 of the Civil Code the individual person can give by a will his (her) property or its part to one or more persons among his (her) heirs or to one or more persons who are not among his (her) heirs.

According to the civil legislation of the Republic of Azerbaijan the testament of the testator as the basis of emergence of the hereditary relations, prevails over inheritance under the law. However, in case of absence of the testament of the testator, inheritance under the law is valid. In the hereditary relations the prevalence of the testament is directed on providing the property right of an individual. So, according to the legislation, the testator has opportunity during lifetime to dispose of the property.

The testament is an expression of testament of the full age capable individual in writing about transfer of the property either its part to one or several persons as entering and also not entering into a circle of successors (Articles 1166, 1167 and 1179 of the Civil Code).

At the same time, according to Article 1176.1, the testator (testatrix) may disinherit with his (her) testament any or all of his (her) heirs at law without proving his (her) decision. As evident, this article is based on the principle of freedom of the testament and guarantees the right of the owner to the free order property by drawing up the testament. So, for deprivation of the successor of inheritance there is enough instruction on it testament of the testator without any explanation. If the testator provides in the testament deprivation of the law of succession any of successors, this ban is not applied to an obligatory share of inheritance, and covers only a share of hereditary property which is due to this successor.

However, the civil legislation also does not recognize the right of an obligatory share in inheritance as the obligatory (boundless) right. Taking into consideration the inherence of the property right, the civil legislation allows the owner still during lifetime by an appeal to the court to deprive of the successor or successors as a whole the right to an obligatory share (Article 1203.2 of the Civil Code). It should be noted that according to Article 1203.1 of the Civil Code, generally deprivation of obligatory share acquiring right is possible in cases causing succession deprivation. Thus, the testator, during lifetime having shown to court the statement of claim with the indication of the circumstances which are the reasons of deprivation of a right of succession, can deprive by means of the judgment of successors of the right to an obligatory share.

According to the Azerbaijani legislation deprivation in the testament of inheritance of one, several or all successors under the law the testator and thus lack of a duty to prove it, is important, from the point of view of the principle of freedom of the testament. Possibility of deprivation of the successor or successors as a whole the rights to an obligatory share by an appeal to the court, the testator still during lifetime completely protecting freedom of the testament, on the one hand, protects legitimate interests of successors, and with another – serves as a property right guarantee (the right of the person of the full order over property).

Considering the above, Plenum of the Constitutional Court notes that deprivation of inheritance of one, several or all successors under the law in the testament the testator should not be understood as deprivation of these persons of the right to an obligatory share. At the same time, deprivation of these persons of the right to an obligatory share by the testator can be applied in an order provided by Article 1203.2 of the Civil Code.

On the basis of specified the Plenum of the Constitutional Court comes to the following conclusions:

- from the point of view of a principle of social justice which is a component of legal system, Article 1193 of the Civil Code corresponds to parts I and II of Article 13, parts I, II, III and V of Article 29 of the Constitution.

From the point of view of time requirements, a circle of people, having the right of receiving an obligatory share in inheritance, and the question of change of volume of an obligatory share of successors can be defined by the Milli Majlis of the Republic of Azerbaijan within its powers.

Being guided by parts VII and IX of Article 130 of the Constitution of the Republic of Azerbaijan and Articles 52, 62, 63, 65-67 and 69 of the Law of the Republic of Azerbaijan “On Constitutional Court”, Plenum of the Constitutional Court of the Republic of Azerbaijan

**DECIDED:**

1. From the point of view of principle of social justice which is a component of legal system, to recognize Article 1193 of the Civil Code as corresponding to parts I and II of Article 13 as well as parts I, II, III and V of Article 29 of the Constitution.

From the point of view of time requirements, a circle of people, having the right of receiving an obligatory share in inheritance and the question of change of volume of an obligatory share of successors can be defined by the Milli Majlis of the Republic of Azerbaijan within its powers.

2. The decision shall come into force from the date of its publication.

3. The decision shall be published in “Azerbaijan”, “Respublika”, “Xalq Qazeti” and “Bakinskiy Rabochiy” newspapers, and “Bulletin of the Constitutional Court of the Republic of Azerbaijan”.

4. The decision is final and can not be cancelled, changed or officially interpreted by any body or official.