HUMAN RIGHTS AND INHERITANCE LAW: A MIRRORED PERSPECTIVE

Aniela-Flavia ȚICĂU-SUDITU[*]

Abstract

The enforcement of fundamental human rights in the spectrum of inheritance law has a lengthy history. From a modern perspective, we confront with a divergent dynamism: the inheritance law has a static dimension, being considered the traditional area of private law. On the other hand, the human rights are more dynamic, and urge to find themselves respected in all the areas of law.

The article unfolds from two perspectives: a syncretic, at a national level point of view and a diachronic, evolutionary one, at a supernational level, of the way the jurisprudence on human rights led towards the legislative changes. As part of the national civil law system, as an anchor in private law, inheritance law is ruled according to internal provisions, making harmonizing the law a challenging endeavor. Despite mutual socio-historical heritage and Roman law origins, there are plenty differences within the substantive succession laws of Member States. Due to the intra-community right to free movement, the patterns of life changed, both from the perspective of the European Union and from the Member States" point of view. As a corollary, transforming life also means shifting the mortis causa legal approach, mainly by considering the succession law.

The aim of this article is to examine the influence of human rights in the area of inheritance law, mainly in family law and property law, across different jurisdictions. Its structure will follow the paradigm of outlining the influence of fundamental human rights in contrast with the general principles of inheritance national laws. The article concludes by exploring the legislative impact and the limits that human rights have from the inheritance law perspective.

Keywords: *inheritance law, human rights, succession law, harmonization.*

1. Introduction

This article seeks to address an analytical overview of critical issues concerning the interpretation and application of fundamental rights, observing that the major impact of fundamental rights, from the private law perspective, is not on the legislation, but on the case-law. This happens as a consequence of interpreting fundamental rights in an appropriate manner in order to apply them to private law rules. In fact, by ricochet, the impact transfers towards the legislation in time, that has to encompass the updated case-law. Therefore, the legal literature points towards an indirect horizontal effect, noting that basic human rights have only a limited influence on inheritance law. As a consequence, it is brought forward the concept of "*subsidiarity in reasoning"*, by interpreting private law using fundamental rights principles and patterns, even though national private law has priority[1].

Inheritance rights are traditionally considered constitutional rights, as most states" constitutions guarantee a specific

[*] Judge, Ph.D. Candidate, Bucharest University of Economic Studies (e-mail: aniela.suditu@yahoo.com).

[1] Verica Trstenjak, Petra Weingerl (eds.), *The Influence of Human Rights and Basic Rights in Private Law*, Ius Comparatum- Global Studies in Comparative Law, Springer, Switzerland, 2016, p. 9.

right of inheritance. Accordingly, there are some principles that encompass these rights. Throughout this paper, we will only discuss the most important ones. For example, the principle of equality, which entails that each natural person is equal in case of succession, with the same rules and conditions applying to all civil rapports. Also, it implies that men or women, legitimate and illegitimate children, as participants to civil relationships, must all be treated the same.

Initially, the rationale of asserting human rights involved vertical relationships. These rapports had the specific attributes that made the object of public law, thus regulating the relationship between the states and individuals by striving for the protection of individuals versus state interference in the area of fundamental rights. The objective is accomplished primarily by enforcing both negative and positive obligations for the states.

Subsequently, that rationale of asserting human rights is continuously expanded, merging in the process the area of private law. Due to the influence on horizontal relationships, this impacts the way that legislators establish and regulate these bonds between individuals.

2. Legal Sources of Human Rights

For a better approach, we will highlight the sources or instruments of human rights, on their different levels. At an international level, the human rights are defined and theoretically protected[2] by treaties, such as the *United Nations" Universal Declaration of Human Rights*, proclaimed by the *United Nations General Assembly* in Paris, in 1948[3].

At a regional level, the instruments become more effective: the *European Convention on Human Rights*, formally the *Convention for the Protection of Human Rights and Fundamental Freedoms*[4] is recognized by the signing parties: member states and the Union itself. As a consequence, the *European Court of Human Rights* protects the human rights stated in the Convention. Another regional instrument is the *European Charter of Human Rights*[5], enacted in 2000. In addition to these instruments, general principles regarding human rights might be found in the *Treaty on the European Union*[6], *Treaty on the Functioning of the European Union*[7] and in the jurisprudence of the *Court of Justice of the European Union.*

Besides the instruments listed above, we also distinguish national-level instruments or sources, such as national constitutions and the rulings of constitutional courts or other national courts that impact by their jurisprudence not only the ruling of other courts, but also the legislative perspective. However, there is a constant dynamism regarding the interpretation of the concept of human rights, due both to social and economic

[2] It is only a theoretical protection due to the fact that the treaty is a non-binding legal instrument. As a consequence, there is no particular court, either at national or international level, that is bound to protect the human rights, as stated in the Treaty.

