# THE INFLUENCE OF FUNDAMENTAL RIGHTS ON THE LAW OF SUCCESSION

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SUMMARY: 1. Fundamental rights as a catalyst for the evolution of inheritance law. – 2. The European Court of Human Rights as a guide throughout the evolution of inheritance law: filiation. – 3. Inheritance rights and de facto partnerships. – 4. Fundamental rights and the autonomy of the testator: a slippery equilibrium. – 5. In search of a European Consensus on the limits to testamentary freedom: civil and common law. – 6. Testator's will and fundamental rights: a first conclusion.

1. The debate concerning the enforcement of fundamental rights in private law-based relationships has been going on for a long time in the juridical literature of the Western Countries. The boundaries of this discussion seem, however, to have shifted towards new horizons due to increased importance and protection of these rights within the European dimension. Looking at the theories stemming from the set of rights of the European Convention on Human Rights (hereinafter referred as ECHR), one can note a generalised preference towards the German theory "*unmittelbare drittwirkung*", which claims that fundamental rights have a double function. On the one hand, they influence the interpretation of civil law; on the other, they allow judges the power to grant the Convention's rights to their respective beneficiaries. This paper will shed light on another interesting aspect: the horizontal application and enforcement of those fundamental rights. The possibility, hence, to enforce them in cases where a violation by another private individual occurs.

Notwithstanding the fact that the topic has been discussed and analysed, by scholars, under wide lenses, there are yet grey areas of private law in which the link between fundamental and substantial rights have not been investigated[1]. One such area is inheritance law, which, over the last years, has been characterised by homogeneous evolutionary trends in the Western Countries: these common evolutionary patterns seem to be drawn by the increasing importance attributed to fundamental rights.

The aim of this paper is to investigate whether a nexus between the new (evolutionary) patterns of inheritance law and fundamental rights exists in Europe. In doing so, a comparative perspective has to be adopted to make the identification of common roots and causes easier.

[1] On the variety of different understandings of fundamental rights and their normative basis, see M.W. HESSELINK, *The Justice Dimensions of the Relationship between Fundamental Rights and Private Law*, 24 *Eur Rev Private Law* (2016) 425-456.

It is worth noting, though, that similar comparative studies on inheritance law have not been frequent in the past. Besides, one of the reasons for this can be the belief that succession law, like family law, was mainly a product of domestic law, society and religious beliefs, and that there were not, hence, compelling reasons to adopt a comparative approach. Furthermore, the relatively static nature of succession law, which has characterised most jurisdictions in the 1900s, has shifted scholarly attention towards more dynamic areas of law where a comparative approach would be more fruitful.

More recently, the emerging of a series of factors has made such a comparative approach to succession law necessary.[2] The introduction of Regulation 2012/650/EU, on jurisdiction, applicable law, recognition of authentic instruments in matters of succession, has also influenced this trend by creating a common regime of private international law in matters of inheritance, without affecting the applicable law of single EU Member States.

The Regulation belies the idea that succession law is a static branch of law, not often subjected to legislative innovations. This theory is nowadays outdated thanks also to changes and mutations to traditional family structures: succession law has been greatly influenced, indeed, by new and more dynamic alternative family structures, such as de facto and other unions. Such enhanced family horizons have claimed the evolution of succession law too, which had to conform itself to new emerging realities, the most relevant of which could be the expansion of the category of heirs and the rights recognised to them by their proximity to the testator.[3]

The latter circumstances can explain the emergence, in the European Countries, of converging common rules to Inheritance Law. More specifically: the increased importance of a spouse status, the relevance of unmarried or de facto partners, the full equivalence of all the children of the deceased, and the debasement of collateral relatives and ascendants, sometimes excluded, by recent legislative reforms, from the circle of forced heirs.

Different factors - such as social attitudes, new dynamics in family structures and a swift composition of assets - have shaped these trends. The European Court of Human Rights (hereinafter ECtHR) has, with its decisions, shaped and influenced the most significant reforms of inheritance law, at least for what concerns Europe. The main catalyst for them has been the need to avoid forms of discrimination and attribute stronger significance to the right to private and family life, as invoked by the

[2] The reversal in trend is testified by a series of scientific works on comparative succession law, especially in Europe. See for example, K. REID, M.J. DE WAAL, R. ZIMMERMANN (eds.), *Intestate Succession*, Oxford University Press, 2015; A.L. VERBEKE ed al. (eds.), *Confronting the Frontiers of Family and Succession Law. Liber Amicorum Professor Walter Pintens*, Intersentia, 2012; M. ANDERSON, E. ARROYO I AMAYUELAS, *The Law of Succession: Testamentary Freedom. European Perspectives*, Europa Law Publishing, 2011.

[3] On the topic of existence of a nexus among the notion of family and the rules of succession law – see M.J. DE WAAL, *The Social and Economic Foundations of the Law of Succession*, in 2 *Stell LR* (1997) 162.

Strasbourg Court in matters of succession, even in the absence of specific rules in the Convention.

At this point, it is interesting to reflect on the increased importance recognised of the (infrequent) decisions of the ECtHR in this field and on the contribution of Supranational Courts in circulating the rules of private international law. Moreover, it can be inferred that the process of revision, within the national judicial systems, of the rules of the law of succession *mortis causa* has been shaped by the following factors: a redefinition of the boundaries of family relationships, and a strong affirmation of the principle of non-discrimination in private law based ones. Both elements find confirmation in various decisions of the ECtHR that will be mentioned below.

New family structures, mentioned above, are challenging the entire devolutionary system, as testified, for instance, by the numerous reform proposals which have been advanced in the field of intestate succession. The rules of inheritance law and the various forms of forced heirship appear nowadays uncertain. In fact, it seems not necessary anymore to impose strict limits to testamentary intention; in this sense, it would also appear useful to reflect on the intersection between this expanded freedom, the strong manifestations of the property rights and the position of the heirs within the family.

