THE PROHIBITION OF DISCRIMINATION OF ART. 14 OF THE EUROPEAN CONVENTION ON HUMAN RIGHTS IN MATTERS OF INHERITANCE AND AFILLIATION REGARDING THE PROVISIONS OF THE NEW CIVIL CODE

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Abstract
Taking into consideration the provisions of the New Civil Code that has recently entered into force, the study focuses on the analysis of its provisions regarding matters of inheritance and affiliation in order to establish their compliance with the established case-law of the European Court of Human Rights in interpreting article 14 of the European Convention on Human Rights.

Key words: *Non-discrimination, inheritance, affiliation, European Court of Human Rigths, the New Civil Code.*

1. Introduction

The paper aims at establishing the rules stated out in the European Court of Human Rights' case-law regarding the application of the principle of non-discrimination in matters of inheritance and affiliation. After pointing out the principles set out by the Court, the study analyses the compliance of the provisions of the New Civil Code with the principle of non-discrimination as it was interpreted by the Court.

In this way, the study refers to both matters of inheritance and affiliation including by interpreting and applying the provisions of the New Civil Code to possible situations.

The universality of human rights recognition and necessarily requires the equal application to all individuals, all human beings are born free and equal in dignity and rights, proclaimed aspect of the first article of the Universal Declaration of Human Rights of 1948. This means that the rights and freedoms recognized all individuals without any discrimination, whatever its source, ie without any discrimination.

The non-discrimination principle is enshrined in virtually all treaties and international instruments for the protection of human rights. Article 2 par. 1 of the Universal Declaration states that everyone is entitled to all rights and all the freedoms it proclaims, without distinction of any kind, such as race, color, sex, language, religion, political or any other opinion, national or social origin to national, his wealth, birth or other status derives. This principle requires equal treatment of all before the law.

Article 14 of the European Convention provides that the exercise of all rights and freedoms that it recognizes them to be secured without discrimination on any ground such as sex, race, color, language, religion, political or other opinion, national origin or social origin, association with a national minority, property, birth or other status.

The European Convention does not contain a general prohibition of discrimination, which should be considered, therefore, all the rights and freedoms recognized in national legal systems of the Contracting States, being covered separately in Protocol no. 12 Additional to the Convention

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concerning the general prohibition of all forms of discrimination, adopted by the Council of Ministers of the Council of Europe on 26 June 2000 and entered into force on 1 April 2005[1].

As a legal right to non-discrimination laid down in art. 14 of the Convention is a substantial subjective right, which has an independent existence in the system of European protection of human rights and fundamental freedoms on which it shall establish, as it can be invoked only by reference to them, but it may appear as autonomous by that in a given situation, it is possible that he may be breached without notice and an infringement on which has been invoked. Evidence of discrimination, therefore, a violation of art. 14 of the Convention can be done but only in relation to other rights protected by the Convention[2].

2. The prohibition of discrimination of art. 14 of the European Convention on Human Rights in matters of adoption

The Court held that art. 14 of the Convention aims to prevent discrimination on the rights and freedoms which it guarantees, in cases where there are different ways to comply with its provisions. Notion, discrimination "within the meaning of the text, generally encompasses cases in which an individual or group of individuals is seen, without adequate justification, treated better than another, even if the Convention does not require that they it be given more favorable treatment.

The difference in treatment is discriminatory within the meaning of art. 14 of the Convention only when the state, introduced distinctions between analog and comparable situations without it is based on objective and reasonable justification.

As consistently held the European court if this text provides protection against any discrimination in the exercise of rights and freedoms which the Convention guarantees, any difference in treatment does not mean, automatically, its violation. For such a violation to occur, it must be established that persons placed in situations analogous or comparable terms, receive preferential treatment and that this distinction cannot find any objective or reasonable justification. In this regard, the Court held that the Contracting States enjoy a certain margin of appreciation in assessing whether and to what extent differences between analogous or comparable situations are distinctions justify legal treatment[3].

The scope of this margin depends on the specific circumstances of each case, the fields and the context in question, as well as the presence or absence of a common legal system of the Contracting States in a given area may be a relevant factor in determining this margin.

The court also noted that European existence situations justify a different treatment of the same kind are to be assessed by reference to the purpose and the means used by the action taken in the light of the principles prevailing democratic INR. A distinction regarding treatment under the Convention right must not pursue a legitimate aim, art. 14 is violated when it is clear that there is a reasonable relationship of proportionality between the means employed and the aim pursued.