[3] Available at, https://www.un.org/en/about-us/universal-declaration-of-human-rights, accessed at 24.03.2021.

[4] Available at https://www.echr.coe.int/documents/convention_eng.pdf, accessed at 24.03.2021.

[5] Available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:12012P/TXT, accessed at 24.03.2021.

[6] Available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012M%2FTXT, accessed at 24.03.2021.

[7] Available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A12012E%2FTXT, accessed at 24.03.2021.

progress. In this respect, the development of private law protection of human rights enables reducing discrimination by protecting weaker parties[8].

Enabling human rights provisions is in close connection with the harmonization or adaptation of Member States" legislations. The purpose of unifying inheritance law in the European Union led towards the enactment of *Regulation (EU) No 650/2012*[9] *and* the implementation of the *European Certificate of Succession*. The regulation was met with great confidence, as being a proof of institutional harmonization of succession law among the Member states of European Union, concurrently establishing a better integration within the European Union and its principles.

The ideal scenario for best implementing human rights, as they are provided for by the sources indicated, implies reducing the divergences of Member states" national regulation concerning inheritance law. This is best achieved by unifying the rules of conflicts of law, mainly involving technical aspects, such as the procedure of determining the variables of inheritance, like heirs, estate portions, reserved estate portions et alii.

In case of cross-border inheritance procedures, because of the different inheritance laws that might apply, the context increases the difficulty, generating concerns not only regarding the lack of legal uniformity, but also in relation with the legal incompatibility. Therefore, the exercise of harmonizing succession laws is welcomed at European level. Moreover, the tendency leans towards creating a common European succession law framework. In this regard, *Regulation No. 650/2012* represents a first step towards harmonization, addressing cross-border juridical matters in a dual manner, by observing both legal and jurisprudential features. Also, the *Regulation No. 650/2012* founds the *European Certificate of Succession* that scrutinizes succession related rights from the Member States.

The *Regulation*"s prime purpose from the European Union"s standpoint was the removal of internal Member states" legal inheritance-related obstacles, as they were encountered while exerting the right to free movement of persons[10]. In other words, the *Regulation*"s aim involved the "*collision uniformity of the succession*", as a first step towards harmonization. This concept entails that the applicable inheritance law involves a single connector, and as a consequence, the estate can be entirely inherited under a single substantive national law. By contrast, in case of inheritance disputes that involve more connectors, such as nationality or category of assets, the determination of applicable law can lead towards *"collision divisibility of the succession"*, enabling the divergent jurisdiction of national substantive laws over distinct inheritance assets.

This purpose would be accomplished in a dual manner. Firstly, the *Regulation* was intended to support the procedures of

[8] Verica Trstenjak, Petra Weingerl (eds.), *The Influence of Human Rights and Basic Rights in Private Law*, Ius Comparatum- Global Studies in Comparative Law, Springer, Switzerland, 2016, p. 6.

[9] *Regulation (EU) No 650/2012 of the European Parliament and of the Council of 4 July 2012 on jurisdiction, applicable law, recognition and enforcement of decisions and acceptance and enforcement of authentic instruments in matters of succession and on the creation of a European Certificate of Succession,* available at https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32012R0650, accessed at 24.03.2021.

[10] Recital 9 of the *Regulation* provides that it applies to '*all civil law aspects of succession to the estate of a deceased person, namely all forms of transfer of assets, rights and obligations by reason of death, whether by way of a voluntary transfer under a disposition of property upon death or a transfer through intestate succession*.", available at https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A62016CJ0558, accessed at 24.03.2021.

recognition and enforcement at intranational level. Therefore, the judgments delivered by a Member State could be easily recognized by a different Member State, thus reducing the incidence of inheritance-related incoherent case-law and jurisdictional disagreements involving a cross-border element. Secondly, the *Regulation* provided for the *European Certificate of Succession*, thus enabling a prompt assessment of inheritance cases involving a cross-border element, without altering the Member states internal substantive succession legislation.