Although the legal tradition of the Western Countries lacks uniform patterns of legislative reform, a general tendency towards expanding the testamentary will of the testator can be observed, with the consequence that they can more freely decide to who devolve their assets. This faculty seems, moreover, intensified in the countries where legislative reforms on this point have taken place.[4] Fundamental rights have been identified too, as possible means of interference with a testator's broad freedom of choice.

Fundamental rights - after a 'privatisation process' - have, therefore, emerged as leading factors of influence and have claimed their role of directing legislative reforms and limiting private autonomy; especially in the field of inheritance law. Those new frontiers of inheritance law can help interpreting the various reforms that the system of successions *mortis causa* has gone through in Europe over the last years; and can be used, as well, to anticipate future reforms. The last consideration appears even truer if one accepts the idea that the foundations of the whole inheritance law have switched: from instruments created to pass assets onto the next generations to a mean of safeguarding individual interests of people tied by bonds of solidarity and affection.

The intersection between the rules of succession *mortis causa* law and fundamental rights, yet not very popular in scholarly writings, can be read through the decision of the ECtHR on inheritance law: the following pages will discuss this

[4] See M.J. DE WAAL, *Comparative Succession Law*, in M. REIMANN, R. ZIMMERMANN (eds.), *The Oxford Handbook of Comparative Law*, Oxford University Press, 2006, 1071 for a comparison between civil and common law systems, which somehow share common principles and are destined to converge on this same topic, notwithstanding their strong formal differences.

specific point. The influence of the ECtHR's jurisprudence on national legal systems represents, generally speaking, an important chance to reflect, firstly, on the traditional categories of private law.[5] Secondly, under the more accurate lenses of inheritance law, the decisions of the Court can help interpreting some of the boldest changes to operational and formal rules.

The first evidence of this can be noted with regards to the identification of the intestate heirs of a deceased person. But, there is little doubt that the core of the succession itself could be affected by a pervasive application of the rules concerning the protection of fundamental rights, taking into account that new type of assets, such as the intangible ones and the digital heritage, came into existence. It is nowadays imperative to balance the rights of the heirs with some fundamental rights of the deceased and recognise them a certain degree of confidentiality, a paramount value to protect after their death.

This paper is organised as follows: part one will verify if and how the rules aimed at identifying the heirs have been influenced by the jurisprudence on fundamental rights (paragraphs 2-3). Part two, instead, investigates the possibility of horizontal application of fundamental rights (paragraphs 4-6). More specifically, if the will of a testator can be, somehow, limited by direct application of those rights, such as the principle of non-discrimination or the respect of private and family life.

2. The connection between the discipline of inheritance law and the rules protecting fundamental rights manifests at its best on the topic of the rights of children born out-of-wedlock, on which the jurisprudence of the European Court of Human Rights has been focusing, and most decisions have been delivered. The same principles have, for sure, played a crucial role in pushing numerous European Countries to modify their internal rules concerning the inheritance rights of children and avoid possible conflicts with articles 8 and 14 of the Convention.

The link between the evolution of inheritance law and the protection attributed to fundamental rights represents one of the clearest examples of civil law's alignment to fundamental rights, also extended to private law; something which would have been impossible to forecast.

The fact that almost all European Countries have modified their legislation on children's inheritance rights, over the last 30 years, always in the direction of removing any difference between children born out in or out of wedlock, can be explained by observing the changes in society and traditional concepts of family.

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[5] '*The relation between human rights law and private law is closer than is commonly supposed by lawyers'* as it has been observed by H. COLLINS, *On the (In)compatibility of Human Rights Discourse and Private Law*, in LSE Working Papers 7/2012, (2014) 4. The topic has only recently caught the attention of the legal debate; see among the most relevant writings, also from a comparative point of view, D. OLIVER D. OLIVER, J. FEDTKE (eds.), *Human Rights and the Private Sphere: A Comparative Study*, Routledge, 2007; G. BRUGGERMEIER, A. COLUMBI CIACCHI, G. COMANDÈ (eds.), *Fundamental Rights and Private Law in the European Union*, vol. I, *A Comparative Overview*, Cambridge University Press, 2010; C. BUSCH, H. SCHULTE-NÖLKE (eds.), *Fundamental Rights and Private Law*, Sellier, 2011.

Changes to patrimonial assets, as a consequence of a pluralism of family models,[6] are at the origins of the latter considerations and form the basis for legislative efforts aimed at modifying the various forms of forced heirship.[7]

The ECtHR, with its repeated decisions, has shaped the evolutionary patterns of domestic legislations and justified those changes by recognising the crucial importance of the fundamental principle of non-discrimination. The principle ignites the entire (revised) system of inheritance law: the identification of the heirs, their respective entitlements, and the means to exercise their rights -and does not apply only to the parent-child relationship.

A comparative approach to succession law can show a convergence of similar legislative remedies, and demonstrate that the jurisprudence of the ECtHR stands as the source of the juridical flow stemming from the private law of the European Countries. Art. 14 of the Convention is usually recalled as the guiding parameter in matters of inheritance law upon which the judges of the Court are called to decide. It requires that the enjoyment of the rights and freedoms outlined in the Convention are secured 'without discrimination on any ground such as sex, race, colour, language, religion, political or another opinion, national or social origin, association with a national minority, property, birth or other status'.

The principle of non-discrimination is not self-contained. Hence, it is always connected to the violation of other rights: it is well-established that the principle can only be invoked when a discrimination occurred in the enjoyment of other fundamental rights or freedoms set out in the Convention.[8]

Although the mechanism might appear excessively restrictive and cumbersome - as it has been critically addressed by scholars[9] - in inheritance law it has proved able to defend claimants' rights by appealing to the protection of private family life and, on other occasions, to the protection of property, as identified under Additional Protocol 1.