In matters of adoption, the Court applied this principle derived from case law domain consisting of equal rights for children born out of wedlock with one born in wedlock. Thus, in light of the case law of the European Court, when adopting a child, it acquires the same legal status at the child's biological adoptive parents, in all respects, including those relating to property rights derived from a difference of treatment will be justified only extremely well-founded reasons[4].

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[1] Bîrsan, Corneliu, *Convenţia Europeană a drepturilor omului. Comentariu pe articole*, (Bucureşti: volume I, All Beck, 2005), 889-890.

[2] CEDO, case *Van Raalte c. Olandei*, 21.02.1997, par. 33, www.echr-coe.int.

[3] Chiriţă, Radu, *Convenţia europeană a drepturilor omului. Comentarii şi explicaţii*, *Second Edition*, (Bucureşti: CH Beck, 2008), 611.

[4] CEDO, case *Pla and Puncernau v. Andorra*, 13.07.2004, par. 61, www.echr-coe.int.

From this point of view, the Romanian legislation on the matter this principle governed both by the provisions of the Civil Code and the law on children's rights.

In this sense, art. 471 of the Civil Code regarding the relationship between the adopter and the adopted child establishes that the latter has to adoptive rights and duties which every person has towards its natural parents.

Applying this legal text by the courts must be made on non-discrimination. European court ruled in Case Pla and Puncernau v. Austria, that although the law in matters testamentary succession does not make any distinction between biological children and adopted child by it, the courts have interpreted the provisions of the will in question in achieving a difference in treatment to the detriment of the applicant, who had been adopted, although the testator expressly does not remove the inheritance.

In the light of the circumstances of the case, the Court reiterates that a distinction is discriminatory for the purposes of Article 14 if it has no objective and reasonable justification, that is if it does not pursue a legitimate aim or if there is not a "reasonable relationship of proportionality between the means employed and the aim sought to be realized". In the present case, the Court does not discern any legitimate aim pursued by the decision in question or any objective and reasonable justification on which the distinction made by the domestic court might be based. In the Court's view, where a child is adopted (under the full adoption procedure, moreover), the child is in the same legal position as a biological child of his or her parents in all respects: relations and consequences connected with his or her family life and the resulting property rights. The Court has stated on many occasions that very weighty reasons need to be put forward before a difference in treatment on the ground of birth out of wedlock can be regarded as compatible with the Convention.

On this occasion, the Court reiterated that the Convention is a dynamic text establishes Positive obligations of the Contracting States and a living instrument which must be interpreted in the light of current conditions, emphasizing the importance given today by the Council of Europe Member States the principle of equality between children born in wedlock and children born out of wedlock as regards their civil rights. Therefore, if the testamentary provisions of national courts were subject to interpretation, that interpretation could only be done in accordance with the social realities of the time of writing the act or the date of death of the author, the more that these two points passed a considerable period of time, in this case about 50 years. If the course of a long period during which social realities, economic and legal were subject to change, domestic courts cannot ignore these new realities in interpreting and determining the effects of a legal act.

The same remarks are applicable if the will, any interpretation of its provisions shall subsume the testator and will be made for the purposes of its use and without overlook the importance of interpreting testamentary clauses in a manner corresponding to both domestic law and the Convention, as interpreted in the Court[5].

Consequently, the effect is remarkable disappearance adoption by small and keeping only the adoption of the new Civil Code in full effect, the institution under which the adopted child and coming, so the adopter wedlock acquires the same rights as a child of the adopter marriage, including rights derived from inheritance. Also, the application of the European Court judgment in relation to the provisions of the Civil Code concerning the institution of adoption, it follows that the courts have an obligation to respect the principle of non-discrimination enshrined in art. 471 para. (1) and (3) of the New Civil Code and the art. 448 Civil Code on the purposes of interpretation of art. 14 the European Court's case-law.

[5] *idem*, par. 62.

3. The prohibition of discrimination of art. 14 of the European Convention on Human Rights in matters of inheritance

Non-discrimination issues in the application presented in succession in cases of differential treatment of children born out of wedlock whose legal situation was governed by legal rules that establishes a system distinct from the situation of children born out of wedlock, with the latter legal status under which enjoy certain rights that were conferred and child out of wedlock.

In this respect, a first judgment of the Court relevant matter is the one given in the Case Marckx v. Belgium[6] the affiliation to the mother of a child born out of wedlock could not be established on the basis of the birth, as was the case of the married mothers, but only after an explicit recognition by the mother or a judicial declaration of adoption, in which case the period between birth and the time to establish filiation parent, the child did not have any legal relationship with family his mother could not be any legatee of his own mother.