One of the main features of the *Regulation* is the establishing as a general principle[11] the jurisdiction of the Member State where *de cuius* had the last *habitual residence*[12]. Therefore, the *habitual residence* at the time of death is a main connector that is provided by the *Regulation.* Nevertheless, the *Regulation* does not impose this connector unto its recipients. For example, *de cuius* can indicate the applicable law, and as a result, the choice of law is a connector itself.

Therefore, even though the *Regulation* could not be a silver bullet for the legal harmonization issue, delivered an efficient solution for the applicable legislation. In time, this process will eventually help reducing the legislative divergence by enabling the juridical communication among Member states and by decreasing the discrepancies and conflicts encountered in the process of applying the law, that led towards the above mentioned "*collision fragmentation of the estate"*[13].

3. The legislative impact of human rights in the inheritance law

The *European Court of Human Rights*, by its jurisprudence, recognized in an indirect manner the fundamental human rights, in this purpose presenting a synthesis of the constitutional laws and traditions established by the Member states. Likewise, The *Charter of Fundamental Rights* represents a significant landmark for the Union"s legislation, because it represents a written bill of rights, whereas *European Convention on Human Rights* embodies an outward bill of rights, generating a possible blunder regarding the legislative origin or legal source of fundamental rights. However, most fundamental rights are not considered absolute rights, recognizing that they can be limited accordingly with the public interest and the principle of proportionality.[14]

Even though the *European Convention on Human Rights* has impacted just a few cases regarding inheritance issues, it remains an important instrument invoked by parties involved in an inheritance dispute. The main provisions that are raised in order to settle the disputes are articles 6, 8, 14 of the Convention and article 1 of Protocol No. 1. The principle of "*the right to enjoy a possession"* and its protection according to *European Convention of Human Rights*, has been an unsettled odyssey. Allegedly, this particular bill of rights is not very resourceful in the inheritance-related issues. This being said, we will examine inheritance-related rights recognized by the

[11] Entitled 'the backbone of the system of succession established by the Regulation'; see Mariusz Zatucki, "Attempts to Harmonize the Inheritance Law in Europe: Past, Present, and Future," Iowa Law Review 103, no. 5 (July 2018): 2317-2342.

[12] The concept of habitual residence designates the place where de cuius was 'at home', where life was most significant and where animus semper manendi contrasting with the concept of "domicile", as it is recognized by national jurisdictions.

[13] See Mariusz Zatucki, "Attempts to Harmonize the Inheritance Law in Europe: Past, Present, and Future" , Iowa Law Review 103, no. 5 (July 2018): 2317-2342.

[14] Robert Schütze, An Introduction to European Law, Cambridge University Press, 2015, pp. 105.

Convention. For example, the right to inheritance is considered, according to *European Convention of Human Rights*, a possession within the scope of Article 1 of Protocol No 1. The European Court established a judicial divergence between two type of rights: on one hand, a settled right, and on the other hand, an expectation of inheritance. In order to have a consistent perspective, we shall examine some of the relevant case-law[15] in the following pages.

As a parenthesis, the consequences of discrimination are plenty and deceptive. In some legislations around the globe, the discrimination is mirrored by the failure of enacting the principle of equality. In such countries, the right to own property is not guaranteed by law for women[16]. However, the right of every person to equality before the law and enjoy the right to own property or the right to inherit, is still an unattained purpose. For example, in a decision from Kenya,[17] regarding the inheritance of land, the Court observed the violation of article 1 of the *Convention on the Elimination of All Forms of Discrimination against Women*. In the cited case, because of the gendered-biased customary law, the daughters-heirs were entitled to a smaller portion of land than the sons-heirs, based expressly on their gender, thus infringing on basic human rights.

3.1. Property and inheritance as human rights

As stated in the legal literature, inheritance law "*deals with the passing on of property and rights and obligations, upon the death of an individual"*[18]. The legal research indicates that more than half a million legal cases encompass every year cross-border inheritances. Moreover, the percentage of cross-border inheritances amongst all the inheritance legal cases in the member states reaches the value of 10%[19]. It is a general rule that, at a European Union"s level, the differences among the national inheritance laws generate insecurity and uncertainty, rendering the difficulty both for de cuius and for the heirs to acknowledge their rights to leave and to receive inheritance in different countries[20]. Undoubtedly, this divergence of Member states" national regulation is an important obstacle in achieving real harmony in the area of human rights. In the following lines we will analyze the circumstances of forced heirship and disinheritance from a human rights standpoint.