The first and most popular case, followed by abundant case law, dates back to 1979: the ECtHR decided to uphold the appeal of *Ms Marckx v. Belgium*, and recognise

[6]Let us consider, for example, the phenomenon of 'blended families': new family structures originate from the breakdown of former marriages or de facto relationships. Therefore, a review of the entire patrimonial assets and rules to protect the positions of children in or out wedlock shall be envisaged. See. I.L. ELLMAN, S.L. BRAVER, *The Future of Child Support Law*, in J. EEKELAAR (ed.), *Family Law in Britain and America in the New Century. Essays in Honor of Sanford N. Katz*, Brill Nijhoff, 2016, 67-89.

[7] The most important aspect here is the importance attributed to a relevant state of need or a situation of economic dependence, as the basis for a new legislative reform on inheritance.

[8] The jurisprudence of the ECtHR, since its very first decision dated 23 July 1968 in the case '*Affaire «relative à certains aspects du régime linguistique de l'enseignement en Belgique» c. Belgique* is firm on this point. As it is well-known, the situation seems to change after the introduction of Protocol 12 which bespeaks a more general prohibition of discrimination, not necessarily connected with the violation of other rights and liberties set forth in the Convention.

[9] For more details on equality and non-discrimination in the ECtHR, see e.g. C. NIKOLAIDIS, *The Right to Equality in European Human Rights Law. The Quest for Substance in the Jurisprudence of the European Courts*, Routledge, 2015, 50 ff.

full inheritance rights to her biological daughter, against the maternal family. Following this case, the right to private and family life had to be safeguarded, without differentiating whether a child is born in or out of wedlock. Hence, the case *Marckx v. Belgium*[10] can be identified as the inspiring source for following cases where inheritance rights, family life and the principle of non-discrimination merged. Additionally, it has somehow forced national legislators to comply with the necessity of ensuring full equality to children's rights of succession. Belgium has, albeit following a cumbersome legislative path and greatly influenced by its Constitutional Court's case law, recognised that biological children are part of the family and, therefore, entitled to inheritance rights.[11]

The Belgian affair is, often, recalled as the first case in which the reasoning of the Strasbourg Court has manifestly shaped the evolutionary patterns of domestic legislation. Similarly, both France and Germany have modified their national law on successions, as a direct consequence of the ECtHR's case law and decisions. More specifically, following the judgment in *Mazurek v. France*,[12] France adopted the Law 2001/1135, which equated the position of biological and legitimate children in matters of inheritance, removing any discriminatory differences. [13]

Notwithstanding the legislative intervention, the transitional arrangements still showed some flaws. Hence, the ECtHR in the recent case *Fabris v. France,*[14] has recognised that excluding a child born from an adulterous relationship from a *donation-partage* in 1970 (to which legitimate children were admitted) constitutes a breach of the principle of non-discrimination, following Additional Protocol 1, Art. 1.

Transitional provisions are also at the heart of the German affair. Although Germany had eliminated the distinction between children born in or out of wedlock in matters of inheritance law since 1997, there were still tangible differences among biological children born before and after 1949. The ECtHR, deciding the case *Brauer v. Germany*,[15] condemned the different treatment of biological children born before and after 1949 for the violation of Articles 8 and 14 of the ECHR. The case sparked the legislative reform of 2011, which removed any reference to the year of birth of a biological child.

The Italian legislative reform on filiation, which recognised biological children as part of the family, had some significant consequences on inheritance rights too: full

[10] *Marckx v. Belgium*, 2 EHRR 330 (1979).
[11] See L. 31 March 1987 and the Resolution DH 88 (3) 4 March 1988 of the Council of the Ministers.
[12] *Mazurek v. France*, 42 EHRR 9 (2006).
[13] Law 2001/1135 has broadly reformed inheritance law by editing various parts of the *code civil*. The most relevant of which, together with equalising legitimate and biological children, is the introduction of a new affidavit (art. 730), aimed at solving disputes linked with proving the status of heir. After a few years a new and broader reform (Law 728/2006) has taken place. See M.C. FORGERARD-R. CRONE-B. GELOT, *Le nouveau droit des successions et des libéralités. Loi du 23 juin 2006. Commentaire & Formules*, in *Defrenois*, 2007.
[14] *Fabris v. France*, 57 EHRR 19 (2013).
[15] *Brauer v. Germany*, 51 EHRR 23 (2010).

equality of children. A long and tedious process of recognition which found its spark in the jurisprudence of the ECtHR.[16]

3. A new dimension of inheritance law seems to be manifesting throughout Europe as de facto unions have started to acquire greater importance in the identification of heirs. This new trend is still, though, in its infancy, as shown by the domestic legislative initiatives in the field, which are very different one to another.

It is, also, unclear if the extension of inheritance rights to de facto partners finds its roots in the respect for fundamental rights or is, conversely, a reflection of the mutations to traditional family structures happening in the Western Countries.

When it comes to identifying the recipients of portions of an estate, the importance of fundamental rights stands out with the principle of non-discrimination, which has equalised inheritance rights of children but which, unfortunately, cannot be considered as the guiding light, in the same ambit, for de facto partnerships. In fact, the sporadic domestic interventions pointing to the contrary - like the widespread rule which allows a de facto partner to take over the lease agreement after the death of the tenant - do not find their rationale in the principle of non-discrimination. Instead, they are built upon the respect to the right to private and family life, which allows a partner the chance to live in the same place where their de facto union was being enjoyed.

In any case, in a system dominated by the supremacy of married partner's inheritance rights, scholars have shown great support for a makeover of inheritance law, with the aim of attributing increased importance to de facto unions and giving relevance to substantial aspects of family bonds. Marriage is not a mandatory (formal) requirement anymore, and family bonds can be scrutinised under elements like its duration, the contribution offered by each to the *ménage* and or the existence of children.