In this case, the Court first identified the existence of differential treatment between children born out of wedlock to the mother for whom parentage can be determined only after explicit recognition or admission of the action with this object, and children born in wedlock, to the mother whose daughter was proven by simple phrases in the act of birth.

The existence of a legitimate aim, the European Court held that supporting and encouraging the traditional family concept is such a purpose worthy of consideration, but subject to this end by means which undermine family interests deemed illegitimate, and the present case. The Court accepts that, when adopting the Convention in 1950, the existence of differences in inheritance between family, self and illegitimate could be regarded as permissible and acceptable to most European countries. However, bear in mind the quality of the Convention to be a living instrument which must be interpreted in the light of present social realities, the Court emphasizing legislative changes made by the majority of the Contracting States in this matter in order to comply with equality of the two categories of children, especially in recognizing the principle already established, arguing east mater semper.

In conclusion, the Court found no objective and reasonable justification of the existence of differential treatment on the determination of parentage to the mother of the child born out of wedlock and therefore held an infringement on art. 14 in relation to Art. 8 of the Convention.

Regarding economic ties between the child born out of wedlock and his mother, namely those arising from the succession, there was a difference in treatment between children born in wedlock and those born out of wedlock in that first had intended to acquire more fewer rights through testamentary succession than those in the second category.

And on this difference in treatment, the Court did not accept the validity of any reasonable justification, finding a violation of Article. 14 in relation to Article 8 of the Convention on the legal status of both the mother and the child born out of wedlock.

The legal provisions of the New Civil Code in this matter conform to the ruling stated by the European Court. Thus, on the establishment of parentage to the mother, art. 408 para. (1) Civil Code establishes that it arises from the fact of birth, being able to establish and by recognition or by court order, while art. 409 para. (1) Civil Code provides that parentage is proven by the document of birth registered in the civil register, as well as birth certificate issued on the basis thereof.

It should also be noted that, according to art. 448 Civil Code, the equality of rights of children refers to children born out of wedlock relationships both to parents and to their relatives, their legal case is identical to that of a child born in wedlock.

A similar situation is one that has been Mazurek v. France[7] case in which the estate of the deceased, the mother of two children, one born out of wedlock, was divided unequally between the two situations are analogous, under the provisions of the French Civil Code in force at the time.

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[6] CEDO, case *Marckx v. Belgiei*, 13.06.1979, www.echr-coe.int.
[7] CEDO, case *Mazurek v. France*, 01.02.2000, www.echr-coe.int.

Regarding the legal provisions governing the devolution, the Court concludes that a different treatment of the two brothers' inheritance rights, the difference could not be based solely on the presence of an objective and reasonable justification, that is, pursue a legitimate aim and involving have a relationship of proportionality between the means employed and the aim pursued.

In this sense, the Convention reaffirmed the position of being a living instrument subject to interpretation in the light of contemporary social relations and increased attention lately by contracting states equality between children born in wedlock and those born out of wedlock, including the adoption of the European Convention of 1975 that has this object and the Convention of Child Rights in 1989 within the United Nations that explicitly enshrines the principle of non-discrimination between the two groups on this criterion.

Thus, the Court held, finally, the possibility (however small) of the will of the state to protect the traditional family concept as being a legitimate aim.

The relationship of proportionality between the means employed and the legitimate aim pursued, it was considered that a child born out of wedlock does not attributable to that fact and, therefore, that fact cannot be relevant and sufficient reasons for this lie with a legal succession rate lower than that set by the law for a child in marriage, for which the Court found a violation of art. 14 in relation to Article 1 of the Additional Protocol no. 1. Inheritance rights are considered in this case as the goods under the Convention and therefore attracting the applicability of the latter text the law.

It should be noted that the provisions of the Romanian Civil Code in matters of legitimate meets the established guidelines set out by the European Court in the abovementioned judgment, art. 975 para. (1) of the New Civil Code establishing the right of inheritance of descendants, ie the children of the deceased and their survivors straight up forever, without making any distinction as they come in late or outside marriage. Also, the application of the text is achieved through systematic interpretation, in addition to art. 448 of the New Civil Code expressly stipulating equal rights of children, referring to the two categories.

With regard to testamentary succession becomes interesting analysis of the European Court in Case Merger and Gros v. France[8] and by reference to the provisions of the New Civil Code which establishes special the legal portion of the estate of succession available to the surviving spouse.