Table 1:

Some Member States" legislations provide that one portion of the deceased"s estate must be granted, to a class of heirs titled forced heirs. This provision is effective no

[15] Jonathan Glasson QC and Toby Grahamy, Inheritance: a human right?, Trusts & Trustees, Vol. 24, No. 7, September 2018, pp. 659–666.

[16] Land and Human Rights, Standards and Application, HR/PUB/15/5/Add.1 © 2015 United Nations "In Cameroon there is no legal provision for women to own property. Following traditional laws, a woman does not inherit land since she will marry and then be provided for by her husband outside her community. When her husband dies, again she will not inherit as the land returns to the husband's family." Source: Report of the Special Rapporteur on violence against women (E/CN.4/2000/68/Add.5), para. 14.

[17] Court of Appeal Eldoret: Mary Rono v. Jane and William Rono, Civil Appeal No. 66 of 2002, as cited in Land and Human Rights, Standards and Application, HR/PUB/15/5/Add.1 © 2015 United Nations.

[18] Martin Schauer, Bea Verschraegen (eds), *General Reports of the XIXth Congress of the International Academy of Comparative law*, Ius Comparatum- Global Studies in Comparative Law, Springer, Switzerland, 2017, f. 91.

[19] See Eleanor Cashin Ritaine, *National Succession Laws in Comparative Perspective*, 14 ERA F. 131, 132 (2013).

[20] Mariusz Zatucki, "*Attempts to Harmonize the Inheritance Law in Europe: Past, Present, and Future*," Iowa Law Review 103, no. 5 (July 2018): 2317-2342.

matter the deceased"s will and is applied both to donations and testaments. But even if the provisions are well established in the national legislations, they are, nevertheless, constraining the right to property. As a consequence, the deceased cannot freely dispose of the property, thus disregarding the right to protection of property, as stated in the *European Convention on Human Rights,* Article 1 of Protocol no. 1. From this perspective, the legal provisions on forced heirship interfere with the right to protection of property as stated in the *European Convention on Human Rights*, Article 1 of Protocol no. 1, although the institution itself theoretically pursues a legitimate purpose.

Table 2:

Another aspect is to distinguish if this particular interference is needed and appropriate in a democratic society and if the margin of appreciation, the way it is recognized to each Member State, is not distorted from its purpose. According to the margin of appreciation principle, member states have a certain autonomy regarding legislative policies related to controversial human rights, although guaranteed by the *European Convention on Human Rights.*

Table 3:

As stated by the legal provisions, part of the deceased"s estate is granted de iure to the designated class of forced heirs. In order to achieve that, the legislator envisioned two portions of the estate: the non-reserved portion, of which de cuius can dispose of without restrictions, and the reserved portion, that entitles the reducing of both donations and wills that surpass the non-reserved portion; nevertheless, the reduction only operates after the death of *de cuius*, but the effects can retroactivate in the case of the donations.

Table 4:

As a principle, *de cuius* has the right to dispose *animus donandi* of his property. In order to do so, one can make donations during his or her lifetime, or a will, that has effect in devising the estate *post mortem*. From this point of view, the limitations concerning the right to decide the outcome of one"s property, are in fact limitations of the right to property[21]. The rules concerning forced heirship are somehow disregarding the right to property as a fundamental human right, as stated in the *European Convention on Human Rights*, Article 1 of Protocol no. 1. In fact, Article 1 of Protocol no. 1 of the Convention, is applicable to more situations, that span from full enjoyment of possessions to control of the use of property and the guarantee of not being deprived of property.

Table 5:

Even though *de cuius* has the right to decide to do whatever he wants with the property during his or her lifetime, if the arrangements involve the reserved portion of the estate, they will be annulled. In other words, the right to inherit the reserved portion is shieled better than the right to protection of property, as stated in the *European Convention on Human Rights,* Article 1 of Protocol no. 1. As a consequence, it is obvious the interference with the aforementioned fundamental right.