In the latter sense, one can appreciate a recent Austrian law reforming the law of succession, the legislation of the Scandinavian Countries and the rules of various autonomous Spanish communities. Another, less incisive, legal provision is the recent Italian law on 'civil and de facto unions', by which a de facto partner of a deceased tenant holds the right to keep living in the family home for a variable time, between two and five years depending on various circumstances.

The clash between fundamental and inheritance rights appears stronger in same-sex unions. Inheritance rights are, though, only one of the aspects of a broader group of issues related to same-sex unions and their solution is often the product of political choices which nowadays mark clear distinctions in the legal system of the Western Countries.

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[16] On the Italian reform of filiation see M.G. CUBEDDU WIEDEMANN, T*he Changing Concept of 'Family' and Challenges for Family Law in Italy*, in J. SCHERPE (ed.), *European Family Law, vol. II, The Changing Concept of 'Family' and Challenges for Domestic Family Law*, Elgar Publishing, 2016, 160, 173.

If, on the one hand, a de facto partner of opposite sex can be automatically identified as intestate heir only when national legislation recognises de facto unions (this does not apply to France where the legislation on Pacs does not include any mention of inheritance rights), on the other, excluding them tout court from a succession undoubtedly hinders their fundamental rights.

It does not seem like the ECtHR is solving this issue in a significant and convincing way. Leaving out the more general topic of same-sex marriage,[17] it is worth analysing a case dealing with inheritance law-related problem of same-sex couples: *Kozak v. Poland*,[18] decided by the ECtHR on 22 March 2010. The judges of the Court had to deal with an appeal from a Polish citizen lamenting the violation of articles 14 and 8 of the Convention. More specifically, the question regarded weather a de-facto partner of a gay couple had the right to succeed in a lease agreement of their deceased partner, a faculty which national legislation recognised to straight (de facto) couples. The applicant had indeed been refused to take over the lease because of the same-sex nature of his union.

Although the Court admits that the preservation of traditional family structures might potentially justify differential treatment in this case, a violation of Art. 14, as connected with the rights set in art. 8 of the Convention, had occurred. Different treatments cannot be justified on the sexual orientation of individuals of a de-facto couple and constitute a blatant discriminatory act which deserves to be punished. Such a discriminatory treatment, moreover, would neglect the fact that similar forms of cohabitation have shaped new and alternative family structures.

Similar reasoning seems to be at the foundation of a recent decision by the Court of Justice of the European Union (CJEU) in the area of social security benefits of a deceased worker to be claimed by their partner.[19] The Court argues that articles 1 and 2 of the Directive 2000/78/EC prevent domestic legislation from excluding same-sex partners, who are in the same legal positions as married ones, from receiving social security benefits, which would have pertained to the deceased. Case identifiable under the German '*Eingetragene Lebenspartnerschaft*'.

It is easy to understand that single decisions such as the above cannot significantly influence the law of succession and are only a tiny piece of a broader puzzle, which is represented by legislative reforms to fight discrimination. The

[17] Which is indeed a florid field of discussion among the scholars, following also the ECtHR decision in the case *Schalk and Kopf v. Austria*, 24.06.2010. The Court has included same-gender relationship in the concept of family but at the same time, has made clear that inheritance law-related issues are left to the autonomy of single States. For a more detailed discussion on homosexual unions in scholarly literature, see I. CURRY-SUMNER, *Same-sex relationships in a European Perspective, in J. Scherpe (ed.), European Family Law, vol. III, Family Law in a European Perspective*, Elgar Publishing, 2016, 116-45; K. BOELE-WOELKI, A. FUCHS (eds.), *Legal Recognition of Same-Sex Relationships in Europe*, 2nd ed., Intersentia, 2012; J. SCHERPE, *Same-sex Relationships*, in J. BASEDOW, K. HOPT, R. ZIMMERMANN (eds.), *Max Planck Encyclopedia of European Private Law*, Oxford University Press, 2012, 1522-25.
[18] *Kozak v. Poland*, 51 EHRR 16 (2010).
[19] CJUE, 1°.04.2008, n.267.

ECtHR (and the CJEU) admits that differential treatments, which are nevertheless being tackled by legislative reform of individual states, can still be abstractly justified, on political grounds, to protect the traditional idea of family.

This preamble is useful to understand why in countries where same-sex marriage is not legally recognised, there is also resistance to providing full rights to same-gender couples. Inheritance law, hence, is - under the principle of non-discrimination - marginally touched by the intervention of the ECtHR.

The Court somehow resigns from being a driving force in shaping the evolutionary patterns of inheritance law, justifying its lack of intervention under a deficit of consensus, although it would be crucial to act and guide the path. This myopic approach does not take into account, either, the contribution offered, over the last years, by more sensitive courts.[20] Courts which were conscious of the fact that some laws, nowadays considered abhorrent (like prohibiting interracial marriages, the inequalities between man and women in family law, or the discriminations based on religious grounds), have dominated the legal systems of the Western Countries for centuries and have been justified under cultural and sociological grounds.

Notwithstanding the lack of guidance of the ECtHR, a comparative look over inheritance law in Europe shows a marked tendency in those countries which have recognised de facto unions: partners hold the same rights of married couples. Eventually, the thirteen countries which introduced same-sex marriage did not even have to point out that same-gender partners held the same succession rights of heterosexual married couples.

4. The scenarios we have so far dealt with belonged to cases where the legislation of the Member States of the Council of Europe showed possible contrasts with fundamental rights of the ECHR. The standard functioning of the Strasbourg Court, in fact, covers cases where the Member States are sanctioned for violations of the rights set forth in the Convention. Hence, since its very first beginning, the case law of the Court has profoundly stimulated their legislation.