In that case, the plaintiff, a child born out of wedlock, was as universal legatee of his father, along with his other four children, but which had the status of children in marriage, and widow of the deceased. Under the statutory provisions of the French Civil Code on inheritance reserve and the possibility of the deceased to dispose of his assets through donations for the heirs, the applicant was afforded a smaller share of inheritance rights that could be acquired by testamentary because act as a child out of wedlock.

In that case, the Court concludes that differential treatment between persons in analogous situations, but found no reasonable or objective justification for this differential treatment, sitting, therefore, on a breach of art. 14 in relation to Article 8 of the European Convention on Human Rights.

This case brings into focus the provisions on special crankshaft available to the surviving spouse, institution maintained by the provisions of art. 1090 of the New Civil Code. According to it, the liberties of the surviving spouse who comes to inheritance in competition with other descendants than common ones that they cannot exceed one quarter of the progeny inherit or receive the least.

At first glance, one cannot find any different treatment depending on the circumstances offspring born out of wedlock with deceased spouse text realizing such a difference, or, where the law does not distinguish, we do not need to distinguish (*ubi lex non distinquit, nec nos distinquere debemus*). Thus, if the deceased had made some donations for the surviving spouse, children inherit both the book and the rest of what will be the difference between the total and the children's estate, the surviving spouse and the special cotitatea available will be divided deceased children equally, whether or not the quality of children from the marriage, and the art aspect provided. 975 para. (4) of the New Civil Code.

[8] CEDO, case *Merger and Gros v. France*, 22.12.2004, www.echr-coe.int.

However, it must be made certain clarifications on the differences between the situation of children born out of wedlock with deceased spouse who comes in competition with the latter, and assuming the child born of the marriage of the deceased spouse.

In the first case, if the deceased leaves entire inheritance by the surviving spouse, child out of wedlock shall be entitled to receive a share of 5/8 which is subject to the law of succession established in art. 1088 of the New Civil Code reported at 975 para. (3) of the New Civil Code, while the surviving spouse will only return a share of 3/8.

Paradoxically, if the child is common descendant of the deceased and the surviving spouse, thus coming out of their marriage, in the same case, the child will return only share 3/8, while the surviving spouse shall be entitled to receive a share of 5/8 of inheritance.

Such differential treatment cannot be justified even by reason often cited by the contracting states, namely the protection of the traditional family institution as if its existence, the child will receive a lower share of the inheritance of the would have received if they had the quality of a child born out of wedlock.

Another hypothesis is the statement of a surviving spouse who, although holding the quality of spouse acquires fewer rights than a person who, in practice, had the quality of life of the deceased partner. In this situation, to be applied on a case by case principles established by the European Court in the matter of family life provided for by art. 8 of the Convention which refers not only to the legal institution of marriage, but also to the specific circumstances of the case, the case in which a spouse of the deceased would be in a situation similar to surviving spouse.

In this case, under current rules, where the deceased would have a child, but it is not common descending and his life partner, the latter would inherit 4/8 of the estate, so half of the estate of the deceased, the other back half child. In contrast to this situation, if the deceased would have married, her husband would return only a share of 3/8 of an inheritance, and child of the deceased, a share of 5/8 of inheritance.

Thus, again paradoxically, both existing treatment difference if husband unlike spouse and if the deceased child, they get a different rate depending on how the deceased was married or not at the time of death, cannot be justified on the grounds of the will of the state to protect the institution of marriage and the traditional family because, as noted, his deceased person bequeaths his property by will to acquire more than the spouse who has the same universal bound, leading is that possibly more legacy to leave her husband to divorce it late in life. It should also be noted that the proportions Inheritance incumbent vary depending on a child element not be attributable to him, although, in fact, the situation is similar.

4. Conclusions

The study above presented underlines the major principles set out by the European Court of Human Rights in matter of inheritance and affiliation in accordance with the application of article 14 of the European Convention on Human Rights stipulating the general principle of non-discrimination.

As a result of the legal research set forth in the study in comparison with the provisions of the New Civil Code which entered into force in October 2011, there appears to be a compliance of the national legislation in matters of inheritance and affiliation with the principle of non-discrimination. Thus, the legal provisions do not establish any differences between the legal status of the children born in wedlock and those born out of wedlock.

A hypothetical question remains in matter of testamentary succession regarding the spouse of the testator and the persons who find themselves in similar situations as the spouse (for example, the partner of the deceased), topic that could form the subject of further theoretical and academic analysis regarding the interpretation set out by the European Court of Human Rights in this area according to the contemporary social developments.