Table 6:

From our point of view, the legal mechanism of forced heirship is not only obsolete, but also detrimental to the legal order. Moreover, it does not appear necessary for the society"s wellbeing, enabling to believe that the legislator does not trust the law"s recipients to make the right choices in protecting their family. Because of that, the legislator decides for the citizens, taking away a part of their freedom of choice by

[21] As stated in the case *Marckx v. Belgium*, application No. 6833/74, 1979, available at hudoc.echr.coe.int, accessed at 24.03.2021.

imposing limitations regarding the protection of property, but delivering a greater protection to heirs by imposing the forced heirship mechanism, thus carrying out a legitimate purpose.

Table 7:

Another important matter is the possibility or impossibility of disinheriting the successors by *de cuius.* The connection with the human rights issue resides in the blurry lines designating the recipient of this protection: the deceased"s will or the designated heirs.

Table 8:

The deceased"s choice of disinheriting an heir is stipulated distinctly across the member states legal systems. Besides the fact that some Member States lack entirely the provisions regarding disinheritance, the ones that provide a legal framework, also specify different legal treatments, both substantive and procedural. As a consequence, enabling a homogenous treatment as provided by the Regulation is not a realistic choice, considering that protecting the deceased"s will over the protection of the designated heirs might not be applicable.

Table 9:

Nonetheless, due to the concept of margin of appreciation recognized to member states by the Convention, for the time being, a claim brought up to the *European Court of Human Rights* concerning the violation of Article 1 of Protocol no. 1 of the Convention, by the mechanism of forced heirship or disinheritance, will probably be dismissed by invoking the Member State"s margin of appreciation doubled by the juridical consistency of the Member states" legislation[22].

Table 10:

For better understanding the essence of the protected right, we will cite the Court"s caselaw, pointing out the provisions taken into consideration for the protection of fundamental human rights.

Table 11:

In the case *Slivenko v Latvia*[23], the court stated that the Article 1 of Protocol No. 1 can be applied when the protection of the right to peacefully enjoy a possession deals with already existing possessions, not future or potential possessions. Therefore, the Convention does not provide any assurances related to the right to attain possessions. However, the Convention does provide a certain protection when the circumstances indicate a legitimate expectation of enjoying a possession.

Following the same rationale, in *Saghindaze and others v Georgia*,[24], the Court stated that the notion of "possession" envisioned by art.1 of Protocol No.1, is an autonomous concept, surpassing the limitations of physical goods, including rights, interests, and even claims, as long as they are under the *"legitimate expectation"* umbrella.

Likewise, in *Fabris v France*[25], the Court stated that even though Article 1 of Protocol No. 1 of the Convention does not provide assurances related to the right to attain possessions, they do offer a certain protection when the circumstances indicate a legitimate expectation, as well as claims

[22] Dimitris Liakopoulos, 'Interactions between European Court of Human Rights and Private International Law of European Union' (2018) 10(1) Cuadernos de Derecho Transnacional 248.

[23] Slivenko v Latvia, Application No 48321/99, 2003, available at hudoc.echr.coe.int, accessed at 24.03.2021.

[24] Saghindaze and others v Georgia, Application no 18768/ 05, 27 May 2010, (2014) 59 EHRR 24, available at hudoc.echr.coe.int, accessed at 24.03.2021.

[25] Fabris v France, Application no. 16574/08, 2013, ECHR, available at hudoc.echr.coe.int, accessed at 24.03.2021.

based on a legitimate expectation[26] of enjoying a possession. Also, the court stated that the autonomous concept of "p*ossession*" might also encompass an advantage as a consequence of discriminatory provisions or circumstances.

The case unfolds as it follows: Mr. Fabris, a French citizen, was considered an illegitimate child, given the fact that he was "*born of adultery"*. As a consequence, he was entitled to only a half of the share a legitimate child would receive. Later on, France passed amendments to the obsolete legislation from 1972, that was deemed discriminatory, and as a consequence, illegitimate children were granted the same inheritance rights like legitimate children. However, the amendments did not have retrospective effect, and Mr. Fabris was only entitled to half of his legitimate brothers" inheritance shares, being considered illegitimate.