A breakthrough in the quality of the protection mechanisms offered by the Court – sometimes invoked but mostly feared and criticised – can arise whereas the protection of fundamental rights operates horizontally, from individual to individual, and not vertically (supranational court, domestic legislation and, eventually, individual values). It goes without saying that, at least in the field of inheritance law, violations

[20] See the jurisprudence of the Constitutional Court of South Africa, and more specifically the case *Gory v. Kolver NO,* 2007 (4) SA 97 (CC), in which before the introduction of same-sex marriage, the Court recognised to a partner of a same-sex couple the right to be identified as heir as normally a married partner would. Additionally, the case led to declaring the *Intestate Succession Act 1987* constitutionally illegitimate due to discrimination based on sexual orientation grounds. '*Partners in a permanent same-sex life partnership in which the partners have undertaken reciprocal duties of support'* had the right to be identified among the intestate heirs. See L. PICARRA, *Gory v Kolver*, in 23 *South African Journal on Human Rights* (2007) 563; F. DU TOIT, *The Constitutional Family in the Law of Succession*, in 126 *South African LJ* (2009) 463.

of fundamental rights can occur not only by law but also by means of private autonomy.

Direct applicability of the rules guarding fundamental rights, somehow reproductive of the Europeanised doctrine of '*Drittwirkung*',[21] found one of its most controversial examples in the ECtHR case *Pla and Puncernau v. Andorra,*[22] on intestate succession. This legal proceeding, decided on 23 July 2004, and extensively cited in scholarly writings, deserves to be remembered for its attempt, by the judges of Strasbourg, to intervene directly on the interpretation of an act of private autonomy.[23] The controversial locution contained in the testament of Ms Carolina Pujol Oller, mother of three children, was the bequest of her properties in favour of her only male son, Francesc-Xavier Pla Pujol, with fideicommissary substitution in favour of his nephew if born within an '*legítim y canònic matrimoni*', allowed in the Principality of Andorra.[24] When Francesc-Xavier dies, he leaves his wife Roser Purcenau and their adoptive child Antoni Pla Pucernau as heirs, and the latter legally succeeds to his grandmother's legacy.

The dispute started when two of Carolina's nephews claim Antoni, an adopted child, should not be receiving the entire legacy because in her will only a child born in wedlock would be entitled and, therefore, demanded an equal split of assets. The High Court of Justice of Andorra, backing up the legal grounds of the two nephews and holding that the original intention of the testator aimed at avoiding an intestate succession only in the presence of a legitimate child born in Francesc-Xavier Pla Pujol's wedlock, imposed the split of the patrimonial asset among all the nephews.

Once all the internal remedies were exhausted, the issue came to the attention of the ECtHR, which had to verify whether the decision of the national courts were in breach of articles 8 and 14 of the Convention. As easily discernible, a discriminatory treatment towards the adoptive child was not identifiable under domestic law but manifested under a testamentary will, as interpreted by the courts of Andorra. The Strasbourg judges inquired into the legitimacy of the testamentary will

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[21] I. KANALAN, *Horizontal Effect of Human Rights in the Era of Transnational Constellations: On the Accountability of Private Actors for Human Rights Violations*, in 7 *Eur. Yearbook Int'l Economic Law* (2016) 423-60; A. COLOMBI CIACCHI, *Horizontal Effect of Fundamental Rights, Privacy and Social Justice*, in K.S. ZIEGLER (ed), *Human Rights and Private Law*, Hart Publishing, 2007, 53-64; O. CHEREDNYCHENKO, Fundamental Rights and Private Law: A Relationship of Subordination or Complementarity?, 3 Utrecht L. Rev. (2007) 1-25; P. STANZIONE, *Diritti esistenziali della persona, tutela delle minorità e* Drittwirkung *nell'esperienza europea*, in *Europa e dir. priv.*, 2002, II, p. 59; D. SPIELMAN, *L'effet potentiel de la Convention européenne des droits de l'homme entre persone privèes*, Lussemburgo, 1995.

[22] *Pla and Puncernau v. Andorra*, 42 EHRR 25 (2006).

[23] E. ARROYO I AMAYUELAS, D. BONDÍA GARCÍA, *¿Intepretación del testamento contraria a los derechos humanos? "El caso 'Pla & Puncernau vs. Andorra" (STEDH, 13 de julio de 2004)*, in 18 *Derecho Privado y Constitución* (2004) 7-87, 80.

[24] The original wording of the controversial clause is: "*El que arribi a ésser hereu haurà forçosament de transmetre l'herència a un fill o net de legítim y canònic matrimoni, al que noobstant podrà posar les condicions que cregui convenients. Y si morsense fills o nets de legítim y canònic matrimoni passarà l'herència als fills o nets dels demés instituït o substituts en la clàusula numero vuit y amb el mateix ordre que en ella s'estableix*".

and concluded that a breach of the non-discrimination principle had occurred. In this regard, the ECtHR seems to be propelling for a direct intervention on acts of private autonomy with horizontal efficacy.[25]

Truly speaking, the decision of *Pla and Puncernau* covers the topic of horizontal efficacy with a very feeble reasoning. It is argued that, to avoid immediate impact on an act of last will, the Court itself could not decide on a discriminatory testament or part thereof, which would be perfectly legal (like if, for example, a grandmother had declared to pass her entire asset onto her nephews only if they were Catholic). What the Court has the power to do is, as observed by the ECtHR judges, to investigate how national judges have interpreted the testament in a way which is compatible with the rules outlined in the European Convention on Human Rights.