The Court solved the cause by applying Article 1 of Protocol No. 1 of the Convention, that provided: *"Every natural or legal person is entitled to peaceful enjoyment of his possessions. No one shall be deprived of his possessions except in the public interest and subject to the conditions provided for by law and by the general principles of international law*." and article 14 of the Convention, that provided the "*enjoyment of the rights and freedoms set forth in Convention shall be secured without discrimination on any ground such as (…) birth"*. In this context, it was underlined the principle of equality, as a human right, and its impact on the right to inherit, and as a consequence, on the right to peacefully enjoy property.

Another interesting case is represented by *Re Land*[27], in which the claimant, the sole beneficiary under his mother"s will, had been found guilty for her death by manslaughter, and as a consequence was applicable the forfeiture rule. The court interpreted the right to inherit as a right to enjoy a possession by itself, according to Article 1 of Protocol No 1 of the Convention. Therefore, it is expected of the national courts to give effect to primary legislation by considering the human rights enshrined in the Convention.

3.2. Family life: children rights and different types of union

Until recently, inheritance laws that violated the rights of the children considered illegitimate were not regarded as discriminatory. There is a certain concern at European level that substantive family law continues to remain in the exclusive competence of Member states, interim enabling European institutions to take measures concerning family law with cross-border implications.

It is an undeniable fact that the main interest of children is to have legal provision that would protect them. The lack of legislation to address the most important rapports regarding the rights and obligations that are particular to family life can be extremely harmful for children, regardless of the rationale that was counted for the lack of legislative protection, such as the parents gender identity, ethnicity or sexual orientation[28].

[26] As a rule, for the legitimate expectation to be recognized, it must be justified by a legislative provision that enables the law's recipients to undertake a certain conduct.

[27] Re Land , [2006] EWHC 2069 (Ch), available at hudoc.echr.coe.int, accessed at 24.03.2021.

[28] L. HODSON, Loveday: *Ties that bind. Towards a child-centered approach to lesbian, gay, bi-sexual and transgender families under the ECHR*, International Journal of Children s Rights, 2012, p 503, available at https://www.researchgate.net/publication/274466020_Ties_That_Bind_Towards_a_Child-

Table 12: The *European Court of Human Rights* handed down an ample case-law that acknowledged the violation of article 14 of the *Convention* where children "*born of adultery"* and as a consequence considered illegitimate, were denied the right to inherit an equal share of their parent"s estate, due to the national legislations.

In *Marckx v Belgium*[29], the Court stated that its provisions, namely Article 1, Protocol No. 1, expresses the protection of the right to peacefully enjoy one"s possessions. As a result, it applies only to existing possessions without guaranteeing the right of mortis causa acquiring possessions, that is only a potential right. Also, in the same case the Court stated not only that the concept of "*family life"* is an autonomous one, but that one cannot make any proper difference in the human rights area between the legal status of a family: legitimate or illegitimate. The legal reason points towards article 8 of the Convention, that uses the word "*Everyone*"[30], in relation with the law"s beneficiaries. As a paradigm, the Court stated that the right of succession between children and parents, and in general between ascendants and descendants, is closely linked to "*family life"*.

In *Paradiso and Campanelli v Italy*[31], the concept of "*family life"* is recognized in relation with the presence of close personal ties, the latter being a sine qua non condition for the acknowledgment of "*family life"*. Moreover, the concept is considered lato sensu, encompassing not only immaterial and non-patrimonial relationships, such as social, cultural or emotional bonds, but also patrimonial and pecuniary relationships, for instance child and spousal support, joint use of property or even the right to inherit property among the individuals of a family, that may have the legal basis of the institution of the forced heirship or the right to a reserved portion of an estate. The same issues were taken into consideration by the Court in the cases *Munioz Diaz v. Spain*[32], *Kroon and Others v. the Netherlands*[33].

Analogously to the circumstances of illegitimate children, the Court noticed human rights violations in the case of adopted children. For instance, in the cases *Hand v George*[34] or *Pla and Puncernau v Andorra*[35], the Court restated its position towards the right of adopted children to be considered equal to natural children,

Centred_Approach_to_Lesbian_Gay_Bi-Sexual_and_Transgender_Families_under_the_ECHR, accessed at 24.03.2021.

[29] *Marckx v Belgium*, Application No. 6833/74, 1979, available at hudoc.echr.coe.int, accessed at 24.03.2021.

[30] Article 8 of the Convention states: '1. *Everyone has the right to respect for his private and family life, his home and his correspondence. 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.*'.