This perspective urges immediate comments. Firstly, and from a substantial standpoint, there is not much of a difference between criticising an act of private autonomy or its interpretative rationale, because the outcome of the testamentary clause would be equally compromised.[26] What matters even more, is that the acts of private autonomy shall be interpreted under the guiding principles of the Convention because the introduction of new interpretative parameters (both to *mortis causa* and *inter vivos* acts) can potentially influence all the subsequent cases domestic courts are called to decide. To do so, national judges shall adopt new hermeneutical parameters which appear destined at orienting the interpretative activity more than respecting the will of the parties.

The dissenting opinion of the Polish Judge Lech Garlicki strengthens the idea for which the ECtHR is, with this decision, showing its will to intersect fundamental rights with private-law based relations. For Garlicki, in fact, the real subject matter of the proceeding in *Pla and Purcernau* was not the interpretative reasoning followed by the judges of Andorra, but the fact that a national judge was empowered to recognise effects to an action which would blatantly violate one of the principles of the Convention. Furthermore, the Court itself censured the interpretation by the Andorran High Court and hastily defined it as '*bluntly inconsistent*' with the real will of the testator. They even evoked the outdated interpretative formula '*quum in verbis nulla ambiguitas est, non debet admitti voluntatis quaestio'*, contravening to decades of interpretative teachings.

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[25] For a recent analysis on horizontal direct and indirect efficacy of fundamental rights in private-law based relations see M. FORNASIER, *The Impact of EU Fundamental Rights on Private Relationships*, 23 *Eur. Rev. Private Law* (2015), 29-46.

[26] This seems to be the reasoning at the base of Justice Bratza's dissenting opinion: "*The fact that, under the Convention, the legislative or judicial organs of the State are precluded from discriminating between individuals (by, for instance, creating distinctions based on biological or adoptive links between children and parents in the enjoyment of inheritance rights) does not mean that private individuals are similarly precluded from discriminating by drawing such distinctions when disposing of their property. It must in principle be open to a testator, in the exercise of his or her right of property, to choose to whom to leave the property and, by the terms of the will, to differentiate between potential heirs, by (inter alia) distinguishing between biological and adoptive children and grandchildren*".

In the light of the above, on the one hand, it is easy to understand that in cases involving a potential discrimination towards biological children, the law allowing them is scrutinised for legitimacy. In fact, when it comes to analysing a testament, the will of the parties is the real subject matter of the proceeding[27]; the national legislation allowing a discriminative interpretation of an act of private autonomy is, instead, the apparent subject matter. The Court has declared it cannot remain idle before an interpretation of a *private contract* which violates the fundamental rights of the ECHR. This approach suggests that the evolution of the jurisdiction on fundamental rights could lead to a compression of private autonomy and a paternalistic control over the will of the parties.

Regardless of the fact that a similar event does not seem imminent, considering that the reasoning of the case *Pla* has not been followed yet by any other ECtHR judgment on succession law, one thing stands out: fundamental rights do interfere, generally speaking, with the law of succession *mortis causa*. This interference concerns both the rights of the testator and heirs. From the standpoint of the Convention, the most relevant provisions which could, in this regard, be invoked are Articles 8 (respect for private and family life), 14 (prohibition of discrimination) and Article 1 of Additional Protocol 1 (protection of property).[28] The balance between conflicting positions shall take into account the different inheritance rights involved, case by case.

5. The *European consensus* is one of the most utilised interpretative tools by the ECtHR: the Court admits that the 'margin of appreciation', recognised to the state parties, compresses every time there is a homogenous approach, shared by several legal systems, towards a similar problem. The Court conducts a comparative study on different legal systems and then identifies, in its decisions, the dominant approach.[29]

In short, in the absence of a clear rule, whenever the Court notes that several Member States adopt similar legislative solutions in solving a dispute, it will impose them on other states. Whenever there is a lack of uniform solutions, on the other hand, the margin of appreciation (re-)expands and the Court restrains its powers. From this point of view, the dynamic circulation of the judicial rules linked with fundamental rights shows a two-sided face: the case law of the ECtHR influences the

[27] Indeed, the basic problem for the construction of wills is always determining the testator's intention, either with a literal approach or a purposive one. See, in general, R. KERRIDGE, J. RIVERS, *The Construction of Wills*, 116 *LQR* (2000) 287-317.

[28] The link between the protection of property and testamentary freedom is confirmed also by the fact that other jurisdictions have included provisions on testamentary freedom in the section of their Constitution aimed at protecting private property. For an example, see the decision of South African Supreme Court *Ex parte BOE Trust Ltd.* 2009 (6) SA 470 (WCC), par. 9, where it is stated that "*the right to property includes the right to give enforceable directions as to its disposal on the death of the owner*".

[29] K. DZEHTSIAROU, *European Consensus and the Evolutive Interpretation of the European Convention on Human Rights*, 10 *German Law Journal* (2011) 1730-45.

evolution of domestic legislation but at the same time, appears affected by existing models.

This reasoning, though, is not systematically applied and the case *Pla and Puncernau* can be, clearly, cited as one of the decisions in which the Court has omitted any comparative reference. It seems helpful to identify the reasons why a comparative approach has not been envisaged in regards to the two most important subject matters of the case. Firstly, the applicability of the principle of non-discrimination to acts of private autonomy, especially a testament; and, secondly the interpretation of last will acts which, as stated by the Court, shall be compatible with fundamental rights.

It is important, hence, to look for the existence of a single European approach intended at declaring invalid (or otherwise challengeable) those potentially discriminatory *mortis causa* dispositions. Preliminarily, though, the phenomenon of testamentary discrimination needs to be narrowed down: the testament is, inevitably in its nature, an instrument destined at creating inequalities of treatment, and the emblem of private autonomy as opposed to the principle of equality[30].