[31] *Paradiso and Campanelli v Italy*, Application No 25358/ 12, 24 January 2017, available at hudoc.echr.coe.int, accessed at 24.03.2021.

[32] *Munioz Diaz v. Spain*, Application no. 49151/07, 2009. In the decision, the Court stated that: 'children born out of wedlock may not be treated differently-in patrimonial as in other family-related matters-from children born to parents who are married to each other', available at hudoc.echr.coe.int, accessed at 24.03.2021.

[33] *Kroon and Others v. the Netherlands*, Application number 00018535/91, October 27, 1994, available at hudoc.echr.coe.int, accessed at 24.03.2021.

[34] *Hand v George*, [2017] EWHC 533 (Ch), available at https://uk.practicallaw.thomsonreuters.com/D-101-2266?transitionType=Default&contextData=%28sc.Default%29, accessed at 24.03.2021.

[35] *Pla and Puncernau v Andorra*, Application no. 69498/01, 2004, available at hudoc.echr.coe.int, accessed at 24.03.2021.

concluding that discriminating against them would violate the provisions of articles 8 and 14 of the Convention. The Court admitted that even though it is not vested to settle disputes of private nature, it cannot remain passive in case of infringement on the prohibition of discrimination, provided by article 8, 14 and the principles underlying the *European Convention on Human rights*, such as the right to respect for private and family life.

The problem of unequal treatment of adopted children or born out of wedlock is amplified by the sexual orientation discrimination that impacts the right to succeed. This is mainly because an important number of Member states do not recognize same-sex marriages and do not provide extra-marital partners the same inheritance rights as provided to spouses.

An unequal development at European level of family law and inheritance law generates many family relationships disputes. These are mostly caused by the fact that these relationships are legally recognized only in some countries. For example, same-sex couples, married in gender-neutral marriage legislations, fear that they would be deprived of their inherent rights as a consequence of the contradictory legal framework. In this respect, the Court paved the way by its case-law, towards the endorsement and the acquiescence of this highly debated human rights.

The cases did not specifically address the issue of substantial marriage validity. However, interpreting the European Court"s case-law, renders that the internal recognition of a same-sex marriage, requested for a precise purpose, does not pose the peril of violating the public national order, albeit one of the spouses is a citizen of that Member state. Also, the case-law projected an emerging European public order that provides its own conformity agenda.[36]

The case *Coman and others v Romania*[37] involved a same-sex married couple, with spouses of different nationalities. One spouse was a Romanian national, hence a European Union citizen. According to the European Union legislation, the European Union citizens have the right to move freely, together with their family members. In the Coman v Romania case, the spouse that was not an European Union citizen was not allowed to move freely, as a consequence of applying the principles of national identity and public order, Romania being one of the member states that do not recognize same-sex marriages. As a result, the legislation fails to offer the legal protection implied traditionally by family rights, both for the spouses, and for the eventual children, such as inheritance rights. Although the case was decided solely in relation to the requirement of recognizing the right to move freely as distinct, autonomous right of the national identity principle, the case could also entail the patrimonial aspects of the family rights, such as inheritance rights.

Likewise, the case *Orlandi and others v Italy*[38] involved more same-sex married couples that were denied family rights by the Italian authorities, on the basis that such unions cannot be recognized by registering into the civil records office, despite the fact that they are legally concluded in a different state, because the national law only provided

[36] Laima Vaige, *"Listening to the Winds of Europeanisation: The Example of Cross-Border Recognition of Same-Sex Family Relationships in Poland,"* Oslo Law Review 7, no. 1 (2020): 46-59.

[37] Case C-673/16, *Coman and Others v Romania*, 2018 (Grand Chamber), available at https://curia.europa.eu/juris/document/document.jsf?text=&docid=202542&doclang=EN, accessed at 24.03.2021.

[38] *Orlandi and others v. Italy*, 26431/12 , 2017, available at hudoc.echr.coe.int, accessed at 24.03.2021.

rules for the traditional families. The Court stated that Italy disregarded fundamental human rights as they are enshrined in article 8 of the *European Convention on Human Rights*.

Despite the fact the Court stated that Member States have the freedom of constraining access to marriage for same-sex couples, having a wide margin of appreciation in this respect, most domestic cases are decided by invoking the principle of public order, that blocks the application of legal provisions and instruments that seem discordant with the national legislation.