A discrimination, hence, can only be envisaged when a testator's will expressively violates the dignity of a person under the parameters of their race, sex, skin colour, sexual orientation and religious beliefs. In verifying what the approach followed by domestic legislations is, it is worth noting, firstly, that there is no European law guiding the solution of similar cases in matters of inheritance (as opposed to the one regulating discriminatory contractual clauses). Secondly, that a censure, still marginally envisaged, can only be imposed on provisions limiting certain liberties of the beneficiary.

Moreover, the analysis of the infrequent decisions delivered by national courts show a common approach, shared both by Civil and Common Law countries, aimed at somewhat ignoring a testator's discriminatory intentions - although a lively debate is emerging among the scholars. Possible interferences and collisions between fundamental rights and inheritance rights – under the principle of non-discrimination – develop directly and most commonly in connection with legislative choices. Alternatively, whereas a testament exists, the interferences concern limitations of fundamental freedoms of the beneficiaries (particularly the religious one) and, therefore, happen indirectly.

As for the United Kingdom, homeland of the boldest juridical literature, with the exclusion of charitable trusts, which are scrutinised for legitimacy under the non-discrimination principle, the case law has, up to now, favoured full testamentary freedom, even when it could potentially lead to discrimination. The examples, sometimes dating back several years and of anecdotal nature, concern the prohibition

[30] Andorra's Tribunal Superior made a similar statement in Pla and Puncernau case: "*tota crida a una successió testamentària és, per difinició, discriminatòria en el sentit que genera diferències entre els hereus*".

to marry a Scottish man[31] or a housekeeper[32] or, even more frequently, people worshipping other religions.[33]

Those cases do (only partially) pertain to the sphere of non-discrimination and, to settle down conflicts, have traditionally been identified as limitations imposed on the right to marry. In any case, the English judges, in the cited proceedings, have considered similar provisions to be perfectly legal[34] and have, therefore, recognised broad guardianship to a testator's freedom of choice. The wording of the House of Lords confirms the tendency to prioritising testamentary freedom and confining non-discrimination cases to an area of non-interference: '*Discrimination is not the same thing as choice: it operates over a larger and less personal area, and neither by express provision not by implication has private selection yet become a matter of public policy*'.[35]

The adoption of the *Human Rights Act 1998*, which has transposed the principles of the ECHR into the Law of the United Kingdom, suggests the possibility of recognising (soft) horizontal efficacy to the principle of non-discrimination in private law-based relations, as a matter of public policy. Anchoring private law-based relations to the principle of non-discrimination might seem controversial as it could impinge on the fundamental characteristics of private autonomy. However, it would be a logical step to envisage, provided that discriminatory acts of private autonomy might violate public policy and are, therefore, exposed to remedies.

Under the above lenses, then, the importance of the case *Pla and Puncernau V. Andorra* is emphasised by those who think that, from now on, a testament containing a glaring discriminatory clause *'should be held to be unenforceable'*[36] - because the ECtHR has made the principle of non-discrimination applicable to succession *mortis causa* affairs.

An example, in this regard, may stimulate the discussion: what is, for instance, the destiny of a bequest to the future wife of one's son upon the condition of her being white?[37] What would happen to the bequest if, at the death of the testator, their son had married a black woman? Following the above reasoning, the clause would be

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[31] *Perrin v Lyon* (1807) 9 East 170 (KB).
[32] *Fenner v Turner* (1880) 16 Ch D 188 (Ch).
[33] *Duggan v Kelly* (1848) 10 I Eq R 295; *Hodgson v Halford* (1879) 11 Ch D 959; *Re May (No 2)* [1932] 1 Ch 99 (CA); *Re Morrison's Will Trusts* [1940] 1 Ch 102 (Ch); *Re Selby's Will Trusts* [1965] 3 All ER 386 (Ch); *Re Abrahams' Will Trusts* [1969] 1 Ch 463 (Ch); *Re Tuck's Settlement Trusts* [1978] 1 Ch 49 (CA). See M. HARDING, *Some Argument Against Discriminatory Gifts and Trust*s, in 31 *Oxford J Legal Studies* (2011), 303-326, 304.
[34] Most of the cases which have struck down religious conditions have done so on the basis of uncertainty rather than the actual religious condition. Eg *Clayton v Ramsden* [1943] AC 320, 112 LJCh 22, [1943] 1 All ER 16. See R. CROUCHER, P. VINES, *Succession. Families, Property and Death*, 4th edn, LexisNexis Butterworths, Australia, 2013, 530.
[35] *Blathwayt v Baron Cawley* [1976] AC 397, 426 (HL), per Lord Wilberforce.
[36] J. BEATSON ET AL., *Human Rights: Judicial Protection in the United Kingdom*, Sweet & Maxwell, 2008 [4.239].
[37] This example is cited by S. GARDNER, *An Introduction to the Law of Trusts*, 2nd ed Clarendon, Oxford, 2003, 48, and later on by M. HARDING (n 31) 320.

unenforceable due to its contrast with the fundamental principle of non-discrimination, which applies to every sector, including inheritance law.

The previous argument would overcome the traditional idea for which in Common Law the relevance of the discriminatory character of a *mortis causa* disposition would be limited to charitable trusts, whose public nature have always required compatibility with some principles of democracy, like the prohibition of discrimination. We could think, as an example, to a charitable trust administering a scholarship for university students, provided they are not Jews.

It is worth acknowledging, though, that the direct applicability of the principle of non-discrimination to acts of private autonomy *mortis causa* is still a minority argument. It does not seem, by looking at other Common Law legislations, there is much will to compress private autonomy broadly.[38]

Similarly, the examples of horizontal efficacy of the principle of non-discrimination, sometimes attributed to Civil Law countries, are not thoroughly persuasive. In the Western Countries, the clauses interfering with the principle of non-discrimination are often, whereas illicit, declared void. If every testamentary provision discriminating the heirs on the grounds of sex, race, sexual orientation or religious beliefs had to be considered illegal, then the whole concept of illegitimacy would, inevitably, need to be revisited too.

It is moreover strange that all the proposals envisaged by British-American Law suggest attributing a 'strong' meaning to discriminatory provisions and require, for relevance, their explicit mention in the act of last will.[39]

In Civil Law systems the boundaries between the complete irrelevance of discriminatory provisions and (conversely) a sanction of invalidity of the whole testament (or a condition therein) are drawn around the concept of illegitimacy of motives. Great significance is, traditionally, attributed to discriminatory grounds that are identifiable, explicit and conclusive.

6. At first glance, the compression of a testator's autonomy, as a direct consequence of the principle of non-discrimination, can appear in countertrend with

[38] Conversely, the US case law shows the existence of an interpretative argument aimed at prioritising the will of a testator above all, and which restricts the number of unlawful cases. There are not, consequently, significant precedents in this regards. G.J. SHERMAN, *Posthumous Meddling: An Instrumental Theory of Testamentary Restraints on Conjugal and Religious Choices*, in *U. Illinois L.R.* (1999) 1273. For a review of US cases in which the weirdest conditions impinging on matrimonial and religious freedom have been deemed legal, see R.D. MADOFF, *Immortality and the Law. The Rising Power of the American Dead*, Yale University Press, 2010, 72 ff.

[39] On the point see M. HARDING (n 31) 323, who reaches a debatable conclusion. The author imagines a situation where a testator, father of two sons and one daughter, believes his sons are better equipped to preserve his assets because 'women are naturally unreliable'. (This example does not take into account the problems related to the identification of forced heirs, which differ in Common Law countries). In a similar scenario, if the discriminatory intent is manifest, the whole testament should be invalidated.
Obviously, there could be hundreds of other possibilities: a grandfather leaving his assets to heterosexual-only nephews, to the catholic ones only, or to the non-adoptive ones, like in *Pla and Puncernau*.

the evolutionary patterns of inheritance law, which show a tendency to expand the margins of private autonomy. If we look at the French model, for example, which has undergone profound reforms over the last 15 years, we can notice that the margins of private autonomy have expanded. As an example, the phenomenon known as 'contractualisation' of succession law has manifested under different profiles: an increased possibility to derogate from the prohibition of agreements as to future succession, and the chance to renounce beforehand to a claim of distributive share or intestate succession. This last circumstance has weakened the protection of distributive shares and stimulated pacts between the heirs.

Moreover, extending the guardianship against discrimination to *mortis causa* successions could appear contradictory with the European framework of contract law: the European legislator has, in fact, confined the well-known anti-discriminatory rules to the ambit of contractual law, albeit explicitly excluding testaments. However, the above considerations do not seem sufficient to exclude the relevance of the principle of non-discrimination in succession law. Indeed, the increased 'contractualisation' of the law of succession and the firm importance of the principle of non-discrimination within contractual law can offer a different angle of analysis.

In fact, envisaging direct efficacy to the principle of non-discrimination in matters of succession law has nothing to do with extending to it the safeguards offered by European Law to contractual matters. Contracts, in fact, involve different conditions of application and remedies, which are unrelated to successions *mortis causa* law. It seems possible, however, to apply the principle of non-discrimination to inheritance law as an interpretative criterion able to foster equality before the death of a testator.

This interpretive criterion could only be applied to legislative interpretation and not to the one investigating a testator's will. On this same point, the ECtHR has envisaged a different approach and suggested, in the cited case *Pla and Puncernau,* that domestic judges should interpret testamentary dispositions in the light of the Convention. This hypothesis appears in contrast with the common framework adopted by national and European legislations and seems likely to be imposing remedial measures on the will of the testator.[40] Corrective measures feared and avoided in the field of contracts and which appear even more undesirable for testamentary will.

After all, the interpretation of inheritance law has shown, notwithstanding the existing differences within the Council of Europe member states and Civil and Common law (sometimes stereotyped by the scholars), a common direction: it has profoundly rejected the adoption of parameters of objective interpretation originating from legally imposed principles. Furthermore, the existing interpretative experiences

[40] J. MEDINA ORTIZ, *Nuevo criterio en la interpretación de las disposiciones testamentarias, introducido por el TEDH*, in *La Notaria*, 10/2004.

show similarities and differences. A common trait is their attempt to search for a testator's will. A difference, instead, can be identified in extending interpretation to documents, able to show the will of the *de cuius,* other than the testament itself. Imposing a method based on interpreting the testamentary dispositions accordingly to the principles of the ECHR, not only can attract substantial critiques but also goes against the orientation of the Court itself concerning a *European consensus*. Following this consideration, I believe this may be the main reason why the judgment *Pla and Puncernau* lacks, in its reasoning, any reference to comparative studies.

Therefore, we can reach a first, albeit limited, conclusion on the intersection between *mortis causa* successions and fundamental rights. In response to a static inheritance law, which seems to, at the European level, retain profound differences on successions, *forced heirship,* and agreements as to succession, one can note a potential bridging force stemming from the judgements of the ECtHR, which moves along the line drawn by prohibition of discrimination, nowadays inspiring principle of the complex system of private law. Hence, a working hypothesis envisaging a deep analysis of the intersection between fundamental rights and rules of protection, while looking at inheritance rights, does not appear groundless.[41]

The way in which this principle will be translated in inheritance law is still unclear, but it seems essential to recognise - in the construction of a regulatory framework of succession law - the existence of new paradigms and relevant interpretative instruments, without excluding possible interferences in the field of testamentary succession.

[41] It is not accidental, then, while reading one of the sharpest essays on private law and fundamental rights to find, from the very first lines, reference to a hypothesis of '*divestment of property rights by a will*" (see H. COLLINS, *On the (In)compatibility of Human Rights Discourse and Private Law*, 26).