For some member states, the concept of marriage is enshrined in the Constitution, as a traditional, different-sex union. As a consequence, an eventual registration or transcription of same-sex parenthood or marriage, might be considered as disregarding the public order. Such Member States do not provide legal protection of same-sex couples family rights, or state same-sex marriages exclusion, defining the legal union only from a heterosexual perspective[39].

The difficulty lays within the outcome of the substantial legitimacy of the legal status of same-sex couples whether they need the legal recognition of their *status quo* in a country that does not give legal effect to such unions, nor recognize as legitimate the children of such spouses. For example, in an internal decision of one Member state[40], the court had to decide the outcome of the legal status of a child whose parents were of the same sex. The object of the case was the transcription of the child"s birth certificate in conformity with a legal birth certificate from Great Britain. The court considered the child"s best interest and the principle of equality and non-discrimination in order to issue a decision. Also, the court acknowledged the fact that the child" s rights could only be protected by recognizing the legal status in relation with his family.

However, besides the direct application of some European Union" Regulations, the optimum manner of providing certain effects of same-sex marriages in the Member States that would not legally recognize these types of unions, implies the acknowledgment, and as a consequence, the recognition, of the case-law provided by the *European Court of Human Rights.*

4. Conclusions

Analyzing the jurisprudence of the *European Court of Human Rights* is one way of understanding the impact of fundamental rights in this specific area of private international law, namely the succession law. In this respect, it is a critical role the was taken up by the *European Court of Human Rights* from the perspective of protecting fundamental rights as a top priority.

Moreover, the development of implementing uniform rules by the European Union, aims towards the methodical elimination of the legal boundaries between the Member States, hence providing superior protection to fundamental rights in comparison to the one

[39] See Mole, Richard CM; (2016) *Nationalism and homophobia in Central and Eastern Europe*. In: Slootmaeckers, K and Touquet, H and Vermeersch, P, (eds.) *The EU enlargement and gay politics: the impact of Eastern enlargement on rights, activism and prejudice*. (pp. 99-121). Palgrave Macmillan: London, UK.

[40] *Judgment of Supreme Administrative Court of Poland, 10 October 2018, ref no OSK 2552/16*, as it is mentioned in Laima Vaige, "*Listening to the Winds of Europeanisation: The Example of Cross-Border Recognition of Same-Sex Family Relationships in Poland*," Oslo Law Review 7, no. 1 (2020): 46-59. According to the author, the child's '*birth certificate was transcribed with only one mother, while the second parent in the registry remained anonymous. The second mother was mentioned only in the margins of the entry in the registry'*.

provided by the national legislation. Among the effects of implementing human rights in national legislations, one can identify the decreased impact of national public order, on one hand, and the augmented role of the European Union"s public order, on the other hand, and, as a consequence, improved legal certainty and predictability for the legal issues that are bound to arise in the context of human rights protection.

Inheritance law harmonization finds itself at the stage of work in progress. A modern Europe cannot and should not withdraw from this project. Obviously, the policy of small steps applies best in this scenario. Therefore, doctrinal harmonization through comparative studies of legislation and case-law dynamics is a first necessary step, leading towards the so-called "*spontaneous harmonization"*[41]. Once achieved this stage, it enables the synchronization at the European institutional level.

Rendering human rights reasonable entails finding the accurate balance amongst different types of protection. Mutually conflicting human rights are frequently debated. For example, the forced heir"s right to a portion of the estate might infringe the testator"s right to dispose mortis causa of the property, according to the personal will; the debtor"s right to a home might infringe the buyer"s right to property, the child"s right to protection might impact the public order of the Member state that would not provide legal effects for the same-sex marriage of the child"s parents, and so on.

In the judgments referred to above, the European Court focused on basic principles like the right to inherit as a fundamental element of family life. Although there is a divergent application and lack of harmonization between private international law and basic human rights, in time, due to the continuously expanding case-law of the European supranational courts, the Member States" legislation will surely find the proper balance, adjusting the legal provisions in order to comply with the supranational legislation concerning human rights

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[41] The so called *'spontaneous harmonization'* indicates a synchronized legislative development at the national level, by means of replicating the changes observed in other countries. For more details about the issue, see Mariusz Zatucki, "*Attempts to Harmonize the Inheritance Law in Europe: Past, Present, and Future*," Iowa Law Review 103, no. 5 (July 2018): 2317-2342

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